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ERROR REPORTING AND INJURY COMPENSATION: ADVANCING PATIENT SAFETY THROUGH A STATE PATIENT SAFETY ORGANIZATION

*Paul J. Barringer, J.D., M.P.A.†**
and
*Allen B. Kachalia, M.D., J.D.***

ABSTRACT

For a number of years, reducing the incidence of medical errors has been a major driver of U.S. health policy. Some states have created voluntary reporting systems to facilitate identification and analysis of medical errors and to support development of patient safety initiatives. In addition, the federal government has passed laws to encourage the development of voluntary reporting initiatives at the state level that are protected and confidential. This article provides an outline of voluntary reporting initiatives undertaken to date at the state level, and summarizes the present status of the new federal law. It also describes how a structured compensation process tied to a state patient safety organization could offer a new opportunity to enhance reporting and leverage the liability system to improve safety.

† Correspondence and reprint requests to: Paul Barringer, Common Good, 1730 Rhode Island Avenue, NW, Suite 308, Washington, DC 20036. Phone 202-293-7450; Fax 202-293-7451; Email PBarringer@cgood.org. This work was supported by The Robert Wood Johnson Foundation. We thank Jack Glode and Fran Cadez for helpful comments, and Brynna Pietz and Andrew Wasicek for exceptionally able research assistance.

* Paul Barringer: General Counsel of Common Good, bipartisan legal and health care reform coalition of Washington D.C..

** Allen Kachalia: Assistant Professor, Harvard Medical School, and Associate Physician, Brigham and Women's Hospital.

INTRODUCTION

Over the past decade, patient safety has become an increasingly important driver of U.S. health policy. Particularly catalyzed by the Institute of Medicine's landmark 1999 report, *To Err is Human: Building a Safer Health System*, the prevalence and consequences of errors in health care treatment have generated substantial public attention and interest from political leaders.[1] In turn, policy makers at both the state and federal levels have considered a number of proposals through which they might use policy change to promote safer health care.[2]

A consistent goal of policy makers addressing patient safety is to promote collection of data on errors in a systematic way; under the theory that improved information and subsequent awareness of errors can help prevent errors from recurring.[3] Among the leading policy approaches in this regard has been the idea of creating an efficient process for reporting and analyzing information about medical errors. A number of states have established statewide patient safety centers that collect and aggregate reported information about errors, and use analyses of such data to inform safety improvement strategies.[4] Congress has also passed law to encourage enhanced reporting of information about error.[5]

Though patient safety advocates often stress the benefits of transparency and communication about errors, some health care providers may be cautious—in large measure because of the fear that such openness may generate greater malpractice exposure.[6] In fact, some health policy experts have identified the legal

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[1] *See, e.g.,* M. L. Millenson, *How the US News Media Made Patient Safety a Priority,* BRIT. MED. J. 324(7344): 1044 (2002); L. Leape, *Institute of Medicine Medical Error Figures Are Not Exaggerated*, J. OF THE AM. MED. ASS'N 284(1): 95-97 (2000); L. Leape & D. M. Berwick, *Five Years After To Err is Human*, J. OF THE AM. MED. ASS'N 293(19): 2384-2390 (2005).

[2] The Patient Safety and Quality Improvement Act of 2005, Pub. L. No. 109-41, 119 Stat. 424 (2005) (signed into law July 29, 2005); PA. PUBLIC LAW 154, No. 13; N.Y. PUB. HEALTH LAW Article 29-D, Title 2 (McKinney 2008), Section 2998; National Academy for State Health Policy, *Quality and Patient Safety: State adverse event reporting rules and regulations*, http://www.nashp.org/_docdisp_page.cfm?LID=2A789909-5310-11D6-BCF000A0CC558925 (last visited April 11, 2008).

[3] J. Rosenthal & M. Booth, *Maximizing the Use of State Adverse Event Data to Improve Patient Safety*, Portland, ME: National Academy for State Health Policy (2005).

[4] J. Rosenthal & M. Booth, *State Patient Safety Centers: A New Approach to Promote Patient Safety,* Portland, ME: National Academy for State Health Policy (2004).

[5] The Patient Safety and Quality Improvement Act of 2005, Pub. L. No. 109-41, 119 Stat. 424 (2005) (signed into law July 29, 2005).

[6] L.T. Kohn, J. M. Corrigan & M. S. Donaldson, *To Err is Human: Building a Safer Health System*, Washington, D.C.: National Academies Press (2000); Joint Commission on Accreditation of Healthcare Organizations, *Health Care at the Crossroads: Strategies for Improving the Medical Liability System and Preventing Patient Injury*, Oakbrook Terrace, IL: Joint Commission (2005), *available at* www.jointcommission.org/NR/rdonlyres/167DD821-A395-48FD-87F9-6AB12BCACB0F/0/Medical_Liability.pdf; D.M. Studdert & T.B. Brennan, *No-Fault Compensation for Medical Injuries: The Prospect for Error Prevention*, J. OF THE AM. MED. ASS'N 286(2): 217-223 (2001).

system as an impediment to improving health care quality—precisely because of the chilling effect it has on providers' willingness to disclose.[7] Various safety initiatives have been designed with this potential concern in mind. Despite such efforts, a number of observers continue to question the extent to which patient safety initiatives can succeed without some fundamental change in our current legal process or environment.[8]

To date, the possibility of incorporating a new process that integrates compensation and safety systems to resolve injury claims as part of a larger safety initiative remains a largely untapped opportunity. Many academics and advocates—among whom we count ourselves—have called for experimentation with alternative approaches to resolving medical liability disputes and compensating patient injuries, particularly as part of broader patient safety initiatives.[9] Some of the alternatives that have been proposed have generated stakeholder opposition to such an extent that their practical feasibility is likely limited.[10] However, a carefully constructed, alternative compensation system could satisfy the needs and objections of key stakeholders in the current system—patients and health care providers.

This article provides a framework for state policy makers who are considering the creation of a statewide patient safety organization, and possibly including a voluntary component for the resolution of injury claims. In particular, we discuss the experiences of a number of other states in establishing the mission, functioning, and funding of their patient safety organizations. We then describe the federal patient safety law passed in 2005, the Patient Safety and Quality Improvement Act, along with its newly released proposed regulations relating to the creation and operation of designated patient safety organizations. Based on this information, we set forth guiding principles for a new state patient safety

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[7] J.M. Corrigan, A. Greiner & S. M. Erickson, *Fostering Rapid Advances in Health Care: Learning from System Demonstrations*, Washington, DC: National Academies Press (2002); D.M. Studdert & T.B. Brennan, *No-Fault Compensation for Medical Injuries: The Prospect for Error Prevention*, J. OF THE AM. MED. ASS'N 286(2): 217-223 (2001).

[8] Joint Commission on Accreditation of Healthcare Organizations, *Health Care at the Crossroads: Strategies for Improving the Medical Liability System and Preventing Patient Injury*, Oakbrook Terrace, IL: Joint Commission (2005) *available at* www.jointcommission.org/NR/rdonlyres/167DD821-A395-48FD-87F9-6AB12BCACB0F/0/Medical_Liability.pdf.

[9] *See, e.g.,* M.M. Mello, D. M. Studdert, A. Kachalia & T. A. Brennan *"Health Courts" and Accountability for Patient Safety*, MILBANK QUARTERLY 84(3): 459-492 (2006); *see also* P. Barringer, *Windows of Opportunity: State-Based Ideas for Improving Medical Injury Compensation and Enhancing Patient Safety*, Washington, DC: Common Good (2006), *available at* www.commongood.org/assets/attachments/Windows_of_opportunity_web.pdf.

[10] *See, e.g.*, M.M. Mello, D. M. Studdert, P. Moran & E. A. Dauer, *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, HARV. J. ON LEGIS. 45: 59-106 (2008); *see also* P.J. Barringer, D. M. Studdert, A. B. Kachalia & M. M. Mello, *Administrative Compensation of Medical Injuries: A Hardy Perennial Blooms Again*, J. HEALTH POL. POL'Y & L. (2008) (forthcoming).

organization, or PSO. We also describe why and how this new organization might pursue establishment of an alternative dispute resolution process as a component of its statewide patient safety activities.

PATIENT SAFETY IN U.S. HEALTH POLICY

Historically, little was known about the prevalence of errors in American health care.[11] Errors tended to be addressed individually within particular institutions, and the public had little reason to believe that they were common. Public perception about error frequency shifted in a profound way, however, with the 1999 publication of the Institute of Medicine's (IOM) landmark report, *To Err is Human: Building a Safer Health System*.[12] Indeed, there may be no single event that more galvanized public interest in health care quality and patient safety than this report, which found that as many as 98,000 people were dying every year because of medical errors in American hospitals.[13] The report went on to discuss factors contributing to errors and concluded that most errors were caused by breakdowns in systems of care delivery.[14]

In this and in subsequent reports, the IOM suggested that error reporting programs be improved throughout the health care system. In particular, the reports stressed that more information about errors and near-misses (errors that do not result in any harm) needed to be collected in order to address and prevent medical errors.[15] Moreover, aggregating and analyzing such data would allow hospitals and providers to learn more about the patterns and frequencies of medical error and to correct the system-wide breakdowns that led to these failures.

As *To Err is Human* made clear, reporting can serve two main functions: (1) first and foremost, providing a base of information to help advance the safety of care and (2) holding providers accountable for performance. These functions are conceptually compatible, but in practice they can be difficult to achieve at the same time. *Mandatory* reporting systems can serve both functions, but are

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[11] K.E. Wood & D.B. Nash, *Mandatory State-Based Error-Reporting Systems: Current and Future Prospects*, AM. J. OF MED. QUALITY 20(6): 297-303 (2005).

[12] L.T. KOHN, J. M. CORRIGAN & M. S. DONALDSON, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM, (Washington, DC: National Academies Press) (2000).

[13] M.L. Millenson, *How the US News Media Made Patient Safety a Priority*, BRIT. MED. J. 324(7344): 1044 (2002).

[14] L.T. KOHN, J. M. CORRIGAN, & M. S. DONALDSON, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM, (Washington, DC: National Academies Press) (2000).

[15] INSTITUTE OF MEDICINE CROSSING THE QUALITY CHASM: A NEW HEALTH SYSTEM FOR THE 21ST CENTURY (WASHINGTON, DC: National Academies Press) (2001); L.T. KOHN, J. M. CORRIGAN & M. S. DONALDSON, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM (Washington, DC: National Academies Press) (2000); J.M. CORRIGAN, A. GREINER & S. M. ERICKSON, FOSTERING RAPID ADVANCES IN HEALTH CARE: LEARNING FROM SYSTEM DEMONSTRATIONS (Washington, DC: National Academies Press) (2002).

often seen as primarily promoting accountability. Mandatory systems typically require that reports be made to a state regulatory agency, often within the state Department of Health. States then generally have the authority to investigate individual instances of care and issue corrective directives or citations. These mandatory programs protect the public by making sure that serious events are reported, and that follow-up action occurs on serious adverse events. They also provide an incentive for health care providers to improve safety at the clinical level, since failure to do so can lead to penalties and/or undesirable exposure.

Yet, mandatory systems can have shortcomings, particularly in addressing the second core function of reporting systems: helping to improve safety. Mandatory systems requiring reports of serious injuries or death can only aggregate data about a small number of events—since these serious events are relatively uncommon. Some state mandatory systems have addressed this by also requiring reports of near misses, under the rationale that having more data reported would allow states to gain greater perspective on trends and weaknesses in safety systems.[16] Regardless of whether a mandatory reporting system collects data on near misses or only serious adverse events, however, fear of punitive sanctions or malpractice liability associated with reporting is likely to reduce compliance with reporting requirements—which in turn can lead to underreporting. (Note too that the related investigation, paperwork, and other duties associated with compliance can also lead to underreporting). To address the malpractice concern, some states have added confidentiality protections to provide increased incentives for reporting. Still, health care providers have expressed concern about the extent to which such information is truly protected.[17]

In contrast to mandatory serious adverse event reporting systems, *voluntary* reporting programs tend to be expressly oriented towards advancing safety in a systematic way. Typically, voluntary systems focus on errors and near misses that involve minimal or no harm, but can also include serious events; reports are made on a confidential basis and do not necessarily trigger external investigations, fines, or penalties. These reports are also generally afforded some kind of legal protections from discoverability. Since these systems are designed to capture a larger number of errors, they can be especially useful in identifying patterns of errors occurring across providers that relate to system problems affecting large numbers of health care institutions. This is particularly the case given that these types of errors may not occur frequently enough for individual institutions to identify a system failing based solely on its own data. The IOM emphasized that both mandatory and voluntary reporting systems have important functions, and that each should ideally be operated separately.

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[16] K. E. Wood & D. B. Nash, *Mandatory State-Based Error-Reporting Systems: Current and Future Prospects,* AM. J. OF MED. QUALITY 20(6): 297-303 (2005).

[17] J. Garbutt, A. D. Waterman, J. M. Kapp, W. C. Dunagan, W. Levinson, V. Fraser & T. H. Gallagher, *Lost Opportunities: How Physicians Communicate About Medical Errors*, HEALTH AFFAIRS 27(1): 246-255 (2008).

Recent years have seen the development and introduction of numerous legislative initiatives at the state and federal levels to address patient safety issues.[18] Many of these initiatives have been oriented towards enhanced reporting of information about errors in medical treatment. At the state level, particular interest has been focused on the establishment and refinement of mandatory state error reporting systems. More than half of all states now have some kind of mandatory adverse event reporting system in place.[19] However, there has also been interest at the state level in facilitating the development of voluntary reporting programs. In particular, statewide patient safety organizations have been established in a number of states to spearhead collaborative, learning-oriented approaches to improving safety of care—in some cases partly through voluntary reporting initiatives.

STATE PATIENT SAFETY ORGANIZATIONS

To date, state patient safety organizations have been established in Connecticut, Florida, Maryland, Massachusetts, New York, Oregon and Pennsylvania. Each of these organizations has been established by the state legislature. Most, but not all, of these entities have enacted some type of reporting system; the extent to which reporting to these systems is voluntary varies by state. To help inform the potential structure and activities of a new state patient safety organization, we outline in the following section the present structure and function of these existing organizations.

Connecticut

In 2004, the Connecticut General Assembly passed legislation that would allow the Department of Public Health (DPH) to designate qualified entities as patient safety organizations.[20] The 2004 law required hospitals and outpatient surgical facilities to contract with one or more patient safety organizations as they became available.[21] The legislation also specified that qualifying entities would have several specific characteristics: its primary function would be to improve patient safety; it would have a staff capable of reviewing patient safety work product; it would not be a component of a health insurer; and its mission would not

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[18] *See, e.g.,* The Patient Safety and Quality Improvement Act of 2005, Pub. L. No. 109-41, 119 Stat. 424 (2005) (signed into law July 29, 2005); PA. PUBLIC LAW, 154, No. 13; NEW YORK SB 8127;. Health Information and Quality Improvement Act of 2000; MD. CODE REGS. §10.07. 06.01 (2008); CONN. GEN. STAT. § 19a-127n (2004); National Academy for State Health Policy. Quality and Patient Safety: State adverse event reporting rules and regulations, http://www.nashp.org/_docdisp_page.cfm?LID=2A789909-5310-11D6-BCF000A0CC558925 (last visited April11, 2008).

[19] National Academy for State Health Policy, *Patient Safety Toolbox for States*, www.pstoolbox.org (last visited March 27, 2008).

[20] CONN. GEN. STAT. § 19a-127o (2004).

[21] CONN. GEN. STAT. § 19a-127o (2004).

create a conflict of interest with the health care providers with which it contracts. The legislation additionally states that any private or public organization or a component of any private or public organization may apply to the Department of Public Health to be designated as a patient safety organization (PSO).[22] Note that the state implemented a mandatory adverse event reporting system within the DPH in 2002 separately from the efforts undertaken by the designated PSOs.[23]

In turn, DPH designated Qualidigm, the state's Medicare Quality Improvement Organization, and the Connecticut Healthcare Research and Education Foundation (CHREF, an affiliate of the Connecticut Hospital Association) as patient safety organizations in 2004.[24] In addition, the Connecticut Ambulatory Surgery Center Association (ASC Association) formed the Ambulatory Surgery Center Patient Safety Organization (ASCPSO), which was added as a state patient safety organization in 2005.[25] Qualidigm is a non-profit research and consulting company that is governed by a board of directors composed of nurses, physicians, scientists and administrators. The other organizations are professional associations governed by their representative members; the ASCPSO contracts solely with ambulatory surgery centers while CHREF works primarily with its hospital members, but will accept contracts with any provider.[26] Qualidigm maintains a mix of contracts with providers, health care facilities and others.[27]

In their capacity as the state's patient safety organizations, Qualidigm, CHREF, and the ASCPSO assist health care providers in making quality enhancements and improving outcomes; they serve as learning organizations but have no regulatory or formal reporting function. In particular, they provide technical assistance with completing root cause analyses and improving quality standards. They also host workshops, issue alerts, and sponsor training on how providers can facilitate a culture of safety. Health care providers are not required to submit any error-

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[22] CONN. GEN. STAT. § 19a-127o (2004).

[23] CONN. GEN. STAT. § 19a-127n (2004). Hospitals and outpatient surgical facilities are required to report adverse events listed in the National Quality Forum's report, Serious Reportable Events in Healthcare. Additionally, DPH has been directed to implement strategies for reducing medical errors and making systems improvements. DPH collaborates with the Quality of Care Advisory Committee, within the General Assembly, to make specific recommendations about improving patient safety.

[24] Personal Communication with Nancy Safer (Patient Safety Organization Manager, Qualidigm) on April 11, 2008; Qualidigm, Patient Safety Organization, www.qualidigm.org/Professionals/Topic/PatientSafety/PSO.aspx (last visited accessed March 27, 2008).

[25] Ambulatory Surgery Association Patient Safety Organization, LLC, *About Us*, http://ctascpatientsafety.org/about.htm (last visited April 11, 2008).

[26] Personal Communication with Tricia Dinneen Priebe (Ambulatory Surgery Center Patient Safety Organization, Administrator) on April 11, 2008; Personal Communication with Julie Petrellis (Director of Clinical Data Support, Connecticut Hospital Association) on April 11, 2008.

[27] Personal Communication with Tricia Dinneen Priebe (Ambulatory Surgery Center Patient Safety Organization, Administrator) on April 11, 2008.

related data, but all information that the PSOs receive about errors and medical care is kept confidential. The designated PSOs are required to make occasional recommendations to the Quality of Care Advisory Committee within the state legislature, the DPH, health care providers, and others about patient safety best practices.

Florida

The Florida Patient Safety Corporation (FPSC) was established by the Florida Legislature in 2004 to serve as a learning organization that would assist health care providers in improving the quality and safety of clinical care in the state.[28] It was also created in part to address "skyrocketing liability insurance premiums."[29] The FPSC maintains a reporting system to which participants can report near misses; reporting is made on a voluntary and anonymous basis that is independent of mandatory systems used for regulatory purposes.[30] This system, run in partnership with the University of Miami/Jackson Memorial Hospital Center for Patient Safety and CS STARS (a software vendor that is a unit of Marsh, an insurance services firm), receives reports from approximately seventy (70) hospitals as well as several birthing centers and ambulatory surgical centers in the state. The FPSC also provides patient resources, convenes conferences, issues patient safety advisory reports, and provides reports to the legislature, among other activities.[31] Note that the FPSC is allowed to receive the adverse event information that is reported to the state's Agency for Healthcare Administration in order to analyze the data for trends and suggest best practice changes.

The FPSC is governed by a board of directors that includes physicians, nurses and other health care professionals with expertise in patient safety.[32] Designated committees provide input to the board, with specific issue focuses, including

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[28] FLA. STAT. § 381.0271 (2004); Florida Patient Safety Corporation *About Us,* www.floridapatientsafetycorp.com/AboutUs/tabid/4287/Default.aspx (last visited March 27, 2008).

[29] *See* Florida Patient Safety Corporation, *About Us,* www.floridapatientsafetycorp.com/AboutUs/tabid/4287/Default.aspx (last visited March 27, 2008); *see also* J. Rosenthal & M. Booth, *State Patient Safety Centers: A New Approach to Promote Patient Safety,* Portland, ME: National Academy for State Health Policy (2004).

[30] FLA. STAT. § 395.0197 (2007); FLA. STAT. § 458.351 (2000); FLA. STAT. § 459.026 (2000) all outline the mandatory reporting requirements for healthcare facilities in the state; Florida Patient Safety Corporation, *Near Miss Reporting System and Advisories*, www.floridapatientsafetycorp.com/NearMissReportingSystemsandAdvisors/tabid/4289/Default.aspx (last visited March 27, 2008).

[31] Florida Patient Safety Corporation, www.floridapatientsafetycorp.com (last visited March 27, 2008).

[32] Florida Patient Safety Corporation, *Board of Directors*, www.floridapatientsafetycorp.com/BoardofDirectors/tabid/4209/language/en-US/Default.aspx (last visited March 27, 2008).

scientific research, education, and litigation alternatives.[33] The operations of the FPSC are funded by the legislature, although the enabling legislation requires the organization to seek private sector funding and to apply for grants to accomplish its goals and duties.[34]

Maryland

The Maryland General Assembly passed a broad legislative package in 2001 that called on the Maryland Health Care Commission, an independent state agency, to address patient safety through a variety of approaches.[35] The Health Care Commission in turn produced a report with a series of recommendations for improving quality throughout the state, including the establishment of a patient safety center and the expansion of a mandatory error reporting system that would include root cause analyses.[36] In 2003, the state legislature passed legislation which enabled the Health Care Commission to establish the Maryland Patient Safety Center (MPSC) in an effort to develop and implement new approaches to improving the quality and safety of health care in Maryland.[37] The Commission selected the Delmarva Foundation (the local Medicare-designated Quality Improvement Organization) and the LogicQual Research Institute (a subsidiary of the Maryland Hospital Association) to run the MPSC.

The MPSC collects and analyzes data about adverse events in Maryland hospitals. Several hospitals use the MPSC's online event reporting tool; others use their own data collection tools but ultimately also send data to the MPSC.[38] The MPSC uses this data to promote collaboration and learning among hospitals, to provide feedback to hospitals, and to help identify patterns of errors across hospitals. The MPSC sponsors educational conferences and seminars, conference calls, and collaborative workshops, and its website provides a variety of patient safety resources and documents. The MPSC has had a particular emphasis on

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[33] Florida Patient Safety Corporation, *Advisory Committees*, www.floridapatientsafetycorp.com/AdvisoryCommittees/tabid/4212/language/en-US/Default.aspx (last visited March 27, 2008). Note the Litigation Alternatives Committee has considered different approaches to resolving injury claims, such as administrative compensation and disclosure programs.

[34] Personal Communication with Susan A. Moore (CEO, Florida Patient Safety Corporation) on March 26, 2008.

[35] MD. CODE ANN. HEALTH-GEN. § 19-139 (2001); Maryland Patient Safety Center, *About Us*, www.marylandpatientsafety.org/html/aboutUs.html (last visited March 27, 2008).

[36] Maryland Health Care Commission, *"Final Report on the Study of Patient Safety in Maryland"* (January 2003). Note that the mandatory reporting of serious adverse events is addressed in Code of Maryland Regulations §10.07.06 *et seq*.

[37] MD. CODE ANN. HEALTH-OCC. § 1-401 (West 2006).

[38] Maryland Patient Safety Center, *Home*, www.marylandpatientsafety.org (last visited March 27, 2008).

analyzing data collected in the contexts of emergency and perinatal care.[39] For example, the MPSC's Emergency Department Collaborative has promoted inter-institutional strategies to improve handoffs and transitions in emergency departments; in a similar fashion, the MPSC's Perinatal Collaborative has promoted strategies to enhance perinatal care by addressing standardization of fetal monitoring language, teamwork training, and documentation.

The operations of the MPSC are overseen by a board of directors, which includes a patient advocate, an insurance representative (currently the Senior Vice President and Chief Medical Officer of CareFirst BlueCross BlueShield), and members of the health care provider community and state legislature.[40] Funding for the operation of the MPSC has come from the Delmarva Foundation and the LogicQual Research Institute.[41]

Massachusetts

In 2002, the General Court of the Commonwealth of Massachusetts (the state legislature) created the Betsy Lehman Center for Patient Safety and Medical Error Reduction (Lehman Center) within the Department of Public Health (DPH).[42] The organization began operation in 2004.[43] Although housed within DPH, the Lehman Center functions separately from other DPH divisions, including the Division of Healthcare Quality (which investigates complaints against health care facilities) and the Board of Registration in Medicine (which investigates complaints and handles disciplinary proceedings involving health care providers). The state's mandatory adverse event reporting filters through these two other entities, while the Lehman Center coordinates efforts to recommend and implement system changes.[44]

The Lehman Center collects and analyzes information about errors that it receives from patients, families, and health care providers. The Lehman Center does not currently participate in any error reporting but may soon initiate a

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[39] Maryland Patient Safety Center, *ED Collaborative*, www.marylandpatientsafety.org/html/collaboratives/ed/index.html. (last visited March 27, 2008); Maryland Patient Safety Center, *Perinatal Collaborative*, www.marylandpatientsafety.org/html/collaboratives/perinatal/index.html (last visited March 27, 2008).

[40] Maryland Patient Safety Center, *Board of Directors*, www.marylandpatientsafety.org/html/board.html (last visited March 27, 2008).

[41] Maryland Patient Safety Center, *"Maryland Patient Safety Center is Established,"* June 18, 2004, *available at* www.marylandpatientsafety.org/html/news/061804.html.

[42] MASS. GEN. LAWS ch. 6, A Section 16E (2008).

[43] Betsy Lehman Center for Patient Safety and Medical Error Reduction, www.mass.gov/dph/betsylehman (last visited March 27, 2008).

[44] 105 MASS. CODE REGS. 130.331 (2008); Personal communication with Eileen McHale (Patient Safety Ombudsman, Betsy Lehman Center) on March 28, 2008.

voluntary and confidential reporting process.[45] It monitors this information to discern trends and patterns that may be emerging in errors across institutions, and it issues patient safety alerts based on this monitoring. The Lehman Center functions as a clearinghouse for developing, evaluating, and disseminating patient safety-related information. This includes sponsorship of educational and training programs as well as distribution of best practices for reducing medical errors. The Lehman Center also functions as an ombudsman for patients, families, and consumers on patient safety-related issues.

Within the Lehman Center there is a Patient Safety and Medical Errors Reduction Board, which includes the Secretary of Health and Human Services, the Director of Consumer Affairs and Business Relations, and the Attorney General.[46] The Board is responsible for appointing the Director of the Lehman Center and has general oversight of the center. The nonprofit Massachusetts Coalition for the Prevention of Medical Errors serves as the Advisory Committee for the Lehman Center. The Lehman Center was launched with $200,000 from the state's health care quality trust fund;[47] the organization now operates with state appropriations.[48]

New York

New York's Patient Safety Center (NYPSC) was established in 2000 as part of broad patient safety-oriented legislation, the Patient Health Information and Quality Improvement Act.[49] This Act called for the creation of a statewide information system within the Department of Health (DOH) to collect and make available to the public data on health plans and providers. This information is collected by the DOH and made available to the NYPSC in order to devise strategies and recommendations for improving patient safety, as well as to track the progress of providers statewide.[50] To carry out its mission of increasing public access to health care information, the NYPSC provides patient-friendly information about preventing medical errors and publishes a periodic newsletter on health care quality and safety issues. The Center also helps to formulate and/or

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[45] Personal communication with Eileen McHale (Patient Safety Ombudsman, Betsy Lehman Center) on March 28, 2008.

[46] MASS. GEN. LAWS ch. 6, A Section 16E (2008).

[47] Alice Dembner, *Push For Patient Safety Honors Writer*, BOSTON GLOBE, January 14, 2004, at B3.

[48] Personal communication with Eileen McHale (Patient Safety Ombudsman, Betsy Lehman Center) on March 28, 2008.

[49] N.Y. PUB. HEALTH LAW Article 29-D, Title 2, § 2998 (McKinney 2008); Patient Safety Center, *About the Patient Health Information and Quality Improvement Act of 2000*, www.health.state.ny.us/nysdoh/healthinfo/about.htm (last visited March 27, 2008).

[50] Personal Communication with Debbie Klein, (Executive Assistant, New York Patient Safety Center) on March 27, 2008.

improve clinical guidelines and standards for a variety of topics. The NYPSC was also tasked with developing (and has created) a voluntary and collaborative error reporting system to improve quality and reduce medical errors. [51] Separate from the state's mandatory reporting system, and consistent with the IOM's recommendations, this approach encourages greater reporting and facilitates learning. The NYPSC is directed by the DOH, which appoints an acting director. In turn, the NYPSC director appoints various advisory groups and subcommittees to assist with its activities.[52]

The NYPSC is housed within the state Department of Health, which also has several other patient safety initiatives. First, the New York Patient Occurrence and Tracking System (NYPORTS) is a mandatory reporting system for adverse events that occur in hospitals.[53] Serious adverse events, for example, patient deaths or serious impairments other than those related to the natural course of disease or where treatment was improper, are investigated individually. Hospitals are required to conduct a root cause analysis of these events.[54] In addition, the DOH administers the Patient Safety and Patient/Resident Safety Award Program, which recognizes excellence in quality improvement among providers and provides grant support to awardee institutions to share their insights with other health care providers.[55]

Oregon

Oregon's Patient Safety Commission (OPSC) was created by the state legislature in 2003 as a semi-independent state agency.[56] Like other state patient safety centers, the OPSC's mission is to improve patient safety by encouraging a patient safety culture and reducing the risk of serious adverse events. The Commission provides reports about patient safety issues to the legislature, makes available de-identified case studies, issues other reports, and convenes working groups in the state.[57] It also maintains a voluntary and confidential adverse event reporting system for participating hospitals, nursing homes, pharmacies, and

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[51] N.Y. PUB. HEALTH LAW Article 29-D, Title 2, § 2998 (McKinney 2008).

[52] Personal Communication with Debbie Klein (Executive Assistant New York Patient Safety Center) on March 27, 2008.

[53] State of New York Department of Health, *New York Patient Occurrence and Tracking System Report* (2002-2004), *available at* www.health.state.ny.us/nysdoh/hospital/nyports.

[54] N.Y. COMP. CODES R. & REGS. Tit. 10, § 405.8 (2008).

[55] State of New York Department of Health, *DOH Initiatives*, www.health.state.ny.us/nysdoh/healthinfo/pscdohi.htm (last visited March 27, 2008).

[56] OR. REV. STAT. § 442.820 (2003).

[57] Oregon Patient Safety Commission, www.oregon.gov/DHS/ph/pscommission/index.shtml (last visited March 27, 2008).

ambulatory surgery centers.[58] Of the twenty-six states with error reporting laws in place, Oregon is the only state that has established only a voluntary reporting system.[59]

The OPSC is governed by a seventeen-member Board of Directors, which includes the Public Health Officer as well as physicians, insurance representatives, labor representatives, academics, consumers, pharmacists, nurses, and administrators, to be appointed by the Governor to four year terms and confirmed by the Senate. The Board's duties include appointing a Director and establishing various groups and subcommittees. The legislation requires the OPSC to maintain a consumer advisory group and technical advisory group.[60] The OPSC is funded by fees assessed upon all health care facilities of the type for which there is a reporting program in place, including hospitals, nursing homes, pharmacies, and ambulatory surgery centers.[61] These organizations are required to pay the fees to support the OPSC, but they are not required to participate in the reporting program.

Pennsylvania

Pennsylvania's Patient Safety Authority (PSA) was established by legislation in 2002 as an independent state agency.[62] The PSA was created as part of a broader legislative initiative addressing patient safety and liability issues, the Medical Care Availability and Reduction of Error (MCARE) Act.[63] The most significant program administered by the PSA is the Pennsylvania Patient Safety Reporting System (PA-PSRS), which receives and analyzes reports of "serious events" (actual occurrences) and "incidents" (near misses). More than 400 institutions are subject to mandatory reporting requirements under the PA-PSRS. The PSA also provides consumer-friendly information about patient safety, convenes public meetings, studies various patient safety topics, and issues extensive quarterly patient safety advisories based on these studies.

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[58] OR. REV. STAT. § 442.820 (2003); Personal communication with Linda Goertz (Executive Assistant, Oregon Patient Safety Commission) on February 25, 2008.

[59] There are twenty-six states, and the District of Columbia, which have some type of error reporting law in place. Of those twenty-six states, Oregon is the sole state to maintain *only* a voluntary reporting system—the other twenty-five maintain mandatory systems, and some have additional voluntary reporting programs in place. National Academy for State Health Policy, *Quality and Patient Safety: State Adverse Event Reporting Rules and Regulations,* www.nashp.org/_docdisp_page.cfm?LID=2A789909-5310-11D6-BCF000A0CC558925 (last visited March 27, 2008).

[60] OR. REV. STAT. § 442.820 (2003).

[61] Personal communication with Linda Goertz (Executive Assistant, Oregon Patient Safety Commission) on February 25, 2008.

[62] PA. PUBLIC LAW 154, No. 13; Patient Safety Authority, www.psa.state.pa.us/psa/site/default.asp (last visited March 27, 2008).

[63] PA. PUBLIC LAW 154, No. 13.

The PSA is headed by an eleven-member Board of Directors which includes the Physician General, several political appointees, consumers, physicians, nurses, pharmacists, and administrators.[64] Financial support for the PSA comes from the state's Patient Safety Trust Fund, which in turn is funded by licensing fees assessed on health care providers that are required to report to the PSA. Note that the total annual assessment on health care providers to fund the Authority is limited by law to $5 million for the PSA's first year, plus an additional amount indexed to the Consumer Price Index.[65]

FEDERAL PATIENT SAFETY LEGISLATION

Public attention to patient safety has also generated interest at the federal level. In Congress, several years of discussion and debate led to the development of a proposal to encourage voluntary reporting, which took legislative form in the Patient Safety and Quality Improvement Act of 2005 (PSQIA).[66] Signed into law on July 29, 2005, the PSQIA is aimed directly at improving patient safety through creating confidentiality protections designed to encourage voluntary reporting of medical adverse events. In particular, the PSQIA empowers the Secretary of the U.S. Department of Health and Human Services (HHS) to designate qualifying organizations as "Patient Safety Organizations" (PSO) to collect and analyze information reported by health care providers.[67]

In the broadest perspective, the PSQIA represents an attempt on the part of federal policy makers to improve the quality of care by encouraging the development of voluntary, provider-driven approaches to improving patient safety. Significantly, organizations qualifying as a "PSO" under the PSQIA are neither to be funded nor controlled by the federal government, nor does the law mandate that specific reporting must occur. Rather, PSOs are intended to collect and analyze information about adverse events occurring in health care treatment on a voluntary basis, independent of health insurers or other state or federal regulatory bodies.

A primary goal of the PSQIA is to ameliorate health care providers' fears that information they report about errors may be used against them in disciplinary proceedings or medical malpractice litigation. As discussed above, many health policy and patient safety experts have noted that this fear can hamper patient safety

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[64] Pennsylvania Patient Safety Authority, *Board of Directors*, www.health.state.ny.us/nysdoh/healthinfo/pscdohi.htm (last visited March 27, 2008).

[65] PA. PUBLIC LAW 154, No. 13.

[66] The Patient Safety and Quality Improvement Act of 2005, Pub. L. No. 109-41, 119 Stat. 424 (2005) (signed into law July 29, 2005).

[67] Department of Health and Human Services, Patient Safety and Quality Improvement; Proposed Rule, 73 Fed. Reg. 8112-8183 (February 12 2008) (to be codified at 42 C.F.R. pt. 3); Proposed § 3.104—Secretarial Actions.

efforts by chilling providers' willingness to report information about errors (which in turn reduces the amount of data available for patient safety analyses). The PSQIA aims to address providers' concerns about reporting by providing uniform statutes under which specified patient safety information is protected. Organizations that gain PSO certification will be able to offer to providers the benefits of review and analysis of patient safety work product that is shielded by strong federal protections. In particular, the law provides legal privilege and confidentiality protection for information that is reported by health care providers to a qualified PSO. The law also protects "patient safety work product"—information developed by a PSO for the purpose of patient safety related activities—by significantly limiting use of such information in civil, criminal, and administrative proceedings.[68]

The PSQIA also is aimed at encouraging greater aggregation of data about medical errors. To help meet this goal, the law provides for the establishment of a Network of Patient Safety Databases (NPSD), with common reporting formats, interoperable reporting systems, and other standardized elements that can be used as a resource by providers and PSOs to analyze national and regional patient safety trends and patterns.

The PSQIA does provide some detail about the designation and functioning of PSOs. For example, it specifies that PSOs must work with more than one health care provider; it also provides eligibility criteria for organizations that would like to be designated as PSOs. However, much of the detail about the functioning of PSOs under the PSQIA is left to regulation. Proposed regulations for the implementation of the PSQIA, much anticipated, were released by HHS in February 2008.[69] As this article was being written, HHS was soliciting comments about the proposed regulations; the final rule may differ from the current proposal.[70] As proposed, the regulations describe how clinicians can report information on a confidential basis, the ways in which such information can be analyzed for patient safety purposes, and how such data can be shared with providers to give feedback on improving safety without jeopardizing the law's confidentiality protections. They also outline how an organization can become designated as a PSO.

The proposed rules make clear that a number of different kinds of organizations can become PSOs, including private, public, for-profit and not-for-profit entities. However, health insurance issuers (or components of health insurance issuers) may not become PSOs. A process for certifying and listing PSOs will be implemented by the Agency for Healthcare Research and Quality (AHRQ). AHRQ's review

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[68] The proposed rule gives total privilege and confidentiality protections, but there are limited exceptions and permissions under which work product can be disclosed to authorities or other parties.

[69] Department of Health and Human Services, Patient Safety and Quality Improvement; Proposed Rule, 73 Fed. Reg. 8112-8183 (February 12 2008) (to be codified at 42 C.F.R. pt. 3).

[70] Comments were to be submitted on the proposed rule by April 14, 2008.

process for listing as a PSO is intended to be simple and straightforward, which is expected to encourage a number of organizations to pursue the listing. Entities seeking to become a PSO will submit an application to AHRQ; certification will rely primarily on attestations of entities seeking listing rather than submission and review of documentation by AHRQ. The proposed rule suggests that little time will be required to submit these forms; an average burden of 30 minutes annually for each entity.

Pursuant to the proposed regulation in its current form, requirements that applicant organizations must meet to gain PSO certification include the following:

— The organization must undertake efforts to improve safety and quality, and the mission and primary activities of the organization must be patient safety-oriented.

— The organization must collect and analyze patient safety work product in a standardized manner, and use this to provide direct feedback to providers about encouraging a culture of safety and reducing patient risk.

— The organization must develop and disseminate information relating to patient safety improvements.

— The organization must employ qualified staff.

— The confidentiality and security of patient safety work product must be maintained.

— Disclosure statements submitted to the Secretary must meet certain requirements.

PSOs will be able to offer expertise to providers about preventing adverse events; they can also provide feedback and recommendations about information they have collected and analyzed. Health care providers in a wide variety of settings will be able to report information to a PSO. To promote data aggregation across providers (and, implicitly, to facilitate identification of system failures and learning about errors), the rule requires PSOs to have at least two contracts with providers for the receipt and review of patient safety work product. These contracts must be for a "reasonable period of time." Subject to certain constraints, PSOs may aggregate patient safety work product gained from multiple clients, as well as other PSOs. Note that the PSQIA called on HHS to implement a network of patient safety databases. However, the proposed regulations do not address this issue except in passing and to note that the other provisions of the law will be implemented independent of the proposed rule.

To ensure that providers are willing to report information, the regulation provides that patient safety work product gains strong privilege and confidentiality protections. Breach of these provisions can lead to substantial civil money penalties, to be enforced by the Office of Civil Rights within HHS. The proposed rules do not in any way obviate existing requirements under federal privacy and confidentiality laws, including the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Instead, the rules specify that providers reporting information to a PSO must continue to satisfy obligations under HIPAA; where providers are covered entities under HIPAA, they must execute business associate contracts with PSOs. By contrast, providers need not have a contract with a PSO to receive PSQIA protection.

In sum, the federal government has taken major steps through the PSQIA and its proposed regulation to promote voluntary reporting and analysis of information about errors. Although no federal funds are available to support such reporting, the confidentiality and privilege protections have substantial potential to spur private entities to work in concert with health care providers to collect, aggregate, and analyze error-related information. In turn, the private sector has taken notice. Indeed, AHRQ estimates that between 50 and 100 entities will seek to become listed as a PSO in the first 3 years after publication of the final rule.

ELEMENTS OF A STATEWIDE PATIENT SAFETY ORGANIZATION

The experience from the state patient safety centers described above, and the directives embedded in evolving federal patient safety law and regulation, provide helpful guidance to policy makers in other states interested in creating a patient safety organization to advance a multi-pronged patient safety agenda in their states. To the extent that such an entity is to be legislatively created, it would be reasonable for the legislature to direct the new organization to have, as has been the case in other states, a mission that is broad and generally oriented around improving the safety and quality of health care provided to its residents. Of course, these initiatives could also be launched without legislative involvement, for example, by a nonprofit organization created by health care providers or other stakeholders. In either case, the functions of the new organization ought to include serving as a resource to patients and health care providers by convening educational conferences and training sessions, by publishing and disseminating resources targeted to both patient and provider audiences, and by establishing a voluntary reporting system for information about errors and near misses. As described above, the legal system has been identified by a number of observers as tending to impede efforts to enhance quality of care.[71] To begin to address this

[71] Joint Commission on Accreditation of Healthcare Organizations, *Health Care at the Crossroads: Strategies for Improving the Medical Liability System and Preventing Patient Injury*, Oakbrook Terrace, IL: Joint Commission (2005), *available at* www.jointcommission.org/NR/rdonlyres/167DD821-A395-48FD-87F9-6AB12BCACB0F/0/Medical_Liability.pdf.

issue, and generally to integrate liability and patient safety to a greater extent, the new organization might also include initiation of an injury compensation pilot project that would be voluntary for both claimants and defendants.

Development and dissemination of information resources of value to health care providers and consumers ought to be a major function of the patient safety center. Oriented toward providers, this might include maintaining and disseminating information about patient safety best practices through various channels.[72] Particularly to the extent that the voluntary error reporting system discussed below identifies patterns or trends across institutions, this outreach ought to be informed by such data analysis, with preventive strategies targeted towards those problem areas that analysis of errors has identified. Given adequate resources, it would make sense for the organization's staff to conduct regional training sessions for providers on a periodic basis and to convene a statewide patient safety conference or event annually or biannually.

For patients, the organization's website could offer tips for individuals about getting safe and effective health care services, as well as links to outside organizations that offer guidance about quality, health, wellness and related topics (*e.g.*, AHRQ, MedlinePlus.gov, and MerckSource.com). If adequate resources are available, organization staff might author periodic consumer-focused columns about patient safety and health quality issues for newspapers around the state. It might also serve as a place through which patients could report adverse experiences in treatment, or provide a statewide patient ombudsman.

Dissemination of educational resources will be helpful, but the real potential of a patient safety center lies in its ability to aggregate information about errors, and employ analyses of this data to drive prevention strategies. Consequently, the establishment of a reporting database within the patient safety center will be highly desirable. Twenty-five states and the District of Columbia already require that serious adverse events be reported.[73] But a voluntary reporting system housed within a patient safety center, like several of the states described above, could capture substantially more data than the existing mandatory systems.

Ideally, therefore, the patient safety center will establish a database with standardized protocols for reporting; this database will receive confidential reports of actual errors, serious and minor, as well as near misses. Reports will be made on a voluntary basis from institutions across the state; the patient safety center will aggregate and analyze this data, particularly for broad patterns of errors occurring

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[72] This might include publication of information on the internet, distribution of such information through email updates, and publication of periodic newsletters.

[73] National Academy for State Health Policy, *Quality and Patient Safety: State Adverse Event Reporting Rules and Regulations*, www.nashp.org/_docdisp_page.cfm?LID=2A789909-5310-11D6-BCF000A0CC558925 (last visited March 27, 2008).

across institutions. Results of these analyses will be shared with institutions via the reports, newsletters, conferences, and training sessions described above. The Board of Medicine may also want to use this information, on a de-identified basis, to develop statewide alerts about problems occurring at the clinical level.

To minimize providers fears associated with the potential adverse consequences of error reporting, information reported to the center ought to be confidential and non-discoverable. The best way to accomplish this will be for the center to gain certification by AHRQ as a patient safety organization (PSO) under federal law (i.e., the PSQIA). Given the current status of the PSQIA's proposed regulations, it is not possible at this time to identify all the requirements that gaining such certification will entail. However, based on the proposed regulations in their current form, it appears likely that the administrative burden associated with making the application to AHRQ will be minimal. And assuming a new patient safety center meets the specific criteria set by HHS (likely to include, for example, having a safety-oriented mission, qualified staff, multiple provider contracts, and so on) gaining PSO certification should be relatively straightforward.

Once the organization gains PSO certification, reporting by providers will gain protections pursuant to federal law and regulation. In turn, the PSO can use the information it collects to promote a culture of safety within health care institutions and to facilitate collaborative learning environments that are focused on continuously improving patient safety. The parameters described in federal law and regulation should provide a helpful roadmap to the PSO as it undertakes these initiatives.

Finally, the PSO has a golden opportunity to gain further information about medical errors, and generally to integrate liability and patient safety issues, by developing an injury compensation pilot project that would be completely voluntary for patients and providers. We next describe how this initiative could be structured.

ESTABLISHING A VOLUNTARY INJURY COMPENSATION PILOT

Through the years, considerable attention has been devoted to the ways in which the legal system functions in resolving medical liability disputes and in compensating patient injuries. A number of observers have noted that the current system is inefficient, highly adversarial, time consuming, and does little to facilitate enhancements in patient safety.[74] In addition, a number of academics, advocates, and policy makers have suggested that these system failings could best

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[74] M.M. Mello, D. M. Studdert, A. Kachalia & T. A. Brennan, *"Health Courts" and Accountability for Patient Safety*, MILBANK QUARTERLY 84(3): 459-492 (2006); D.M. Studdert & T. A. Brennan, *No-Fault Compensation for Medical Injuries: The Prospect for Error Prevention*, J. OF THE AM. MED. ASS'N 286(2): 217-223 (2001).

be addressed by removing medical liability claims from the tort system altogether, and instead processing them through an administrative system with specialized judges and court-appointed expert witnesses.[75] Today's administrative proposals tend to contemplate strong linkages with patient safety initiatives and structures, with the goal of creating feedback loops whereby health care providers can learn from mistakes and hopefully take steps to prevent them from reoccurring.

Although conceptually elegant, a number of past administrative compensation proposals have failed to engender a positive response from health care providers (due to concern about potentially increased liability), attorneys (due to concern about erosion of individual rights and vested interests in the functioning of the current system), and patients (due to concern about potential limitations of compensation awards).[76] These responses are generally quite consistent across both broad administrative compensation proposals as well as more limited variants, such as the removal of certain kinds of cases (*e.g.,* obstetrics claims) from the tort system.[77]

In contexts where stakeholder concerns have made enacting an administrative compensation system through legislation unlikely, some observers have suggested that a compensation process much like the administrative compensation proposal could be created on a purely contractual basis, without legislation.[78] In particular, patients could opt into the jurisdiction of a non-tort alternative as part of the subscriber agreement between an individual and his or her health plan, or as part of the admission documents executed between an individual and a hospital or other health care provider at the initiation of a treatment episode.

Although this approach dodges the near-certain constitutional challenges that would likely ensue from any legislatively enacted program, it still faces barriers. Health plans are generally unenthusiastic about this approach, even where there

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[75] M.M. Mello, D. M. Studdert, A. Kachalia & T. A. Brennan, *"Health Courts" and Accountability for Patient Safety*, MILBANK QUARTERLY 84(3): 459-492 (2006); D.M. Studdert & T. A. Brennan, *No-Fault Compensation for Medical Injuries: The Prospect for Error Prevention*, J. OF THE AM. MED. ASS'N 286(2): 217-223 (2001); P. Barringer, *Windows of Opportunity: State-Based Ideas for Improving Medical Injury Compensation and Enhancing Patient Safety,* Washington, D.C.: Common Good (2006), *available at* www.commongood.org/assets/attachments/Windows_of_opportunity_web.pdf.

[76] P.J. Barringer, D. M. Studdert, A. B. Kachalia & M. M. Mello, *Administrative Compensation of Medical Injuries: A Hardy Perennial Blooms Again*, J. HEALTH POL. POL'Y & L. (2008) (forthcoming).

[77] *Id.*

[78] M.M. Mello, D. M. Studdert, P. Moran & E. A. Dauer, *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 HARV. J. ON LEGIS. 59, 106 (2008).

is favorable state law.[79] Hospitals worry about the effect of asking patients to waive rights in the event of injury (before treatment has even begun), as well as the staff time required to execute such agreements en masse. And attorneys are generally very critical of opt-in agreements that bind patients before an injury has occurred.[80]

An alternative approach—the approach we advocate in this paper—will likely face substantially fewer barriers to implementation. In particular, a PSO might make available to patients and providers a process for resolving medical injury claims that involves certain elements of the administrative compensation proposal—but that is completely voluntary for patients and health care providers. The PSO would prescribe criteria by which this process would be made available to patients and providers; this ought to occur after efforts have been made through formal and informal programs at the provider level to disclose the circumstances of injury, offer an apology where warranted, and pay mutually agreeable compensation for the injury.[81] To the extent that these steps have occurred and the matter remains unresolved, the claimant and defendant could mutually agree to have their case heard and resolved by the PSO's structured voluntary compensation process. The proposed approach essentially would amount to voluntary arbitration with some added structure.[82] Naturally, liability carriers would need to participate in this initiative, along with providers and patients. It would also be vitally important for patients to be provided adequate, meaningful notice of the system and its limitations, to ensure that patient agreements to participate were made on a knowing, willing, and voluntary basis.

This process would need to be administered separately from the PSO's other functions, including reporting and provider training. Failure to do so could chill providers' willingness voluntarily to report information about errors. To maintain

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[79] For example, New York passed a law in the early 1990s to allow health plans to bind their members to arbitration for medical injury claims. *See* N.Y. PUB. HEALTH LAW § 4406-a (McKinney 2008); *see also* P.D. Jacobson, *Legal Challenges to Managed Care Cost Containment Programs: An Initial Assessment,* HEALTH AFFAIRS 18(4): 69 (1999). However, few if any plans in New York have done so pursuant to this law. By contrast, Kaiser Permanente (KP) requires that its California members arbitrate medical injury claims. Note that California has considerable pro-arbitration statutory and case law; in addition, the arbitration approach makes particular sense in this context given KP's integrated structure.

[80] Vesna Jacksic, *Patient Arbitration Acts are Alarming Attorneys*, NAT'L L. J., March 28, 2008.

[81] Programs currently operating in a number of states around the country (especially the COPIC Insurance Company's "3-R" program) provide excellent examples for how such activities can be put in place. Note too that many states have apology laws in place to encourage adoption of such disclosure initiatives, although the effect of these state laws varies.

[82] For background information on the use of arbitration in medical injury litigation, *see* U.S. General Accounting Office, *Medical Malpractice: Alternatives to Litigation,* Washington D.C.: GAO/HRD-92-28 (1992). For information on a recently enacted law that contemplates use of post-injury arbitration agreements with some structured elements, *see* A.L. Sorrel, *Physicians See North Carolina Tort Reform as First Step*, AMNEWS, October 8, 2007.

appropriate separation, the compensation process should be administered by an outside vendor pursuant to a methodology and particular standards established by the PSO. In particular, the process would entail the use of arbitrator neutrals who had completed a certain prescribed number of hours of medico-legal training.[83] Rather than each party retaining its own expert witness, the neutral in each case would retain between one and three expert witnesses, selected from a pre-approved panel of experts who met certain credentialing standards. Consulting with these experts, the neutral would determine the liability in the matter, including the standard of care and other relevant issues.To the extent that compensation was to be paid, a specific methodology or schedule would be used to determine non-economic damages; this would be based on patient circumstances and severity of injury, would be completely transparent, and would involve specific values being paid depending on these factors up to a cap. Significantly, information generated through this process would be used by the PSO, on a de-identified basis, for patient safety purposes. Again, however, the compensation process would be operated separately from the PSO's reporting or training functions, and on a completely voluntary basis for the parties.

To the extent that the agreement to participate in the alternative is made after an injury occurs, it is likely to generate selection issues—but far less likely to engender opposition from the bar, or concerns from health care providers about enforceability. Moreover, the structured compensation process has the potential, particularly in light of its link to the PSO, to answer to the needs and wishes of patients who have suffered medical injuries. Evidence suggests that patients who have been injured due to medical care want to have an explanation, an apology, and an assurance that what has happened will not reoccur.[84] The structured compensation process can meet these needs by promoting utilization of disclosure and apology initiatives at the provider level; that is, by requiring that such steps be taken before the parties can opt into the structured compensation process. Of course, the PSO can also promote disclosure and apology programs through its educational and outreach initiatives. In addition, the tie to the PSO helps to ensure that claimants' injury experiences will be used for learning and prevention purposes. Finally, many past plaintiffs and consumers have decried the adversarialism of the existing legal system;[85] the PSO's structured compensation

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[83] Training programs for judges in various specialty courts should offer guidance as to the crafting of this curriculum. As one example, consider the training curriculum prescribed by the "ASTAR" (Advanced Science and Technology Adjudication Resource) program for its "Fellows," or specially trained judges, http://einshac.org/platformB.htm (last visited March 31, 2008).

[84] T. Delbanco & S.K. Bell, *Guilty, Afraid and Alone—Struggling with Medical Error*, NEW ENG. J. MED. 357(17): 1682-1683 (2007); R.R. Bovbjerg & B. Raymond, *Patient Safety, Just Compensation and Medical Liability Reform*, Oakland, CA: Kaiser Permanente Institute for Health Policy (2003).

[85] *See, e.g.,* S.S Sheridan & M. J. Hatlie, *We're Not Your Enemy: An Appeal from a Consumer to Re-imagine Tort Reform*, PATIENT SAFETY AND QUALITY HEALTHCARE, July/August: 22-26, 2007.

process may offer a way to substantially reduce the adversarial nature of the process by which the claim is resolved.

Establishing a new PSO, and structured compensation process, will take resources. Following the lead of other states, financing for the patient safety organization might come from a variety of sources, including legislative appropriations, contributions from providers, and grant support. A strong argument can be made for general support from the legislature, given the potential for a PSO to advance shared public policy objectives: the reduction of health care errors and the provision of safer health care services to state residents. Moreover, the creation of a PSO may well have substantial returns on investment. In particular, AHRQ has estimated that total benefits from PSOs will save the nation almost $300 million annually by 2012 (with net benefits—total benefits minus total costs—reaching over $100 million).[86] As noted above, a number of states have imposed assessments on participating providers to fund the operation of state patient safety organizations. Foundation support may be available to support this initiative, particularly for establishing the voluntary compensation pilot.

CONCLUSION

Improving patient safety is almost certain to continue to be a major driver of health policy at the federal and state levels. Creating a voluntary state reporting system offers great potential to facilitate identification and analysis of medical errors—and development of proactive patient safety initiatives. The 2005 federal patient safety law—the Patient Safety and Quality Improvement Act—provides an excellent opportunity for state patient safety organizations to collect voluntarily reported information about errors in a way that is protected and confidential. And a structured compensation process tied to the state organization could offer a new opportunity to enhance reporting and leveraging the liability system to improve safety. With leadership from state policy makers and leaders in the fields of law and medicine, this promising reform may become a reality.

[86] Department of Health and Human Services, Patient Safety and Quality Improvement; Proposed Rule, 73 Fed. Reg. 8112-8183 (February 12, 2008) (to be codified at 42 C.F.R. pt. 3).

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ETHICAL CONSIDERATIONS WHEN REPRESENTING HEALTH CARE ORGANIZATIONS

*John M. Burman**

Representing physicians or other health care workers (physicians and other individual health care practitioners are referred to collectively as "HCWs"), medical organizations, physicians' organizations, is not particularly unique. The same ethical standards apply that generally apply to lawyers who represent clients. As with any group or type of clients, however, there can be a few differences. Perhaps the main one in this area, however, is that the medical profession is itself, unique, subject to myriad federal and state laws that govern the payment and receipt of government funds for HCWs and organizations that provide health care services, as well as laws about virtually every aspect of the health care system. That uniqueness presents some different challenges for those lawyers who represent HCWs, health care organizations, or both.

Among the many ethical issues facing lawyers who represent HCWs is that many HCWs, or the associations or institutions for which the lawyers work, are governmental entities, or private entities that receive federal money, state money, or both. Accordingly, the ethical issues faced by the lawyers who represent such clients are the issues faced by government lawyers (or, more accurately, lawyers who represent government entities), in general. The other major category of ethical issues involves lawyers who represent any type or organization or entity, governmental or private. Those two categories of issues are the focus of this article.

This article is intended to provide a general overview of a lawyer's ethical duties when the lawyer represents either an individual HCW or a health care

* John M. Burman is a Professor of Law at the University of Wyoming. He spent nearly twenty-five years representing the Medicaid programs in two different states, where he was involved in the creation and implementation of reimbursement systems for individual and organizational providers of health care services, and representing states in controversies with the federal government about Medicaid funds. The author thanks Denise Burke, who read and commented on a draft of this article. Her comments were helpful.

organization. As so many HCWs and health care organizations are governmental, part I addresses the differences between private and government lawyers. Part II considers a lawyer's obligations when that lawyer represents an organization, including: (1) who is the client and with whom should the lawyer interact when representing the client? (2) general ethical considerations when representing a health care organization; (3) explaining how a lawyer's duty of confidentiality and the attorney-client privilege apply when the client is an organization; (4) a lawyer's obligation to blow the whistle to protect an organization; and (5) a brief description of the additional requirements imposed by Congress on health care lawyers and HCWs or health care organizations that receive government funds.

I. GOVERNMENT LAWYERS ARE DIFFERENT

Any discussion of how the Rules of Professional Conduct ("the Rules") apply to government lawyers,[1] begins with the cardinal concept that all lawyers are subject to the Rules, even when they act at the direction of another person.[2] The Rules do, however, anticipate that government lawyers, especially full-time government lawyers, will play a somewhat different role than lawyers in private practice, and their ethical obligations, therefore, are a bit different.

An analysis of a lawyer's ethical obligations begins with the Preamble and Scope of the Rules, as: "[t]he Preamble and this note on Scope provide general orientation [to the Rules]."[3] The note on Scope also makes it clear that sources other than the Rules may affect government lawyers' ethical obligations (the Rules do not generally expressly distinguish between full and part-time government lawyers; that distinction is the author's): "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships."[4]

The Scope continues by illustrating how a government lawyer's role may differ:

> For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal

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[1] *See infra* note 79-223 and accompanying text.

[2] WYO. RULES OF PROF'L CONDUCT Rs. 5.2(a) and 8.5(a) (2006); *see also,* DISCIPLINARY CODE FOR THE WYO. STATE BAR Preamble, § 1(a) (2006) ("Any attorney [in Wyoming] is subject to the exclusive disciplinary jurisdiction of this Court and the Board of Professional Responsibility.").

[3] WYO. RULES OF PROF'L CONDUCT Scope [20] (2006).

[4] *Id.* at Scope [17].

> counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.[5]

The reference to "a lawyer for a government agency" does not indicate whether the reference is to full-time government lawyers, part-time government lawyers, or both. Given the general structure of the Rules and applicable substantive law, however, it appears that the question should not be simply whether one is a full or part-time government lawyer, but rather the key is the role the lawyer is playing, *i.e.*, does the lawyer represent a government agency. As a practical matter, however, a part-time government lawyer may feel that he or she has less "power" than a full-time one.

A. Differences in the Rules.

While all lawyers are bound by the Rules, the Rules treat government lawyers differently in a couple respects. The most important difference applies to full-time government lawyers.

The Rules treat conflicts of interest involving former clients of full-time government lawyers differently. Generally, conflicts of interest regarding former clients are addressed in Rule 1.9, "Duties to former clients."[6] Under that Rule, lawyers owe duties of loyalty when they switch firms[7] and a duty of confidentiality to former clients and former clients of the lawyer's former or current firm.[8] The duty of loyalty when a lawyer switches employment is more flexible for former full-time government lawyers who move to private practice, than for lawyers in private practice who switch private firms.

1. Rule 1.11: "Special Conflicts of Interest for Former and Current Government Officers and Employees."

Rule 1.11 is entitled "Special conflicts of interest for former and current government officers and employees." As the title suggests, it contains different conflict of interest standards for full-time government lawyers.

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[5] *Id.* at Scope [4] (emphasis added).

[6] *See* Carlson v. Langdon, 751 P.2d 344, 348 (Wyo. 1988) (the Wyoming Supreme Court applied Rule 1.9 to lawyers in private practice).

[7] WYO. RULES OF PROF'L CONDUCT R. 1.9(b) (2006).

[8] *Id.* at R. 1.9(c).

First, Rule 1.11 makes it clear that the rule applies to a lawyer who "has formerly served as a public officer or employee of the government."[9] The Rule applies, in other words to former full-time government lawyers.[10] As Rule 1.9 does with respect to non-governmental lawyers, Rule 1.11 creates duties of confidentiality and loyalty to former clients. The duty of confidentiality is the same. Lawyers who were formerly "public officer[s] or employee[s] of the government" are "subject to Rule 1.9(c) [which prohibits lawyers from using or revealing information about former clients in most circumstances]."[11]

Second, the Rule creates, and limits, full-time government lawyers' duty of loyalty to former clients. The general rule is that "[a] lawyer who has formerly served as a public officer or employee . . . shall not . . . represent a client in connection with a matter[12] in which the lawyer participated personally and substantially as a public officer or employee . . . ."[13] The Rule creates the typical exception for waiver of a conflict when a lawyer was involved in a matter "personally and substantially." A lawyer may represent a client with interests adverse to the former client if "the appropriate government agency makes an informed decision[14] [to allow the representation], confirmed in writing."[15]

The big difference between the Rules' treatment of full-time government lawyers and other lawyers is in the imputation of conflicts. As a general matter,

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[9] WYO. RULES OF PROF'L CONDUCT R. 1.11(a) (2006).

[10] Though the Rule and the comments do not use the term "full-time," it seems clear from the use of the words "public officer or employee . . ." that the Rule applies to full-time government lawyers, not employees of a private firm that represent government entities. *See id.* R. 1.11 cmt. [2].

[11] *Id.* at R. 1.11(a)(1).

[12] "Matter" means, for purposes of Rule 1.11, "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties . . ." *Id.* at R. 1.11(e)(1). It includes "any other matter covered by the conflict of interest rules of the appropriate government agency." *Id.* at R. 1.11(e)(2).

[13] *Id.* at R. 1.11(a)(2).

[14] "Informed decision" means "the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." WYO. RULES OF PROF'L CONDUCT R. 1.0(f) (2006).

[15] WYO. RULES OF PROF'L CONDUCT R. 1.11(a)(2) (2006). "Confirmed in writing" means

> an informed decision that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming the oral informed decision. . . If it is not feasible to obtain or transmit the writing at the time the person makes an informed decision, then the lawyer must obtain or transmit it within a reasonable time thereafter.

WYO. RULES OF PROF'L CONDUCT R. 1.0(c) (2006).

"[w]hile lawyers are associated in a firm,[16] none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . ."[17] Significantly, the Rule on imputing conflicts of interest refers only to "Rules 1.7 or 1.9," not to Rule 1.11, the Rule which applies to current or former full-time government lawyers. It is clear, therefore, that the Rules treat full-time government lawyers differently when it comes to imputing conflicts of interest.

The difference is that even when a former full-time government lawyer is disqualified under Rule 1.11 because he or she "participated personally and substantially,"[18] the lawyer's new private firm is not precluded from involvement in the matter, as it would be under Rule 1.9(b), if certain conditions are met. First, the disqualified lawyer must be "timely screened[19] from any participation in the matter and is apportioned no part of the fee therefrom."[20] Screening is not permitted under Rule 1.9(b) with respect to lawyers who switch between private firms. The new firm will be disqualified if the lawyer switching firms "acquired information" protected by Rule 1.6 (the Rule which generally prohibits a lawyer from revealing "confidential information"[21] about a client) that is "material to the matter . . ."[22]

Second, "written notice [must be] promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule."[23] The phrase "to enable it [the government agency] to ascertain compliance with the provisions of this rule [Rule 1.11]," is to allow "the government agency [to] have a reasonable opportunity to ascertain that the lawyer

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[16] "Firm" means "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." *Id.* at R. 1.0(d). The reference to "the legal department of . . . [an] organization" includes a government law office. *See id.* at R. 1.0 cmt. [3].

[17] WYO. RULES OF PROF'L CONDUCT R. 1.10(a) (2006).

[18] *Id.* at R. 1.11(a)(2).

[19] "Screened" means "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." *Id.* at R. 1.0(l). "The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected." *Id.* at R. 1.0 cmt. [8]. Screening may include "denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel." *Id.*

[20] WYO. RULES OF PROF'L CONDUCT R. at R. 1.11(b)(1) (2006).

[21] "Confidential information" means "information provided by the client or relating to the client which is not otherwise available to the public." WYO. RULES OF PROF'L CONDUCT R. 1.0(b) (2006).

[22] WYO. RULES OF PROF'L CONDUCT R. 1.9(b)(2) (2006).

[23] WYO. RULES OF PROF'L CONDUCT R. 1.11(b)(2) (2006).

is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying."[24]

Paragraph (c) of Rule 1.11 addresses another conflict of interest issue regarding government lawyers (whether full or part-time), and, once again, treats them differently than lawyers in private practice. The issue is a former full-time lawyer who obtained "confidential government information."[25]

If a lawyer has obtained "confidential government information," while "the lawyer was a public officer or [government] employee" and "knows"[26] it, the lawyer "may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person . . . ."[27] Once again, however, the disqualification of an individual lawyer is not necessarily imputed to the new firm. "A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom."[28]

The restriction on using "confidential government information" to the "material disadvantage" of the person identified in the information is particularly important when medical records or information are involved (it will be common for full-time government lawyers who represent medical institutions to have access to such information as "public records" is defined very broadly, but the definition excludes those records "privileged or confidential by law."[29]) Among those "privileged or confidential" records to which the custodian "shall deny the right of inspection"[30] are "[m]edical, psychological and sociological data on individual persons . . . ."[31] In other words, a government lawyer, either full or part-time, who obtains medical records that identify an individual or individuals may not subsequently use that information, after he or she is no longer a government lawyer, to the "material disadvantage" of person so identified.[32]

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[24] *Id.* at R. 1.11 cmt. [8].

[25] *Id.* at R. 1.11(c). As used in this rule "confidential government information" means "information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public." *Id.*

[26] "Knows" means "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." WYO. RULES OF PROF'L CONDUCT R. 1.0(g) (2006).

[27] WYO. RULES OF PROF'L CONDUCT R. 1.11(c) (2006).

[28] *Id.* at R. 1.11(c).

[29] WYO. STAT. ANN. § 16-4-201(a)(v) (2006).

[30] *Id.* at § 16-4-203(d).

[31] *Id.* at § 16-4-203(d)(i).

[32] WYO. RULES OF PROF'L CONDUCT R. 1.11(c) (2006).

The reason that the restriction should apply to both full and part-time government lawyers is that the danger to be avoided, using confidential government information to the "material disadvantage" of a person or persons identified in the records, exists whenever a lawyer has access to such information, regardless of whether the lawyer is a full-time or a part-time government lawyer. And given the reality that many lawyers who represent government HCWs and the institutions in which they work are private attorneys, such as a private firm that represents a county or county memorial hospital,[33] it is critical that the prohibition be applied to any lawyer with access to such confidential information.

Paragraph (d) of Rule 1.11 addresses the conflicts that may arise when a lawyer moves from private practice to work as a "public officer or employee," conflicts, that is, for current government lawyers. Once again, the Rule does not specify whether it applies to full-time or part-time government employees. Given the use of the term "public officer or employee," it could be argued that the provision applies to full-time government employees only as lawyers in private practice are not "employees" of a governmental entity. Nevertheless, given the harm to be avoided, the use of confidential information gained in previous employment, the Rule should apply to both full-time and part-time lawyers as a current government lawyer, whether full-time or part-time, should not be able to use information against a previous client.[34]

The general rule is that a lawyer who has moved from private practice to government practice is subject to the general conflict of interest provisions of Rule 1.7 (concurrent conflicts of interest) and Rule 1.9 (conflicts involving former clients).[35] In addition to complying with those Rules, the current government lawyer "shall not participate in a matter in which the lawyer participated personally and substantially while in private practice . . . unless the appropriate government agency makes an informed decision to allow the representation, confirmed in writing."[36]

It appears counter-intuitive, at first blush, that a "government agency," presumably the agency for which the lawyer now works or represents, and which

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[33] "County hospitals" and "county memorial hospitals" are regulated by WYO. STAT. ANN. §§ 18-8-101 *et seq.* (2006).

[34] *See* Lisa G. Lerman, *Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1162 (1991)

> The case law addressing who is the client of the government attorney for the purpose of determining conflicts of interest involves mainly part-time state or local government lawyers, and most of the cases involve conflicts with compensated private practice. . . . The courts tend to examine each situation to determine whether the government lawyer in question has an actual or an apparent conflict of interest.

Id.

[35] WYO. RULES OF PROF'L CONDUCT R. 1.11(d)(1) (2006).

[36] *Id.* at R. 1.11(d)(2)(i).

is, therefore, the current client, and not the lawyer's former client, should be allowed to waive such a conflict. The interests of the former client are protected, however, by the Rule's earlier inclusion of Rule 1.9, the Rule which sets out lawyers' duties to former clients.[37] Rule 1.9 "would require the former client's consent ["informed decision" is the term used in Wyoming's Rules]".[38]

The Rule also limits a government lawyer's (a full-time government lawyer's) ability to "negotiate for private employment" while a government employee.[39] A "public officer or [government] employee . . . shall not . . . negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially . . ."[40] (There is an exception for lawyers working as law clerks.)[41]

2. *Rule 1.13: "Organization as Client"*

One of the more troublesome realities of virtually all forms of government practice, and most forms of private practice, is that many clients today are organizations of some sort, not individuals. The difficulty is that the ABA's Model Rules, and the Wyoming Rules which are based on them, is that they were developed, for the most part, to accommodate an individual lawyer, or a member of a small firm, who represents individuals. The reality, today, is that many lawyers are part of a firm, whether private or governmental, and many of their clients are organizations, either private or governmental, large or small, or for profit or not-for-profit. A lawyer's duties do not change when the lawyer's client is an organization, but applying the rules to organizations, including the government, can be a challenge. Just identifying the client can be difficult when it is a collection of individuals. Applying confidentiality concepts and conflict of interest standards to organizations can be equally difficult.

Most HCWs work in some sort of group, or for some sort of institution, either private or governmental. Accordingly, the lawyers who represent those groups or institutions must be aware of how their duties are applied in an organizational setting. In addition, many groups or institutions are governmental organizations, presenting some additional challenges to the lawyers who represent them.

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[37] ABA ANN. RULES OF PROF'L CONDUCT, 205 (5th ed. 2003).

[38] *See, e.g.,* WYO. RULES OF PROF'L CONDUCT R. 1.9(a) & (b)(2) (2006) "Informed decision" means "the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *Id.* at R. 1.0(f).

[39] WYO. RULES OF PROF'L CONDUCT R. 1.11(d)(2)(ii) (2006).

[40] *Id.*

[41] *Id.*

Rule 1.13 is the only Rule that expressly addresses organizations as clients. It generally applies to all organizations, but does anticipate that government lawyers may play a slightly different role. While the language of the Rule does not distinguish between governmental and private organizations, the commentary[42] does.

Comment [7] is entitled "Government Agency." It makes several important points. First, "[t]he duty defined in this Rule applies to governmental organizations."[43] Second, the comment warns that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.[44] Third, when it comes to identifying the client, "in some circumstances the client may be a specific agency, [but] it may also be a branch of government, such as the executive branch, or the government as a whole." (Perhaps the best way to determine who is the client is for a lawyer to consider from whom he or she takes directions. An assistant attorney general for the State of Wyoming is unlikely, for example, to take directions from the Governor. Rather, an agency head, or even a lower ranking official, is likely the person. That agency, therefore, and not the entire state government, is the client. By contrast, a city attorney generally takes direction from the City Council. The client, therefore, is the entire city.) Finally, the comment notes that:

> [I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.[45]

Comment [7] appears to apply to both full-time and part-time government lawyers, as both may face the issues raised. Furthermore, misconduct by a government official can occur at any level, and the evil to be avoided is the same, regardless of whether the lawyer for the government organization is a full-time

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[42] The Commentary to each Rule "explains and illustrates the meaning and purpose of the Rule" *Id.* at Scope [20].

[43] WYO. RULES OF PROF'L CONDUCT R. 1.13 cmt. [7] (2006).

[44] *Id; see* WYO. RULES OF PROF'L CONDUCT R. at Scope [16] (2006) (noting that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

[45] WYO. RULES OF PROF'L CONDUCT R. 1.13 cmt. [7] (2006).

or part-time lawyer. A lawyer's general obligations to an organizational client are discussed in detail below.[46]

The Rules "presuppose a larger legal context shaping the lawyer's role."[47] Accordingly, "[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client. . . ."[48] It is important, therefore, for government lawyers who represent HCWs or institutions in which HCWs work, to know if statutes impose certain obligations on them.

B. Statutory Duties

1. The Wyoming Attorney General

Not surprisingly, different statutes apply to different levels of government and different types of representation, including the representation of HCWs, institutions in which they work, or both. While there are numerous HCWs who work for federal institutions, the duties of the lawyers who represent them are beyond the scope of this article. Rather, this article focuses on Wyoming State Government, and its subdivisions.

By statute, the Wyoming Attorney General has several responsibilities. First, he or she is "to [p]rosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law;"[49] Second, the Attorney General is to "[d]efend suits brought against state officers in their official relations, . . ."[50] Third, the Attorney General is to "[b]e the legal adviser of all elective and appointive state officers and of the county and district attorneys of the state."[51] Fourth, "[w]hen requested, [the Attorney General shall] give written opinions upon questions submitted to him by elective and appointive state officers . . ."[52] Fifth, the Attorney General is to "[a]pprove or disapprove any contract submitted to him for review . . ."[53] Finally, the Attorney General is to be involved in rulemaking by agencies, including the Departments of Health and Correction, both of which operate health care institutions or provide health care services. As part of that involvement, notice of proposed rulemaking is

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[46] *See infra* notes 99–109 and accompanying text.

[47] WYO. RULES OF PROF'L CONDUCT Scope [15] (2006).

[48] *Id.* at Scope [17].

[49] WYO. STAT. ANN. § 9-1-603(a)(i) (2008).

[50] *Id.* at § 9-1-603(a)(iii).

[51] *Id.* at § 9-1-603(a)(v).

[52] *Id.* at § 9-1-603(a)(vi).

[53] *Id.* at § 9-1-603(a)(viii).

to be given to the Attorney General.[54] In addition to receiving notice of proposed rulemaking, the Attorney General "shall furnish advice and assistance to all state agencies in the preparation of their regulations, and in revising, codifying and editing existing or new regulations."[55] A party to a lawsuit, an individual seeking advice or an opinion, a party to a contract, or an agency that wishes to promulgate rules, may well be the Director of the Department of Health[56] or the Directors subordinates, some of which administer HCWs or the institutions in which HCWs work.

The Wyoming Department of Corrections also maintains several institutions, such as the Wyoming State Penitentiary, the Wyoming women's center, the boys' school, the girls' school, the Wyoming retirement center, and the Wyoming state hospital.[57] Inmates at those, and other correctional institutions, have a right to adequate medical treatment.[58]

2. *Attorneys for County Hospitals, County Memorial Hospitals, or Special Hospital Districts.*

Most hospitals in Wyoming are public, either county hospitals, county memorial hospitals, or hospitals in special hospital districts (A "rural health care district" may also be established). The lawyers who represent them are generally part-time government lawyers, lawyers in private practice for whom the hospital or hospital district is one of the firm's clients. Since county hospitals, county memorial hospitals, and hospitals in special hospital districts exist by virtue of statutes, it is important to know what those statues say.

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[54] WYO. STAT. ANN. § 16-3-103(a)(i) (2008).

[55] *Id.* at § 16-3-104(d).

[56] The Director of the Department of Health has broad powers. WYO. STAT. ANN. § 9-2-102 (2008). They are, *inter alia,* "the state mental health authority, the developmental disabilities authority and the substance abuse authority," with broad powers in those health fields. *Id.* at § 9-2-102(a). Among other things, the Department of Health is to "[p]rovide a coordinated network of programs and facilities offering the following services to persons afflicted with mental illness or developmental disabilities or for substance abuse: diagnosis, treatment, education, care, training, community living, habilitation and rehabilitation." *Id.* at § 9-2-102(a)(ii). The Department's powers include promulgating administrative rules. *Id.* at § 9-2-106(a)(iii); *see also* WYO. STAT. ANN. § 42-4-104(a)(iv) (2008) ("The department of health shall . . . [a]dopt, amend and rescind rules and regulations on the administration of [the Medical Services Act] . . .").

[57] WYO. STAT. ANN. § 25-1-201(a) (2008).

[58] *See, e.g.,* Farmer v. Brennan, 511 U.S. 825, 832 (1994) (Under the Eighth Amendment, "officials . . . must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate . . . medical care . . ."). The Department of Corrections may provide such medical services through contracts through private service providers. WYO. STAT. ANN. § 25-1-105 (c)(iv) (2008). The department is also to "adopt rules and regulations necessary to carry out its functions." *Id.* at § 25-1-105(a).

County hospitals and county memorial hospitals are governed by Chapter 8 of Title 18 of the Wyoming statutes (Title 18 is entitled "Counties," and sets forth provisions regarding counties, which are subdivisions of the State of Wyoming, which have only those powers delegated to them by the State Legislature.[59])

A "[c]ounty hospital and a county memorial hospital" is "any institution, place, building or agency in which any accommodation is maintained, furnished or offered for the hospitalization of the sick, injured . . . ."[60] It is to be governed by a "board of trustees" appointed by the county commissioners.[61] Upon appointment and compliance with the statute, the board of trustees "is a body corporate with power to sue and be sued. . . . ."[62] Among its (the board's) powers, are the "erection, management and control" of a hospital.[63]

As a "body corporate" governed by a "board of trustees," a county hospital or county memorial hospital qualifies as a governmental organization, and the duties of a lawyer who represents an organization, whether public or private, are discussed in detail below.[64]

Chapter 2 of Title 35 allows for the creation of "special hospital districts," [65] and "special rural health care districts." [66] Either a "special hospital district" [67] or a "special rural health care district" [68] is a "body corporate," governed by an elected "board of trustees."[69] Once again, either a "special hospital district" or a "special rural health care district" is a governmental organization, and the duties of a lawyer who represents an organization are discussed below.[70]

In addition to the various governmental organizations that employ HCWs, there are myriad private organizations that do, too. An organization of HCWs may take the form of a partnership,[71] P.C. (professional corporation),[72] limited

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[59] *See, e.g.,* Board of County Com'rs of Teton County v. Crow, 65 P.3d 720, 724 (Wyo. 2003).

[60] WYO. STAT. ANN. § 18-8-101(a)(i) (2008).

[61] *Id.* at § 18-8-104(a).

[62] *Id.*

[63] *Id.*

[64] *See infra* notes 85–143 and accompanying text.

[65] WYO. STAT. ANN. § 35-2-401(d) (2008);

[66] *Id.* at § 35-2-701(e).

[67] *Id.* at § 35-2-401(d).

[68] *Id.* at § 35-2-701(e).

[69] *See id.* at § 35-2-404 ("special hospital district") and *id.* at § 35-2-704 ("special rural health care districts").

[70] *See infra* notes 85–143 and accompanying text.

[71] *See* WYO. STAT. ANN. §§ 17-21-101 through 1105 (2008).

[72] *See id.* at §§ 17-3-101–104.

liability company,[73] or some other form. Any of these associations of HCWs are organizations for purposes of determining lawyers' obligations, which obligations are discussed below.[74]

C. Wyoming Supreme Court

While the Wyoming Supreme Court has, as the Rules, generally held governmental and non-governmental lawyers to the same standards, there are some differences. When it comes to conflicts of interest, the court has applied different standards, and it is important for lawyers, whether governmental or in private practice, to be aware of the difference. The difference which is important for lawyers who represent HCWs or the institutions in which they work is found in the court's opinion in *State v. Asch.*[75] While that case was a criminal one, its analysis of how conflicts of interest should be addressed in the context of full-time government lawyers who work for a single entity (the Wyoming Public Defender's Office, in that case), is relevant to how conflicts might be addressed when the lawyers involved are full-time government lawyers, such as the members of the Wyoming Attorney General's Office, who represent government HCWs or the State institutions in which they work.

The primary issue in *Asch* was whether it was permissible for two lawyers from the Casper office of the Wyoming State Public Defender to represent, even briefly, two individuals (one of whom was David Asch) who were charged with (different) crimes arising out of the same set of facts.[76] One was appointed counsel from the Casper Office of the Wyoming Public Defender. The other, Asch, was appointed an attorney who was not part of that office, but was on contract with the Public Defender's Office.

For whatever reason, the second attorney was not able to appear at Asch's initial hearing, in county (now circuit) court. In her stead, another attorney from the Casper Office of the Wyoming Public Defender appeared on behalf of Asch. Since the attorney who appeared on behalf of Asch at the initial appearance was "associated in" the practice of law with the attorney for the other person charged with a crime arising out of the same traffic stop, the question became whether an improper conflict of interest had arisen (the reason for the question is that the

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[73] *See id.* at §§ 17-15-101 through 147.

[74] *See infra* notes 85–143 and accompanying text.

[75] State v. Asch, 62 P.3d 945 (Wyo. 2003). The court has also established a more flexible conflicts of interest standard for full-time government lawyers who switch sides, *e.g.*, from the defense to the prosecution of a criminal defendant. *See* State v. Hart, 62 P.3d 566, 573 (Wyo. 2003); Johnson v. State, 61 P.3d 1234 (Wyo. 2003). It seems unlikely that a full-time government lawyer would switch sides in the health care context, so those decisions are not discussed in this article.

[76] This, and the following paragraph, is based on *Asch,* 62 P.3d at 948-49.

conflicts of one attorney are generally imputed[77] to the rest of the firm[78] and the Wyoming Supreme Court has held that allowing a lawyer to represent multiple defendants in a criminal case is reversible error.[79])

In *Asch,* the court concluded that although the Wyoming Public Defender's Office is a "firm" within the meaning of the conflict of interest rules, those rules should be applied on a case-by-case basis, and not result in *per se* disqualification of the State Public Defender's Office.[80]

It seems reasonably likely that the court would use the same standard with respect to other government "firms," such as the Attorney General's Office. As those firms may be involved in representing HCWs or the institutions in which they work, the more flexible standard for conflicts of interest may well be applicable.

II. ETHICAL AND LEGAL CONSIDERATIONS WHEN REPRESENTING AN ORGANIZATION[81]

A. The Proliferation of Health Care Organizations

Most HCWs work for or as part of an organization, though there are still some sole practitioners around. Accordingly, as with the majority of a lawyer's other clients, most of today's health lawyers' clients are organizations of some sort, not individuals. As mentioned earlier, the Rules refer generally contemplate clients as individuals, leaving unanswered many ethical questions which inevitably arise when a lawyer represents an organization. With one notable exception, Rule 1.13, the Rules do not directly address how a lawyer's duties and responsibilities change when the client is an organization.

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[77] WYO. RULES OF PROF'L CONDUCT R. 1.10(a) (2006). The Rule in effect now is substantially similar. The difference is that the current rule contains the following phrase: "unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." *Id.* at R. 1.10(a).

[78] A "firm" was defined as "a lawyer or lawyers in a private firm, the legal department of a corporation or other organization and lawyers employed in a legal services organization. *See* Comment, Rule 1.10." WYO. RULES OF PROF'L CONDUCT Terminology (c) (2006). The current definition is: "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." WYO. RULES OF PROF'L CONDUCT R. 1.0(d) (2006). Much of the comment to Rule 1.10, to which the old Terminology section referred, is now found in Comment [2] to Rule 1.0.

[79] Shongutsie v. Wyoming, 827 P.2d 361, 367 (Wyo. 1992).

[80] *Asch,* 62 P.3d at 953, 952 n.3.

[81] The following section of this article is based, in part, on John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581, 612-630 (2003).

Health care organizations come in all shapes and sizes. Some are private, others are governmental. Among private organizations, some are for profit, ranging from two HCWs to large, national chains, such as nursing-homes. Others are not-for-profit; they too may be small or large. Government health care organizations have proliferated. Thousands of HCWs now work in dozens of them. Collectively, they now play a significant role, and often a dominant one, such as with public hospitals, and virtually all HCWs and health care organizations receive federal funds, state funds, or both, and must, therefore, comply with applicable laws. Accordingly, a lawyer must know either how to ethically represent the government, its employees, or both, or how to ethically represent clients with interests adverse to the governments.

Not surprisingly, the development and proliferation of health care organizations and other organizational clients has significantly altered lawyers' ethical and legal obligations in several important ways. First, questions which are simple when a client is an individual, become complex when the client is an organization. When a client is an individual, for example, the lawyer knows who the client is and with whom the lawyer should interact—the individual. But that question becomes difficult when the client is an organization, which is a legal entity, but, as such, can act only through individuals. Second, a lawyer's duties of confidentiality and the application of the attorney-client privilege are relatively simple when the client is an individual. They are not when the client is an organization. Third, when the client is an organization, a lawyer's duties run primarily to it; meaning that the lawyer must take action to protect the organization's interests, even when doing so is contrary to the interests of the individuals within the organization with whom the lawyer interacts. Fourth, potential and actual conflicts of interest increase substantially when the client is an organization, meaning that a lawyer must be even more sensitive to discovering and properly handling such conflicts. Finally, while government lawyers are generally held to the same ethical standards as private lawyers, their duties may vary in some circumstances.[82]

Attorneys for health care organizations may be outside counsel or they may work directly for the organization as in-house counsel. Attorneys in the former role face numerous challenges in determining who is the client and with whom should the lawyer interact. The first question, who is the client, is not an issue for in-house counsel; the client is the employer. While that issue is simple, in-house counsel faces the additional issues which arise from the dual role of representing a client who is also one's employer. Since the Rules generally do not distinguish between outside and in-house counsel, the latter are "subject to the full array of ethical rules and considerations governing the practice of law . . . and the concomitant fiduciary obligations of a faithful and loyal employee."[83]

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[82] *See supra,* notes 7–42 and accompanying text.

[83] Carol Basri, *The Client-Ethical Considerations*, 126 N.Y. PRAC. LAW INST. 17, 19 (2002).

1. Who Is the Client, and With Whom Should the Lawyer Interact?

When a client is an individual HCW, the questions of who is the client and with whom should the lawyer interact are usually easily answered. The client is the individual, and generally that individual is the person with whom the lawyer should interact.[84] The same cannot be true when the client is a health care organization, of any type, because by definition, an organization is a legal entity made up of individuals, referred to in the Rules as "constituents,"[85] who are supposed to act on behalf of the organization. A county hospital or county memorial hospital's constituents, for example, include the members of the board of trustees, the chief executive office, the chief financial officer, and other employees. There may be others, such as the county commissioners who have an interest in the operation of the hospital. The variety of interested parties and their varied interests makes it more difficult, and even more important, for a lawyer to clarify who is the client[86] and with which individuals may or should the lawyer interact professionally.

The attorney-client relationship in Wyoming is contractual, arising either by express agreement of the parties or because of their conduct.[87] It seems self-evident that everyone who enters into a contract should know with whom he or she is contracting and what he or she is agreeing to. A lawyer is no different. A lawyer should never be in doubt about whether he or she has a client or about the identity of that client, regardless of whether the client is a health care organization or an individual HCW. When a lawyer represents a governmental entity, the client may be specified by statute.[88] A lawyer in private practice has much more freedom about whom the lawyer will represent. That freedom makes it imperative that the client's identity be addressed in an engagement letter which, *inter alia*: (1) identifies the client; (2) specifies those persons with whom the lawyer should or may interact; (3) clarifies the scope of the lawyer's representation; (4) discusses

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[84] In some circumstances, that question is not quite so simple. When a client is an insured, for example, the role of the payer may confuse the issue. It should not. Two separate rules make it clear that a lawyer cannot ethically allow a third party payer to intrude into the attorney's relationship with the client. WYO. RULES OF PROF'L CONDUCT R. 1.8(f) and 5.4(c) (2006). A lawyer who represents a client who is impaired by reason of youth, age, mental disability, or for any other reason, has special obligations. *Id.* at R. 1.14. Finally, a lawyer who is appointed as an attorney for the best interests of an individual or as a guardian *ad litem* for a person has special obligations. *See* WYO. RULES OF PROF'L CONDUCT R. Preamble [2]; R. 1.2(a) & (e); R. 1.4(b); R. 1.6(b)(5); R. 1.14(d) (2006) and the comments thereto.

[85] WYO. RULES OF PROF'L CONDUCT R. 1.13 (2006).

[86] M.C. Daly, *Avoiding the Ethical Pitfall of Misidentifying the Organizational Client,* 1318 N.Y. PRAC. LAW INST. 721, 724 (2002) ("[I]t is critical that the lawyer not lose sight of the client's identity.").

[87] Carlson v. Langdon, 751 P.2d 344, 347 (Wyo. 1988).

[88] *See, e.g.,* WYO. STAT. ANN. § 9-1-603(a)(1) (2008) ("The attorney general shall [among other things]. . . : [p]rosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law . . .").

the rate or rates to be paid the lawyer for the lawyer's services (fees) and which costs and disbursements (costs) will be the responsibility of the client; (5) sets forth how and when fees and costs will be billed; and (6) clarifies who will pay the lawyer's fees and costs.[89] Such a written engagement letter is recommended, but not required by the Wyoming Rules.[90] Lawyers who choose not to use engagement letters are, however, asking for trouble. Without an express agreement about the representation, the agreement between the attorney and the client may be an implied one.[91] Whenever an implied agreement arises, there will be at least two versions of the agreement, the client's and the lawyer's. A dispute over the existence of or terms of the agreement is an invitation for a client to file a grievance, a malpractice suit, or both, when the client believes the lawyer did not live up to the agreement, as the client understood it. A contest with a client over the existence and/or terms of an implied agreement is always dangerous for a lawyer since the lawyer has the burden of clarifying the existence and terms of the relationship.[92] That is because the attorney-client relationship is not one between equals. The lawyer has a fiduciary relationship with each client,[93] and the benefit of any doubt will go to the client, the subordinate one in the relationship. Accordingly, in a dispute between a client and a lawyer about the existence and/or terms of an implied agreement, the lawyer is likely to lose.[94]

Identifying the client(s) is especially important when representing organizations, whether private or public, small or large, profit or not for profit. Unfortunately, too many lawyers do not follow the practice of using engagement letters. That failure gets them into trouble (one simply does not read disciplinary opinions where a lawyer had an engagement letter; virtually all involve implied attorney-client relationships in which the attorney and the client disagree about the terms of the implied agreement or about its very existence).

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[89] For a sample engagement letter, *see* R.W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND & WATER L. REV. 191, 238 (1998).

[90] WYO. RULES OF PROF'L CONDUCT R. 1.5(b) (2006) (When the lawyer has not regularly represented the client, "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation . . . .") (emphasis added).

[91] *See, e.g.,* Meyer v. Mulligan, 889 P.2d 509, 513 (Wyo. 1995) (An attorney-client relationship "'may be implied from the conduct of the parties.'" (quoting Chavez v. State, 604 P.2d 1341, 1346 (Wyo. 1979))).

[92] *See, e.g.,* WYO. RULES OF PROF'L CONDUCT R. 1.3 cmt. [4] (2006) ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."); *Carlson*, 751 P.2d at 348 ("The burden of proof to show that it was unreasonable for a client to believe that an attorney-client relationship existed . . . has to rest with the attorney.").

[93] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1 (1986).

[94] *See Carlson*, 751 P.2d at 348 (The lawyer "did not demonstrate any effort to dispel [the former client's] understanding . . .").

2. *General Ethical Considerations in Representing Health Care Organizations*

Although Rule 1.13 is titled "Organization as client," it applies only after an attorney-client relationship has been formed between a lawyer and an organization. The Rule does not purport to address how that relationship is or should be formed. Accordingly, whether an attorney-client relationship exists is not determined by the Rules, whether the client is an individual HCW or a health care organization. Rather, the Rules say that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."[95] Substantive law in Wyoming, in turn, says that whether such a relationship exists "depends on the facts and circumstances of each case."[96] Generally, an attorney-client relationship exists if: (1) a prospective client consults a lawyer; (2) for the purpose of obtaining legal advice; (3) the lawyer undertakes to give the advice or fails to clarify that he or she will not give the requested advice; and (4) the prospective client relies on the advice or the lawyer's inaction.[97] Since the first, second, and fourth elements are virtually always present (a prospective client almost always consults a lawyer to receive legal advice and then nearly always relies on that advice or inaction), the third element should be a lawyer's focus, as it is the only element the lawyer can control. That is, a lawyer should know when he or she is undertaking to give legal advice, and a lawyer needs to be especially careful to ensure that prospective clients know that the lawyer is not going to represent them as it is the failure to clarify that a lawyer is not going to give legal advice which most often gets lawyers in trouble.[98]

As noted above, the attorney-client relationship in Wyoming is contractual.[99] The contract may, of course, and should be, an express one; it may, however, "be implied from the conduct of the parties . . . [and] the general rules of agency apply to the establishment of the relationship."[100] When the contract is implied, doubt about whether a relationship exists, or doubt about the terms of the contract, will be resolved in favor of the client.[101] The question for a court considering

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[95] WYO. RULES OF PROF'L CONDUCT Scope [16] (2007).

[96] Chavez v. State, 604 P.2d 1341, 1346 (Wyo. 1979), *cert. denied*, 446 U.S. 984 (1980); *see also Meyer*, 889 P.2d at 513.

[97] No Wyoming Supreme Court case lays out the elements of the relationship clearly. The elements of the relationship, however, are consistent throughout the country. *See, e.g.,* Togstad v. Vesely, 291 N.W.2d 686, 692 (Minn. 1980).

[98] *See, e.g., Togstad,* 291 N.W.2d at 692.

[99] *Carlson*, 751 P.2d at 347 (quoting *Chavez*, 604 P.2d at 1346).

[100] *Carlson*, 751 P.2d at 347.

[101] *See, e.g.,* WYO. RULES OF PROF'L CONDUCT, R. 1.3 cmt. [4] (2006) ("Doubt about whether a client-lawyer relationship still exists *should be clarified by the lawyer, preferably in writing*, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs . . . .") (emphasis added).

whether an attorney-client relationship existed and, if so, what its terms were, will be whether it was reasonable for the client to believe that the relationship existed and/or whether it was reasonable for the client to believe the terms were as the client asserts they were.[102] If so, the client (or former client) wins.

The focus on a client's reasonable belief means that a lawyer needs to use engagement letters when undertaking the representation of a client, especially a new one, and to use non-engagement letters when declining to do so. This is particularly important since the burden will be on the lawyer to show the asserted attorney-client relationship did not exist, or that if it did, its terms are different that the client alleges. It will be difficult, if not impossible, for a lawyer to carry that burden without having an engagement letter setting forth the scope and terms of the relationship, or a non-engagement letter declining the representation (it is advisable to send non-engagement letters by certified mail, return receipt requested so one can prove mailing and delivery).[103]

Assuming an attorney wishes to represent an organization, properly forming the attorney-client relationship involves an additional consideration, identifying and specifying with which person or persons ("constituents") in the organization the lawyer should or may interact. The reason is simple. "A lawyer employed or retained by an organization represents the organization, acting through its duly authorized constituents."[104] The question for the lawyer thus becomes who are the organization's "duly authorized constituents"? And it does not matter if the organization is public or private, small or large, profit or not-for-profit.[105] The lawyer represents the organization and the lawyer has to know with whom he or she may or must interact.

The importance of identifying the duly authorized constituents is easily demonstrated. Assume a lawyer represents a county hospital. The lawyer receives two telephone calls. One is from a member of the hospital's board of trustees. He requests the lawyer initiate termination action against one of the hospital's HCWs. The other call is from the director of human resources. She tells the lawyer to expect a call from angry trustees or others asking that an employee, the same one identified by the trustee, be fired. The director of human resources tells the lawyer to do nothing, at least for now. Which directive should the lawyer follow? The answer is it depends on who is "duly authorized" to act on behalf of

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[102] *Carlson*, 751 P.2d at 348.

[103] For a sample non-engagement letter, *see* Robert W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND & WATER L. REV. 191, 238 (1998).

[104] WYO. RULES OF PROF'L CONDUCT R. 1.13(a) (2006).

[105] Pietrina Scaraglino, *Ethical Problems in Representing Nonprofit Corporations*, 1330 N.Y. PRAC. LAW INST. 187, 194 (2002) ("An attorney retained by a not-for-profit corporation represents the corporation itself, not its employees.").

the organization, the hospital, which is the client. It is very unlikely the trustee, acting alone, is. It is likely the director of human resources is. And the lawyer better know who it is. That knowledge, in fact, is a threshold issue for the lawyer.

3. Special Problems With Forming New Health Care Organizations.

Even more difficult issues arise when a lawyer is asked to perform the legal work necessary to form a health care organization, such as a professional corporation or a limited liability company. It is common, for example, for professional colleagues to decide to go into practice together. They decide to form an entity, an organization in the parlance of the Rules, to do so, and they ask a lawyer to do the necessary legal work. Such request presents myriad ethical issues which, if not property resolved, can lead to serious problems for the lawyer who receives and acts on the request. Although it was not in the health care context, such a case reached the Wyoming Supreme Court, and the opinion provides important guidance for health lawyers.

Meyer v. Mulligan[106] involved a typical scenario. Two married couples asked a lawyer to form a corporation to operate a business. The lawyer agreed to do so and formed the corporation. Problems began when one couple refused to contribute the promised money, and the couples become embroiled in a lawsuit. One couple, the Meyers, sued the lawyer who had established the corporation for malpractice, claiming he had negligently failed to draft documents which accurately reflected the parties' agreement.[107] The attorney moved for summary judgment, arguing that he had no attorney-client relationship with the Meyers, and they could not, therefore, sue him; the trial court agreed and granted the motion.[108] On appeal, the supreme court reversed and said "it is not clear" who the attorney represented:[109]

> Since the record is devoid of the specifics of any conversation concerning representation, we cannot discern whether Mulligan disclaimed representation of the Meyers or if the Meyers' claimed reliance is valid. Therefore, we hold that a genuine issue of material fact remains concerning the existence of an attorney-client relationship between the Meyers and Mulligan.[110]

Meyer v. Mulligan plainly illustrates the difficulties a lawyer faces when asked to represent a nascent business, whatever the context, and the problems which arise when the lawyer does not use an engagement letter. The lawyer cannot represent

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[106] Meyer v. Mulligan, 889 P.2d 509 (Wyo. 1995).

[107] *Id.* at 511-13.

[108] *Id.* at 513.

[109] *Id.* at 515.

[110] *Id.*

the entity to be formed for the simple reason that it does not exist. But the lawyer has to represent somebody or something, and the lawyer certainly expects that the client (whoever it is) will pay the bill. The threshold question must, therefore, be answered. Who is the client? And what should a lawyer do to avoid becoming trapped in the quagmire of friendly business ventures (and whether we want to admit it or not, a medical practice is a business) gone bad?

A lawyer asked to form a business entity has some options as to whom to represent; and the lawyer *must* select one, or the lawyer will be deemed to have chosen, anyway. First, the question of the existence or terms of an attorney-client relationship, can be solved simply by having an engagement letter which clarifies the existence and terms of the relationship. Second, it may not always be easy, but a lawyer asked to form an organization must identify the client(s). In the case of two doctors, for example, who want to form an entity within which to practice medicine, at least three options exist: the lawyer may agree to represent both doctors, one doctor, or the other doctor. Whatever the choice, the lawyer should then enter into a written agreement, usually in the form of an engagement letter, with the client(s) selected. That agreement should, *inter alia,* identify the client(s), define the scope of the representation (*e.g.*, form a professional corporation), specify who will be responsible for the lawyer's bills, and state with which person or persons the lawyer may or must interact. If the lawyer has multiple clients, *e.g.,* the lawyer has agreed to represent both of the doctors who wish to form an entity, the lawyer must also advise them of the potential conflicts of interest which abound in all joint representation situations, and obtain proper waivers.[111]

After the legal entity has been formed, the parties often expect the lawyer who formed the entity will become its lawyer. That is generally permissible, so long as it is done properly. The first consideration is that assuming the agreement with the entity's founders specified the scope of the representation as forming the entity, the completion of that task should conclude that representation and end the attorney-client relationship with the founders. Even if the agreement defines the end of the relationship, the lawyer should send a closing letter, clarifying the status of the relationship and setting forth the lawyer's document retention schedule.[112] It is the lawyer's obligation, by the way, to clarify the status of the relationship.[113] If the new entity then wishes to hire the lawyer as its lawyer, that may be done, so long as there representation does not involve an impermissible conflict of interest with any current or former clients—and the entity's founders are now former clients.[114] It is important to conclude attorney-client relationships

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[111] While potential conflicts exist, they are often conflicts which may be waived under *See* WYO. RULES OF PROF'L CONDUCT R. 1.7(b) (2006).

[112] For a sample closing letter, *see* Martin, *supra* note 107, at 242.

[113] WYO. RULES OF PROF'L CONDUCT R. 1.2, cmt. [1] (2006).

[114] Rule 1.9 regulates former client conflicts of interest. For a discussion of such conflicts, *see,* John M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND AND WATER L. REV., 79, 86-69 (2000).

because the standards for conflicts of interest are more stringent for current clients than for former clients,[115] and a lawyer is much more likely to have on-going, affirmative obligations to a current client than to a former one.[116]

When a lawyer who formed an entity becomes the lawyer for that entity, the lawyer has a new client—the entity (an "organization"). As with any new client, the lawyer ethically must consider the possibility of conflicts of interest, including those with former clients, and the lawyer should enter a written agreement with the new client. The agreement should, of course, specify the identity of the client, the scope of the representation, and, a critical term when representing any organization, who is authorized to act on behalf of the organization and on what issues.[117] This may sound like much ado about nothing, and preparing engagement and closing letters will be a bit of work. It will be time well spent as preparing such letters is far less work than defending a lawsuit, a grievance, or both. If a deal goes bad, the time spent documenting the existence and terms of the relationship will provide valuable protection for the lawyer, and a court will not be able to find, as the Wyoming Supreme Court did in *Meyer v. Mulligan*, that there is a genuine issue of material fact about whether and on what terms a lawyer represented a client. In the absence of such an issue, the lawyer may be entitled to summary judgment.

4. With Whom Should the Lawyer Interact?

It seems self-evident, but it bears repeating. "An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents."[118] Since an organization can act only through its "constituents," the question for a lawyer, after an attorney-client relationship with the organization has been formed, is who within that organization is "duly

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[115] *Compare* WYO. RULES OF PROF'L CONDUCT R. 1.7(b) (2006) (which applies to current clients), *with* WYO. RULES OF PROF'L CONDUCT R. 1.9(a) and (b) (2006) (which applies to conflicts involving former clients). Perhaps the most significant difference is that a lawyer generally may not represent one client against another in litigation, even if the matters are not related. WYO. RULES OF PROF'L CONDUCT R. 1.7 cmt. [6] (2006). By contrast, a lawyer may represent a client against a former client unless the matters are "substantially similar" and the interests of the former client are "materially adverse" to those of the new client. WYO. RULES OF PROF'L CONDUCT R. 1.9(a) (2006).

[116] *See, e.g.,* WYO. RULES OF PROF'L CONDUCT R. 2.1 cmt. [5] (2006) ("[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 [Communication] may require that the lawyer offer advice . . . .") The duty, when it exists, applies to "clients[s]", not former clients. For a discussion of a lawyer's duty to advise clients about non-legal matters, *see* John M. Burman, *Advising Clients About Non-Legal Factors,* VOL. XXVII, NO. 1, WYOMING LAWYER (February 2004).

[117] WYO. RULES OF PROF'L CONDUCT R. 1.4 cmt. [7] (2006) ("When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 1.13.").

[118] WYO. RULES OF PROF'L CONDUCT R. 1.13 cmt. [1] (2006).

authorized" to act on behalf of the organization.[119] The answer will vary, both by the type of organization, and the precise issue(s) involved.

The governing body of a legal entity is generally specified by law. In Wyoming, for example, it is common for HCWs to organize as "professional corporations."[120] Under the Wyoming Business Corporation Act or the Wyoming Close Corporation Supplement, both of which are incorporated by reference in the professional corporation statute,[121] "[a]ll corporate powers shall be exercised by or under the authority of" a board of directors.[122] By contrast, the management of a limited liability company is "vested in its members, which . . . shall be in proportion to their contribution to the capital of the limited liability company . . . ."[123] In addition, most governing bodies have the authority to delegate various functions, such as interacting with the entity's lawyer, by some form of resolution.[124] The keys for the organization's lawyer are to know: (1) the law governing the organization; and (2) how and to whom the governing documents, the governing body, or both, of the organization has delegated authority. Ultimately, the lawyer must know who is authorized by law, the governing documents, or the governing body of the organization to act on its behalf, and what those individuals are authorized to do.

The "duly authorized constituents" are the individuals, of course, with whom the organization's lawyer will normally communicate about the representation. Having a specified individual or individuals with whom to communicate is not simply an ethical imperative. As the commentary to Rule 1.4 (Communication) notes, it is a practical necessity because it "is often impossible or inappropriate to inform every one of [the organization's] members about its legal affairs; ordinarily, [therefore,] the lawyer should address communications to the appropriate officials of the organization."[125]

Even after identifying the individuals with whom the organization's lawyer should interact, a lawyer has the ethical obligation to make sure that those individuals understand the lawyer's role. Many will not. The common

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[119] *Id.* at R. 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

[120] *See* WYO. STAT ANN. § 17-3-101 (2008) ("A corporation organized under the Wyoming Business Corporation Act or the Wyoming Statutory Close Corporation Supplement [chapter 17 of this title] . . . may, by and through the person or persons of such licensed stockholder or stockholders, or licensed employees, practice and offer professional services in such profession.").

[121] *Id.*

[122] *Id.* at. § 17-16-801(a).

[123] *Id.* at § 17-15-116.

[124] *See, e.g., id.* at § 17-16-841 ("Each officer has the authority and shall perform the duties set forth in the bylaws or . . . [and] the duties prescribed by the board of directors . . .").

[125] WYO. RULES OF PROF'L CONDUCT R. 1.4 cmt. [7] (2006).

misunderstanding involves the question just discussed. Whom does the lawyer for an organization represent? Many, if not most, of an organization's constituents will assume the lawyer represents them and the organization, and not just the organization.[126]

Because many constituents will misunderstand the lawyer's role, a lawyer who represents an organization must ensure constituents with whom he or she interacts understand that the organization's lawyer does not generally represent the organization's constituents, even those "duly authorized" to speak for it. Similarly, the lawyer must take care to avoid implying that he or she represents the duly authorized constituents individually. The failure to do so may result in the inadvertent creation of an attorney-client relationship with such individuals arising by implication.[127] While it is ethically permissible to represent both an organization and some of its constituents in some circumstances, a lawyer should never allow an attorney-client relationship to arise inadvertently. It will be ethically permissible to represent both an organization and some of its constituents only when no impermissible conflicts of interest exist between the interests of the organization and those of the individual constituents.[128] If representation of both the organization and a constituent is ethically permissible and the attorney intends to have an attorney-client relationship with each, those relationships should both be explicit. A lawyer should simply never allow an attorney-client relationship to arise by implication; to do so is to invite problems.

Furthermore, whenever a lawyer represents an organization, the lawyer must be aware of the possible divergence of interest between the client (the organization) and the constituents of the organization with whom the lawyer is dealing. The reason is that when it becomes "apparent" that their interests are adverse, the lawyer has an ethical duty to "explain the identity of the client . . . [and] that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[129] Where the interests of the organization and constituents diverge, and the constituents do not have separate counsel, the lawyer for the organization is essentially dealing with an unrepresented person. Accordingly, the only advice the lawyer may ethically give the constituent, which the lawyer should

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[126] ABA ANN. RULES OF PROF'L CONDUCT, 91 (5th ed. 2007) ("Many corporate executives apparently do not realize that corporate counsel represents the corporation only, and not them as individuals.").

[127] *Id.*

[128] WYO. RULES OF PROF'L CONDUCT R. 1.13(e) (2006) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [Rule 1.7 regulates concurrent conflicts of interest].").

[129] *Id.* at R. 1.13(d).

give, is that the individual should obtain counsel.[130] As an example, when an organization is being sued for the actions or inactions of one of its constituents, the interests of the organization and those of that individual whose actions led to the suit, are potentially adverse. The organization may have an interest, for example, in trying to avoid liability by asserting that the individual was acting beyond the scope of his or her employment. The individual's interest, by contrast, is to make sure that the organization is responsible for the individual's actions or inactions, and will, therefore, likely assert that the actions in question were within the scope of employment. In such circumstances, the divergence of interests is obvious, and direct. Because of that divergence of interests, the organization's lawyer must be careful to notify the individual of the identity of the lawyer's client (the organization), and that the lawyer is looking after the client's interests, not the individual's.[131]

As with any attorney-client relationship, the information the lawyer learns in the course of the representation is often confidential,[132] regardless of when or how the information was learned.[133] Accordingly, the information a lawyer learns from constituents of the organization is confidential. The lawyer may not, therefore, generally disclose the information to anyone other than the client without an "informed decision"[134] by the client to allow such disclosure.[135] The lawyer must be careful, however, not to disclose information learned from one constituent to another unless the constituent to whom the disclosure is made is authorized to receive the information. The reason is simple. The mere fact that a lawyer has obtained confidential information from a constituent "does not mean . . . that constituents of an organizational client are the clients of the lawyer."[136]

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[130] WYO. RULES OF PROF'L CONDUCT R. 4.3 (2006) ("The lawyer shall not give legal advice to an unrepresented person, other than *the advice to secure counsel*, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.") (emphasis added).

[131] WYO. RULES OF PROF'L CONDUCT R. 1.13(d) (2006).

[132] Wyoming's Rule on confidentiality is unique. It protects "confidential information relating to the representation . . ." WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006). "Confidential information" means "information provided by the client or relating to the client which is not otherwise available to the public."). The ABA Model Rules are not limited to "confidential information." They apply to "information relating to the representation." ABA MODEL RULES OF PROF'L CONDUCT, R. 1.6(a) (2008).

[133] WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

[134] "Informed decision" means "the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." WYO. RULES OF PROF'L CONDUCT R. 1.0(f) (2006).

[135] WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

[136] WYO. RULES OF PROF'L CONDUCT R. 1.13 cmt. [3] (2006) ("The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6 [the Rule on confidentiality]").

The lawyer must be careful, therefore, not to create the impression that the lawyer represents the constituent by disclosing confidential information to unauthorized constituents.

With small businesses, including professional practices, the same individuals often fill multiple roles. The same persons are often a professional corporation's shareholders, directors, and officers. A lawyer's obligations do not, however, change because of the relative size of an organization. The organization's lawyer still represents the organization and does not automatically represent the constituents.[137] In such circumstances, however, the possibility of confusion about the lawyer's role is significantly increased, and the lawyer needs to be especially careful to clarify his or her role. The question of whether the lawyer represents only the organization or the individuals within the organization, too, should be expressly addressed. The reason is simple. The individuals will probably assume that the lawyer represents the organization and themselves, as well, particularly when the lawyer has extensive interactions with one or more of the organization's constituents.[138] Failing to clarify the lawyer's role may mean just that. If the lawyer has done nothing to defeat the client's expectation that the lawyer represents the organization and the individuals who constitute it, and if that expectation is reasonable, the lawyer has probably allowed an attorney-client relationship to arise by implication.[139] Once again, the clarification should be done in an engagement letter with the organization which clarifies the identify of the client and that the lawyer does not represent the constituents, individually.

5. Summary

Organizational clients present special ethical challenges for a lawyer. Those challenges are not, however, insurmountable. First, the lawyer must identify the client. In the case of a health care organization, it is the organization, whether small or large, private or government, profit or not-for-profit. Second, the lawyer must identify the individuals (the "constituents") who are authorized to act on behalf of the organization and with respect to which issues. Third, when it is apparent that the interests of the organization and those of the constituent(s) with whom the lawyer is dealing are adverse, the lawyer has a duty to notify the constituent of the identity of the client (the organization), that the lawyer is representing the organization, not the constituent, and that the constituent may want to seek legal counsel.

The first two issues, the identity of the client and the individuals authorized to act on behalf of the client, should be clarified in a written agreement between the client and the lawyer, usually an engagement letter. Such an agreement will

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[137] ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT § 91:2015.

[138] *Id.*

[139] *Id.* at 91:2001.

eliminate the possibility of the lawyer, of a court, wondering who the client is or was. The third issue, advising constituents about the lawyer's role, is critical to avoiding an attorney-client relationship arising by implication, which will put the lawyer in a conflict which is likely non-waivable, and which will likely require the lawyer to withdraw from the representation of both the organization and the individual.

B. Confidentiality and the Attorney-Client Privilege.

1. Introduction

A lawyer has both a legal and an ethical obligation to maintain client confidences. The legal obligation arises out of the law of agency, the law of evidence (through the attorney-client privilege)[140] and the rules of civil and criminal procedure (which embody the work-product doctrine[141]). Each requires a lawyer to preserve client confidences, certain information regarding a client or the client's case; or both, and each survives the termination of the attorney-client relationship.[142]

A lawyer's ethical obligation of confidentiality is based on Rule 1.6 of the Wyoming Rules of Professional Conduct, or similar rules in other states. The Wyoming Rule says that a lawyer "shall not reveal confidential information relating to representation of a client . . . ," however the information is learned and regardless of the source.[143] The ethical duty is much broader than either

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[140] *See, e.g.*, RESTATEMENT (SECOND) OF THE LAW OF AGENCY, § 395 (2006) ("[A]n agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal . . .").

The attorney-client privilege is part of the law in every American jurisdiction, either by statute, court rule, or common-law. Charles W. Wolfram, MODERN LEGAL ETHICS, § 6.3.1 (West 1986). Generally, it prevents an attorney from testifying about communications to or from a client and the lawyer regarding the representation. *Id.*

[141] *See, e.g.,* WYO. R. CIV. P. 26(b)(3). A lawyer must assert the privilege or it disappears. *Id.* at 26(b)(5) *and* WYO. R. CRIM P. 16(a)(2) & (b)(2).

[142] After the end of an agency relationship, the agent may not use or disclose "trade secrets, written lists of names, or other, similar confidential information concerning the methods of business of the principal . . . . The agent is entitled to use general information concerning the method of business of the principal . . . ." RESTATEMENT (SECOND) OF AGENCY, § 396(b) (2006). While many statutes or rules which establish the attorney-client privilege are silent on the question of whether the privilege continues after the end of the attorney-client relationship, courts generally hold that the privilege continues, along with the attorney's obligation to assert it. Charles W. Wolfram, MODERN LEGAL ETHICS, § 6.3.4 (West 1986). The privilege generally extends after the death of a client. *See, e.g.*, Swidler & Berlin v. U.S., 524 U.S. 399, 407 (1998).

[143] WYO. RULES OF PROF'L CONDUCT R. 1.6(a)(2006); *see also id.* at R. 1.6 cmt. [6] ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

the attorney-client privilege or the work-product doctrine since it applies to all "confidential information relating to the representation."[144] The attorney-client privilege, by contrast, protects only communications between a lawyer and a client.[145] The work-product doctrine protects only "trial preparation materials."[146] Accordingly, everything which is subject to the attorney-client privilege or the work-product doctrine is confidential under Rule 1.6, but information which is covered by Rule 1.6 may not be protected by either the attorney-client privilege or the work-product doctrine (a communication from a third person, for example, is subject to Rule 1.6 if it is confidential information that relates to the representation. That communication is not protected by the attorney-client privilege, because it is not a communication to or from a client, and it is not subject to the work-product doctrine as it was not prepared in anticipation of litigation.) The ethical duty of confidentiality is, however, similar to the legal duty in one important way. It never ends.[147] Not only is the scope of the duties different, they apply at different times, too.

The attorney-client privilege applies when communications between a lawyer and a client are sought from the attorney or the client through judicial or other legal processes, including discovery.[148] The attorney-client privilege is much narrower, as it applies only to communications between a lawyer and a client, not to other information the lawyer learns during the representation.[149]

Applying the confidentiality concept, the attorney-client privilege, or the work product doctrine becomes significantly more difficult when the client is an organization. The identity of the client is clear; it is the organization. A lawyer cannot communicate, however, with a legal entity. The lawyer must communicate with one or more constituents of the entity.

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[144] *Id.* at R. 1.6(a).

[145] WYO. STAT. ANN. § 1-12-101(a) (2008).

[146] WYO. R. CIV. P. 26(b)(3); *see also* WYO. R. CRIM. P. 16(a)(2) & (b)(2).

[147] WYO. RULES OF PROF'L CONDUCT R. 1.9(c) and R. 1.6, cmt. [25] (2006).

[148] WYO. RULES OF PROF'L CONDUCT R. 1.6, cmt. [6]. The attorney-client privilege and the work product doctrine are not a part of the rules of ethics. *Id.* The attorney-client privilege is part of the law of evidence and is differently defined in different jurisdictions. The privilege generally exists when four features a present: (1) There is a communication; (2) between privileged persons (an attorney or the attorney's staff and a client); (3) made in confidence; and (4) for the purpose of obtaining or providing legal advice. *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

[149] *See, e.g.*, ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT § 55:304 ("the ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the [attorney-client privilege].").

2. *Which Information is Subject to the Confidentiality Obligation of Rule 1.6?*

The language of Rule 1.6 is clear: "A lawyer shall not reveal confidential information relating to representation of a client . . ."[150] The commentary to Rule 1.13 ("Organization as client") discusses the application of the confidentiality principle to an organizational client. "When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6 [The Rule which creates the ethical duty of confidentiality]"[151] It does not matter, in short, if the client is an individual or an organization. The Rule applies. Since the Rule applies, a lawyer may not reveal confidential information about the representation of a client, regardless of how it is learned, unless the client makes an informed decision to allow the disclosure, the disclosure is "impliedly authorized in order to carry out the representation,"[152] or unless one of the Rule's narrow exceptions applies.[153]

Although it is easy to say that all confidential information which relates to representation of an organizational client "shall not be revealed,"[154] the more difficult question is to whom within the organization may a lawyer ethically disclose such information? Assume, for example, that a lawyer conducts an investigation for an organization the request of the organization's board of directors (the governing authority for a corporation). The lawyer receives information from a variety of sources, including many "constituents" of the organization. Some are high level management, such as corporate officers. Others are lower level employees or other constituents, such as stockholders. As noted above, the information communicated to the lawyer by any constituent in that individual's organizational capacity is confidential. The question becomes, therefore, which confidential information may be shared with which constituents?

The commentary to the Rule 1.13 (Organization as a client) provides important guidance. Information learned from organizational constituents is confidential. The lawyer may not, however, necessarily disclose such information learned from one constituent to another:

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[150] WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

[151] WYO. RULES OF PROF'L CONDUCT R. 1.13 cmt. [3] (2006).

[152] WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

[153] A lawyer may disclose otherwise confidential information if the lawyer "reasonably believes" disclosure is necessary to prevent a client "from committing a criminal act," "to establish a claim or defense" in a dispute with a client, or "to comply with other law or court order," or "to protect the best interests" of an individual for whom the attorney is acting as guardian *ad litem. See id.* at R. 1.6(b)(1), (2), (3).and (4).

[154] *Id.*

> The lawyer *may not disclose* to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6 ["Confidentiality of information"].[155]

The answer should have a familiar ring. A lawyer may disclose confidential information only to duly authorized constituents. The question comes back, in short, to the question addressed above. With whom should a lawyer interact when representing an organization? Such constituent is likely also authorized to receive information from the lawyer. Accordingly, the answer is disclosure may be made to the persons duly authorized by the organization to interact with the lawyer.

An attorney's ethical duty of confidentiality may, of course, be waived by the client.[156] That waiver may be explicit or implicit. An attorney may reveal confidential information if "the client makes an informed decision," or if disclosure is "impliedly authorized in order to carry out the representation."[157] The questions which arises when the client is an organization are: (1) who may make a decision to waive confidentiality; and (2) with whom must the lawyer consult before that waiver is valid? The answers follow from the concept that the client is the organization. Therefore, the organization may waive confidentiality. As with other decisions by an organization, this one must be made by the organization's governing body or someone duly authorized by that body to act in its stead. This means that information imparted to the attorney by an individual is controlled by the organization, not by the individual from whom it was received.

3. *Applying the Attorney-Client Privilege to a Health Care Organization.*

The attorney-client privilege is "the oldest of the privileges of the common law . . ."[158] The privilege is not only recognized by federal law,[159] it is a part of the law of evidence in every U.S. jurisdiction.[160] Since it is part of the law of evidence, the starting point in analyzing the applicability of the privilege is the rules of evidence. Rule 501 of the Wyoming Rules of Evidence says "[e]xcept as otherwise required by . . . statute . . . the privilege of a witness . . . shall be governed by the principles of the common law . . ."[161] Rule 501 of the Federal Rules of Evidence

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[155] WYO. RULES OF PROF'L CONDUCT R. 1.13 cmt. [3] (2006).

[156] WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

[157] *Id.*

[158] Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).

[159] *Id.* at 396-97.

[160] Charles.W. Wolfram, MODERN LEGAL ETHICS, § 6.1.1 (West 1986).

[161] WYO. R. EVID. 501.

contains identical language.[162] While the attorney-client privilege in Wyoming is now statutory, the federal privilege is part of the federal common law.[163]

The attorney-client privilege in Wyoming is codified in statute, but the statute is regrettably sparse, especially on issues involving its application to an entity.[164] The statute simply says:

> The following persons shall not testify in certain respects:
>
> *An attorney* or physician concerning *a communication made to him by his client* or patient *in that relation, or his advice to his client or* patient. The attorney or physician may testify by express consent of the client or patient, and if the client or patient voluntarily testifies the attorney or physician may be compelled to testify on the same subject;[165]

That's it. The statute sets forth three criteria. First, an "attorney" may not testify in certain respects. Second, the privilege is limited to "communications" from a client to an attorney or the attorney's "advice" to the client. Finally, the communications or advice must be "in that relation," *i.e.*, communications which are a part of the attorney-client relationship. The statute leaves numerous questions unanswered, including questions about how the privilege applies to organizational clients, if it applies at all.[166]

The first problem is that Wyoming's statute, on its face, provides a privilege for attorneys to not testify about their communications to or from a client, but it does not provide a reciprocal privilege for clients. Second, the statute makes no mention of the non-attorney staff members who work for an attorney, persons such as secretaries, investigators, and paralegals, who often have more communications with a client than the attorney. Third, the statute is silent on if or how the privilege should be applied to organizational clients. The statute's silence about organizational clients raises three significant issues: (1) Does the attorney-client privilege apply to organizational clients at all? (2) If so, which communications between an attorney and individuals within the organization are privileged? (3) Finally, who within the organization may waive the privilege?

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[162] FED. R. EVID. 501.

[163] *Upjohn Co.*, 449 U.S. at 389.

[164] WYO. STAT. ANN. § 1-12-101(a) (2008).

[165] WYO. STAT. ANN. § 1-12-101(a) (2008) (emphasis added).

[166] Statutes in other states often address such issues directly. In Arizona, for example, the statute includes an attorney's "paralegal, assistant, secretary, stenographer or clerk." ARIZ. REV. STAT. § 12-2234(A) (2007). It further provides that "any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity . . . ." *Id.* at § 12-2234(B).

This section will address the general questions surrounding the attorney-client privilege in Wyoming, as well as those issues unique to organizations.

a. The Attorney-Client Privilege Applies to Clients, As Well As to Lawyers.

As noted, Wyoming's statute says that "attorneys" may not testify in certain respects, but it says nothing about clients. The notion that the omission of any reference to clients means that they are not covered by the attorney-client privilege flies in the face of the reasons for the privilege, as well as the applicability of the common-law privilege.

The reason for the attorney-client privilege, according to the United States Supreme Court, is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[167] That policy is so important that the privilege has been extended to include not just communications between a lawyer and a client, but observations "which [are] the product of a privileged communication."[168] Not extending the privilege to include observations "might chill free and open communication between attorney and client and might also inhibit counsel's investigation of his client's case."[169] So, too, not applying the privilege to protect clients from testifying would severely chill attorney-client communications, and courts have interpreted the privilege to foster communications, not chill it.

Over a century ago, the Alabama Supreme Court put it well. The privilege "against the disclosure of such communications by counsel would be a mockery if the client could be compelled to disclose that as to which counsel's lips are sealed."[170] Not extending Wyoming's attorney-client privilege to prevent a client from testifying would seriously chill full and frank communication between attorneys and their clients; not doing so would make a mockery out of the privilege. It is hard to imagine, therefore, that the Wyoming Supreme Court would not construe the statue which codifies the attorney-client privilege to also prevent clients from having to testify.

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[167] *Upjohn*, 449 U.S. at 389.

[168] People v. Meredith, 631 P.2d 46 (Cal. 1981).

[169] *Id.* at 48.

[170] Birmingham Railway and Electric, Co., v. Wildman, 24 So. 546, 549-50 (Ala. 1898).

b. The Attorney-Client Privilege Applies to an Attorney's Non-Attorney Staff.

A second problem with Wyoming's attorney-client privilege statute is that it refers only to a communication between a client and an "attorney."[171] Many of a lawyer's communications with a client, however, are through non-attorney support staff members, such as a secretary, an investigator, or a paralegal. The absence of any reference in the statute to non-attorney support staff raises the question of whether the attorney-client privilege covers communications between a client and a non-attorney staff member. It should.

One of the most recent and most comprehensive analyses of the attorney-privilege is contained in the Third Restatement of The Law Governing Lawyers. The Restatement asserts that the attorney-client privilege applies to communications between "privileged persons."[172] The term "privileged persons" is then defined as "the client (including a prospective client), the client's lawyer, [and] agents of either who facilitate communication between them . . ."[173] A person is a privileged agent if "the person's participation is reasonably necessary to facilitate the client's communication with a lawyer . . ."[174] Since it is often reasonably necessary for a client and a lawyer to communicate through other person's, the attorney-client privilege should extend to them, as well.

c. The Attorney-Client Privilege Applies to Organizational Clients.

Although there has been substantial debate about whether the attorney-client privilege should apply to organizations, that debate has been resolved in favor of such a privilege in every jurisdiction which has considered the issue.[175] Accordingly, the general view is that when the client is "a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, or other for-profit or not-for-profit organization, the attorney-client privilege extends" to quailed communications between privileged persons.[176] A qualified communication is one which is made "for the purpose of obtaining or providing legal assistance to the client."[177] Privileged persons include, those whose participation "is reasonably necessary to facilitate the client's communication with a lawyer."[178] Since an

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[171] WYO. STAT. ANN. § 1-12-101(a)(1) (2008).

[172] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 68 (2000).

[173] *Id.* at § 70.

[174] *Id.* at § 70 cmt. f.

[175] Charles W. Wolfram, MODERN LEGAL ETHICS § 6.5.3, 283-84 (West 1986).

[176] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73 (2000).

[177] *Id.* at § 68(4).

[178] *Id.* at § 70 cmt. f.

organization can act only through its agents, it is reasonably necessary to protect communications between at least some of the organization's agents (constituents) and the organization's attorney. Extending the privilege to organizations is also consistent with promoting the policy behind the privilege. Including associations within the privilege "encourages organizational clients to have their agents confide in lawyer in order to realize the organization's legal rights and to achieve compliance with law."[179]

Although the Wyoming attorney-client statute is silent[180] and no Wyoming Supreme Court opinions are on point, it is reasonable to expect that the privilege will be extended to organizations in Wyoming as has been done everywhere else.[181] In addition to the overwhelming weight of authority in other jurisdictions, the Wyoming Supreme Court has acknowledged the need for corporate privacy by limiting the *ex parte* contacts a lawyer for an opposing party may have with corporate employees.[182] The same principles argue in favor of extending the attorney-client privilege to include organizations. Doing so, however, does not end the inquiry. The next issue is to define the scope of the privilege in an organizational setting. And while it is reasonable to assume that the privilege will be extended to organizations in Wyoming, predicting the scope of the privilege is more difficult.

d. Which Communications To or From Which Constituents of an Organization Are Protected by the Attorney-Client Privilege?

Two general views of the scope of the attorney-client privilege in the organizational setting have emerged: (1) the control-group test; and (2) the subject-matter test.[183] The control-group test is based on the notion that the attorney-client privilege applies only to communications between the organization's lawyer and persons who have managerial responsibility or control of the issue(s) involved in the communications. The standard is difficult to apply, however, because the parameters of the control group will vary with the issue(s) involved.[184] The persons with managerial responsibility for one area of the organization's operation may be different than the persons responsible for another. As the composition of the control group varies, it is difficult to know which communications with which

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[179] *Id.* at § 72 cmt. b.

[180] The Wyoming statute refers only to "client," without definition of that term. WYO. STAT. ANN. § 1-12-101(a)(i) (2008).

[181] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73 cmt. b. (2000) ("Extending the attorney-client privilege to corporations and other organizations was formerly a matter of doubt but is no longer questioned.").

[182] Strawser v. Exxon, 843 P.2d 613, 616-17 (Wyo. 1992).

[183] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73 cmt. b. (2000). *See also,* Upjohn Co. v. U.S., 449 U.S. 385 (1981).

[184] *Upjohn Co.*, 449 U.S. at 392 (The control group test "is difficult to apply.").

persons are protected. This lack of predictability renders the test impractical since "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected [because a]n uncertain privilege . . . is little better than no privilege at all."[185] In addition, by definition, the test excludes communications between the attorney for the organization and constituents without managerial responsibility. As a result, persons with important information, usually factual, fall outside the protection of the privilege. Similarly, individuals who are not part of the control group may be responsible for implementing the lawyer's legal advice. Not protecting the communications with the organization's lawyer "makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy."[186] Ultimately, the narrow scope of the control group theory "not only makes it difficult for corporate attorneys to formulae sound advice . . . [it] also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."[187]

The subject-matter test takes a very different approach. Communications between an organization's lawyer and any constituents of the organization are subject to the attorney-client privilege if they relate to the giving or receiving of legal advice.[188] The test was given a significant boost in 1981 when the United States Supreme Court rejected the control-group test and, at least implicitly, adopted the subject-matter test in its decision in *Upjohn Co. v. United States*.[189] The Court began by reiterating the purpose of the privilege. It exists, wrote then Justice Rehnquist, to "protect . . . the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice."[190] Although the Court criticized and rejected the control group test, its adoption of the subject matter test has not ended the debate for two reasons. First, *Upjohn* involved the scope of the federal law of attorney-client privilege and the scope of the privilege is often an issue of state law. Second, the subject-matter test requires a case-by-case analysis. Since *Upjohn*, some states have rejected the subject matter test, deciding to retain the control group test.[191] Courts have generally been unwilling to adopt the subject-matter

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[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] Charles W, Wolfram. MODERN LEGAL ETHICS, § 6.5.4, 285 (West 1986).

[189] *Upjohn Co.,*449 U.S. at 390.

[190] *Id.* at 389-90.

[191] *See, e.g.,* Nalian Truck Lines, Inc., v. Nakano Warehouse & Transportation Corp., 8 Cal. Rptr.2d 467, 471 (Cal. Ct. App. 1992) (The drafters of the rules of professional conduct in California "intended to retain the control group test.").

test *in toto,* preferring some sort of hybrid test. Also, applying the test case-by-case has resulted in numerous attempts to formulate a workable standard. The decision in *Boyer v. Board of County Commissioners*[192] is a good example of the latter.

Boyer involved a §1983 claim of unlawful retaliation. Ruling on a motion to compel discovery, the court discussed the practical application of the subject-matter test. The court took a pragmatic approach, noting that corporations act "through all employees acting within the scope of their employment."[193] Accordingly, it adopted the *Upjohn* decision's approach that the giving of sound legal advice requires corporate counsel to gather information from "multiple levels of the corporation . . . ."[194] When it comes to the question of the applicability of the attorney-client privilege, therefore, the inquiry must be "whether the communications [to or from non-managerial constituents] were made at the request of management in order to allow the corporation to secure legal advice."[195] The court then crafted a two step test: (1) the status of the employee; and (2) the context of the communication. If the employee occupies a managerial position, communications will generally be privileged. Regardless of an employee's status, however, if the employee is a "primary source for information concerning the facts" involved in the legal matter, the attorney's communications with that person will be covered by the attorney-client privilege.[196]

The *Boyer* opinion, which has been often cited, usually favorably, by both courts and commentators, recognizes that organizations often act through constituents who are not in managerial positions, and that if the attorney-client privilege is going to accomplish its goals, it must include communications with the relevant actors, regardless of their positions.[197] The opinion represents a logical, practical approach to the issue, an approach which is similar to the approach taken by the Wyoming Supreme Court in the *Strawser* case, which involved the related issue of *ex parte* communications with corporate employees.[198] Further, *Boyer* was affirmed by the Tenth Circuit.[199] Judge Brorby authored the unpublished opinion.[200]

The Restatement also favors the subject matter test over the control group test since the latter "overlooks that the division of functions within an organization often separates decisionmakers from those knowing relevant facts."[201] It seems

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[192] Boyer v. Bd. of County Comm'rs, 162 F.R.D. 687 (D. Kan. 1994).

[193] *Id.* at 690.

[194] *Id.* at 689.

[195] *Id.*

[196] *Id.* at 690.

[197] Boyer v. Bd. of County Comm'rs, 162 F.R.D. 687, 690 (D. Kan. 1994).

[198] Strawser v. Exxon, 843 P.2d 613, 614 (Wyo. 1992).

[199] Boyer v. Johnson County Bd. of County Comm'rs, 108 F.3d 1388 (10th Cir. 1997).

[200] Although the opinion is unpublished, it is available at 1997 WL 143597.

[201] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73, cmt. d, (2000).

clear, therefore, that the better reasoned approach is the subject matter test or some variant of it. When all is said and done, however, lawyers in Wyoming have no clear standards for which communications with which of an organization's constituents will be protected by the attorney-client privilege.

Although the parameters of the attorney-client privilege in Wyoming with respect to organizations are unclear, an attorney can and should advise organizational clients about that uncertainly. The lawyer should advise organizational constituents that the scope of the privilege in Wyoming is unclear, and that communications with non-managerial persons may not be protected. The attorney should make such a disclosure since most constituents will have the expectation that their communications with the organization's lawyer are privileged. Disclosing that they may not be may result in reticent constituents, but that is preferable to constituents having an expectation of confidentiality which turns out to be incorrect. If that occurs, the lawyer will likely be the target of a grievance, a malpractice action, or both, premised on the lawyer's failure to properly disclose the true situation and "explain [the] matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation . . ."[202]

While the scope of the attorney-client privilege is unclear, an organizational lawyer's ethical duty is clear. Whatever the source of the information, it is confidential under Rule 1.6, meaning that the lawyer may not disclose it in the absence of an informed decision by the client to waive that confidentiality, unless it falls within one of the exceptions to the rule or the lawyer has a duty to disclose.[203]

e. Who Within An Organization May Waive the Attorney-Client Privilege?

The attorney-client privilege belongs to the client.[204] Since an organizational lawyer's client is the organization, the privilege belongs to it, regardless of which test is adopted to define the scope of the privilege. Accordingly, the organization may waive the privilege.[205] This creates the potential that constituents who were

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[202] WYO. RULES OF PROF'L CONDUCT R. 1.4(b) (2006). Although not designed to serve as a basis for civil liability, "the Rules do establish standards of conduct by lawyers, [and] the Rules may be evidence of the applicable standard of conduct." *Id.* at Scope [19].

[203] For discussions of exceptions to the rule and a lawyer's duty to disclose, *see* John M. Burman, *An Attorney's Duty to Warn*, Vol 30, No.1, WYOMING LAWYER (February 2007) *and* John M. Burman, *The Disclosure of Confidential Information Under the New Wyoming Rules of Professional Conduct*, Vol 29. No 6, WYOMING LAWYER (December 2006).

[204] *See, e.g.,* WYO. STAT. ANN. § 1-12-101(a)(i) (2008) (An attorney may testify "by express consent of the client . . . . ").

[205] Charles W. Wolfram, MODERN LEGAL ETHICS, § 6.5.4 (West 1986).

not involved in communications with the organization's lawyer may, nevertheless, have the authority to decide to waive the privilege. Similarly, constituents who were involved in the combinations may not be in a position to oppose a waiver. Such a situation is likely contrary to the expectations of those constituents who were involved in the communications. It is important, therefore, for the lawyer involved in the communications to ensure that constituent's expectations regarding the attorney-client privilege are accurate.

Under the control-group test, the subject-matter test, or any other test which the court might adopt, it is likely that at least some of the constituents who communicate with an organization's lawyer will not be in a position to control the decision of whether to waive the privilege. Yet those constituents will probably assume that their communications with the organization's lawyer are privileged, and that they are the ones who may waive or insist on the privilege. Both of those assumptions may be incorrect—and it is the lawyer's responsibility to correct them.

As discussed above, the scope of the attorney-client privilege in Wyoming is unclear, and that uncertainty should be disclosed to the organization's constituents with whom the attorney is interacting.[206] In addition, the constituent(s) with whom the lawyer is dealing may not be the one(s) who will decide if the privilege should be waived. To ensure that those persons are properly informed, the lawyer should explain that someone else will be making that decision. The reason is that the organization's interests may well diverge from a constituent's. Consider a simple example.[207]

An organization (a corporation) is being investigated for illegal activity. The corporation's lawyer learns, through conversations with corporate constituents, that persons within the entity were involved in the activity. The corporate management decides that the best approach is to disclose to the appropriate regulatory officials which individuals were involved in the illegal activity. The decision, in other words, is to hang someone out to dry, for the benefit of the corporation. While that may be the best strategy for the organization, it is likely counter to the interests of the person(s) who are to be hung out to dry. Because of the clear divergence of interests, which was a potential conflict from the outset, the lawyer should have notified the constituents of the possible outcome, *i.e.*, that although the conversations between the lawyer and the constituent may well be privileged under any test the court may adopt, the corporation may decide to waive the privilege, regardless of the wishes of the constituents involved in the communications. Only with such a disclosure at the time of the initial contact with the constituent can the lawyer avoid being the subject of a disgruntled

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[206] *See supra* notes 188–208 and accompanying text.

[207] This example is based on the facts of *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

constituent's wrath when there is a waiver of the privilege (or the ethical duty of confidentiality), thereby disclosing the individual's potential culpability. Such a disclosure will also satisfy the lawyer's disclosure obligations under Rule 1.13(d); those obligations are discussed above.[208]

f. Summary

Although the applicability and scope of the attorney-client privilege in Wyoming are not specified in the statute, the answers to three fundamental questions are reasonably predictable, while the answer to a fourth is less certain. First, there is little doubt the privilege will apply to protect clients, and not just their lawyers. Second, it is reasonable to assume that the privilege will be applied to organizations' in Wyoming, just as it has in every jurisdiction which has considered the issue. To hold otherwise would completely undermine the purpose of the privilege, encouraging full disclosure between an attorney and the attorney's client. Third, there is also little doubt that the privilege belongs to the organization, and it, acting through its governing body, may waive the privilege, just as it may waive a lawyer's ethical duty of confidentiality.

The question which is both unanswered and difficult to predict with accuracy is what is the scope of the privilege? Will it be defined by the control group test, the subject matter test, or something else? The better reasoned view is the subject matter test, or some variant of it. That view is better reasoned because it recognizes reality. Organizations act through all constituents, not just those in managerial positions, and it is critical that an organization's lawyer be able to commentate with relevant constituents, regardless of their position in the organization, confident that the communications will be privileged.

Whatever the scope of the privilege, an organization's lawyer must be careful to correct constituents' misconceptions about the nature of their communications. A constituent needs to know the communications may not be privileged, and that the organization, not the constituent, will have the ability to waive the privilege, if it exists, the attorney's ethical duty of confidentiality, or both.

D. A Lawyer's Whistle-Blowing Obligations.

Identifying the client, the constituents authorized to act on behalf of the client, and properly applying the confidentiality principles to organizations are critically important, but doing so does not end an organizational lawyer's ethical duties to the client. Among the lawyer's other duties to the organization is the obligation to blow the whistle when the actions or inactions of an individual within or associated with the organization threaten the organization.

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[208] *See supra* notes 106–107 and accompanying text.

1. The Ethical Framework

Generally, clients, not lawyers, call the shots: ethically, a lawyer "shall abide by the client's decisions regarding the objectives of the representation."[209] Further, a lawyer "shall consult with the client as to the means by which they [the objectives] are to be pursued."[210] As in any attorney-client relationship, the attorney for an organization is an agent for the client, who is the principal in that relationship. An agent must, of course, "act solely for the benefit of the principal . . ."[211] Furthermore, as an agent, "the lawyer generally owes the client rigorously enforced fiduciary duties . . ."[212] The lawyer for an organization, therefore, is both an agent and a fiduciary for the organization—and to it flow all the ethical and legal duties a lawyer owes to any client, including the duties of loyalty, confidentiality, and competence.[213]

Paragraph (b) of Rule 1.13 articulates the importance of the lawyer's duty of loyalty to an organizational client. It is based on the principle that since a lawyer for an organization represents the organization, the lawyer must act to protect the organization from individuals who might harm it, even if those individuals are constituents who work for or are associated with the organization and are constituents with whom the lawyer interacts. The lawyer must, in short, ignore his or her personal relationship with any such constituent and blow the whistle on any person whose actions or inactions threaten the organization's best interests from within.

The whistle-blowing provisions, paragraphs (b) and (c) of Rule 1.13, contain two components. First, the organization's lawyer must "know" certain things. Second, if the lawyer does "know" those things, the lawyer must act to protect the organization.

"Know" is a defined term. It means "actual knowledge of the fact in question. A person's knowledge may [however] be inferred from circumstances."[214] It is not enough, therefore, for a lawyer to suspect, believe, or even reasonably believe something. The lawyer must "know" before the whistle blowing obligation is triggered. The lawyer must know four things: (1) that "an officer, employee or other person associated with the organization is engaged in action, intends to

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[209] WYO. RULES OF PROF'L CONDUCT R. 1.2(a) (2006).

[210] *Id.*; *see also* WYO. RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2006) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished.").

[211] RESTATEMENT (SECOND) OF THE LAW OF AGENCY, § 387 (1958).

[212] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73, cmt. B (2000).

[213] Charles W. Wolfram, MODERN LEGAL ETHICS § 4.1 (West 1986).

[214] WYO. RULES OF PROF'L CONDUCT R. 1.0(g) (2006).

act or refuses to act in a matter related to the representation:" (2) "that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization;" (3) that the violation of a legal obligation or violation of law "reasonably might be imputed to the organization . . . ;" and (4) the violation is "likely to result in substantial injury to the organization . . ."[215]

The question is what does that really mean? What must a lawyer know? Two types of events fall within Rule 1.13(b). Actions or inactions by a person associated with the organization that is either (1) "a violation of a legal obligation to the organization;" or (2) "a violation of law which reasonably might be imputed to the organization."[216] The former type of activity generally involves the "breach of a constituent's fiduciary duty to the organization, such as usurpation of a corporate opportunity or self-dealing."[217] The latter type of activity "refers to conduct for which an organization would be traditionally responsible under the common law doctrine of 'respondeat superior' or by operation of statute or regulation."[218] Given the proliferation of federal and state laws that allow for the recovery of erroneously paid government funds from the provider itself, which is likely an organization, lawyers need to be especially mindful of the possibility the health care organization the lawyer represents does not get into legal hot water.[219]

How will a lawyer know? A common scenario will be that an organization's lawyer is asked for an opinion about one of the organization's proposed activities. The lawyer opines that the proposal will involve either actions by a constituent that are a violation of legal obligations owed to the organization or a violation of law which might reasonably be imputed to the organization, and, therefore, taking the proposed action would be ill-advised. The lawyer's advice is rejected by

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[215] WYO. RULES OF PROF'L CONDUCT R. 1.13(b) (2006).

[216] *Id.*

[217] Mary C. Daly, *Avoiding the Ethical Pitfall of Misidentifying the Organizational Client*, 1319 PLI/CORP. 721, 725-26 (1997).

[218] *Id.* at 726.

[219] *See, e.g.,* WYO. STAT. ANN. § 42-4-207 (2008) ("the department [of Health] may through appropriate action recover any incorrect payment of medical assistance under this chapter on behalf of a recipient . . . . Any recovery shall be prorated to the federal government in proportion to the amount it contributed . . . ."); *see also* WY Rules and Regulations HLTH MDCD Ch. 7 s 31 ("Recovery of excess payments or overpayments.") *and* Ch. 16 ("Medicaid Program Integrity."). The State is required by federal law to attempt to recover overpayments. 42 U.S.C. § 1396b (1984) ("[W]hen an overpayment [of Medicaid funds] is discovered, which was made by a State to a person or other entity, the State shall have a period of 60 days in which to recover or attempt to recover such overpayment . . .").

The foregoing are just a few of the myriad laws and regulations, at both the state and federal level, which permit or require recovery from a provider of medical services (a provider is often an organization, such as a hospital, nursing home, or group of HCWs) of erroneously paid government funds.

the constituent(s) with whom the lawyer is interacting. Another common scenario is that a lawyer is asked to investigate certain activity and learns of on-going, improper activity, such as improper billing for and receipt of state and/or federal funds for medical services, by someone associated with the organization. Finally, a lawyer who has an on-going relationship with an organizational client may become aware of improper actions just because of the lawyer's general familiarity with how the organization operates. However the lawyer comes to "know," once he or she does, the question for the lawyer is "What next?" The question is a tough one, but the Rules help to answer it by clarifying that the lawyer's ultimate duty is to the organization, not its constituents, regardless of the constituent's position in the organization.

If a lawyer "knows" the foregoing, *i.e.*, that an individual associated with an organization is about to embark on or has already embarked on a course of conduct which is in violation of the individual's obligations to the organization or which is illegal and may be imputed to the organization, and the injury to the organization will be substantial, the lawyer must act. He or she "shall," says the Rule, "proceed as is reasonably necessary in the best interest of the organization."[220] This language makes the organization's primacy clear. The lawyer "shall" act in the best interest of "the organization," even at the expense of the interests of the individual(s) who may control it. The Rule then articulates several factors for the lawyer to consider in deciding what to do:

> In determining how to proceed, the lawyer shall give due consideration to *the seriousness of the violation* and its consequences, *the scope and nature of the lawyer's representation,* the responsibility in the organization and the apparent motivation of the person involved, *the policies of the organization* concerning such matters and any other relevant considerations.[221]

While the lawyer's primary obligation is to protect the organization, the lawyer must act with caution. "Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization."[222] The emphasis on not disclosing otherwise confidential information outside the organization is a natural outgrowth of a lawyer's general obligation not to reveal "confidential information relating to the representation."[223] The idea is that a lawyer can, and should, take steps within the organization to protect the best interests of the organization, while at the same time preserving the client's confidences.

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[220] WYO. RULES OF PROF'L CONDUCT R. 1.13(b) (2006).

[221] *Id.* (emphasis added).

[222] *Id.*

[223] WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

In addition to the Rule's general directive to "minimize disruption of the organization," the Rule provides specific ideas. Acting in the best interest of an organization "may include" the following: First, the lawyer may ask for "reconsideration of the matter."[224] The persons to ask, of course, are the persons, the constituents, in the words of the Rule, who are authorized to act on behalf of the organization.[225] They are the persons who made the decision in question, and they are the persons who can change it. If that does not work, the second recommended step is that the lawyer "advis[e] that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization."[226] Once again, the advice to ask for reconsideration should be given to the constituent or constituents authorized to act on behalf of the organization. If that advice falls on deaf ears, the third suggestion is to "refer[] the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law."[227] Who is a "higher authority" depends on with whom the lawyer has been interacting and, as the Rule notes, "applicable law." The ABA's new Model Rules, adopted in 2002 substantially revised Rule 1.13, including paragraphs (b) through (d). Among other things, the ABA's Rules presume that attorneys should refer the matter to a higher authority, and, under some circumstances, ABA Rule 1.13(c) permits attorneys to disclose otherwise confidential client information.[228] Those changes were not adopted when the Wyoming Rules were modified in 2005.[229]

If, for example, the organization is a corporation and the "authorized constituent" with whom the corporation's lawyer has been dealing is a vice-president, the CEO is obviously a higher authority. If the CEO is the authorized constituent, the "higher authority," according to Wyoming law, the applicable law, is the board of directors, which has ultimate authority over the corporation.[230] If the organization is a limited liability company, governance is vested in its members."[231] Whatever the entity, the ultimate control will be established by "applicable law," and the lawyer better know that law.

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[224] WYO. RULES OF PROF'L CONDUCT R. 1.13(b)(1) (2006).

[225] *See* John M. Burman, *Representing Organizations: Part I, Who is the Client, and With whom Should the Lawyer Interact?* XXV. WYOMING LAWYER at 39-41 (April 2002).

[226] WYO. RULES OF PROF'L CONDUCT R. 1.13(b)(2) (2006).

[227] *Id.* at R. 1.13(b)(3).

[228] MODEL RULES OF PROF'L CONDUCT R. 1.13(b) through (d) (2008).

[229] *See* WYO. RULES OF PROF'L CONDUCT R. 1.13 (2006).

[230] By law, a corporation is governed by its board of directors. WYO. STAT. ANN. § 17-16-801(a) (2008).

[231] *Id.* at § 17-16-801.

If asking for reconsideration, requesting a second opinion, and referring the matter to a higher authority do not succeed in diverting the organization from a harmful course of conduct, paragraph 1.13(c) provides further guidance. If "the highest authority that can act on behalf of the organization" is unwilling to alter the organization's conduct, and the conduct is *"clearly a violation of law and is likely to result in substantial injury* to the organization, the *lawyer may resign* in accordance with Rule 1.16" ["Declining or terminating representation"].[232] The language of this paragraph is more restrictive than the language of paragraph (b), which requires the lawyer to blow the whistle. While a lawyer must blow the whistle when an act or proposed act is "a violation of a legal obligation to the organization, or a violation of law," paragraph (c) requires an action which is "*clearly* a violation of law." The "substantial injury" language of paragraph (c) is the same as the language of paragraph (b). Accordingly, when the action is "clearly a violation of law" a lawyer may resign in accordance with Rule 1.16[233] (the "may resign" standard may become a shall resign if the lawyer's continued representation of the organization "will result in violation of the Rules of Professional Conduct or other law."[234]). While withdrawal likely satisfies the lawyer's ethical duty, it may be an empty gesture. The client may not be deterred from the conduct which led to the lawyer blowing the whistle, and, ultimately, the lawyer's withdrawing. The issue which then arises is whether the lawyer may disclose the now former client's intended conduct.

A lawyer whose former (or current) client intends to pursue an illegal or otherwise improper course of conduct is caught in a bind, between two potentially conflicting ethical and legal duties. On the one hand, a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[235] Further, a lawyer must withdraw from representation of a client if "the representation will result in violation of the Rules of Professional Conduct or other law."[236] On the other, a lawyer has an obligation of confidentiality to both current and former clients and may not use or reveal any "confidential information relating to the representation" of a current[237] or former client."[238] A lawyer may not, therefore, simply withdraw and disclose the reasons for doing so. There is authority, however, to support a lawyer making a "noisy withdrawal," in which the lawyer communicates, at least implicitly, the fact and the reasons for

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[232] WYO. RULES OF PROF'L CONDUCT R. 1.13(c) (2006) (emphasis added).

[233] WYO. RULES OF PROF'L CONDUCT R. 1.16 (2006) (Paragraph (a) of Rule 1.16 requires withdrawal in certain circumstances. Paragraph (b) permits withdrawal in others.).

[234] *Id.* at R. 1.16(a)(1).

[235] WYO. RULES OF PROF'L CONDUCT R. 1.2(d) (2006).

[236] WYO. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2006).

[237] WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

[238] WYO. RULES OF PROF'L CONDUCT R. 1.9(c) (2006).

withdrawing."[239] That authority is considerably stronger in Wyoming because of a Wyoming's lenient rule on disclosing confidential information.[240]

As discussed in detail above,[241] when it is "apparent" to an organization's lawyer that the interests of the organization and its constituents "are adverse," the lawyer must "explain the identity of the client . . . [and] that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[242] If the constituent with whom the lawyer is interacting does not have a lawyer, the only advice the lawyer may give the individual, which the lawyer should give, is that the individual should obtain counsel.[243] If the constituent has counsel, the lawyer may not communicate about the matter with the individual "unless the lawyer has the consent of the other lawyer or is authorized by law to do so."[244]

Requiring a lawyer to act to take reasonable steps to protect an organization's best interests is consistent with the Rules' general requirement that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."[245] It is also consistent with the ethical mandate that a lawyer "shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or other law."[246] Despite these clear directives, a lawyer must remember that the duty of confidentiality always applies and a lawyer's withdrawal from representing a client does not mean that the lawyer may disclose information about the client's conduct.[247]

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[239] Valerie Breslin & Jeff Dooley, *Whistleblowing v. Confidentiality: Can Circumstances Mandate Attorneys To Expose Their Clients,* 15 GEO. J. LEGAL ETHICS, 719, 720-22 (2002).

[240] WYO. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006) ("A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . .to prevent the client from committing a criminal act.").

[241] *See supra* notes 240 through 245 and accompanying text.

[242] WYO. RULES OF PROF'L CONDUCT R. 1.13(d) (2006).

[243] WYO. RULES OF PROF'L CONDUCT R. 4.3 (2006) ("In dealing on behalf of a client with a person who is not represented by counsel . . . [t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel. ") (emphasis added).

[244] WYO. RULES OF PROF'L CONDUCT R. 4.2 (2006).

[245] WYO. RULES OF PROF'L CONDUCT R. 1.2(d) (2006).

[246] WYO. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2006).

[247] WYO. RULES OF PROF'L CONDUCT R. 1.9(c)(1) & (2) (2006) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . .[u]se information relating to the representation to the disadvantage of the former client . . . or . . . [r]eveal information relating to the representation . . ."); *see also* WYO. RULES OF PROF'L CONDUCT R. 1.6, cmt. [25] (2006) ("The duty of confidentiality continues after the client-lawyer relationship has terminated.").

2. Disclosing the Information Which Led to Whistle-Blowing.

A lawyer's ethical duty of confidentiality is broad: "A lawyer shall not reveal confidential information relating to representation of a client *unless* the client makes an informed decision, the disclosures is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."[248] Since it is unlikely that an organization will decide to allow its lawyer to disclose the information which triggered the lawyer's whistle-blowing obligation, the question becomes is the lawyer permitted to disclose the information pursuant to "paragraph (b)," or is the lawyer required to remain mute, knowing that the proposed action may cause injury, either physical or otherwise, to third parties? In answering this question, Wyoming has taken a much different approach than the ABA.

When it comes to personal injury, the ABA suggests restricting a lawyer's disclosure of confidential information to circumstances where the lawyer "reasonably believes"[249] that disclosure is necessary to prevent "reasonably certain death or substantial bodily injury."[250] The ABA also permits disclosure when a lawyer "reasonably believes" disclosure is "necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;[251] Also, in a significant departure from the policy that a lawyer may only disclose confidential client information to prevent future crimes, the ABA now recommends that lawyers be allowed to reveal confidential client information about prior client actions in some circumstances. Subparagraph (b)(3) permits disclosure when a lawyer "reasonably believes" that disclosure is "necessary . . . to prevent**,** *mitigate or rectify* substantial injury to the financial interests or property of another that is reasonably certain to result or *has resulted* from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;[252] The use of the words "mitigate [or] rectify," and "has resulted" make the rule's applicability to past acts clear. One simply cannot "mitigate [or] rectify" future acts, and the use of the past-tense, "has resulted," obviously applies to the past, not the future. Finally, the ABA has added a disclosure provision to Rule 1.13 ("Organization as client"). If a lawyer blows the whistle inside an organization (and has referred the matter to the "highest authority that can act on behalf of an organization [and it] insists

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[248] WYO. RULES OF PROF'L CONDUCT R. 1.6(b) (2006).

[249] "Reasonable belief" is a defined term. It means: "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." MODEL RULES OF PROF'L CONDUCT, R. 1.0(3) (2008).

[250] MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(1) (2008).

[251] MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(2).

[252] MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(3) (emphasis added).

upon or fails to address [a matter] . . . that is clearly a violation of law," a lawyer may disclose information outside the organization if: (1) the lawyer "reasonably believes" (2) "that the violation is reasonably certain to result in substantial injury to the organization."[253]

The Wyoming Rules, however, take a much different approach, permitting disclosure of otherwise confidential information "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act."[254] In some ways, that standard is more liberal than the ABA's standard with respect to future acts. It does not, however, allow disclosure of past acts, ever, and is, in that way, more restrictive than the ABA's Rule.

Wyoming is not alone in rejecting the ABA's view. It is one of approximately thirty-three jurisdictions which have adopted the view that a lawyer may disclose otherwise confidential information to prevent the client from committing a criminal act.[255] (By contrast, eighteen jurisdictions have adopted the ABA's view and permit disclosure only when a client's intended criminal act will result in substantial harm or death.[256] Another eleven jurisdictions require disclosure to

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[253] MODEL RULES OF PROF'L CONDUCT, R.1.13(c) (2008).

[254] WYO. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006).

[255] *Id.* at R. 1.6(b)(1); *see also* Arkansas (ARK. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); California (CAL. RULES OF PROF'L CONDUCT R. 3-100(B)); Colorado (COLO. RULES OF PROF'L CONDUCT R. 1.6 (b)); Idaho (IDAHO RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Indiana (IND. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Iowa (IOWA CODE OF PROF'L CONDUCT R. 4-101 (C)(3)); Kansas (KAN. RULES OF PROF'L CONDUCT R. 1.6(b)(1);R. 226); Maine (ME. RULES OF PROF'L CONDUCT R. 3.6 (h)(4)); Michigan (MICH. RULES OF PROF'L CONDUCT R. 1.6 (c)(4)); Minnesota (MINN. RULES OF PROF'L CONDUCT R. 1.6 (b)(3)); Mississippi (MISS. RULES OF PROF'L CONDUCT R. 1.6 (b)(2)); Nebraska (NEB. CODE OF PROF'L CONDUCT DR. 4-101 (C)(3));New York (N.Y. RULES OF PROF'L CONDUCT DR. 4-101 C. 3); North Carolina (N.C. R BAR Ch 2, R. 1.6 (b)(2)); Ohio (OHIO CODE OF PROF'L CONDUCT DR. 4-101 (C)(3)); Oklahoma (OKLA. RULES OF PROF'L CONDUCT R. 1.6 (b)(2)(i)); Oregon (OR. CODE OF PROF'L CONDUCT DR. 4-101 (C)(3)); South Carolina (S.C. R A CT R. 407, S.C. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Tennessee (TENN. S CT RULE 8, TENN. CODE OF PROF'L CONDUCT DR. 4-101 (C)(3)); Washington (WASH. RULES OF PROF'L CONDUCT R. 1.6 (b)(2)); and West Virginia (W. VA. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)). In addition, eleven states require the disclosure of information necessary to prevent substantial bodily harm or death, and permit a lawyer to disclose information relating to other crimes. *See,* Arizona (ARIZ. ST S CT R. 42, ARIZ. CODE OF PROF'L CONDUCT ER. 1.6 (b)); Connecticut (CONN. RULES OF PROF'L CONDUCT R. 1.6 (b)); Florida (FLA. ST BAR R. 4-1.6 (b)(1)); Illinois (ILL. S CT RULES OF PROF'L CONDUCT R. 1.6 (b)); Nevada (NEV. S CT R. 1.6 (c)); New Jersey (N.J. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); North Dakota (N.D. RULES OF PROF'L CONDUCT R. 1.6 (b)); Texas (TEX. RULES OF PROF'L CONDUCT R. 1.05 (e)); Vermont (VT. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Virginia (VA R S CT PT 6 S 2, VA. RULES OF PROF'L CONDUCT R. 1.6 (c)(1)); and Wisconsin (WIS RULES OF PROF'L CONDUCT R. 20:1.6 (b)).

[256] The eighteen jurisdictions are: Alabama (ALA. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Alaska (ALA. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Delaware (DEL. RULES OF PROF'L CONDUCT R.1.6 (b)(1)); District of Columbia (D.C. RULES OF PROF'L CONDUCT R.1.6 (c)(1)); Georgia (GA. BAR R. 4-102. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)(ii)); Hawaii (HAW. S CT EX A RULES OF PROF'L CONDUCT R. 1.6 (c)(1)); Kentucky (KY. ST S CT R. 3.130, RULES OF PROF'L CONDUCT

prevent serious bodily harm or death, and they permit disclosure of information to prevent lesser crimes.[257] Allowing disclosure of confidential information to prevent a "criminal act" will certainly permit an organization's lawyer to disclose information to prevent the organization from committing a crime. Under no circumstances, however, may a Wyoming lawyer disclose a client's past conduct. The exception is for future conduct because one can prevent it, not past crimes. A "lawyer may disclose otherwise confidential information in order to prevent the criminal act which the lawyer reasonably believes is intended by the client. [But i]t is very difficult for a lawyer to 'know' when such a purpose will actually be carried out for the client may have a change of mind."[258] Accordingly, while a Wyoming lawyer may disclose a client's intent to commit a future crime, he or she never has an ethical duty under Rule 1.6 (which governs confidentiality of information) to disclose. Accordingly:

> A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, conversely, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).[259]

Regardless of whether a Wyoming lawyer has an ethical duty to disclose, he or she may have a tort duty to disclose when a client intends to commit a crime which will result in substantial bodily harm or death to an identifiable victim.[260]

R. 1.6 (b)(1)); Louisiana (L.A. ST BAR ART 16, L.A. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Maryland (MD. R CTS J & ATTYS RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Massachusetts (MASS. S CT R. 3:07, Mass. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Missouri (MO. R RULE 4, RULES OF PROF'L CONDUCT R. 4-1.6 (b)(1)); Montana (MONT. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)): New Hampshire (N.H. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); New Mexico (N.M. RULES OF PROF'L CONDUCT R. 16-106 B. ("a lawyer should reveal")); Pennsylvania (PA. RULES OF PROF'L CONDUCT R.1.6 (c)(1)); Rhode Island (R.I. R S CT ART V RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); South Dakota (S.D. ST T. 16, Ch 16-18, APP, RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); and Utah (UT. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)).

[257] Arizona (ARIZ. ST S CT RULE 42 RULES OF PROF'L CONDUCT ER. 1.6 (b)&(c)); Connecticut (CONN. RULES OF PROF'L CONDUCT R. 1.6 (b)&(c)); Florida (FLA. ST BAR R. 4-1.6 (b)(1)); Illinois (ILL. ST S CT RULES OF PROF'L CONDUCT R. 1.6 (b)&(c)(3)); Nevada (NEV. ST S CT R. 1.6(b) 2)); New Jersey (N.J. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); North Dakota (N.D. RULES OF PROF'L CONDUCT R. 1.6 (c)); Texas (TEX. RULES OF PROF'L CONDUCT R. 1.05(e)); Vermont (VT. RULES OF PROF'L CONDUCT R. 1.6 (b)(1)); Virginia (VA. R S CT PT 6 S 2, RULES OF PROF'L CONDUCT R. 1.6 (c)(1); and Wisconsin (WIS. RULES OF PROF'L CONDUCT SCR. 20:1.6 (b)).

[258] WYO. RULES OF PROF'L CONDUCT R. 1.6 cmt. [12] (2006).

[259] *Id.* at R. 1.6 cmt. [20].

[260] *See, e.g.,* John M. Burman, *An Attorney's Duty to Warn*, Vol 30, No.1, WYOMING LAWYER (February 2007).

In sum, withdrawing from representation of an organization does not free a lawyer from the duty of confidentiality discussed above as a lawyer owes a similar duty not to use or reveal confidential information regarding a former client[261] or a former prospective client.[262] The commentary[263] to Rule 1.6 explains the effect of withdrawal on a lawyer's confidentiality obligation:

> After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in Rule 1.6. Neither this Rule [1.6] nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. *Where the client is an organization,* the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, *the lawyer may make inquiry within the organization* as indicated in Rule 1.13(b).[264]

The commentary makes it clear that the Rule contemplates giving notice of the fact of withdrawal. The more difficult question is what does it mean to and how should a lawyer "disaffirm any opinion, document, affirmation, or the like?" The answer depends on the context.

When a lawyer enters an appearance in a tribunal[265] on behalf of a client, the rules change. The lawyer now owes his or her highest duty to the tribunal. The lawyer must not, among other things, "make a false statement of fact or law . . . fail to disclose to the tribunal legal authority . . . known to the lawyer to be directly adverse to the position of the client . . . [or] offer evidence the lawyer knows to be false."[266] In addition, if the lawyer has offered evidence which the lawyer subsequently learns to be false, the lawyer "shall take reasonable remedial measures" to correct the situation.[267] Such measures begin with the lawyer seeking

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[261] WYO. RULES OF PROF'L CONDUCT R. 1.9(c) (2006); *see also* WYO. RULES OF PROF'L CONDUCT R. 1.6 cmt.[25] ("The duty of confidentiality continues after the client-lawyer relationship has terminated.").

[262] WYO. RULES OF PROF'L CONDUCT R. 1.18(b) (2006).

[263] The comments which accompany each rule "explain and illustrate the meaning and purpose of the Rule." WYO. RULES OF PROF'L CONDUCT R. Scope [20] (2006).

[264] WYO. RULES OF PROF'L CONDUCT R. 1.6 cmt. [21] (2006) (emphasis added).

[265] "Tribunal" means "a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." WYO. RULES OF PROF'L CONDUCT R. 1.0(n) (2006).

[266] WYO. RULES OF PROF'L CONDUCT R. 3.3(a)(1), (2), & (4) (2006).

[267] *Id.* at R. 3.3(a)(3).

to persuade the client to correct the falsity.[268] If that fails, the lawyer may seek to withdraw from the representation if doing so "will undo the effect of the false evidence."[269] If withdrawal will not work either, the lawyer "must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6 [the rule on confidentiality]."[270] This duty to disclose is much different than a lawyer's general duty of confidentiality, which overrides the lawyer's duties to other third parties.[271] A lawyer's duties to a tribunal, however, have primacy.

A lawyer's duties to the tribunal "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."[272] This means that a "lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[273] Accordingly, if the lawyer has filed a pleading with a tribunal that the lawyer later learns contains a material misstatement of fact or law, or that omits a material fact, the lawyer must correct or supplement the pleading, or disafirm it. Doing so is required by Rule 3.3 ("Candor to the tribunal").[274] The disclosure of otherwise confidential information,

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[268] *Id.* at R. 3.3 cmt. [10].

[269] *Id.*

[270] *Id.* Although the ethical duty applies to criminal defense lawyers, it may be qualified by the client's Constitutional rights: "The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases . . . . However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. " *Id.; but see* Nix v. Whiteside, 475 U.S. 157 (1986) ("It was not a violation of a defendant's Sixth Amendment right to effective assistance of counsel for his attorney to threaten to withdraw if client committed perjury.").

[271] *See, e.g.,* WYO. RULES OF PROF'L CONDUCT R. 4.1(b) (2006) (A lawyer shall not "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.").

[272] WYO. RULES OF PROF'L CONDUCT R. 3.3(c) (2006).

[273] *Id.* at R. 3.3(a)(1).

[274] The lawyer may also have a problem with Rule 11 (of the Wyoming Rules of Civil Procedure). The problem is that a lawyer who signs a pleading which is filed with the court (which is a tribunal) is certifying that the document is: (1) not submitted for any improper purpose; (2) the legal contentions in the document are "warranted;" and (3) the factual allegations have evidentiary support. WYO. R. CIV. P. 11(b). If that turns out to be incorrect, the signing lawyer may be sanctioned. *Id.* at R. 11(c).

In Wyoming, the requirements of Rule 11 have been adopted as part of the Rules of Professional Conduct. WYO. RULES OF PROF'L CONDUCT R. 3.1(c) (2006) ("The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other court document; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.").

however, "should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."[275]

Finally, a lawyer who has entered an appearance in a court may not withdraw without the permission of the court, regardless of the client's actions.[276] The lawyer must receive the court's permission even if the Rules would otherwise require the lawyer to terminate the representation because of the severity of the client's conduct.[277] The lawyer who wishes to withdraw, and who is ethically obligated to withdraw because of a client's conduct, may not tell all. Instead, the lawyer must be careful not to disclose too much information, even information which would clearly establish the impropriety of the client's actions and the appropriateness of the lawyer's request to withdraw since the lawyer shill owes a duty of confidentiality to the client and the disclosure must be limited to that which is "necessary." The lawyer should resist the temptation to detail the reasons for seeking to withdraw, and the court should not require the lawyer to specify the reasons:

> Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. *The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted* as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 [confidentiality] and 3.3 ["Candor to the tribunal"].[278]

If the matter is not in litigation and the lawyer has not entered an appearance, Rule 3.3, which requires candor to the tribunal, will not apply, although the Rule on confidentiality (1.6) will. Withdrawal from the representation will be governed by Rule 1.16 ("Declining or terminating representation") Paragraph (a) of the Rule requires termination of the representation if continued representation "will result in violation of the Rules of Professional Conduct or other law."[279] Paragraph (b)

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[275] WYO. RULES OF PROF'L CONDUCT R. 1.6 cmt. [19] (2006).

[276] *See, e.g.,* UNIFORM RULES FOR THE DISTRICT COURTS OF WYO., R. 102(c) (2007) ("Counsel will not be permitted to withdraw from a case except upon court order.") The rule applies in circuit court, as well. UNIFORM RULES FOR THE CIRCUIT COURTS OF WYO., R. 1.02 (2007) ("The Uniform Rules for the District Courts of Wyoming shall govern the practice before the circuit courts of Wyoming.").

[277] WYO. RULES OF PROF'L CONDUCT R. 1.16(c) (2006) ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

[278] *Id.* at R. 1.16 cmt. [3] (emphasis added).

[279] *Id.* at R. 1.16(a)(1).

permits termination for a variety of reasons, including when "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent,"[280] or "the client has used the lawyer's services to perpetrate a crime or fraud."[281] Conduct which gives rise to a lawyer's duty to blow the whistle will likely fall under either the mandatory or the permissive withdrawal provisions, and if the attorney has not entered an appearance, those provisions will control withdrawal.

A lawyer's whistle-blowing duty to an organization is the reciprocal of the lawyer's obligation to ensure that constituent(s) whose conduct may lead to liability for the organization know that the organization's lawyer does not represent them. Almost by definition, when a lawyer has a duty to blow the whistle, the interests of the constituent(s) and the organization are very much in conflict. The Rules anticipate such a conflict and require an organizational lawyer to take steps to avoid that conflict.[282]

Before disclosing confidential information, a lawyer has another duty, the duty to communicate with the client about the lawyer's proposed actions and whether the client wishes to act to eliminate the need for the attorney's disclosure.[283] The reason is that a client, not the client's lawyer, is authorized to make decisions about the objectives of the representation, and the lawyer "shall abide" by those decisions.[284] Further, the lawyer "shall consult with the client as to the means by which they are to be pursued."[285] Accordingly, whether disclosing information is an objective or a means, the lawyer has a duty to consult with the client about potential disclosure and its possible effects. Furthermore, a lawyer has a duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[286] The client thus needs to make such an informed decision about whether to act to eliminate the need for disclosure by the lawyer, or to do nothing, knowing the lawyer will disclose the information.

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[280] WYO. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2006).

[281] WYO. RULES OF PROF'L CONDUCT R. 1.16(b)(3) (2006).

[282] *Id.* at R. 1.16.

[283] WYO. RULES OF PROF'L CONDUCT R. 1.6 cmt.[19] (2006) ("Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.").

[284] WYO. RULES OF PROF'L CONDUCT R. 1.2(a) (2006).

[285] *Id.*; *see also* WYO. RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2006) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished;").

[286] WYO. RULES OF PROF'L CONDUCT R. 1.4(b) (2006).

Requiring a lawyer to consult with a client before disclosure appears to be effective. In the only study which has been done on the efficacy of lawyers trying to dissuade their clients from committing violent acts, lawyer suasion was found to be very effective with individual clients who had told their lawyers of their intentions to commit violent crimes.[287] It should be similarly effective with organizational clients. It may be more effective as the organization's ultimate decision-maker may not have been involved in the original decision and may be very pleased to be able to correct the proposed action and avoid potential legal liability for the organization.

The lawyer's ethical duties are clear. The lawyer represents the organization, and he or she must act to protect it when the lawyer knows that the organization may be substantially harmed by the actions or inactions of an individual within or associated with the organization. Similarly, the lawyer must take care not to create the impression that the lawyer represents the individuals who work for or with the organization. This obligation means that the lawyer must explain his or her role to the individuals with whom the lawyer is interacting.

When all is said and done, a lawyer in Wyoming has discretion to reveal information when the lawyer reasonably believes disclosure is necessary to prevent the client from committing "a criminal act."[288] That will often permit a lawyer for an organization to disclose at least some of the conduct which has given rise to the lawyer's obligation to blow the whistle to protect the best interests of the organization. A disclosure outside the organization, however, must be limited. It "should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."[289]

3. The Legal Framework

A lawyer owes both ethical and legal duties to a client. When it comes to blowing the whistle, a Wyoming lawyer's ethical and legal duties are virtually identical.

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[287] A 1993 study of New Jersey lawyers showed both that lawyers confront the issue of clients intending violent criminal action fairly often, and that the lawyers are generally successful in persuading the client not to commit the acts. Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 111–12 (1994). First, Professor Levin found that sixty-seven lawyers out of 776 responding lawyers reported that they had, at least once in their careers, reasonably believed that a client intended to commit future crime which would cause serious injury to another. Second, the study found that lawyers who reasonably believed that their clients were going to seriously harm a third party tried to convince the clients not to do so. *Id.* at 117. The lawyers believed they had been successful in persuading their clients not to commit the crimes 92.4% of the time. *Id.*

[288] WYO. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006).

[289] *Id.* at R. 1.6 cmt. [19].

The Third Restatement of the Law Governing Lawyers mirrors the ethical duty described above:

> If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization . . . the lawyer must proceed in what the lawyer reasonably believes to be in the best interests of the organization.[290]

The Restatement suggests the same steps as Wyoming's Rule 1.13(b). First, the lawyer may "ask the constituent to reconsider" the proposed action.[291] Second, the lawyer may "recommend that a second legal opinion be sought."[292] Third, the lawyer may "seek review by appropriate supervisory authority within the organization, including . . . the highest authority that can act on behalf of the organization."[293] Blowing the whistle on constituent wrong-doing is not, however, all an organizational lawyer must do.

As a general matter, a lawyer owes every client an ethical duty of competence, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[294] The legal duty is similar. A lawyer is held to the standard of "a reasonable, careful and prudent lawyer . . . ."[295]

The legal duties a lawyer owes to an organizational client mirror the lawyer's ethical duties. The Wyoming Supreme Court addressed an organizational lawyer's legal duties in *Bowen v. Smith.*[296] In that case, minority shareholders sued the corporation's lawyers. Although the history leading up to and culminating in the suit is lengthy and complex, the salient facts are both simple and important. The corporation retained a law firm, at the sole expense of the majority shareholder, to represent it in litigation. The litigation was resolved through a cash settlement favorable to the corporation. The majority and minority shareholders then disagreed about the division of the settlement proceeds, a dispute which, itself, ultimately ended in litigation. In that dispute, the corporation's former law firm represented the majority shareholder. While the suit over the division of the settlement

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[290] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 96 (2) (2000).

[291] *Id.* at § 96(3).

[292] *Id.*

[293] *Id.*

[294] WYO. RULES OF PROF'L CONDUCT R. 1.1.(2006).

[295] Moore v. Lubnau, 855 P.2d 1245 (Wyo. 1993).

[296] Bowen v. Smith, 838 P.2d 186 (Wyo. 1992) overturned in part on other grounds, *In re* Estate of Drwenski, 83 P.3d 457, 463 (Wyo.2004).

proceeds was pending, the minority shareholders sued the corporation's former law firm, the firm which was then representing the majority shareholder. The trial court granted the law firm's motion for summary judgment. The judgment was upheld on appeal.

The minority shareholders' suit against the corporation's former law firm was premised on the notion that an attorney-client relationship had existed between the corporation's law firm and the corporation's minority shareholders.[297] The minority shareholders thus asserted claims against the firm for breach of fiduciary duty; conspiracy; breach of contract; fraud; malpractice; and punitive damages.[298] Cutting through the cluster of charges and counter-charges, the supreme court held that the key was "one simple issue."[299] That is, whether "representation of the parent corporation . . . by attorneys employed in the interest of the majority shareholder . . . create[d] an attorney/client relationship with the minority shareholders in the same corporation."[300] The answer, said the court, was no: "[T]he law firm was not representing the minority shareholders and violated no fiduciary relationship to them."[301] Furthermore, as it should have been, "the settlement [had been] approved by the board of directors of the corporation . . . ."[302] The law firm, in other words, represented the corporation, the organization, to which it owed ethical and legal duties, and not the individual shareholders who comprise it, the constituents. The Wyoming view is in accord with the prevailing principle that a lawyer for an organization owes legal duties to the organization, and not to the organization's constituents.[303]

Bowen vs. Smith is premised on a fundamental principle of corporate law. A corporation is an "independent entity" which must be "distinguished from individual shareholders."[304] The same principle should apply to a professional corporation of HCWs. Not only is that distinction well-established in law, it is, said the court, a "principle" of the Wyoming Rules of Professional Conduct, Rule 1.13 ["Organization as client"], in particular.[305] The ultimate question for the court, therefore, was whether the law firm had fulfilled its duties to its client, the corporation, not whether the law firm was looking out for the interests of the shareholders, who were non-clients. The answer, said the court, was yes: "[t]he parent corporation was faithfully and fully represented by the law firm . . . ."[306]

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[297] *Bowden*, 838 P.2d at 187 n.1.

[298] *Id.*

[299] *Id.* at 189.

[300] *Id.*

[301] *Id.* at 187.

[302] *Bowden*, 838 P.2d at 190.

[303] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 96(1) (2000).

[304] *Bowden*, 838 P.2d at 193.

[305] *Id.*

[306] *Id.*

While *Bowen* remains good law, a lawyer who represents an organization must be careful not to blur the line between representing the organization and the constituents within it. The problem is that in Wyoming, the attorney-client relationship is a contractual one. It may arise by express agreement of the parties, or it "may be implied from the conduct of the parties."[307] When a constituent claims an attorney-client relationship existed with both the organization and the constituent, the question for a reviewing court will be whether the constituent reasonably believed the lawyer represented him or her individually, and "the burden of proof to show that is was unreasonable for a client to believe that an attorney-client relationship existed . . . *has to rest with the attorney.*"[308]

One of the difficulties an organizational lawyer faces is that he or she "may also represent any of its directors, officers, employees, members, shareholders or other constituents" so long as the dual representation does not involve an impermissible conflict of interest.[309] So long as no problems arise, it is unlikely for an impermissible conflict to prevent dual representation of a constituent and the organization. When the obligation to blow the whistle arises, however, it is extremely likely that the circumstances which gave rise to that obligation will be the result of an adverse relationship between the constituent(s) involved and the organization.[310] When that occurs, having an attorney-client relationship with both an organization and some of its constituents will likely place the lawyer in an impossible conflict, one which will require the lawyer's complete withdrawal from representing either the organization or its constituents.[311]

The frequency and likelihood of an organizational constituent reasonably believing that the organization's lawyer also represents that individual is the reason for the organizational attorney's ethical duty to be aware of when the organization's interests and those of a constituent begin to diverge, and the further duty of the lawyer to clarify the identity of the client when that occurs.[312] It is critical, therefore, that the lawyer not create the impression in the minds of constituents that the lawyer represents them, as well as the organization.

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[307] Chavez v. State, 604 P.2d 1341, 1346 (Wyo. 1980), *cert den.* 446 U.S. 904; *see also* Carlson v. Langdon, 751 P.2d 344, 347 (Wyo. 1988).

[308] *Carlson*, 751 P.2d at 348 (emphasis added).

[309] WYO. RULES OF PROF'L CONDUCT R. 1.13(d) (2006).

[310] The issue of conflicts between the interests of constituents and the organization is discussed in detail at notes 221 through 228, *infra,* and accompanying text.

[311] Some conflicts may not be waived. The question is, *inter alia,* whether the lawyer with the conflict "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected." WYO. RULES OF PROF'L CONDUCT R. 1.7(b)(1) (2006). In addition, the clients must "make[ ] an informed decision to waive the conflict, in writing signed by the client." *Id.* at R. 1.7(b)(4).

[312] WYO. RULES OF PROF'L CONDUCT R. 1.13(d) (2006).

4. *Special Considerations for Lawyers Who Represent HCWs or Health Care Organizations*

When the client is a HCW or an organization which provides health care and receives federal funds (virtually all health care providers, whether individual HCWs or health care organizations, receive Medicare or Medicaid payments, which include federal funds), the lawyer needs to be aware of federal law which arguably overrides a lawyer's general ethical and legal obligations of confidentiality, even with respect to past acts. A little known provision of the Social Security Act has the potential to fundamentally alter a lawyer's responsibility to a health care client:

> *Whoever* . . . having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals *or fails to disclose* such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized [is guilty of a felony].[313]

Whether a lawyer who represents a provider of health care services, whether an individual HCW or an organization, who learns that the provider has received federal funds in excess of that to which the provider is entitled falls under the mandate of the statute is not clear. Nevertheless, its plain language—"whoever"—could be construed by a zealous federal prosecutor to apply to a health lawyer and effectively force him or her to inform on the lawyer's client. Such a result would dramatically change the traditional relationship between a client, who consults a lawyer for legal assistance, and the lawyer, who would become the client's worst nightmare (a government informant), instead of a confidant who will zealously represent the client's interests.

Thus far, no reported cases say that a lawyer falls within the purview of the above statute.[314] There are also many potential defenses should such a case arise. Lawyers who represent health care providers who receive federal funds, however,

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[313] 42 U.S.C. § 1320a-7b(a)(3) (2006) (emphasis added).

[314] *See* R.J. NESSIM, *Health Care Disclosure Statute: What Does It Mean*? 13 CRIMINAL JUSTICE 34 (Winter 1999). For an extensive discussion of a health care lawyer's duty to report, *see*, BEST PRACTICES HANDBOOK IN ADVISING CLIENTS ON FRAUD & ABUSE ISSUES, Chapters 1 & 2 (American Health Lawyers Association 1999); see also Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled Involuntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 897 (2006) ("'[T]he [corporate] attorney-client privilege is under attack today as never before.'").

need to be aware of the law and its potential applicability and advise their clients accordingly.

Lawyers who represent HCWs, health care organizations, or both, also need to be familiar with and advise their clients about complying with federal fraud and abuse laws. In particular, the so-called STARK and anti–kickback laws should be of concern. While similar in some respects, "[t]he Stark II exceptions unfortunately are sufficiently different from the anti-kickback law that a transaction can be valid under one and invalid under the other."[315] Both laws apply when a HCW or a health care organization provide "ancillary" services, such as laboratory or other types of tests, or referrals to other HCWs or organizations.

When STARK was first enacted in 1989 it applied only to "Medicare referrals for clinical laboratory services."[316] In 1993, STARK was "significantly modified,"[317] and became STARK II. As modified, "Stark II created a blanket prohibition on physician Medicare and Medicaid referrals."[318]

After STARK became law, "the Health Care Financing Administration ("HCFA") published proposed regulations interpreting it on March 11, 1992 and final regulations on August 14, 1995 (60 Fed. Reg. 41914)."[319] After the 1993 amendments became law:

> HCFA published proposed regulations interpreting Stark II on January 9, 1998 (63 Fed. Reg. 1659) and published Phase I of the final regulations of Stark II on January 4, 2001 (66 Fed. Reg. 856). The Centers for Medicare and Medicaid Services ("CMS")[320] published Phase II of the final regulations of Stark II on March 26, 2004 (69 Fed. Reg. 16054). The Phase II final

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[315] 4 COMPENSATION AND BENEFITS § 57:199, Part VIII. Health Care Benefits, Chapter 57. Other Legal Issues Affecting Health Care Plans, XI. Fraud and Abuse in Health Care Transactions, E. Other Federal Self-Referral Law (Stark Acts) (2008) ("The Stark II exceptions unfortunately are sufficiently different from the anti-kickback law that a transaction can be valid under one and invalid under the other.").

[316] *Id.*

[317] *Id.*

[318] *Id.; see also* 42 U.S.C. § 1395nn (2003).

[319] Grant Nyhammer, *Physician Provided Physical Therapy Under Attack: South Carolina Rejects Consensus In Sloan v. South Carolina Board of Physical Therapy Examiner,* 20 NO. 3 HEALTH LAW. 17, n.281 (2008).

[320] HCFA was renamed CMS in January of 2001. Harvey L. McCormick, MEDICARE AND MEDICAID CLAIMS AND PROC. § 1:1, fen. 1 (4th ed.) ("The Secretary of the Department of Health and Human Services . . . announced on June 14, 2001, the new name for the Health Care Financing Administration (HCFA): The Centers for Medicare & Medicaid Services (CMS)").

> regulations of Stark II are published in the Code of Federal Regulations at 42 C.F.R. §411.350 et. seq. CMS published Phase III of the final regulations of Stark II on September 5, 2007. 72 Fed. Reg. 51012- 51099 (2007).[321]
>
> Stark II applies to a variety of designated health services including
> - clinical laboratory services;
> - physical therapy services;
> - occupational therapy services
> - radiology or other diagnostic services;
> - radiation therapy services;
> - durable medical equipment;
> - parenteral and enteral nutrients, equipment, or supplies;
> - prosthetics, orthotics, and prosthetic devices;
> - home health services;
> - outpatient prescription drugs; and
> - inpatient and outpatient hospital services.[322]

The anti-kickback statute[323] "is a criminal statute that prohibits the knowing and willful offer, solicitation, payment, or receipt of remuneration to induce or reward the referral of any business payable by a federal health care program."[324] The severity of the potential sanctions should cause this statue to be in the forefront of the minds of every lawyer who represents HCWs or health care organizations that receive federal funds. The issue is that "violation of the anti-kickback statute is a crime, and the punishment carries a mandatory exclusion [from the program, such as Medicare] along with other penalties."[325]

The anti-kickback statute does "list[] eight exceptions to which the statutory prohibitions against solicitation or receipt of remuneration in return for, or to induce, referral of program-related benefits under a federal health-care program do not apply . . . ."[326]

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[321] Nyhammer, *supra* note 319, at n.281.

[322] 4 COMPENSATION AND BENEFITS § 57:199, Part VIII. Health Care Benefits, Chapter 57. Other Legal Issues Affecting Health Care Plans, XI. Fraud and Abuse in Health Care Transactions, E. Other Federal Self-Referral Law (Stark Acts) (2008).

[323] 42 U.S.C. § 1128B(b)(3) (2006).

[324] Richard Kusserow, *Anti-Kickback Statute, Hospitals Cannot Form Intent to Violate the Law, Executives Might Pay More Attention to What They are Doing if They Knew They Could Be Held Liable,* 10 NO. 2 J. HEALTH COMPLIANCE 55 (March-April 2008).

[325] *Id.*

[326] Kimberly C. Simmons, *Florida Jurisprudence, Second Edition, Database* updated, 57 FLA. JUR 2D WELFARE § 4 (2008).

The key for a lawyer is to watch for any arrangement that could be construed as a referral or kickback. If such a thing exists, and the lawyer "knows" it, the whistle-blowing provisions, discussed above,[327] come into play.

5. Summary

A lawyer for a health care organization owes primary allegiance to the organization, not the individuals, the constituents, who make up the organization and with whom the lawyer interacts. When the actions or inactions of anyone, even constituents, threaten the organization, the lawyer must blow the whistle. He or she must act to protect the organization, even at the expense of the constituents with whom the lawyer interacts.

A lawyer has some options. The lawyer may ask for reconsideration, for a second legal opinion, or refer the matter to a higher, or even the highest, authority in the organization. If that does not work, the lawyer may withdraw (withdrawal will be required if the lawyer's services will be used to perpetuate a crime or fraud). Both before and after withdrawal, a lawyer owes a duty of confidentiality to the client. The lawyer may be permitted, however, to disclose both the fact of withdrawal and at least some information about why withdrawal occurred. The lawyer should neither withdraw nor disclose information, however, until after he or she has advised the client of why the lawyer is proposing to withdraw, why, the potential ramifications of withdrawal, and that before withdrawal, the client has an opportunity to decide how to proceed in light of that information.

Because an organizational lawyer's primary obligation is to the organization, the lawyer must strive to keep the line between the client (the organization) and its constituents (the individuals) clear. A lawyer who allows the line to blur, and by whose conduct allows an implied attorney-client relationship with such constituents to arise, may well face a conflict which cannot be waived. If that occurs, the lawyer will be required to withdraw from representing the organization and the constituents. Such a result will be a grave disservice to all clients, especially the organization which hired the lawyer in the first place, and to whom the lawyer owed his or her primary loyalty.

Finally, the unique nature of the health professions, and the concomitant receipt by most health care providers of federal funds, state funds, or both, imposes special obligations on the providers and their lawyers to make sure that they do not run afoul of federal law, state law, or both, thereby incurring civil liability, criminal liability, or both.

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[327] *See supra* notes 209–247 and accompanying text.

MEDICAL MALPRACTICE AND STATE MEDICAL CENTERS: *CLARKE v. OREGON HEALTH SCIENCES UNIVERSITY*

*Professor Arthur Birmingham LaFrance**
Lewis and Clarke Law School

Laramie, Wyoming
April 2, 2008

Before I get started what I do want to say is that it's a real pleasure to be back here in Laramie. I taught Bioethics here last semester. I loved the students, I loved the school and I had a chance to participate in some of the earlier discussions of this conference. Most of my suggestions I'm pleased to report were ignored and as a consequence what we have here is a huge success; national caliber speakers, somewhere around 200 people in the room, information which I think is both theoretical and also of immediate value, and none of that comes easily. It takes a huge amount of work and so I hope you'll join me in congratulating Darci Arsene and give her a round of applause but until she stands we can't do that and Aaron Bieber, is Aaron here, well, Darci will tell Aaron that your round of applause extended to Aaron as well and then I particularly wanted to extend my congratulations to Assistant Dean Denise Burke who is over here; I'll ask her to rise because this has been a lot of work for a long time and a round of applause is well deserved.

Now what I propose to do is to talk about medical malpractice and state medical centers. I don't suggest that this has immediate relevance to many of you in this room although as I go along I think some of the analysis will come clear in ways which I hope you will find useful and interesting. I'm talking about this subject chiefly because I tell my students, and I've told them for decades, that you need to bring passion to your work, whether it be law practice or medical practice, and when you see something that seems wrong, that in your gut you find upsetting maybe even outrageous, you need to understand what is going on with it and perhaps change it, or at least challenge it.

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* Professor Arthur Birmingham LaFrance teaches courses in health law, bioethics, and health policy at Lewis and Clarke Law School in Portland, Oregon. He also has taught those subjects in the Health Law program at the University of Houston, as well as in the legal departments at Canterbury University in Christchurch New Zealand and Murdoch University in Perth Australia. He has recently published articles on state health reform and Oregon's physician-assisted death statute. He is the author of teaching text for law schools, Bioethics: Health, Human Rights and the Law (2d ed. Lexis 2006).

We as professionals are privileged with our licenses to bring to bear resources of society not only in the routine medical or legal practice which we enjoy but also in our civic lives, to confront and defeat outrageous injustices. I am speaking about one of those.

In December of this past year *The Oregonian*, our Portland newspaper, reported on a case which caught my attention. It was *Clarke v. Oregon Health Sciences University*.[1] It had caught my attention because some of its dimensions were news to me. I've been teaching about health law and health care delivery for well over twenty years and I've seen health care systems at work in a number of countries and what was happening here was new and in my experience different.

Jordaan Clarke was born in February and a couple of months later in May he went back to Oregon Health Sciences University to have heart repair surgery. As we heard earlier from our speakers, at Johns Hopkins it's not unusual for vents to be misplaced and the vent was misplaced with Jordaan Clarke. My medical degree, as I tell my students, is still in the mail and so I won't get more sophisticated than simply to say that the vent should have gone where the windpipe was and instead it went to where the food goes into the stomach. Perhaps, I shouldn't put it as frivolously as that because as a consequence Jordaan Clarke is brain damaged and for the rest of his life will need extensive medical and custodial and therapeutic care; devastating for him and devastating for his parents.

So far all this is just a routine story and it could be leading into a routine discussion of medical malpractice but it's not because what is different here is that the parties agree there was approximately $17 million dollars in damages that had been inflicted upon the Clarke family. Moreover they agreed that this was a product of negligence. Moreover they agreed on who had engaged in the negligence. So none of the criticisms of our medical malpractice system would apply in this case: that our torts system frequently excludes those needing relief, awards relief against those who are not at fault, provides inadequate relief, fails to get at the root causes of medical error.[2]

Those are criticisms with which by and large I agree, but they simply would not apply here. This was a case where a wrong had been done, everybody agreed not only on that fact but also on the consequences of it. But Oregon statutes provide that damages against a state agency cannot exceed $200 thousand dollars,[3]

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[1] Clarke v. OHSU, 206 Or. App. 610, 138 P.3d 900 (Or. App. 2006).

[2] There are abundant sources criticizing our existing tort system's approach in medical malpractice. These will be cited at a later time in the article which will follow this speech. At present, let me say simply that I agree with the critics who say a better system is needed to ensure improved safety in health care, and, at the same time, to assure full care and compensation of those injured by adverse events.

[3] OR. REV. STAT. ANN. § 30.270 (West 2007).

so Oregon Health Sciences University said we are a state agency and Clarke family you need to come up with $16 million, $800 thousand dollars to cover the mistakes that we admit we made. One very troubling dimension to this, with which I was totally unfamiliar, is this; Oregon in 1991 modified its statutes to provide that when state employees are sued the agency is substituted[4] so that the doctors and the nurses who were involved in Jordaan Clarke's case could not be held individually liable for their errors and their negligence, and most importantly it meant that whatever malpractice insurance they carried would not be available to the Clarke family. So put these two together and the Clarkes get only $200 thousand dollars, because the State of Oregon like the majority of states has provided that a state medical center is immune from liability and responsibility for its errors and moreover in about half of those states, employees of the state medical center are totally relieved from responsibility for their misconduct.

So a couple of background comments about medical malpractice damages. I think it's all common knowledge for all of us that our medical malpractice system for compensating for error requires that negligence be found. Damages are usually economic. They can be non-economic as in pain and suffering, sometimes they can go to punitive damages as well. The purpose is to compensate, or to deter future errors, and to distribute costs across society.[5] My point here is not to rehearse or discuss the criticisms of that system, I would join in most of them, it's an awful way to provide reserves and compensation for families that need those reserves to compensate for errors which they'll have to live with for the rest of their lives. It's also an awful way to try to improve safety in health care when the finding must, as a predicate, be negligence. A number of states have therefore set caps on the damages that can be rewarded; some of those state courts have held caps to be unconstitutional as unfair and unequal,[6] but it's not unusual to find that a state has said economic damages in med mal cases may surely be awarded but noneconomic damages beyond that will be limited to let's say $250,000 or $300,000 dollars.

In Oregon several years ago a $500,000 dollar cap had been invalidated as too rigid: denying equal protection, not tailoring remedies to the needs of a particular case. Significantly in Jordaan Clarke's case the cap remains because Oregon Health Sciences University (OHSU) maintains that it is a state medical center, as a result of which patients are specially disabled in ways which would not be true for patients going to any other medical center in that state or other states as well.

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[4] OR. REV. STAT. ANN. § 30.270 (West 2007).

[5] Again, these considerations are common knowledge for those in attendance at the conference. For those needing references, they will be provided in the article presently being drafted.

[6] Indeed, Oregon has invalidated a $500,000 cap on damages generally. And so the limitation of the *Clarke* case, where the limitation to $200,000 is solely because of state sovereignty, is doubly invidious: first, because it is so low and inadequate and discriminatory, but, second, because if the wrongdoers have been in the private sector, they would be fully responsible there would be no limitation at all.

What did the Supreme Court in Oregon say in the Clarke case? First of all, it said OHSU is a state instrument and a state agency and therefore immune from liability. Its functions are a public function, it has public powers, it educates, it provides health care, and the governor appoints the Board. According to the 1856 Constitution of the State of Oregon, this is a state agency; it is like the Port of Portland, it's like the Board of Higher Education, it's like SAIF, which is our State Accident Insurance Fund or workers comp. fund. And so when the State decided it would waive its immunity, but only to the amount of $200,000 dollars, OHSU, like the Department of Transportation or any other agency, could commit wrongs and deny responsibility beyond $200,000 dollars.

The Oregon Supreme Court then separately addressed the issue of the liability of employees, the doctors, the nurses, and the like, and said that setting the cap at $200,000 dollars was not valid because in 1856 they would have been liable, they did not have immunity and under the Oregon Constitution, if you take away a remedy you've got to give compensation, you've got to give a substantially equivalent remedy. Two hundred thousand dollars, the last time I ran the math, was not equivalent to $17 million dollars, especially when a family faces the horrific future that the Clarke family is facing.

Other states have taken a position similar to Oregon's as to their state medical centers, and they continue to immunize totally the medical center employees.

I file a dissenting view. My students will tell you that I do this often, and I can do it because I'm not on the court and when this case will go back up to the Oregon Supreme Court I will probably do an amicus brief if I can find some group in the community that will let me do it for them. My wife has noted that if she had known my entire legal career would consist of pro bono activity she might have considered another line of marriage.

My view in the amicus brief would be first of all that OHSU is not a state agency by 1856 Constitution standards or indeed by any present time meaning of the term and that this would be true of many other state medical centers as well. The modern medical school wasn't really even conceived until 1917, some of you will know about the Flexner Report. Medical centers are a part of the 1980s. Also the ways in which medical centers are funded and operated changed in the 1980s with Medicare and Medicaid. Most modern medical centers are, really, federal in nature, and at least when viewed from the perspective of their funding: not only is much of it from Medicare or Medicare, but in OHSU's case,[7] $300 million a year for research comes mostly from NIH, a federal agency. Finally not only is the

[7] The figures discussed below concerning OHSU's operations and finances, come from OHSU's annual reports or business plan or website. An interested reader can readily find the relevant documents, either through the website or by request directly to the president's office of OHSU. No effort will be made here to provide the detailed footnoting found in scholarly articles.

modern medical center a new entity, and unlike any other state agency, but it is very much like its private competitors, so if you download from OHSU's website their 20/20 Vision Plan it reads like a business plan for any hospital in Colorado or Wyoming, Nebraska or Montana.

As for the employees, my view is basically they should be responsible for their torts and wrongs just as if they were working for any other health care entity. For one thing to say that all employees of OHSU or a state medical center shall be immune from suit ignores the tremendous variety among their statuses and relationships. There are attending physicians, there are hospitalists, the folks from Johns Hopkins this morning were talking about residents and interns and that's just looking at the medical staff. There are in addition at OHSU janitors, and there are people who work in the cafeteria, there are groundskeepers, and all of them are immunized by relationship to OHSU.

And then, of course, there is the medical staff, comprised, as with all medical centers, principally of private practitioners in the community, who place their patients in a hospital, and sometimes provide the services there, raising the question of whether that very limited relationship should immunize them as well. Most importantly, OHSU has a number of clinics around the state. Most medical centers do. It also has developed recently a couple of research facilities in Florida and I must say those are looking very good about this time of year. I don't know if the state immunity extends to the people in Florida but I would expect that's part of the bargain.

One other point about the employees, those of you have experienced CMS and Medicare provisions, and several people spoke about these this morning, will know that as a part of CMS's reimbursement formulas for physicians, malpractice expenses are factored in. Now it's a relatively small factor but that means that for the employees who are being immunized at OHSU, there has already been a factor payment in their Medicare reimbursement formula for medical malpractice insurance, which they're not buying! But presumably they nevertheless keep the heightened Medicare reimbursement.

Two other points about my dissenting view; one is, quite apart from all of this, protecting OHSU and its employees is a very discriminatory process. It means that OHSU, in competing against other hospitals and other medical centers, has a huge economic advantage. They are discriminated against because they do not have blanket immunity and their expenses are therefore heightened. It's also discriminatory against patients who go to OHSU who do not have the benefit of knowing that if OHSU errs, they will not be compensated. There will be no care for them after care has gone wrong. They are not told if they go to other hospitals, they have the benefit, however inefficient, of care and compensation for medical error.

Separately, in terms of unfairness, the common law claim against the doctors has been taken without a quid pro quo and that is what the Oregon Supreme Court has reversed and remanded; that issue is now before the trial court. This is not an easy case. If $200,000 is too little when the cost is $17 million dollars, the trial court has got to come up with a formula which is somehow going to be fair. How they will do that is beyond me and the inability to do that is a fundamental flaw in this system of immunizing state medical centers and their employees. The Supreme Court has seemed to imply in the *Clarke* case that a flat rate can and might be permissible, but if the validity of the flat rate has got to be tested in the context of each case, on a case-by-case basis, then a flat rate simply does not work. At the same time, a patient as a litigant can never know whether limitations are going to be imposed, at some level. Obviously, this is unworkable. The only feasible approach is simply to say, as with private malpractice litigation, there should be no cap at all.

Now I'm going to take a couple of minutes and take a closer look at OHSU, not necessarily because anybody here will ever be a patient there (but if you are, make sure you have good insurance), but because some of these observations about governance, finance and the like apply to medical centers around the country.

For one thing the modern medical center did not exist as I said in 1856. The Flexner Report invented med schools in 1917 and cut by two-thirds the med schools that were in existence then. As a result of the Flexner Report, we invented the four-year med school, invented the notion of clinical medical education, invented the notion of the connection to hospitals in 1917, and so this is something new, familiar to us, but new to the state constitution. OHSU moved from Willamette University to the University of Oregon and then on to the State Board of Education and in 1995 separated itself from the Board and the University of Oregon and Oregon State and other such entities precisely so it could compete in the private market place with private entities.

Yet it claims state immunity! It is similar to competitors and centers in other states. As I've mentioned, the governor does in fact appoint the Board, but the only contribution the state makes now is $45 million dollars a year in a $1.3 billion dollar a year budget; small potatoes. The legislative purposes were declared in severing OHSU as being education, research, a delivery resource to the people of the state. Those are important purposes, OHSU performs them well, but so do a dozen other hospitals in the Portland area.

If we take a closer look at organization of the modern medical center, OHSU as an example, has a med school, a dental school, a nursing school, a grad school, a bunch of research units, including toxicology and bioinfo. We have a primate center, which every few months gets into the newspapers because of PETA finding more horrendous misconduct and then the primate center defends itself, plus a neurological sciences center, and two hospitals each at about 450 beds.

There are 150 primary or specialty clinics around the state, and some interesting developments in Florida!

None of this was imaginable in 1856 or 1956 or even perhaps 25 or 30 years ago. And how it can be said that a single, crude concept like sovereign immunity attaches equally to all these things or in what ways it will play out, boggles the imagination. Add two other considerations. OHSU has formed its own medical group. This is a standard practice for large hospitals around the country and these medical groups may have hundreds of docs rendering health care. The question then becomes: are all of them immune from liability by dint of some gossamer connection to OHSU?

And then the final point that I'll mention is the so-called "captive" insurance company. On the plane here I was reading OHSU's annual report. You have to be committed, maybe even obsessed, about an issue and a case to pore through annual reports, but I do. I started life as a public utilities attorney, fortunately I escaped that, but I retain the capacity to review financials for the items barely hidden, and I stumbled across in the annual report a reference to a "captive" insurance company which OHSU is maintaining even while it's wrapping itself in immunity from liability. If they are insured, and can insure themselves, why do they need immunity? And why do they maintain that the *Clarke* case is financially beyond their ability to bear?

And finally as a part of the organization, not only is OHSU a corporation but its foundation, hundreds of millions of dollars, are separate and its children's hospital, at least tens of millions of dollars, is also separate. Are they nevertheless immune, although separate from OHSU, as part of a state agency?

When the Oregon Supreme Court decided the *Clarke* case, the president was quoted, this is the president of OHSU, was quoted in the newspaper as saying that this was an utter disaster.[8] It would cost between $30 and $50 million a year.[9] It would mean that OHSU would have to shut down clinics, rural services, it would have to raise tuition, delay repairs, reduce enrollment, it would be taking in fewer students in the med school, they have about 2500 students all told. So on the plane I took a look at the annual financial statements. In 2007, revenues of $1.37 billion were up from $1.25 billion. Patient revenue was up 8%. The return in 2007 on endowment was 17%. They reported $34 million dollars in profits as a not-for-profit public service entity, $34 million dollars in net profits that could have paid for Jordaan Clarke for the rest of his life and had $11 million dollars left over in 2007 alone.

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[8] There are a number of such articles in the Oregonian, elaborating OHSU's pain.

[9] How this figure was determined has never been stated. The financial statements, to say that OHS unit has increased name and set aside against probable incidents.

Now I could go on; cash and short-term investments were up 44% in 2007 alone. But in some ways the most significant figures I saw in the annual report, and I've got to double check this and I hope I'm wrong, but I do believe I saw it: in 2007 OHSU, a public service entity, claiming to be serving the state as a state agency, reported a paltry $34 thousand dollars in charity care. That is somewhere near .002% of revenues. If they were a not-for-profit corporation like half of the hospitals in this country, the IRS, as some of you know, would be beating on them right now with newly processed regs to assure that not for profit hospitals really do charity care. Say, 3%, not .002%! I hope I'm wrong but the figure I saw against gross revenues of $1.3 billion—they did $34 thousand dollars in charity care.

The point of all this is; they can afford to pay for Jordaan Clarke and all of the Jordaan Clarkes and they should do so. Error is inevitable; it's a part of care. The pattern of services at OHSU is not as big as at John Hopkins, which we have heard about today, but it's pretty big, 184,000 patients annually, educating 2500 students, and $300 million dollars a year in research funding. As far as I can tell the pattern of service is standard. They have a category called Other Adults—about 57,000 a year, orthopedics and gastrointestinal about 10,000 each year, and then they have a category called Women, the women here will enjoy this, it's just called Women and they're about 35,000 a year, and somewhere in there is pediatrics and somewhere in pediatrics comes Jordaan Clarke. Let's look at it this way: if there are 184,000 patients, and the speakers at this conference have largely agreed that error is one adverse event for every ten patients, then approximately 18,000 patients a year are erred on. How can OHSU, or any provider, solicit such people to come for care, indeed charge for care, while refusing to accept responsibility for the harm inflicted as part of such care?

So my position is that OHSU and most other state medical centers should be viewed like any provider of care. It should have the same responsibilities. It competes with Legacy, with Providence, with small community hospitals like Tuality. Its own business statement says that it competes with community hospitals. It talks about market share, about 8–12% in varying markets around the state of Oregon. If it is in the market, they should play by the market rules.

Look at this from a somewhat different perspective. Immunity gives OHSU an unfair edge in service, in hiring, and in competition. This is a point that ought to be a concern to everybody in the community. We need all of those other hospitals to form the safety net of which OHSU's view is only a part. Immunity tends to harm the safety net.

Realistically, OHSU is far more federal than it is state, by a wide margin. Focusing on the funding, the federal funding for OHSU is chiefly through Medicare and Medicaid. About 60% of its funding is from patient revenues: that would be Medicare, Medicaid, Blue Cross Blue Shield, and some other private programs. 30% is through gifts and contracts, including $300 million in research

funds—$200 million from NIH. Now if you were to take the balance sheet of any other hospital or medical center in the country, I think it would look pretty much the same. A 60/30 distribution, which has almost nothing to do with the state of Oregon. The research component of OHSU was certainly performing a public function, and it is—I hope all of it—important research, but it's not state research, that money doesn't come from the State of Oregon and it doesn't necessarily benefit the people of Oregon.

But they moved to the structure of multiple subsidiaries which I mentioned, the clinics, the doctors groups and the like, along which are in medical school, nursing school. These schools are an important consideration which does tend to distinguish a medical center from even a large hospital in a metropolitan area, unless one stops to reflect upon the composition and the missions of large urban hospitals. They have residents, they have interns, many of them have their own nursing schools, many of them have their own paraprofessional schools. It is important that they contribute those educational products and missions to the community. When so viewed, even a major medical center like OHSU is not very different in terms of its public mission from any large metropolitan hospital.

The difference is OHSU has state sovereign immunity and doesn't have to pay for its mistakes.

Let me turn to the employees. I suggest they ought to be viewed the same way as private providers. There's no need to relieve them of liability. If they were connected with any other entity, and indeed in their own private practices, they would have liability insurance. The concurring opinion in the *Clarke* case notes that most providers in Oregon carry one to $3 million dollars in liability insurance and those in the higher liability practices, $5–$10 million dollars, obstetrics, pediatrics, and a couple other specialties, perhaps neurology. I've already mentioned that Medicare covers some insurance and already reimburses for it.

And so there is no need to immunize the employees. Probably the points most compelling to me are this—every entity which writes about patient safety with which I am familiar—CMS' National Health Safety Office, Kaiser, the Commonwealth Fund, Robert Wood Johnson, Institute for Health Improvement, Institute of Medicine, even OMB and the Congressional Budget Office, has done studies on patient safety. All of them are clear: you avoid injury and mishaps to the extent that you affix individual liability within, as our speakers this morning were saying, an institutional matrix which brings about sharing of responsibility.

We need to improve both processes and people. If we immunize people, they can simply skate; they don't need to pay attention. Why should they care? It isn't that they'll be irresponsible. It isn't that they set out in the morning to say "Today

I will hurt people." It is that some of the impetus is not there; but emphatically it is on other providers working with institutions which are not immunized.

And so immunity is contrary to the public interest. In addition, the state immunity umbrella, as I've already suggested, is simply too broad. There are a huge variety of relationships between physicians and other providers and hospitals or medical centers and to immunize all of them to the same degree simply doesn't make sense. And of course it isn't only the doctors who are immunized, or the nurses, it is as well, the groundskeepers, the painters, and cafeteria workers, and the drivers. So this immunity umbrella is, I think, even if it has a public purpose, far too crude an instrument.

Now when I do my amicus brief, if I do my amicus brief, I'll develop constitutional considerations and try to persuade the Oregon Supreme Court—which will probably be unpersuaded—that the present arrangement is unconstitutional, either under state law or federal law. Of course, in arguing that OHSU is not a state agency, I have been arguing an interpretation of the state constitution. But here, I am turning to a different level of constitutional argument. It is that if the state legislature extends immunity to OHSU, or its employees, it is violating the individual rights of patients. For our purposes today, I will make only three points quickly.

One is this: under most state constitutions and also somewhere in the federal constitution there is a right to trial, a right to a hearing, a right to procedural due process. And the cap of $200,000 in Oregon, and the absolute cloak of immunity in Oregon, cut off any meaningful right to trial. I mean you could bring a lawsuit. Negligence declared, but you would not get damages, that's justice for you. There would be really no way or reason to bring the lawsuit. Financially, it simply would not be feasible. In a simplistic sense, the right remains, but it has been subjected to an undue burden. Effectively, it is a denial of a right to trial.

Secondly, I already suggested in several different ways that immunizing OHSU, or immunizing its employees, is discriminatory. It discriminates against other hospitals, since they must pay for errors and bear an economic burden, which is not also equally borne by OHSU. It is also discriminatory against patients, against patients that go to OHSU. They do not have a resource in the event of injury, a resource available to patients at other hospitals provided through other hospitals. It is as though the State of Oregon has passed legislation that says, of all of the patients in the state of Oregon, 184,000, the number growing annually to OHSU will have less protection, less care, less coverage.

And then finally, due process, not only is it that immunity cuts people off from a right to trial or a right to a hearing, it is that the right is taken without compensation. If we were taking somebody's land, if we were taking somebody's home or business for a public purpose, there would have to be compensation.

There is none with the total cloak for OHSU: there's a limit of $200,000, and there is no compensation for taking the common law cause of action against the physicians. They get lumped in with OHSU, but under common-law the liability was joint and several.

And of course, the figure of $200,000 is woefully inadequate. That is a different due process issue, not only one of taking, but one of rationality. Given the escalating cost of health care, no prior limitation, no matter how large, will prove to be rational, if the purpose is compensation. But if the purpose is to free physicians and providers of responsibility and accountability, the connection is unmistakable, but no one can justify such a purpose. It is simply irrational in any meaningful public purpose sense.

A different point not argued in the Oregon Supreme Court is this, and it seems to me absolutely crucial, not as a lawyer or a doctor, but as a patient. And I tell most of my students that they're going to hear endless stories about my career as a patient. I've undertaken basic research on their behalf and so I bring it forth; my knees, my kidney stones, my colonoscopies, my pathetic athletic injuries, they hear about those in great detail. As a patient, if I go into Providence or Legacy or Tuality or Newport, all good hospitals, I assume if they make a mistake they'll stand behind their product, and they'll make good on their mistake. Now I know the tort system is flawed but it will be there and available to me and I assume they've got insurance.

There's nothing that tells me when I go to OHSU that that's not true there. There is no notice, you know Dante's seventh level of hell, "abandon hope all ye who enter." There's no notice when you go to OHSU as a patient that care stops at error, beyond error we don't care. Nothing says that to the 184,000 people, that for their money and their lives, OHSU only goes half way, and abandons them if they are harmed by OHSU. Yet due process requires a state agency to provide notice before inflicting harm. Then the final point is, and those who are lawyers will fully understand, that this comment is totally worthless as a legal proposition, yet as a common sense proposition I think it's compelling, and it is this: OHSU is shifting the cost of its mistakes to those least able to bear or avoid those costs, the Clarkes. I don't know them. I can tell you I don't have $16.8 million dollars in my checking account. I don't expect over what remains of my lifetime to accumulate even one tenth of that amount.

As a cost-shifting device, this immunity is by far the most horrendous tool available. There are other alternatives. As a cost-shifting device, insurance works and insurance would be available and should be required simply by removing the immunity which is presently given to OHSU and to its employees. As a cost-shifting device, as well, having individual employees bear responsibility for the harms they inflict distributes the cost across employees, and makes their resources available to compensate for harm. So also, as a cost-shifting device, making

available the resources of the charitable foundation or the captive insurance company or the Florida enterprise, would go a long way towards lifting the burden off the Clarkes. So also, factoring into every research grant proposal a component to cover malpractice and the harm inflicted in research will provide a resource available to compensate for harm.

A few words on malpractice reform seem essential, because I'm talking about medical harm and safety to an audience comprised of significant portions of doctors and lawyers. Already today, there has been considerable talk about malpractice shortcomings and the tort systems failures, and I agree with almost all of those comments. I spent a lot of my legal career in the courtroom and I have a rush walking into a courtroom, I suppose the way a surgeon has a rush walking into an operating room. Although I love the courtroom, I think the torts system for malpractice purposes is an utter failure, tied to finding negligence, requiring that about a third of any recovery go to the lawyers when the patients are the ones who need it, screening out cases haphazardly that may have merit, screening in those which do have merit, it unfairly taints doctors and it doesn't help patients, and it drives up costs. Perhaps all of that is true, perhaps it's not, I mean the studies go both ways.

But denying healthcare and custodial care for the rest of his life to the Jordaan Clarkes of this country will not change any of that, in a case in which everybody agreed there was negligence and everybody agreed on the cost and everybody agreed that right now OHSU can walk to the tune of a wholly inadequate $200,000.

So my conclusion, state medical centers should not be immune from liability for their harms. They're out there playing in the marketplace against other people who will stand up and be responsible. Why shouldn't they?

Secondly, employees should also be individually liable for their misconduct. Why not? As the brief for the Clarkes said in the Oregon Supreme Court, "Prior to 1991 doctors in Oregon bought malpractice insurance and it covered them. In 2008 doctors working in some fashion at OHSU don't have to buy malpractice insurance." Where's the common sense or the necessity of public value in that?

And my final two points are simply this, paying for harm should be a part of care. I followed closely the excellent presentation by the representatives from Johns Hopkins this morning, and one thing that struck me was, I forget if it was their mission statement or a document that said "harm is untenable." I think it was under a heading of "Culture of Safety." Under the heading of "Culture of Safety" one of the lines was "harm is untenable." I think that's wrong. I think a culture of safety acknowledges that harm is inevitable, seeks to minimize it, and accepts responsibility when it happens. I think in a mass system of health care there will be harm.

If OHSU here is going to have $300 million dollars of experimentation on 184,000 patients, by definition some of those experiments will go wrong. OHSU is experimenting on people; doesn't it owe them an obligation of caring, when harm is inflicted? And in routine care, from labor and delivery, to heart surgery to the ICU, not only will mistakes occur, but the risks inherent in the place and the system will play out, nosocomial infections and iatrogenic harms will occur. They are part of the system. Shouldn't those responsible step up, and be, well, how shall I put it, be responsible?

It doesn't mean that experiments are bad, or routine care is hazardous, it means that sometimes a vent will be misplaced four times, as we were told this morning at Johns Hopkins within the space of two years. It's not that that's a good thing. To say harm is untenable is to deny the reality that harm happens, and care may include inflicting harm and must include fixing harm. Care doesn't stop only when it goes well. The duty of care, the ethic of care, continues for the Jordaan Clarkes of this world even when, especially when, the caregivers inflict harm.

So let me end with this. There is a clear connection between our inadequate system for dealing with medical malpractice and our more broadly inadequate system of health care. Both have huge gaps, connected to the judgments of fault and failure. We should adopt universal health care, get out of this fault business. I saw it work in New Zealand. People receive universal health care, and people are not allowed to sue for medical error. I think it's terrific, and I think we should abolish fault-based malpractice and I think everybody should stand up for their mistakes and whenever possible finish early. Let me do my part, by doing exactly that.

I would welcome questions or reactions. The question is, she's sure this is happening elsewhere; has this issue been resolved elsewhere? I'm only starting to track that down. I have two wonderful research assistants hard at work for me even as we speak, I hope, and what we are doing is looking at the laws of other states and finding that many of them are quite similar to Oregon's. Trying to find out what the organizational structures of other state medical centers are and finding in varying ways that they are like OHSU's because they've all had to move into the market place to compete essentially for patients and dollars and practitioners.

The case law that I've found so far has not included a single incidence of what I'm advocating that is revoking the immunity for a state medical center. There is case law though that has held that some of the component units were not entitled to immunity, like the doctors groups or some of these clinics or who knows, possibly the entities in Florida.

There is a lot of case law on the separate issue of the immunity of the practitioners and it's very troubling case law because what it means is the courts have had to go case by case to look at whether a particular practitioner, when he

or she was making the error at issue, whether he or she was working within a state medical center role or agency such that they should be entitled to immunity. And there are two problems with that. One is the criteria are very, very confusing, but the other basic flaw which is my position shouldn't exist at all. So I'm still trying to find out.

Let me say that for anybody who has a continuing interest in this subject and wants to email me, I'd be happy to correspond with you and I'd also be happy to send along a set of these slides and if I do the amicus brief I'll send that along as well.

Comment from a member in the audience: In Colorado it's almost a mirror image of what you've just talked about. Maybe three things that are worse: when it's a $150,000 rather than $200,000 immunity and follows providers regardless of their site of practice. So if they're practicing in a private hospital, seeing a private patient as a university doctor they enjoy immunity and probably the most frustrating thing is they rarely if ever pay the total $150,000 in settlement. They'll pay $130,000 or $120,000 recognizing that nobody's going to take the time to sue for the difference.

Thank you for those comments and maybe we can talk later and I can get some sources. It is the notion that immunity for the state medical center doc travels with that doc to other settings that I think is very troubling. Other questions?

What I didn't make clear enough was that in 1995 Oregon Health Sciences University, which had been under the aegis of the State Board of Education, became separately incorporated by a legislative act and so it sets all of its own policies, generates its own revenues, and makes all of its own expenditures. It just opened last year two 40, 000 square foot buildings within the city of Portland and I might note finished constructing an overhead tram that would make Aspen or Vail's ski area proud, to move people from a lower parking lot to the hospital on the hill. I think the total cost was about twice what it would have cost to take care of Jordaan Clarke for the rest of his life.

Thank you.

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A CASE FOR RANCHER-ENVIRONMENTALIST COALITIONS IN COAL BED METHANE LITIGATION: PRESERVATION OF UNIQUE VALUES IN AN EVOLVING LANDSCAPE.

*Robert Stepans**

I. AN EVOLVING LANDSCAPE: SETTING THE STAGE FOR CONFLICT.

The western United States presents a dynamic landscape. Moving westward across the Great Plains the scenery dramatically ascends from the pastoral farmlands of the Midwest to the looming presence of the Rocky Mountains. Small ranching communities have been the most visible human presence on much of the rural landscape of the Rocky Mountain West since the initial push of European settlers into the region more than a century ago. Basins once dominated by bison and native peoples became scenes of scattered herds of domestic cattle, cowboys and homesteads dotting the landscape. But the picture of that rural landscape is changing again. Now, rather than a cowboy and his horse, one is more likely to see ATV's, company trucks and bulldozers. Roads, destined for drill rigs and pads or second homes and weekend cabins, swallow once diminutive trails that were, not long ago, the exclusive terrain of hoofed ungulates. In Wyoming's Powder River Basin, for example, pronghorn antelope and ranchers alike are being collectively displaced. Mineral developers searching for coal bed methane now form the herds of the plains. Heavy equipment does their bidding, and when they have pulled what they need from the ground, the remains lie scattered in the form of mechanical footprints memorialized like tank treads in the salty, fallow earth.

Much like the previous century, settlement of the West continues to be contentious. Scarcity of water, abundance of land, a wealth of marketable resources,

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and rugged natural beauty create fertile grounds for dispute. The dichotomy of richness and scarcity has coupled to push allocation, development, and settlement at an urgent, almost frantic, clip. At present, the urgency is nowhere more apparent than in the development of coal bed methane. Regulation and oversight in the development of this resource struggle to keep pace as do the traditional ways of life that only a few decades ago were the most obvious indication of civilization on the vast tracts of undeveloped land. Conflict about how best to manage the regions' resources, whether scarce or abundant, is ingrained in the landscape as part and parcel of western life. Ironically, ranchers and environmentalists, though adversarial to one another on many issues, are both left to endure the bitter aftertaste lingering when development consistently trumps regulation.

Until recently, ranchers and environmentalists have been at odds with one another in myriad resource disputes because of conflicting values regarding allocation, preservation and production. But new trouble is on the horizon for both groups, and failing to recognize common interests and pool their collective resources could spell the end of an already diminished way of life. Coal bed methane (CBM) drilling has commenced making the hum and hammer of machinery audible. Environmentalists and ranchers must make a choice. Are the drill rigs sounding out a drum roll call for collective action, or are they metering a death knell, sounding the opening notes of a requiem for the rural west?

Using coal bed methane development as its focus, this article investigates the ways in which National Environmental Policy Act (NEPA)[1] litigation conducted by a coalition of ranchers and environmentalists[2] in response to this new wave of mineral development is more effective than solitary efforts by either group. Specifically, this article evaluates the use of NEPA litigation to mitigate some of the effects of coal bed methane development in the Powder River Basin of Wyoming. This article also discusses other federal environmental laws relevant to the proposition that rancher-environmentalist coalitions are a very effective tool in protecting the values of small western communities such as those in the Powder River Basin. The discussion is broken into three parts: Section II describes the expanding scope of coal bed methane development in the Powder River Basin; Section III considers the importance and potential efficacy of rancher-environmentalist coalitions in relation to coal bed methane litigation; and Section IV addresses how to use the standards of NEPA to place tangible parameters around, as of yet, unrestrained development. Section V concludes that cooperative efforts are the best and perhaps only way to protect the values of the rural West.

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[1] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-61 (2000).

[2] For the purposes of this analysis, agricultural interests when referenced in the collective will hereinafter be referred to as "ranchers" or "rancher" and parties with primary interests in wildlife, scenic, and ecosystem integrity will be referred to as "environmentalists." Applying these labels is overly simplistic and generalizations of this variety may indeed play an implicit part in the problem of divisiveness at which this paper is aimed; however, it is necessary for the sake of clarity and brevity.

II. OVERVIEW OF COAL BED METHANE: PUSHING FOR DEVELOPMENT IN THE POWDER RIVER BASIN.

The Wyoming Oil and Gas Conservation Commission estimated in 2002 there are 31.8 trillion cubic feet of recoverable coal bed methane in the Powder River Basin of Wyoming.[3] The mining industry is no stranger to Wyoming, but recent numbers are staggering by any standard. For example, in 1995 there were 427 coal bed methane wells in Wyoming. As of 2004, in order to expedite the extraction of methane, the Bureau of Land Management catapulted the number of approved wells to 51,000, with 21,000 of those already in operation.[4]

Coal bed methane production affects the interests of both ranchers and environmentalists in striking ways. While not wholly unique in the world of mineral development, coal bed methane differs from historic and traditional mining practices in at least one important way. Similar to other extractive resource production, coal bed methane spawns a slew of potential conflicts because of the complexity of the legal and administrative framework that governs such activities.[5] Impacts on air, water, and land implicate regulation by a dozen or more local, state, and federal agencies. However, coal bed methane is unique because it requires that huge volumes of water be removed from the earth in order to release the methane from the coal seam. Naturally occurring water in the coal seams create pressure which holds the methane gas in place, either in the veins or bonded to the coal itself.[6] In order to extricate the methane, the water, too, must be pulled from the seams:

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[3] Kristin Keith, Jim Bauder & John Wheaton, *Coal Bed Methane Frequently Asked Questions, Water Quality and Irrigation Mgmt.*, The Dep't of Land Res. and Envtl. Sciences, Montana State Univ.-Bozeman (2003), *available at* http://waterquality.montana.edu/docs/methane/cbmfaq.shtml. Coal bed methane is the naturally occurring gas that is trapped in coal seams. *See infra* notes 8-11.

[4] Statement of Kathleen Clarke—Director, Bureau of Land Mgmt., U.S. Dep't of Interior. House Resources Subcomm. on Energy and Mineral Res. Oversight Hearing on FY 2003 Energy and Minerals Budgets of BLM and Forest Serv. (Feb. 14, 2002), *available at* http://www.blm.gov/nhp/news/legislative/pages/2002/te020214b.htm; *see also* J.M. McCord, *Wastewater Goes Unwatched*, HIGH COUNTRY NEWS, Mar. 7, 2005, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=15335.

[5] Agencies involved include federal agencies (BLM, IBLA, EPA, Army Corps of Engineers), state regulatory commissions (Wyoming Oil and Gas Commission (WYOGC)), county commissions, and state water boards. Issues presented include water quality, air quality, roads, water rights, and access. Potential claims include trespass, nuisance, 5th amendment takings, section 1983, Clean Water Act, and NEPA claims. *See generally* Jan G. Laitos & Elizabeth H. Getches, *Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development*, 23 VA. ENVTL. L.J. 1 (2004); *see generally* Mary A. Throne, *Coalbed Natural Gas Development, Making Environmental Permitting More Efficient Without Sacrificing Environmental Protection*, 27 WYO. LAWYER 23 (June 2004).

[6] *See* Newman v. RAG Wyo. Land Co., 53 P.3d 540, 543-44 (Wyo. 2002). This case involved issues concerning the lease of mineral rights, including coal bed methane, by private landowners for production. *Id.* at 541-42. Specifically, the court examined the language of the deed to determine which rights where retained by the landowners. *See id.* at 544-46, 550-51.

> [e]ach well produces 5 to 20 gallons of water per minute. At 12 gallons per minute, one well produces a total of 17,280 gallons of water per day. It is common to have one well every 80 acres, and in the Powder River Basin, there are up to three methane-bearing coal seams. Therefore, there may be up to three wells per 80 acres.[7]

This wastewater needs to go somewhere.

There are several methods of disposal of the water produced by coal bed methane development. The cheapest and most favored by the industry involves discharging the water into surface containment ponds.[8] Other, more costly methods include re-injection of the subsurface water back into the ground.[9]

The sheer volume of the water that must be removed to produce coal bed methane, coupled with the number of proposed and already-producing wells, presents a number of concerns to environmentalists and ranchers alike. Foremost among those concerns are the uncertainties and potential impacts that, because of the dewatering process, accompany the production of coal bed methane.

> CBM product water has a moderately high salinity hazard and often a very high sodium hazard based on standards used for irrigation suitability. With time, salts from the product water can accumulate in the root zone to concentrations which will affect plant growth. Saline conditions stunt plant growth because plants must work harder to extract water from the soil . . . Disposal of the quantities of CBM product water into stream channels and on the landscape poses a risk to the health and condition of existing riparian and wetland areas. High salinity and sodium levels in product water may alter riparian and wetland plant communities by causing replacement of salt intolerant species with more salt tolerant species. It is well recognized that encroachment of such noxious species as salt cedar, Russian olive, and leafy spurge is enhanced by saline conditions. [10]

In addition to water quality issues, CBM extraction raises concerns about water quantity. Accurate predictions of how dewatering a coal seam will affect groundwater quantity are hard to come by because of the site-specific characteristics of aquifers and the localized nature of groundwater movement. Thus, as a practical matter, the question of how coal bed methane mining will affect the overall water

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[7] Keith, Bauder & Wheaton, *supra* note 3.

[8] *See* Keith, Bauder & Wheaton, *supra* note 3.

[9] *See* Keith, Bauder & Wheaton, *supra* note 3.

[10] Keith, Bauder & Wheaton, *supra* note 3.

table is yet to be determined.[11] While testing does occur prior to drilling, the potential for decreasing the amount of available drinking water is a concern for a region that considers water one of its most valuable commodities. Because of the potentially devastating effects of coal bed methane production, and the unwillingness of agencies to adequately assess potential consequences, the burden of checking development falls on the communities that are targets of coal bed methane production.

III. RANCHER-ENVIRONMENTAL COALITIONS: MAKING NEPA WORK.

NEPA is traditionally used to advance environmentally protective interests.[12] Emphasis, as a general rule, is on the impacts of a project on the physical environment.[13] However, NEPA requires attention to the social and economic impacts on the human environment as well. My contention is that NEPA is structured in such a manner that ranching and environmental objectives can coalesce to provide greater scrutiny for agency actions rather than scenarios which push conventional conceptions of environmental objectives alone. Such coalitions, formed from normally adversarial interest groups make the court more receptive to NEPA challenges in general and create powerful incentives for agencies to require Environmental Impact Statements (EISs'). With an increased level of judicial receptivity, cumulative impacts statements may be required more often and development of coal bed methane will be forced to proceed diligently, with due regard to the mandates of NEPA. On the other hand, a failure to realize the potential power of rancher-environmentalist alliances will leave the region vulnerable, in terms of both agricultural and recreational values, to the whims of outside development interests whose primary goal is expediting mineral development with little regard to other values.

This discussion is framed by an analysis of two recent Wyoming Cases, *Wyoming Outdoor Council v. U.S. Army Corps of Engineers*[14] and *Greater Yellowstone Coalition v. Flowers.*[15] These two cases illustrate the power of coalitions to bring agency and

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[11] *See* Joshua Skov & Nancy Myers, *Easy Money, Hidden Costs: Applying Precautionary Economic Analysis to Coalbed Methane in the Powder River Basin*, 15-16 (June 2004), *available at* www.sehn.org/pdf/cbm.pdf.

[12] *See generally* Sabrina C.C. Fedel , *Cause of Action Against the Federal Government Under the National Environmental Policy Act of 1969 (NEPA)*, 12 COA2d 321 (2004) (Causes of Action 2d series).

[13] *Id.* at § 5.

[14] Wyo. Outdoor Council v. U.S. Army Corps. of Eng'rs, 351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005) (holding that, in light of the extensive administrative record containing the concerns of ranchers and environmentalists, the agency decision to issue drilling permits for coal bed methane was arbitrary and capricious because it did not properly address the concerns contained in the record).

[15] Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1274, 1277, 1279 (10th Cir. 2004) (holding the agency decision to issue permits for the construction of a housing development was not arbitrary and capricious in spite of the potential environmental impacts of that decision).

judicial scrutiny to CBM projects. The language employed by the district court in the former case (particularly in reference to the importance of cultural values that could be affected by coal bed methane development) supports the argument that cooperative efforts of ranchers and environmentalists can achieve a result that would not be available to either group standing alone. This argument also draws support, by way of contrast, from the *Flowers* case. Both cases originated in Wyoming and were heard by the same district court judge. Yet, separated by only two years, these cases represent significantly different outcomes in the respective applications of NEPA.[16] While these two cases are easily distinguishable on the facts, there are also important differences in the language that the court used, the methodology employed by the judge, and the ultimate message to be taken away from each case. Additionally, other Tenth Circuit law suggests further support for the position that rancher-environmental coalitions create a formidable alliance.

A. Wyoming Outdoor Council v. U.S. Army Corps of Engineers: *Fulfilling the Potential of NEPA.*

The Wyoming Outdoor Council (WOC), along with the Powder River Basin Resources Council and the Biodiversity Conservation Alliance, brought suit in Federal district court in Wyoming challenging a decision by the Army Corps of Engineers (Corps) to issue a general permit (GP 98-08) for discharge of dredge and fill materials associated with the development of coal bed methane.[17] The Corps issued a Combined Decision Document (CDD) with the permit in an attempt to comply with the requirements of both NEPA and the Clean Water Act (CWA). The general permit "authorizes discharge of dredge and fill materials associated with several activities related to oil and gas development in the State of Wyoming, including surveys, roads, well pads, utilities, reservoirs, erosion control, hazardous waste cleanup, and mitigation."[18] The general permit covers *the entire state of Wyoming*, so long as permit specifications are met.[19] *WOC*

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[16] Both *WOC* and *Flowers* originated in the District of Wyoming. Judge Downes wrote *WOC* and the initial opinion in *Flowers*. *Flowers* was remanded to the district court for further inquiry after which Judge Downes' decision was ultimately upheld by the Tenth Circuit Court of Appeals. Judge Downes did not actually order the Corps to prepare an EIS in *WOC*, but rather remanded to the agency for additional investigation and explanation. For the Court to order an EIS is "an extreme remedy"; more often than not, the Court will remand to the agency. This, however, does not undercut the proposition that rancher-environmental coalitions are effective in forcing Environmental Impact Statements. This is true because of the action-forcing mechanism of NEPA which allows for judicial review of agency actions. The heightened standard of review that these coalitions present to the Court works to make the agency more careful in its review of environmental impacts of a proposed project.

[17] The general permitting process allows for more efficient dissemination of permission to dredge and fill for projects that are alike in kind and not likely to produce significant impacts. *See infra*, note 19, for a better explanation.

[18] *WOC*, 351 F. Supp. 2d. at 1237.

[19] This permit is issued by the Corps (pursuant to the Clean Water Act, 33 U.S.C. § 1344(e) (1987)) and then the surface land management agency (i.e. BLM) administers the use of the general

addresses the attempt to use GP 98-08 to permit the release of dredge and fill materials from construction of reservoirs to hold the water released from coal bed methane production. The appeals court explains that the permit "was issued in large part to address the growing need for permits to discharge dredge and fill materials associated with the boom in development of coalbed methane gas . . . in the Powder River Basin of Wyoming."[20] This broad permitting process essentially allowed the impacts of specific methane producing projects to be overlooked and subsumed into the general permit without individual review.

The Court of Appeals felt the Corps' attempt to comply with NEPA and the CWA, through the general permit and CDD, was inadequate with respect to private landowners who would be affected by the issuance of these permits and the commensurate mineral development.[21] The record indicated that ranch owners were concerned about the impact of the permits.[22] After quoting several of the comments of the landowners, the Court explained the deficiency of the CDD:

> [t[he Corps clearly failed to address the concerns of these private landowners in the CDD. The conclusions in the CDD, which are contrary to established Wyoming law, reflect indifference to the interests of surface owners of split-estates. Nowhere does the CDD express or demonstrate a consideration for those individuals whose livelihood depends on the vitality and sustainability of the land. The Court cannot accept the Corps' summary dismissal of the reasonably foreseeable impacts to private ranchlands. Though the Corps need not provide an inordinate amount of detail on impacts to private ranchlands, neither can the Corps completely disregard those impacts in light of the comments of private surface owners. The Corps must at least recognize the

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permit "in conjunction with approval of surface use plans when the plan proposes discharge of dredge and fill material into waters of the United States on federal lands." *WOC*, 351 F. Supp. 2d. at 1238. However, on private land, the Corps itself administers the application of the permit. The conditions accompanying the permit were that the permittee must comply with the state water quality standards. For more complete descriptions of the permitting process *see* Throne, *supra* note 5, at 23-24.

[20] *WOC*, 351 F. Supp. 2d at 1237. The court noted that "the impacts to private lands [can not] be deemed trivial. In calculating the impacts to wetlands in the CDD, the Corps concludes that of the total number of CBM wells that could be drilled (34,560) during GP 98-08's duration, approximately 70% (24,160) would be drilled on land where the surface is privately owned. Clearly, the development of CBM is not limited to federal lands, but has implications for private lands as well." *WOC*, 351 F. Supp. 2d at 1247 n.5.

[21] *WOC*, *351* F. Supp. 2d at 1238.

[22] *Id.* at 1246-47.

> reasonably foreseeable impacts and give a cogent reason why they are not significant. The Corps' failure to do so was arbitrary and capricious.[23]

The CDD issued by the Corps explained that on private land where the landowner also has mineral rights "oil and gas production cannot occur without the landowner's consent."[24] As such, the Corps concluded that "[i]t is anticipated that in most cases the landowner would not allow destruction of prime or unique farmland due to its high value."[25] These conclusory statements completely failed to consider the landowner who does *not* own the mineral estate. In Wyoming, as in most states, the rules of split estate provide the surface owner's estate is subject, and subservient, to the dominant mineral estate.[26] The administrative record reflected the concerns of private land owners who own the surface but not the mineral estate beneath their property; a non-unique situation for many landowners.[27]

Two letters from private land owners included in the administrative record were highlighted by the court.[28] These landowners explained that companies executing coal bed methane leases "'refuse[d] to inform landowners or lessees about the plans for gas gathering or water discharge'" and "'gouge huge areas for roads and drilling sites.'"[29] Other concerns of private land owners included in the record were the "dewatering" which "'damag[ed] the aquifer we depend on for domestic and livestock water,' and the coal bed methane producers' failures 'at reclamation, controlling . . . water discharges, maintaining . . . roads' as well as 'interfering with ranch operations.'"[30] The court found that the Corps' unwillingness to address these concerns was manifestly unacceptable.[31] The Corps had simply noted that "[a]dverse effects on livestock grazing could occur as a result of the changes in land use and water use, both of which are beyond the Corps' ability to control."[32] The

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[23] *Id.* at 1246-1247. The Court alluded to an abridgment of Wyoming law that pertains to water quality standards under the CWA and implemented according to state-specific standards. *See id.* at 1243-44.

[24] *Id.* at 1245.

[25] *Id.*

[26] *Id.* (citing Mingo Oil Producers v. Kamp Cattle Co., 776 P.2d 736, 741 (Wyo. 1989)). For specific coal bed methane discussion of the split estate *see Newman v. RAG Wyo. Land Co.*, 53 P.3d 540, 544-45 (Wyo. 2002), and Drake D. Hill, *Understanding Split-Estate Ownership*. 27 WYO. LAWYER 26 (June 2004).

[27] *See WOC*, 351 F. Supp. 2d at 1246.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *WOC*, 351 F. Supp. 2d at 1246 n.3 (evaluating public interest factors pursuant to 33 C.F.R. § 320.4(a)(2008)).

court viewed this explanation as patently unacceptable because "the Corps neither explains how such adverse effects could occur or why effects on livestock grazing are beyond its control. The statement does not reflect a realistic assessment of the possible significance of those impacts."[33]

The emphasis in the court's opinion put on the impacts to private ranchlands is critical to an understanding of the ways in which a rancher/environmentalist coalition is superior to a classic environmental approach. In fact, without a coalition effort, the result in this case could not be realized. While environmentalists have often tried to give a voice to nature in praying for relief, ranchers can speak for themselves, tell their story, and quantify how they have been affected. Because of the presence of ranchers in this litigation it was impossible for the Corps to give an accurate assessment of the impacts of coal bed methane mining while ignoring statements of those ranchers in the record. Classic environmental arguments have merit and should be presented, but standing alone they have failed in many cases.[34] In coal bed methane litigation, ranchers and environmentalists together are stronger than either on their own.

B. Greater Yellowstone Coalition v. Flowers: *Environmental Interests Standing Alone.*

The contrary results for the plaintiffs in *WOC* and *Flowers* illustrate that the formation of rancher-environmentalist coalitions can be an invaluable tool in forcing NEPA compliance, specifically in regard to coal bed methane development.

Tenth Circuit case law, as represented by these two cases, suggests rancher-environmentalist coalitions are more able to reach desirable results in coal bed methane litigation than solitary efforts by either group.[35] In *Greater Yellowstone*

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[33] *Id.* at 1246 n.3.

[34] Examples include *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004) as well as the respective progeny of these cases. *See* Fedel, *supra* note 12 for a broad overview of cases involving litigation along these lines.

[35] *But see* Northern Plains Res. Council v. U.S. Bureau of Land Mgmt., 298 F. Supp. 2d 1017 (D. Mont. 2003). In *Northern Plains*, a resource council comprised of ranchers, farmers and environmentalists was unable to convince the District Court of Montana that the Bureau of Land Management had acted arbitrarily and capriciously in relying on older Resource Management Plans (RMP) and Environmental Impact Statements (EIS) for the leasing of federal ground for coal bed methane drilling. This case can be, however, distinguished on the facts. The court found that the RMP and EIS upon which the BLM relied to make the leasing decisions contemplated only limited coal bed methane drilling. The court explained that further development, specifically full field development of coal bed methane resources, had not been considered in the original EIS and that "regardless of BLM's interpretation . . . a reading of the leases shows that [the leases] did not in fact convey development rights any greater than those authorized by the [original RMP/EIS]." *Id.* at 1023.

Coalition v. Flowers, plaintiffs Greater Yellowstone Coalition and Jackson Hole Conservation Alliance challenged the issuance of a dredge and fill permit authorizing construction of a housing development and golf course on the banks of the Snake River in northwest Wyoming. Although this case did not involve CBM development, it is equally germane for the ways in which it can be distinguished from *WOC*, considering factual similarities found in the two cases. The Army Corps of Engineers, the same agency at work in *WOC*, issued permits without preparing an EIS in spite of the fact that the development plan implicated the ESA through potential eradication of bald eagle nesting habitat.[36] Further, the Environmental Protection Agency (EPA) raised concerns about the impacts of the project on the Snake River corridor, and the U.S. Forest Service criticized the reports upon which the Corps relied in making the decision not to prepare an EIS because they were incomplete and conclusory.[37] The opposition by EPA and the Forest Service focused upon physical impacts of the project consistent with classic environmental challenges.

On the other hand one of the purported purposes of the development project in *Flowers* was to allow the River Bend Ranch to continue as a viable and operating ranch.[38] Mr. and Mrs. Edgecomb purchased the River Bend Ranch in 1994 and ran cattle there.[39] The opinion explains:

> [r]esponding to the impact of tourism on the Teton County economy, the Edgecombs sold 286 acres of the Ranch to [the developer] Canyon Club in December 2000, intending the land to be converted into an eighteen hole golf course and residential development. According to Canyon Club, the Edgecombs needed the income generated by such a development in order to sustain the operation of the Ranch.[40]

Ranchers and farmers can demonstrate a tangible loss where environmentalists often can not. *Flowers* does not stand for the idea that *carte blanche* private interests are beyond the reach of federal statutes. Rather in those circumstances, the agency interpretation of federal statutory requirements was adequate. By way of comparison, the presentation of a united front, by way of a rancher-environmental coalition in *WOC* gives the court both sides of the argument, private property interests coupled with environmental concerns. Judge Downes explains in *WOC*:

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[36] Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257, 1275 (10th Cir. 2004).

[37] *WOC*, 351 F. Supp. 2d at 1254.

[38] *Flowers*, 359 F.3d at 1263, 1275.

[39] *Id.* at 1263.

[40] *Id.*

> [t]he Court is cognizant of the importance of mineral development to the economy of the State of Wyoming. Nevertheless, mineral resources should be developed responsibly, keeping in mind those other values that are so important to the people of Wyoming, such as preservation of Wyoming's unique natural heritage and lifestyle. The purpose of NEPA and the CWA is to require agencies, such as the [Army Corps of Engineers], to take notice of these values as an integral part of the decision making process. This Court will not rubberstamp an agency determination that fails to consider cumulative impacts, fails to realistically assess impacts to ranchlands, and relies on unsupported, unmonitored mitigation measures. NEPA and the CWA require more.[41]

Traditional ways of life were at stake in *WOC*, and Wyoming state law as it pertains to the CWA (sculpted in recognition of those values) has been abridged. *Flowers* is about birds, a handful of them.[42] To dismiss the result in this case as being only about birds may seem facetious and overly simplistic. However, normative judgments about whether *Flowers* should have come out differently ignore the practical reality of reaching desired results. Specifically, this is not to say that there should have been a housing development allowed in the Snake River corridor, but the defendants in *Flowers* illustrated a similar contention to the one laid out in by the coalition in *WOC*. In *WOC*, the court was willing to recognize the viability of the working ranch as dependent upon a particular course of action, or at least that the impact on a ranch's future was an impact requiring consideration. Here, it appears that the difficulty for the environmental interests is one of scale. Taking on developments one at a time has the effect of minimizing the impacts of development. That approach holds little promise that environmental groups will win every battle. On the other hand, when developments implicate private property interests and cultural values, in addition to wildlife and scenic values, a court has more to hang its hat on when questioning the sufficiency of agency compliance with NEPA. Thus, coalition efforts have the potential of creating synergistic momentum which serves to bolster independently valid arguments.

There are several ways in which the two cases can be distinguished on the facts. *Flowers* involves a smaller area (286 acres), and thus, the effects of the proposal were mostly insular and specific to a small area directly affecting only the discrete interests of the property owners in that spot.[43] Only the bald eagles were threatened; only this segment of river would have reputation houses and golf greens.[44] *WOC* was about a large scale plan, expansive in geographic

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[41] *WOC*, 351 F. Supp. 2d at 1260.

[42] *Flowers*, 359 F.3d at 1263.

[43] *See id.* at 1263-64.

[44] *See id.*

area, and multiple interests were affected by the decision.[45] *Flowers* was about environmental groups challenging the use of private property and the ways in which those uses affect public interests.[46] Ultimately, private property interests trumped environmental concerns.[47]

What cannot be distinguished away is that in those places where environmentalists and ranchers see eye to eye on bottom-line issues, ranching interests can help advance the environmental agenda. The coal bed methane boom looms over both ranchers and environmentalists, threatening both of their interests. In the face of this common threat, the two groups would be wise to swallow their collective pride, offer conciliatory gestures to their generations-old adversaries, and work together as allies to address the potential damage of large-scale CBM development.

C. NEPA and Coal Bed Methane in the Powder River Basin

The presence of coal bed methane in the Powder River Basin of Wyoming has given rise to numerous complicated, and as yet unsettled, series of conflicts and disputes. These conflicts are multilayered, including many agency actions and decision making bodies, and also a variety of private interests.[48] While a plethora of agencies are involved in the overall scheme of regulating and monitoring coal bed methane development, there is a noticeable lack of cohesion between agencies, causing not only confusion on the part of the agency officials, but also opening the door for opportunistic profiteering on the part of the oil and gas industry. In Wyoming, there is an empirically low level of agency enforcement of existing, and sub-par rules concerning coal bed methane production.[49] But these concerns are not limited to Wyoming. Colorado, while not facing production of the magnitude being carried out in Wyoming, faces these dilemmas as well. "Between 1998 and 2003 natural gas production in Colorado increased by a factor of more than 16."[50] As of 2005, the Colorado Oil and Gas Conservation Commission had never denied a permit.[51] When the state agency responsible for oversight of energy development willingly dispenses permits, the message is clear that facilitation of energy production is the state's priority. As such, there is little or no recourse for private citizens to challenge permitting decisions other than through the courts.[52]

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[45] *WOC*, 351 F. Supp. 2d at 1260.

[46] *Flowers*, 359 F.3d at 1262.

[47] *See, e.g., id.* at 1278-79.

[48] Laitos & Getches, *supra* note 5, at 3.

[49] McCord, *supra* note 4, at 13.

[50] Jennie Lay, *State Laws—and Small Staff—Muzzle Would-be Watchdog*, HIGH COUNTRY NEWS, March 7, 2005, at 11, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=15333.

[51] *Id.*

[52] However, in Colorado, the BLM recently removed proposed energy leases from auction, citing environmental and wildlife concerns. This is noteworthy in spite of the leasing process being

It is fantastical to assume that there will be little or no impact to the land or communities in the Powder River Basin when coal bed methane mining and all of its accoutrements come to town, yet time and again that is the position of industry. The impacts are, in fact, already visible to the naked eye. So rooted in alternate reality are the claims of industry that one would have to look past the actual damage and to accompanying documentation to realize that there are no cumulative impacts:

> [c]oalbed methane []development, in particular, is increasingly affecting aquifers and surface water resources. In Wyoming's Powder River Basin alone, over 51,000 CBM wells have been proposed. These actions threaten both the treasured landscapes and the traditional lifestyles of the West. Yet, no overall assessment of the cumulative impacts of the new National Energy Plan has been conducted. In fact, BLM has not even assessed the combined effects of proposed wells in the Powder River Basin alone, having split the analysis for the area into two separate environmental impact analyses.[53]

As of this moment, coal bed methane development is being carried out without proper attention to the actual and potential impacts of that development.

1. *NEPA Challenges are Particularly Effective When Employed Cooperatively By Varied Local Interests.*

"The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government."[54] The court reviews federal agencies' compliance with NEPA under the Administrative Procedure Act (APA). Using these statutory guidelines the court is compelled to bar action by an agency that is "arbitrary, capricious, and [an] abuse of discretion, or otherwise not in accordance with the law."[55] Under the arbitrary and capricious standard, the court "review[s] the *decision-making* process and determine[s] whether the [agency] examined all relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[56] As such, while NEPA is a statutory requirement of the agency itself, the proper application of the statute is ensured only by way of public comment because without involvement by the public, some degree of "relevant

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a technically distinct consideration from permitting. *See BLM Pulls Energy Leases From Auction*, CASPER STAR-TRIBUNE, November 1, 2007, at B5.

[53] Sharon Buccino, *NRDC Perspectives on NEPA*, SK008 ALI-ABA 593, 601 (2004).

[54] 40 C.F.R. § 1502.1 (2007); *See* 5 U.S.C. § 701, 706(2)(A) (2007).

[55] *Flowers*, 359 F.3d at 1274.

[56] Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1576 (10th Cir. 1994).

data" would likely escape the attention of both the agency and any reviewing court.

a. Establishing a Comprehensive Administrative Record is Crucial to Successful NEPA Litigation.

Coalitions consisting of recreational, environmental, and agricultural interests have important advantages over interest groups that stand alone. Presenting diverse concerns which are focused on a common goal (responsible development and preservation of aesthetic, recreational, agricultural, ecosystem, and cultural values) provides an important incentive for agencies, the legislatures, and ultimately the courts to weigh those concerns carefully in the decision-making process. This is true not only because of the obvious accountability that the agency and legislature have to their constituents, but also because when an agency's NEPA decision reaches judicial review "the Court is also charged under an arbitrary and capricious standard with a plenary review of the record as it existed before the agency to determine whether the agency's action was supported by substantial evidence."[57] In *WOC*, the court's review of the Corps' issuance of GP 98-08 was largely based upon the public comment in the record. Specifically, the court "conclude[d] that the Corps was *arbitrary and capricious in . . . failing to consider impacts to private ranchlands in light of the concerns voiced in the record*."[58]

While the requirements of NEPA, as well as the Supreme Court's reading of those requirements seems fairly clear,[59] there is always a danger that the agency will fail to meet its obligations and proceed with uninformed impunity. This danger is especially acute when pressure for agency approval gets ahead of the agency's ability to develop the necessary facts:

> [t]oo often agencies are relying on old, out-dated information to justify new actions. For example, the BLM is relying on old—some as many as ten and twenty years old—resource management plans (RMPs) to justify coalbed methane development that was

[57] Wyo. Outdoor Council v. U.S. Army Corps. of Eng'rs, 351 F. Supp. 2d 1232, 1239 (D. Wyo. 2005) (quoting in part *Olenhouse*, 42 F.3d at 1576) (internal quotations omitted).

[58] *WOC*, 351 F. Supp. at 1260 (emphasis added). The court also alludes to the insufficiency of the Corps' response to the record in the agency's reliance on mitigation measures. "The record is replete with comments from individuals who question whether the mitigation measures will be successful." The court explained, "In the face of such concerns, it is difficult for this Court to see how the Corps' reliance on mitigation is supported by substantial evidence in the record." *Id.* at 1252 n.8.

[59] *Methow Valley*, 490 U.S. at 333. In *Methow Valley*, the Court explained that the eradication of the valleys' entire mule deer population because of the impacts associated with the development of a ski area presented no bar to the project. Instead, the requirements of NEPA were only to recognize those impacts and report them as such.

> never addressed in those plans nor the environmental analysis that accompanied them. While some new development may be appropriate, the BLM must involve the public in a meaningful way to determine how much and in what manner it occurs. BLM should not rely on old data to circumvent this public process.[60]

It is disingenuous to claim that NEPA requirements are satisfied by reliance on Environmental Impact Statements which did not even consider the impacts of the proposed activity on the scale contemplated by the leases, much less the cumulative effects of new development on top of prior development. NEPA may well be, in the parlance of industry, inefficient. From the industry perspective, anything that slows the development process and includes public comment on company decisions is inefficient. But business efficiency and expedited resource production is only one standard by which to judge an action. Preventing irreparable damage and complying with environmental laws are also important considerations. However, even NEPA does not guarantee the avoidance of adverse environmental impacts. What NEPA does allow is that the public be apprised of instances when agencies deem it appropriate to allow development even in the face of environmental damage and marginal compliance with the law. Public comment plays a vital role in highlighting potential impacts of proposed projects from a variety of perspectives.

b. Adequate NEPA Analysis Requires Evenhanded Evaluation of Project Proposals.

Evaluation of projects based solely upon the economic efficiency to the industry should be solely the providence of the industry interests. It is not an agency's job to accommodate economic interests with impunity, even to the detriment of other values. However, in light of recent developments in coal bed methane production, one might be tempted to conclude otherwise:

> [b]ecause of industry's interest in natural gas development, including coalbed methane, the BLM continues to experience a significant increase in requests for oil and gas leases and subsequently in drilling permit filings. In 2003, the BLM [requested additional funding] to identify ways to *expedite the process of approving drilling permits*, with an emphasis on coalbed methane development [and to] review Bureau policies and practices to *facilitate development of coal and coalbed methane in areas of development conflict*.[61]

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[60] Buccino, *supra* note 53, at 602.

[61] Statement of Kathleen Clarke, *supra* note 5 (emphasis added). This statement concludes with a brief reference to "environmentally-sound recovery of the nation's mineral resources." *Id.*

If there is to be any meaningful effort to encourage industry accountability, the responsibility of spearheading those efforts falls to the public and the courts. The agency charged with monitoring CBM development has spoken and its position is clear. If directives, as that above, do not instill a little fear in both ranchers and environmentalists that their interests stand to be compromised by the ramifications of such policies, they certainly should. Without the public using the courts for agency review, there appears to be nothing standing between industry and unbridled development.

In particular, when talk turns to mineral development of the scale proposed in the Powder River Basin, there should be more than a modicum of caution in approving new projects. Industry certainly should not be allowed to proceed unchecked, but when the official agency policy is one of "expediting" and "facilitating" that is the practical reality. There is a historical rationale for this caution, but there is also the practical reality of mineral development. Extractive resource development is checked only by regulations administered by government agencies. Government agencies are necessarily accountable to a broad public comprised of many constituencies. At the very least, agencies are required to provide full disclosure of the reasons for, and results of decisions made by those agencies. NEPA does not require specific results, nor does it require wise decisions,[62] but it does require informed and somewhat transparent decisions. NEPA requires that the decision making process be pursued in a logical, reasoned, informed, and public manner. Furthermore, NEPA requires that agencies allow public comment so that damaging, hurried, and unduly-influenced decisions become a matter of public record. NEPA is a tool but it will not work on its own; in order to work it requires proper application and capable hands.

2. *Rural Coalitions Empower Communities and Help Preserve the Status Quo Until Impacts are Fully Assessed and Weighed.*

There is a legitimate need for local interests to be present in the decision-making process. Contrary to a strictly economic analysis to guide public land policy, these local interests offer specific understanding of what is at stake and intimate contact with the ramifications of decisions. Operating from a paradigm which allows far-removed economic interests to dictate to local governments and community residents creates a vacuum of responsible and wise decision-making. Well-intentioned guidelines cannot adequately substitute for well-informed policy. This is always a loss; the only question is who is forced to live with the consequences. When the decision-making and implementation processes move seamlessly towards predetermined development these impacts are felt by those who stand between industry and the resources they desire.

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[62] *See Methow Valley*, 490 U.S. at 333.

Coalbed methane production has proved to be a unique catalyst for creating new and powerful coalitions out of traditionally divergent interest groups. Since the West's tumultuous infancy as a frontier in the hands of the settlers, there has been conflict concerning the "best" use of the vast expanses of the western states. Difficulty in reconciling what have historically been viewed as incompatible uses is a theme that runs throughout history, from early discussions about homesteading and settlement, through the emergence of wide-scale development and the recent appearance of outdoor recreation as a valuable resource.[63]

There is a wealth of interests at work in the rural west.[64] A short list reveals conservationists, preservationists, environmentalists, ranchers, sheepmen, cattlemen, farmers, miners (both hardrock and coal), oil and gas drillers, timber companies, and real estate developers. The line between private and public property is often blurred because many of the extractive resource pursuits that worked to settle the West, most notably mining, timber, and ranching, all depend upon the use of the public domain for their continued viability.[65] These traditional uses of the public land, however, often find themselves at odds with new uses and users emerging only in the last several decades. Resolution of these conflicts is hindered by the presence of strong, disparate views from varied interest groups and the presentation of information with varying degrees of accuracy in support of those interests.[66]

a. The Picture of the West Continues to Evolve: Recognizing New and Traditional Interests.

The availability of an abundance of land and proportionally equal numbers of divergent ideals about what to do with that property has led to a conundrum. These circumstances play out in the human arena in stereotypically predictable ways. "Small-minded" traditional ranchers fight every change tooth and nail, while "small-minded" environmentalists make enemies of the ranchers by attempting to

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[63] U.S. DEP'T. OF AGRIC. NATIONAL REPORT ON SUSTAINABLE FORESTS 2003 FS-766 51(Feb. 2004), *available at* http://www.fs.fed.us/research/sustain/documents/SustainableForests.pdf.

[64] Pamela Case & Gregory Alward, PATTERNS OF DEMOGRAPHIC, ECONOMIC AND VALUE CHANGE IN THE WESTERN UNITED STATES, U.S. DEP'T OF AGRIC. FOREST SERV., REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMM'N 16 (Aug. 1997), *available at* http://www.fs.fed.us/institute/news_info/jwwp rc_report.pdf. While the discussion in this report indicates that the West has an increasingly diverse economy, this is largely based upon the development of urban centers. "Rural areas show lower levels of economic diversity or, stated conversely, are more specialized and depend on a narrower spectrum of economic activities (often agricultural or extractive uses)." *Id.* at 35.

[65] George Cameron Coggins, Charles F. Wilkinson, and John D. Leshy, FEDERAL PUBLIC LAND AND RESOURCES LAW 12-13 (5th ed. Foundation Press 2002).

[66] The same could be said of this note, no doubt. The object and thesis here is not that the assertions of this note will resolve all of these contentious issues—rather that the some of the sources of conflict between ranchers and environmentalists are contrived and encouraged by mining interests.

minimize the important role that ranchers have played in the settlement of the west, as well as their preservation of open space that could have been developed. The dogmatic effort to "debunk the cowboy myth"[67] has done little but to drive a wedge between ranchers and environmentalists, thus diminishing the potential for cooperative, mutually beneficial decision-making.[68] Minimizing the knowledge, culture, and values embedded in the rural west has become a pastime and livelihood for much of the environmental community. The incongruous position of progressive xenophobia often accompanies much of the "forward" thinking, progress-minded preservation ideals of the environmental movement. Just the same, those with development ideals demonize and try to alienate the "radical environmentalists" of this country by dismissing their position as antiquated and untenable. The extreme polarization of these interests often leads to a less than honest discussion, particularly in relation to impacts that result from the concept of recreation as a replacement for ranching.

Recreation has taken center stage as the emerging use of the public lands.[69] In spite of the number of recreationists, this use of the public lands is lauded as being a less demanding, more sustainable use of the land. However, as the number of people seeking recreation on the public lands increases, the form of recreation takes on a constantly shifting persona. Recreation is proving, in many ways, to be as burdensome on the land as many of the "extractive uses" and therefore requires intensive management.[70] It becomes apparent that recreation, standing as the lone solution, will not alleviate the problems of resource allocation depletion and contention.

However, equally evident are the consequences of relying upon and encouraging isolationist or paternalistic paradigms that disregard new solutions

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[67] *See* Debra L. Donahue, THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY 112-13 (Univ. of Okla. Press 1999). Donahue emphatically asserts that removal of cattle from public lands is necessary and desirable to the ecological viability of western rangelands. A cornerstone of her argument is that the mythology of the cowboy ideal is responsible for furthering culturally false and environmentally damaging decision-making.

[68] Case & Alward, *supra* note 64, at 22-23. "Older people, particularly in rural areas, know more about the actual status of the environment and about management of natural resources . . . than people in mid-adulthood. Not surprisingly, analysis of the data seems to indicate this knowledge is acquired primarily through direct experience . . . . Younger people (from any location in the West) score as high on overall knowledge as older, rural residents, but they appear to be more knowledgeable of ecology of the environment processes than they are of the actual condition of the environment." *Id.* Thus, while these two groups (older, rural and young western) have the potential to be a powerful combination, they often find themselves at odds with one another because of lack of exposure and misunderstandings. Ranchers and Farmers on one side and Environmentalists on the other.

[69] Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 178, 184 (1999).

[70] Jeffrey L. Bleich, *Chrome on the Range: Off-Road Vehicles on Public Lands*, 15 ECOLOGY L.Q. 159 (1988).

to old, but increasing prevalent, sources of conflict in the West. Even a cursory perusal of the western states allows one to see that the logical sequence of events will lead to increased mineral development,[71] more recreation, less public grazing and large scale development of the private property adjacent to public property.[72] There is literally no ceiling on the potential consumption of western resources. Small ranching and farming operations, because they are "inefficient"[73] are in danger of being culled in the rural west to make way for development.

"Throughout the West, the livestock and logging industries have come under mounting attack. Environmental and economic pressures are driving the large parts of these industries that are mobile to shift their operations from public land in the West to private land in the South."[74] Inattention to details of the large-scale trends in agriculture can cause one to miss important realities that accompany these trends so as to be deceptive and inaccurate. The public is led to believe that there is a relative stasis in agriculture when, in fact, the truth is more complex. Almost incomprehensible change has taken place. Taken as a whole, these statistics point out what is glaringly obvious to anyone living in the rural west: large corporate farms and ranches have displaced many smaller operations by buying out and consolidating those operations.[75] In some cases the operations have moved to the abundant private land of the East,[76] raising cattle on feedlots rather than grazing them on range and leaving rural western communities bereft and vulnerable. Because ranching operations are important components of many rural communities the loss of ranches effectively eviscerates the potential power of these communities to realize self-determined and environmentally sound decision-making. Without this cohesion and community structure, these rural locales are often rendered ineffective as an interest group. The same is true of environmental groups, working to protect their interests in the area, as they similarly lack the power structure and are rendered impotent but for their attempts to hold off development in the short term.

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[71] Statement of Kathleen Clarke, *supra* note 4.

[72] *Id*. at 30-31. While the study cited does not necessarily make these explicit claims they are derived from the demographic patterns of change not only in the West but in the nation as a whole.

[73] Donahue, *supra* note 67, at 250-63. This inefficiency is evidently a result of the huge numbers of cattle that can be raised in the infinitely small confines of private feedlots relative to the use of wide expanses on public lands. *Id*.

[74] Frank J. Popper & Deborah E. Popper, *The Reinvention of the American Frontier*, AMICUS, Summer 1991, at 4-7. The thrust of this article is that the Environmental movement has helped to propel extractive industry out of the rural West. These authors make the accurate observation that many families and communities which depended upon agriculture have been displaced. However, writing in 1991 they were less than clairvoyant in their assessment of the decline of extractive resources in the West as is evidenced by the unprecedented scale of mineral development now taking place in the Powder River Basin. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-61 (2000).

[75] Case & Alward, *supra* note 64, at 23-26.

[76] Popper & Popper, *supra* note 74, at 7.

b. Environmental Concerns are Increasingly Focused on Stalling Tactics.

From a practical perspective, stalling by environmental groups comes about as a result of environmental groups having difficulty overcoming jurisdictional hurdles so that they may have access to the courts for substantive claims which would provide actual relief.[77] As a long term strategy, the efficacy of an environmental group holding out as long as possible in the face of apparently irresistible inertia in the direction of development seems tenuous at best. It is overwhelming when development is viewed as a force acting of its own volition. However, if we are able to set aside this inevitable overriding propensity to develop, then it becomes a much more tangible and manageable question of individual motivation. What are people looking for in the West? What will the future West look like, and how will those visions be sculpted? There are, no doubt, some that would have it look exactly as the eastern portion of the country looks now. Similar development patterns, mineral development, agriculture, recreation, and real estate. More people, more productivity. But the west has the unique benefit of foresight and opportunity to set aside public lands for the collective good. The interplay between the public and private land is important to recognize. What goes on in the public domain drastically affects the character and nature of adjacent private property.

Animosity towards historical uses of the public domain is prevalent in certain environmental academic circles.[78] Much of this disdain is couched in a concern for the land. However, the disagreement often comes down to differing concepts of the way that the land should be used. Discussion in these circles often focuses on the economically "marginal" nature of grazing or timber coupled with significant environmental impacts, compared to the supposedly benign physical impacts and positive economic benefits of the "non-extractive" recreational uses.[79] There is less often a discussion of the ways in which traditional interests,

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[77] Beyond the scope of this paper, but worth mentioning for the sake of documentation if not clarity, are the issues of standing, mootness, ripeness and attorneys fees that create a complex jurisdictional tapestry for environmental groups to unravel. While *Friends of the Earth v. Laidlaw Envtl. Servs,* 528 U.S. 167 (2000), seemingly expanded the ability of environmental groups to overcome the standing requirements laid out in *Lujan v. Nat'l Wildlife Fed'n*, 504 U.S. 555 (1992), the court established that the environmental plaintiffs must make a showing of injury not just to the environment. Rather the plaintiffs must show that they were injured by the environmental damage in some specific way. *See also* Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Res., 532 U.S. 598 (2001) (discussing attorneys fees and mootness).

[78] Donahue, *supra* note 67, at 112.

[79] Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539, 582 (Summer 1999). It should be noted that this article supports cultural claims as a legitimate means for rural communities to preserve their unique characteristics. As a practical matter the author explains that in the absence of constitutional claims these cultural claims are important and, perhaps, necessary to the continued existence of these unique cultures. However, the paternalism that pervades much of academic explanation of rural community problem-solving is present in the tenor and conclusions of the article. I mention this only as a point of interest—even in spite of best efforts by the author to be sensitive to the nature,

ranching and timber for example, have staved off large scale development of the adjacent private property interests. Putting ranching and environmentalism at odds one with the other ignores the reality that, in many cases, these interests employ divergent methodology in preserving similar values of the West: the methods, not the ideology, are the true dividing point. In many cases ranchers and environmentalists want the same end: a stable and productive environment. They simply have different solutions to achieve that end.[80] The inability of ranchers and environmentalists to come together until recently has allowed for other interests (real estate developers and mining companies for example) to creep in and take advantage of the lack of local cohesion. One solution that has the potential to meet the wants and needs of both environmentalists and ranchers is for these groups to join forces and make NEPA much more than a minor inconvenience to industry and development interests. This requires an understanding of what NEPA was designed to do, what it has done, and most importantly, what NEPA is capable of accomplishing when used to its full potential.

IV. NEPA WITH TEETH: CULTURAL IMPACTS AND PRIVATE LANDOWNERS.

NEPA requires that agencies take a "hard look" at the cumulative environmental consequences of that agency's plans or actions.[81] This begs the question: what are the agencies supposed to take a hard look at?

> [NEPA] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.[82]

A. As a Practical Matter, Taking a "Hard Look" Includes Review of Public Comment and Responding to Concerns Included in Those Comments.

Once individual concerns become a part of the administrative record, they are available for the court to use in evaluating the sufficiency of the agency response to those comments. Accordingly, the more complete the public comment, and thus

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structure and conscience of these communities there is a overarching theme that they are antiquated to the point that they are legitimized only in the recognition of their unique values, and not as a result of the presence of those values in, and of, themselves. For example, *see* Michelle M. Campana, *Public Lands Grazing Fee Reform: Welfare Cowboys and Rolex Ranchers Wrangling with the New West*, 10 N.Y.U. Envtl. L.J. 403 (2002); Laitos & Carr, *supra* note 69.

[80] Mark Dowie, *Notes From A Fence-Sitter*, HIGH COUNTRY NEWS, Apr. 10, 2000, at 13, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=5712.

[81] *See, e.g.,* Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). A brief explanation of the Kleppe decision follows *infra*.

[82] *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

the administrative record, the closer we are to achieving the goals and standards of NEPA because "these procedures are almost certain to affect the agency's substantive decision."[83]

Coming back to the *WOC* decision, it stands to reason that presenting a diverse range of potential environmental impacts that are similarly focused is a powerful tool for ensuring full and effective compliance with NEPA.[84] There, environmental claims that methane mining had impacts beyond what the agency was willing to admit were reinforced by private landowners who demonstrated the tangible damage incurred on their property as a result of the mining.[85] It appears to be an elementary conclusion that if a project is impacting the environment on one level, then it is likely impacting it on other levels as well. But, much of the litigation strategy in this area does not reflect recognition of the potential for inclusion of more total claims in a single suit. Nor does it reflect awareness of the valuable potential found in substantively corroborative claims which are made possible by bringing ranchers and environmentalists together. This diverse range of impacts can be similarly focused either in terms of the concerns upon which they are collectively centered, or on a common goal that manifests by way of common values. When the record is fashioned in this way it creates a higher standard for review of the agency by the court because it forces the agency to justify its actions in the face of considerable, unified concerns presented collaboratively by diverse interest groups.

On the other hand, if an agency is presented with myriad competing self interests and a unified industry perspective, dissenters have made the agency's decision an easy one. After all, the agency cannot please everyone all of the time, they may as well go with the utilitarian solution that seems to come from the development of the minerals in as rapid fashion as is possible. When, however, traditionally contrary interests come together in alliance for the preservation of the status quo, at least until all of their questions are answered, it is (or should be) more difficult for the agency to disregard these questions and concerns.

In 1976, the United States Supreme Court decision in *Kleppe v. Sierra Club* set the standard for much of the Courts' NEPA analysis in *WOC*.[86] *Kleppe* concerned coal leases in basically the same geographic region as *WOC*. The Court in *Kleppe*

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[83] *Id.* at 350.

[84] This proposition is derived from analyzing similar fact patterns of cases with different outcomes where, in the case with a positive outcome, the administrative record has been fully developed by separate interest groups with a common goal. *Compare*, Wyo. Outdoor Council v. U.S. Army Corps. of Eng'rs, 351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005), *with* Greater Yellowstone Coal. v. Flowers, 359 F.3d 1257 (10th Cir. 2004). *See also supra* notes 15-17 and accompanying discussion.

[85] *WOC*, 351 F. Supp. 2d at 1246-47.

[86] *Kleppe*, 427 U.S. 390.

held the BLM had no obligation to perform regional environmental impact statements because there was not a "regional plan of development."[87] Whether *WOC* and similar challenges fare better over the long-term remains to be seen, but there are indications that they could, particularly where, as in *WOC*, the plaintiffs are private land owners with tangible interests at stake. Additionally, the large scale development plans for the region make it more difficult for agencies to claim that there is no plan in this instance because of the approval of so many leases. The issuance of a sweeping general permit, GP 98-08, in anticipation of expediting the permitting process, contemplates a large scale plan. In *WOC*, and other coal bed methane litigation, one could argue that in light of the number of leases, the general permitting, and the push for full field development, in this case no plan constitutes poor planning and the agency must prepare both regional development plan and a regional EIS.[88] Incorporation of tangible injury into NEPA lawsuits can strengthen the argument for requiring EISs', which then must adequately identify all of the potential impacts of a project. Showing how a project impacts people directly makes the argument for constraining the project more accessible and more effective. To state a truism, operating from an anthropocentric perspective is human nature. Judges are not impervious to this truth. No amount of logic or artful legal argument can circumvent the fact that showing direct human consequences is more tangible than explaining abstract environmental impacts.

Emphasizing an anthropocentric reading of NEPA can be particularly effective in litigation of this type. First, there is the actual harm done to the land, which also has an effect on the human environment, specifically land that was once viable for agricultural purposes is no longer available for either farming or ranching. On a large scale, coal bed methane mining threatens to destroy a way of life by marginalizing and potentially compromising the agricultural interests of an entire region. Second, there is a private property right at stake. Not only is the land being degraded but specific private property interests are implicated in that degradation. This particular farmer/rancher is suffering concrete, and very real, injury. Third, an anthropocentric argument does not foreclose the opportunity to assert an argument concerning the ecologically significant injury to the environment as well as wildlife and scenic values. Viewed in this light, NEPA can either continue to be relegated to superfluous status as either a single dimensional stalling tactic, an insulated and abstract legal obligation performed with perfunctory machination or; NEPA can be used as a multi-pronged tool to force sustainable development.

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[87] *Id.* at 401.

[88] Support for this proposition is found in a recent discussion of segmentation and cumulative impacts as they pertain to *Kleppe* in NEPA analysis. *See* Florida Wildlife Fed. v. U.S. Army Corps of Eng., 401 F. Supp. 2d 1298, 1313 (S.D. Fla. 2005).

B. NEPA's Cultural Impact Analysis and the 10th Circuit.

The broad goal of NEPA according to the *WOC* court, in language borrowed from the statute itself, is to "encourage productive and enjoyable harmony between man and his environment: to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man: to enrich the understanding of the ecological systems and natural resources important to the Nation."[89] The Tenth Circuit seems willing to recognize a higher standard for agency actions by way of an anthropocentric reading of NEPA which allows that coalitions involving farming and ranching interests are better situated as potential plaintiffs than those groups which include only environmental interests:

> [i]mpacts to private lands should be considered in determining whether impacts are significant under NEPA. Significance requires an evaluation of both context and intensity. The Tenth Circuit has held that impacts to farmlands can lead to a finding of significance.[90]

The importance of this type of language coming from the Tenth Circuit is the way in which it establishes an effective standard for the question of "significant" as it relates to NEPA analysis. Where, as here, the threshold for significance of environmental assessments is tied to the viability of a valuable commodity (here irrigated farmland) there is a tangible standard for the court to rely upon when finding that a comprehensive EIS is required: "[g]iven the aesthetic, economic, ecological, and cultural value of agriculture to the region, even a loss of 2,000 acres of irrigated farmland is significant."[91]

It is important to note while this type of significance finding may stand alone, it does not preclude and, in the context of a coalition effort, can reinforce a finding of significant environmental impacts of other kinds. This is true because of the potential to show a direct human injury as a result of the environmental harm.

While NEPA is not substantive in nature, using NEPA to create a tangible standard of what constitutes a "significant" impact comes close to establishing a substantive effect. In particular, under this standard, the agency must take into account that property is being used as farm or ranchland when determining whether an EIS is required because "NEPA is intended to guarantee that government agencies are informed of and fully consider environmental consequences when undertaking major Federal actions significantly affecting the quality of the *human*

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[89] 42 U.S.C. § 4321 (2000).

[90] *WOC*, 351 F. Supp. 2d at 1245.

[91] Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1229 (10th Cir. 2002). *See infra* notes 82-88 for a description of this case.

environment."[92] Tenth Circuit case law is instructive as to the ways in which private farm and ranch land can factor into NEPA analysis.

The District of New Mexico, in *Middle Rio Grande Conservancy Dist. v. Norton,* found consequential impacts in the Draft Economic Analysis prepared by the Fish and Wildlife Service.[93] Specifically, the court recognized that "while the . . . analysis acknowledges that farming in the Middle Rio Grande valley is put at serious risk," the agency "dismiss[es] the probability of a vast shift in New Mexico's economy, culture, ecology and social life as wholly unremarkable."[94]

In *Middle Rio Grande* the "[agency rule] will cause a substantial curtailment of irrigated agriculture in the Middle Rio Grande Valley and will result in vast, completely negative ecological, economic, aesthetic, cultural and social changes."[95] Each of these negative changes is an "impact" within the meaning of NEPA and each should be recognized discretely as well as in aggregation. Thus, there are two ways in which a given impact should be dealt with under NEPA. First, impacts need to be recognized on an individual basis: the ways in which a project affects both cultural values and aesthetic qualities should be identified individually and with specificity. But the analysis does not end there, each of these impacts is important on its own, but they do not exist in a vacuum. Therefore, the second part of the analysis must consider all of the impacts in conjunction one with another. The second part of the analysis is important so that the synergistic effect these individual impacts have, when evaluated as a collective whole, is not overlooked.

The *WOC* decision adheres to an appropriate standard for the analysis that must take place in a truly "cumulative" impact statement.[96] The standard in *WOC* fully investigates the impacts of the project, as is required by NEPA, to the human

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[92] Middle Rio Grande Conservancy District v. Babbitt, 206 F. Supp. 2d 1156, 1174 (D.N.M. 2000) (quoting NEPA in part) (internal quotations omitted and emphasis added).

[93] *Id.* at 1180. The court, in *Middle Rio Grande*, was evaluating the sufficiency of a draft economic analysis in reference to the Endangered Species Act 16 U.S.C. § 1531 (ESA), which is not implicated in this discussion. However, the quotation is included to illustrate the deficiency in the cultural analysis on the part of the agency and the recognition of that deficiency by the court. While the court is establishing a failure to comply with statutory requirements that are not at issue here, it is the agency's failure to address the impacts that could be applicable to a NEPA claim of the sort that is discussed here. So, while this case dealt with the Endangered Species Act, NEPA was implicated by the final agency action of the Secretary declaring a final rule as it pertained to water flow in support of the silvery minnow. The correlation to the sufficiency of an EA as it applies to an EIS is comparable, in particular, the requirements of NEPA to factor cumulative impacts as they relate to cultural considerations.

[94] *Id.*

[95] *Id.*

[96] *WOC*, 351 F. Supp. 2d at 1238-41.

environment. Without consideration of the cultural impacts there is little hope that an Environmental Assessment will adequately satisfy even the plain language of NEPA, much less the congressional intent therein.

Maintaining the integrity of NEPA in relation to coal bed methane development in the Powder River Basin is dependent upon the cooperation of varied interest groups and the inclusion of private property interests. Circumvention of NEPA's requirements by operating on private lands should not be allowed.[97] "Impacts to private lands should be considered in determining whether impacts are significant under NEPA."[98] Property owners have a unique interest in maintaining the ability of the land to be viable agriculturally. Private property interests are well served by the Tenth Circuit in requiring that the effects of the proposed action account for the impacts on the private lands affected by the drilling. This adds another element into the argument for collective actions comprised of environmentalists and ranchers as private property interests that must be factored into the determination by the agency.

By incorporating and using to its full potential the administrative record in the agency decision not to perform an EIS there is potential for NEPA to achieve its purpose. Specifically, a full EIS will allow for public review of all of the potential impacts of a decision. That review is imperative in the consideration whether or not to apply public pressure to the agencies in position to make decisions on behalf of the people as a whole. This is an excellent opportunity for private and public interests to insure full disclosure on the part of agency and industry decision-makers. Without such information available to the public there is little opportunity for the public to hold those entities accountable for their decisions.

> NEPA's requirements are not solely designed to inform the *Secretary* of the environmental consequences of his action. NEPA documentation notifies the *public and relevant government officials* of the proposed action and its environmental consequences and informs the *public* that the acting agency has considered those consequences.[99]

NEPA requires that the public be fully apprised of the impacts of industry and agency actions—that information is at once powerful, and crucial, in the people's role of demanding wise decisions.

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[97] *Id.* at 1245.

[98] *Id.* at 1245-46.

[99] *Middle Rio Grande*, 206 F. Supp. 2d at 1174 (quoting Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996) (emphasis added)).

C. *Additional Advantages of Rancher-Environmentalist Coalitions: Forcing Sustainable Development.*

Rancher-environmentalist coalitions provide an opportunity to reduce the reactionary impact shifting which has traditionally dominated U.S. environmental policy. Reactionary approaches to environmental problems seek to remedy the immediately identifiable situations that are obvious upon first glance; remedial rather than preventative policies. This type of remedial perspective, which ignores root causes and seeks to placate rather than solve, has huge potential for creating unforeseen impacts because of the focus of resources on fixing problems that already exist. Rancher-environmentalist coalitions can create actual solutions to difficult environmental dilemmas. Recognition of the interconnected nature of the ecosystems that we are dealing with is an important starting point in an effort to ultimately arrive at a platform where truly informed decision-making takes place. Practically speaking, the environmental movement has been a long series of reactionary efforts that shift the burden of various types of development from one population to another rather than attempting to recognize and address the root of environmental problems.[100] On the other hand, ranching interests have long been averse to change, instinctually reacting to what are perceived as outsider threats to their way of life. These interests should cease to be resistant to the point of fault where they face the potential of breaking altogether rather than bending. Pooling resources and recognizing that compromise leads to workable results for both groups is crucial. Basically this comes down to a matter of pragmatic decision-making that can objectively evaluate potential consequences of development. In this case, neither ranchers nor environmentalists might get exactly what they want, but collectively they can work to shape the work in progress that is the rural western landscape.

1. *Rancher-Environmental Coalitions Present Unique Opportunities for Encouraging Sustainable Development.*

The ability of a landowner to bring damages claims enhances the possibility of forcing responsible development beyond general environmental claims that do not incorporate the possibility of actual damages. Further private property owners, because of the intertwined nature of private and public land in the west, make the requirements of NEPA into an effective tool in forcing wise decisions when it comes to development of natural resources.

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[100] It should be noted that the environmental movement has made incredible strides in the recognition and reduction of environmentally disparaging practices. However, the problem becomes that the burden of living in a consumer driven society is shifted to populations with either an inability to play a meaningful role in the *decision-making* process, or, to populations with more immediate concerns than the somewhat abstract concept of environmental protection.

The ability to bring multiple claims and cover the bases of litigation in a collective lawsuit is important. First, it promotes judicial economy. Second, collective actions equalize the resources on the playing field. Third, presenting a united front allows for the court, as well as the legislature, to find for a collective group of interested persons. Finally, when coalitions present a united front, corporate interests have less opportunity to employ tactics that are employed to divide potentially common interests by highlighting differences and minimizing similarities. Ranchers and environmentalists do not have to look hard to find an abundance of common ground. The alternative to cooperation between environmentalists and ranchers is that someone else will call the shots, and if that someone else is a mining company these two groups may well find out too late how relatively similar their vision of the West was. The reality is this difference in vision between in how to properly manage rangeland amongst ranchers and environmentalists pales in comparison to seeing that very rangeland eviscerated by well pads, roads, and containment ponds.

2. The Clean Water Act; Employing State Law.

Rancher-environmental coalitions are also useful in forcing responsible development of coal bed methane through the Clean Water Act (CWA).[101] Much of the west, including Wyoming, has state regulations that recognize the importance of water for agricultural uses. These standards are federally enforceable because "state standards are incorporated into a [National Pollutant Discharge Elimination System] NPDES permit . . . those standards [become] enforceable in a citizen suit under the CWA."[102]

Citizen suits by landowners present an important additional facet of a potential CWA claim by presenting tangible, measurable injury. Environmental groups have long had difficulty in maintaining standing for citizen suits because of an inability to demonstrate injury and or state a claim upon which relief can be granted.[103] But partnered with a rancher whose ranch lies over, or adjacent to, a

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[101] *WOC*, 351 F. Supp. 2d at 1252-60.

[102] Swartz v. Beach, 229 F. Supp. 2d 1239, 1271 (D. Wyo. 2002).

[103] *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990). *See also* Natural Res.Def. Council, Inc. v. Buford, 716 F. Supp. 632 (D.C. 1988) (reviewing a challenge by environmental groups and residents of western states of Department of Interior rules governing leasing and mining of federally owned coal, where the district court found that the plaintiffs lacked standing to bring the suit). Specifically the D.C. circuit stated that, "In support of [their] claims of injury, plaintiffs have rested on the bare allegations in the complaint and upon one paragraph in a subsequent pleading which attempts to elucidate the nature of the injuries and the causal link to the defendants' actions." *Id.* at 636. The court conceded that, "[t]here is no dispute over the fact that surface mining of coal has many far-reaching environmental effects which are of concern to the plaintiffs. What has not been shown is that the regulatory program at issue here has injured or threatens to injure the plaintiffs." *Id.* Finally the court explained that, "the total absence of support for plaintiffs' claim that the challenged actions have injured them puts the court in the completely untenable position of having to speculate both as to injury and to the causal relationship. Such pure speculation is an

coal bed methane deposit, standing becomes a less ephemeral argument. A private property owner can demonstrate real and concrete injury. In *Swartz v Beach*, the plaintiff landowner brought suit under the citizen suit provision of the CWA, alleging that the producers of coal bed methane had violated state standards for water quality.[104] The state water quality standards were incorporated into the NPDES permit and therefore, violations of the state standards were enforceable. The pertinent statutory language reads:

> Agricultural Water Supply. All Wyoming surface waters which have the natural water quality potential for use as an agricultural water supply shall be maintained at a quality which allows continued use of such waters for agricultural purposes. Degradation of such waters shall not be of such an extent to cause a measurable decrease in crop or livestock production. Unless otherwise demonstrated, all Wyoming surface waters have the natural water quality potential for use as an agricultural water supply.

In Wyoming, the inclusion of public waters as "agricultural waters" provides an avenue by which to arrive at a successful CWA claim, achieved only with the involvement of ranchers or farmers. Here as well, a combined effort between agricultural interests and environmentalists sets the stage for success in a way that cannot be duplicated by independent action by either group.

V. CONCLUSIONS

Rancher-environmentalist coalitions are a pragmatic solution to checking reckless development. The ability of several groups to come together in an action brings to light the important and diverse interests at stake in situations such as coal bed methane production. The presence of both ranchers and environmentalists on the same side of an issue creates an impression of wrongdoing on the other side. Should an action arouse the animosity of both ranchers and environmentalists perhaps that in itself should give a court reason to pause. Further, collective action often can serve as a forum for opening avenues of dialogue that have traditionally and consistently been closed. Bringing together the collective views of different

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unacceptable basis upon which to ground a party's standing." *Id.* at 639. The court, in its opinion, cited several other cases that support the contentions that 1) standing is often a difficult hurdle for environmental groups to overcome, and 2) a showing of a particularized injury, causation, and redressibility would allow many of these challenges to be heard on the merits. *See* Sierra Club v. Morton, 405 U.S. 727 (1972); Nat'l Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988); Wilderness Soc'y v. Griles, 824 F.2d 4 (D.C. Cir. 1987).

[104] *Swartz*, 229 F. Supp. 2d at 1268-69.

[105] Wyo. Water Quality Rules, ch. 1 § 20 (quoting *Swartz*, 229 F. Supp. 2d at 1270).

groups in a non-adversary context provides for differences to be reconciled and similarities recognized. Thus, even if an arrangement has its roots in purely strategic motives, the progeny of that relationship can become an effective force in resisting unwise, hasty decision-making as a default.

Absent cohesion, sparsely populated communities are vulnerable to a variety of outside interests. This statement should not be taken out of context where it could be viewed as isolationist and xenophobic (which is antithetical both to the basic contention here and the reality of the situation facing these communities). The premise from which this observation operates is that there are inherent values in community, values which are accessible on different levels, to the population as a whole. Some of these values include open space, minimization of industrial or residential development, aesthetic qualities of the landscape, wildlife and recreation opportunities. The contention here is that often "outside" economic interests represent an attempt to commodify some part of the natural environment or inherent value that has been created by the very community that is now being displaced (the relative open space, for example, of agricultural communities) with little or no concern for maintaining those values beyond their initial economic value. This is particularly true with CBM development, where the outside interests bring promising economic growth, an influx of jobs, increased property values, and progressive development. Divergent interests acting in self-serving circles will be less effective in convincing either the court or the legislature that an agency should act in the best interests of the collective. It would be naive to believe that ranchers and environmentalists will always get along. However, it is not quixotic to believe that there is a fundamental good to cooperative, fully informed decision making.

Without cooperative efforts to check development, all of the values of the rural west are in jeopardy. Communities in the rural west constitute unique cultures and should be recognized and protected as such. The difficulty is that the necessary mechanisms to achieve this protection can only be actualized by community members who are willing to recognize both the scope, and the importance, of western culture, as well as to be open to new concepts and new partnerships. These coalitions stand as a metaphor for life in the west. Cooperation is crucial. Because of the abundance, and scarcity, of resources there are many opportunities for exploitation by those who have no stake in the cultural values of rural communities. In the case of coal bed methane development in the Powder River Basin there is little doubt that marching forward with little or no attention paid to the traditional, as well as emerging, western cultural values will have significant impacts. Allowing agencies, at the behest of industry, to roll over congressional mandates and the values that those rules were meant to give a voice to is legally, practically, and morally untenable.

The presence of outside influences that have no interest in the continued vitality, sustainability, or character of rural communities is dangerous.[108]

Particularly seductive are the promises of quick money, increased property values, jobs and influx of industry. There is an indispensable consideration that is largely overlooked in the analysis of western resource allocation, that is to whom is the sustainability of the community most important? There is incentive to create enemies of the entrenched interests, putting them at odds with one another. The commodity that is most valuable is the western way of life. There are differing opinions about what the "western way of life" entails. But it does not really matter whether you believe in the rich tradition of the cowboy culture, the recreationalist ideal of open spaces and the world as a playground, the individualism, collectivism, antidevelopment or development. Though there are different concepts of what exactly the west does, or should represent to individuals, there is a consistent theme of endless possibility constrained only by a sometimes harsh and sometimes fragile environment. This potential is the inherent value which exists in the West and it does not subscribe to a particular ideology.

Widespread development with little or no attention paid to potential ramifications puts this value of possibility at risk. As a result of widespread coal bed methane mining, development, and production, the West will be different. The Powder River Basin will be different. Whether or not that is a good thing is open to debate, but we live in a time that not only allows for the luxury of prior planning and evaluation of potential impacts before irreparable decisions are made but also requires such prior review by law. There is a distinction between careful cultivation of resources and rapid, myopic exploitation of the quick and dirty economic value of those resources. Resource values include, but certainly are not limited to, large tracts of undeveloped land (supporting not only the continuity and viability of ecosystems but also the aesthetic qualities of open spaces), deep community roots, sustainable economies, recreation values, and agriculture. They are all served by the collective efforts of ranchers and environmentalists. There is little doubt that areas of conflict exist between these two groups, however, there are increasing indications that there is more common ground than divergent views.

Given the looming potential of widespread development of coal bed methane there is a need to recognize collective goals and work together for a sustainable future. That sustainable future recognizes the wants/needs of society, appropriately assesses the West's place in that equation and demands responsible development of those resources. Divisive interests on either side of this argument have no place in the discussion. An unwillingness to compromise and recognize the validity of the other's argument is useful only to the outside interests who have time, resources and moral flexibility to wait until those with something to lose have fought it out amongst themselves, rendering the remaining opposition ineffectual.

The choice presents itself in no uncertain terms, cooperation and participation or complacency and subjugation. Environmentalists and ranchers alike must grasp the gravity of this situation, they must accept that values contained in both

the people and landscapes of the rural west are worth protecting. Recognizing that these values are more important than adherence to a particular ideology is a fundamental step towards realizing that protection. Coal bed methane is poised to change the rural West on a scale that is unprecedented. Rural communities whose residents depend upon the land for recreation, aesthetic comfort, or agriculture stand to lose as much or more than industry stands to gain. Collective action is the key. NEPA and the CWA provide avenues to achieve reasoned decision-making. There is much to be gained by working together to protect the prospect of infinite possibility that is the rural West.

CASE NOTE

ENVIRONMENTAL LAW—A Tale of Two Conflicting Mandates: Limiting Agency Authority under the Endangered Species Act or Resolution of the Statutory Overlap?, *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).

*Alicia D. Kisling**

Introduction

In February 2002, officials from the State of Arizona applied for Environmental Protection Agency (EPA) authorization to administer and oversee the National Pollution Discharge Elimination System (NPDES) within the state's borders, pursuant to section 402(b) of the Clean Water Act (CWA).[1] Section 402(b) of the CWA authorizes any state to request a transfer of NPDES permitting authority to state officials.[2] This section directs the EPA, the agency originally responsible for administering the NPDES program within each state, to approve a state's transfer application as long as that state meets the nine criteria laid out in the statute.[3] The State of Arizona satisfied all nine statutory criteria.[4]

After reviewing the state's application, however, the EPA determined a transfer of NPDES permitting authority could potentially affect endangered and threatened species in Arizona.[5] Consequently, the EPA initiated consultation with the United States Fish and Wildlife Service (FWS) pursuant to section 7(a)(2) of the Endangered Species Act (ESA).[6] The FWS concluded a transfer of permitting authority would not directly impact listed species, however, the FWS expressed

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* Candidate for J.D., University of Wyoming, 2009. I would like to thank my husband Jeremy for his continued love and support.

[1] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2526 (2007); Clean Water Act of 1972, 33 U.S.C. § 1342(b) (2000). Under Arizona's petition, the Arizona Department of Environmental Quality would be responsible for administering and overseeing the State's NPDES pollution permitting system. Defenders of Wildlife v. EPA, 420 F.3d 946, 952 (9th Cir. 2005). At the time of Arizona's transfer application, the EPA had already granted forty-four other states and several United States territories authority to administer the NPDES permitting system within their borders. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2527 n.3.

[2] 33 U.S.C. § 1342(b).

[3] 33 U.S.C. § 1342(b); *see infra* note 39 and accompanying text (stating the nine criteria a state must satisfy prior to obtaining NPDES pollution permitting authority).

[4] *Defenders of Wildlife*, 420 F.3d at 963 n.11.

[5] *Id.* at 952.

[6] *Id.* Section 7(a)(2) of the ESA requires each federal agency to consult the Secretary charged with administering the ESA to insure any agency action will not jeopardize endangered and threatened species. Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000). The FWS is

concern that the transfer would lead to an issuance of more permits, which could indirectly jeopardize listed species.[7]

The EPA disagreed, stating a transfer of permitting authority to Arizona would not negatively impact endangered species in the future.[8] Furthermore, the EPA maintained section 402(b) of the CWA required the EPA to approve Arizona's transfer application once the state met the section's nine statutory criteria.[9] In support of the EPA's position, the FWS issued a biological opinion indicating the transfer of permitting authority would not jeopardize listed species.[10] As a result of the biological opinion, the EPA determined Arizona satisfied the nine statutory requirements set forth in section 402(b) of the CWA, and subsequently approved the state's transfer application.[11]

Respondents Defenders of Wildlife, the Center for Biological Diversity, and Craig Miller, an Arizona Resident (collectively, "Defenders") filed a petition for review of the EPA's transfer decision in the United States Court of Appeals for the Ninth Circuit.[12] Defenders also brought a lawsuit against the EPA in the United States District Court for the District of Arizona alleging the FWS's biological opinion did not comply with ESA standards.[13] The Ninth Circuit allowed three

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responsible for administering the ESA with respect to species under the jurisdiction of the Secretary of the Interior; the National Marine Fisheries Services (NMFS) administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. *See* 50 C.F.R. §§ 17.11, 222.101(a), 223.102, 402.01(b) (2007).

[7] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2527 (2007) (noting the FWS' fear that because section 7(a)(2) of the ESA applies only to federal agency actions, transferring permitting authority to Arizona could allow Arizona officials to issue NPDES permits without considering the potential effect on listed species).

[8] *Id.*

[9] *Id.*; 33 U.S.C. § 1342(b) (2000) (stating the EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to meet the nine statutory requirements).

[10] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2527. Pursuant to ESA section 7(c)(1), "each Federal agency shall . . . request of the [Secretary of the Interior] information whether any species which is listed or proposed to be listed may be present in the area" of the agency's proposed action, prior to undertaking the proposed action. 16 U.S.C. § 1536(c)(1) (2000). If the Secretary of the Interior determines a listed species may exist, the FWS shall conduct a biological assessment to determine whether any endangered or threatened species are likely to be affected by the agency action. *Id.*

[11] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2527-28.

[12] *Id.* at 2528; 33 U.S.C. § 1369(b)(1)(D) (2000) (stating the Court of Appeals has jurisdiction to hear a petition regarding the EPA's transfer decision under section 402(b) of the CWA). Defenders prevailed on their petition to the United States Court of Appeals for the Ninth Circuit, and became respondents before the Supreme Court when the State of Arizona appealed the Ninth Circuit's decision to the United States Supreme Court. *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2528.

[13] Defenders of Wildlife v. EPA, 420 F.3d 946, 955 (9th Cir. 2005). The district court held the Ninth Circuit Court of Appeals had exclusive jurisdiction over Defenders' biological opinion challenge pursuant to 33 U.S.C. § 1369(b)(1)(D) and ordered the challenge transferred to the Ninth Circuit and consolidated with the EPA transfer suit. *Id.*

other parties to intervene as petitioners in the case: the National Association of Home Builders, the Arizona Chamber of Commerce, and the State of Arizona (collectively, "Home Builders").[14] Defenders' two lawsuits were consolidated and brought before the Ninth Circuit where a divided panel granted Defenders' petition and vacated the EPA's transfer decision, holding the decision was arbitrary and capricious.[15] The Ninth Circuit found the EPA's decision arbitrary and capricious because the EPA relied on legally contradictory positions regarding its obligations under ESA section 7.[16]

The United States Supreme Court granted certiorari to determine whether ESA section 7(a)(2) effectively functions as a tenth criterion a state must satisfy prior to obtaining NPDES permitting authority under CWA section 402(b).[17] In a five-four decision delivered by Justice Alito, the Supreme Court reversed the Ninth Circuit's decision, holding that section 7(a)(2) of the ESA applies only to federal agency "actions in which there is discretionary Federal involvement or control."[18] Since section 402(b) of the CWA mandates the EPA grant a state's transfer application after a state satisfies the nine statutory criteria, the decision to transfer NPDES permitting authority is nondiscretionary and does not trigger section 7(a)(2)'s no-jeopardy considerations.[19]

This case note demonstrates how the Supreme Court's interpretation of section 7(a)(2) of the ESA in *National Association of Home Builders v. Defenders of Wildlife* (*NAHB*) balances competing public interests and agency actions with the continued protection of endangered and threatened species and their habitats.[20] Specifically, this case note first examines the legislative history surrounding the ESA's enactment and demonstrates how the Court's decision furthers the ESA's intent as applied to federal agency actions.[21] Second, this case note explains how the Court's decision effectively resolved the statutory overlap between the ESA and the CWA.[22] By resolving the statutory overlap between the two statutes, the Court also resolved a split of authority among the circuits and provided federal courts

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[14] *Id.*

[15] *Id.* at 950.

[16] *Id.* at 959.

[17] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2525, 2529; 16 U.S.C. § 1536(a)(2) (2000) (requiring all federal agencies to insure their actions will not jeopardize listed species).

[18] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538.

[19] *Id.*; 16 U.S.C. § 1536(a)(2) (prohibiting federal agencies from undertaking any action that could jeopardize threatened or endangered species).

[20] *See infra* notes 159-235 and accompanying text.

[21] *See infra* notes 170-81 and accompanying text.

[22] *See infra* notes 182-211 and accompanying text.

with a clearer, more definitive answer regarding the ESA's scope.[23] Finally, this case note illustrates the Court's decision in *NAHB* should not restrict Congress's ability to protect listed species in the future, because the opinion exempts only those actions that are truly nondiscretionary.[24]

BACKGROUND

Section 402(b) of the CWA states the EPA "shall" approve a state's request for a transfer of NPDES permitting authority upon a showing the state satisfied the nine statutory criteria.[25] The statute goes on to state the EPA "shall" approve a transfer application unless EPA determines the state does not possess sufficient authority to adequately administer the NPDES program.[26] Section 7(a)(2) of the ESA states each federal agency "shall" consult the Secretary of the Interior to "insure" any agency action will not jeopardize endangered and threatened species.[27] Clearly, the two statutes present conflicting mandates and result in a statutory overlap.[28] The U.S. Supreme Court's early interpretation of the two statutes indicated a preference for the ESA to preside over all federal agency actions, regardless of the cost.[29] Recent U.S. Supreme Court decisions, however, have found the ESA inapplicable to federal agency actions in certain limited circumstances.[30] Nevertheless, many courts remained confused about how to balance the competing interests of the ESA and the CWA, resulting in a split of authority among the circuits.[31]

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[23] *See infra* notes 212-23 and accompanying text. Prior to the Supreme Court's decision in *NAHB*, the circuits were divided regarding whether the ESA imposes a duty to consider listed species independent of the agency statute. *See infra* notes 68-90 and accompanying text.

[24] *See infra* notes 224-35 and accompanying text.

[25] 33 U.S.C. § 1342(b) (2000).

[26] *Id.*

[27] 16 U.S.C. § 1536(a)(2) (2000).

[28] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538 (2007) (Stevens, J., dissenting) (stating *NAHB* presents a problem of conflicting "shalls" and discusses the proper way to resolve "competing statutory mandates"). The ESA makes it difficult for the EPA to transfer permitting authority to state officials as soon as the State satisfies the nine statutory criteria if the EPA must also insure its transfer decision will not jeopardize listed species since a consideration of listed species is not one of the nine expressly enumerated statutory criteria set forth in CWA section 402(b). *Id.*

[29] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172-73 (1978) (reasoning section 7(a)(2) of the ESA required a permanent halting of the construction and operation of a virtually completed $100 million dam because the dam's operation would jeopardize a listed species).

[30] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538; 16 U.S.C. § 1536(e)-(h) (2000); Sherry L. Bosse, Defenders of Wildlife v. EPA: *Testing the Boundaries of Federal Agency Power under the ESA*, 36 ENVTL. L. 1025, 1054 (2006) (reasoning ESA section 7(a)(2) is inapplicable when the statute a federal agency is administering neither provides the agency with authority to consider listed species, nor provides the agency with sufficient discretion to consider its impact on listed species).

[31] *See infra* notes 68-90 and accompanying text.

The Clean Water Act

1n 1972, Congress established the CWA as a way to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[32] The CWA created the National Pollution Discharge Elimination System (NPDES) program, designed to protect the nations' waters from the discharge of harmful pollutants.[33] Under the NPDES program, any individual or organization desiring to discharge pollutants into the nations' waters must apply for and receive a permit.[34] The EPA is the agency initially responsible for administering the program within the United States.[35]

Recognizing Congress's policy to protect the rights of states to prevent and reduce water pollution within their borders, Congress enacted section 402(b) of the CWA, which authorizes any state to apply for a transfer of NPDES pollution permitting authority to state officials.[36] Section 402(b) of the CWA instructs the governor of each state desiring to administer its own NPDES program to submit to the EPA a complete description of the plan the state proposes to administer.[37] In addition, the state must submit a statement indicating it possesses adequate authority to carry out the desired program.[38] Any state requesting a transfer of permitting authority to state officials must conclusively establish it has the authority to oversee nine statutory criteria laid out in the CWA.[39] Once a state has

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[32] 33 U.S.C. § 1251(a) (2000).

[33] 33 U.S.C. §§ 1342(a) (2000), 1251(a).

[34] 33 U.S.C. § 1342(a).

[35] 33 U.S.C. § 1251(d).

[36] 33 U.S.C. §§ 1251(b), 1342(b) (stating "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources").

[37] 33 U.S.C. § 1342(b).

[38] *Id.*

[39] *Id.* Section 402(b) of the CWA states that the EPA "shall" approve a transfer application once the State demonstrates it has the ability achieve the following nine criteria: (1) issue fixed-term permits that insure compliance with the CWA, and that can be terminated or modified for cause; (2) issue permits and inspect, monitor, and require reports to the extent necessary to satisfy section 308 of the CWA; (3) insure the public, and any other state whose waters might be affected by the transfer, receive notice of each permit application and provide that state with an opportunity to hold a public hearing; (4) insure the EPA receives notice of each permit application; (5) insure any other state whose waters might be affected by the issuance of a permit be afforded the opportunity submit written comments to the state requesting the transfer of authority, and that the permitting state will notify the affected state in writing if the affected state's recommendations are not accepted; (6) insure a permit will not be issued if the Secretary of the Army believes the anchorage and navigation of navigable waters would be substantially impaired thereby; (7) decrease violations of the permit program; (8) insure any permit for a discharge from a publicly owned treatment works facility be accompanied by a statement identifying the character and volume of pollutants being discharged; and (9) insure any industrial user of any publicly owned treatment works facility will comply with the CWA. *Id.*

satisfied these nine criteria, the statute mandates the EPA "shall" transfer NPDES permitting authority.[40]

The Endangered Species Act

One year after Congress enacted the CWA it established the ESA to provide a program for the conservation of endangered and threatened species and their habitats.[41] Section 7 of the ESA requires federal agencies to cooperate to further the conservation of listed species.[42] In addition, ESA section 7(a)(2) requires each federal agency to "insure" its actions do not jeopardize threatened and endangered species or their habitats.[43] Furthermore, the Secretaries of the Interior and Commerce promulgated a joint regulation which states section 7 applies to all actions involving "discretionary" federal involvement or control.[44]

Prior to undertaking a federal agency action, an agency must consult the Secretary of the Interior if the action could potentially jeopardize threatened or endangered species.[45] As soon as practicable upon completion of the consultation process, the Secretary of the Interior shall provide the federal agency with a written biological opinion discussing whether the agency action affects listed species.[46] If the Secretary determines the proposed agency action could jeopardize listed species, the Secretary shall suggest possible alternatives which likely would not violate section 7(a)(2) and which would allow the federal agency to undertake its proposed action.[47] An agency has three options if the Secretary determines its proposed action would jeopardize listed species: (1) terminate the action;

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[40] *Id.* (stating the EPA "*shall* approve each submitted program unless [it] determines that adequate authority does not exist" (emphasis added)).

[41] 16 U.S.C. § 1531(b) (2000).

[42] 16 U.S.C. § 1536 (2000).

[43] 16 U.S.C. § 1536(a)(2) (stating "[e]ach Federal agency *shall*, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical" (emphasis added)). The FWS administers the ESA with respect to species listed under the jurisdiction of the Secretary of the Interior, while the National Marine Fisheries Service (NMFS) administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. *See* 50 C.F.R. § 402.01(b) (2007). The affected species in *NAHB* involved species under the jurisdiction of the FWS, thus any reference to the "Secretary" in this case note implies the Secretary of the Interior. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2527 (2007).

[44] 50 C.F.R. § 402.03 (2007) (stating ESA section 7 "[applies] to all actions in which there is *discretionary* federal involvement or control" (emphasis added)).

[45] 16 U.S.C. § 1536(a)(2).

[46] 16 U.S.C. § 1536(b)(3)(A).

[47] *Id.*

(2) implement the proposed alternative; or (3) seek an exemption from the Endangered Species Committee.[48]

Because both the ESA and the CWA impose conflicting statutory mandates upon federal agencies, a clear overlap exists between the ESA and the CWA.[49] CWA section 402(b) states the EPA "shall" grant a state's transfer request once the state satisfies the nine statutory criteria; ESA section 7(a)(2) states all agencies "shall" insure their actions will not jeopardize listed species or their habitats.[50] As a result, courts have had difficulty in determining which statute, if any, should yield to better serve Congress's intent.[51]

Court Applies ESA Section 7(a)(2) to "All" Agency Actions

The U.S. Supreme Court's first major attempt to determine the extent of the ESA's reach arose in *Tennessee Valley Authority v. Hill*.[52] *Hill* presented the issue of whether the ESA required the Court to enjoin the construction of a nearly complete federal dam upon the Secretary of the Interior's determination that the dam's operation would eradicate a listed species.[53] The Tennessee Valley Authority (TVA) nearly completed the Tellico Dam when a researcher discovered a previously unknown species, the snail darter, in the waters near the dam.[54] Believing the dam's construction and operation would either eradicate the snail darter or destroy its critical habitat, thus resulting in the creature's demise, the

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[48] 16 U.S.C. §§ 1536(a)(2), 1536(b)(3)(A), 1536(h). Congress established the Endangered Species Committee (Committee) which consists of seven Cabinet-level members authorized to grant exemptions under section 7 of the ESA. 16 U.S.C. § 1536(e)-(h). Congress realized certain species must necessarily submit to important agency actions, thus Congress granted the Committee the power to determine when it is acceptable for a species to become extinct in order to allow a beneficial agency action to proceed. 16 U.S.C. § 1536(h).

[49] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2534 (2007) (stating an "agency cannot simultaneously obey the differing mandates" set forth in ESA section 7(a)(2) and CWA section 402(b)).

[50] 33 U.S.C. § 1342(b) (2000) (stating the EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" to meet the nine statutory requirements); 16 U.S.C. § 1536(a)(2) (stating "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize" listed species).

[51] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2533-37 (indicating since Congress enacted CWA section 402(b) prior to enacting ESA section 7(a)(2), the CWA should prevail because holding otherwise would effectively repeal the CWA by adding a tenth criterion to the statute's exclusive list of factors).

[52] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 156 (1978).

[53] *Id.* In 1967, Congress appropriated and spent over $100 million for the construction of the Tellico Dam. *Id.* at 157. The Tellico Dam involved a multipurpose development project designed to increase shoreline development, generate electricity, and provide recreation and flood control. *Id.*

[54] *Id.* at 159. The snail darter, a three-inch, tannish-colored fish, numbered approximately 10,000 to 15,000 when a researcher discovered the fish. *Id.* A University of Tennessee ichthyologist located the snail darter when the TVA nearly completed construction of the Tellico Dam. *Id.* at 158-59.

Supreme Court determined the TVA would violate the ESA if it operated the dam as planned.[55] According to the Court, the dam's continued operation would violate the ESA because Congress, in enacting the ESA, clearly intended to afford threatened and endangered species the highest of priorities.[56]

Congress Creates an Exception to Section 7(a)(2)

Concerned the *Hill* Court's application of section 7(a)(2) of the ESA to "all" federal agency actions created an overly-broad standard, Congress amended the ESA and established the Endangered Species Committee (Committee).[57] Congress granted the Committee the power to authorize exemptions from section 7(a)(2) of the ESA.[58] An exemption issued by the Committee authorizes the requesting agency to undertake its proposed action, despite such action jeopardizing or even eradicating endangered and threatened species or their habitats.[59]

The Committee represents the single statutory exception to the stringent ESA requirements.[60] The Committee, comprised of six high-ranking cabinet members and a presidential nominee from each effected state, has the authority to balance the interest of endangered species with those of the public.[61] In amending

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[55] *Id.* at 171-72.

[56] *Id.* at 173.

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in [section] 7 of the [ESA]. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized*, *funded*, or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species.' This language admits of no exception.

Id. (quoting 16 U.S.C. § 1536 (2000) (emphasis in the original)).

[57] 16 U.S.C. § 1536(e)-(h) (2000); *see Tenn. Valley Auth.*, 437 U.S. at 196 (Powell, J., dissenting) (arguing the Court's holding, preventing the operation of a virtually complete $100 million dam due to the discovery of an endangered species of snail darter, "absurd"); *see also* Rio Grande Silvery Minnow v. Keys, 356 F. Supp. 2d 1222, 1224 (D.N.M. 2002) (stating Congress created the Committee as an exception to the stringent requirements of ESA section 7(a)(2) because the broad ramifications of the ESA concerned Congress). The Committee members include: (1) the Secretary of Agriculture; (2) the Secretary of the Army; (3) the Chairman of the Council of Economic Advisors; (4) the Administrator of the EPA; (5) the Secretary of the Interior; (6) the Administrator of the National Oceanic and Atmospheric Administration; and (7) a presidential nominee from each state effected by the petition for an exemption from the requirements of section 7(a)(2) of the ESA. 16 U.S.C. § 1536(e)-(h).

[58] 16 U.S.C. § 1536(e)-(h).

[59] 16 U.S.C. § 1536(h).

[60] *Rio Grande Silvery Minnow*, 356 F. Supp. 2d at 1224 (stating Congress created the Committee as the "single exception to the stringent requirements of the ESA"). Section 7(a)(2) of the ESA requires all federal agencies to "insure" their actions will not jeopardize listed species or their habitats. 16 U.S.C. § 1536(a)(2).

[61] 16 U.S.C. § 1536(e)-(h).

the ESA, Congress specifically provided the Committee, not the courts, with the power to grant exemptions under section 7(a)(2).[62] Thus, even after the creation of the Committee, Congress still required the federal courts to apply the ESA as interpreted by the Supreme Court in *Hill*.[63] This meant continuing to give endangered species the highest of priorities regardless of the cost.[64]

However, even if an agency's proposed action could jeopardize listed species, Congress entrusted the Committee with authority to grant exemptions to ESA section 7(a)(2) if the Committee determines the agency has met certain requirements.[65] Additionally, the Committee must establish reasonable mitigation and enhancement measures to minimize the adverse effects of the agency action upon listed species and their critical habitats.[66] If the agency satisfies the Committee's mitigation measures, the Committee may grant an exemption to the requirements of section 7(a)(2), thereby allowing the agency to proceed with its proposed action.[67]

Circuit Split of Authority

Even after Congress created the Endangered Species Committee as a way to limit the overly broad application of the ESA, many courts remained unsure regarding the extent of the ESA's reach.[68] This resulted in a split of authority

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[62] *Rio Grande Silvery Minnow*, 356 F. Supp. 2d at 1225.

[63] *Id.* (stating Congress "specifically and exclusively" delegated the power to balance the interests of the public with the interests of endangered species to the Committee, rather than to the federal courts; thus, the federal courts must continue to give endangered species the highest of priorities "whatever the cost").

[64] *Id.*

[65] 16 U.S.C. § 1536(h)(1)(A). An agency must establish four requirements in order to receive an exemption from the Committee:

> (i) there are no reasonable and prudent alternatives to the agency action; (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; (iii) the action is of regional or national significance; and (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) [of section 7(a)(2) of the ESA].

Id. Section 7(d) of the ESA states the Federal agency and the exemption permit applicant must not make any "irreversible or irretrievable" commitment of resources that would have the affect of prohibiting the implementation of any reasonable and prudent alternative. 16 U.S.C. § 1536(d).

[66] 16 U.S.C. § 1536(h)(1)(B). The subsection lists several reasonable mitigation measures including live propagation, transplantation, and habitat acquisition and improvement. *Id.*

[67] 16 U.S.C. §§ 1536(a)(2), 1536(h)(1).

[68] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 203 (1978) (Powell, J., dissenting) (characterizing the Court's holding as a "sweeping construction" of the ESA); *see* Bosse, *supra* note 30, at 1047 (indicating circuits have reached divergent conclusions).

among the circuits.[69] In particular, the circuit split involved the question of whether the ESA provides an affirmative grant of authority to agencies to protect listed species.[70] One line of cases, followed by the First Circuit and the Eighth Circuit, suggests ESA section 7(a)(2) confers additional authority on agencies to consider listed species.[71] Under this approach, an agency possessing sufficient discretion to consider listed species must give species protection the highest of priorities if the agency action could jeopardize listed species.[72] In contrast, the Fifth Circuit and the D.C. Circuit have determined the ESA does not confer any additional authority on the agencies.[73] The Fifth and D.C. Circuit cases held an agency only needs to consider its impact to listed species if the statute in question specifically provides for the consideration of species.[74]

One line of cases in the split, followed by the Fifth and D.C. Circuit, holds an agency does not have authority to consider the agency action's impact on listed species if the agency interprets a statute without a species consideration provision.[75] In *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC* (*FERC*), the United States Court of Appeals for the District of Columbia

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[69] *See* Bosse, *supra* note 30, at 1047 (stating the First and Eighth Circuits interpreted ESA section 7(a)(2) to confer additional authority on agencies to consider species, while the Fifth and Tenth Circuits held section 7(a)(2) does not grant agencies additional authority). *Compare* Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291, 299 (5th Cir. 1998) (stating ESA section 7(a)(2) does not grant an agency authority to take listed species into account when the agency is interpreting a statute that does not provide some authority for the agency to do so), *and* Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding ESA section 7(a)(2) does not confer additional powers upon agencies to consider listed species), *with* Defenders of Wildlife v. EPA, 882 F.2d 1294, 1299 (8th Cir. 1989) (holding ESA section 7(a)(2) imposed substantial obligations upon agencies to consider the effect of their actions on listed species), *and* Conservation Law Found. of New England, Inc. v. Andrus, 623 F.2d 712, 714 (1st Cir. 1979) (determining ESA section 7(a)(2) imposes an obligation upon agencies to protect listed species).

[70] *See* Bosse, *supra* note 30, at 1047 (stating the circuit split involved the issue of whether ESA section 7 provides agencies with additional authority to protect listed species).

[71] *Id.* The courts that found ESA section 7(a)(2) conferred additional authority on agencies to take species considerations into account did so because the statute those agencies were interpreting already provided for limited species consideration. *See infra* notes 84-90 and accompanying text. Thus, by holding section 7(a)(2) applied to the particular statutes, the Courts essentially conferred "additional authority" on the agencies to consider their impacts on listed species. *See infra* notes 84-90 and accompanying text.

[72] *Conservation Law Found. of New England*, 623 F.2d at 714 (interpreting the OCSLA which possessed sufficient discretion for the agency to consider listed species because the OCSLA required approval of an oil and gas exploration plan unless approval would likely cause serious harm or danger to life); Bosse, *supra* note 30, at 1047 (stating ESA section 7(a)(2) requires agencies with sufficient discretion to give listed species the highest of priorities).

[73] Bosse, *supra* note 30, at 1047 (stating the ESA does not bestow any additional authority upon agencies to consider listed species).

[74] *See infra* notes 75-83 and accompanying text (discussing the Fifth and D.C. Circuit decisions).

[75] *See infra* notes 75-83 and accompanying text (discussing the Fifth and D.C. Circuit decisions).

Circuit held section 7 of the ESA does not confer additional powers upon agencies to consider potential negative impacts to endangered and threatened species.[76] The court stated the ESA "does not *expand* the powers conferred on an agency by its enabling act."[77] According to the court, the statute does not require agencies to go beyond their statutory authority to carry out the ESA's purposes.[78]

Six years later, the United States Court of Appeals for the Fifth Circuit relied on the D.C. Circuit's *FERC* holding.[79] The Fifth Circuit determined the ESA does not grant an agency authority to take species into account when the agency interprets a statute that does not provide some authority for the agency to do so.[80] The court determined the ESA does not create additional authority to consider listed species, but merely requires agencies to use their existing authority to protect species.[81] The court applied section 7(a)(2) of the ESA to section 402(b) of the CWA and determined ESA section 7 does not grant the EPA the authority to add additional criteria to the CWA requirements.[82] Rather, ESA section 7 merely requires the EPA to consult with the FWS before undertaking any agency action.[83]

In contrast, the United States Court of Appeals for the First Circuit in *Conservation Law Foundation of New England, Inc. v. Andrus Authority* (*Conservation Law*) determined ESA section 7(a)(2) imposed an affirmative obligation on agencies to protect species.[84] *Conservation Law* discussed the issue of whether ESA section 7 applied to the Outer Continental Shelf Lands Act (OCSLA).[85] OCSLA required the approval of an oil and gas exploration plan

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[76] Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992).

[77] *Id.* (emphasis in the original) (stating agencies are not required to do "whatever it takes" to protect listed species because agencies are not required to look beyond the powers Congress granted them in their enabling acts, and agencies have no authority to consider listed species when Congress did not confer any statutory authority on the agencies to take species into account).

[78] *Id.*

[79] Am. Forest & Paper Ass'n v. EPA, 137 F.3d 291, 299 (5th Cir. 1998) (reasoning unless the statute an agency is interpreting provides for some, albeit limited, authority to consider listed species, the agency is not required to consider its impact on endangered and threatened species).

[80] *Id.*

[81] *Id.* (stating "the ESA serves not as a front of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction" (emphasis in the original)).

[82] *Id.* at 298.

[83] *Id.* at 299.

[84] Conservation Law Found. of New England, Inc. v. Andrus, 623 F.2d 712, 714 (1st Cir. 1979).

[85] *Id.*

unless such approval would "probably cause serious harm or danger to life."[86] The First Circuit determined the ESA and OCSLA were "complimentary" because the OCSLA provided some consideration for listed species.[87] However, *Conservation Law* did not address whether ESA section 7(a)(2) grants agencies additional authority to consider listed species under a statute that does not explicitly provide for the consideration of species.[88]

Similarly, the United States Court of Appeals for the Eighth Circuit in *Defenders of Wildlife v. EPA* held the ESA "impose[d] substantial and continuing obligations on federal agencies" to consider the effects of their actions on listed species.[89] Once again, however, the Eighth Circuit did not address the question of whether the ESA applies to a statute that does not, itself, allow an agency to take into account potential impacts to species.[90]

Even though the First Circuit and the Eighth Circuit determined the ESA confers additional powers on agencies, these circuits did not address the same issue presented in the Fifth Circuit and D.C. Circuit cases, resulting in an important distinction.[91] Thus, the Ninth Circuit in *Defenders of Wildlife v. EPA* further muddied the waters surrounding the ESA's scope by holding ESA section 7(a)(2) applies to CWA section 402(b).[92] Unlike the statutes involved in the First Circuit and Eighth Circuit decisions, nothing within the text of CWA section 402(b)

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[86] *Id.* at 715 n.2; Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(2)(A)(i) (2000); *see* 43 U.S.C. § 1340(c)(1) (2000) (setting forth requirements for plan approval).

[87] *Conservation Law Found. of New England, Inc.*, 623 F.2d at 714; 43 U.S.C. § 1334(a)(2)(A)(i)(2005) (requiring approval of an exploration plan unless approval would "probably cause serious harm or danger to life"). Although section 1334(a)(2)(A)(i) provided a lower standard for species protection than ESA section 7(a)(2)'s "no jeopardy" mandate, the First Circuit held the ESA applied to the OCSLA because it provided for limited species consideration. *Conservation Law Found. of New England, Inc.*, 623 F.2d at 714.

[88] Bosse, *supra* note 30, at 1048 (stating because OCSLA provides for the consideration of species, *Conservation Law* did not address whether the ESA applies to a statute, such as the CWA, that does not provide for the consideration of species).

[89] Defenders of Wildlife v. EPA, 882 F.2d 1294, 1299 (8th Cir. 1989) (holding the agency's compliance with the Federal Insecticide, Fungicide, and Rodenticide Act did not exempt the agency from compliance under the ESA).

[90] *See* Bosse, *supra* note 30, at 1050 (stating the court found the ESA applies when an agency acts under a statute with less-protective species standards, but the court did not address whether ESA section 7(a)(2) confers any additional power to protect species).

[91] *Id.* at 1054 (stating while ESA section 7(a)(2) imposes a substantive mandate upon agencies to insure their actions will not jeopardize listed species, this mandate only applies if an agency action possess sufficient discretion to allow the agency to take species into account).

[92] *See id.* (reasoning the Ninth Circuit's failure to recognize the important distinction in the split, that ESA section 7(a)(2) applies only if an agency action includes sufficient discretion to allow the agency to consider listed species, resulted in the Ninth Circuit's failure to explain how the ESA could confer additional authority on an agency to consider listed species when interpreting a statute that does not provide discretion for the agency to consider additional factors in its decision).

requires federal agencies to consider their impacts to listed species.[93] Consequently, the Ninth Circuit's decision necessitated the Supreme Court's involvement in the principal case to shed some light on this complicated issue.[94]

PRINCIPAL CASE

National Association of Home Builders v. Defenders of Wildlife presented the question of whether ESA section 7(a)(2) effectively imposes an additional requirement that states must satisfy to obtain pollution permitting power under the CWA.[95] The EPA originally granted the State of Arizona's request to administer its NPDES program with regard to Arizona waterways.[96] Respondent Defenders of Wildlife (Defenders) subsequently filed a petition for review of the EPA's decision in the United States Court of Appeals for the Ninth Circuit.[97] The Ninth Circuit vacated the EPA's decision, holding the EPA had the authority and the obligation to consider the potential harm to threatened and endangered species in making the transfer decision.[98] The Ninth Circuit determined the EPA failed to take into account the possible jeopardy to listed species and held the EPA made an arbitrary and capricious decision.[99]

Petitioner National Association of Home Builders (Home Builders) appealed to the United States Supreme Court.[100] The Supreme Court granted certiorari because the Ninth Circuit's construction of ESA section 7(a)(2) contradicts the construction adopted by other Courts of Appeals.[101] The United States Supreme Court began its discussion by addressing whether the EPA acted arbitrarily and capriciously in granting the State of Arizona's request for pollution permitting

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[93] *Compare* Conservation Law Found. of New England, Inc. v. Andrus, 623 F.2d 712, 714-16 (1st Cir. 1979) (interpreting the OCSLA which required approval of an exploration plan unless approval would "probably cause serious harm or danger to life"), *with* Defenders of Wildlife v. EPA, 420 F.3d 946, 959-71 (9th Cir. 2005) (interpreting CWA section 402(b) which does not include a species consideration provision).

[94] Mary B. Hubner, Defenders of Wildlife v. EPA: *Reconciling the Endangered Species Act and Clean Water Act or Further Confusing the Statutory Overlap?*, 17 VILL. ENVTL. L.J. 433, 456-57 (2006) (stating Supreme Court review would likely be necessary to resolve the statutory overlap between the CWA and the ESA).

[95] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2525 (2007).

[96] *Defenders of Wildlife*, 420 F.3d at 954.

[97] *Id.* at 954-55; *see supra* note 12 and accompanying text (stating the Court of Appeals has jurisdiction to review an EPA transfer decision under CWA section 402(b)).

[98] *Defenders of Wildlife*, 420 F.3d at 950.

[99] *Id.* (holding the EPA's transfer decision was arbitrary and capricious because it had the authority to consider jeopardy to listed species and failed to properly do so when it granted Arizona's transfer request).

[100] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2529.

[101] *Id.* (stating the Court granted certiorari to resolve the conflict among the Courts of Appeals).

authority.[102] The Court noted it should uphold an agency decision of "less than ideal clarity" so long as the "agency's path may reasonably be discerned."[103] According to Defenders, the EPA's path was not reasonably discernable because the agency changed its mind regarding its section 7(a)(2) obligations when determining whether to grant the transfer request.[104] The Court, however, reasoned that, as long as agencies follow the proper procedures, agencies may change their minds.[105] Furthermore, the Court asserted the fact that a preliminary agency determination "is later overruled at a higher level . . . does not render the decisionmaking process arbitrary and capricious."[106]

The Court then addressed the substantive statutory question raised by petitioners, Home Builders.[107] Home Builders argued the use of the word "shall" in section 402(b) of the CWA requires mandatory agency action once the state satisfies the nine statutory criteria.[108] The Court agreed, holding the statutory language mandatory and the list of criteria a state must satisfy to obtain a transfer of pollution permitting authority exclusive.[109] The Court reasoned the word "shall" typically does not allow room for discretion; rather, it indicates a requirement an individual or state must meet.[110] Similarly, the word "shall" appears in section 7(a)(2) of the ESA, which requires agencies to insure their actions are unlikely to jeopardize listed species or their habitats.[111] The use of the word "shall" in both

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[102] *Id.* at 2529-31; Administrative Procedure Act of 1946, 5 U.S.C. § 706(2)(A) (2000) (stating "the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The Administrative Procedure Act (APA) governs the procedure agencies follow to establish rules and regulations and provides for judicial review of agency decisions. *See* 5 U.S.C. §§ 500-96, 701-06. The APA specifically allows the reviewing court to set aside agency decisions that are arbitrary and capricious. 5 U.S.C. § 702(2)(A).

[103] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2530 (quoting Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974)).

[104] *Id.* Defenders argued that the EPA's decision was of "less than ideal clarity" because the EPA engaged in ESA section 7 consultations and later determined that CWA section 402(b) required it to approve Arizona's transfer request as soon as the State satisfied the nine criteria. *See id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 2531.

[108] Opening Brief of Petitioners National Association of Home Builders, et. al. at 25, *Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (Nos. 06-340, 06-549), 2007 WL 549100; 33 U.S.C. § 1342(b) (2000). Section 402(b) states "[t]he [EPA] *shall* approve each such submitted program unless [it] determines that adequate authority does not exist." 33 U.S.C. § 1342(b)(2000) (emphasis added).

[109] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2531.

[110] *Id.* (citing Ass'n of Civilian Technicians v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994)).

[111] 16 U.S.C. § 1536(a)(2) (2000). Section 7(a)(2) provides that "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize" endangered or threatened species or their habitats. *Id.*

the ESA and the CWA results in the imposition of conflicting statutory mandates upon federal agencies.[112]

In resolving the contradiction regarding the use of the word "shall" in both the ESA and the CWA, the Court first considered the general presumption against an implied repeal of a statute.[113] The Court noted that "repeals by implication are not favored" in the law.[114] Thus, courts will not construe a later enacted statute (such as the ESA) to repeal an earlier enacted statute (such as the CWA) unless Congress clearly intended to repeal the earlier enacted statute.[115] According to the Court, construing section 7(a)(2) of the ESA literally—requiring every agency to insure its actions do not jeopardize listed species—would impliedly repeal section 402(b) of the CWA by adding a tenth criterion that states must satisfy before they can obtain a transfer of pollution permitting authority.[116]

Furthermore, the Court found it impossible for an agency to simultaneously obey the conflicting mandates outlined in section 7(a)(2) of the ESA and section 402(b) of the CWA.[117] The Court went on to note the presumption against implied repeals does not, by itself, indicate which statute should prevail.[118] Consequently, the Court conducted a review of the FWS' regulations to determine which statute, if any, should prevail.[119] The FWS, acting on behalf of the Secretary of the Interior, promulgated a regulation that states the ESA section 7 requirements "apply to all actions in which there is *discretionary* Federal involvement or control."[120] According to the Court, by factoring in the provisions of this regulation, ESA section 7(a)(2) would only take effect when an agency action results from the use of agency discretion.[121]

Defenders argued the Court's decision in *Hill*, holding section 7(a)(2) of the ESA prohibited the Tennessee Valley Authority (TVA) from operating a dam due to the negative impact such operation would have on the endangered snail

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[112] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2531-32 (determining CWA section 402(b) and ESA section 7(a)(2) are contradictory to one another because both impose conflicting statutory mandates on federal agencies).

[113] *Id.* at 2532-33 (discussing the presumption against "implied repeals" which occurs when a later enacted statute operates to amend or repeal an earlier statutory provision).

[114] *Id.* at 2532.

[115] *Id.* at 2532 (citing Watt v. Alaska, 451 U.S. 259, 267 (1981)).

[116] *Id.*

[117] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2534.

[118] *Id.*

[119] *Id.* at 2533-37.

[120] 50 C.F.R. § 402.03 (2007) (emphasis added). The FWS promulgated the regulation in cooperation with the NMFS, which acts on behalf of the Secretary of Commerce. *See* 50 C.F.R. § 402.01(b).

[121] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2533.

darter, required the Court to decide in Defenders' favor.[122] The Court, however, found *Hill* distinguishable from the present action because *Hill* did not address the question of whether the FWS' regulation applies to nondiscretionary, as well as discretionary, agency actions.[123] Rather, *Hill* involved a discretionary project, which the Court already determined ESA section 7(a)(2) applies.[124]

Next, Defenders argued even if section 7(a)(2) of the ESA applies only to discretionary agency actions, the EPA's decision to transfer pollution permitting authority to Arizona involved the use of agency discretion.[125] According to Defenders, the EPA's transfer decision was not "entirely mechanical" and involved "some exercise of judgment" as to whether Arizona met the criteria set forth in CWA section 402(b).[126] The Court found this argument unpersuasive because section 402(b) does not grant an agency the discretion to consider an "entirely separate" criterion when deciding whether to grant a state's transfer request.[127]

Finally, Defenders argued the section 402(b) criteria incorporate references to wildlife conservation that bring ESA section 7(a)(2) under the purview of agency discretion.[128] The Court also rejected this argument on the ground that nothing in the text of CWA section 402(b) permits the EPA to consider the potential danger to listed species "as an end in itself" when deciding whether to grant a state's application for a transfer of permitting power.[129]

Justice Stevens's Dissent

In a dissenting opinion, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, disagreed with the majority's opinion on the ground that the Court should attempt to give full effect to each of the two competing statutes, if possible.[130] The dissent stated "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[131] In advancing its position, the dissent indicated ESA section 7(a)(2) and CWA section 402(b) can co-exist and provided two separate

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[122] Brief for Respondents Defenders of Wildlife, et. al. at 38, *Nat'l Ass'n of Home Builders*, 127 S. Ct. 2518 (Nos. 06-340, 06-549), 2007 WL 951129; Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 (1978).

[123] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2536.

[124] *Id.*

[125] *Id.* at 2537.

[126] *Id.*

[127] *Id.*

[128] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2537.

[129] *Id.*

[130] *Id.* at 2538 (Stevens, J., dissenting).

[131] *Id.* (Stevens, J., dissenting) (internal quotations omitted).

approaches to harmonize the two conflicting statutes.[132] Finally, the dissent argued that even if the Court should only apply section 7(a)(2) to discretionary agency actions, the EPA's transfer decision constituted a discretionary act, and thus falls under the purview of the ESA.[133]

The dissent's first argument centered on the Court's decision in *Hill*, where the Court determined the ESA should receive first "priority over the primary missions of federal agencies."[134] The dissent noted the *Hill* Court plainly held section 7 admits "no exception."[135] According to the dissent, no exception to the protections granted to endangered species under ESA section 7 should exist.[136] Thus, forming an exception for nondiscretionary agency actions goes against the precedent set by the Court in *Hill* and the ESA's statutory text.[137]

Reasoning the *Hill* decision granted the highest of priorities to endangered species, the dissent stated the CWA should yield to the ESA if necessary.[138] Nevertheless, the dissent searched for a way for the two statutes to coexist.[139] The dissent reasoned the plain language of 50 C.F.R. § 402.03 does not limit the provisions of the ESA only to discretionary actions.[140] Rather, the dissent stated that while 50 C.F.R. § 402.03 states ESA section 7(a)(2) applies to discretionary actions, nothing in the regulation's text prohibits the application of section 7(a)(2) to nondiscretionary actions.[141] To advance this point, the dissent relied on 50 C.F.R. § 402.02, which states an agency "action means all activities or programs of any kind authorized . . . by Federal agencies."[142] By definition, the term "action" applies to all agency activities, and the Court's reading of the term "discretionary" as a limitation on "action" contradicts the FWS's own regulations, according to the dissent.[143]

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[132] *Id.* at 2539-48 (Stevens, J., dissenting) (stating there are two possible ways in which the ESA and the CWA can co-exist: (1) an extensive consultation with the Secretary of the Interior, and (2) requiring the EPA and the FWS to enter into a Memorandum of Agreement (MOA) setting forth continuing obligations to consider impacts to listed species).

[133] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2548-50 (Stevens, J., dissenting).

[134] *Id.* at 2538 (Stevens, J., dissenting) (internal quotations omitted).

[135] *Id.* at 2539 (Stevens, J., dissenting).

[136] *Id.* at 2541 (Stevens, J., dissenting).

[137] *Id.* (Stevens, J., dissenting).

[138] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2541 (Stevens, J., dissenting).

[139] *Id.* at 2541-44 (Stevens, J., dissenting).

[140] *Id.* at 2541 (Stevens, J., dissenting); 50 C.F.R. § 402.03 (2007) (stating section 7 of the ESA applies to "all actions in which there is discretionary Federal involvement or control").

[141] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2542 (Stevens, J., dissenting); 50 C.F.R. § 402.03.

[142] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2543 (Stevens, J., dissenting) (quoting 50 C.F.R. § 402.02 (2007) (internal quotations omitted)).

[143] *Id.* (Stevens, J., dissenting).

Next, the dissent argued two possible ways existed to give effect to both section 7(a)(2) of the ESA and section 402(b) of the CWA without sacrificing either statute.[144] First, the text of ESA section 7(a)(2) provides that each federal agency shall consult the Secretary of the Interior or Commerce to insure its actions will not jeopardize endangered and threatened species.[145] If, after consulting the Secretary, the agency determines the proposed action will not affect listed species, the agency satisfies its obligation under section 7(a)(2).[146] If, however, the Secretary determines the agency action could potentially harm listed species, the Secretary shall suggest "reasonable and prudent alternatives" that would not violate section 7(a)(2) and that would allow the agency to proceed with its proposed action.[147] In the rare circumstance that no "reasonable and prudent alternatives exist," the agency could consult the Committee, which has the authority to grant exemptions to ESA section 7(a)(2).[148] Second, an agency may harmonize the provisions of the ESA and the CWA by entering into a Memorandum of Agreement (MOA) that details the particulars of an agency's "oversight duties."[149] Entering into a MOA would allow a state to obtain control of the NPDES permitting system within its borders while still allowing the EPA to protect endangered species in accordance with section 7(a)(2) of the ESA.[150]

Finally, the dissent argued even if section 7(a)(2) only applies to discretionary agency actions, the EPA engaged in a discretionary action subject to the provisions of the ESA when it transferred permitting power to Arizona.[151] The dissent cited the *Hill* decision, in which the Court held a "federal statute using the word 'shall' will sometimes allow room for discretion."[152] Thus, according to the dissent, the

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[144] *Id.* at 2544 (Stevens, J., dissenting).

[145] *Id.* (Stevens, J., dissenting). The FWS is responsible for administering the ESA with respect to species under the jurisdiction of the Secretary of the Interior; the NMFS administers the ESA with respect to species under the jurisdiction of the Secretary of Commerce. *See* 50 C.F.R. §§ 17.11, 222.101(a), 223.102, 402.01(b) (2007).

[146] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2545 (Stevens, J., dissenting).

[147] *Id.* (Stevens, J., dissenting).

[148] *Id.* at 2546 (Stevens, J., dissenting).

[149] *Id.* at 2547 (Stevens, J., dissenting). Regarding the EPA's oversight duties, the MOA may include additional terms, conditions, or agreements "relevant to the administration and enforcement of the State's regulatory program." 40 C.F.R. § 123.24(a) (2007). For example, additional terms or conditions could specify the "frequency and content of reports, documents and other information" which the state must submit to the EPA. 40 C.F.R. § 123.24(b)(3) (2007). Additionally, terms or conditions could provide for coordination and compliance monitoring activities by the state and by EPA. 40 C.F.R. § 123.24(b)(4)(i) (2007).

[150] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2547 (Stevens, J., dissenting). EPA must approve an MOA prior to transferring NPDES permitting authority. *Id.* As a result, EPA can include a provision in the MOA allowing the EPA to protect endangered species, even after EPA has transferred permitting authority. *Id.*

[151] *Id.* at 2548 (Stevens, J., dissenting).

[152] *Id.* (Stevens, J., dissenting) (citing Tenn. Valley Auth. v. Hill, 437 U.S. 153, 211-12 (1978)).

Court should take a closer look at the nine specified criteria in section 402(b) of the CWA to determine whether there is room for discretion within the statute.[153]

Justice Breyer's Dissent

Justice Breyer joined in Justice Stevens's dissent but reserved judgment regarding whether section 7(a)(2) of the ESA applies to all possible agency actions.[154] Justice Breyer indicated section 7(a)(2) likely does not apply to all agency actions, especially those actions undertaken by totally unrelated agencies, such as the Internal Revenue Service.[155]

In summary, the Court in *NAHB* concluded that ESA section 7(a)(2) does not apply to the CWA.[156] The Court reached its conclusion after determining section 7(a)(2) does not apply to nondiscretionary agency actions.[157] In particular, the Court reasoned an agency does not have sufficient authority to "insure" its actions will not jeopardize listed species when the agency lacks the discretion to consider the action's impact on such species.[158]

ANALYSIS

The Supreme Courts' 1978 decision in *Hill* presented a broad interpretation of the ESA as applying to *all* federal agency actions, without exception, and regardless of cost.[159] Over the years, the courts, as well as Congress, have attempted to limit the overarching provisions of the ESA to prevent the "absurd result" that came about in *Hill* from occurring in the future.[160] However, not until the Supreme Court's recent decision in *NAHB* did the courts receive clear

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[153] *Id.* (Stevens, J., dissenting).

[154] *Id.* at 2552 (Breyer, J., dissenting).

[155] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2552 (Breyer, J., dissenting).

[156] *Id.* at 2538.

[157] *Id.* at 2533-36.

[158] *Id.* at 2534-35 (stating "when an agency is *required* to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species" (emphasis in the original)).

[159] *See* Rio Grande Silvery Minnow v. Keys, 356 F. Supp. 2d 1222, 1224 (D.N.M. 2002) (stating the broad reach of the ESA after the Supreme Court's holding in *Hill* concerned Congress).

[160] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 196 (1978) (Powell, J., dissenting) (describing the majority's holding, which prevented the operation of a virtually complete $100 million dam due to the discovery of an endangered species of snail darter, as "absurd"); Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding ESA section 7(a)(2) does not confer additional authority on agencies to consider negative impacts to listed species); 16 U.S.C. § 1536(e)-(h) (2000) (granting the Endangered Species Committee authority to grant exemptions to the ESA).

and logical precedent to follow when determining the extent of the ESA's reach.[161] The *NAHB* Court concluded the ESA does not apply to statutes that do not grant agency discretion to consider impacts on listed species.[162] In doing so, the Court resolved the statutory overlap that existed between the ESA and the CWA and indirectly reconciled the split of authority among the circuits.[163]

Resolution of the Statutory Overlap

The Supreme Court correctly determined the "no jeopardy" provision in section 7(a)(2) of the ESA does not apply to CWA section 402(b)'s statutory mandate.[164] In doing so, the Court resolved the problematic statutory overlap between the ESA and the CWA.[165] The Court arrived at its decision after determining the ESA applies only to discretionary agency actions.[166] The legislative history surrounding the ESA's enactment indicates the section 7 phrase, "utilize their authorities," requires agencies to "insure" their actions do not jeopardize listed species only when they have discretion to do so, but not when faced with a nondiscretionary statutory mandate, such as the CWA.[167] The EPA does not have discretion to "insure" its actions do not jeopardize listed species when determining whether to grant a State's transfer request because CWA section 402(b) does not contain a species consideration provision.[168] Thus, because the EPA does not have

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[161] *See* Hubner, *supra* note 94, at 457 (stating determination of the extent of the EPA's authority under the EPA likely necessitates Supreme Court Review).

[162] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538 (indicating a transfer of NPDES permitting authority does not trigger ESA section 7(a)(2)'s no-jeopardy requirement because a transfer of permitting authority is not discretionary).

[163] *See infra* notes 164-223 and accompanying text. Even though the *NAHB* Court did not directly decide the question presented in the circuit split—whether the ESA provides an affirmative grant of authority to consider listed species—the Court indirectly resolved the circuit split by holding that ESA section 7 only applies to discretionary agency actions. *See infra* notes 212-23 and accompanying text. Consequently, ESA section 7 does not apply where the agency does not possess sufficient discretion to consider listed species, and thus, ESA section 7 cannot confer additional authority on agencies to consider listed species if the agencies do not possess sufficient discretion to consider species. *See infra* notes 212-33 and accompanying text.

[164] *See* Bosse, *supra* note 30, at 1054 (reasoning ESA section 7(a)(2) does not apply to nondiscretionary agency actions such as the CWA); 16 U.S.C. § 1536(a)(2) (2000). CWA section 402(b) mandates a transfer of permitting authority to state officials once the state satisfies the nine statutory criteria. 33 U.S.C. § 1342(b) (2000).

[165] *See infra* notes 164-223 and accompanying text (discussing how the *NAHB* Court's decision resolved the statutory overlap between the ESA and the CWA).

[166] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538.

[167] *See* H.R. REP. NO. 95-1804, at 18 (1978) (Conf. Rep.) (stating a new ESA section 7(a) was created, which "essentially restates section 7 of existing law"); 16 U.S.C. § 1536(a) (1978) (requiring all federal agencies shall "utilize their authorities" to carry out the purposes of the ESA).

[168] 33 U.S.C. § 1342(b). None of the nine criteria enumerated in CWA section 402(b) allow an agency to consider its impact on listed species. *Id.*

the authority to consider listed species, and because an agency must have some discretion to consider impacts to species to trigger ESA section 7 requirements, ESA section 7(a)(2) clearly applies only to discretionary agency actions.[169]

Agencies Must "Utilize Their Authorities" to Protect Species

In 1973 when Congress originally enacted the ESA, section 7 obligations required all federal agencies to "utilize their authorities" to further the protection of endangered species.[170] While the phrase "utilize their authorities" currently appears only in section 7(a)(1) of the ESA, the legislature clearly intended for this phrase to apply to section 7(a)(2) as well.[171] In its original form, section 7 obligated federal agencies to carry out conservation programs and to avoid jeopardizing listed species.[172] Later, in 1978, Congress amended the ESA and split the original section 7 into separate subsections.[173] Subsection 7(a) in the 1978 version of the ESA contained essentially the same language as the original 1973 version of ESA section 7.[174] Once again in 1979, Congress amended the ESA and further divided section 7(a) into subsections 7(a)(1) and 7(a)(2).[175] In the current version of the ESA, section 7(a)(1) requires agencies to "utilize their authorities" to further conservation efforts, while section 7(a)(2) imposes the "no jeopardy" requirement on agency actions.[176]

As petitioners, Home Builders, in *NAHB* correctly argued, Congress intended for the phrase "utilize their authorities" to apply to both subsection

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[169] *See infra* notes 182-211 and accompanying text (explaining ESA section 7 is inapplicable when Congress fails to provide an agency with discretion under a given statute to consider listed species).

[170] 16 U.S.C. § 1536 (1973) (stating all federal agencies "shall . . . utilize their authorities in furtherance of the purposes of this act by carrying out programs for the conservation of endangered species and threatened species . . . and by taking such action necessary to insure that [their actions] do not jeopardize the continued existence of such endangered species and threatened species").

[171] *See infra* notes 177-81 and accompanying text (indicating the legislature's intent for the phrase "utilize their authorities" to apply to subsection 7(a)(2)).

[172] 16 U.S.C. § 1536 (1973).

[173] 16 U.S.C. § 1536(a) (1978).

[174] 16 U.S.C. § 1536 (1973) (directing all federal agencies to "utilize their authorities in furtherance of the purposes of this act by carrying out programs for the conservation of endangered species and threatened species . . . and by taking such action necessary to insure that [their actions] do not jeopardize the continued existence of such endangered species and threatened species"); 16 U.S.C. § 1536(a) (1978) (requiring all federal agencies "shall . . . utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species . . . . Each Federal agency shall, . . . insure that any [agency action] does not jeopardize the continued existence of any endangered species or threatened species").

[175] 16 U.S.C. § 1536(a) (1979).

[176] 16 U.S.C. § 1536(a) (2000).

7(a)(1) and 7(a)(2).[177] According to the Conference Report that accompanied the 1978 Amendments, the new subsection 7(a) "essentially restates section 7 of existing law."[178] Consequently, even though Congress set forth the "no jeopardy" requirement in a separate sentence that did not contain the phrase "utilize their authorities," the 1978 legislative history indicates Congress's intent to preserve the substantive requirements of section 7's original form.[179] The fact that Congress amended ESA section 7(a) again in 1979 does not undermine this intent because the 1979 amendments did not substantively alter section 7(a).[180] Accordingly, the legislative history surrounding the ESA's enactment clearly indicates an agency's ability to "utilize [its] authorities" under existing law continues to limit an agency's duty to "insure" its actions do not jeopardize listed species.[181]

ESA Section 7 Applies Only to "Discretionary" Agency Actions

ESA section 7(a)(1)'s requirement that agencies must "utilize their authorities" to further the conservation of threatened or endangered species does not mandate that agencies must do "whatever it takes" to protect species.[182] Rather, section 7(a)(1) merely requires agencies utilize the authority Congress granted them to further conservation efforts.[183] According to the D.C. Circuit in *FERC*, the ESA "does not expand the powers conferred on an agency by its enabling act" and

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[177] *See* H.R. REP. NO. 95-1804, at 18 (1978) (Conf. Rep.) (indicating the 1978 amendments were a restatement of the existing ESA section 7 even though the 1978 amendments divided section 7 into subsections).

[178] H.R. REP. NO. 95-1804, at 18 (Conf. Rep.); Brief for Petitioner Environmental Protection Agency at 32, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007) (Nos. 06-340, 06-549), 2007 WL 542243 (stating Congress, in rewording ESA section 7, "did not seek to expand the scope of federal agencies' no-jeopardy and consultation duties in potentially far reaching ways, but rather intended to preserve the substance of the requirements in their prior form").

[179] Brief for Petitioner Environmental Protection Agency, *supra* note 178, at 32 (noting the phrase "utilize their authorities" attached to the "no jeopardy" requirement in ESA section 7's original form).

[180] *Id.* at 33. In 1978, ESA section 7(a) stated all federal agencies "shall . . . utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species . . . . Each Federal agency shall, . . . insure that any [agency action] does not jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a) (1978). In 1979, Congress divided ESA section 7(a) into subsections. 16 U.S.C. § 1536(a) (1979). ESA section 7(a)(1) stated all federal agencies "shall . . . utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). ESA section 7(a)(2) required all federal agencies "shall . . . insure that any [agency action] is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

[181] Brief for Petitioner Environmental Protection Agency, *supra* note 178, at 30-33.

[182] Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992) (stating ESA section 7 requires agencies to "utilize their authorities" to carry out the statute's objectives, but it "does not *expand* the powers conferred on an agency by its enabling act" (emphasis added)).

[183] *Id.*

thus does not confer additional power upon agencies to protect listed species.[184] Although section 7(a)(2) of the ESA mandates that all agencies "insure" that their actions do not jeopardize listed species, this obligation only applies if an agency has sufficient discretion to consider listed species.[185]

Regulations promulgated jointly by the FWS and the NMFS specifically state section 7 of the ESA applies to "all actions in which there is *discretionary* Federal involvement or control."[186] The term "discretionary" refers to an act or duty "involving an exercise of judgment and choice."[187] As Justice Stevens correctly articulated in the dissenting opinion, this regulation does not state ESA section 7(a)(2) "only" applies to discretionary actions.[188] However, sufficient authority exists to indicate section 7(a)(2) does not apply to nondiscretionary actions.[189] In fact, the regulation becomes superfluous and unnecessary if ESA section 7(a)(2) applies to discretionary actions.[190] Nothing within the text of section 7(a)(2) or the other agency regulations indicate the ESA excludes discretionary actions.[191] Consequently, the FWS did not need a separate regulation to bring discretionary actions within the scope of the ESA because they were never explicitly excluded.[192]

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[184] *Id.*

[185] Brian P. Gaffney, *A Divided Duty: The EPA's Dilemma under the Endangered Species Act and Clean Water Act Concerning the National Pollutant Discharge Elimination System*, 26 REV. LITIG. 487, 498 (2007) (stating that if an agency action is nondiscretionary, "ESA section 7(a)(2) would not apply").

[186] 50 C.F.R. § 402.03 (2007) (emphasis added).

[187] BLACK'S LAW DICTIONARY 499 (8th ed. 2004).

[188] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2418, 2541-42 (2007) (Stevens, J., dissenting).

[189] *E.g.*, Natural Res. Def. Council v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (reasoning the ESA does not apply to nondiscretionary agency actions); Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073-74 (9th Cir. 1996) (reasoning an agency action does not exist, as contemplated under ESA section 7(a)(2), when an agency lacks discretion); Sierra Club. v. Babbit, 65 F.3d 1502, 1509 (9th Cir. 1995) (indicating ESA section 7(a)(2) cannot apply when a discretionary agency action does not exist).

[190] *See* Gaffney, *supra* note 185, at 497-98 (stating where an agency lacks discretion, "to require compliance with section 7 of the ESA would be an exercise in futility" (internal quotations omitted)). Canons of statutory construction instruct courts to construe statutes so that "no clause, sentence, or word shall be superfluous, void, or insignificant." TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001).

[191] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2535-36; *see, e.g.,* 16 U.S.C. § 1536 (2000) (listing no section or text stating ESA section 7 excludes discretionary actions).

[192] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2535-36 (stating no need for a separate regulation to bring discretionary actions within the reach of the ESA since nothing within the text of the ESA, or the regulations interpreting that section, specifically excludes discretionary actions from the ESA's reach); 50 C.F.R. § 402.03 (2007) (stating ESA applies to "all actions in which there is discretionary Federal involvement or control").

Thus, 50 C.F.R. § 402.03 becomes unnecessary unless it serves to exclude nondiscretionary actions from the ESA's reach.[193]

In the dissenting opinion, Justice Stevens argued that limiting the ESA's application to discretionary actions upsets the Supreme Court's previous decision in *Hill*.[194] However, the Court in *Hill* did not address the question presented in *NAHB*, and thus, the *NAHB* decision did not overrule the *Hill* decision.[195] The construction project at issue in *Hill*, while expensive, involved a discretionary action.[196] The *Hill* Court determined Congress did not mandate the construction of the dam, and no statute required TVA to put the dam into operation.[197] Thus, the dam's construction constituted a discretionary action, to which ESA section 7(a)(2) properly applied.[198] Consequently, the Supreme Court's decision in *NAHB* did not upset the Court's previous holding in *Hill* because *NAHB* involved a nondiscretionary agency action, whereas *Hill* involved a discretionary action.[199]

Since ESA section 7(a)(2) does not apply to nondiscretionary agency actions, the Supreme Court in *NAHB* correctly held ESA section 7(a)(2) does not apply to CWA section 402(b), a nondiscretionary statute.[200] CWA section 402(b) imposes a nondiscretionary statutory mandate upon the EPA to transfer permitting authority to state officials once the state satisfied the nine specified criteria.[201] As the mandatory nature of CWA section 402(b) illustrates, not all agency actions involve the agency's exercise of discretion.[202] CWA section 402(b) explicitly states the EPA "*shall* approve each submitted program unless [it] determines that adequate authority does not exist" to meet the nine statutory criteria.[203] The

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[193] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2535-36; 50 C.F.R. § 402.03 (stating ESA section 7 applies to discretionary federal actions).

[194] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2541 (Stevens, J., dissenting).

[195] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189-93 (1978) (viewing the dam's construction and operation as discretionary because Congress did not mandate the TVA put the dam into operation, and because Congress did not obligate TVA to spend the funds Congress appropriated to complete the dam).

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *See id.* (characterizing the dam's construction as discretionary because Congress did not mandate that the TVA put the dam into operation); *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2537 (stating the decision to transfer NPDES permitting authority involves a nondiscretionary action).

[200] *See* Gaffney, *supra* note 185, at 502 (stating the nine statutory requirements in CWA section 402(b) "appear mandatory and exclusive, suggesting that no other federal statute may be considered in its application").

[201] 33 U.S.C. § 1342(b) (2000) (requiring the EPA to approve a State's transfer request upon a showing that the State satisfied the nine statutory criteria).

[202] *Id.*

[203] *Id.* (emphasis added).

mandatory nature of the word "shall" in the statute does not provide the EPA with discretion to consider outside factors when determining whether to grant a state's transfer request.[204] While the statute does allow the EPA to exercise some discretion in determining whether a state has satisfied the nine criteria, this discretion ends once the EPA determines the state has satisfied those nine requirements.[205] As a result, the Supreme Court correctly held ESA section 7(a)(2) does not apply to CWA section 402(b)'s statutory mandate.[206]

In conclusion, ESA section 7(a)(2) does not apply to CWA section 402(b) because of the nondiscretionary nature of the CWA.[207] The CWA's nondiscretionary statutory mandate does not permit agencies to look outside the nine statutory criteria when deciding whether to grant a state's transfer request.[208] Further, ESA section 7(a)(1)'a requirement that agencies must "utilize their authorities" to "insure" their actions will not jeopardize listed species does not confer additional power upon agencies to look beyond the existing law of the CWA.[209] Thus, ESA section 7(a)(2)'s requirement that agencies must "insure" their actions will not jeopardize listed species does not extend to agencies lacking the discretion to consider potential negative impacts to listed species.[210] This determination resolves the statutory overlap between the ESA and the CWA by giving effect to the ESA only when an agency has discretion to consider listed species.[211]

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[204] *See* Bosse, *supra* note 30, at 1062-63 (reasoning the ESA has no authority to confer upon agencies the authority to create additional discretion to consider listed species if the agency did not already possess sufficient discretion to consider listed species).

[205] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2537 (2007) (stating that while CWA section 402(b) allows the EPA to exercise some judgment in deciding whether to grant a State's transfer request, the "statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list); Gaffney, *supra* note 185, at 502 (stating the EPA's only source of discretion involves determining whether a state has fully satisfied the nine enumerated criteria set forth in CWA section 402(b)).

[206] *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538.

[207] *Id.*

[208] *Id.*; 33 U.S.C. § 1342(b) (2000).

[209] *See* Gaffney, *supra* note 185, at 495 (stating "the ESA directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act" (internal quotations omitted)).

[210] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538 (stating non-discretionary statutory mandates, such as the CWA, do not trigger ESA section 7(a)(2)'s consultation and no-jeopardy requirements).

[211] *Id.* at 2533-34 (interpreting the ESA to apply only to discretionary agency actions which result in a harmonization of the ESA and the CWA "by giving effect to the ESA's no-jeopardy mandate whenever an agency has discretion to do so, but not when the agency is forbidden from considering such extrastatutory factors").

Resolution of the Circuit Split of Authority

In addition to resolving the statutory overlap between the ESA and the CWA, the Supreme Court's decision in *NAHB* also indirectly resolved the split of authority among the circuits and clarified the particular law courts should follow when determining the ESA's scope.[212] Prior to *NAHB*, two competing bodies of law existed among the circuits.[213] The D.C. Circuit and the Fifth Circuit held that ESA section 7 does not confer additional power on agencies to consider effects on endangered and threatened species.[214] Conversely, the First Circuit and the Eighth Circuit both held section 7 grants additional power on the agencies to consider the effect their actions would have on listed species.[215] The cases decided by the First Circuit and the Eighth Circuit, however, involved statutes which either indicated the agency had some authority to consider species, or provided sufficient discretion for the agency to consider extra-statutory factors.[216] In contrast, the D.C. Circuit and Fifth Circuit cases both addressed the ESA's application to statutes that provided limited, if any, discretion to consider factors not specifically enumerated in the statute.[217]

CWA section 402(b) is similar to the statutes addressed by the D.C. Circuit and Fifth Circuit cases.[218] Nothing in the text of section 402(b) confers authority

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[212] *See* Jan Hasselman, National Association of Home Builders v. Defenders of Wildlife: *Supreme Court's Endangered Species Act Decision Should Have Limited Impacts*, 22 J. ENVTL. L. & LITIG. 343, 354-56 (2007) (reasoning the *NAHB* decision solidified the view that ESA section 7(a)(2) applies only to discretionary agency actions and gave important guidance about how much discretion is enough to trigger ESA section 7 consultation).

[213] Bosse, *supra* note 30, at 1047-54.

[214] *Id.* at 1050-54.

[215] *Id.* at 1048-50.

[216] Defenders of Wildlife v. EPA, 882 F.2d 1294, 1299 (8th Cir. 1989) (interpreting FIFRA); Conservation Law Foundation of New England, Inc. v Andrus, 623 F.2d 712, 714 (1st Cir. 1979) (interpreting the OCSLA); Bosse, *supra* note 30, at 1048-50. The OCSLA requires the approval of an oil exploration plan unless approval would "probably cause serious harm or danger to life." Outer Continental Shelf Lands Act, 43 U.S.C. § 1334(a)(2)(A)(i) (2000). FIFRA authorizes the EPA to approve a pesticide registration only after determining that when used in compliance with a "commonly recognized practice," the pesticide "will perform its intended function without unreasonable adverse effects on the environment." Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(5)(C)-(D) (2000).

[217] Am. Forest & Paper Ass'n v. EPA, 137 F. 3d 291, 299 (5th Cir. 1998) (interpreting section 402(b) of the CWA); Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 34 (D.C. Cir. 1992) (holding the EPA did not provide sufficient discretion for FERC to consider listed species in the issuance of an annual license when the original license did not grant FERC the ability to amend the license); Bosse, *supra* note 30, at 1054. The FPA requires FERC to issue annual licenses "under the terms and conditions of the existing license." Federal Power Act, 16 U.S.C. § 808(a)(1) (2000).

[218] *See* 16 U.S.C. § 808(a)(1); 33 U.S.C. § 1342(b) (2000). The FPA, the statute in question in *FERC*, does not authorize FERC to consider factors outside those specifically stated in an original license. 16 U.S.C. § 808(a)(1);. Thus, if an original license does not include a species consideration

on the EPA to consider impacts to listed species when deciding whether to grant a state's transfer request.[219] Nor does the statute provide the EPA with discretion to consider factors not specifically enumerated in the statute itself.[220] Thus, although ESA section 7(a)(2) mandates all agencies "insure" that their actions will not jeopardize listed species, this mandate only applies if an action provides the agency with sufficient discretion to take species into account.[221] The Supreme Court in *NAHB* correctly applied this rule and properly held ESA section 7(a)(2) does not apply to the nondiscretionary statutory mandate in CWA section 402(b).[222] By holding section 7(a)(2) of the ESA inapplicable to statutes that provide agencies with neither statutory authority, nor discretion to consider listed species, the Supreme Court resolved the split of authority and clarified the law regarding whether the ESA applies to a particular statute.[223]

ESA Effectiveness Remains Intact After NAHB

While the *NAHB* decision provided agencies with guidance on the applicability of ESA section 7(a)(2) to federal agency actions, the Supreme Court's decision worried environmentalists.[224] In particular, environmentalists argue the Court's decision creates a loophole in the effectiveness of the ESA, and allows federal agencies to circumvent ESA section 7(a)(2)'s no-jeopardy requirement.[225] However, environmentalists need not worry that the *NAHB* decision will hinder the protection of listed species in the future because the opinion exempts only those truly nondiscretionary actions from the ESA's reach.[226] Additionally, the

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provision, FERC does not have authority to take listed species into account when deciding whether to renew the license. *Platte River Whooping Crane Critical Habitat Maint. Trust*, 962 F.2d at 34. Since neither the FPA nor the CWA authorize an agency to consider factors outside the statute, the two statutes are similar. *See* Bosse, *supra* note 30, at 1054 (reasoning the CWA, like the FPA, involves a statutory mandate and does not include a provision, however slight, requiring agencies to consider impacts to species).

[219] 33 U.S.C. § 1342(b). The statute does not include an express provision allowing for species consideration, and the mandatory nature of the statute does not provide the EPA with discretion to consider impacts to species once the nine criteria have been met. *Id.*

[220] *Id.*

[221] Bosse, *supra* note 30, at 1054.

[222] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538 (2007).

[223] *See* Hasselman, *supra* note 212, at 354-56 (stating the *NAHB* decision provides agencies with important guidance regarding the application of ESA section 7 to other statutes and duties).

[224] *Id.*; Allison Winter, *Enviros fear Supreme Court Ruling Creates ESA 'Loopholes'*, E&N NEWS PM, June 25, 2007, *available at* LEXIS.

[225] *See* Winter, *supra* note 224 (stating the Court's ruling could open the door for agencies to ignore listed species when implementing other laws).

[226] *See* Hasselman, *supra* note 212, at 354 (stating the *NAHB* opinion is written in a way that strongly suggests a narrow application).

decision provides agencies with important guidance regarding the amount of discretion necessary to trigger ESA section 7 requirements.[227]

First and foremost, the *NAHB* decision reaffirmed the position the ESA exempts only truly nondiscretionary agency actions.[228] This exemption exists only when an agency cannot possibly comply with the ESA and some other statute or duty.[229] If a given statute detailing an agency's obligation to undertake a particular action also provides some flexibility for the agency to consider listed species, the agency likely possesses sufficient discretion to take species considerations into account.[230] Thus, such an action would be discretionary and subject to ESA section 7(a)(2)'s no-jeopardy provision.[231]

In addition, the *NAHB* decision does little to undermine the ESA's effectiveness because the decision provides agencies with important guidance regarding the amount of discretion necessary to trigger ESA section 7.[232] The opinion suggests that in the presence of an unambiguous statutory mandate from Congress, where compliance with the ESA would result in a violation of the statute, an agency likely lacks sufficient discretion to consider potential impacts to species.[233] Conversely, absent such an unambiguous statutory mandate, an agency likely possesses sufficient discretion to take species considerations into account.[234] As a result, the *NAHB* Court's decision should not limit the ESA's application in the future, because the decision merely reaffirmed the position that ESA section 7 exempts nondiscretionary agency actions.[235]

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[227] *Id.* at 356 (stating the Court provided important guidance about the level of discretion necessary to trigger ESA section 7).

[228] Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2538 (2007). Prior to the Ninth Circuit's holding in *Defenders of Wildlife*, the courts generally agreed that ESA section 7 exempted nondiscretionary agency actions. Hasselman, *supra* note 212, at 354. Thus, the *NAHB* decision merely restored the status quo and reaffirmed the general consensus that existed among the courts prior to *Defenders of Wildlife*. Hasselman, *supra* note 212, at 358.

[229] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2538 (exempting nondiscretionary agency actions from the ESA's reach).

[230] Hasselman, *supra* note 212, at 358 (stating if any flexibility exists regarding how to carry out the action so that species may also be protected, the exemption does not apply).

[231] *Id.*

[232] *Id.* at 356 (stating the Court provided important guidance on the amount of discretion necessary to trigger ESA section 7).

[233] *See Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2536-37 (characterizing the *Hill* Court's decision, where Congress did not mandate nor require completion of a federally funded dam as discretionary, while classifying the *NAHB* Court's decision, where the CWA unambiguously mandates a transfer of NPDES permitting authority once a state has satisfied the nine statutory criteria, as nondiscretionary).

[234] *Id.*

[235] Hasselman, *supra* note 212, at 357.

CONCLUSION

When the United States Supreme Court reversed the Ninth Circuit's decision in *NAHB*, it struck a balance between section 7(a)(2) of the ESA and CWA section 402(b).[236] The *NAHB* Court restricted the scope of ESA section 7(a)(2) by holding section 7(a)(2) no longer applies to "all" federal agency actions "without exception."[237] The Court clarified the previous confusion regarding which agency actions are subject to the provisions of the ESA by stating that section 7 applies to all federal agency actions in which there is discretionary involvement or control.[238] The Court's decision represents a positive step forward toward encouraging federal agency actions while continuing to place importance on the conservation of endangered and threatened species and their habitats.[239]

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[236] *See supra* notes 159-235 and accompanying text.

[237] *See supra* notes 164-211 and accompanying text; Tenn. Valley Auth. V. Hill, 437 U.S. 153, 173 (1978) (stating the language of the ESA "admits of no exception").

[238] *See supra* notes 182-211 and accompanying text.

[239] *See supra* notes 159-235 and accompanying text.

CASE NOTE

PUBLIC LAND LAW—Looking into the Future: The Need for a Final Judgment on the Validity of the Roadless Rule, *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207 (10th Cir. 2005).

*Cortney Hill Kitchen**

INTRODUCTION

The future of national forest roadless areas is uncertain.[1] Since 2001, litigation has surrounded national forest roadless area management.[2] Courts render a judgment on the issue, only to have an opposite judgment issued by another court.[3] Although one may know today what the management plan for national forest roadless areas is, courts have continually quashed hopes for a long-term plan and the ability to predict the future of roadless areas.[4] Also, two presidential administrations with different views on roadless area management increased the

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* University of Wyoming College of Law J.D. Candidate, 2009.

[1] *See generally* Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1214 (10th Cir. 2005) [hereinafter *Wyoming II*] (holding the Roadless Rule case to be moot); Kootenai Tribe v. Veneman, 313 F.3d 1094, 1123 (9th Cir. 2002) [hereinafter *Kootenai II*] (holding the district court erroneously granted a preliminary injunction of the Roadless Rule); Cal. *ex rel*. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006) (holding the State Petitions Rule is to be set aside, reinstating the Roadless Rule); Wyoming v. U.S. Dep't of Agric., 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) [hereinafter *Wyoming I*] (holding the Roadless Rule invalid, thus granting a permanent nationwide injunction of the rule); Kootenai Tribe v. Veneman, 142 F. Supp. 2d 1231, 1248 (D. Idaho 2001) [hereinafter *Kootenai I*] (holding a likelihood of success on claims, thus granting a preliminary injunction of the Roadless Rule).

[2] *See Wyoming II*, 414 F.3d 1207; *Kootenai II*, 313 F.3d 1094; *Lockyer*, 459 F. Supp. 2d 874; *Wyoming I*, 277 F. Supp. 2d 1197; *Kootenai I*, 142 F. Supp. 2d 1231.

[3] *Compare Wyoming I*, 277 F. Supp. 2d at 1239 (holding the roadless rule violated NEPA, thus granting a permanent nationwide injunction on the rule) *and Kootenai I*, 142 F. Supp. 2d at 1248 (granting a preliminary injunction on the Roadless Rule because court found a likelihood of success on NEPA claims and of irreparable harm), *with Kootenai II*, 313 F.3d at 1123 (finding *Kootenai I* erroneously granted a preliminary injunction based on the faulty assumption of likelihood of success of NEPA claim and finding of irreparable harm), *and Lockyer*, 459 F. Supp. 2d at 919 (repealing the State Petitions Rule and reinstating nationwide the Roadless Rule); *see also* Felicity Barringer, *Judge Voids Bush Policy on National Forest Roads*, N.Y. TIMES, Sept. 21, 2006 at A21(describing the national forest management litigation as "legal Ping-Pong").

[4] *See generally Wyoming II*, 414 F.3d 1207 (mooting the Roadless Rule case); *Kootenai II*, 313 F.3d at 1123 (reversing *Kootenai I*'s preliminary injunction of the Roadless Rule); *Lockyer*, 459 F. Supp. 2d at 919 (repealing the State Petitions Rule and reinstating the Roadless Rule nationwide); *Wyoming I*, 277 F. Supp. 2d at 1239 (granting a nationwide injunction of the Roadless Rule); *Kootenai I*, 142 F. Supp. 2d at 1248 (holding the Roadless Rule likely violated NEPA, granting a preliminary injunction of the rule); *see also* Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1185 (2004) ("While the Ninth Circuit held that the Forest Service fully complied with NEPA [National Environmental Policy Act] in its promulgation of the Roadless Rule, the Wyoming district court found several deficiencies in the agency's efforts to comply with NEPA."); *see infra* note 199.

uncertainty surrounding these areas.[5] One administration assured national, long-term protection of roadless areas, while the next sought state-by-state protection, which would allow for varying degrees of protection.[6] Without a long-term plan, the U.S. Forest Service (Forest Service) and states lack the ability to assure preservation of this finite resource.[7]

The decisions sparking litigation over national forest roadless area management began almost ten years ago.[8] In March 1999, after years of forest-by-forest management plans, the Forest Service placed a moratorium on road construction in inventoried national forest roadless areas.[9] During the moratorium, President Clinton directed the Forest Service to develop a new management policy for roadless areas.[10] The Forest Service commenced the public process to establish new Forest Service regulations.[11] This process, in compliance with the National Environmental Policy Act (NEPA), included a Draft Environmental Impact Statement (DEIS) and a proposed rule, both of which were published in May 2000.[12] After the public comment period, the Forest Service published a Final Environmental Impact Statement (FEIS) in November 2000.[13] In January 2001,

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[5] Glicksman, *supra* note 4, at 1208 ("[T]he direction in which the Bush Administration is steering roadless area management policy is very different from the direction reflected in the Roadless Rule and associated Clinton Administration initiatives: [President Bush's] direction is aligned less with natural resource preservation and more with resource extraction and development.").

[6] *See, e.g.*, Glicksman, *supra* note 4, at 1143-44; *compare* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) [hereinafter Roadless Area Conservation] (mandating a nationwide conservation of national forest roadless areas), *with* Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25654, 25661 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294) [hereinafter State Petitions] (mandating a state-by-state approach to national forest roadless areas, which would allow for varied levels of protection between states and even within a state).

[7] The Forest Service through "[t]he Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests." Protection of National Forests; Rules and Regulations, 16 U.S.C. § 551 (2006). The courts' indecisiveness greatly affects Wyoming, a state with an abundance of national forest land. *Wyoming II*, 414 F.3d at 1211. Approximately 3.25 million acres (35%) of the national forest land in Wyoming is roadless as defined by Roadless Area Review Evaluation II. *Id.*

[8] *See* Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7,290 (Feb. 12, 1999) (to be codified at 36 C.F.R. pt. 212).

[9] *Id.* ("This final interim rule temporarily suspends decisionmaking regarding road construction and reconstruction in many unroaded areas within the National Forest System."); *see also Wyoming I*, 277 F. Supp. 2d at 1205-06 (granting a moratorium allowed "time to assess the ecological, economic, and social value of roadless areas and to evaluate the long-term management options for inventoried roadless areas.").

[10] *Wyoming I*, 277 F. Supp. at 1205-06.

[11] *Wyoming II*, 414 F.3d at 1210.

[12] National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006); *Wyoming II*, 414 F.3d at 1210.

[13] *Wyoming II*, 414 F.3d at 1210.

the Forest Service adopted the Roadless Rule.[14] The Roadless Rule prohibited road construction activities and timber harvesting in inventoried national forest roadless areas, unless the activity fell into one of the enumerated exceptions.[15]

Criticism of the Roadless Rule and the Forest Service quickly developed.[16] Four months after the Forest Service adopted the Roadless Rule, the State of Wyoming filed suit against the United States Department of Agriculture (USDA) for procedural and substantive deficiencies.[17] Wyoming asked the U.S. District Court for the District of Wyoming (district court) for declaratory and injunctive relief from the Roadless Rule.[18] Wyoming claimed the Forest Service violated NEPA, the Wilderness Act, and other acts when promulgating the Roadless Rule.[19] The district court found for Wyoming on five of its NEPA claims and its Wilderness Act claim.[20] The court ordered a nationwide injunction of the Roadless Rule.[21]

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[14] *Id.*; *see* Roadless Area Conservation, 66 Fed. Reg. 3244-01 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

[15] *See* Roadless Area Conservation, 66 Fed. Reg. at 3272 ("A road may not be constructed or reconstructed in inventoried roadless areas of the National Forest System . . . . Timber may not be cut, sold, or removed in inventoried roadless areas of the National Forest System."); *see also Wyoming II*, 414 F.3d at 1210; *see infra* note 53 and accompanying text (listing the exceptions).

[16] *Wyoming II*, 414 F.3d at 1211.

[17] *Id.* (alleging the Roadless Rule violated NEPA and the Wilderness Act); *see infra* notes 153-58 and accompanying text. The USDA oversees the Forest Service. *See* Charles L. Kaiser & Scott W. Hardt, *Fitting Oil and Gas Development Into the Multiple-Use Framework: A New Role for the Forest?*, 62 U. COLO. L. REV. 827, 832 (1991).

[18] *Wyoming II*, 414 F.3d at 1211.

[19] *See id.*; *see also* National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006); National Wilderness Preservation System Act, 16 U.S.C. §§ 1131-1136 (2006). Although the court recognized the *Kootenai II* decision, which held the Roadless Rule was unlikely to violate NEPA, the court gave no deference to the decision. *Wyoming II*, 414 F.3d at 1210 n.1. The court found the *Kootenai II* decision "to be of limited persuasive value" for three reasons: (1) the decision may have overruled other Ninth Circuit opinions concerning NEPA, (2) the opinion departed from U.S. Supreme Court NEPA precedent by discussing substantive components of NEPA, and (3) the opinion failed to clarify what it overruled. *Id.* In contrast, *Lockyer* asserted the Ninth Circuit's *Kootenai II* opinion "explained in considerable detail its conclusion" that the promulgation of the Roadless Rule likely did not violate NEPA. Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 880-81 (N.D. Cal. 2006).

[20] Wyoming I, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003).

[21] *Id.* The Northern District of California explained an injunction is generally the remedy for NEPA violations. *Lockyer*, 468 F. Supp. 2d at 913. Additionally, the injunction should be "tailored to the violation of the law that the [c]ourt already found—an injunction that is no broader but also no narrower than necessary to remedy violations of NEPA." Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 468 F. Supp. 2d 1140, 1144 (N.D. Cal. 2006). The court further elaborated that the injunction must "prevent such injury from occurring again by the operation of the invalidated regulations, be it in the Eastern District of California . . . *or anywhere else in the nation*." *Id.* (emphasis added). Thus, the court explained the proper remedy for a national rule that violates NEPA can be a nationwide injunction. *See id.*

The USDA did not appeal the district court's decision, but environmental organizations, intervenors in the suit, appealed to the Tenth Circuit Court of Appeals.[22] Concurrently, however, the new administration was taking steps to replace the Roadless Rule.[23] Under the direction of President Bush, the Forest Service announced an interim rule for national forest roadless area management, while it developed a new management plan.[24] In May 2005, the Forest Service replaced the Roadless Rule with the State Petitions Rule.[25] The State Petitions Rule allows state governors to petition the Secretary of Agriculture to establish state management practices for national forest roadless areas within the state's boundaries.[26]

Because the Tenth Circuit Court of Appeals found the Roadless Rule no longer existed, it held the case was moot.[27] To preserve the petitioners' rights the Tenth Circuit vacated the lower court's decision.[28]

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[22] *See Wyoming II*, 414 F.3d at 1211. Intervenors included the Wyoming Outdoor Council; the Wilderness Society; Sierra Club; Biodiversity Associates; Pacific Rivers Council; Natural Resources Defense Council; Defenders of Wildlife; National Audubon Society. *Id.* at 1207. There were also twenty amici curiae, which included environmental groups, mining associations, petroleum associations, states, and counties. *Id.*

[23] *Id.* at 1211 ("While the appeal [*Wyoming II*] was pending, the Forest Service announced a proposal to replace the Roadless Rule.").

[24] *Id.*; *see also* Roadless Area Protection, 69 Fed. Reg. 42648-02 (July 16, 2004) ("The reinstated [interim directive] . . . is intended to provide guidance for addressing road and timber management activities in inventoried roadless areas until land and resource management plans are amended or revised.").

[25] *Wyoming II*, 414 F.3d at 1211.

[26] *Id.*

[27] *Id.* at 1211-13. The court stated that the "portions of the Roadless Rule that were substantively challenged by Wyoming no longer exist . . . . Moreover, the alleged procedural deficiencies of the Roadless Rule are now irrelevant because the replacement rule was promulgated in a new and separate rulemaking process." *Id.* at 1212. The court determined the announcement of the State Petitions Rule removed both the substantive and procedural challenges to the Roadless Rule, making the case on appeal moot. *See id.*

[28] *Id.* at 1213-14. Following Tenth Circuit and Supreme Court precedent, once the court determined the case to be moot, it vacated the lower court's decision. *Id.* at 1213. Vacating a judgment "is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." U.S. v. Munsingwear, Inc., 340 U.S. 36, 41 (1950). The U.S. Supreme Court further explained how parties' rights are protected through vacatour by stating "that those who have been prevented from obtaining the review to which they are entitled should not be treated as if there had been a review." *Id.* at 39. When an appeals court moots a case and then vacates the lower court's decision "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40. The court in *Wyoming II* stated that "the rights of the *defendant-intervenors*, the nonprevailing parties seeking appellate relief, are preserved" by vacating the lower court's judgment. *Wyoming II*, 414 F.3d at 1213 n.6 (emphasis added).

This case note argues the Tenth Circuit in *Wyoming II* erroneously decided the case to be moot.[29] This note analyzes the Tenth Circuit Court of Appeals' decision, arguing the court should have employed a recognized exception to the mootness doctrine, public interest, and judicial economy to rule on the merits of the case.[30] Furthermore, this note reviews the two opposing national forest roadless area management rules and recent cases, which challenged roadless area management plans, to defend its position.[31]

BACKGROUND

In 1897, the Forest Service Organic Act (Organic Act) instituted the first management plan for national forest land.[32] Recently, however, national forests, especially roadless areas, have lacked a steady management plan because of administrative and judicial flip-flopping.[33] The Tenth Circuit added to the inconsistent management by failing to rule on the merits of the Roadless Rule.[34]

Reviewing the history of national forest roadless area management, relevant cases, and the mootness doctrine helps to understand why the Tenth Circuit should have ruled on the merits of the Roadless Rule.[35] The recent vacillation of national forest roadless area management demonstrates the controversial nature of the issue and also the need for a long-term management plan.[36] A Ninth Circuit Court of Appeals decision and a U.S. District Court for the Northern District of California decision illustrate the same vacillation, but in the judicial context.[37] Finally, an examination of the mootness doctrine reveals an exception applicable to *Wyoming II*.[38]

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[29] *See infra* notes 145-94 and accompanying text.

[30] *See infra* notes 145-94 and accompanying text.

[31] *See infra* notes 39-99 and accompanying text.

[32] Kaiser & Hardt, *supra* note 17, at 830-31; *see* Forest Service Organic Act, 16 U.S.C. §§ 473-478, 489-482, 551 (2006).

[33] *Compare* Wyoming I, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) (holding the roadless rule violated NEPA, thus granting a permanent nationwide injunction on the rule) *and* Kootenai I, 142 F. Supp. 2d 1231, 1248 (D. Idaho 2001) (granting a preliminary injunction on the Roadless Rule because court found a likelihood of success on NEPA claims and of irreparable harm), *with* Kootenai II, 313 F.3d 1094, 1123 (9th Cir. 2002) (finding *Kootenai I* erroneously granted a preliminary injunction based on the faulty assumption of likelihood of success of NEPA claim and finding of irreparable harm), *and* Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006) (repealing the State Petitions Rule and reinstating nationwide the Roadless Rule); *see also* Barringer, *supra* note 3, at A21 (describing the national forest management litigation as "legal Ping-Pong").

[34] *See* Wyoming II, 414 F.3d 1207, 1214 (10th Cir. 2005).

[35] *See infra* notes 39-120 and accompanying text.

[36] *See infra* notes 39-68 and accompanying text.

[37] *See infra* notes 69-99 and accompanying text.

[38] *See infra* notes 100-120 and accompanying text.

A. Management Plans for National Forest Roadless Areas

Until the promulgation of the Roadless Rule, the Forest Service offered no uniform plan for national forest roadless area management.[39] Instead, "individual forest plans governed the use of roadless areas . . . [and there was] forest-by-forest decision making."[40] Often the Forest Service bowed to industrial interests in forest plans, allowing industrial logging in roadless areas and the infrastructure needed to support such operations.[41] As concern for the degradation of roadless areas rose, a national mandate to protect this finite resource was inevitable.[42]

Recognizing the importance of roadless areas, the Forest Service issued an interim national forest management rule in 1999.[43] The interim rule mandated an eighteen-month moratorium on road construction in roadless areas identified by the second Roadless Area Review and Evaluation.[44] The Forest Service used this eighteen-month period to analyze the "benefits and impacts of roads."[45] During this period, Congress required the Forest Service to prepare an Environmental Impact Statement (EIS).[46] The Forest Service used the EIS as a guide to create a

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[39] *See* Cal. *ex rel*. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 880 (N.D. Cal. 2006).

[40] *Id.*

[41] *Cf.* Kootenai II, 313 F.3d 1094, 1105 (9th Cir. 2002) (noting that in twenty years the Forest Service developed (built roads, logged, etc.) 2.8 million acres of national forest roadless areas).

[42] *See* Heather S. Fredrikson, *The Roadless Rule that Never Was: Why Roadless Areas Should be Protected Through National Forest Planning Instead of Agency Rulemaking*, 77 U. COLO. L. REV. 457, 464 (2006). From 1970 to 1990 the Forest Service adopted a "commodity production" policy, thus, timber and energy companies became keenly interested in road construction in national forests. *Id.* Conservationists and the Clinton administration voiced their concern over such practices in national forest inventoried roadless areas. *Id.*

[43] *See* Wyo. Timber Indus. Ass'n v. U.S. Forest Serv., 80 F. Supp. 2d 1245, 1249 (D. Wyo. 2000) ("In particular, the Forest Service was concerned with funding shortfalls, erosion and other environmental damage, substandard roads, and the value of unroaded areas"); *see also* Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7,290 (Feb. 12, 1999) (to be codified at 36 C.F.R. pt. 212) ("This final interim rule temporarily suspends decisionmaking regarding road construction and reconstruction in many unroaded areas within the National Forest System.").

[44] *See* Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. at 7,290 ("The temporary suspension of road construction and reconstruction will expire upon the adoption of a revised road management policy or 18 months from the effective date of this final interim rule, whichever is sooner."); *see, e.g.*, *Wyo. Timber Indus.*, 80 F. Supp. 2d at 1249. In 1979, the second Roadless Area Review and Evaluation (RARE II) identified 2,919 national forest roadless areas and recommended the appropriate future management for each. Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 387 (D. Wyo. 1980) (estimating the roadless areas included more than sixty-two million acres).

[45] *Wyo. Timber Indus.*, 80 F. Supp. 2d at 1249.

[46] *See* H. Micheal Anderson & Aliki Moncrief, *America's Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 436 (1999).

new rule for national forest roadless area management.[47] In May 2000, the Forest Service published the DEIS and the proposed rule, allowing public comment until July 2000.[48] The Forest Service then issued the FEIS in November of 2000.[49] The FEIS subjected 58.5 million acres to the Roadless Rule, including 4.2 million acres of roadless area previously not included in the DEIS.[50] Finally, on January 5, 2001, the Forest Service announced the final Roadless Rule, which would be implemented in March of the same year.[51]

The Roadless Rule prohibited all forms of road construction in inventoried national forest roadless areas unless the construction fell into one of four enumerated exceptions.[52] Road construction was allowed under the Roadless Rule if it was (1) for the protection of public health and safety, (2) needed for statutory environmental cleanup, (3) a right reserved in a statute or treaty, or (4) necessary for established mineral leases.[53] The Roadless Rule's extensive ban on road construction and its national scope "were necessary to protect the diminishing areas of relatively unspoiled national forest from further fragmentation by the steady accretion of local decisions allowing encroachment."[54]

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[47] *See id.*

[48] Wyoming II, 414 F.3d 1207, 1210 (10th Cir. 2005); *see also* Special Areas; Roadless Area Conservation; Proposed Rules, 65 Fed. Reg. 30275 (May 10, 2000) (to be codified at 36 C.F.R. 294).

[49] Wyoming I, 277 F. Supp. 2d 1197, 1206-10 (D. Wyo. 2003).

[50] Kootenai II, 313 F.3d 1094, 1105 (9th Cir. 2002).

[51] *Id.*; *see also* Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

[52] *Wyoming I*, 277 F. Supp. 2d at 1210.

[53] *Id.*

[54] Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 880 (N.D. Cal. 2006). In December 2003, the Department of Agriculture amended the Roadless Rule to include the Tongass Amendment. Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75136-01 (Dec. 30, 2003) (to be codified at 36 C.F.R. 294). The Tongass Amendment "temporarily exempt[ed] the Tongass National Forest . . . from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas . . . until the Department promulgate[d] a subsequent final rule concerning the application of the roadless rule within the State of Alaska." *Id.* at 75136. The amendment spurs from the settlement of a lawsuit between the State of Alaska and the USDA. *Id.* at 75137. Impetus for the rule comes from the two facts: (1) many communities in southeast Alaska are surrounded by Tongass roadless areas, thus prohibiting roads would limit the access to these communities; and (2) the majority of people in these communities rely on timber harvesting in the Tongass for work, losing this would cause a huge detriment to the economy of southeast Alaska. *Id.* "The November 2000 [F]EIS for the roadless rule estimated that a total of approximately 900 jobs could be lost in the long run in Southeast Alaska due to the application of the roadless rule, including direct job losses in the timber industry as well as indirect job losses in other sectors." *Id.*

The Roadless Rule, however, did not go into effect in March 2001 as planned.[55] When President Bush took office, he suspended the Roadless Rule and other actions not yet implemented by the previous administration.[56] The suspension allowed the Bush administration "the opportunity to review any new or pending regulations."[57] In May 2001, when the suspension was almost over, the U.S. District Court for the District of Idaho preliminarily enjoined implementation of the Roadless Rule.[58] The Roadless Rule finally went into effect in April 2003 when the Ninth Circuit Court of Appeals reversed the preliminary injunction.[59] The Roadless Rule, however, was in effect only three months before the U.S. District Court for the District of Wyoming declared a national, permanent injunction on the rule.[60] Subsequently, the Forest Service replaced the Roadless Rule with the State Petitions Rule in May 2005.[61]

The State Petitions Rule revoked the national management plan for national forest roadless areas and installed a system for state-by-state management of these lands.[62] The State Petitions Rule allows a governor to petition the Secretary of Agriculture to establish management plans for all or portions of national forest roadless areas within the state's borders.[63] The petition "must include specific information and recommendations on the management requirements for individual inventoried roadless areas within that particular State."[64] The State Petitions Rule

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[55] *Lockyer*, 459 F. Supp. 2d at 880; *see also* Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001).

[56] *Lockyer*, 459 F. Supp. 2d at 880; *see* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies [hereinafter Memorandum], 66 Fed. Reg. 7702 (Jan. 24, 2001) ("With respect to regulations that have been published in the [Federal Resister] but have not taken effect, temporarily postpone the effective date of the regulations for 60 days.").

[57] Memorandum, 66 Fed. Reg. 7702; *see also* Fredrikson, *supra* note 42, at 464.

[58] *See* Kootenai I, 142 F. Supp. 2d 1231, 1248 (D. Idaho 2001) (holding a likelihood of success on claims, thus granting a preliminary injunction of the Roadless Rule); *see infra* notes 72-74 and accompanying text; *see also Lockyer*, 459 F. Supp. 2d at 880.

[59] *See* Kootenai II, 313 F.3d 1094, 1126 (9th Cir. 2002) (concluding the preliminary injunction was incorrectly issued); *see infra* notes 80-84 and accompanying text; *see also Lockyer*, 459 F. Supp. 2d at 918.

[60] *See* Wyoming I, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) (granting a nationwide injunction of the Roadless Rule).

[61] *See* Wyoming II, 414 F.3d 1207, 1211 (10th Cir. 2005); State Petitions, 70 Fed. Reg. 25654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

[62] *See* State Petitions, 70 Fed. Reg. 25654 ("[M]anagement requirements for inventoried roadless areas [will] be guided by individual land management plans until and unless these management requirements are changed through a State-specific rulemaking."); *see also* Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 881 (N.D. Cal. 2006).

[63] State Petitions, 70 Fed. Reg. at 25661.

[64] *Id.* at 25655. The State Petitions Rule continued by stating if a state submits a petition for a national forest roadless area and the area extends into another state, the petitioning governor "should coordinate with the Governor of the adjacent State." *Id.*

allows governors to file petitions within eighteen months of the Rule's inception.[65] The Secretary and an advisory committee then evaluate the petition.[66] The life of the State Petitions Rule, like the Roadless Rule, was short.[67] On October 11, 2006, the U.S. District Court for the Northern District of California set aside the State Petitions Rule and reinstated the Roadless Rule nationwide.[68]

B. Recent Cases Addressing National Forest Roadless Area Management Plans

Just three days after the Forest Service issued the Roadless Rule, the Kootenai Tribe filed a claim challenging the Roadless Rule.[69] The Tribe claimed the Roadless Rule violated NEPA and the Administrative Procedure Act (APA).[70] Just one day later, the State of Idaho filed a similar complaint in the same court.[71] The U.S. District Court for the District of Idaho granted both plaintiffs' request for a preliminary injunction of the Roadless Rule.[72] The court found the plaintiffs presented "a strong likelihood of success on the merits" of their NEPA claims.[73] The court also found the plaintiffs presented sufficient information to show the Roadless Rule was likely to cause irreversible harm to national forests.[74] Although the Forest Service did not appeal the injunction, intervening environmental organizations did.[75]

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[65] *Id.*

[66] *Id.* The advisory committee was a national committee established to address the concerns that management of roadless areas have national implications. *Id.* The committee was composed of people concerned with the conservation and management of national forest roadless areas. *Id.*

[67] *Lockyer*, 459 F. Supp. 2d at 919.

[68] *Id.* Prior to its repeal, eleven States submitted petitions pursuant to the State Petitions Rule. Red Lodge Clearinghouse, *National Forest Management*, *available at* http://www.redlodgeclearinghouse.org/legislation/ nationalforestmanagement2.html (last visited Sept. 30, 2007). States submitting petitions were CA, CO, ID, ME, MI, NC, NM, OR, SC, VA, WA. *Id.*

[69] Kootenai I, 142 F. Supp. 2d 1231, 1231 (D. Idaho 2001).

[70] *Id.* at 1236; *see also* National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006); Scope of Review, 5 U.S.C. § 706(2)(A) (2006). Plaintiffs claimed the Forest Service failed to take a "hard look" when preparing the EIS and that this would cause potential irreparable harm to national forests. *Kootenai I*, 142 F. Supp. 2d at 1243. Specifically, plaintiffs contended the Forest Service (1) failed to analyze reasonable alternative to the Roadless Rule, (2) the public comment period was inadequate, and (3) failed to analyze adequately the cumulative impacts of the Roadless Rule. *Id.* at 1243-47.

[71] *See* Kootenai II, 313 F.3d 1094, 1104 (9th Cir. 2002).

[72] *See Kootenai I*, 142 F. Supp. 2d at 1248.

[73] *Kootenai II*, 313 F.3d at 1107.

[74] *Id.* at 1106-07. The harm would result from the lack of accessibility to prevent "unnaturally severe wildfires, insect infestation and disease." *Id.* at 1112.

[75] *Id.* at 1104. The Ninth Circuit Court of Appeals consolidated the appeals. *Id.*

The Ninth Circuit Court of Appeals examined whether the plaintiffs demonstrated a likelihood of success on their NEPA claims.[76] The court reviewed NEPA's procedural requirements to determine if a preliminary injunction of the Roadless Rule was appropriate.[77] First, the court found the Forest Service most likely complied with NEPA's notice and comment procedures.[78] Second, the court found the Forest Service most likely considered a reasonable range of alternatives in the EIS.[79] Therefore, the court found the plaintiffs failed to meet the preliminary injunction burden; they failed to show probable success on their NEPA claims.[80]

In conclusion, the court of appeals rejected the lower court's holding that irreparable harm would occur if the Forest Service implemented the Roadless Rule.[81] The court of appeals opined that "restrictions on human intervention are not usually irreparable in the sense required for injunctive relief."[82] The court held that promulgation of the Roadless Rule was not likely to violate NEPA and the lower court "incorrectly applied the 'possibility of irreparable harm' standard to justify an injunction."[83] Therefore, the Ninth Circuit reversed and remanded the lower court's decision.[84]

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[76] *Id.* at 1115. First, the court found that an EIS is required in accordance with NEPA when a federal action significantly affects *the human environment*, but not when an action "maintain[s] the environmental status quo." *Id.* at 1114; *see* 40 C.F.R. § 1508.14 (2005) (defining human environment). The environmental organizations argued that the Roadless Rule did not affect the human environment, but the Rule "simply amounts to a decision to leave nature alone." *Kootenai II*, 313 F.3d at 1115. The court, however, decided the Roadless Rule did trigger an EIS, as human intervention, or in this case, the lack of intervention would change the environmental status quo. *Id.*

[77] *Kootenai II*, 313 F.3d at 1115.

[78] *Id.* at 1115-20. Contrary to the lower court's finding, the court found the Forest Service did provide adequate information and public notice concerning the Roadless Rule. *Id.* at 1116. Specifically, the Court found there was actual notice of the areas to be affected, despite an initial lack of maps of the area. *Id.* at 1117. The court also found the additional 4.2 million acres of affected land in the FEIS did not require a supplemental EIS. *Id.* at 1118. The court also noted the public had time to comment on the additions. *Id.* Finally, the court found the Forest Service provided substantially more time for public comment than required by NEPA. *Id.* at 1119. The Forest Service accepted public comments for sixty-nine days, whereas, NEPA only requires a forty-five day comment period. *Id.* at 1118.

[79] *Id.* at 1120-24. In support, the court determined NEPA does not require the Forest Service to consider alternatives that directly conflict with NEPA's policy objectives. *Id.* at 1121. The court explained by stating that NEPA's objective "is first and foremost to protect the natural environment." *Id.* at 1123.

[80] *Id.*

[81] *Id.* at 1126.

[82] *Kootenai II*, 313 F.3d at 1125.

[83] *Id.* at 1126. "[T]he process [of implementing the Roadless Rule] abided the general statutory requirements of NEPA." *Id.*

[84] *Id.*

Recently, the U.S. District Court for the Northern District of California, in *California ex rel. Lockyer v. USDA*, once again changed the management of national forest roadless areas.[85] In *Lockyer*, the plaintiffs consisted of four states and a host of environmental organizations.[86] The plaintiffs claimed the USDA violated NEPA, the Endangered Species Act (ESA), and the APA when it promulgated the State Petitions Rule.[87]

To determine whether the promulgation of the State Petitions Rule required a NEPA analysis, the court addressed whether the Rule constituted a procedural change or a substantive repeal of the Roadless Rule.[88] The court asserted that a substantive repeal, but not a procedural change, would require a NEPA analysis.[89] The court found the State Petitions Rule did substantively repeal the Roadless Rule because it "eliminated the uniform nationwide protections for roadless areas."[90] Therefore, NEPA required an EIS for the State Petitions Rule.[91]

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[85] *See* Cal. *ex rel*. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006).

[86] *Id.* at 879. The four states were California, Washington, New Mexico, and Oregon. *Id.* The environmental groups were the Wilderness Society, California Wilderness Coalition, Forests Forever Foundation, Northcoast Environmental Center, Oregon Natural Resources Council Fund, Sitka Conservation Society, Siskiyou Regional Education Project, Biodiversity Conservation Alliance, Sierra Club, National Audubon Society, Greater Yellowstone Coalition, Center for Biological Diversity, Environmental Protection Information Center, Klamath-Siskiyou Wildlands Center, Defenders of Wildlife, Pacific Rivers Council, Idaho Conservation League, Humane Society of the United States, Conservation NW and Greenpeace. *Id.*

[87] *Id.* at 884; *see also* National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (2006); Endangered Species Act, 16 U.S.C. §§ 1531-1539 (2006); Scope of Review, 5 U.S.C. § 706(2)(A) (2006). The plaintiffs claimed the USDA violated NEPA because the Forest Service adopted the State Petitions Rule "without environmental analysis under NEPA;" the Forest Service did not prepare an EIS when promulgating the State Petitions Rule. *Lockyer*, 459 F. Supp. 2d at 881. The plaintiffs claimed the USDA also failed to engage in the consultation process required by ESA. *Id.* The ESA requires the agency to engage in a consultation to insure the agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

[88] *Lockyer*, 459 F. Supp. 2d at 883. The court began its discussion by recognizing the "threshold that triggers the requirement for NEPA analysis is relatively low." *Id.* at 894. To show an analysis is needed one only needs to prove there are "'substantial questions whether a project may have a significant effect' on the environment." *Id.* (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)).

[89] *Lockyer*, 459 F. Supp. 2d at 883.

[90] *Id.* at 898. The court relied on *Andrus v. Sierra Club*, a U.S. Supreme Court opinion, to support the finding that an EIS was required when the Roadless Rule was repealed. *Id.* at 899. *Andrus* stated if a program is terminated and the termination "'would significantly affect the quality of the human environment,'" then an EIS is required. *Id.* (quoting Andrus v. Sierra Club, 442 U.S. 347, 393 n.22 (1979)).

[91] *Lockyer*, 459 F. Supp. 2d at 894. A substantive repeal signified that the Forest Service implemented a new management plan for roadless areas. *Id*. When the Forest Service implements a new management plan, NEPA requires an EIS. *Id.* "An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive." *Id.*

The court also found the State Petitions Rule itself, not just the repealing of the Roadless Rule, required an EIS.[92] The State Petitions Rule required an EIS because it was a new management plan for national forest roadless areas.[93] "To characterize this shift from uniform national protections for roadless areas to protections that vary by state as well as by forest as merely procedural would elevate form over substance and eliminate environmental assessment of this substantial change."[94] Thus, the court found the State Petitions Rule "substantively effects the environment" by both repealing the existing rule and by implementing a new rule.[95]

In conclusion, the court enjoined the State Petitions Rule and reinstated the Roadless Rule.[96] When discussing this remedy the court stated that "[t]he Ninth Circuit has explained that 'the effect of invalidating an agency rule is to reinstate the rule previously in force.'"[97] The court prohibited the USDA from taking any actions that would violate the Roadless Rule without first preparing an EIS.[98]

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[92] *Id.*

[93] *Id.* at 899. Before the Roadless Rule, national forest roadless areas were managed on a forest-by-forest level, whereas with the State Petitions Rule the forest may be managed on a state-by-state level. *Id.*

> For example, a number of national forests and the roadless areas within them cross state lines . . . Previously, those areas were managed uniformly on both sides of the state border under the forest plan. At oral argument, Defendants' counsel conceded that the Forest Service had not taken a hard look at what would happen if neighboring states submitted petitions seeking differing treatment of roadless areas that crossed state borders.

Id. "Similarly, the Forest Service failed to consider what would happen if one state petitioned for more protection of those roadless areas and the neighboring state did not." *Id.*

> [T]he Palisades and Winegar Hole roadless areas in the Targhee National Forest straddle the Idaho-Wyoming border and contain areas in both states where road construction and reconstruction are not prohibited under the current forest plan. The State of Idaho, which filed an amicus brief in support of Defendants in this case and opposed reinstatement of the Roadless Rule, has announced that it will submit a petition that apparently will not seek to reinstate all the protections it had under the Roadless Rule . . . while the State of Wyoming has announced that it will not file a petition.

Id. at 900 n.5.

[94] *Id.* at 901.

[95] *Id.* at 904. The court also found for the petitioners that the "Forest Service violated ESA by failing to engage in the consultation process before issuing the State Petitions Rule." *Id.* at 912. The court decided not to address the APA claim, as it already found the State Petitions Rule to violate NEPA and ESA. *Id.* at 913.

[96] *Lockyer*, 459 F. Supp. 2d at 919.

[97] *Id.* It is well recognized that when a court invalidates an agency rule, the court has authority to reinstate the previous rule. *See, e.g.*, Paulson v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force.").

[98] *Lockyer*, 459 F. Supp. 2d at 919.

As these cases demonstrate, the Roadless Rule is controversial and continues to be a prominent issue in the judicial context.[99]

C. The Mootness Doctrine

Federal courts are limited to deciding actual cases and controversies.[100] The mootness doctrine is applicable if a case or controversy once existed, but subsequently was resolved prior to the federal court's judgment.[101] If the court finds that no case or controversy exists, it may dismiss the case as moot.[102] The Supreme Court, however, has emphasized the mootness doctrine's flexibility.[103] This flexibility is seen in the exceptions to the doctrine.[104] Two exceptions are relevant here—cases capable of repetition, yet evading review and voluntary cessation.[105]

A case is not moot when a case or controversy is capable of repetition, yet evades review.[106] A case is not moot, thus reviewable by a federal court, if two factors are satisfied: (1) the challenged issue terminates before full litigation occurs, and (2) a reasonable expectation exists that the same party will be exposed to the

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[99] *Compare* Kootenai I, 142 F. Supp. 2d 1231, 1248 (D. Idaho 2001) (granting a preliminary injunction of the Roadless Rule because the court found a likelihood of success on NEPA claims and irreparable harm), *with* Kootenai II, 313 F.3d 1094, 1123 (9th Cir. 2002) (finding *Kootenai I* erroneously granted a preliminary injunction based on the faulty assumption of likelihood of success on NEPA claims and finding irreparable harm), *and Lockyer*, 459 F. Supp. 2d at 919 (repealing the State Petitions Rule and reinstating the Roadless Rule nationwide); *see also* Barringer, *supra* note 3, at A21(describing the national forest management litigation as "legal Ping-Pong").

[100] Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 277 (1990); *see also* U.S. CONST. art. III, § 2. The mootness doctrine is based on Article III of the U.S. Constitution, although this assumption has been debated. Bandes, *supra* note 100, at 277 ("The Court currently views the mootness doctrine as grounded, at least in part, in article III concerns. A number of commentators, recently joined by Chief Justice Rehnquist, have questioned this assumption.").

[101] *See, e.g.*, Bandes, *supra* note 100, at 245; 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.1 (2007).

[102] *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 135, 129-30 (Vicki Been et al. eds., Aspen Publisher 5th ed. 2007) ("Essentially, any change in the facts that ends the controversy renders the case moot"). The U.S. Supreme Court has stated "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). Parties to the suit or the court are capable of raising the issue of mootness. WRIGHT, MILLER & COOPER, *supra* note 101, at § 3533.1.

[103] U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980) (noting the "flexible character of the Art. III mootness doctrine").

[104] There are four exceptions to the mootness doctrine: "'collateral' injuries," "capable of repetition yet evading review," voluntary cessation, and "certified class action suit[s]." CHEMERINSKY, *supra* note 102, at 131.

[105] *See infra* notes 106-20 and accompanying text.

[106] *See, e.g.*, 5 AM. JUR. 2D *Appellate Review* § 602 (2007).

same action in the future.[107] This exception allows courts to rule on short duration issues, which are likely to reoccur, but terminate before or during litigation.[108]

The other relevant exception to the mootness doctrine is when a party voluntarily ceases the disputed action, but could resume the action in the future.[109] The U.S. Supreme Court, in *Friends of the Earth v. Laidlaw Environmental Services*, recently stated when a party voluntarily terminates a disputed act the case is moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[110] The Court stressed the party claiming mootness carries a "heavy burden" and must show the contested actions would not reoccur.[111] The case should not be moot if the party fails to carry this burden.[112]

The Supreme Court's decision in *City of Mesquite v. Aladdin's Castle, Inc.*, demonstrates when a statutory repeal satisfies the voluntary cessation exception to mootness.[113] In that case, Aladdin's Castle sought declaratory and injunctive relief

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[107] *See, e.g.*, Lewis J. Heisman, *Federal Administrative Orders as Subject to Judicial Review Where Such Orders are "Capable of Repetition, yet Evading Review"*, 66 A.L.R. FED 285 (1984).

[108] Heisman, *supra* note 107, at § 1(a). Cases dealing with pregnancy issues are good examples of how this exception can apply— pregnancy is a temporary condition that usually lasts around nine to ten months, whereas litigation of a pregnancy issue may require more time. *See* 5 AM. JUR. 2D *Appellate Review* § 602; *see also* Roe v. Wade, 410 U.S. 113, 125 (1973) ("Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'").

[109] *See, e.g.*, CHEMERINSKY, *supra* note 102, at 139; 5 AM. JUR. 2D *Appellate Review* § 606 (2007); Walling v. Helmerich & Payne, 323 U.S. 37, 43 (1944) ("Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power."); *see also* U.S. v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot."). The court does not appear to have discretionary power to avoid applying this exception. *See* CHEMERINSKY, *supra* note 102, at 139 ("A case *is not to be dismissed as moot* if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time.") (emphasis added).

[110] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (citing U.S. v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)) (emphasis added). In *Laidlaw*, environmental groups brought suit seeking declaratory and injunctive relief and civil penalties against the defendant for violation of the Clean Water Act permit regulations. *Laidlaw*, 528 U.S. at 167. The Supreme Court found the case not moot even though the defendant had closed one facility and also changed its behavior to be in compliance with the regulations. *Id.* at 193. In *Laidlaw* the Supreme Court found the burden was not met; it was not absolutely clear the actions would not reoccur, thus, the case was not moot even though the acts had been amended. *Id.* at 193.

[111] *Laidlaw*, 528 U.S. at 189 ("[The] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.").

[112] *Id.* at 189; *accord* CHEMERINSKY, *supra* note 102, at 139-40.

[113] City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982). A statutory change or repeal, however, does not always fulfill the exception to mootness. *See infra* note 120.

against a city ordinance because of a vague phrase in a licensing provision.[114] The district court found the challenged phrase was unconstitutionally vague.[115] While the case was pending on appeal, the City eliminated the challenged phrase from the ordinance.[116] The Supreme Court found "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated."[117] The Court found the City failed to carry its burden; it failed to prove there was no reasonable expectation of reinstatement of the statute.[118] Therefore, the Supreme Court held the case was not moot, but rather the court could proceed to the merits of the case.[119] Whether a statutory repeal makes a case moot appears to hinge on the likelihood of reinstatement of the statute.[120]

PRINCIPAL CASE

In 2003, the State of Wyoming filed suit against the USDA in the U.S. District Court for the District of Wyoming.[121] Numerous environmental organizations intervened as defendants.[122] Wyoming claimed the USDA violated NEPA, the Wilderness Act, and other acts when promulgating the Roadless Rule.[123] The court found for Wyoming on five of its six NEPA claims and its Wilderness Act claim.[124]

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[114] *Aladdin's Castle*, 455 U.S. at 283.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 289. The court stated that the City changed the provision in response to the lower court's decision. *Id.*

[118] *Id.*

[119] *Aladdin's Castle*, 455 U.S. at 289.

[120] *See* CHEMERINSKY, *supra* note 102, at 141-43; *compare* Massachusetts v. Oakes, 491 U.S. 576 (1989) (holding the case was moot when the challenged statute was amended), *with Aladdin's Castle*, 455 U.S. 283 (holding a change in the challenged statute while the case was on appeal does not moot the case).

[121] Wyoming I, 277 F. Supp. 2d 1197, 1203 (D. Wyo. 2003).

[122] *Id.* at 1204. Intervenors included Wyoming Outdoor Council, Wilderness Society, Sierra Club, Biodiversity Associates, Pacific Rivers Council, Natural Resource Defense Council, Defenders of Wildlife, and National Audubon Society. *Id.*

[123] *Id.* at 1217. Specifically, Wyoming claimed the Forest Service violated NEPA for the following six reasons: (1) failure to provide the public with adequate information during the scoping period and development of the EIS; (2) denial of cooperating agency status for Wyoming; (3) failure to consider a reasonable range of alternatives; (4) failure to conduct site specific analysis; (5) failure to conduct an adequate cumulative impact analysis; and (6) failure to provide a supplemental EIS. *Id.* at 1219-32. In addition, Wyoming claimed the Roadless Rule constituted "a de facto designation of 'wilderness' in contravention of the process established by the Wilderness Act." *Id.* at 1232. Wyoming contended the Roadless Rule created wilderness areas, thus bypassed Congress's sole authority to designate wilderness areas. *Id.* at 1232; *see also* National Wilderness Preservation System Act, 16 U.S.C. §§ 1131-1136 (2006).

[124] *Wyoming I*, 277 F. Supp. 2d at 1231-32, 1235-37. The court agreed with Wyoming on all of its NEPA claims, except that NEPA required a site specific analysis. *Id.* at 1227. Also the

Since the court found the Roadless Rule violated NEPA and the Wilderness Act, it decided not to address Wyoming's remaining claims.[125] The U.S. District Court concluded by ordering a nationwide injunction of the Roadless Rule.[126]

Although the USDA decided not to appeal the district court's decision, environmental organizations—the defendant-intervenors—filed an appeal with the Tenth Circuit Court of Appeals.[127] Because the Forest Service repealed the Roadless Rule during appellate oral arguments, the court dismissed the case as moot and vacated the lower court's decision.[128]

The court began its discussion of mootness by determining the Roadless Rule was nonexistent.[129] The court stated the Forest Service's adoption of the State Petitions Rule rendered the Roadless Rule irrelevant.[130] The court stated that in determining whether an issue is moot, "'[t]he crucial question is whether granting a present determination of the issues offered will have some effect in the real world.'"[131] Since the court found the Roadless Rule no longer existed, there was no need to address the case.[132]

The court then discussed one exception to the mootness doctrine—a wrong capable of repetition, yet evading review.[133] The court explained this exception has two prongs.[134] An exception exists if the "challenged conduct" is short

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court determined that the Roadless Rule violated the Wilderness Act because (1) a roadless area "is synonymous with the Wilderness Act's definition of 'wilderness,'" (2) the permitted uses of the two areas were the same, and (3) most of the roadless areas covered by the Roadless Rule were identified in a study intended to identify areas to recommend as wilderness. *Id.* at 1236.

[125] *Id.* at 1237. Although Wyoming properly raised National Forest Management Act and Multiple-Use and Sustained-Yield Act claims, the court found it was not required to address these claims after holding the Roadless Rule violated NEPA and the Wilderness Act. *Id.* The court then dismissed Wyoming's other claims under federal statutes because of lack of authoritative support. *Id.* at 1237.

[126] *Id.* at 1239. The U.S. District Court for the District of Wyoming found "the Roadless Rule was promulgated in violation of the National Environmental Policy Act and the Wilderness Act [and thus was] set aside." *Id.* at 1239. The court concluded by ordering a nationwide injunction of the Roadless Rule. *Id.*

[127] Wyoming II, 414 F.3d 1207, 1211 (10th Cir. 2005).

[128] *Id.* at 1214.

[129] *Id.* at 1212.

[130] *Id.*

[131] *Id.* (quoting Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1182 (10th Cir. 2000)).

[132] *Wyoming II*, 414 F.3d at 1212. The court reasoned the "alleged procedural deficiencies of the Roadless Rule [were] now irrelevant because the replacement rule was promulgated in a new and separate rulemaking process." *Id.*

[133] *Id.; see also* CHEMERINSKY, *supra* note 102, at 135 (explaining the exception to the mootness doctrine).

[134] *Wyoming II*, 414 F.3d at 1212.

lived, making litigation during its existence difficult, and if reoccurrence of the challenged conduct is reasonably expected.[135] The court declared neither prong was met.[136] First, the court decided that if the Roadless Rule was reinstated there would be ample time to litigate the issue.[137] Second, the court stated that it would not speculate as to whether the issue would be relitigated.[138] Since the court found the case failed to satisfy either prong, the court held the case was moot.[139]

Because the court found the case was moot, it also vacated the judgment of the lower court.[140] The court reasoned that vacating the lower court's decision was appropriate because the party bringing the appeal and the party that made the case moot were not the same.[141] The court vacated the lower court's decision because mootness was a result of "'circumstances unattributable to any of the parties.'"[142] The court also found there was an absence of manipulation in the case, which would forbid a vacatur.[143] Thus, the court dismissed the case as moot and vacated the lower court's judgment.[144]

ANALYSIS

The Tenth Circuit Court of Appeals erroneously determined *Wyoming II* to be moot. First, the court should have applied the "voluntary cessation" exception, allowing the court to rule on the merits of the case.[145] Second, public interest in

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[135] *Id.* (citing Lewis v. Cont'l Bank Corp., 494 U.S. 472, 481 (1990) (for exceptions)).

[136] *Wyoming II*, 414 F.3d at 1212.

[137] *Id.* ("[T]here would be ample opportunity to challenge the rule before it ceased to exist."). The court, however, did not cite to any authority for this conclusion. *Id.*

[138] *Id.* The court asserted it would be speculative to conclude Wyoming would be faced with the Roadless Rule in the future. *Id.* The court cited to *Murphy v. Hunt*, a Supreme Court case, to assert "the possibility of recurrence must be more than theoretical." *Wyoming II*, 414 F.3d at 1212; *see* Murphy v. Hunt, 455 U.S. 478, 482-83 (1982).

[139] *Wyoming II*, 414 F.3d at 1212-13. The court did not discuss this exception in detail. *See id.* at 1212 (concluding the mootness exceptions did not apply in three sentences).

[140] *Id.* at 1213; *see also supra* notes 128-39 and accompanying text (discussing why the case was moot); *see supra* note 30 (explaining when a vacatur is proper).

[141] *Wyoming II*, 414 F.3d at 1213. The Forest Service was responsible for mooting the case, and it was not seeking relief from the lower court's judgment. *Id.*

[142] *Id.* (quoting U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 23 (1994)).

[143] *Wyoming II*, 414 F.3d at 1213. Vacating is not an option if a party uses it to obtain relief not afforded through the judicial system. *Id.* The "instant case [does] not suggest that the Forest Service was motivated by a desire to avoid or undermine the district court's ruling." *Id.*

[144] *Id.* at 1214.

[145] CHEMERINSKY, *supra* note 102, at 139 (defining the voluntary cessation exception to the mootness doctrine and citing to relevant cases); *see also supra* notes 100-20 and accompanying text.

national forest roadless area management militated against mootness.[146] Third, judicial economy supported ruling on the merits instead of dismissing the case.[147]

A. Exception to the Mootness Doctrine: Voluntary Cessation

Although the Tenth Circuit examined one exception to the mootness doctrine, it overlooked another applicable exception—voluntary cessation.[148] A court should not dismiss a case "as moot if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time."[149] As found in *City of Mesquite v. Aladdin's Castle, Inc.*, this exception can apply to statutory repeals.[150] The voluntary cessation exception can apply to statutory repeals if there is a reasonable likelihood that the statute will be reinstated.[151]

The Tenth Circuit in *Wyoming II* should have examined the voluntary cessation exception, focusing its analysis on the possible reinstatement of the Roadless Rule.[152] Although the Forest Service did not repeal the Roadless Rule in response to litigation, the repeal occurred during oral arguments of *Wyoming II*.[153] Also, but for the Forest Service's voluntary repeal, the Tenth Circuit would have ruled on the merits of the Roadless Rule.[154] Once a court establishes the party terminated

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[146] *See* U.S. v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("[P]ublic interest in having the legality of the practices settled, militates against a mootness conclusion," when there is the possibility of reoccurrence.); *see infra* notes 177-83 and accompany text.

[147] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 192 (2000) (finding when litigation is in an advanced stage, it may be more efficient to decide a case, not moot it); *see infra* notes 184-94 and accompany text.

[148] *See, e.g.*, CHEMERINSKY, *supra* note 102, at 139 (explaining the exception to the mootness doctrine); 5 AM. JUR. 2D *Appellate Review* § 606 (2007) (reviewing the effects of "voluntary acquiescence" of challenged conduct upon mootness).

[149] CHEMERINSKY, *supra* note 102, at 139; *W.T. Grant*, 345 U.S. at 632 ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot."); *see, e.g.*, Walling v. Helmerich & Payne, 323 U.S. 37, 43 (1944) ("Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power."). In order for this exception to apply there must be a "reasonable expectation that the wrong will be repeated." *W.T. Grant*, 345 U.S. at 633 (citing U.S. v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945)).

[150] City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982). The Supreme Court found "the city's repeal of the objectionable language [in the statute] would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.*; *see also* 16 C.J.S. *Constitutional Law* § 169 (2007) (stating that amending or repealing a challenged statute requires an analysis to determine if the voluntary cessation exception to the mootness doctrine applies).

[151] *See* CHEMERINSKY, *supra* note 102, at 141-43.

[152] *See* Wyoming II, 414 F.3d 1207, 1211 (10th Cir. 2005).

[153] *See id.*

[154] *See id.*; *see also* CHEMERINSKY, *supra* note 102, at 141-43.

the challenged conduct voluntarily, next it must determine the likelihood of the action reoccurring.[155] The Supreme Court's standard to determine if challenged conduct is likely to reoccur is whether "events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[156] Because of the Ninth Circuit's holding in *Kootenai II*, the assured challenge to the State Petitions Rule, and precedent establishing a court's remedial authority to reinstate a prior rule a reasonable likelihood that the Roadless Rule would be reinstated existed.[157]

The *Kootenai II* opinion indicates the Ninth Circuit thought the Roadless Rule was valid.[158] Although the Ninth Circuit in *Kootenai II* only addressed whether the plaintiffs presented enough evidence to warrant a preliminary injunction, the court discussed the petitioners' NEPA claims in great depth.[159] After discussing the merits of each alleged NEPA violation, the Ninth Circuit opined "it cannot be said that there is a strong likelihood of success on the merits."[160] The Ninth Circuit further emphasized its point by stating "it is *plain* that the Forest Service gave a 'hard look' at the complex problem presented."[161] These statements and the depth of analysis undertaken by the court reveal that the Ninth Circuit considered the Roadless Rule valid.[162]

Although the Ninth Circuit indicated the Roadless Rule was valid, the adoption of the State Petitions Rule repealed the Roadless Rule.[163] The repeal of the Roadless Rule and implementation of the State Petitions Rule was certain to spark litigation.[164] One newspaper article lucidly stated the State Petitions Rule would

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[155] *See* 32A AM. JUR. 2D *Federal Courts* § 599 (2007) ("Defendants who seek to establish mootness because of their voluntary discontinuance of allegedly illegal activity must establish that there is *no reasonable likelihood that the wrong will be repeated*.") (emphasis added); 1A C.J.S. *Actions* § 83 (2008) (stating a case is not moot if the termination of the challenged act is "not expected to be permanent").

[156] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 203 (2000) (quoting U.S. v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)).

[157] *See, e.g.*, *Laidlaw*, 528 U.S. at 203; 1A C.J.S. *Actions* § 83; 32A AM. JUR. 2D *Federal Courts* § 599.

[158] *See* Kootenai II, 313 F.3d 1094, 1115-23 (9th Cir. 2002).

[159] *Id.*

[160] *Id.* at 1123.

[161] *Id.* (emphasis added).

[162] *See generally id.*

[163] *See Kootenai II*, 313 F.3d at 1115-23; State Petitions, 70 Fed. Reg. 25654 (May 13, 2005) (to be codified at 36 C.F.R. pt. 294).

[164] Note the plethora of newspaper articles devoted to the national forest roadless area management. *See, e.g.*, Felicity Barringer, *Logging and Politics Collide in Idaho*, N.Y. TIMES, Aug. 9, 2004, at A10 (discussing the "polarizing and fierce" debate between "those who want to make a profit from federal timberlands and those who want to lock business out"); Editorial, *T.R.? He's No T.R.*, N.Y. TIMES, Feb. 11, 2007, at Section 4 (noting President Bush thwarted "one of the

"spur a new round of suits by environmentalists."[165] In *Wyoming II*, the Tenth Circuit recognized the zealous nature in which roadless area management plans are litigated.[166] When describing the background of the Roadless Rule the court stated: "Almost *immediately*, the Roadless Rule was embroiled in litigation."[167] The Tenth Circuit must have foreseen that the adoption of the State Petitions Rule would cause further litigation of roadless area management plans.[168]

Since litigation of the State Petitions Rule was inevitable, the Tenth Circuit should have considered the remedy involved in such litigation and the possible reinstatement of the Roadless Rule.[169] Many circuits have precedent declaring that when a court invalidates an agency rule, the court has authority to reinstate the previous rule.[170] Although the Tenth Circuit lacks binding precedent for

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most important acts of environmental stewardship in many years, Mr. Clinton's roadless rule."); Editorial, *The Roadless Rule Takes a New Turn*, N.Y. TIMES, Sept. 25, 2006 at A24 (discussing the U.S. District Court for the Northern District of California's ruling to reinstate the Roadless Rule); *see* Juliet Eilperin, *Roadless Rules for Forests Set Aside: USDA Plans to Reverse Clinton Prohibitions*, WASH. POST, July 13, 2004 at A1 (writing about the Bush Administration's proposal to replace the Roadless Rule); Jeff Gearino, *Roadless Rule Affects State*, CASPER STAR TRIBUNE, May 5, 2005 (noting there are many different opinions about national forest roadless area management); Bill Marsh, *The Nation; Where the Human Footprint is the Lightest*, N.Y. TIMES, July 31, 2005, at Section 4 (noting where the "last of the truly wild" places are located and the dispute surrounding management of these roadless areas); Karl Puckett, *Roadless Rule: State of Montana Backs Clinton-era Protection*, GREAT FALLS TRIBUNE, Oct. 8, 2007 (discussing the debate surrounding national forest roadless area management); Whitney Royster, *Roadless Rule Puzzles Governor*, CASPER STAR TRIBUNE, Aug. 6, 2004 (discussing the implications of the State Petitions Rule); Garren Stauffer, *Still No Resolution on Roadless Rule*, LARAMIE BOOMERANG, Oct. 20, 2007 (discussing the "hot-button issue" of national forest roadless areas).

[165] *See, e.g.*, Eilperin, *supra* note 164, at A1.

[166] Wyoming II, 414 F.3d 1207, 1211 (10th Cir. 2005) (mentioning *Kootenai II* and *Wyoming I*, which reached different conclusions about the merits of the Roadless Rule).

[167] *Id.* (emphasis added).

[168] It is fair to say the court knew litigation was inevitable because even newspapers foresaw it. *See, e.g.*, Eilperin, *supra* note 164, at A1. Petitioners filed a complaint for declaratory and injunctive relief from the State Petitions Rule on August 30, 2005, about seven weeks after the Tenth Circuit decided *Wyoming II*. *See* Complaint for Declaratory and Injunctive Relief at 17, Cal. *ex rel*. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006) (No. 05-cv-04038-EDL).

[169] *See Lockyer*, 459 F. Supp. 2d at 919.

[170] *See, e.g.*, *id.*; Paulson v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency rule is to reinstate the rule previously in force."); Int'l Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d 1249, 1257 (D. Wyo. 2004) (finding that a judgment on the validity of a rule must be made when there exists potential for reinstatement); Bedford County Mem'l Hosp. v. Health & Human Servs., 769 F.2d 1017, 1024 (4th Cir. 1985) ("Hence we find that the appropriate relief . . . is to remand for entry of decrees directing payment forthwith under the old overhead formula."); Menorah Med. Ctr. v. Heckler, 768 F.2d 292, 297 (8th Cir. 1985) ("Unless special circumstances are present, which we do not find here, prior regulations remain valid until replaced by a valid regulation or invalidated by a court."); Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1569 (11th Cir. 1985) ("The effect [of invalidating the malpractice rule] was to reinstate the prior method of reimbursement."); Abington Mem'l Hosp. v. Heckler, 750

such authority, the court should have considered the practice in other circuits.[171] Furthermore, the Tenth Circuit could have predicted that when selecting a forum to challenge the State Petitions Rule, supporters of the Roadless Rule would select a forum likely to give a judgment in their favor.[172] Specifically, future petitioners were likely to file suit in a forum where invalidation of the current rule allowed the court to reinstate the prior rule—the Roadless Rule.[173] Thus, at the time of the Tenth Circuit's ruling, there existed a reasonable probability that the Roadless Rule would be reinstated through State Petitions Rule litigation.[174]

When looked at together the Ninth Circuit's approval of the Roadless Rule, the certain challenge to the State Petitions Rule, and precedent allowing courts to reinstate a prior rule, it appears the burden on the Forest Service—to show there was no reasonable expectation of reinstatement—was not met.[175] Thus, because the Forest Service voluntarily repealed the Roadless Rule and a reasonable likelihood of a court reinstating the Rule existed, *Wyoming II* satisfies the voluntary cessations exception to the mootness doctrine.[176]

F.2d 242, 244 (3d Cir. 1984) ("Thus, until rendered invalid by a court decision or replaced by a valid new regulation, the prior method of reimbursement remains operative."); Action on Smoking & Health v. C.A.B., 713 F.2d 795, 797 (D.C. Cir. 1983) ("Thus, by vacating or rescinding the rescissions proposed by ER-1245, the judgment of this court had the effect of reinstating the rules previously in force.").

[171] Although not binding precedent, in *International Snowmobile Manufacturers Association v. Norton* the U.S. District Court for the District of Wyoming recognized the authority to reinstate a prior rule. Int'l Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d at 1257 ("[N]ew rules and regulations implemented by the [National Park Service] could be found invalid and as a default, the [previous rule] would be reimplemented.").

[172] Undeniably the Tenth Circuit is aware of forum shopping. *See, e.g.*, JAMES R. PRATT, III & BRUCE J. MCKEE, ATLA'S LITIGATING TORT CASES § 3:2 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2007) ("[T]he plaintiff's attorney must give the utmost attention to all the possible forum selection factors in order to pick the forum that will probably best favor the plaintiff.").

[173] *See Lockyer*, 459 F. Supp. 2d at 874. The *Lockyer* complaint requested relief in the form of "enjoin[ing] defendants from approving any actions inconsistent with the Roadless Rule." Complaint for Declaratory and Injunctive Relief at 16, Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006) (No. 05-cv-04038-EDL).

[174] *See supra* notes 157-73 and accompanying text.

[175] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) ("[The] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."); *see* 1A C.J.S. *Actions* § 83 (2008) ("In actions which challenge a government practice, mootness is obviated where a probability of the recurrence of the practice is coupled with a certainty that the impact of the recurrence will fall on the litigants before the court."); Daniel Steuer, *Another Brick in the Wall: Attorney's Fees for the Civil Rights Litigant After* Buckhannon, 11 GEO. J. ON POVERTY L. & POL'Y 53, 63 (2004) ("[A] case would not be declared moot if some indication existed that the defendant might reinstate the challenged practice"). Although a factor in the court's decision, a party's stated intent not to reinstate a rule is not sufficient evidence to prove the challenged conduct will not be repeated. Steuer, *supra* note 175, at 64.

[176] *See supra* notes 148-75 and accompanying text.

B. Public Interest

In addition to the voluntary cessation exception to the mootness doctrine, public interest in the adjudication of the Roadless Rule's validity supported a conclusion to not moot the case.[177] Courts can decide issues of great public interest if it is likely the controversy will occur again in the future.[178] The U.S. Supreme Court has stated "public interest in having the legality of the practices settled, militates against a mootness conclusion."[179] National forest roadless area management has proven itself an issue of great public interest.[180] The *Kootenai II* court identified the public interest when it stated, "in a case such as this one where the purpose of the challenged action is to benefit the environment, the public's interest in preserving precious, unreplenishable resources must be taken into

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[177] *See, e.g.*, Foster V. Carson, *The Ninth Circuit Misapplies the Capable-of-Repetition-Yet-Evading-Review Exception to the Mootness Doctrine and Lends a Free Hand to Budget-Cutting State Officials*, 79 WASH. L. REV. 665, 668 (2004) ("Federal courts do not recognize an exception to mootness for cases involving a strong public interest. However, both the U.S. Supreme Court and the Ninth Circuit have held that a strong public interest in settling the legality of an action may weigh against a holding of mootness."); Steuer, *supra* note 175, at 64 (stating strong public interest in having an issue decided adds to the consideration of mootness). Additional support that the court should not have mooted the case because of public interest comes from its own citations. Wyoming II, 414 F.3d 1207, 1212 (10th Cir. 2005). The U.S. District Court for the District of Wyoming cites to *Camfield v. Oklahoma City*, to support its conclusion of mootness, by paraphrasing *Camfield* to conclude "that, without more, the possibility that a legislature may reenact the challenged statute does not preclude a mootness determination." *Id.*; Camfield v. Okla. City, 248 F.3d 1214, 1223-24 (10th Cir. 2001). Public interest, however, can be the "more" needed to "preclude a mootness determination." *See Wyoming II*, 414 F.3d at 1212; *see also* Carson, *supra* note 177, at 668 (stating, although not dispositive, public interest can mitigate a mootness conclusion).

[178] Public interest is distinct from the "capable of repetition, yet evading review" exception to mootness, because public interest does not require the litigation to involve the same parties. *See* 5 AM. JUR. 2D *Appellate Review* § 604 (2007); *see also supra* notes 105-08 and accompanying text; *see, e.g.*, U.S. v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (citing U.S. v. Trans-Mo. Freight Ass'n, 166 U.S. 309, 309, 310 (1897) (stating "[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion."); Alton & S. Ry. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, 463 F.2d 872, 878 (D.C. Cir. 1972) ("[T]he court continues an appeal in existence . . . when the court discerns a likelihood of recurrence of the same issue, generally in the framework of a 'continuing' or 'recurring' controversy, *and 'public interest' in maintaining the appeal*.") (emphasis added); Boise City Irrigation & Land Co. v. Clark, 131 F. 415, 419 (9th Cir. 1904) ("[T]he courts have entertained and decided such cases heretofore . . . partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.").

[179] *W.T. Grant*, 345 U.S. at 632.

[180] *See generally* Wyoming I, 277 F. Supp. 2d 1197 (D. Wyo. 2003); *Wyoming II*, 414 F.3d 1207; Kootenai I, 142 F. Supp. 2d 1231 (D. Idaho 2001); Kootenai II, 313 F.3d 1094 (9th Cir. 2002); Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006); *see also supra* note 164 (listing newspaper articles addressing national forest roadless area management).

account."[181] The extensive litigation demonstrates the overriding public interest "in preserving . . . national forests in their natural state."[182] Thus, combined with the voluntary cessation exception to the mootness doctrine, the strong public interest concerning national forest roadless area management should have persuaded the Tenth Circuit to rule on the issues presented in *Wyoming II*.[183]

C. Judicial Economy

Finally, the theory of judicial economy also supported a decision not to moot *Wyoming II*.[184] A court's inquiry "into the possibility of future recurrence of a dispute may conserve the judicial machinery by anticipating future litigation through the state and federal court systems. Under such circumstances, finding a case *not* moot may advance judicial economy."[185] The reasonable probability of the Roadless Rule being reinstated supported ruling on *Wyoming II* to enhance judicial economy.[186]

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[181] *Kootenai II*, 313 F.3d at 1125. The court continued by stating: "The district court in our view failed adequately to weigh the public interest in preserving our national forests in their natural state." *Id.*

[182] *Id.* "As evidenced by this litigation, a number of states and environmental organizations consider the environmental protections of roadless areas repealed by the State Petitions Rule *to be vital to the public interest*." *Lockyer*, 459 F. Supp. 2d at 914; s*ee also Wyoming II*, 414 F.3d at 1214 (holding the Roadless Rule case to be moot); *Kootenai II*, 313 F.3d at 1123 (holding the district court erroneously granted a preliminary injunction of the Roadless Rule); *Lockyer*, 459 F. Supp. 2d at 919 (holding the State Petitions Rule is to be set aside, reinstating the Roadless Rule); *Wyoming I*, 277 F. Supp. 2d at 1239 (holding the Roadless Rule invalid, thus granting a permanent nationwide injunction of the rule); *Kootenai I*, 142 F. Supp. 2d at 1248 (holding a likelihood of success on claims, thus granting a preliminary injunction of the Roadless Rule); *see also* Ben Neary, *Wyoming Judge to Hold Hearing on Roadless Rule*, CASPER STAR TRIBUNE (May 24, 2007). The Roadless Rule hearing was scheduled for Oct. 19, 2007 in the U.S. District Court for the District of Wyoming in front of Judge Brimmer. *Id.*

[183] *See, e.g.*, Steuer, *supra* note 175, at 64; *W.T. Grant*, 345 U.S. at 632 (citing U.S. v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 309, 310 (1897) (stating "[t]he defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.")).

[184] *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 192 (2000) ("[B]y the time mootness is an issue, the case has been brought and litigated, often . . . for years. To abandon the case at an advanced stage may prove more wasteful than frugal."); Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1675 (1970).

[185] *Mootness on Appeal in the Supreme Court*, *supra* note 184, at 1675 (emphasis in original); *accord Laidlaw*, 528 U.S. at 192 ("[B]y the time mootness is an issue, the case has been brought and litigated, often . . . for years. To abandon the case at an advanced stage may prove more wasteful than frugal.").

[186] *See supra* notes 157-76 and accompanying text; *Mootness on Appeal in the Supreme Court*, *supra* note 184, at 1675. The State of Wyoming has filed new litigation, consisting of the same Roadless Rule claims as brought in *Wyoming I* in U.S. District Court for the District of Wyoming. *See* Neary, *supra* note 182.

The Tenth Circuit could have conserved judicial resources by deciding the validity of the Roadless Rule when it was first on appeal to the court.[187] If the Tenth Circuit had invalidated the Roadless Rule, then the *Lockyer* court might have adjusted its remedy, not reinstating the Roadless Rule.[188] If the Tenth Circuit had ruled the Roadless Rule was valid, the ruling would have added credibility to the *Lockyer* remedy of reinstating the Roadless Rule.[189] In both situations, a ruling by the Tenth Circuit would have barred the State of Wyoming from filing the current lawsuit challenging the Roadless Rule.[190] Instead, the Tenth Circuit's decision to moot the case necessitated repeat litigation of the same Roadless Rule claims in the U.S. District Court for the District of Wyoming.[191] Because that court had ruled on the same claims in 2003, it is highly likely to again invalidate the Roadless Rule.[192] In response to the court's likely ruling, proponents of the Roadless Rule will, for the second time, appeal to the Tenth Circuit.[193] A decision by the Tenth Circuit in *Wyoming II* would have avoided this second round of Roadless Rule litigation in the U.S. District Court for the District of Wyoming and the Tenth Circuit.[194]

CONCLUSION

The Tenth Circuit Court of Appeals erroneously determined *Wyoming II* to be moot.[195] In its opinion the court ignored the voluntary cessation exception to mootness, which appears to be applicable.[196] Furthermore, both public interest and judicial economy militated against mooting the case.[197] A Tenth Circuit decision about the validity of the Roadless Rule would have added guidance and

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[187] *See, e.g.*, *Mootness on Appeal in the Supreme Court*, *supra* note 184, at 1675.

[188] *See also* Cal. *ex rel.* Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874, 919 (N.D. Cal. 2006).

[189] *See id.*

[190] Hearing held on Oct. 19, 2007 in front of Judge Brimmer, U.S. District Court for the District of Wyoming. *See* Neary, *supra* note 182.

[191] Stauffer, *supra* note 164 (stating: "[Judge] Brimmer already has ruled against the federal government regarding the [Roadless R]ule. Another judge, in a different jurisdiction, has since re-instated the rule.").

[192] *See* Wyoming I, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003) (holding the Roadless Rule invalid because of NEPA and Wilderness Act violations).

[193] *See generally* Wyoming II, 414 F.3d 1207 (10th Cir. 2005).

[194] *Mootness on Appeal in the Supreme Court*, *supra* note 184, at 1675 ("The inquiry into the possibility of future recurrence of a dispute may conserve the judicial machinery by anticipating future litigation through the state and federal court systems. Under such circumstances, finding a case *not* moot may advance judicial economy.").

[195] *See supra* notes 145-91 and accompanying text.

[196] *See supra* notes 148-76 and accompanying text.

[197] *See supra* notes 177-94 and accompanying text.

boundaries to subsequent roadless area management plan litigation.[198] Deciding the issue to be moot, however, the Tenth Circuit avoided making a decision that would have national ramifications.[199]

Because the mootness doctrine appears to be flexible, when a court is faced with the issue of mootness, the court must examine all relevant aspects of the case, including exceptions to mootness, public interest, and judicial economy.[200] Only by reviewing all applicable aspects can a court make an informed, just decision. But, if a court dismisses a case as moot without a full analysis, the decision can subject the judicial system and the public to a continuing cycle of unresolved litigation. The Tenth Circuit Court of Appeals' *Wyoming II* opinion did just that; the court's brief and superficial analysis of the mootness doctrine and its failure to consider public interest and judicial economy has spurred unnecessary, repetitive litigation, contributing to the unpredictable future of national forest roadless areas.[201] Courts can avoid similar situations by using the flexibility of the mootness doctrine to rule on a case, instead of simply using the doctrine as a tool to dismiss a case.

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[198] *See supra* notes 187-90. Hearing held on Oct. 19, 2007 in front of Judge Brimmer, U.S. District Court for the District of Wyoming. Neary, *supra* note 182; Boise City Irrigation & Land Co. v. Clark, 131 F. 415, 419 (9th Cir. 1904) ("[T]he courts have entertained and decided such cases heretofore . . . partly because of the *necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter*.") (emphasis added); *see also* Cal. *ex rel*. Lockyer v. U.S. Dep't of Agric., 459 F. Supp. 2d 874 (N.D. Cal. 2006).

[199] The State of Wyoming and the nation appear to be split on how national forest roadless areas should be managed: Should management be a federal, state, or forest-by-forest plan? No matter which plan is adopted, having a long-term management plan will allow states, counties, citizens, and industry to distinguish what activities are and are not allowed in roadless areas. Currently, however, permissible activities in roadless areas are unpredictable. Although the *Lockyer* court reinstated the roadless rule, it is very probable that the U.S. District Court for the District of Wyoming will hold the Roadless Rule to be invalid. *See Lockyer*, 459 F. Supp. 2d at 919; *see generally* Wyoming I, 277 F. Supp. 2d 1197 (D. Wyo. 2003) (stating Judge Brimmer's conclusions about the Roadless Rule). The Forest Service will be stuck between a rock and a hard place, as one court prohibited it from doing anything contrary to the roadless rule, while the other will probably hold the Rule to be invalid. *Compare Lockyer*, 459 F. Supp. 2d at 919, *with Wyoming I*, 277 F. Supp. 2d at 1239. Thus it will be hard for the Forest Service to avoid contempt of court orders, as it will have two diametrically opposed orders.

[200] U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400-01 (1980) (stating "the flexible character of the Art. III mootness doctrine").

[201] *See* Wyoming II, 414 F.3d 1207, 1211-13 (10th Cir. 2005). The Tenth Circuit only examined one exception to the mootness doctrine. *Id.* Additionally, the court failed to analyze public interest and judicial economy as each relates to the mootness doctrine. *Id.*; *see also supra* notes 127-44, 177-94, 199 and accompanying text.

CASE NOTE

ENVIRONMENTAL AND ADMINISTRATIVE LAW—The U.S. Supreme Court's Decision Implements Stricter Regulations for Modifications to Coal-fired Power Plants, *Environmental Defense v. Duke Energy*, 127 S. Ct. 1423 (2007).

*Whitney Marquardt**

Introduction

Between 1988 and 2000, Duke Energy Corporation (Duke) modified and subsequently operated eight of its coal-fired generating plants.[1] However, Duke neglected to seek a determination from the Environmental Protection Agency (EPA) regarding a possible violation of the Clean Air Act (Act) prior to modifying its plants.[2] Consequently, twelve years after the first modification, the EPA alleged the plant owner had violated the Act with the modifications.[3] Furthermore, the EPA claimed the plant owner could not challenge the regulations because the requisite time had passed.[4]

In 2000, the United States brought suit against Duke at the request of the EPA Administrator for a violation of Act.[5] The disputed violation started when Duke placed one of its power plant units, Buck Four, into Extended Cold Storage (ECS).[6] After putting Buck Four into storage, Duke developed a Plant

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* Candidate for J.D., University of Wyoming, 2009.

[1] United States v. Duke Energy Corp., 278 F. Supp. 2d. 619, 623-24 (M.D.N.C. 2003).

[2] *See infra* notes 71-95 and accompanying text describing how the power plant owner failed to seek an applicability determination.

[3] *Duke,* 278 F. Supp. 2d at 625.

[4] *See* United States v. Duke Energy Corp., 411 F.3d 539, 549 n.7 (explaining there was no question regarding the validity, and, therefore, the time had not passed to challenge the regulations); *see infra* notes 50-70 and accompanying text (explaining how attacks on the validity of a regulations must be challenged within sixty days after promulgation by the agency in the United States Court of Appeals for the District of Columbia).

[5] *Duke,* 278 F. Supp. 2d at 622. The Clinton Administration investigated numerous facilities for non-compliance with the current New Source Review (NSR) program. Thomas Gremillion, Comment, *Envtl. Def. v. Duke Energy Corp*., 31 Harv. Envtl. L. Rev. 333, 336 (2007). The EPA brought suit against thirty-two utilities allegedly undergoing "modifications" without permits; Duke had eight such complaints brought against it. *Id*.

[6] *Duke*, 278 F. Supp. 2d at 624. During ECS, Duke continuously circulated dehumidified air through the unit's water, steam, air, and gas passages in an effort to protect the unit during its inactive state. *Id.*

Modernization Program (PMP).[7] Consequently, the United States brought suit alleging Duke's PMP resulted in a "modification" requiring Prevention of Significant Deterioration (PSD) review and permitting, and Duke failed to obtain the required PSD preconstruction review and permit.[8] Duke argued its "modifications" fell under the Routine Maintenance, Repair, and Replacement (RMRR) exemption under the Act, and, therefore, exempted it from PSD review and permitting.[9]

Duke based its arguments on the 1977 congressional amendments to the Act.[10] When Congress amended the Act, it created the New Source Review (NSR) program, which included PSD.[11] Congress designed PSD to ensure air quality of attainment areas did not decline to the minimum level allowed under the National Ambient Air Quality Standards (NAAQS).[12] This requires operators of facilities in attainment areas to limit their emissions to a "baseline rate," which is higher than the minimum levels allowed under the NAAQS, and obtain permits before a source's construction or "modification."[13]

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[7] *Id.* at 625. Duke developed a plan to address a variety of maintenance, repair, and replacement needs, and according to Duke, the PMP would allow a more safe, reliable and cost effective operation for an additional twenty years. *Id.*

[8] *Id.*

[9] *Id.* at 626, 628; Standards of Performance for New Stationary Sources, 40 C.F.R. § 60.2(h)(1) (1971). The EPA provided exemptions from the "modification" rule for some activities currently underway at already existing and operating facilities. *Duke*, 278 F. Supp. 2d at 628. Under the standard, a modification, did not include any "maintenance, repair, and replacement which the Administrator determines to be routine for a source category." Standards of Performance for New Stationary Sources, 40 C.F.R. § 60.14(e)(1) (1975).

[10] *Duke,* 278 F. Supp. 2d at 628.

[11] *Id.* Although, the NSR program has two parts, only PSD applies to this case. *Id.* at 628. The NSR's two parts consist of PSD and Non-attainment New Source Review (NNSR). *Id.* PSD governs areas of the country with relatively clean air and NNSR governs areas of the country that do not meet air quality standards. *Id.*

[12] *Id.* Congress directed the EPA to develop NAAQS, which specify the maximum allowable concentrations of air pollutant for different areas of the country. *Id.* at 627. Based on the levels of pollution established by the EPA, States had to develop State Implementation Plans (SIPs) that defined source-by-source emission limits so each state could meet the NAAQS. *Id.* at 627-28. An attainment area meets the NAAQS for a particular pollutant where a non-attainment area does not meet the designated NAAQS for a particular pollutant. *Id.* at 628. Congress designed the PSD program to maintain air quality in attainment areas and to not let the air decline to the minimum levels permitted by NAAQS as a result of increases in total annual emissions. *Id.* Therefore, before PSD, a unit could pollute right up to the limit set by the NAAQS. *Id.* However, after PSD a unit subject to those regulations had to emit at a lower level than that established by the NAAQS. *Id.*

[13] *Duke*, 278 F. Supp. 2d at 628. Furthermore, when Congress enacted the PSD program it explicitly incorporated the New Source Performance Standards (NSPS) definition of "modification" into the PSD definition of construction/modification. *Id.* at 629; *see infra* notes 45-49 and accompanying text explaining the 1970 amendments. The 1970 Act amendments incorporated NSPS to regulate pollutants (on an hourly emission rate) from both new sources and "modified" sources. *Duke*, 278 F. Supp. 2d at 628. The NSPS program focuses on the "affected facility," or the

Congress also enacted § 307(b) of the Act, which it first promulgated in 1955.[14] This statute section binds future parties to final agency action unless the party challenges the action within sixty days after promulgation by the EPA in the United States Court of Appeals for the District of Columbia.[15] Congress has directed that proper petitions for review under § 307(b) include any national air quality standard, any other nationally applicable regulation, or any final action.[16] Consequently, if a court determines a party did not properly challenge the regulations under § 307(b), according to the Act that party waives the right to challenge, and the court does not have the jurisdiction to hear the case.[17]

Although § 307(b) could have been an important point for the Court in *Duke*, the *Duke* trilogy did not focus on the jurisdictional issue.[18] Rather, the overarching question was whether Duke should have obtained a PSD permit prior to modifying its facility.[19] The United States District Court for the District of North Carolina granted summary judgment in favor of Duke, and determined an industry's routine standard should govern whether the RMRR exemption applies.[20] The court also determined the regulations allow a reviewing authority to use the period most representative of normal source operations.[21] Meaning, the two years prior to a project do not have to establish the baseline rate, but rather the most representative two years of normal source operations and emissions

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affect on the particular apparatus. N. Plains Res. Council v. Envtl. Prot. Agency, 645 F.2d 1349, 1356 (9th Cir. 1981). Therefore, NSPS is equipment oriented. *Id.* On the other hand, PSD focuses on the location of the plant and its potential impact on its surroundings. *Id.*

[14] Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b) (1955).

[15] *See infra* notes 50-63 and accompany text (explaining the importance of § 307(b)). Section 307(b)(1) and 42 U.S.C. § 7607(b)(1) are the same. Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b) (1977). The Act refers to this provision as § 307(b) and this note will refer to it as § 307(b) as well. *Id.* In promulgating a rule under § 307(b), the rule must go through notice and comment. *Id.*

[16] 42 U.S.C. § 7607 (1977).

[17] *Id*. § 7607(b). However, if the party raising the objection can prove to the Administrator the impracticality of raising the objection during the designated time after the period for public comment, and the objection is too central to the outcome of the rule, the Administrator can reconsider the rule and provide the same procedural rights as would have been afforded had the information been available at the time. *Id.* § 7607(d)(7)(B).

[18] *Duke*, 278 F. Supp. 2d. at 619; U.S. v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005); Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2007).

[19] *Duke,* 278 F. Supp. 2d at 626.

[20] *Id.* at 626-35. The question is: would this particular unit routinely have this type of maintenance during its lifetime, or would similar units in the industry have the maintenance done only one or two times during their lifetime. *Id.*

[21] *Id.* at 648; Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 40 C.F.R. § 51.166(b)(21)(ii) (1987).

prior to a project.[22] The district court did not address, and the United States and Environmental Defense did not argue the jurisdictional issues under § 307(b).[23]

The United States Court of Appeals for the Fourth Circuit held Duke's PMP did not require a PSD permit.[24] Furthermore, the appellate court found the EPA must interpret "modification" congruently with the New Source Performance Standards (NSPS) definition because Congress explicitly defined PSD in terms of NSPS.[25] The appellate court briefly discussed § 307(b), and determined a question as to the validity of the PSD regulations did not exist.[26] Therefore, the appellate court's only concern related to the correct interpretation of the PSD regulation.[27]

The United States Supreme Court granted the petition for certiorari and held an actual, annual increase in emissions triggers the term "modification" under PSD.[28] As a result, the Act now requires power plants to seek PSD review when the facility undergoes a modification that increases its hours of operation or actual, annual production rates.[29] In addressing the jurisdictional issues presented in § 307(b) the Court concluded the appellate court's construction of the 1980 regulations invalidated these issues.[30] The Court also determined the invalidation implicated § 307(b).[31] However, because the appellate court did not reason that § 307(b) applied, the Court determined it had "no occasion at this point to consider the significance of § 307(b)."[32]

This note addresses how the Supreme Court's interpretation of "modification" supports the Act's goals of controlling air quality.[33] The note achieves this by

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[22] *Duke,* 278 F. Supp. 2d at 648. Meaning, the last two functioning years of a unit. *Id.*

[23] *Id.* at 619. In the district court various environmental groups moved to intervene as plaintiffs. U.S. v. Duke Energy Corp., 171 F. Supp. 2d 560, 562 (M.D.N.C. 2001). The court found the environmental groups had a right to intervene pursuant to Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure. *Id.*

[24] U.S. v. Duke Energy Corp., 411 F.3d 539, 551 (4th Cir. 2005).

[25] *Id.* at 550. The appellate court found it undisputed that prior to PSD the EPA's promulgation of the NSPS regulations defined the term "modification" to mean "a project that increases the *hourly* rate of emissions. . . .'" *Id.*

[26] *Id.* at 549 n.7.

[27] *Id.*

[28] Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1433-34 (2007); Administrative Proceedings and Judicial Review, 42 U.S.C. §7607(b) (1977).

[29] *Envtl. Def.*, 127 S. Ct. at 1433-34. If a unit increases its production of emissions this will now trigger PSD review and permitting. *Id.*

[30] *Id.* at 1436.

[31] *Id.*

[32] *Id.*

[33] *See infra* notes 37-44 and accompanying text describing the purpose of the Clean Air Act.

looking at the Act's initial goals, and more specifically the 1970 and 1977 amendments along with the subsequent 1980 regulations.[34] The principal case section addresses the history of *United States v. Duke Energy Corporation* at the district and appellate levels leading up to the Supreme Court's decision, as well as the Supreme Court's opinion.[35] Furthermore, the analysis discusses two possible improvements to the Court's opinion along with policy considerations.[36]

BACKGROUND

The Clean Air Act's Goals, Amendments, and Changed Regulations

Congress created the Clean Air Act (Act) to aid in the fight against air pollution.[37] Consequently, the Act directed the EPA to develop National Ambient Air Quality Standards (NAAQS), specifying the maximum allowable concentrations of air pollutant for each area of the country.[38] In 1970, Congress amended the Act to include New Source Performance Standards (NSPS), requiring the EPA to regulate and minimize emissions from "new sources."[39] The NSPS regulates hourly emission rates for both newly constructed facilities and "modifications" to existing facilities.[40] Moreover, the NSPS regulations require a "modified" source to become subject to the NSPS's "technology-based" standards requiring the installation of the best demonstrated pollution control technology.[41] Because of the cost and difficulties in installing new pollution control technologies, the EPA made exemptions to the "modification" rule for activities currently being undertaken by a facility.[42] The first exemption allows for "'maintenance, repair, and replacement'

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[34] *See infra* notes 45-49 and accompanying text discussing the relevant amendments and regulations.

[35] *See infra* notes 115-58 and accompanying text discussing the instant case at the district and appellate level, and also at the Supreme Court.

[36] *See infra* notes 159-228 and accompanying text analyzing the Supreme Court's decision.

[37] H.R. REP. NO. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356; U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619, 627 (M.D.N.C. 2003).

[38] *Duke*, 278 F. Supp. 2d at 627.

[39] *Id.* at 628. Congress defined "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations . . . prescribing a standard of performance under this section which will be applicable to such source." Standards of Performance for New Stationary Sources, 42 U.S.C § 7411(a)(2) (1977).

[40] *Duke*, 278 F. Supp. 2d at 628. Congress defined "modification" as "any physical change in, or change in the method of operation of, a stationary source which increase the amount of air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4) (1977).

[41] U.S. v. Duke Energy Corp., 411 F.3d 539, 542 (4th Cir. 2005).

[42] Standards of Performance for New Stationary Sources, 40 C.F.R. § 60.2(h)(1) (1971). Congress wanted to allow older facilities to stay in operation without subjecting them to costly new technologies. *Duke*, 278 F. Supp. 2d at 630.

which the Administrator determines to be routine for a source category," without requiring compliance under NSPS.[43] The regulations also exempt increases in hours of operation or production rates that are not considered a "modification" as long as the increase is within the operating design of the facility.[44]

In 1977, Congress, once again, amended the Act to include the NSR program.[45] This program included both PSD and NNSR.[46] PSD requires operators of pollutant generating facilities to limit emissions to a "baseline rate" and obtain permits before "construction" or "modification" of a source.[47] A "modification" includes any physical change or a change in the method of operation of a stationary source that significantly increases the amount of emissions from a regulated pollutant.[48] Therefore, according to the statute, a modification results when a physical change has occurred, and when emissions have significantly increased.[49]

Section 307(b)of the Clean Air Act

Unlike many amendments to the Act, § 307(b) does not aid in the fight against air pollution; rather, Congress created § 307(b) to effectuate timely challenges to final agency action.[50] Under § 307(b), when the EPA Administrator promulgates, approves, or takes action that appears in the Federal Register, it binds future parties.[51] However, parties are not bound if a suit challenging the regulations is brought in the United States Court of Appeals for the District of

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[43] 40 C.F.R. § 60.14(e)(1) (1975).

[44] *Duke*, 278 F. Supp. 2d at 628; 40 C.F.R. §§ 60.2(h)(2)(ii), 60.14(e)(2), (3) (1975) (explaining the definition of modification). The 1975 NSPS regulations clarified operating design as an increase in the production rate of an existing facility that can be accomplished without a capital expenditure. New York v. Envtl. Prot. Agency 413 F.3d 3, 12 (C.A.D.C. 2005).

[45] Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1429 (2007).

[46] *Duke*, 278 F. Supp. 2d at 628. NNSR governs areas of the country that do not meet air quality standards, while PSD govern areas of the country that do. *Id.* NNSR does not apply here because the Duke facilities were located in areas of the country governed by PSD or attainment area standards. *Id.* at 628 n.7.

[47] *Id*. at 628.

[48] *Envtl. Def.*, 127 S. Ct. at 1429; Permit Requirements 40 C.F.R. §51.166(b)(2)(i) (1987). A "modification" is "'any physical change in or change in the method of operation of a major stationary source that would result in significant net emission increases of any pollutant subject to regulations under the Act.'" *Envtl. Def.*, 127 S. Ct. at 1429 (quoting 40 C.F.R. § 51.166(b)(2)(i) (1980)). Both parties agree the 1980 regulations control in this case. *Duke*, 278 F. Supp. 2d at 629.

[49] *Duke*, 278 F. Supp. 2d at 629. The preamble to the 1980 PSD regulations explained companies do not have to obtain a PSD permit for mere increases in operating hours because that would undermine the ability of any company to take advantage of favorable market conditions. *Envtl. Def.*, 127 S. Ct. at 1435.

[50] H.R. REP. NO. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356; Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b)(1) (1977).

[51] 42 U.S.C. § 7607(b)(1) (1977).

Columbia within sixty days after promulgation by the agency.[52] In § 307(b)(1), Congress directs petitions for review for any national air quality standard, any other nationally applicable regulation, or any final action may be filed only in the United States Court of Appeals for the District of Columbia within sixty days after promulgation by the EPA's Administrator.[53] Furthermore, § 307(b)(2) states "[a]ction[s] of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."[54] Consequently, if a court determines the validity of regulation, an authoritative interpretation, or a final action is being challenged, that court does not have the jurisdiction to hear the case unless that court is the United States Court of Appeals for the District of Columbia.[55]

Although the D.C. Circuit has the power to hear these kinds of cases, the judicial power to hear a case involving administrative agency action is not inherent in the federal courts.[56] Statutes grant the courts jurisdictional power, and in the absence of a grant of jurisdiction, a federal court may not hear the case.[57] Nevertheless, once a court has determined it has subject-matter jurisdiction, it can entertain any cause of action within the bounds of the regulating statute.[58] However, just because a court finds it has jurisdiction, this does not mean a party has a cause of action and can bring suit.[59] A challenging party can only bring suit if it establishes a cause of action under the Administrative Procedure Act (APA) or the regulating statute.[60] Although a party can bring suit under the APA, § 307(b)

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[52] *Id.*

[53] *Id.*

[54] *Id.* § 7607(b)(2).

[55] *Id.* §7607(b); Lower courts have often used § 307(b) to dismiss cases for a lack of jurisdiction. *See* Grand Canyon Trust v. Pub. Serv. Co. of N. M., 283 F. Supp. 2d 1249, 1253 (D.N.M. 2003). The *Grand Canyon* court held the proper approach to challenging the EPA's decisions regarding PSD permit requirements was through the judicial review provisions of the Act. *Id.* at 1254. The court based its reasoning on three prior decisions. *Id.* at 1253. First, a district court refused to recognize jurisdiction over a collateral attack claim on a permitting decision made by an agency. *Id.* Second, a citizen's suit did not allow a collateral attack on an EPA permit decision. *Id.* Finally, a state court suit impermissibly made a collateral attack on a federal agency's decision and disregarded the court of appeal's exclusive jurisdiction. *Id.*

[56] Charles H. Koch, Jr., *The Structure of the Judicial Process,* ADMINISTRATIVE LAW AND PRACTICE, 2 Admin. L. & Prac. § 8.14 (2d ed.) (2007).

[57] Koch, *supra* note 56; Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

[58] Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979), on remand 612 F.2d 68 (2d Cir. 1979).

[59] Stockman v. Fed. Election Comm'n., 138 F.3d 144, 151 (5th Cir. 1998).

[60] *Id.* The Supreme Court reaffirmed in 1999 that the APA does not create subject-matter jurisdiction. Your Home Visiting Nurse Servs. v. Shalala, 525 U.S. 449, 457-58 (1999). The APA is the Act created by Congress that defines the procedural rights of people outside of government and guides the manner in which decisions are made inside the government. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 22 (Thomson West 2006) (1997).

does not use the APA to create a cause of action.[61] Rather, it uses its own statutory authority to create subject-matter jurisdiction.[62] Therefore, a party cannot bring suit to challenge a regulation under § 307(b) through the APA, it must do so through the language of the statute itself.[63]

Not only does the D.C. Circuit have the power to hear these kinds of cases, it also has the obligation to do so.[64] This obligation is based on a 2006 decision by the U.S. Supreme Court concluding a court cannot waive subject-matter jurisdiction.[65] Furthermore, the Court found all courts, including the Supreme Court, have "an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."[66] Because of the importance in ensuring that a court has subject matter jurisdiction, the Federal Rules of Civil Procedure additionally state a party can object to a court's lack of subject-matter jurisdiction at any stage in the litigation, even after the entry of judgment.[67] In the instant case, the Supreme Court found the appellate court's interpretation of the 1980 PSD regulations an invalidation of the regulations.[68] As discussed above, under § 307(b) invalidations of regulations can only be heard in the D.C. Circuit within sixty days after promulgation.[69] Therefore, if a court finds a party is challenging the validity of regulations outside the D.C. Circuit, the court must dismiss on the basis of a lack of jurisdiction and not hear the case.[70]

When a statute does not provide a party with a specific review provision, § 702 of the APA becomes the fall back. *Id.* at 408. Section 702 establishes a cause of action for a person suffering because of agency action. *Id.*

[61] Funk, *supra* note 60, at 408.

[62] Funk, *supra* note 60, at 408. Specific judicial review provisions can create both jurisdiction and a cause of action. *Id.* Section 307(b) does not use the APA to create a cause of action, it uses it own statutory authority in § 307(b)(2) to create subject-matter jurisdiction which applies to § 307(b)(1). *Id.*

[63] *Id.*

[64] Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

[65] *Id.*

[66] *Id.* "Congress has broadly authorized the federal courts to exercise subject-matter jurisdiction over 'all civil actions arising under the Constitution, laws, or treatises of the United States.'" *Id.* at 505 (quoting Federal Question, 28 U.S.C. § 1331 (2006)).

[67] *Arbaugh*, 546 U.S. at 506; FED. R. CIV. P 12(b)(6), (h)(3).

[68] Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1436 (2007).

[69] Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b)(1) (1977).

[70] *Id.*

Applicability Determinations

As stated, § 307(b)(1) requires challenges to final agency action be brought within sixty days after promulgation.[71] An applicability determination is one example of final agency action.[72] In *Wisconsin Electric Power Company v. Reilly* the United States Court of Appeals for the Seventh Circuit reviewed just such an applicability determination.[73] Wisconsin Electric Power Company (WEPCO) sought an applicability determination; however, when the agency issued the determination, WEPCO sought review in the federal courts.[74] When a party, like WEPCO, seeks an applicability determination, that party submits a proposal to the appropriate agency and waits for a determination.[75] If the party is not satisfied with the agency's determination, the party may then challenge the agency's result in the appropriate court pursuant to the relevant statute.[76]

In *Wisconsin*, the EPA made an applicability determination as to whether proposed changes at a Wisconsin power plant would qualify as a "modification" under NSPS and/or PSD.[77] The EPA determined a "modification" that increased

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[71] Gremillion, *supra* note 5, at 345. A petition for review of any EPA Administrator's action that is locally or regionally applicable may be filed only in the United States Court of Appeal for the appropriate circuit. 42 U.S.C. § 7607(b) (1977).

[72] Gremillion, *supra* note 5, at 345.

[73] Wis. Elec. Power. Co. v. Reilly, 893 F.2d 901, 905-12 (7th Cir. 1990).

[74] *Id.*

[75] *See generally Wisconsin*, 893 F.2d at 901 (describing the process for an applicability determination).

[76] *Id.* In *Chevron v. Natural Resource Defense Council,* petitioners sought review from the Court to determine if the EPA gave a permissible interpretation to the term "stationary sources." Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984). The Court in *Chevron* established a two prong test that gives deference to agencies. *Id.* at 866. First, when a court reviews an agency's interpretation of a statute that it administers, it asks whether Congress has addressed the precise question at issue. *Id.* at 842. If the court finds Congress has addressed the question at issue, the court defers to the congressional intent as law. *Id.* at 843 n.9. However, if the court determines Congress has not addressed the issue directly, then the court does not impose its own interpretation, but instead determines whether the agency gave a permissible interpretation. *Id.* at 842-43.

[77] *Wisconsin*, 893 F.2d at 901. During an applicability determination, the EPA makes a case-by-case decision to determine if a unit qualifies for the RMRR exemption. U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619, 632 (M.D.N.C. 2003). The EPA looks at the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors. *Id; Wisconsin*, 893 F.2d at 905. WEPCO conducted a study and determined both its air heaters and rear steam drums needed renovation to continue operation of its plant. *Wisconsin*, 893 F.2d at 905. WEPCO submitted the proposed project to the appropriate state agency, which then consulted the EPA to determine whether WEPCO needed a PSD and/or NSPS permit. *Id.* at 905-06. A PSD permit means a unit has to comply with stricter standards than the NAAQS, while NSPS means the unit only has to meet the NAAQS standards. *Duke*, 278 F. Supp. 2d at 628.

the facility's hourly rate of emissions triggered NSPS.[78] Conversely, to trigger PSD, the "modification" must increase the total amount of emissions.[79]

However, the EPA decided under some circumstances a unit can avoid PSD.[80] A unit can avoid PSD if the EPA determines that a project is routine, therefore, qualifying for the RMRR exemption.[81] To determine how routine a project is, the EPA developed a multi-factor test in *Wisconsin*.[82] The factors included the nature, extent, purpose, frequency, and cost of the project.[83] After weighing these factors, the EPA found the project at Wisconsin Electric Power Company (WEPCO) not routine.[84] As a result, the project did not fall under the exception to the "modification" rule, and the EPA required the facility to obtain a PSD permit.[85] The EPA relied on WEPCO's potential to emit in concluding the plant's subjectivity to PSD review.[86] The EPA also found WEPCO subject to NSPS because the EPA determined the renovation projects would increase the plant's hourly rate of emissions.[87] However, WEPCO did not agree with the EPA's determination and challenged the decision.[88] By challenging an agency decision with an applicability determination, a party can have assurance it has properly interpreted a regulation and it will not be subject to litigation in the future.[89]

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[78] *Wisconsin*, 893 F.2d at 905.

[79] *Id.* Relevant exceptions to the modification rule are: 1) routine maintenance, repair, and replacements for a source category, and 2) increases in the hours of operation. *Id.*

[80] *Id.* at 911-12.

[81] *Id.*

[82] *Id.*

[83] *Wisconsin*, 893 F.2d at 910. The EPA observed the substantial nature and extent of the project, and, furthermore, that WEPCO wanted to perform an unprecedented project. *Id.* at 911. Additionally, WEPCO admitted they typically scheduled equipment changes and routine maintenance simultaneously. *Id.*

[84] *Id.* at 910-11.

[85] *Id.* at 911-12. The EPA did not find, and WEPCO did not identify, even one facility which had undergone similar work. *Id.* WEPCO argued forty air heaters in other plants had been replaced without NSPS and PSD review, but the EPA concluded the heaters at the WEPCO facility had to be replaced in whole, while the other plants only replaced parts. *Id.* at 912.

[86] *Id.* at 916. WEPCO appealed to the Seventh Circuit Court of Appeals. *Id.* at 906. The "potential to emit" calculation used by the EPA troubled the appellate court partly because the EPA based its calculation on the plant operating continuously. *Id.* at 917. The court concluded the EPA may not rely on assumed continuous operations as a basis for finding an emissions increase, and thus the plant could not be subject to PSD review until WEPCO made data available to the EPA so a determination could be made on whether the renovated plant would cause a significant net emissions increase. *Id.* at 918.

[87] *Id.* at 914.

[88] *See Wisconsin,* 893 F.2d at 906 (explaining how WEPCO challenged the EPA's decision); *see supra* note 71 and accompanying text (detailing which circuit is appropriate).

[89] *See id.* at 901 (describing the process for seeking an applicability determination).

A proper understanding of the law also created the central issue in *Chaganti & Associates v. Nowotny*.[90] In *Chaganti*, a suit arose, but, prior to trial, the parties reached a settlement agreement.[91] When it came time to execute the agreement, the plaintiff refused to sign, and the United States District Court for the Eastern District of Missouri held the plaintiff in contempt.[92] The plaintiff argued the court order did not identify all the required documents, and was, therefore, unclear.[93] However, the court found the meaning should have been clear based on previous pleadings and discussions.[94] Thus, the court concluded even if the terms were unclear, the plaintiff had the "obligation to seek clarification of the court's order," rather than maintain a studied ignorance of the law.[95] Although the *Duke* trilogy did not focus on § 307(b) nor applicability determinations, this issue is important because Congress has shown a desire to utilize § 307(b) and ensure that final actions, such as applicability determinations, are promptly challenged.[96]

Statutory Interpretation

The district court in *Duke,* relied heavily on *Wisconsin Electric Power Company v. Reilly* to conclude a routine within the industry standard should determine whether the RMRR exemption applies.[97] Conversely, both the appellate court and Supreme Court in *Duke* primarily focused on the correct statutory interpretation of the term "modification."[98] The Supreme Court found the appellate court's reliance on the presumption that identical words must have the same construction too rigid.[99] In *Atlantic Cleaner & Dyers v. United States*, the Court found it natural to assume identical words used in different parts of the statute required identical meanings, but this presumption was not rigid.[100] In *Atlantic,* the Court reasoned most words have different "shades of meaning," and can have a different

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[90] Chaganti & Assoc's. v. Nowotny, 470 F.3d 1215, 1218 (8th Cir. 2006).

[91] *E.g., id.* (noting there are other cases which stand for a similar proposition).

[92] *Id.* at 1220.

[93] *Id.* at 1224.

[94] *Id.*

[95] *Chaganti*, 470 F.3d at 1224 n.2. Similarly, in *Islip v. Eastern Air Lines, Inc.*, the trial court found the defendant in noncompliance with a permanent injunction. Islip v. E. Air Lines, Inc., 793 F.2d 79, 80 (2nd Cir. 1986). However, on appeal, the court vacated the judgment of contempt because the trial court's orders failed to give the defendant a clear understanding of the requirements, and the defendant had tried to clarify the ambiguous orders. *Id.* at 83. Since the defendant did not maintain a studied ignorance, the vacated contempt order was proper. *Id.* at 85.

[96] Brief for the Petitioners at 27-28, Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2006) (No. 05-048) [hereinafter Brief for the Petitioners, July 21st]; *Duke,* 278 F. Supp. 2d at 623-24.

[97] *Duke,* 278 F. Supp. 2d at 626-35.

[98] *See generally Duke,* 411 F.3d 539; *Envtl. Def.*, 127 S. Ct. 1423 (discussing the correct interpretation for the term "modification").

[99] *Envtl. Def.,* 127 S. Ct. at 1432.

[100] Atlantic Cleaner & Dyers v. U.S., 286 U.S. 427, 433 (1932).

construction when used in separate parts of a statute.[101] Consequently, if one could reasonably interpret the words as having different meanings because of the subject matter to which the words refer or the conditions in which one uses the words, the "meaning well may vary to meet the purpose of the law."[102]

Further emphasizing its point that identical phrases do not require identical interpretation, the Court relied on the context of a statute to determine the meaning of a term.[103] In *Robinson v. Shell Oil Company*, the Court decided if a term is ambiguous, standing alone, then analyzing the context to see whether the context gives the term further meaning would resolve the dispute.[104] Similarly, the D.C. Circuit found in *New York v. Environmental Protection Agency,* that because of the different regulatory definitions of the term "modification" for New Source Review (NSR) and New Source Performance Standards (NSPS) it would take a strong indication from Congress it intended to apply an identical definition.[105] The Supreme Court used the above cases to illustrate identical words may have different meanings when the statutory context supplies different objectives.[106]

PRINCIPAL CASE

Summary of the Case

The United States and Environmental Defense sued Duke for an alleged violation of the PSD provision of the Act.[107] The parties brought this suit based on Duke's conduct over a span of twelve years.[108] During this time, Duke engaged in a Plant Modernization Program (PMP) to conduct maintenance and upgrade its

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[101] *Id.*

[102] *Id.*

[103] Robinson v. Shell Oil Co., 519 U.S. 337, 343-44 (1997).

[104] *Id.*

[105] New York v. Envtl. Prot. Agency 413 F.3d 3, 20 (C.A.D.C 2005). At the time of the 1977 amendments, § 60.2(h) defined modification to include "any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant;" however, § 60.14(a) defined modification as "any physical or operational change to an existing facility which results in an increase in the emissions rate to the atmosphere of any pollutant." *Id.* at 19-20. Once again, in *United States v. Cleveland Indians Baseball Company*, the Court found words within different codes can have different meanings. U.S. v. Cleveland Indians Baseball Co., 532 U.S. 200, 200 (2001). The Court found no direct relation between an identical term used in both social security law and the tax code, and thus, the different context led the Court to conclude a symmetrical construction of the term was not necessary. *Id.* at 212-13.

[106] Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1432-33 (2007).

[107] U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619, 622 (M.D.N.C. 2003); *see supra* note 23 and accompanying text (explaining that environmental groups intervened as plaintiffs in the district court).

[108] *Id.* at 624-25.

operating units.[109] The case's central issues concerned the appropriate interpretation of the term "modification" for PSD.[110] Then, depending on the interpretation, whether Duke's maintenance and upgrades constituted "modifications," which should have triggered PSD review and permitting.[111] Duke argued an hourly increase in emissions triggered PSD, regardless of the effect on the annual emissions rate.[112] Conversely, the United States and Environmental Defense argued PSD should be trigged by an actual, annual increase in the discharge of pollutants.[113] Ultimately, the Supreme Court held the term "modification" does not require the same interpretation for both PSD and NSPS, and the EPA's actual, annual increase in pollutants was the correct standard to trigger PSD.[114]

District Court

The district court decided two sub-issues.[115] First, the district court determined a routine within the industry standard was the appropriate standard to use when determining whether a project qualifies for the RMRR exemption.[116] Second, the district court found post-project emission levels should be calculated based on the last two years a unit operated.[117] The court granted summary judgment to Duke and the government appealed.[118]

United State Court of Appeals for the Fourth Circuit

The appellate court decided the issue of whether a plant "modification" that does not increase the hourly rate of emissions production, but does increase the number of hours a plant operates, requires a permit under PSD.[119] The appellate court found no requirement for a PSD permit as long as a plant's hourly rate

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[109] *Id.*

[110] *Id.* at 625.

[111] *Id.*

[112] Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1430 (2007).

[113] *Id.*

[114] *Id.* at 1435-36.

[115] *Duke*, 278 F. Supp. 2d at 626, 640.

[116] *Id.* at 626, 635.

[117] *Id.* at 648-49. According to the district court, a net emission increase can only result from an increase in hourly emission rates. *Id.* The district court used statements made by Edward E. Reich, the EPA's director of the Division of Stationary Source Enforcement, in its finding that increase in annual emissions do not trigger PSD. *Id.* at 641-42. Reich stated that only an hourly emission rate would trigger PSD, and thus, the district court determined these statements deserved substantial weight because Reich headed the division responsible for interpreting questions relating to PSD. *Id.*

[118] U.S. v. Duke Energy Corp., 411 F.3d 539, 542 (4th Cir. 2005).

[119] *Id.* at 542-47.

of production did not increase.[120] The issue of § 307(b) was first raised in the appellate court, but the court disregarded the argument.[121]

United States Supreme Court

The Environmental Defense appealed, and the Supreme Court granted its petition for certiorari.[122] The Court vacated the appellate court's decision and remanded the case.[123] Justice Souter's opinion for the Court was unanimous, except for one portion, which Justice Thomas did not join for reasons explained in his opinion, concurring in part.[124] The Supreme Court considered the issue of whether to measure an air pollutant emitted in terms of an hourly rate of discharge, the way NSPS regulations specify, or whether the EPA can interpret PSD with a different regulatory interpretation.[125] The Court determined identical interpretations were not required for the term "modification" under both PSD and NSPS.[126]

Overview

The Environmental Defense argued under PSD, a "modification" should be measured in terms of the actual, annual discharge of the pollutant regardless of the hourly emissions rate after the modification.[127] Agreeing, the Supreme Court relied on a more lenient rule of statutory construction and a different interpretation of "modification" for PSD than NSPS.[128]

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[120] *Id.* at 550. The appellate court used *Chevron* to determine Congress directly addressed the question at issue when it defined "modification" in NSPS and then "expressly directed that the PSD provisions of the Act employ this same definition." *Id.* at 546. The appellate court's conclusion that Congress had spoken directly to the question at issue ended the matter under the first prong of *Chevron. Id.* at 547 n.3.

[121] *Id.* at 549 n.7.

[122] Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1428, 1432 (2007); Gremillion, *supra* note 5, at 338. The Bush Administration declined to petition to the Supreme Court, stating that the 2002 NSR regulations made the Fourth Circuit's ruling of little importance in a practical setting. *Id.*

[123] *Envtl. Def.*, 127 S. Ct. at 1437. On remand, Duke can argue the EPA has taken inconsistent positions and is retroactively targeting the last twenty years of practice. *Id.*

[124] *Id.* at 1423, 1428, 1437.

[125] *Id.* at 1430.

[126] *Id.* at 1436.

[127] *Id.*

[128] *Envtl. Def.,* 127 S. Ct. at 1423.

The Statutory Cross-Reference Does Not Mandate a Singular Regulatory Construction

Contrary to the appellate court's interpretation of statutory construction, the Supreme Court found the rule of statutory construction less rigid.[129] The Court reiterated that words have different "shades of meaning," and can have a different construction when used in separate parts of a statute.[130] Furthermore, the Court found it natural to assume identical words used in different parts of the statute required identical meanings, but this presumption, the Court stated, is not absolute.[131] If the words could reasonably be interpreted as having a different meanings because of the subject matter to which the words refer or the conditions in which the words are used, the "meaning well may vary to meet the purpose of the law."[132]

Based on this reasoning, the Court found the EPA could interpret the term "modification" differently in PSD and NSPS.[133] The Court found no "effectively irrebuttable" presumption similar terms need identical interpretations.[134] Consequently, the Court concluded that NSPS and PSD can have different interpretation of the term "modification."[135]

PSD Regulations Cannot Be Interpreted Consistently With an Hourly Emission Test

The Court further determined that basing PSD review and permitting on an hourly rate of emissions invalidated the PSD regulations.[136] First, the Court found the 1980 PSD regulations did not define "major modification" in terms of

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[129] *Id.*

[130] Atlantic Cleaner & Dyers v. United States, 286 U.S. 427, 433 (1932); *see supra* notes 100-02 and accompanying text (explaining the *Atlantic* case).

[131] *Atlantic*, 286 U.S. at 433.

[132] *Id.*

[133] *Envtl. Def.*, 127 S. Ct. at 1432. First, the Court examined *Robinson* where it held each section of the Civil Rights Act had to be analyzed using the context around the term to determine whether the issue could be resolved within the framework. Robinson v. Shell Oil Co., 519 U.S. 337, 343-44 (1997); *see supra* notes 103-04 and accompanying text (describing the significance of *Robinson*). Next, the Court used it decision in *Cleveland Indians*, to emphasize that similar terms do not require the same statutory interpretation. *Envtl. Def.*, 127 S. Ct. at 1433. In *Cleveland Indians*, the Court "rejected the notion that using the phrase 'wages paid' in both 'the discrete taxation and benefits eligibility context' can, standing alone, 'compel symmetrical construction.'" *Envtl. Def.*, 127 S. Ct. at 1433 (quoting U.S. v. Cleveland Indians Baseball Co., 532 U.S. 200, 213 (2001)).

[134] *Envtl. Def.*, 127 S. Ct. at 1433 (referring to U.S. v. Duke Energy Corp., 411 F.3d 539, 550 (4th Cir. 2005)).

[135] *Envtl. Def.,* 127 S. Ct. at 1436.

[136] *Id.* at 1436.

an increase in the "hourly rate of emissions."[137] In fact, the regulations gave no rate at all.[138] In addition, the Court found a unit's actual operating hours should be calculated using actual emissions, and actual emissions should be calculated using the hours the unit actually runs.[139] Therefore, according to the Supreme Court, increases in actual hours of operations which increase the annual emission rate of a unit should trigger PSD permitting and review.[140]

Finding that annual emission rate increases should trigger PSD, the Court defined "major modification" as having two separate components that must be satisfied.[141] The first component is, "any physical change in or change in the method of operation."[142] The second component requires a "significant net emissions increase."[143] Finding two necessary components to the term "major modification," the Court found the appellate court's construction invalidated the 1980 regulations.[144]

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[137] *Id.* at 1434.

[138] *Id*. The regulation only mentioned a rate in terms of annual emissions, not hourly. *Id.* The regulations described "significant" in tons per year. Prevention of Significant Deterioration of Air Quality, 40 C.F.R. §51.166(b)(23)(i)(1980). A "net emissions increase" for "actual" emissions measures the "average" emission rate, prior to the project, measured in "tons per year." *Id.* at § 51.166(b)(21)(ii); *Envtl. Def.*, 127 S. Ct. at 1434.

[139] *Envtl. Def.*, 127 S. Ct. at 1434.

[140] *Id*.

[141] *Id.*

[142] *Id*. at 1434.

[143] *Id.* (quoting 40 C.F.R. § 51.166(b)(2)(i)(1980)). The district court thought an increase in the hourly emission rate was a necessary prerequisite to a PSD "major modification" because of a provision in the 1980 PSD regulations. *Envtl. Def.*, 127 S. Ct. at 1435. The relevant provision excluded increased hours of operation or production from the scope of a physical change or a change in the method of operation. *Id.* Using this exclusion, the district court assumed that increases in hours of operation, which result in a significant increase in emissions, must be ignored if caused by a physical change or a change in the method of operation. *Id.* The Supreme Court read the 1980 PSD regulations as requiring a difference between the two separate components of the regulation. *Id.* The Court agreed a mere increase in the hours of operation was not a "physical change or change in the method of operation." *Id.* However, the Court disagreed with the appellate court's reliance on the district court's interpretation that an increase in operating hours, resulting in an emission increase, must be ignored if caused by a "physical change or change in the method of operation." *Id.* The Supreme Court found this reading "turns an exception to the first component . . . into a mandate to ignore the very facts that would count under the second." *Id.*; Prevention of Significant Deterioration of Air Quality, 40 C.F.R. § 51.166(b)(21)(ii) (1980).

[144] *Envtl. Def.*, 127 S. Ct. at 1437; Administrative Proceedings and Judicial Review 42 U.S.C. §7607(b) (1980). The Court aligned itself with both the District of Columbia and the Seventh Circuit with its decision to vacate and remand the appellate court's decision. The District of Columbia in *New York* and the Seventh Circuit in *United States v. Cinergy Corporation* both held that an actual, annual increase in emissions should trigger PSD. New York v. Envtl. Prot. Agency, 413 F.3d 3 (C.A.D.C 2005); U.S. v. Cinergy Corp., 458 F.3d 705 (7th Cir. 2006); *see also Envtl. Def.*, 127 S. Ct. at 1437 (agreeing with both the court in *New York* and the Seventh Circuit).

When the appellate court found that there was no question relating to the validity of the PSD regulations for it to resolve, it dismissed the § 307(b) argument.[145] However, the Court found there was an issue relating to the validity of the 1980 regulations, and furthermore, the appellate court's construction invalidated the 1980 regulations.[146] Thus, the Supreme Court concluded the appellate court overstepped its authority because invalidations of regulations are addressed under § 307(b) of the Act in the Court of Appeals for the District of Columbia within sixty days of EPA rulemaking.[147] However, since the appellate court disregarded the applicability or effect of § 307(b), the Court found no reason to consider the importance of § 307(b) in this case.[148]

Justice Thomas' Concurring Opinion

Justice Thomas wrote to address his grievances with the dicta in the portion of the opinion stating: "[T]he statutory cross-reference does not mandate a singular regulatory construction."[149] In Justice Thomas's opinion Congress had explicitly linked the PSD statute's definition of the term "modification" to the NSPS's definition of "modification."[150] This explicit linkage prevented the EPA from defining "modification" differently in each statute.[151] Instead, Justice Thomas used the presumption that repeating the same words in different parts of the statute means the words have identical meanings.[152]

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[145] U.S. v. Duke Energy Corp., 411 F.3d 539, 549 n.7 (4th Cir. 2005).

[146] *Envtl. Def.*, 127 S.Ct at 1436.

[147] *Id.*; *see also* Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b) (1980) (requiring invalidations to be addressed within sixty days after EPA promulgation).

[148] *Envtl. Def.*, 127 S. Ct. at 1436. Duke's final argument was if the 1980 regulations entitled the EPA to define PSD "modification" as it had done, then the EPA has taken an inconsistent stand and is "retroactively targeting the last twenty years of practice." *Id.* at 1436-37. This claim was not addressed by any of the earlier courts and the Supreme Court found it was an issue Duke can press on remand. *Id.* at 1437.

[149] *Envtl. Def.*, 127 S. Ct. at 1437 (Thomas, J., concurring).

[150] *Envtl. Def.*, 127 S. Ct. at 1437 (Thomas, J., concurring). The cross-reference in 42 USC § 7479(2)(C), explicitly links the definition of "modification" in PSD and NSPS and makes them identical. *Id.* (Thomas, J., concurring).

[151] *Id.* (Thomas, J., concurring). Justice Thomas found in *Atlantic* a word could have a different statutory meaning if Congress repeated the word in a different context, but he distinguished *Atlantic* from the instant case because Congress's incorporation of PSD into the NSPS definition of "modification" demonstrated the congressional intent that both have the same definition regardless of the context surrounding each. *Id.* (Thomas, J., concurring); Atlantic Cleaner & Dyers v. U.S., 286 U.S. 427, 433 (1932). Thus, Justice Thomas did not find *Cleveland Indians* relevant because it analyzed the repetition of terms in different statutory contexts. *Envtl. Def.*, 127 S. Ct. at 1437 (Thomas, J., concurring). Additionally, Justice Thomas found *Robinson* inapplicable because there was no contextual difference which implied a reason to define PSD differently from NSPS. *Id.* at 1438 (Thomas, J., concurring).

[152] *Envtl. Def.*, 127 S. Ct. at 1437 (Thomas, J., concurring) (referring to *Atlantic*, 286 U.S at 433).

According to Justice Thomas, the Court explained why the instant case did not require identical interpretations of the language in all situations.[153] However, the Court did not overcome the general presumption that the same words, repeated in different parts of the statute, require interpreting the terms to mean the same thing.[154] Accordingly, the Court needed to explain further why the general presumption did not apply in this case.[155]

Summary

The Supreme Court held the EPA was not required to interpret the term "modification" the same for PSD as it does for NSPS.[156] The Supreme Court's decision sets a standard for what constitutes a "modification" under the 1980 PSD regulations.[157] This holding will no longer allow older power plant operators to avoid PSD review by increasing their annual emissions, but not their hourly emissions rate.[158]

ANALYSIS

The Supreme Court made the correct decision in holding that older power plants will now be subject to PSD review for any increase in their annual emissions rate.[159] The holding aligns the PSD regulations with Congress's intent and the goals of the Act.[160] Although the Court's holding effectuates Congress's intent in passing the Act, the Court should have dismissed the case because Duke did not comply with § 307(b).[161] Rather than taking the action that it did, Duke should have invalidated the PSD regulations in accordance with § 307(b).[162] Not only should the Court have dismissed the case based on Duke's non-compliance

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[153] *Envtl. Def.*, 127 S. Ct. at 1438 (Thomas, J., concurring). Justice Thomas agreed with the majority that the term "modification" did not require an identical definition under PSD and NSPS. *Id.* at 1437. However, Justice Thomas wanted the majority to further explain why this case should be distinguished from the general presumption. *Id.*

[154] *Id.* at 1438 (Thomas, J., concurring).

[155] *Id.* (Thomas, J., concurring).

[156] *Id.* at 1433-36 (majority opinion).

[157] *Id*. at 1435-37.

[158] *Envtl. Def.*, 127 S. Ct. at 1435-37.

[159] *Id.* at 1423.

[160] Gremillion, *supra* note 5, at 333; U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619, 627-28 (M.D.N.C. 2003).

[161] *See* Chaganti & Assoc. v. Nowotny, 470 F.3d 1215, 1224 n.2 (8th Cir. 2006) (discussing the importance of a party not maintaining a studied ignorance of the law); *see* Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b)(1) (1977) (explaining how final agency action must be brought within sixty days after promulgation in the D.C. Circuit).

[162] Grand Canyon Trust v. Pub. Serv. Co. of N.M., 283 F. Supp. 2d 1249, 1253-54 (D.N.M. 2003).

with § 307(b), the Court also should have dismissed the case based on Duke's failure to obtain an applicability determination from the EPA as to whether its projects would trigger PSD review and permitting.[163] A decision by the Court to dismiss could have made this decision much more significant.[164] Dismissing may have reduced litigation in the future by encouraging industry to take proactive measures, and by aligning industry with the intent of the Act.[165]

Utilization of § 307(b) of the Clean Air Act

According to § 307(b) of the Act, the United States Court of Appeals for the District of Columbia may address a regulation's invalidation within sixty days of any EPA final action.[166] In this case, the appellate court did not consider the effect of § 307(b) because it found that rather than determining PSD's validity, it was, instead, interpreting PSD regulations.[167] However, the Supreme Court concluded the appellate court did determine the validity of the regulations and in doing this, the appellate court overstepped its jurisdictional authority.[168] Nevertheless, instead of dismissing the case for lack of jurisdiction, the Court did not address the § 307(b) issue.[169] Furthermore, it found no reason to consider the importance of § 307(b).[170] As it stands, the Court diminished the § 307(b) requirements.[171]

When a party wishes to challenge the EPA's final action, it must do so pursuant to § 307(b).[172] Section 307(b) gives a federal court, which has limited jurisdiction, the jurisdiction to hear a case involving a challenge to final agency action.[173] In addition, a court has an obligation to determine whether subject-matter jurisdiction exists.[174] Therefore, if a federal court has limited jurisdiction

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[163] *Id.*

[164] *See infra* notes 166-221 and accompanying text describing how this case could have had a more meaningful affect with a dismissal by the Court.

[165] *See supra* note 37 and accompanying text (describing the goals of the Act).

[166] Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b) (1977). However, if the grounds for review arise sixty days after promulgation, then a petition must be filed within sixty days after such grounds arise. *Id.*

[167] Gremillion, *supra* note 5, at 338.

[168] Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1436 (2007).

[169] *Id.* at 1436-37.

[170] *Id.*

[171] *See* Utah Power & Light Co. v. Envtl. Prot. Agency, 553 F.2d 215, 218 (D.C. Cir. 1977) (explaining when an issue comes before a court, it must determine if the validity or a particular interpretation or application of a regulation is under attack).

[172] Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607 (1977).

[173] *See* Exxon Mobil Corp. v. Allapattah Servs. Inc., 125 S. Ct. 2611, 2616 (2005) (noting U.S. district courts are limited in their jurisdiction to the powers granted to them by the Constitution and statutes).

[174] Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

and an obligation to determine whether jurisdiction exists, that court should not ignore the statute granting it jurisdiction.[175] Nevertheless, this is exactly what occurred in this case.[176] Here, the Court only had jurisdiction to hear a case which involved enforcement proceedings.[177] Instead both the district and appellate court heard this case and made a determination on the merits.[178] This was inappropriate, and every court along the way had the opportunity and obligation to determine whether jurisdiction existed at the outset of the challenge.[179]

If a court finds itself determining the validity or a particular interpretation of an agency's regulations, the court must dismiss the case on jurisdictional grounds under § 307(b)(1).[180] However, Duke argued this case did not involve a challenge to any rule, rather the issue was the interpretation of the 1980 PSD regulations.[181] Moreover, both lower courts only struck down the EPA's application/interpretation of the 1980 regulation, but did not invalidate the regulation itself; therefore, Duke argued § 307(b) did not apply.[182] Furthermore, Duke argued the EPA never promulgated an authoritative interpretation or took final action regarding the NSR regulations, and therefore, Duke never had an opportunity to seek review.[183]

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[175] *See id.* at 514 (asserting a court has an obligation to ensure it has the proper jurisdiction, even if the parties do not raise it).

[176] Brief for the Petitioners, July 21st, *supra* note 96, at 27.

[177] Brief for the Petitioners, July 21st, *supra* note 96, at 27. An enforcement proceeding does not involve a challenge to any rule; rather, it involves an interpretation of a rule. Brief for Respondent Duke Energy Corporation in Opposition at 3, Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2006) (No. 05-848) [hereinafter Brief for Respondent, March 8th].

[178] U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619 (M.D.N.C. 2003); U.S. v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005). The Supreme Court concluded the appellate court did not interpret the 1980 regulations, but instead invalidated the regulations by ignoring the two required components of the definition of "major modification." *Envtl. Def.*, 127 S. Ct. at 1434, 1436.

[179] *Arbaugh*, 546 U.S. at 514.

[180] Brief for the Petitioners, July 21st, *supra* note 96, at 29-30. "[U]nless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule." *Id.* at 30 n.21 (quoting H.R. REP. NO. 95-294 at 322).

[181] Brief for Respondent, March 8th, *supra* note 177, at 24. Duke argued the lower courts had three different interpretations of actual emissions that the EPA had advanced. *Id.* at 16. Of the three interpretations, Duke argued that both the district court and appellate court chose to uphold the "actual-to-actual" interpretation. *Id.* at 16-17. The third test was an "actual-to-potential" test for units that had not yet begun normal source operations. *Id.*

[182] Gremillion, *supra* note 5, at 339; *see also* Brief for Respondent Duke Energy Corporation at 26, Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2006) (No. 05-848) [hereinafter Brief for Respondent, September 15th] (arguing the EPA's subsequent interpretation of the 1980 rules was improper, not that the rules were invalid).

[183] Gremillion, *supra* note 5, at 339; *see also* Brief for Respondent, September 15th, *supra* note 182, at 26. According to Duke, the appellate court had the jurisdiction to review the validity of an

Conversely, Environmental Defense argued any claim asserting the plain language of the Act required an identical interpretation of PSD and NSPS was purely a question of law (i.e. an attack on the validity of the regulation), and Duke should have challenged it in the D.C. Circuit within sixty days as required by § 307(b).[184] Congress created § 307(b) for the specific purpose of forcing parties to challenge regulations shortly after promulgation by the EPA.[185] Congress wanted to avoid prolonged and conflicting adjudication involving nationally applicable regulations and the Court could have helped to promote this interest by a dismissal in this case.[186]

A dismissal in this case could have assisted Congress with its desire for courts to utilize § 307(b).[187] The desire became evident in 1977 when numerous proposals gave Congress the opportunity to narrow the scope of § 307(b), but instead Congress chose to expand the grant of exclusive jurisdiction to the D.C. Circuit.[188] Congress established this exclusive grant of jurisdiction based on its desire to exploit the D.C. Circuit's special expertise in administering complex regulatory statutes.[189] Congress worried if different circuits could rule on the same regulation, courts could create uncertainty regarding the legality of the regulation.[190] Likewise, Congress desired assurance that regulatory programs

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EPA regulatory interpretation which arose in the Fourth Circuit. Brief for Respondent, March 8th, *supra* note 177, at 24.

[184] Brief for the Petitioners, July 21st, *supra* note 96, at 29-30. Environmental Defense argued that Duke had adequate notice of an authoritative interpretation in the 1980 preamble to the PSD regulations published in the Federal Register. *Id.* at 31. The preamble stated that the focus of the PSD program had shifted from "potential to emit" to "actual emissions." *Id.*; Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. at 52700 (Aug. 7, 1980) (to be codified at 40 C.F.R. pts. 51, 52, 124). The EPA explained the departure from the 1979 proposed regulations, which would trigger PSD if a unit increased its potential to emit. Brief for the Petitioners, July 21st, *supra* note 96, at 31-32.

[185] Brief of the States at 12-13, Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2006) (No. 05-848).

[186] *Id.* at 13.

[187] Brief for the Petitioners, July 21st, *supra* note 96, at 27-28.

[188] *Id.* at 27.

[189] *Id.* Additionally, Congress established a uniform and final forum which would make final decisions with the exception of review by the Supreme Court. *Id.* at 28.

[190] Brief of the States, *supra* note 185, at 13. A number of states had reservations about their State Implementation Plans (SIPs) based on the uncertainty of the proper standard for PSD after the appellate court's ruling. *Id.* Reservations of States regarding their SIPs was not Congress's intent; rather, Congress wanted to "'avoid protracted and inconsistent adjudication over the validity' of nationally applicable EPA regulations" with the creation of § 307(b). *Id.* at 13 (citing U.S. v. Ethyl Corp., 761 F.2d 1153 (5th Cir. 1985)). The appellate court's holding made many States hesitant about how to fulfill their obligation under federal environmental regulations. *Id.* at 13-15. The concern among States was that the national PSD regulations they relied on to implement their SIPs were illegal. *Id.* at 13. The Act's judicial review provision is meant to ensure that the

would either be followed or promptly challenged in the proper court.[191] With the creation of § 307(b), Congress did not intend for industry to not comply with the Act's regulations only to have them later invalidated by local courts during enforcement interpretation proceedings.[192] By not enforcing Congress's desires regarding § 307(b), this decision could lead to obscurity and uncertainty in other areas of environmental law as well.[193] Furthermore, if the Court had dismissed this case and enforced a broad reading of § 307(b), it could have reduced both uncertainty and waste of overlapping adjudication concerning environmental statutes, and ensure that final actions are promptly challenged in the proper court.[194]

Applicability Determination

In addition to the jurisdictional issues presented in § 307(b), the Court could have bolstered its opinion by addressing Duke's behavior in neglecting to obtain an applicability determination.[195] Duke never sought an applicability determination and instead waited until the EPA brought an enforcement action before it challenged the EPA's PSD regulations.[196] Duke argued the EPA's view of the PSD regulations was an "enforcement interpretation" that Duke could not have challenged in the D.C. Circuit because it was not a final action.[197] However,

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validity of a regulation for national application has the correct standard before States must adopt regulations to implement them. *Id.* If the appellate court's reasoning became the standard, it would have led to administrative confusion along with wasted resources to promulgate SIPs which may have mistakenly relied on the validity of a federal regulation. *Id.* Furthermore, the appellate court's decision guaranteed, contrary to congressional intent, that federal Clean Air Act programs will not have uniform implementation across the United States. *Id.* at 14-15.

[191] *Id.* at 13.

[192] Brief for the Petitioners, July 21st, *supra* note 96, at 29.

[193] Brief of the States, *supra* note 185, at 15. By not dismissing the appellate court's reasoning, other areas of environmental law could be affected. *Id.* at 14-15. Other areas of environmental law contain statutes concerning provisions similar to § 307(b). *Id.* at 14. Other possibly affected environmental statutes are the Clean Water Act, the Comprehensive Environmental Response Compensation and Liability Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act. Brief of Amici Curiae National Parks Conservation Association and Our Children's Earth Foundation in Support of Petitioner at 13-14, Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2006) (No. 05-848). Time and time again Congress has established a uniform system for judicial review for environmental statutes and a proper forum to challenge them. *Id.* at 14.

[194] Gremillion, *supra* note 5, at 345.

[195] Gremillion, *supra* note 5, at 345.

[196] Gremillion, *supra* note 5, at 345. If the grounds for petition arise after the sixtieth day, then the petition must be filed within sixty days after such grounds arise. Administrative Proceedings and Judicial Review, 42 U.S.C. § 7607(b) (1977).

[197] Reply Brief for the Petitioners at 2 Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2006) (No. 05-048) [hereinafter Reply Brief for the Petitioners, October 19th]. Section 307(b) prohibits challenges to final agency action during an enforcement proceeding. Gremillion, *supra* note 5, at 345.

even if this argument was substantiated, this should not alleviate Duke of its responsibility to seek out the correct interpretation of the PSD regulations before undergoing a PMP.[198] Under the 1990 Act amendments and Title V Operating Permit Program, self-monitoring and reporting is emphasized.[199] Congress may have waited until later amendments to stress the importance of industry taking initiative and responsibility, but the 1990 amendment became effective during the span of Duke's PMP.[200] Therefore, Duke's "wait-and-see" behavior was something the Supreme Court should have addressed in its opinion.[201]

The law has established a party may not maintain a studied ignorance of the law, or just "wait-and-see" to postpone compliance.[202] Arguably, Duke chose ignorance to avoid costly compliance.[203] Instead of plunging forward, Duke should

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[198] Chaganti & Assoc. v. Nowotny, 470 F.3d 1215, 1218 (8th Cir. 2006); *see supra* notes 90-95 and accompanying text (explaining that a party may not maintain a studied ignorance of the law). *Chaganti* stood for the proposition that if the terms of a court order are unclear, a party has an obligation to seek clarification rather than maintain a studied ignorance of the law in order to postpone compliance. *Chaganti*, 470 F.3d at 1224 n.2. The *Chaganti* case did not involve an applicability determination, but it does seem realistic to apply the reasoning in *Chaganti* to other areas of the law. *Id.* Accordingly, any uncertainty about the term "modification" should have resulted in Duke's active clarification in the form of an applicability determination. *See* Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (sorting through the cloud of uncertainty surrounding the term "modification" in both industry and the agency). Because the EPA has limited time and resources, it is industry's responsibility to obtain the appropriate permit under the 1990 Act amendments. Gremillion, *supra* note 5, at 345; Voices of the Wetlands v. Cal. State Water Res. Control Bd., 157 Cal. App. 4th Supp. 1268, 1299 (Cal. Ct. App. 2007). The 1990 amendments to the Act, mandate that a new, modified sources obtain air pollution permits meeting uniform federal requirements, such as a PSD permit. *Voices*, 157 Cal. App. 4th Supp. at 1299. Additionally, Duke should have consulted with the EPA before engaging in hundreds of millions of dollars worth of improvements. Gremillion, *supra* note 5, at 345. If industry continually engages in this type of behavior, industry will prove victorious because the EPA and other agencies do not have adequate funding to compete. *Id.*

[199] Peter Hsiao & Siegmund Shyu, *Clean Air Act Litigation and Enforcement*, ALI-ABA COURSE OF STUDY MATERIALS, ENVIRONMENTAL LITIGATION, Vol. 2 (2003). The 1990 amendment to the Act by Congress created Title V. Sierra Club v. Ga. Power Co., 365 F. Supp. 2d 1297, 1299 (N.D. Ga. 2004). Title V's goal is to impose stricter requirements on stationary sources in non-attainment areas by implementing new operating permits for stationary sources. *Id.* Additionally, Congress hoped to achieve ease in administration by creating a single document usable by the state and federal government and the public to monitor compliance. *Id.*

[200] *See* Gremillion, *supra* note 5, at 345 (noting a party should not wait-and-see to avoid compliance).

[201] Gremillion, *supra* note 5, at 345.

[202] Perfect Fit Indus., Inc., v. Acme Quilting Co., Inc., 646 F.2d 800, 808 (2nd Cir. 1981). In *Chaganti*, the court did not discuss applicability determinations, but it does not seem too far of a jump to require industry to seek applicability determinations and no longer allow ignorance of the law to postpone compliance. Chaganti & Assoc. v. Nowotny, 470 F.3d 1215, 1224 n.2 (8th Cir. 2006).

[203] *See* Hsiao & Shyu, *supra* note 199, at 2 (explaining that the 1990 amendments intended to strengthen compliance with the Act because many were not complying).

have sought an applicability determination before undertaking its first project.[204] This would have enabled the EPA to clarify, for Duke, the standard for triggering PSD review.[205] Furthermore, if Duke had sought an applicability determination, it could have challenged the agency's final results pursuant to § 307(b) before it engaged in a PMP.[206]

However, Duke did not seek an official applicability determination, but instead insisted it relied upon statements made by Edward Reich that only an hourly increase in emissions triggers PSD.[207] Edward Reich headed the EPA's Division of Stationary Source Enforcement (DSSE), the lead office responsible for making applicability determinations.[208] The statements Reich made were not an official applicability determination; rather, the statements were the opinion of one high ranking individual.[209] Thus, Duke did not frivolously rely on Reich's statements, but the Supreme Court's finding the statements were not "heavy ammunition" illustrates the EPA's needs to implement a rule regarding the proper use of applicability determinations.[210] Using the Act's goals, the EPA could require mandatory applicability determinations in some situations.[211] A dismissal by the

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[204] *See* Wis. Elec. Power. Co. v. Reilly, 893 F.2d 901, 905-06 (7th Cir. 1990) (seeking an applicability determination to determine if its facility's life extension project would subject the plant to PSD review and permitting).

[205] *Id.*

[206] U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619, 623-24 (M.D.N.C. 2003). Wisconsin Electric Power Company (WEPCO) sought an applicability determination regarding whether or not it needed to obtain a PSD permit for a life extension project it wanted to undertake at its facilities. *Wisconsin*, 893 F.2d at 905-06. The EPA determined that the plant was subject to both the NSPS and PSD requirements. *Id.* WEPCO did not agree with this determination, and the company brought suit in *Wisconsin. Id.* The Seventh Circuit had the jurisdiction under § 307(b)(1) to hear an appeal for the EPA's final determination. *Id.* at 906. The Seventh Circuit used *Chevron*, and determined that the agency correctly decided that NSPS applied to the WEPCO project, but the agency acted improperly when it subjected WEPCO to PSD review. *Id.* at 906, 909-11, 918.

[207] *See supra* note 117 and accompanying text (describing the statements of Reich which condoned triggering PSD for only an increase in the hourly emissions rate). U.S. v. Duke Energy Corp., 411 F.3d 539, 546 (4th Cir. 2005). If a regional office could not answer a company's questions concerning regulations under the Act, the regional office would refer the question to Mr. Reich's office. Brief of Walter C. Barber as Amicus Curiae Supporting the Respondent at 6-7, Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423 (2006) (No. 05-848). The EPA has tried to have consistent treatment of stationary source regulations. *Id.* at 9-11. The EPA has strived for consistency by having one headquarter office take the lead on applicability determinations. *Id.* During the time period in question, Mr. Reich's office had that duty. *Id.*

[208] Brief of Walter C. Barber, *supra* note 207, at 9-11.

[209] *See* Brief of Walter C. Barber, *supra* note 207, at 9-11 (explaining Reich's position within the EPA).

[210] *Envtl. Def.*, 127 S. Ct. at 1436. The Court found the Reich Statements unpersuasive with "neither of them containing more than one brief and conclusory statement supporting Duke's position." *Id.* Furthermore, the Court states than an isolated opinion by an agency official does not authorize a court to read the regulatory language inconsistently. *Id.*

[211] *See* H.R. REP. NO. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356. Congress's goals in implementing the Act were to clean the nation's air. *Id.* When Duke did not

Court could have drawn attention to this issue and encouraged the EPA to act in the future with a rule regarding applicability determinations.[212]

Possible Future Actions by the EPA

Encouraging the EPA to act in the future with a rule clarifying the use of applicability determinations could lead to less litigation and a proper application of the law.[213] Currently, industry does not often seek applicability

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seek an applicability determination, tons of pollutants were emitted into the atmosphere for years; however, the EPA could end this "studied ignorance" of the law by requiring applicability determinations under the Clean Air Act. *Id.; see infra* note 213 and accompanying text (describing when the EPA should require applicability determinations).

[212] *See* Gremillion, *supra* note 5, at 345 (noting Duke never sought an applicability determination and the company should not be relieved of its responsibility to seek out an official EPA opinion).

[213] Gremillion, *supra* note 5, at 345.*; see supra* note 211 and accompanying text (describing how when Congress implemented the Act, the goal was to clean the nation's air). Pursuant to the goal of the Act, Congress gave the EPA the authority to improve and protect the nation's air. Congressional Findings and Declaration of Purpose 42 U.S.C. § 7401(b)(1) (1995). Mandatory applicability determinations could aid this objective. *See* Wisconsin Elec. Power. Co. v. Reilly, 893 F.2d 901, 905-06 (7th Cir. 1990) (showing how applicability determination can lead to the correct application of the law). Title V has lead to discussions of including mandatory applicability determinations. Hsiao & Shyu, *supra* note 199, at 10. Accordingly, applicability determinations could be incorporated into Title V as part of the permitting process. Hsiao & Shyu, *supra* note 199, at 10. Currently, States administer the Title V program, but the EPA has extensive oversight. U.S. v. E. Ky. Power Coop. Inc., 498 F. Supp. 2d 1010, 1012 (E.D. Ky. 2007). For example, the EPA receives a copy of each Title V permit application and it then has the opportunity to comment and object. *Id.* When the EPA objects, the state permitting authority may not issue the permit unless it is revised in accordance with the EPA regulation. *Id.* The problem with the Title V program is that emission facilities are divided into two categories, major and minor sources. HQ Air Force Center for Environmental Excellence, *PROACT Fact Sheet,* PROACT ENVIRONMENTAL SOLUTIONS, TECHNOLOGY, AND GUIDANCE, *available at* http://www.afcee.brooks.af.mil/pro-act/fact/titlev.asp (last visited March 9, 2008). A major source is defined as a facility that produces more than one-hundred tons of pollutant per year. *Id.* Some sources that have the physical and operational capacity to emit large amounts of pollutants, can achieve minor status under state law, and, therefore, avoid Title V permitting. *Id.* It is possible that if these programs were in place when Duke first underwent its PMP, it could have classified itself as having minor status, avoiding Title V. *See id.* (explaining what constitutes a minor emitter). Consequently, even with Title V in place, a case similar to Duke's could arise. *Id.* Therefore, if a facility has minor statute, it should still be required to submit to the EPA a proposal for the work at a new or modified facility and have the EPA make an applicability determination. *See* Charles F. Mills III, Comment, *Clearing the Air: Use of* Chevron's *Step One to Invalidates EPA's Equipment Replacement Provision*, 33 FLA. ST. U. L. REV. 259, 265-66 (2005) (describing industry's confusion relating to the NSR program). This mandatory applicability determination process would be very similar to the process described above for Title V, with the difference being that a minor emitter would be required to obtain an applicability determination to ensure they are not a major emitter misconstruing the regulations. *See Eastern Kentucky,* 498 F. Supp. 2d at 1012 (explaining the Title V process). Even though Title V was not an issue in this case, a dismissal may have shown possible flaws in Title V which could lead to future litigation. *See* HQ Air Force Center for Environmental Excellence, *PROACT Fact Sheet,* PROACT ENVIRONMENTAL SOLUTIONS, TECHNOLOGY, AND GUIDANCE, *available at* http://www.afcee.brooks.af.mil/pro-act/fact/

determinations.[214] Furthermore, when industry does seek these determinations, there can be ambiguity as to their meaning.[215]

The EPA could solve these issues in two ways.[216] First, the EPA must standardize the way it makes an applicability determination to create less confusion amongst members of the agency and industry.[217] It must also take steps to ensure that an applicability determination gives a clear, final answer that represents, not only the opinion of one person, but that of the entire agency.[218] Second, the EPA could require that industry obtain an applicability determination when a facility does not believe it is subject to Title V.[219]

Once again, a dismissal could have encouraged the EPA to implement a rule that would require industry to take proactive measures to ascertain the applicable law.[220] In a case such as *Duke*, an applicability determination, early on, would have avoided years of litigation and saved tons of pollutants from being emitted into the environment because Duke would have installed the Best Available Control Technology (BACT) as required by PSD.[221]

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titlev.asp (last visited March 9, 2008) (explaining how minor emitters are not subject to the Title V permitting process). As stated above, it is possible that if Title V was present when Duke first engaged in a PMP, it may have been able to qualify as a minor emitter, and therefore, avoided Title V oversight. *Id.* This could result in the same type of litigation today as in the past. *Id.*

[214] *See* Brief of Walter C. Barber, *supra* note 207, at 9-11 (describing Edward Reich's role in applicability determinations). The district court and Duke used statements made by Reich, in its finding that increase in annual emissions do not trigger PSD. U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619, 642 (M.D.N.C. 2003). However, the Court found the Reich Statements unpersuasive relating to PSD. Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1436 (2007).

[215] *See* Brief of Walter C. Barber, *supra* note 207, at 9-11 (describing Edward Reich's role in applicability determinations).

[216] Brief of Walter C. Barber, *supra* note 207, at 9-11.

[217] Brief of Walter C. Barber, *supra* note 207, at 9-11.

[218] Brief of Walter C. Barber, *supra* note 207, at 9-11.

[219] *See* Hsiao & Shyu, *supra* note 199, at 2 (explaining that the 1990 amendments intended to strengthen compliance with the Act because many were not complying). If a facility is subject to Title V, the EPA will have an opportunity to review a facilities permit and monitor compliance. HQ Air Force Center, *supra* note 213. However, if a facility can classify itself as a minor emitter, it is not subject to Title V. *Id.*

[220] Congressional Findings and Declaration of Purpose, 42 U.S.C. § 7401(b)(1) (1995); *see* Wis. Elec. Power. Co. v. Reilly, 893 F.2d 901, 905 (7th Cir. 1990) (seeking an applicability determination as to whether it needed a PSD permit before commencing a repair and replacement program).

[221] U.S. v. Duke Energy Corp., 278 F. Supp. 2d 619, 623-24 (M.D.N.C. 2003). By becoming subject to PSD in 1988, the year of Duke's first PMP, Duke would have been required to install Best Available Control Technology (BACT); therefore, eliminating the amount of emissions it emitted annually. *Id.;* Preconstruction Requirements, 42 U.S.C. § 7475(a)(4)(1980).

Congress's Intent for New Technology

New technologies have been discovered which significantly decrease the amount of pollutant emitted into the air while still utilizing coal.[222] Use of new technologies is exactly what Congress expected when it initially created the Routine Maintenance Repair and Replacement (RMRR) exemption.[223] Congress expected older facilities to run only for a few more years.[224] In creating the exemption, Congress wanted to prevent older facilities, which would soon be out of commission, from having to undergo costly repairs that would bring the plants up to the current standards for air pollution control.[225] Instead of this exemption operating as Congress intended, facilities scheduled life extension projects into their routine maintenance and identified them as rehabilitation programs.[226] Industry abused the RMRR exemption by making modifications and not installing the BACT as required by PSD.[227] Once again, an applicability determination could have provided guidance as to whether a facility qualifies for an RMRR exemption.[228]

CONCLUSION

Ultimately, the Supreme Court's holding was correct regarding the substantive law.[229] The decision informed coal-fired power plant owners of exactly what

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[222] *See* Lory Hough, *King Coal Comes Clean*, KENNEDY SCHOOL BULLETIN, summer 2006, *available at* http://www.ksg.harvard.edu/ksgpress/bulletin/summer2006/features/coal.htm (last visited September 6, 2007). Instead of industry wasting money on litigation, industry could apply its wealth towards a new technology that has been discovered to burn cleaner coal in a process known as "coal gasification." *Id.*

[223] Mills, *supra* note 213, at 264.

[224] Mills, *supra* note 213, at 264.

[225] Mills, *supra* note 213, at 264.

[226] Mills, *supra* note 213, at 268. In *Wisconsin,* the facility underwent a life extension project. *Wisconsin,* 893 F.2d at 906. Wisconsin Electric Power Company (WEPCO) submitted a proposed replacement program, which it called a "life extension" project to the appropriate state agency. *Id.* In its proposal, WEPCO explained that it had to renovate a unit to keep it operational past its planned retirement date. *Id.* Professional literature has stopped using the term life extension project and now refers to these projects as rehabilitation programs. Larry Parker, *Congressional Research Serv., Clean Air and New Source Review: Defining Routine Maintenance*, CRS REPORT FOR CONGRESS, January 14, 2004, *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8199:1 (last visited at February 9, 2008).

[227] American Lung Association et al., *Comments on the Proposed Rule: "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Routine Maintenance, Repair and Replacement,"* AMERICAN LUNG ASSOCIATION, ET AL., May 2, 2003, *available at* http://www.catf.us/press_room/20030501-Final_Comments_on_Proposed_Rule.pdf (last visited at February 29, 2008).

[228] *See supra* notes 195-212 and accompanying text (describing why applicability determinations are important).

[229] *See supra* notes 28-29, 129-35 and accompanying text (describing why the holding was correct).

constitutes a modification triggering PSD review and permitting.[230] However, a dismissal would have emphasized the importance of the procedural requirements of § 307(b) and sent a message to industry that any uncertainly in a regulation must be promptly challenged.[231] Furthermore, courts would know the importance of watching for § 307(b) jurisdictional violations and promptly dismiss cases they do not have jurisdiction to hear.[232] With a dismissal, the Court could have emphasized to the EPA the importance of ascertaining the applicable law with an applicability determination and pushed the EPA in the direction of mandatory applicability determinations.[233] As demonstrated throughout this note, this decision could have had a more meaningful and lasting effect with a dismissal based on § 307(b).[234]

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[230] *See supra* notes 129-35 and accompanying text (explaining the Court's reasoning regarding the proper interpretation for a modification under PSD).

[231] *See supra* notes 166-94 and accompanying text (showing the importance of § 307(b)).

[232] *See supra* notes 166-94 and accompanying text (demonstrating the importance of utilizing § 307(b)).

[233] See *supra* notes 195-212 and accompanying text (explaining why the EPA needs to utilize applicability determinations).

[234] *See supra* notes 166-94 and accompanying text (demonstrating the importance of a proper utilization of § 307(b)).

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DEALING WITH THE DISRUPTIVE PHYSICIAN

Thomas E. Lubnau, II and Daniel B. Bailey***

Imagine you operate a fast food restaurant. You have an employee who excels at cooking french fries, but you find increasingly, she is throwing food at customers, groping male co-workers, and cussing with increasing regularity. Despite her ability to cook french fries, you find your other employees avoid her with regularity. As a matter of fact, three or four of the dishwashers have left your employment for reasons you suspect to be connected to the behavior of the french fryer. You have confronted her about her behavior, and she has informed you her outbursts are: 1) distorted and a product of the imagination of her coworkers; 2) the fault of incompetent co-workers (if she did not have to deal with such incompetence, she would not be so angry); 3) justified, because her french frying ability far exceeds that of any other french fry cooker in the world, and the restaurant will go out of business without her invaluable assistance; 4) exaggerated and her co-workers are too sensitive; or 5) necessary to the efficient function of the restaurant.

Now, assume the french fry cook is a physician. What are the differences? Are physicians in such short supply, they are afforded special treatment? Are there special rules that guarantee a physician's right to practice medicine? Should we avoid dealing with the physician because he or she is an intelligent person? Should we avoid conflict with the physician because he or she is wealthy and powerful?

* Thomas E. Lubnau, II has been practicing law for over twenty years in Wyoming. He has experience in corporate litigation, health care law, medical staff and peer review issues, oil and gas law and estate planning. A second generation Wyoming lawyer, Lubnau has served as President of the Wyoming Bar, Chancellor of Jackrabbit Bar and President of the Campbell County Bar. Mr. Lubnau is a healthcare arbitrator with the American Health Lawyers Association.

** Daniel B. Bailey has practiced law in Wyoming for almost fifteen years and his primary practice focus is in health care law and as general counsel to hospitals and health care providers. He was born in Topeka, Kansas, and practiced law in the State of Kansas for five years prior to entering into the private practice of law in Wyoming with Thomas E. Lubnau, II on April 1, 1992. Tom and Dan will celebrate fifteen years as partners on April 1, 2007. He received his education at Washburn University in Topeka, Kansas, earning a Bachelorís Degree in Business Administration in 1981 and a Juris Doctor in 1987. The firm acts as general counsel for the Albany County Hospital District d/b/a Ivinson Memorial Hospital.

Is the process so complicated and full of trip wires and mine fields that dealing with the disruptive physician is nearly impossible? The purpose of this article is to examine the laws that govern how to deal with a disruptive physician in Wyoming, and to provide advice on how to resolve the problems they create.

I. DON'T DO IT. AND IF YOU THINK YOU CAN DO IT, DON'T DO IT.

An old proverb says an ounce of prevention is worth a pound of cure. Nowhere is this statement more applicable than in the recruitment and retention of physicians. Carefully checking the background of prospective physicians is the single most important step in protecting the collegiality, function, and operation of the medical staff. If a physician candidate has a history of an inability to get along with professors, other practitioners, administrators, nurses, staff, and the community, problems are looming in the future for you. If this inability to get along is the result of the practitioner's perceived view that all those around her are incompetent, and it was their incompetence which led to the breakdown in communication, an alarm should be sounding with respect to the credentialing of this candidate. If all of the problems in the candidate's life appear to be the fault of everyone except the practitioner, proceed with extreme caution. Leopards rarely change their spots. If a candidate has a history of discipline matters or lawsuits arising out of physician-patient interaction, or with other institutions, that candidate should receive additional scrutiny before recruitment to the community, or credentialing at your hospital.

A disruptive physician can be like a bad relative, who comes to your house and never leaves. When a candidate is recruited, or is seeking privileges, treat that candidate as if he or she is going to be around for the next thirty or forty years. Trust your judgment. When viewed in that time frame, if issues arise which create suspicions, pass on the candidate and continue searching until someone is found who could fill the position for the next three or four decades.

Conduct a thorough background check. Check not only the credentials and educational history of the practitioner, but interview his former co-workers and educators. Conduct thorough interviews with the practitioner. Conduct these steps with due diligence and as if the future of your organization depends on it. View the applicant with the same scrutiny as someone who wishes to court your child. Subject to the ADA concerns (which this article addresses later) if a history of disruptive behavior exists with the practitioner, never assume the behavior is reserved for history. Remember, personalities change when money is involved. If a practitioner becomes obstinate or unyielding in the negotiation of the recruitment or employment agreement; view that behavior as an indicator of future behavior. Trust your gut.

If there are indications the practitioner will not fit within your medical community, consider all of your options. The goal of bringing physicians into

your medical staff is to establish a long-term, committed relationship for the benefit of the community, and which is satisfactory to the other physicians, administration, the staff, and the governing body. A disruptive practitioner can destroy the harmony among all. Our advice is, do not ignore a practitioner's pattern of disruptive behavior in order to have him or her on your medical staff. Don't do it. Even if you think you can deal with the practitioner's behavior, just don't do it.

II. GET YOUR HOUSE IN ORDER

Before proceeding with an action against a disruptive practitioner, make sure the hospital's house is in order. If a hospital has noncompliant bylaws or policies, the noncompliance will be used as defenses to any peer review action, or worse, may give rise to a cause of action against the hospital for noncompliance with the law. Disruptive physician proceedings are usually acrimonious and often result in lawsuits against the hospital. The hospital should anticipate and prepare for adversarial proceedings prior to commencement of any action, so they do not receive traction later in the proceedings.

Peer review, as we presently know it, was a product of the Health Care Quality Improvement Act of 1986 which provided limited immunity from liability in damages to peer review participants and established a scheme for reporting physician disciplinary actions to a nationwide data bank.[1] The standards in §11112(a) require the professional review body to take review actions only with the reasonable belief that the action is in furtherance of quality health care, after reasonable efforts to obtain the facts, with the provision of adequate notice and hearing procedures, and only in the belief that such action is warranted by the facts.[2] If those standards are met, and the reporting requirements in §§ 11131-11137 are met, then the persons participating in the peer review process have immunity from damages in most circumstances.[3] No immunity is provided under federal or state civil right laws.[4]

Wyoming has codified the Health Care Quality Improvement Act in the Professional Standard Review Organizations Statutes.[5] The statutes provide for a medical peer review organization, and allow local, county or state medical societies to establish professional standard review organizations.[6] The act provides

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[1] Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152 (1986).

[2] 42 U.S.C. §11112(a) (1986).

[3] 42 U.S.C. §11111(a)(1) (1987).

[4] 42 U.S.C. §11111(a)(1)(d).

[5] WYO. STAT. ANN. § 35-17-101 (2008) *et seq.*

[6] WYO. STAT. ANN. § 35-17-102 (2008).

immunity for civil damages against a member of a peer review organization as a result of acts or omissions in performing peer review activities, except for intentional, malicious or grossly negligent acts or omissions resulting in harm.[7] The Wyoming act immunizes witnesses who provide information to the professional standard review organization,[8] and provides that all reports, findings, proceedings, and dates of the professional standard review organization are confidential and privileged, and that no person shall be compelled to testify as to what occurred in the professional standard review organization meetings.[9] Interestingly, Wyoming also has a separate quality management function statute which provides the same protections to hospitals licensed by the State of Wyoming.[10] The statute requires each hospital to implement a quality management function, provides immunity from suit in any civil action for good faith participation, and provides information relating to the evaluation or improvement of the quality of health care services is confidential.[11]

While the framework for the peer review process is generally outlined by both federal and state law, the specific details of the process are left up to each of the individual hospitals. Consequently, it is left to the board of trustees and the medical staffs of each individual hospital to determine the process by which practitioners are admitted to medical staff membership, the credentialing process, the peer review process, and the discipline process. As a result, there is a great deal of technical work which must be done to get a hospital's house in order prior to proceeding with a disciplinary action. Areas which must be addressed prior to a hospital conducting a disruptive physician peer review proceeding are the application and admissions process to the medical staff, the disruptive physician policy, a Title VII policy, an ADA compliance policy, a disciplinary action policy, and a fair hearing process policy. Each policy should coexist seamlessly with the other policies, and provide a comprehensive scheme for enforcement of disciplinary actions. Rest assured the practitioner who is the subject of any disruptive physician action will cry "foul" at the slightest hint of an internal or unwritten, policy deviation or legal violation. Those cries of "foul" will provide defense opportunities that are frequently "red herrings" but nevertheless detract from the central issue in front of the hearing panel—the behavior of the disruptive practitioner.

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[7] WYO. STAT. ANN. § 35-17-103 (2008).

[8] WYO. STAT. ANN. § 35-17-104 (2008).

[9] WYO. STAT. ANN. § 35-17-105 (2008).

[10] WYO. STAT. ANN. § 35-2-910 (2008).

[11] WYO. STAT. ANN. § 35-2-910 (2008).

III. DUE PROCESS REQUIREMENTS

An understanding of the Wyoming's due process requirements, HCQIA and case law is important to understand the preparation of policies for your hospital. The Health Care Quality Improvement Act requires certain due process protection, which has been supplemented by the courts.[12] Due process protections include:

1. The physician receives notice of a proposed action stating:

    a. a professional review action has been proposed;
    b. the reason[s] for the proposed action;
    c. a specification of the cases in which the practitioners professional performance was challenged and stating in reasonable fullness the nature of the criticism in each case;
    d. the physician's right to request a hearing on the proposed action;
    e. any time limit (of not less than 30 days) within which to request such a hearing; and
    f. a summary of rights in the hearing under paragraph 3.

2. If the physician requests a hearing, the physician must receive a notice of a hearing that states:

    a. The place, time and dates of the hearing, which date shall not be less than 30 days after the date of the notice of hearing; and
    b. a list of witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

3. Discovery of relevant records, including:

    a. access to all relevant hospital and medical records during the period provided for preparation and response.

4. If a hearing is requested on a timely basis, the hearing is to be held:

    a. before an arbitrator mutually acceptable to the physician and the health care entity;
    b. before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved; or

[12] 42 U.S.C. §11112 (1986).

c. before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved.

5. At the hearing, the physician has the right to:

   a. representation by an attorney or other person of the physician's choice;
   b. have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charge associated with the preparation thereof;
   c. to call, examine and cross-examine witnesses;
   d. to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law; and
   e. to submit a written statement at the close of the hearing.

6. Upon completion of the hearing, the physician involved has the right to:

   a. receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations; and
   b. receive a written decision of the health care entity, including a statement for the basis of the decision.[13]

In addition to the procedures set forth in the Health Care Quality Improvement Act, the Wyoming Administrative Procedure Act (WAPA) sets forth another required series of due process protections hospitals must follow in administering contested case hearings.

WAPA requires notice to the affected Practitioner which sets forth:

1. The time, place and nature of the hearing;

2. The legal authority and jurisdiction under which the hearing is held;

3. The particular sections of the statutes and rules involved; and

4. A short and plain statement of the matters asserted.[14]

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[13] 42 U.S.C. §11112 (1986); Suckle v. Madison General Hospital, 362 F. Supp. 1196 (W.D. Wis. 1973).

[14] WYO. STAT. ANN. § 16-3-107(b) (2008).

Additionally, WAPA provides for the taking of depositions and discovery;[15] issuance of subpoenas;[16] the right to counsel;[17] the right to respond and present evidence and argument on all issues;[18] the requirement of keeping a record of the proceeding and what must be included in the record;[19] and the requirement for findings of fact.[20]

In addition to the prehearing procedural process, WAPA sets forth what evidence may be admitted, the need for cross examination, the type of documentary evidence to be produced, and the availability of the doctrine of judicial notice.[21] The statutes provide that the findings of fact and conclusions of law shall be set forth and separately stated in the final order, and the order shall be mailed to each party.[22] Hearing officers are given powers to administer oaths, issue subpoenas, rule upon evidence, regulate the hearing, determine procedural matters and recommend decisions, among other things.[23] It is important to note that hearing officers are prohibited from making final decisions.[24]

Drafting the policies in advance of the hearing is a complicated process, and should be undertaken or at least reviewed by experienced counsel for the healthcare entity who has special skills and experience in this area of the law. Careful preparation of the policies and bylaws of the hospital will insure the disciplinary action proceeding against a disruptive practitioner will stay as free of distractions as possible.

IV. APPLICATION FOR APPOINTMENT FOR MEDICAL STAFF

One document often overlooked in preparation of a hospital's internal documents is the Application for Appointment to Membership of the Medical Staff. An application for membership to the medical staff sets forth the terms and conditions of the relationship the hospital will have with the practitioner. The document, if carefully drafted, will contain: (1) a certification by the applicant that the application for medical staff membership is true and complete;[25]

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[15] WYO. STAT. ANN. § 16-3-107(g) (2008).

[16] WYO. STAT. ANN. § 16-3-107(d) (2008).

[17] WYO. STAT. ANN. § 16-3-107(j) (2008).

[18] WYO. STAT. ANN. § 16-3-107(j) (2008).

[19] WYO. STAT. ANN. § 16-3-107(o) & (p) (2008).

[20] WYO. STAT. ANN. § 16-3-107(r) (2008).

[21] WYO. STAT. ANN. § 16-3-108 (2008).

[22] WYO. STAT. ANN. § 16-3-110 (2008).

[23] WYO. STAT. ANN. § 16-3-112(b) (2008).

[24] WYO. STAT. ANN. § 16-3-112(e) (2008).

[25] Oftentimes, the practitioner will omit prior disciplinary incidents which later discovery will disclose. The certification of truthfulness and completeness will, in and of itself, give grounds for disciplinary action.

(2) a thorough checklist of the practitioner's history; (3) a statement the practitioner agrees to abide by the bylaws as now existing or hereafter amended;[26] and (4) will provide a release of liability for peer review and credentialing activities.

V. DISRUPTIVE PHYSICIAN POLICY

The next document which should be in place prior to bringing any proceeding against a disruptive practitioner is a disruptive practitioner policy. The American Medical Association (AMA) recommends each medical staff should adopt a policy which addresses personal conduct, whether verbal or physical, that affects or potentially may affect patient care as disruptive behavior.[27] The AMA recommends the policy should clearly state the principal objectives in terms that ensure high standards of patient care and promote a professional practice and work environment; describes the behavior that prompts intervention; provides a reporting channel; establishes a process to review or verify reports of disruptive behavior; establishes a process to notify the physician of the disruptive behavior report; includes a process for monitoring behavior improvement of the physician; provides for evaluative and corrective actions that are commensurate with the behavior; identifies the individuals involved; provides clear guidelines of confidentiality; and ensures individuals who report disruptive conduct are duly protected.[28]

Caution should be taken to ensure all organizational polices are consistent, and work to achieve the same ends. The policies should be seamless rather than separate and independent processes for notice and hearing. As will be discussed *infra*, the interaction of the disruptive conduct policy, the ADA policy, and the fair hearing policy need to be examined for inconsistencies, and also to insure a proper response is made to the behavior.

VI. IMPAIRED PRACTITIONER POLICY

It is estimated six percent (6%) of physicians have drug-use disorders and fourteen percent (14%) have alcohol-use disorders.[29] The next policy which should be prepared in advance of any disruptive practitioner matter is the impaired practitioner policy. In many cases, impairment causes the disruptive behavior. In many instances, a hospital will have made a substantial investment in practitioners admitted to their medical staff. Salvaging a career, and a relationship, by addressing

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[26] The "hereafter amended" language is important, because sometimes a practitioner will try to hold the hospital to the bylaws that were in existence at the time the practitioner applied for membership to the medical staff.

[27] AMA Policy H-140.918 Disruptive Physicians.

[28] *Id.*

[29] Stephen Ross, *Identifying the Impaired Physician,* Virtual Mentor, Ethics Journal of the AMA at 1, Dec. 2003.

underlying chemical or alcohol problems is an appropriate response, from a policy and community perspective. Additionally, the Joint Commission Manual requires the hospital to have a process for addressing impaired practitioners.[30]

The impaired practitioner policy should define the types of impairment applicable to the policy, provide a confidential treatment referral process, and provide for monitoring of the practitioner after treatment. The process should also include referral to the disciplinary action process if the practitioner fails to address the impairment issues through the impaired practitioner policy. Care must be taken to insure the seamless interaction of the impaired practitioner policy with the disciplinary action policy, so that the information and notices provided under one policy are interoperable with the other policy. Otherwise, practitioners subject to the impairment will likely object that one process or the other was not followed correctly, placing the status of procedural due process in jeopardy.

Wyoming has created the Wyoming Professional Assistance Program (WyPAP). The WyPAP program has been very successful in monitoring impaired practitioners. Upon completion of treatment, the impaired practitioner signs an agreement which includes a provision for chemical monitoring and testing, and a voluntary agreement that if the practitioner fails a chemical test, the practitioner will resign their Wyoming medical license.[31] As a result, WyPAP has a very high success rate in treating impaired practitioners within the State of Wyoming.

VII. AMERICANS WITH DISABILITIES ACT

Two provisions of the Americans with Disabilities Act have possible application to disruptive physicians. Title 1 of the ADA applies to employment relationships—and thus the employed physician relationship. The act requires employers to make reasonable accommodations for employees who have a physical or mental impairment which limits one or more major life activities.[32] To be a qualified individual with a disability, the individual must be able to perform, with or without reasonable accommodation, the essential functions of the job in question.[33] Employers are required to reasonably accommodate known disabilities of an individual under the ADA unless the accommodation would cause undue hardship.[34]

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[30] JCAHO Standard MS 4.80.

[31] Wyoming Professional Assistance Program, Monitoring Agreement, http://www.wpapro.org/Agreement.htm (last visited March 30, 2008).

[32] 42 U.S.C. § 12112(a) (1990).

[33] 42 U.S.C. § 12111(8) (1990).

[34] 42 U.S.C. § 12111(9) (1990).

Title III of the ADA prohibits discrimination based on a disability in a public accommodation and services operated by private entities.[35] The ADA includes hospitals as a place of public accommodation.[36] A case interpreting Title III of the ADA, ruled the accommodations required under Title III apply to physicians on the medical staff.[37] As a result, both employed physicians and medical staff members are parties covered by the reasonable accommodation provisions of the ADA.[38]

Whether a disability is covered by the Act is a technical question, and should be answered on a case-by-case basis. Active substance abuse is not covered.[39] However, "rehabilitated" individuals are protected by the ADA.[40] For those engaged in direct patient care in a hospital, the person with the disability has a higher burden to demonstrate the disability will not negatively impact patient care.[41] Other cases have addressed the same issue. When an employee relapsed after his treatment for drug and alcohol abuse and was terminated, the court upheld the termination holding that no longer engaging in drug use means being "in recovery long enough to have become stable."[42] In *Colorado State Board of Medical Examiners v. Davis,*[43] the court held that evidence of current use of illegal drugs does not shield the physician from losing his license.[44]

When contemplating a disruptive physician action, the hospital should assess the possibility of a disability, whether in the context of recovery for substance abuse, or mental illness or physical malady which manifests itself as behavioral problems (e.g. diabetes). If a disability exists, a reasonable accommodation should be considered. If no reasonable accommodations are possible, then proceed with the disruptive physician action.

VIII. PROMULGATE YOUR RULES ACCORDING TO LAW

One common mistake made by hospitals throughout Wyoming is the failure to promulgate the rules according to the Wyoming Administrative Procedure Act. Wyoming Statute § 16-3-102 provides that no agency rule, order or decision is valid or effective against any person or party, nor may it be invoked by the agency

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[35] 42 U.S.C. § 12182 (1990).

[36] 42 U.S.C § 12181(7)(F) (1990).

[37] Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 122-23 (3rd Cir. 1998).

[38] *Id.*

[39] 42 U.S.C. § 12114(b) (1990).

[40] 42 U.S.C. § 12114(b)(1) (1990).

[41] Altman v. New York City Health & Hosp. Corp., 100 F.3d 1054 (2nd Cir. 1996).

[42] McDaniel v. Miss. Baptist Med. Ctr., 877 F. Supp 321, 327-28 (S.D. Miss. 1995).

[43] Colo. State Bd. of Med. Exam's v. Davis, 893 P.2d 1365, 1368 (Colo. Ct. App. 1995).

[44] *Id.*

for any purpose until it has been filed with the registrar of rules (the County Clerk in this instance) and made available for public inspection as required by the Act. Failure to comply with this section may have the effect of voiding the rules adopted by your hospital. It has been argued in the past, the acceptance of the bylaws on the medical staff application makes the rules a contract, and thus, the rules are still effective. However, filing the rules with the County Clerk is a quick and easy step to insure the rules are effective, and avoids a defense which may be raised by the affected practitioner.[45]

IX. BE PREPARED FOR THE LONG HAUL

Disruptive physician actions may have serious consequences to the physician who is the subject of the action. Affected practitioners can be obstinate and lacking in pleasant interpersonal skills. Such factors, coupled with the fact the practitioners are financially able to afford protracted litigation, means anyone embarking on a disruptive practitioner action should plan to be in litigation for the long haul. While disruptive practitioner proceedings are sometimes easily resolved, our suggestion is to plan on being in the matter for the distance, and adopt litigation strategies which reflect the commitment of your hospital to the proceedings. As a practical matter, the hospital should conduct a thorough investigation of the allegations. The investigation should be conducted by outside legal counsel, or an independent investigator hired by outside legal counsel. Witness statements should be prepared, and if possible, signed by the witnesses. Memories change over time, and a contemporaneous statement of the facts is invaluable in preserving the facts. Preparing for a lengthy process allows the hospital to gather the necessary witness information anticipate defenses, and close loopholes early in the process. This preparation usually results in a quicker and less expensive resolution, than in instances where the matter inefficiently proceeds with little attention to detail or documentation, and then slowly snowballs into major litigation. By preparing early, and isolating the relevant facts, the focus of the matter can be limited to the behavior in question. The way the matter proceeds from inception is within in the control of the hospital and the medical staff. The strategy of the hospital and of the medical staff should be established at the beginning, and then followed throughout the stages of the action.

Often, medical staffs proceed without the involvement of legal counsel. Many times, practitioners view legal counsel as antagonistic, especially the hospital's legal counsel. Often, the medical staff's mind set is to quickly assess the problem, prescribe a course of action, and solve the problem. The process is in many ways

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[45] *See* Smith v. Deaconess Hosp., 161 P.3d 314 (Okl. 2007) (holding bylaws are a contract), Richter v. Danbury Hosp., 759 A.2d 106 (Conn. 2003), (holding bylaws are a contract); *but see* Vesom v. Atchison Hosp. Ass'n, No. 04-2218, 2006 WL 2714265 (D. Kan. 2006) (holding bylaws are not a contract).

counter-intuitive to the scientific knowledge base of the practitioner. Disruptive physician proceedings often fall outside the physician's set of concrete experiences. Fuzzy testimony, stories that do not match, distorted perceptions, outright lying and deeply rooted personality issues do not lend themselves easily to the physician mind set paradigm. The temptation is to resolve the matter informally with a collegial chat. Sometimes those chats work. Many times, they do not. As a result, the hospital and the medical staff should engage legal counsel, at the beginning, to document the case, and prepare for litigation. In other words, the hospital should follow the rules. The medical staff is frequently sensitive to the perception the hospital administration or the hospital board is trying to usurp the physician's authority to regulate his or her own medical staff. One way to diffuse this perception is to suggest that counsel separate from the hospital's general counsel be retained to represent the hospital in the proceedings. However, remember the client is the hospital not the medical staff.

X. FOLLOW THE RULES

By now, the hospital has prepared its policies. It has engaged counsel and done a thorough investigation of the matter. Witness statements have been gathered, a strategy determined, and the hospital and medical staff are prepared to proceed with the disruptive physician disciplinary action. Carefully following the rules, as set forth in the hospital and medical staff bylaws and policies, HCQIA and Wyoming Statutes will allow the action to proceed without distraction. Varying from the rules in any way, will give the affected practitioner grounds to complain, or in the worst case scenario, grounds on which to sue the hospital. Think of procedural due process as a cook book recipe. Follow the instructions, step by step, one step at a time. If you do not, the end product will be distasteful.

The medical staff should document, early on, its grounds for taking the action. "Document" in this instance is defined as a thorough, comprehensive, written report that describes and evidences the process every step of the way. Items to be documented include:

1. Why the medical staff has a reasonable belief the action is in furtherance of quality health care.

2. The steps it took to gather the facts of the matter.

3. The methodology utilized by the medical staff to follow the bylaws and procedures and to provide a fair hearing to the affected practitioner.

4. The facts which lead to a reasonable belief the action is warranted under the circumstances.

Care should be taken in documenting these facts, because this documentation will serve as the basis for immunity from suit under Wyoming Law, and immunity from damages under HCQIA. The documentation serves two purposes. First, it forces the medical staff to clearly articulate its grounds for proceeding with the action. And second, it provides documentation later on of the rationale for proceeding.

Somewhere in the process, allegations will likely be made by the affected practitioner regarding improper motives, revenge, and the infamous "green eyed monster" which gave rise to the peer review action. The proper documentation of the reasons and the facts underlying the reasons are the best tool for combating the inevitable red herrings which will arise later in the process. In addition to complying with the rules and requirements contained in HCQIA, the hospital must also comply with the Wyoming Statutes governing contested cases contained in the Wyoming Administrative Procedure Act. First and foremost in those statutes is the requirement of an unbiased hearing panel. Wyoming Statute § 16-3-111 provides:

> Unless required for the disposition of ex parte matters authorized by law, members of the agency, employees presiding at a hearing in a contested case and employees assisting the foregoing persons in compiling, evaluating and analyzing the record in a contested case or in writing a decision in a contested case shall not directly or indirectly in connection with any issue in the case consult with any person other than an agency member, officer, contract consultant or employee or other state or federal employee, any party other than the agency or with any agency employee, contract consultant or other state or federal employee who was engaged in the investigation, preparation, presentation or prosecution of the case except upon notice and opportunity for all parties to participate. Nothing herein contained precludes any agency member from consulting with other members of the agency. No officer, employee, contract consultant, federal employee or agent who has participated in the investigation, preparation, presentation or prosecution of a contested case shall be in that or a factually related case participate or advise in the decision, recommended decision or agency review of the decision, or be consulted in connection therewith except as witness or counsel in public proceedings. A staff member is not disqualified from participating or advising in the decision, recommended decision or agency review because he has participated in the presentation of the case in the event the staff member does not assert or have an adversary position.[46]

[46] WYO. STAT. ANN. § 16-3-111 (2008).

Essentially, those persons who must make the ultimate decision in an administrative hearing cannot participate in the preparation, presentation or prosecution of the case. Consequently, the hospital's governing body may be informed generally about the existence of the matter and may make such necessary decisions like deciding to finance the matter, but should be insulated from the underlying facts of the case. Wyoming case law provides for *voir dire* of the panel for bias, and such insulation of the governing body allows it to be the ultimate decision maker, based upon the report of the arbitrator, hearing officer or hearing panel.[47] The process of the hearing should be governed by the rules we discussed earlier in this document. Insure the rules and statutory provisions are followed.

The Wyoming Supreme Court has set forth additional requirements regarding professional licensing hearings. In *Devous v. Board of Medical Examiners*, the Wyoming Supreme Court held that before a physician can lose his license to practice medicine, there must be adequate notice of the violations, and the licensing board's burden of proof is that of clear and convincing evidence.[48] In *Painter v. Abels,*[49] the Wyoming Supreme Court had the opportunity to extend the rules set forth in the *Devous* case. In *Painter*, the Wyoming Supreme Court held the physician must receive clear notice of the charges pending, be provided with adequate discovery, have a fair hearing panel, expert testimony supporting the positions of the Board of Medicine, and reiterated the burden of proof of clear and convincing evidence.[50] In *Dorr v. Board of Certified Public Accountants*[51] the Wyoming Supreme Court set forth the standards of appellate review in licensing hearings.[52] In that case, the courts would defer to the administrative agency's wisdom unless the decision was clearly erroneous, against the substantial weight of the evidence or an abuse of discretion.[53]

One final note about the hearing process: the proceedings are confidential. Failure to maintain that confidentiality gives rise to a cause of action for defamation or wrongful disclosure of confidential medical information. A hospital can carefully negotiate all of the requirements of due process, gain an order of discipline with the practitioner, and then compromise it all by failure to maintain confidentiality. Furthermore, failure to maintain confidentiality is an easy civil case to prove against the hospital.

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[47] Board of Trustees, Laramie Co. School District No. 1 v. Spiegel, 549 P.2d 1161, 1165 (Wyo. 1976).

[48] Devous v. Bd. of Med. Exam'rs, 845 P.2d 408, 415-16 (Wyo. 1999).

[49] Painter v. Abels, 998 P.2d 931 (Wyo. 2000). It is interesting to note that during the times these violations allegedly occurred, Dr. Devous was married to Dr. Painter.

[50] *Id.* at 937-39, 941.

[51] Dorr v. Bd. of Certified Pub. Accountants, 146 P.3d 943 (Wyo. 2006).

[52] *Id.* at 948-49.

[53] Id. at 949; *See also* Medcalf v. Coleman, 71 P.3d 53 (Okla. Civ. App. 2003) (holding the court would not substitute its judgment for the judgment of the hospital board).

XI. ANTICIPATE THE DEFENSES

Disruptive physician contested case matters follow a remarkably similar pattern. Not unlike the domestic abuse cycle, the pattern in disruptive physician matters is often recurrent. Anticipating and planning for the affected practitioner's responses are essential to successfully prosecuting disruptive practitioner proceedings. Nothing short of absolute commitment to the sanctity of the process, without pre-judgment, is essential. The practitioner's first response is often, this would not have happened except for the incompetence of those around me. The disruptive practitioner, in responding to the action, may attempt to turn himself into a whistle blower, and claim the action was in retaliation for the practitioner's whistle blowing activities. Wyoming has a whistle blower protection statute which applies specifically to those involved in health care which provides:

> Health care facilities subject to or licensed pursuant to this act shall not harass, threaten discipline or in any manner discriminate against any resident, patient or employee of any health care facility for reporting to the division a violation of any state or federal law or rule and regulation. Any employee found to have knowingly made a false report to the division shall be subject to disciplinary action by the employing health care facility, including but not limited to, dismissal.[54]

Care must be taken to insure the action against the affected practitioner is not taken in retaliation for whistle blowing activities. A strategy which may be used to address the whistle blower concerns are to separate those who were the subject of the original reporting, if any, from the disruptive physician action. Every effort should be made to maintain a fair, balanced and independent hearing panel.

Another response of the practitioner may be to allege improper motive. He or she may allege the action is motivated by political, economic, personality conflicts, incompetent accusers, or timing to interfere with business opportunities. Prior to bringing the action, the hospital should look for any underlying hidden motives of any of the accusers or victims. Those persons participating in the process, other than witnesses, who have some tangible interest which could possibly be distorted into an improper motive for the proceeding should be asked to excuse themselves from the process, if possible. Such preventative action is another anticipatory action which should be taken to keep the focus on the conduct of the affected practitioner.

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[54] WYO. STAT. ANN. § 35-2-910(b) (2008).

XII. GETTING SUED

The disruptive practitioner is in the proceedings because he or she cannot play well in the sandbox with others. If a disruptive practitioner action is brought, the hospital should plan on being counter-sued, both as a harassment tactic and as revenge. The lawsuits do not always happen; but they occur, or are threatened with such regularity that it should come as no surprise when the lawsuit comes. If you follow no other advice from this article, follow this point. Prior to undertaking a disruptive practitioner action, make sure your organization has directors and officers insurance which covers every person who participates in the process. The insurance will provide a defense, at minimum, and likely cover any claims if the action against the hospital is successful.

The most remarkable of the reported cases in this area of the law is *Poliner v. Texas Health Systems*,[55] in which a cardiologist was awarded a $366 million dollar verdict arising from the suspension of his cardiac cath lab privileges.[56] The case is a model of what not to do in peer review actions. The peer review committee did not document the evidence necessary for a suspension.[57] They proceeded with an emergency suspension without granting a hearing.[58] Later, one of the doctors testified he did not have enough information to assess whether Dr. Poliner posed a present danger to his patients.[59] Three out of four of the patients which formed the basis for the emergency suspension were treated months earlier, and thus those cases could not have posed an immediate danger.[60] The committee did not consider less severe options.[61] The committee was comprised of economic competitors of Dr. Poliner.[62] Dr. Poliner was told he could not consult an attorney prior to the committee taking action.[63] And finally, Dr. Poliner was not given an opportunity to offer any explanation in any of the cases.[64] Commentators have referred to this type of peer review as "sham" peer review, conducted for motives other than the quality of care, and thus the $366 million dollar verdict was justified.[65]

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[55] Poliner v. Texas Health Sys., No. Civ. A. 3:00-CV-1007-P, 2003 WL 22255677, at 3 (N.D. Tex. Sept. 30, 2003); *See also* Poliner v. Texas Health Sys., No. Civ. A. 3:00-CV-1007-P, Verdict & Settlement Summ., 2004 WL 2563600 (N.D. Tex. Aug. 27, 2004).

[56] *Poliner*, No. Civ. A. 3:00-CV-1077-P, at 3.

[57] *Id.* at 3.

[58] *Id.* at 3.

[59] *Id.* at 13.

[60] *Poliner*, No. Civ. A. 3:00-CV-1077-P, at 3.

[61] *Id.* at 3.

[62] *Id.* at 3.

[63] *Id.* at 3.

[64] *Id.* at 3.

[65] *Poliner*, No. Civ. A. 3:00-CV-1077-P, at 3.

However, for every *Poliner* case, there are cases which end up summarily dismissed.[66] The bottom line is an action is likely to bring a reaction. If the hospital has followed the procedural steps, and conducted the disruptive physician action in good faith, most likely the lawsuit will be dismissed, and HCQIA and state law immunities will be enforced. If the action is motivated by improper or ulterior motives the likelihood of exposure for damages is greatly enhanced.

XIII. STRATEGIES FOR SUCCESS

The following strategies for success are offered as a result of our experiences in dealing with disruptive physicians. The list is not all inclusive, but will give some guidelines to avoid common pitfalls.

1. "Due diligence" is not just a catch phrase. Do the hard work in advance or as the wise, greasy mechanic once opined, "You can pay me now, or you can pay me later."

2. Put your house in order. Make sure your policies comply with both state and federal laws. Record your policies with the county clerk.

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[66] *See* for example Vranos v. Franklin Med. Ctr., 862 N.E.2d 11 (Mass. 2007), (A suit for defamation was dismissed because a peer review committee shared its disruptive doctor findings that Dr. Vranos used intimidating, abusive and hostile behavior, and exhibited threatening behavior toward another physician with the Board of Medicine.); Curtsinger v. HCA, 2007 WL 124294 (Tenn. Ct. App. 2007) (A suit for breach of contract, interference with prospective economic advantages, interference with right to practice medicine, civil conspiracy, antitrust, conspiracy to restrain trade, wrongful reporting of confidential information, bad faith and libel were all dismissed for failure of the physician to prove a violation of HCQIA standards.); Bryan v. James E. Holmes Regl. Med. Ctr., 333 F.3d 1318 (11th Cir. 1994) (holding that granting immunity when physician's privileges were revoked for inappropriate and unprofessional behavior stemming from his "being a volcanic-tempered perfectionist," a difficult man with whom to work, and a person who regularly viewed it as his obligation to criticize staff members at [the Hospital] for perceived incompetence or inefficiency, some of which occurred in front of patients about to undergo surgery); Morgan v. PeaceHealth, Inc., 14 P.3d 773 (Wash. Ct. App. 2000) (upholding immunity when the physician's privileges were suspended for sexual harassment and inappropriate behavior with patients); Meyers v. Columbia/HCA Healthcare Corp., 341 F.3d 461 (6th Cir, 2003) (upholding immunity when physician's reappointment was denied because of failure to timely disclose disciplinary actions in another state, personality problems and various incidents of disruptive behavior); Joseph v. Univ. of Texas, 2005 WL 3591018 (S.D. Tex. 2005) (holding the disciplinary action was not based on the physician's race); Catipay v. Humility of Mary Health Partners, 2006 WL 847235 (Ohio App. 2006). A physician was suspended for disruptive behavior for posting the Kama Sutra Indian Sex Guide on the hospital bulletin board; and posted an article titled "Police say man kills wife at work" in the labor and delivery unit with his hand written comments stating "This happens when wives talk too much. They never learn, they never stop, Why?"; and for sending naked pictures of men's buttocks to the nurse's station with his name or the name of an actor written on each man's buttocks; and posting an article entitled "Cohabitation, Contraception and Sperm Exposure" on a bulletin board with a bulleted item referring to oral sex, discussing with nurses why men enjoy performing oral sex on woman and other specific sexual references, was not terminated in violation of HCQIA standards. *Id.*

3. Document informal disciplinary conversations. Seemingly insignificant discussions now, may later become critical evidence.

4. Triage your actions. Know you are going to be in the matter for the long haul. After you make the decision and decide to go forward, stick to your guns.

5. Deal with the physician where they live. Take a scientific approach. Identify the behaviors that are unacceptable and communicate them to the physician. Disruptive professionals rarely seek independent help. Following aggressive intervention and assessment, the majority develop at least positive insight.[67] Prior to confrontation, determine in advance acceptable outcomes. Consider what treatment or therapy is available in lieu of assessment. Send the message that disruptive conduct will not be tolerated and follow through on that message.

6. Prepare your case in detail, early on. Make sure to document witness interviews. Take statements and prepare to go the distance. Engage the services of experts, early. Use their insight to guide you in the case.

7. Involve legal counsel early. Early involvement of experienced legal counsel can assist in avoiding the legal pitfalls. Additionally, the interviews and facts gathered in preparation for the action may be protected as both work product and privileged communications.

8. Thoroughly prepare your case prior to filing the action. Make sure your evidence is documented. Be able to clearly articulate the behaviors which are inappropriate and the actions the hospital chooses to take. Avoid changing your position on the issues mid-stream.

9. Once you have developed your case, disclose the complaints, the evidence and the proposed course of action to the affected practitioner. Don't hide anything. Hiding evidence, even evidence counter to your case, may constitute a denial of due process.

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[67] Irons M.D., R, *The Behaviorally Disruptive Physician*, http://prckansas.org/articles/Behaviorally_Disruptive_Physician.htm (last visited March 28, 2008).

10. Hire a hearing officer who is experienced and well versed with health care law. An adept hearing officer can be a line of defense for the healthcare entity in insuring due process rights are protected and avoiding a later law suit for denial of due process under 42 U.S.C. §1983.[68]

11. Don't be intimidated, and protect your employees from intimidation. Don't let the practitioner bully your staff and other physicians into submission on the disruptive behavior action. Anticipate such intimidation will occur, and take measures to protect your people from intimidation. If the intimidation occurs, document it, and report it to the hearing officer, and ask for a protective order against the affected practitioner.

12. Don't tolerate disruptive behavior. A lack of institutional response can compromise staff morale, retention and affect patient care.[69]

13. Encourage the practitioner to submit to an assessment. Use a sophisticated forensic psychiatrist experienced in disruptive physician behavior. Don't let the practitioner be the sole source of information to the assessing psychiatrist. If the practitioner is the sole source of information, the assessing psychiatrist will not have the opportunity to see the full facts. Provide the assessing psychiatrist with a statement of the charges and evidence against the affected physician. Give the forensic psychiatrist the information needed to make a full and fair diagnosis.

14. Keep a firm hand in the administrative process, but work toward an amicable solution. Determine a solution. The best way to obtain a negotiated solution is to work from a position of strength in the administrative proceeding. Plan to go the distance, and prepare for going the distance, but keep options open with a problem solving result in mind.

15. If an agreed solution cannot be reached, don't cut corners. Prepare the case thoroughly. Try the case. Allow the process to work.

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[68] *See* 42 U.S.C.A. § 1983 (2008).

[69] D. Meyer and M. Price, *Forensic Psychiatric Assessments of Behaviorally Disruptive Physicians,* Journal of American Academy of Psychiatry and the Law, 34:72–81, 2006.

16. Follow the rules. Don't give the affected practitioner technicalities upon which to avoid consequences by making mistakes. Provide procedural due process. Provide substantive due process.

17. Insure your hearing panel and your governing body are unbiased.

18. Keep everyone's mouth shut. Medical staff proceedings are confidential. Don't give an affected practitioner a cause of action against the medical staff and the hospital for wrongful disclosure of confidential medical information. Don't give the affected practitioner a tool with which to continue to be disruptive to your day to day operations.

19. Don't allow the disruptive practitioner process to be used for hidden agendas. Focus only on disruptive practitioner behavior.

XIV. CONCLUSION

By the time the medical staff, or the administration, or the governing body finally begins to consider corrective action with a disruptive physician, the emotions have usually become inseparable from the process. Breathe. Place the responsibility in the hands of a professional who is trained to focus on the delicate balance between the competing interests of the health care entity, the practitioner, and the health care community. Remember, there is nothing less at risk, than the economic life of a professional, and the physical lives of people who need care.

CASE NOTE

CRIMINAL LAW—Determining the Suppressibility of a Defendant's Fingerprints Following an Unlawful Arrest; *United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006).

*Zane Gilmer**

Introduction

Following up on a tip from an informant, United States Border Patrol Agents, Luis Armendariz and Mark Marshall, went to a New Mexico trailer park on February 2, 2004.[1] The agents saw a truck pulling out of a driveway, and they blocked the truck from leaving.[2] Agent Armendariz instantly recognized the passenger of the vehicle as an illegal alien he had previously arrested for being in the United States illegally.[3] The agents questioned the two people in the truck about their citizenship status without *Miranda* warnings.[4] The defendant admitted to being an illegal alien and the agents took him to the border-patrol station where they fingerprinted him and asked about his biographical information.[5] The defendant's fingerprints led the agents to the defendant's immigration record (A-file), indicating the defendant's deportation history.[6] Finally, Agent Armendariz read the defendant his *Miranda* warnings.[7]

A grand jury indicted the defendant on March 4, 2004, for his presence in the United States after deportation.[8] Due to the defendant's previous felony conviction, prosecutors charged him with a separate violation, making him eligible for a maximum prison sentence of twenty years.[9] The defendant filed a motion to suppress any physical evidence and statements obtained as a result of his unlawful seizure and interrogation.[10] The defendant claimed the interrogation

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* University of Wyoming College of Law J.D. Candidate, 2009.

[1] U.S. v. Olivares-Rangel, 458 F.3d 1104, 1106 (10th Cir. 2006).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Olivares-Rangel*, 458 F.3d at 1106.

[7] *Id.*

[8] *Id.* at 106-07. The grand jury indicted the defendant according to 8 U.S.C. § 1326(a) (2000). *Id.*

[9] *Olivares-Rangel*, 458 F.3d at 1107. The federal statute prohibiting immigrants from being in the United States following deportation is 8 U.S.C. § 1326(b). Reentry of Removed Aliens, 8 U.S.C. § 1326(a) (2000).

[10] *Olivares-Rangel*, 458 F.3d at 1107.

and detention violated his Fourth Amendment right of unreasonable seizure and Fifth Amendment right against self incrimination.[11] The United States District Court for the District of New Mexico granted the motion to suppress, concluding that the defendant's stop and arrest violated his Fourth Amendment rights.[12] Furthermore, the court found the defendant's fingerprints and statements were the "fruit of the poisonous tree" and required suppression.[13] The court also rejected the government's argument that the defendant's identity or body is never suppressible as fruit of an unlawful arrest based on *INS v. Lopez-Mendoza*.[14] The court rejected this argument stating the Supreme Court in *Lopez-Mendoza* only addressed jurisdictional challenges under the Fourth Amendment and not evidentiary challenges as existed in this case.[15] As a result, that case did not prohibit this court from suppressing illegally obtained evidence.[16] The government appealed the suppression of evidence.[17] The issue on appeal for the Tenth Circuit Court of Appeals became whether a defendant's identity, specifically fingerprints, are suppressible following an unlawful arrest.[18] The court held a defendant's fingerprints obtained in certain unconstitutional manners are suppressible.[19]

The *Rangel* court correctly interpreted leading case law in the area of the suppressibility of a defendant's identity in order to make its decision. This case note will analyze the leading cases regarding the suppressibility of a defendant's identity.[20] More specifically, this case note will explore the circuit court split regarding the suppressibility of a defendant's identity.[21] Finally, this case note will focus on the Tenth Circuit Court's analysis of case law and doctrines relating to the suppressibility of a defendant's identity, specifically a defendant's fingerprints, in *United States v. Olivares-Rangel*.[22]

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1108; INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[15] *Olivares-Rangel*, 458 F.3d at 1108.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 1112-16.

[20] *See infra* notes 74-133 and accompanying text.

[21] *See infra* notes 36-40 and accompanying text.

[22] *See infra* notes 69-133 and accompanying text.

BACKGROUND

INS v. Lopez-Mendoza: *The Precedent is Set for Misunderstanding*

There is a long line of cases dealing with the admissibility and suppressibility of a defendant's identity.[23] These cases form the necessary framework to fully understand the law's current state and to understand how the court in *United States v. Olivares-Rangel* came to its conclusion.[24] These cases will be further discussed in the sections that follow; however, it is important to initially discuss *INS v. Lopez-Mendoza* since this case note continuously refers to this case.[25]

The U.S. Supreme Court in *INS v. Lopez-Mendoza* reasoned a defendant's body or identity is never suppressible in a criminal or civil proceeding, even following an unlawful search or seizure.[26] Furthermore, the Court noted , at his deportation hearing, Lopez-Mendoza objected only to being summoned to the hearing, not to the evidence introduced against him.[27]

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[23] *See*, *e.g.,* Davis v. Mississippi, 394 U.S. 721 (1969) (holding a detention for the sole purpose of obtaining a suspect's fingerprints is unlawful); U.S. v. Crews, 445 U.S. 463 (1980) (holding a witness's in-court identification of the defendant is not suppressible as a fruit of an unlawful arrest when the witness was discovered prior to any unlawful police misconduct); INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding the body or identity of a defendant is never suppressible as a fruit of an unlawful arrest in the context of a defendant's challenge to their presence in court. Furthermore, the Court refused to extend the exclusionary rule to civil deportation hearings); U.S. v. Guzman-Bruno, 27 F.3d 420, 421 (9th Cir. 1994) (holding no remedy exists for a defendant when an illegal arrest leads to the defendant's identity, which in turn leads to other incriminating evidence. The court relied on *Lopez-Mendoza's* holding that the body or identity of a defendant is never a suppressible fruit of an unlawful arrest).

[24] *See Olivares-Rangel*, 458 F.3d at 1109-10; s*ee infra* notes 74-133 and accompanying text.

[25] *See infra* notes 76-133 and accompanying text.

[26] *Lopez-Mendoza*, 468 U.S. at 1038 ("the body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."). Although the Court in *Lopez-Mendoza* stated the defendant's body or identity is never suppressible in a criminal or civil proceeding, as explained in the analysis section of this note, the proposition is not as absolute as it appears. *See infra* notes 74-97 and accompanying text. *Lopez-Mendoza* addressed two separate issues regarding two defendants. *See Lopez-Mendoza*, 468 U.S. at 1034. First, Immigration and Naturalization Service (INS) agents arrested Adan Lopez-Mendoza for being in the country illegally. *Id.* at 1040. The evidence that Lopez-Mendoza did not object to included an affidavit he signed after being arrested, admitting being in the country illegally. *Id*. At his deportation hearing, Lopez-Mendoza objected to being summoned to the deportation hearing following an unlawful arrest, but did not object to any evidence entered against him. *Id*. The immigration judge found that, contrary to Lopez-Mendoza's argument, any supposed illegal arrest of Lopez-Mendoza was irrelevant to the deportation hearing and therefore found Lopez-Mendoza deportable. *Id*. at 1035-36.

[27] *Lopez-Mendoza*, 468 U.S. at 1040.

The Court also addressed the arrest of Elias Sandoval-Sanchez in *Lopez-Mendoza*.[28] Sandoval-Sanchez argued that officers arrested him unlawfully and evidence offered against him to prove his unlawful presence in the country was suppressible as fruit of that unlawful arrest.[29]

In evaluating the case on appeal, the Supreme Court compared Sandoval-Sanchez's situation to Lopez-Mendoza's and recognized them as distinguishable.[30] The Court found Sandoval-Sanchez's claim for suppression of evidence more persuasive because, unlike Lopez-Mendoza, Sandoval-Sanchez objected to the evidence being presented against him at the deportation hearing rather than simply objecting to his presence at the hearing.[31] The Court then identified the general rule in criminal proceedings: evidence obtained due to an unlawful arrest is suppressible.[32] The Court then recognized, however, that the exclusionary rule's use beyond criminal proceedings is less clear.[33]

In an attempt to define the exclusionary rule's applicability beyond criminal proceedings, the Court evaluated and balanced the costs and benefits of applying the doctrine to civil proceedings such as civil deportation hearings.[34] Determining that the exclusionary rule does not apply to civil deportation hearings, the Supreme Court held the arrest did not violate Sandoval-Sanchez's Fourth Amendment rights and his statements were admissible.[35]

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[28] *Id.* at 1040-41. Officers arrested Sandoval-Sanchez independently of Lopez-Mendoza. *Id.* at 1034. INS agents arrested Sandoval-Sanchez at his work for being in the country illegally. *Id.* at 1036. INS agents questioned Sandoval-Sanchez following his arrest and recorded him admitting to being in the country illegally. *Id.* at 1037.

[29] *Id.* at 1037. An immigration judge rejected this claim, finding the legality of his arrest irrelevant to the proceedings. *Id.* at 1037-38. The judge found Sandoval-Sanchez deportable based in part on his admission. *Id.* On appeal, the Ninth Circuit found the arrest violated Sandoval-Sanchez's Fourth Amendment rights and held his statements inadmissible and ultimately reversed his deportation order. *Id.* at 1038.

[30] *Id.* at 1040.

[31] *Lopez-Mendoza*, 468 U.S. at 1040.

[32] *Id.* at 1040-41. The Court made this statement in reference to the applicability of the exclusionary rule being unclear in non-criminal cases such as various civil proceedings like deportation hearings. *Id.*

[33] *Id.* at 1041.

[34] *Id.* at 1042-50. The Court relied on *United States v. Janis*, 428 U.S. 433 (1976), which set forth elements for deciding in which type of judicial proceedings the exclusionary rule should apply. *Lopez-Mendoza*, 468 U.S. at 1042-50. Based on application of these elements, the Court decided the circumstances and complications of civil deportation proceedings prevented the exclusionary rule's application in such cases. *Id.* at 1050.

[35] *Lopez-Mendoza,* 468 U.S. at 1051.

Circuit Courts Split Over the Admissibility of Identifying Evidence

In interpreting Lopez-Mendoza, some courts, including the Ninth Circuit in *United States v. Guzman-Bruno*, have held the exclusionary remedy is not available when a defendant's illegal arrest leads to the defendant's identity, which lead in turn to the discovery of an official file or other evidence.[36] Other courts, including the Eighth Circuit in *United States v. Guevara-Martinez*, have held that the availability of the exclusionary remedy will depend on the purpose for which the identification procedure is performed.[37] If, for example, fingerprinting

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[36] U.S. v. Guzman-Bruno, 27 F.3d 420, 421 (9th Cir. 1994). INS officers detained Guzman-Bruno for suspicion of being in the country illegally and Guzman-Bruno admitted to this suspicion and to a prior drug conviction. *Id.* Following this admission, the government indicted Guzman-Bruno under federal statutes for being in the country illegally after deportation and having a prior felony conviction. *Id.* Guzman-Bruno moved to have all of the evidence resulting from his arrest suppressed, arguing the unlawfulness of the initial detention. *Id.* The District Court for the Central District of California suppressed all evidence resulting from Guzman-Bruno's arrest but refused to suppress his admission of his name to officers. *Id.* The Ninth Circuit acknowledged and relied on Lopez-Mendoza, and found the defendant's body or identity is never suppressible as a fruit of an illegal arrest. *Guzman-Bruno*, 27 F.3d. at 422.

In 2001, the Ninth Circuit decided *U.S. v. Parga-Rosas*, 238 F.3d 1209 (9th Cir. 2001). The court refused to exclude from evidence the defendant's fingerprints taken following an illegal arrest. *Id.* It determined the State took the fingerprints from the defendant to prove the defendant's identity and not for investigatory purposes. *Id.* at 1215. Therefore, the fingerprints were not suppressible. *Id.*

[37] U.S. v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001). During a traffic stop, officers placed Martin Guevara-Martinez under arrest after officers found methamphetamine in his car. *Id.* at 753. Following the arrest, Guevara-Martinez gave officers a false name, but admitted to being in the country illegally. *Id.* Also following the arrest, officers fingerprinted Guevara-Martinez which revealed his true identity and discovery of an INS file showing a previous deportation. *Id.* The Eighth Circuit held that without evidence showing officials took the defendant's fingerprints during a routine booking process, and not for obtaining evidence for an INS proceeding against Guevara-Martinez, the district court properly suppressed the evidence. *Id.* at 753. Other cases support the proposition if fingerprints are taken during the routine booking process, then those fingerprints are admissible against the defendant for an unrelated charge or prosecution for another crime. *See* People v. McInnis, 6 Cal.3d 821 (Cal. 1972); Paulson v. State, 257 So.2d 303(Fla. Dist. Ct. App. 1972). In *Guevara-Martinez*, the court was referencing the fact the government failed to show that the initial fingerprints were taken as part of the routine booking process for the possession of methamphetamine charge. *Guevara-Martinez*, 262 F.3d at 755-56. If that was the case, then the court is insinuating those fingerprints might be admissible against Guevara-Martinez in prosecuting him for being in the country illegally since that was a separate charge. *Id*. Nevertheless, because the government failed to show the fingerprints were taken during the routine booking process, the court does not further address this issue or speculate on any potential outcome. *Id*. at 756.

The Eighth Circuit made this decision after determining that *Davis* and *Hays* controlled, rather than Lopez-Mendoza. *Id.* at 753. The Eighth Circuit reasoned that *Lopez-Mendoza* did not control in this case because it does not stand for the proposition that a suspect's identity or body can never be a fruit of an unlawful detention or arrest, but that *Lopez-Mendoza* actually strictly addressed only jurisdictional issues. *Id*. Supporting its position, the court explained that the *Lopez-Mendoza* Court, when dealing with the issue relating to Sandoval-Sanchez, did not distinguish between identity related evidence and other types of suppressible evidence following an unlawful arrest. *Guevara-Martinez,* 262 F.3d at 753. The court reasoned that if the *Lopez-Mendoza* Court meant identity

occurs as part of the routine booking process, then the exclusionary rule will not be available.[38] But if fingerprinting is consciously undertaken for the purpose of obtaining evidence for us, say, in INS proceeding, then the defendant will be entitled to suppression of any evidence derived from the fingerprinting.[39]

Several years following the Eighth Circuit's decision in *Guevara Martinez*, the Tenth Circuit faced a similar issue regarding the suppressibility of a defendant's fingerprints, in *United States v. Olivares-Rangel*.[40]

PRINCIPAL CASE

Following a tip, Border Patrol Agents arrested Gustavo Olivares-Rangel for being in the country illegally.[41] Fingerprints taken from Rangel led the agents to Rangel's immigration file (A-file), proving that Rangel was in the country following a previous deportation.[42] The United States District Court for the District of New Mexico granted Olivares-Rangel's motion to suppress various pieces of evidence including his fingerprints and A-file based on his unlawful arrest.[43]

The issue on appeal for the United States Court of Appeals for the Tenth Circuit turned on whether evidence of a defendant's identity, including fingerprints,

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related evidence is never suppressible in a criminal proceeding, then it would have said that when dealing with the evidentiary challenge from Sandoval-Sanchez. *Id.* at 754. Instead, the Court made the statement that the body or identity is never suppressible when discussing the jurisdictional issue with the *Lopez-Mendoza* matter. *Id.* Additionally, the *Lopez-Mendoza* Court never mentioned possible exceptions to the exclusionary rule. *Id.* at 1040-41. The Court only said the exclusionary rule still applies to the criminal process, but its application is less clear beyond that. *Id.* Since the *Lopez-Mendoza* Court made that statement in reference to the jurisdictional issue regarding Lopez-Mendoza, and not in reference to Sandoval-Sanchez's evidentiary issue, the Court did not intend the holding to mean identity related evidence can never be suppressed. *Guevara-Martinez,* 262 F.3d at 754. Furthermore, the Eighth Circuit reasoned that because *Lopez-Mendoza* never mentioned *Davis* or *Hayes*, *Lopez-Mendoza* did not overrule those cases. *Id.* Therefore, the Eighth Circuit had an obligation to follow those earlier cases. *Id.* The court rejected the government's contention that *Davis* and *Hayes* do not apply because Guevara-Martinez was not arrested for the sole purpose of collecting his fingerprints. *Id.* at 755. The court, however, reasoned the exclusionary rule is applicable whenever the government obtains evidence due to exploiting the primary illegality, regardless of whether the detention was for the sole purpose of collecting the fingerprints. *Id.* The court found the government neglected to offer evidence showing the government obtained the fingerprints during the routine booking process instead for purposes to pursue INS proceedings against Guevara-Martinez. *Guevara-Martinez,* 262 F.3d at 755. Given the circumstances of how the government obtained the evidence, the court ordered the suppression of the evidence. *Id.*

[38] *See* U.S. v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001).

[39] *See id.*

[40] U.S. v. Olivares-Rangel, 458 F.3d 1104 (10th Cir. 2006).

[41] *Id.* at 1106.

[42] *Id.*

[43] *Id.* at 1107-08.

statements, and A-file, are suppressible as the fruit of an unlawful arrest.[44] The Court of Appeals also addressed the government's argument that *Lopez-Mendoza* held that a suspect's identity or body is never suppressible.[45] The appeals court rejected the government's blanket claim, and interpreted *Lopez-Mendoza* to mean that a suspect's identity is not suppressible when a suspect argues the court lacks jurisdiction due to an unlawful arrest.[46] The court stated, however, that *Lopez-Mendoza* did not pertain to evidentiary issues relating to a defendant's identity following an illegal arrest or detention.[47] For evidentiary issues, the court should use the traditional Fourth Amendment exclusionary rule to determine if evidence relating to a defendant's identity is suppressible.[48]

In evaluating the admissibility of the defendant's fingerprints, the court recognized the government's argument on appeal did not go beyond the *Lopez-Mendoza* argument that the identity or body of the defendant is never suppressible.[49] The court, however, already rejected such a blanket claim.[50] In the alternative, the government claimed that even if *Lopez-Mendoza* did not preclude the suppression of the defendant's fingerprints, then traditional principles of the exclusionary rule preclude their suppression.[51] The government based this contention on the theory that this case is distinguishable from *Davis* and *Hayes*.[52]

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[44] *Id*. at 1108. *Rangel's* dissent reasoned the majority needlessly engaged in the debate regarding whether evidence relating to a defendant's identity is suppressible as a fruit of an unlawful arrest. *Olivares-Rangel*, 458 F.3d at 1121-22 (Baldock, J., dissenting). The dissent contended that engaging in this debate was unnecessary because the agents lawfully arrested the defendant. *Id.* at 1122 (Baldock, J., dissenting). Specifically, the dissent argued that reasonable suspicion existed for the agents to initially stop Rangel's truck and subsequently, sufficient probable cause existed for the INS agents to lawfully arrest Rangel. *Id.* at 1122-23 (Baldock, J., dissenting). Therefore, the agents lawfully arrested Rangel so any evidence derived from the arrest, including Rangel's fingerprints and A-file, were admissible. *Id.* (Baldock, J., dissenting). In response to these arguments, the majority justified its decision to not address these issues claiming that the state failed to raise the issue of lawful arrest on appeal and therefore conceded that the agents unlawfully arrested Rangel. *Id.* at 1107. Therefore, the majority stated the only issue as whether a defendant's identity is suppressible following an unlawful arrest. *Olivares-Rangel*, 458 F.3d at 1108.

[45] *Id.* at 1109-10.

[46] *Id*.

[47] *Id*. at 1112.

[48] *Id*.

[49] *Olivares-Rangel,* 458 F.3d at 1112.

[50] *Id*.

[51] *Id.* at 1112. The government argued the fingerprints were admissible since the government did not seize them for the purpose of linking Olivares-Rangel to a crime. Brief for Petitioners at 10, U.S. v. Olivares-Rangel, 458 F.3d 1104 (2006) (No. 04-2194), 2004 WL 5536709.

[52] *Olivares-Rangel,* 458 F.3d at 1112. *Davis v. Mississippi* held that the Fourth Amendment applies to investigatory stages and, therefore, a detention for the sole purpose of obtaining a suspect's fingerprints is unlawful. Davis v. Mississippi, 394 U.S. 721, 725-29 (1969). *Hayes v. Florida*, reaffirmed a similar proposition. Hayes v. Florida, 470 U.S. 811, 816 (1985).

The government claimed this case is distinguishable because in both *Davis* and *Hayes*, the defendant's fingerprints were taken in an attempt to link the defendant to a crime, but here the agents did not take the fingerprints with the purpose of linking Olivares-Rangel to a crime.[53] The court neither directly accepted nor rejected this argument, but rather analyzed the holdings in *Davis* and *Hayes* in conjunction with *Lopez-Mendoza*.[54]

In its analysis, the appeals court distinguished between fingerprints obtained as a result of an unconstitutional investigation, which are suppressible, and fingerprints obtained as part of a routine booking procedure, which are not suppressible.[55] Fingerprints obtained through routine booking procedures, even if obtained following an unlawful arrest, are not suppressible.[56] This is based on the importance of identifying suspects the government has in custody.[57] Conversely, if an illegal arrest or detention occurs for the purpose of obtaining a person's fingerprints for investigatory reasons, the fingerprints are then fruits of the poisonous tree and suppressible.[58] In determining the government's purpose behind a suspect's arrest and fingerprinting, the court stated it must evaluate the government's intent.[59] The court determined the record was unclear as to the government's intent when it fingerprinted the defendant.[60] Therefore, the court remanded the case to determine the government's purpose in fingerprinting the defendant.[61]

Admissibility of INS File

The court of appeals then addressed the admissibility of the defendant's A-file.[62] Specifically, the court discussed the government's contention that the A-file is not suppressible since the government did not discover it solely because of the defendant's illegal detention.[63] The government contended the A-file was

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[53] Brief for Petitioners at 10, U.S. v. Olivares-Rangel, 458 F.3d 1104 (2006) (No. 04-2194), 2004 WL 5536709.

[54] *See Olivares-Rangel*, 458 F.3d at 1112-16. Ultimately the court remanded the case in order to determine the purpose for which the government seized Olivares-Rangel's fingerprints. *Id.* at 1113.

[55] *Id.*

[56] *Id.* at 1112-13.

[57] *Id.*

[58] *Id.* at 1114.

[59] *Olivares Rangel*, 458 F.3d at 1116.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1117.

not suppressible because the contents of the file were compiled independently from the defendant's illegal seizure.[64] The appeals court determined the A-file's admissibility rests only on whether the defendant's fingerprints were suppressible.[65] The court determined if the fingerprints were suppressible, so too is the A-file.[66] The fingerprints ultimately led to the A-file's discovery, regardless of whether the government compiled the file prior to, or independently of, the illegal seizure.[67] Thus, the court also remanded this issue for reconsideration in conjunction with the issue of the fingerprints' admissibility.[68] Analysis of this case requires a look at the other circuit court decisions addressing the suppressibility of a defendant's identity and fingerprints.

ANALYSIS

The circuit court split has caused confusion concerning the issue of the admissibility or suppressibility of a defendant's fingerprints following an unlawful arrest.[69] Nevertheless, the Tenth Circuit's holding in *Olivares-Rangel* illustrates the correct approach to analyzing this issue because the holding appropriately characterizes *Lopez-Mendoza* as only applying to civil cases and jurisdictional issues.[70] Several things will be discussed and analyzed in this analysis to support this argument. First, the authority the Court in *Lopez-Mendoza* cited for its proposition that the body or identity of the defendant is never suppressible fruit dealt with jurisdictional challenges, not evidentiary challenges.[71] Second, the attenuation doctrine supports the *Olivares-Rangel* holding.[72] Finally, as *Olivares-Rangel* points out, case law supports distinguishing between the purpose in which the government obtains a defendant's fingerprints for the purposes of applying the exclusionary rule.[73]

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[64] *Olivares-Rangel*, 458 F.3d. at 1117.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1119.

[69] *See Olivares-Rangel*, 458 F.3d at 1110.

[70] *Id.* at 1112; *see generally* David R. Miller and James M. Beach, *Employer Options Under The OSHA Inspection Warrant Procedure: A Rock and a Hard Place*, 20 SETON HALL L. REV. 804, n.54 (1990) (explaining the holding in *Lopez-Mendoza* as standing for the proposition that the exclusionary rule does not extend to civil deportation hearings); Michelle D. Grady, *Fourth Amendment-Evidence Unconstitutionally Seized From a Parolee's Residence is Admissible at the Parolee's Revocation Hearing Because Parole Boards are not Required by Federal Law to Exclude Evidence Obtained in Violation of the Fourth Amendment*-Pennsylvania Board of Probation and Parole v. Scott, *118 S. Ct. 2014 (1998)*, 10 SETON HALL CONST. L.J. 215, 228-31 (1999) (explaining the *Lopez-Mendoza* Court refused to apply the exclusionary rule in this case, in part, because of the high social costs of applying the rule to civil deportation hearings).

[71] INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984); *see infra* notes 74-97 and accompanying text.

[72] *See infra* notes 98-133 and accompanying text.

[73] *See infra* notes 111-133 and accompanying text.

I. Lopez-Mendoza *as a Jurisdictional, Not an Evidentiary Holding*

As the *Rangel* court correctly explained, *Lopez-Mendoza* does not stand for the broad proposition that a defendant's identity is never suppressible as fruit of an unlawful arrest in the context of evidentiary challenges.[74] In fact, the statement in *Lopez-Mendoza* that the body or identity of a defendant is never a suppressible fruit of an unlawful arrest does not even apply to evidentiary issues, but rather jurisdictional-based issues.[75] The Court made this statement in reference to Lopez-Mendoza's objection that the deportation court lacked jurisdiction over him because of the unlawful arrest.[76] *Lopez-Mendoza* cites as authority both *Frisbie v. Collins* and *Gerstein v. Pugh* as holding the defendant's body or identity is never suppressible as fruit, in discussing Lopez-Mendoza's jurisdictional objection.[77] Both of these cases deal with jurisdictional challenges, not evidentiary challenges.[78]

A. The True Meaning of Frisbie v. Collins *and* Gerstein v. Pugh

Citing *Frisbie* and *Gerstein*, *Lopez-Mendoza* stated, "The body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."[79] In *Frisbie*, a defendant challenged his conviction claiming Michigan officers forcibly seized him while living in Chicago and brought him to Michigan to stand trial for murder.[80] The Court asserted the government satisfied Frisbie's due process rights because he received notice of the charges against him, stood trial for those charges, and was then convicted following a fair trial.[81] Furthermore, the Court stated the Constitution can not

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[74] *Olivares-Rangel,* 458 F.3d at 1112 (explaining the language in *Lopez-Mendoza* stating that a defendant's identity or body is never a suppressible fruit refers only to jurisdictional challenges); U.S. v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001) (concluding *Lopez-Mendoza* has no bearing on the suppression of illegally obtained identity related evidence in a criminal proceeding).

[75] *Olivares-Rangel*, 458 F.3d at 1112; *Guevara-Martinez*, 262 F.3d at 754; *see infra* notes 74-97 and accompanying text (explaining how *Lopez-Mendoza* only applies to jurisdictional and not evidentiary challenges because the Court made the statement in reference to Lopez-Mendoza's jurisdictional challenge and not Sandoval-Sanchez's evidentiary challenge).

[76] *Lopez-Mendoza*, 468 U.S. at 1040.

[77] *Id.* at 1039; Frisbie v. Collins, 343 U.S. 519 (1952); Gerstein v. Pugh, 420 U.S. 103 (1975).

[78] *Lopez-Mendoza*, 468 U.S. at 1039; *Frisbie*, 343 U.S. at 519; *Gerstein*, 420 U.S. at 103; Abraham Abramovsky, *Transfer of Penal Sanctions Treaties: An Endangered Species,?* 24 VAND. J. TRANSNAT'L L. 449, n.86 and accompanying text (1991) (explaining *Frisbie* is part of the *Ker-Frisbie* doctrine which stands for the proposition that an unlawful arrest can not impair the ability of a court's jurisdiction over the defendant and further that this proposition has been subsequently upheld in *Gerstein*).

[79] *Lopez-Mendoza*, 468 U.S. at 1039-40.

[80] *Frisbie*, 342 U.S. at 520.

[81] *Id.* at 522.

possibly require a guilty person, who was correctly convicted, to escape justice simply because he stood trial against his will.[82] *Frisbie* does not stand for the proposition that a person's identity is never suppressible as fruit of an unlawful arrest.[83] Rather, the issue there was jurisdictional.[84] This decision stands for the idea that a defendant's conviction is not reversible simply because of an unlawful arrest.[85]

Similarly, the second case the *Lopez-Mendoza* Court cited for its proposition, *Gerstein*, did not concern evidentiary issues when discussing the admissibility of a defendant's identity.[86] Rather, *Gerstein's* issue concerned whether officials can arrest a defendant and force him to face charges for a crime with only a prosecutor's information, and with no subsequent probable cause hearing in front of a judicial officer.[87] The *Lopez-Mendoza* Court cited *Frisbie,* stating that an illegal arrest or detention will not void a subsequent conviction.[88] It did so, however, in the context of explaining that a suspect who is in custody may request a probable cause hearing to determine the lawfulness of his detention, but failure to provide a probable

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[82] *Id.*

[83] U.S. v. Olivares-Rangel, 458 F.3d 1104, 1111 (10th Cir. 2006) (explaining *Frisbie* deals with the jurisdiction over a person and not with a defendant's challenges to his illegally obtained identity); U.S. v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001) (stating the Court in *Frisbie* held the power of the court to hear a case is not destroyed simply because the government brought the defendant within the court's jurisdiction against his will); *See* Ashley Wright Baker, *Forcible Transborder Abduction: Defensive Versus Offensive Remedies For Alvares-Machain*, 48 ST. LOUIS U. L.J. 1373, 1394-95 (2004) (explaining the exclusionary rule did not apply in *Frisbie* because there was no evidence to be suppressed since the objection was to the jurisdiction of the court over the defendant).

[84] *Olivares-Rangel*, 458 F.3d at 1111 (explaining *Frisbie* dealt with the jurisdiction over a person and not with a defendant's challenges to his illegally obtained identity); *Guevara-Martinez*, 262 F.3d at 754; s*ee* Baker, s*upra* note 83, at 1394-95 (explaining *Frisbie* combined with *Ker v. Illinois*, 119 U.S. 436 (1886) make up the *Ker-Frisbie* doctrine which is often cited to uphold jurisdiction over a defendant; moreover, the *Ker-Frisbie* doctrine stands for the proposition that a court maintains criminal jurisdiction over a defendant, regardless of the illegal method used to provide the court in personam jurisdiction over the defendant).

[85] *Olivares-Rangel*, 458 F.3d at 1111 (explaining a defendant can be brought before a court and stand trial even though the government unlawfully arrested him); *Guevara-Martinez*, 262 F.3d at 754 (stating *Gerstein v. Pugh* later affirmed the *Frisbie* holding when *Gerstein* held an illegal arrest does not void a subsequent prosecution and conviction).

[86] Gerstein v. Pugh, 420 U.S. 103, 111 (1975) (stating the issue on appeal as whether a defendant arrested and held on a prosecutor's information is entitled to a judicial determination of probable cause); *see* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, n.320 (2000) (citing *Gerstein* for the proposition that an illegal arrest does not void a subsequent prosecution and conviction).

[87] *Gerstein,* 420 U.S. at 111; *see* Brady, *supra* note 86, at n.320 and accompanying text (citing *Gerstein* for the proposition that an illegal arrest does not void a subsequent prosecution and conviction).

[88] *Gerstein,* 420 U.S. at 119.

cause hearing will not result in a defendant's conviction being overturned.[89] Like *Frisbie*, *Gerstein* did not address any admissibility of evidence issues regarding a defendant's identity.[90] Rather, *Gerstein* simply addressed jurisdictional issues.[91]

B. The Misunderstood Identity of Lopez-Mendoza

The second reason supporting the proposition that *Lopez-Mendoza* stands for jurisdictional and not evidentiary challenges is the fact that *Lopez-Mendoza* itself was addressing a challenge to jurisdiction and not evidence.[92] When the *Lopez-Mendoza* Court stated a defendant's identity is never suppressible, it did so not in addressing the evidentiary challenges made by Sandoval-Sanchez, but rather was made in reference to Lopez-Mendoza's jurisdictional challenge.[93] Sandoval-Sanchez objected to the use of the evidence the INS agents seized, arguing the agents unlawfully arrested him so any evidence obtained as a result cannot be used against him.[94] Conversely, Lopez-Mendoza challenged the court summoning him to a deportation hearing following an unlawful arrest.[95] It was in reference to this jurisdictional challenge the Court stated a defendant is never himself suppressible as a fruit of an unlawful arrest.[96] Therefore, the Court did not anticipate the statement of a defendant's body or identity never being a suppressible fruit to apply beyond the jurisdictional context in which it used it.[97]

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[89] *Id.*

[90] *Id.*; *see* Brady, *supra* note 86, at nn. 67 & 320.

[91] U.S. v. Olivares-Rangel, 458 F.3d 1104, 1111 (10th Cir. 2006); U.S. v. Guevara-Martinez, 262 F.3d 751, 754 (8th Cir. 2001); *see* Brady, *supra* note 86, at nn. 67 & 320.

[92] *See Olivares-Rangel*, 458 F.3d at 1111 ("Lopez argued only that the immigration court lacked personal jurisdiction over him due to the illegal arrest" and "did not challenge the admissibility of his statements to officers disclosing his identity").

[93] INS v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) (stating the body or identity of a defendant is never suppressible as a fruit of an unlawful arrest and on that basis alone the issue relating to *Lopez-Mendoza* is decided). The Court went on to decide the evidentiary issue regarding Sandoval-Sanchez and without discussing the admissibility of a defendant's identity, determined that Sandoval-Sanchez cannot object to the evidence offered against him because the Court determined the exclusionary rule should not apply to civil deportation hearings. *Id.* at 1040-47; Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 548-50 (1991) (explaining Lopez-Mendoza objected to the deportation proceeding against him, not to the actual evidence being entered against him; whereas, Sandoval-Sanchez objected to the actual evidence offered by the INS agents).

[94] *Lopez-Mendoza*, 468 U.S. at 1037-38.

[95] *Id.* at 1040.

[96] *Id.* at 1039-40.

[97] *Id.*

II. How Attenuation Plays a Role

The general rule of admissibility of evidence seized as a result of an unlawful arrest is the court should suppress it.[98] However, it is not enough for the discovery of the evidence to simply follow an unlawful arrest; the important issue is whether the unlawful arrest was a but-for cause of the discovery of the evidence.[99] In other words, it is not sufficient the government's discovery of the evidence follow the unlawful conduct, but rather, the question is but-for the unlawful conduct of the government, would the government have discovered the evidence?[100] For instance, there are times when a court will still hold evidence admissible even though the police discovered the evidence as a result of an unlawful arrest.[101] An example of this is when the court determines attenuation exists.[102]

Attenuation exists "when the casual connection between the illegal government conduct and the discovery of evidence is so 'remote as to dissipate' the taint from the illegal conduct."[103] Three factors the Supreme Court uses in

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[98] *See, e.g.,* Illinois v. Krull, 480 U.S. 340, 347 (1987); *see* David R. Childress, Maryland v. Garrison*: Extending the Good Faith Exception to Warrantless Searches*, 40 BAYLOR L. REV. 151, 151 (1988) (explaining evidence should generally be excluded from defendant's trial when the government unconstitutionally seizes it).

[99] *See* J. Spencer Clark, Hudson v. Michigan: *"Knock and Announce"—An Outdated Rule?*, 21 BYU J. PUB. L. 433, 438-39 (2007) (explaining but-for causation as a necessary, but not a sufficient condition for suppressibility of evidence that is seized following unlawful conduct by the government).

[100] *See id.* (stating but-for causation is a necessary condition for suppression of evidence).

[101] *See* Wong Sun v. U.S., 371 U.S. 471, 487-88 (1963) (holding evidence seized resulting from unlawful conduct is inadmissible except when it is sufficiently attenuated from the taint of the unlawful conduct); U.S. v. Crews, 445 U.S. 463, 474 (1980) (holding photographs the police took of the defendant following the unlawful arrest were suppressible, but the in court testimony of the victim was not since the victim's recollection of the defendant was attenuated from the unlawful arrest and was thus untainted by the unlawful arrest); *see* Hudson v. Michigan, 547 U.S. 586, 592 (2006) (refusing to suppress evidence seized following a search of a home simply because the officers failed to knock prior to entry, stating that even though the entry was a but-for cause of the discovery of the evidence, the police would have executed the warrant properly and found the same evidence); Joe Rivera, *When is Good Faith Good Enough? The History, Use, And Future of Texas Code of Criminal Procedure Article 38.23(B)*, 59 BAYLOR L. REV. 919, 948 (2007); The Georgetown University Law Center, *Warrantless Searches and Seizures*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 38, 89-90 (2007) (explaining evidence discovered following an unlawful search may be admissible if subsequent consent given by the defendant was sufficient to attenuate the discovery of the evidence from the unlawful search).

[102] *See* David Carn, *Hey Officer, Didn't Someone Teach you to Knock? The Supreme Court Says No Exclusion of Evidence For Knock-and-Announce Violations in* Hudson v. Michigan, 58 MERCER L. REV. 779, 785 (2007) (stating evidence the government illegally obtained may be admissible if attenuation occurs, that is, when the causal connection between the illegal government act and the discovery of the evidence "is so remote to dissipate the taint from the illegal conduct"). Two other exceptions to the exclusionary rule exist, which are inevitable discovery and independent source. *Id.* at n.56.

[103] *Id.* at 785.

evaluating whether the causal chain has been sufficiently attenuated are the time between the government's illegal conduct and the discovery of the evidence, whether intervening circumstances exist, and the purpose and flagrancy of the government's illegal conduct.[104] Since the exclusionary rule's sole purpose is to deter future police misconduct, the focus behind the principle of attenuation is to determine the point at which the diminishing returns of the deterrent principle no longer outweigh the social costs of exclusion.[105]

United States v. Crews demonstrates an application of this rule and why the Court in *Crew* allowed a robbery victim to provide in court testimony identifying the defendant as the person who robbed her, even though the police unlawfully arrested him.[106] The Supreme Court held a defendant is never himself suppressible as fruit of the poisonous tree.[107] The defendant moved to have all identifying evidence of him suppressed including line-up photographs and in-court identifications made by witnesses.[108] The Court reasoned suppressing the victim's in-court testimony would not serve the purpose of deterring future police misconduct.[109] Evidence suppression would not deter future misconduct in this case because a victim's memory of a suspect is too attenuated from the misconduct of the police.[110]

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[104] Brown v. Illinois, 422 U.S. 590, 603-04 (1975); Jack A. Levy, *The Exclusionary Rule*, 85 GEO. L.J. 969, 976-77 (1997).

[105] See Wayne R. LaFave, Search and Seizure § 11.4(a), at 235 (3d ed. 1996); E. Martin Estrada, *A Toothless Tiger in the Constitutional Jungle: The "Knock and Announce Rule" and the Sacred Castle Door*, 16 U. FLA. J.L. & PUB. POL'Y 77, n.62 and accompanying text (2005) (explaining that application of the cost-benefit analysis of the attenuation principle may result in the admissibility of unlawfully seized evidence if excluding the evidence would provide little or no benefit in the form of deterrence, but would result in large societal costs of allowing a crime to go unpunished); *See* Estrada, *supra* note 105, at 90; Jennifer Yackley, Hudson v. Michigan*: Has the Court Turned the Exclusionary Rule into the Exclusionary Exception?*, 30 HAMLINE L. REV. 409, 429 (2007) (stating when "there is no appreciable deterrent effect, the Court does not consider the exclusionary rule an appropriate remedy").

[106] *Crews*, 445 U.S. at 463-66 (holding photographs the police took of the defendant following the unlawful arrest were suppressible, but the in court testimony of the victim was not since the victim's recollection of the defendant was attenuated from the unlawful arrest and was thus untainted by the unlawful arrest).

[107] *Id.* at 474. The defendant wanted to suppress not only any photographs used to identify him as the perpetrator, but he also wanted to suppress the use of any in court identifications of him by witnesses. *Id.* at 467-68. The Court held that the government can not be completely deprived of the opportunity to prove a suspect's guilt through untainted evidence from the illegal activity. *Id.* at 474. Thus, in-court identifications are not suppressible as "fruits of the poisonous tree" because they were not directly tainted by any unlawful police conduct. *Id.*

[108] *Crews,* 445 U.S. at 474.

[109] *See id. at* 463-64; Estrada, *supra* note 105, at n.62 and accompanying text.

[110] *Crews,* 445 U.S. at 463-64; *see also* U.S. v. Ceccolini, 435 U.S. 268, 277-80 (1978) (admitting a witness's testimony even though officials discovered the witness' identity due to the unlawful arrest). The court held the witness' testimony was admissible because it was sufficiently attenuated from the taint of the unlawful arrest in part because of the likelihood the witness, through free will, would have came forward on her own and therefore been discovered through lawful means. *Id.*

III. Distinguishing How the Government Obtains Fingerprints

Further distinguishing but-for causation from the discovery of the evidence simply following the unlawful arrest, is the way in which the government obtained the evidence. For example, the *Rangel* court correctly distinguished between fingerprints taken as part of the routine booking process and fingerprints taken solely for investigatory purposes.[111] The Supreme Court first recognized this distinction in *Davis v. Mississippi*.[112] In *Davis*, the Court held the Fourth Amendment applies to the investigatory stages of the criminal process.[113] Therefore, a detention for the sole purpose of obtaining a suspect's fingerprints is unlawful.[114] Although the Court determined the police acted unlawfully, it conceded the possibility that some fingerprints obtained without probable cause may comply with the Fourth Amendment.[115] The Court, however, neglected to elaborate on what kind of situation this may be as that narrow question was not before them.[116] In applying the exclusionary rule, the Court suppressed the unlawfully seized fingerprints and overturned Davis' conviction.[117]

Various courts have also recognized the inherent differences between the booking process and other interactions with suspects that imply a more investigatory aspect.[118] Courts make this distinction because the function of the

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[111] *Olivares-Rangel,* 458 F.3d at 1112-13; *see* Davis v. Mississippi, 394 U.S. 721, 727 (1969); Hayes v. Florida, 470 U.S. 811, 816 (1985); Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (defining interrogation as including either "express questioning or its functional equivalent," including, "words or actions on the part of the police . . . which the police should know are reasonably likely to elicit an incriminating response from the suspect").

[112] *Davis*, 394 U.S. 721. In *Davis*, the police rounded up and detained dozens of black youths, without probable cause, and took them to the police station for the sole purpose of obtaining their fingerprints to link them to a rape. *Id*. at 722.

[113] *Id*.

[114] *Id*. The U.S. Supreme Court affirmed a similar proposition in *Hayes v. Florida*, 470 U.S. 811 (1985). In *Hayes*, a rape investigation focused on the petitioner as the primary suspect. *Hayes,* 470 U.S. at 811. The police went to the petitioner's home to obtain his fingerprints and the petitioner hesitated to comply with the officer's request. *Id*. The officers told him they would arrest him if he refused to accompany them to the police station for fingerprinting. *Id*. The petitioner finally submitted to the request because he said he would rather go to the police station under his own volition, rather than be arrested. *Id*. The Court held that forcing a defendant to the police station for investigatory fingerprinting, without probable cause, violates the Constitution. *Id*. at 816. The Court did leave open the possibility of briefly detaining a suspect in "the field," as part of a *Terry* stop, in order to fingerprint the suspect for identification purposes when reasonable suspicion exists, but not probable cause. *Hayes,* 470 U.S. at 816.

[115] *Davis*, 394 U.S. at 727.

[116] *Id.*

[117] *See id*. at 727-28.

[118] *See* Pennsylvania v. Muniz, 496 U.S. 582, 601-02 (1990) (holding answers given during the routine booking process for administrative purposes are admissible); U.S. v. Salgado, 292 F.3d 1169,1171 (9th Cir. 2002) (holding the defendant freely provided information about his place of

booking process is not investigatory by nature.[119] In fact, the government cannot ask questions designed to incriminate the defendant, during this process.[120] Evidence obtained during the booking process is admissible as evidence against the defendant even if the evidence incriminates the defendant.[121] However, the government cannot turn the booking process into an investigatory tool.[122] The booking process has a long history of being afforded less protection than other criminal processes.[123] Because of this, evidence collected through the routine booking process lacks the same evidentiary protection that evidence would receive if discovered in an investigatory manner.[124]

Rangel correctly recognized not all identifying evidence is admissible following an unlawful arrest.[125] The court determined the traditional exclusionary rule announced in *Wong Sun* still applies to evidence, including identifying evidence, if the evidence results from exploiting the original unlawful conduct.[126] As the *Rangel* court recognized, any evidence, if obtained in a manner for investigatory purposes by exploiting the illegal arrest, is suppressible even if the government

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birth and citizenship as part of the routine booking process and officials sought the information as nothing more than for routine booking information, not incriminating information); U.S. v. Parra, 2 F.3d 1058, 1068 (10th Cir. 1993) (holding INS agent's questioning of defendant about his true name during the booking process in order to link him to his incriminating immigration file constituted unlawful interrogation so the evidence provided by the defendant about his identity should have been suppressed).

[119] *Muniz*, 496 U.S. at 602.

[120] *Id*.

[121] *Id*. at 601-02 (explaining that although some evidence obtained by the government during a routine booking process may incriminate the suspect, that evidence is admissible against the suspect since obtaining biographical information is necessary for the booking process).

[122] *Id.*

[123] *See* U.S. v. Olivares-Rangel, 458 F.3d 1104, 1113-14 (10th Cir. 2006); Meghan S. Skelton and James G. Connell, III, *The Routine Booking Question Exception To* Miranda, 34 U. BALT. L. REV. 55, 60-62 (2004) (explaining a suspect's admissions made during the routine booking process are an exception to *Miranda* warnings because the routine booking process is not an interrogation and officers are not attempting to elicit incriminating information from suspects through the questions the officers ask); James C. Harrington, *Civil Rights*, 26 TEX. TECH. L. REV. 447, 493 (1995) (stating the police are allowed to ask suspects routine questions during the booking process without violating the suspects Fifth Amendment right of self incrimination).

[124] *See, e.g., Muniz*, 496 U.S. at 601-02.

[125] *Olivares-Rangel*, 458 F.3d at 1114; *see* Davis v. Mississippi, 394 U.S. 721, 727 (1969); Hayes v. Florida, 470 U.S. 811, 816 (1985); Roberto Iraola, *DNA Dragnets-A Constitutional Catch?*, 54 DRAKE L. REV. 15, 33-35 (2005) (discussing the rule announced in *Davis* that unlawful arrests for the sole purpose of collecting a defendant's fingerprints makes the fingerprints a fruit of the unlawful arrest and therefore suppressible); *see supra* notes 98-133 and accompanying text.

[126] *Olivares-Rangel* 458 F.3d at 1115-16.

did not intend the arrest to procure the evidence.[127] Evidence obtained as a result of exploiting an illegal arrest, warrants suppression if the conduct's purpose was investigatory rather than administrative in nature, such as the routine booking process.[128]

Therefore, applying the principle of attenuation to *Rangel* helps explain the distinction based on the purpose whether the exclusionary rule should be applied in order to suppress the fingerprints and A-file.[129] Suppressing *Rangel*'s fingerprints and A-file would have a deterrent effect if the government's purpose for obtaining Rangel's fingerprints was to obtain evidence against Rangel since the agents could foresee that the action of collecting the fingerprints is easily traced to the unlawful arrest.[130] Suppressing the fingerprints in that instance would deter the government from randomly rounding up suspects, without probable cause, in order to collect their fingerprints and use them as evidence.[131] However, if the government's purpose in collecting Rangel's fingerprints was not to uncover evidence to use against him, but rather, was for the routine booking process, then there is no deterrent value in suppressing the evidence since the agents may not

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[127] *Id.*

[128] *Id.*; *see supra* notes 98-105 and accompanying text (explaining how attenuation play role in determining among other things, the foreseeability on the part of the officer as to whether the evidence is related to the unlawful conduct for purposes of deterrence).

[129] *See supra* notes 98-105 and accompanying text (explaining why attenuation is important and how to apply it).

[130] *See generally* Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (discussing the importance of evaluating the government's purpose of the misconduct that produced the evidence in evaluating whether the evidence is sufficiently attenuated from the unlawful conduct to render it admissible); U.S. v. Recalde, 761 F.2d 1448, 1458-59 (10th Cir. 1985) (holding evidence of automobile search tainted where the purpose of the officer's illegal seizure was designed to uncover evidence). As the *Rangel* Court recognized in remanding the case back to the district court, the imperative question in determining whether Rangel's fingerprints and A-file are suppressible turns on the purpose behind the government's seizure of the Rangel's fingerprints. *See supra* notes 98-105 and accompanying text (explaining how attenuation play role in determining among other things, the foreseeability on the part of the officer as to whether the evidence is related to the unlawful conduct for purposes of deterrence); WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 511 (Thomson/West 2004) (stating when an officer can reasonably foresee the challenged evidence as a product of his illegal conduct then there is a deterrent value and applying the exclusionary rule makes sense).

[131] *See generally* Sarah Hughes Newman, *Proving Probable Cause: Allocating the Burden of Proof in False Arrest Claims Under § 1983*, 73 U. CHI. L. REV. 347, 372 (2006) (explaining the exclusionary rule does not deter police from arresting people without probable cause because the exclusionary rule only applies to the exclusion of evidence seized; however, the rule does act as a deterrent against police unlawfully arresting people in order to use evidence subsequently seized against them, since the rule does apply to evidence); LaFave, Israel & King, *supra* note 130, at 511 (stating when an officer can reasonably foresee the challenged evidence as a product of his illegal conduct then there is a deterrent value and applying the exclusionary rule makes sense).

foresee the evidence as a product of their unlawful arrest.[132] Even though the original arrest may still be unlawful, in this instance, the court should not suppress the evidence since little, if any, deterrent value exists in suppressing it.[133]

CONCLUSION

The *Rangel* court correctly held Rangel's fingerprints and A-file are suppressible, if the district court determines upon remand that the government obtained the evidence through an investigatory procedure rather than because of a routine booking process.[134] Since *Davis*, the U.S. Supreme Court has held the Fourth Amendment prohibits detentions for the sole purpose of collecting a suspect's fingerprints.[135] Furthermore, courts of varying jurisdictions have dealt with the admissibility of fingerprints including *Lopez-Mendoza*.[136] Thus, the task that courts have faced following *Davis* has been to determine when and how the exclusionary rule actually applies to evidence of a suspect's identity.[137] Although some confusion exists among the varying circuit courts as to the applicability of *Lopez-Mendoza*, the *Rangel* court correctly interpreted that opinion, holding that *Lopez-Mendoza* applies only to jurisdictional challenges and not to evidentiary

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[132] *See* LaFave, Israel & King, *supra* note 130, at 511 (stating when an officer can reasonably foresee the challenged evidence as a product of his illegal conduct then there is a deterrent value and applying the exclusionary rule makes sense).

[133] *See generally* Eric Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U.L. REV. 113, 167 (2008) (stating a court's focus in determining whether evidence is sufficiently causally related to the government's unlawful conduct to warrant suppression should focus on "'the extent to which the basic purpose of the exclusionary rule'-the deterrence of police misconduct- will be advanced by its application in any particular case." *Id.* (quoting United States v. Ceccolini, 435 U.S. 268, 276 (1968)).

[134] U.S. v. Olivares-Rangel, 458 F.3d 1104, 1116-17 (10th Cir. 2006).

[135] Davis v. Mississippi, 394 U.S. 721, 727 (1969).

[136] *See, e.g.,* U.S. v. Guzman-Bruno, 27 F.3d 420 (9th Cir. 1994) (relying on *Lopez-Mendoza*, holding a defendant's identity or body is never suppressible even following an unlawful arrest); U.S. v. Guevara-Martinez, 262 F.3d 751 (8th Cir. 2001) (holding *Lopez-Mendoza* does not stand for the broad proposition that a defendant's identity is never suppressible); *Olivares-Rangel*, 458 F.3d 1104 (holding *Lopez-Mendoza* does not stand for the broad proposition that a defendant's identity is never suppressible).

[137] *See, e.g., Guzman-Bruno*, 27 F.3d 420 (holding that a body or identity is never suppressible so the exclusionary rule does not apply to evidence of a defendant's identity); *Guevara-Martinez*, 262 F.3d 751 (holding *Lopez-Mendoza* does not stand for the broad proposition that a defendant's body or identity is never suppressible and therefore there are situations where the exclusionary rule may act to suppress evidence of a defendant's fingerprints); *Olivares-Rangel*, 458 F.3d 1104 (holding *Lopez-Mendoza* does not stand for the broad proposition that a defendant's body or identity is never suppressible and therefore there are situations where the exclusionary rule may act to suppress evidence of a defendant's fingerprints).

challenges.[138] Furthermore, the court correctly characterized the issue regarding fingerprint admissibility based on the doctrine of attenuation and the purpose for which the government obtain them.[139]

[138] *Olivares-Rangel*, 458 F.3d at 1112; *supra* notes 74-97 and accompanying text.

[139] *Supra* notes 98-133 and accompanying text.

CASE NOTE

TORTS—Damage Control? Unraveling the New Due Process Standard Prohibiting the Use of Nonparty Harm to Calculate Punitive Damages, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

*Maren P. Schroeder**

Introduction

Jesse Williams, a long-time smoker, preferred Marlboro cigarettes, manufactured by Philip Morris.[1] Upon his death, caused by smoking, his widow brought a lawsuit against Philip Morris for negligence and deceit.[2] At trial, the jury found her husband smoked, in part, because Philip Morris knowingly and falsely led him to believe smoking was safe.[3] The jury also found both Williams and Philip Morris equally negligent, and further determined Philip Morris engaged in deceit.[4] The jury awarded $821,000 in compensatory damages and $79.5 million in punitive damages for the deceit claim.[5] The trial judge found the punitive damages award excessive and reduced the award to $32 million.[6]

Both Philip Morris and Williams appealed the district court's ruling.[7] Upon appeal, the Oregon Court of Appeals restored the $79.5 million jury award.[8] The Oregon Supreme Court then denied review.[9] Following this denial, Philip Morris appealed to the United States Supreme Court.[10] The Supreme Court granted

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* Candidate for J.D., University of Wyoming, 2009. I want to recognize the following people who made this note possible. First, I would like to thank Professor John M. Burman for his guidance and insight. Additionally, I would like to thank the members of the Wyoming Law Review editorial board for their time and encouragement. Any errors belong solely to me. I further express my gratitude to Edward T. Schroeder for his always timely and ever sage advice. I also thank Turner W. Branch for giving me such a wonderful introduction to the field. Finally, I want thank my family, including my parents Greg and Mary Ann Foster for their support and encouragement. And I dedicate this case note to my husband, Derek, thank you for your valuable insight and patience. Thank you all, I am forever in your debt.

[1] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060-61 (2007).

[2] *Id.* at 1060.

[3] *Id.* at 1061.

[4] *Id.*; Williams v. Philip Morris, 48 P.3d 824, 828 (Or. Ct. App. 2002). The jury found Williams fifty percent negligent, and therefore, did not award punitive damages on the negligence claim. *Id.*

[5] *Philip Morris*, 127 S. Ct. at 1061. The jury awarded compensatory damages of $21,000 for economic harm and $800,000 for noneconomic harm. *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Philip Morris*, 127 S. Ct. at 1061.

certiorari, vacated the judgment, and remanded the case back to the Oregon Court of Appeals.[11] Upon remand, the Oregon Court of Appeals refused to reduce the award.[12] Philip Morris, once again, appealed to the Oregon Supreme Court.[13]

The Oregon Supreme Court granted review and rejected Philip Morris's argument that the Constitution prohibits punishing a defendant with punitive damages based on nonparty harm.[14] The court, considering Philip Morris's reprehensible conduct, did not find the award grossly excessive.[15] Following this ruling, Philip Morris, once again, sought certiorari in the United States Supreme Court claiming Oregon courts violated the Constitution by allowing punishment for harm suffered by nonparty victims.[16] The United States Supreme Court granted certiorari to decide "whether the Constitution's Due Process Clause permits a jury to base [an] award in part upon its desire to punish the defendant for harming person's who are not before the court (e.g., victims whom the parties do not represent)."[17]

In a five-to-four decision, the United States Supreme Court held the Constitution's Due Process Clause prohibits a jury from using an award to punish the defendant for harming persons not before the court.[18] According to the Court, using an award to punish a defendant for such harm constitutes a taking of "property" without due process of law.[19]

This case note provides a case-law background regarding punitive damages, which provides a framework for understanding the Court's reasoning and the multiple *Philip Morris* dissents.[20] The note argues the Court draws a confusing line between using nonparty harm to make reprehensibility determinations and to punish defendants directly.[21] Despite this confusing new standard, this case

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[11] *Id.*; Philip Morris USA Inc. v. Williams, 540 U.S. 801 (2003) (remanding in light of *State Farm Mutual Automobile Insurance, Co. v. Campbell*); *see* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding there is no mathematical formula for punitive awards, but few awards with larger than a single-digit ratio between the compensatory and punitive awards will satisfy due process).

[12] *Philip Morris*, 127 S. Ct. at 1061.

[13] *Id.*

[14] *Id.* at 1061-62; Williams v. Philip Morris, Inc., 127 P.3d 1165, 1175 (Or. 2006).

[15] *Philip Morris*, 127 S. Ct. at 1062; *Williams*, 127 P.3d at 1181-82 (stating Philip Morris continually schemed to defrauded the smoking public, concealing known health risks of smoking, which ultimately killed a number of smokers in Oregon).

[16] *Philip Morris*, 127 S. Ct. at 1062.

[17] *Id.* at 1060.

[18] *Id.* at 1060, 1062.

[19] *Id.* at 1062.

[20] *See infra* notes 23-115 and accompanying text.

[21] *See infra* notes 119-149 and accompanying text.

note guides both courts and practitioners in avoiding Due Process Clause violations in punitive damages cases.[22]

BACKGROUND

"Punitive damages have long been a part of traditional state tort law."[23] They serve the purposes of retribution and deterrence.[24] Punitive damages are generally awarded for a defendant's outrageous conduct, based on the defendant's evil motive or reckless indifference.[25] In this case note, nonparty harm refers to harm suffered by strangers to the litigation.[26] The following United States Supreme Court, federal, and Wyoming cases detail the long tradition of punitive damages.

Early case law indicates the foundation of punitive damages in the common law. In 1851 the United States Supreme Court observed that punitive damages were well-established in the common law.[27] The *Day v. Woodworth, et al.* Court stated a jury should measure punitive damages in relation to the magnitude of the offense, rather than in compensation to the plaintiff.[28] The Court found the "malice, wantonness, oppression or outrage of the defendant's conduct" necessary for punitive damages.[29] It also described the punitive damage award as a punishment, which is made payable to the plaintiff.[30] The Supreme Court and most states consider the doctrine of punitive damages settled law.[31]

The Court Rejects Use of Mathematic Formula

More recently, the Court addressed whether punitive damages calculation requires the use of a mathematical formula.[32] In *Pacific Mutual Life Insurance Co.*

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[22] *See infra* notes 150-168 and accompanying text.

[23] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984).

[24] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

[25] *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (1979).

[26] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007).

[27] Day v. Woodworth et al., 54 U.S. (13 How.) 363, 371 (1851) (noting "repeated judicial decisions for more than a century" are evidence of well-established nature of exemplary or punitive damages). *Day* involved a claim of a downstream milldam owner whose dam had been taken down by an upstream mill owner. *Id.* at 363-64.

[28] *Id.* at 371.

[29] *Id.*

[30] *Id.*

[31] Smith v. Wade, 461 U.S. 30, 35 (1983).

[32] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991). *Haslip* involved a fraud claim against an insurer and agent for the misappropriation of health insurance premium payments, which resulted in a canceled policy without notice to four insureds. *Id.* at 4-5, 18.

v. Haslip the Court declined to institute a mathematical line separating acceptable and unacceptable punitive damage awards, under the Due Process Clause.[33] The Court stated the Constitution requires inquiry into the reasonableness and adequacy of jury guidance.[34] The Court conceded, however, that unlimited jury discretion in awarding punitive damages leads to extreme and unconstitutional results.[35]

Ultimately, the Court concluded the lower court's criteria for determining punitive damage awards were reasonably related to the State's deterrence and retribution goals, and sufficiently constrained the trial court's damage award.[36] The seven criteria used to assess the excessiveness or inadequate nature of an award included 1) whether a reasonable relationship exists between the punitive damages award and actual harm or potential harm resulting from the defendant's conduct, 2) the reprehensibility and length of the defendant's conduct, the defendant's knowledge, any concealment, and the *existence and frequency of similar past conduct*, 3) the defendant's profitability resulting from his conduct, and whether profit should be removed to give the defendant a loss, 4) the defendant's wealth, 5) all costs of litigation, 6) mitigation by any criminal sanctions imposed, and 7) mitigation by other civil awards against the defendant for the same conduct.[37] Ultimately, the Court upheld a punitive damages award more than four times the compensatory damage amount, and two-hundred times more than the plaintiff's out-of-pocket expenses.[38]

Two years later in *TXO Production Corp. v. Alliance Resources Corp.*, the Court again declined to use a mathematical formula to uphold a large punitive damages award despite small compensatory damages.[39] In refusing to issue a mathematical test, the Court stated: "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim . . . as well as the possible harm to other victims that might have resulted if similar

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[33] *Id.* at 18.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 21-22.

[37] *Haslip*, 499 U.S. at 21-22 (citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)) (emphasis added). *But see* State Farm Mut. Auto. Ins. Co. v. Campbell 538 U.S. 408, 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of *other parties' hypothetical* claims against a defendant under the guise of the reprehensibility analysis.") (emphasis added).

[38] *Haslip*, 499 U.S. at 24. The jury rendered a general verdict in favor of Haslip in the amount of $1,040,000—it is believed that $200,000 of the award was compensatory (including $4,000 of plaintiff's out of pocket expenses), and that at least $840,000 was punitive. *Id.* at 6 n.2.

[39] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 446-47 (1993) (concerning slander of title of oil and gas rights). In this case, a jury awarded $19,000 in compensatory damages and $10 million in punitive damages. *Id.* at 451.

future behavior was not deterred."[40] The Court did not find the dramatic difference between the compensatory damages and punitive damages controlling.[41] Instead, the Court considered the potential amount of money involved, the defendant's bad faith, the defendant's greater pattern of fraud, and the defendant's wealth.[42] The Court concluded the factor of "alleged wrongdoing in other parts of the country" was an appropriate factor in determining punitive damages.[43]

Judicial Review Required by the Due Process Clause

After rejecting a bright line rule for calculating punitive damages in relation to compensatory damages, the Court specifically held the absence of judicial review of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment.[44] The Court noted judicial review has historically safeguarded against excessive punitive damage awards.[45] The Court held punishment, with exemplary damages, is an act of state power that must comply with the Fourteenth Amendment Due Process Clause.[46]

Notice Requirements Satisfying the Due Process Clause

The Court next required a defendant be given notice of the conduct that will lead to punitive damages and the potential severity of the award.[47] In *BMW of North America, Inc. v. Gore*, Gore unknowingly purchased a repainted car, after the vehicle sustained damage prior to its delivery to the dealership.[48] The jury awarded $4,000 in compensatory damages and $4 million in punitive damages at trial.[49] The Alabama Supreme Court reduced the award to $2 million, after

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[40] *Id.* at 460.

[41] *Id.* at 462.

[42] *Id.*

[43] *Id.* at 462 n.28.

[44] Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994). The Oregon Constitutional amendment prohibited judicial review of a punitive damages award, unless no evidence existed to support the verdict. *Id.* at 418; OR. CONST. ART. VII, § 3. In *Oberg*, a product liability case, the plaintiff suffered permanent injuries when he overturned an all-terrain vehicle manufactured and sold by Honda Motor Co.. *Oberg*, 512 U.S. at 418. The Court held the Oregon Constitutional amendment denying judicial review violated the Fourteenth Amendment Due Process Clause, and arbitrarily deprived the defendant of its property without due process of law. *Id.* at 430, 432, 435. The Court reversed and remanded the case. *Id.* at 435.

[45] *Oberg*, 512 U.S. at 421 (stating judicial review of punitive damage awards has been a "safeguard against excessive verdicts as long as punitive damages have been awarded").

[46] *Id.* at 434-35.

[47] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).

[48] *Id.* at 563.

[49] *Id.* at 565.

determining the jury inappropriately multiplied the compensatory award by the number of similar sales outside of the state.[50]

In *Gore*, the Court noted that laws and policies protecting citizens from deceptive trade practices vary widely among states.[51] As a result, the *Gore* Court held no state could impose its own policy on the entire nation or neighboring states.[52] Specifically, a state could not punish a company for its lawful conduct in other states.[53] Nevertheless, the Court allowed the use of the defendant's out-of-state conduct to determine the reprehensibility of the defendant's conduct.[54]

The *Gore* Court also held that under the Due Process Clause of the Fourteenth Amendment a person must have notice of both the type of conduct that is punishable and the potential severity of that punishment.[55] In determining that BMW had not received the requisite notice, the Court used three guideposts: 1) reprehensibility of conduct; 2) disparity between harm (or potential harm) suffered and the punitive damages award; and 3) the difference between the punitive damage award and other civil penalties imposed or awarded in similar cases.[56]

In assessing reprehensibility, the *Gore* Court found the plaintiff suffered only economic harm, and that the defendant did not show indifference or reckless disregard for the health and safety of others.[57] The Court concluded BMW's conduct, while sufficient to warrant tort liability and modest punitive damages, did not warrant a $2 million punitive award.[58] The Court held Alabama could not justify its sanction imposed on BMW without considering whether a less drastic remedy would achieve its goal.[59]

Deprivation of Property

The Court upheld the *Gore* guideposts and asserted that high punitive damage ratios may not comport with the Due Process Clause in *State Farm Mutual Auto Insurance Co. v. Campbell.*[60] In *Campbell*, the Court found a $145 million

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[50] *Id.* at 567.

[51] *Id.* at 569-70.

[52] *Gore*, 517 U.S. at 571.

[53] *Id.* at 572.

[54] *Id.* at 574 n.21.

[55] *Id.* at 574.

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

[57] *Gore*, 517 U.S. at 576.

[58] *Id.* at 580.

[59] *Id.* at 584.

[60] State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003).

punitive damages award an irrational and arbitrary deprivation of property since the compensatory damage totaled only $1 million.[61]

In *Campbell*, the United States Supreme Court held the punitive damages award served no legitimate purpose, was grossly excessive, and constituted an arbitrary deprivation of property.[62] Addressing the use of alleged nonparty harm, the Court stated a jury may not base punitive damages on a defendant's dissimilar and unrelated acts.[63] The Court found the Utah Supreme Court violated the Fourteenth Amendment Due Process Clause when it adjudicated nonparties' hypothetical claims in its reprehensibility analysis.[64] Because the judgment does not bind nonparties, the Court warned that such punitive damage calculations could lead to multiple awards against a defendant for a single course of conduct.[65]

Discussing the excessive nature of awards, the *Campbell* Court also asserted a single-digit ratio between the compensatory and punitive damages awards would usually comport with Due Process requirements.[66] Nevertheless, it refused to institute a maximum bright-line ratio for punitive damages.[67]

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[61] *Id.* at 412, 429. The Campbells filed suit against State Farm because the company failed to settle an automobile liability suit when a considerable likelihood of an excess verdict existed. *Id.* at 413. The Campbells asserted claims of bad faith, fraud, and intentional infliction of emotional distress. *Id.* at 414. At trial, the Campbells introduced evidence of the defendant's unrelated nationwide business practices, indicating alleged harm to nonparties. *Id.* at 415. The jury awarded $2.6 million in compensatory damages and $145 million in punitive damages. *Id.* The trial court judge reduced these to $1 million in compensatory damages and $25 million in punitive damages. *Id.* The trial court based its award reduction on the large ratio between compensatory and punitive damages. *Id.* Applying the Supreme Court's decision in *Gore*, the Utah Supreme Court reinstated the $145 million punitive damage award. *Id.*; Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134 (Utah 2001). The United States Supreme Court granted review to reverse the reinstatement of the $145 million punitive award by applying the Gore guideposts. *Campbell*, 538 U.S. at 418.

[62] *Campbell*, 538 U.S. at 417.

[63] *Id.* at 423.

[64] *Id.* The Utah Supreme Court supported its improper holding stating, "[e]ven if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate.'" *Id.*; Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1149 (Utah 1991).

[65] State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003).

[66] *Id.* at 425. The following is an example of a single-digit ratio: a $1 million compensatory damage award and a $9 million punitive damages award, arrived at by using a single-digit multiplier of nine.

[67] *Id.* "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.*

Federal and Wyoming case law involving punitive damages also provide a helpful framework for examining and understanding *Phillip Morris*. Under this case law, the United States Court of Appeals for the Seventh Circuit used nonparty harm to justify a large punitive damage award in a case with low compensatory damages.[68] Writing for the court, Judge Posner, in *Mathias v. Accor Economy Lodging, Inc*. relied on nonparty harm, in part, to uphold the punitive damages despite the large ratio between the compensatory and punitive damages award.[69] Additionally, the court held that punitive damages in the case served to remove the defendant's potential profits it derived from escaping detection.[70]

Punitive Damages in Wyoming

Several Wyoming cases have established standards for punitive damages. The Wyoming Supreme Court has stated a jury may use a defendant's wealth, the injury's nature and extent, the injurious act's character, and aggravation in determining punitive damages.[71] Additionally, the Wyoming Supreme Court has stated three factors juries should consider in punitive damage awards: nature of the tort, actual damages, and the defendant's wealth.[72]

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[68] Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003). In *Mathias*, the court upheld a punitive damages award of $186,000 in a negligence action brought by two motel guests for bedbug bites when the compensatory damages awarded in the case only totaled $5,000. *Id.* at 673-74.

[69] *Id.* at 678. Judge Posner stated, "[T]his is just the beginning. Other guests of the hotel were endangered besides these two plaintiffs." *Id.* The court emphasized the defendant's outrageous conduct including offering refunds only upon request, failing to fumigate, and deceiving ignorant customers by alleging the bugs were ticks. *Id.* at 677.

[70] *Mathias*, 347 F.3d at 677. ("The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the time he gets away."). The profit loss argument necessarily involves consideration of harm to nonparties. *See id.*

[71] Hall Oil Co. v. Barquin, 237 P. 255, 278 (Wyo. 1925). In this trespass case involving entry and drilling upon the plaintiff's land, the court found the defendant acted with a "reckless disregard for, or a willful indifference to, the rights of the plaintiffs." *Id.* at 271. The plaintiff requested punitive damages in this trespass action. *Id.* at 257, 269.

[72] Sears v. Summit, 616 P.2d 765, 772 (Wyo. 1980). Sears involved an incident of trespass of a landowner upon trespassing party using heavy construction equipment. *Id.* at 766-69. The landowner suffered damage from the trespass of the heavy equipment on his property. *Id.* at 768-69. The landowner required the trespassing crew to leave their equipment on the property, while being ushered off the property at gunpoint. *Id.* The court explained the defendant's wealth was a proper factor in calculating punitive damage awards, but required evidence in the record to support an instruction based on this factor. *Id.* at 772. The court reversed and remanded on the issue of punitive damages claims made by each party. *Id.* at 773-74.

The Wyoming Supreme Court has more recently articulated an objective standard it found comported with *Gore*, in *Farmers Insurance Exchange v. Shirley*.[73] The court held juries must be given the seven criteria for determining punitive damages: reasonable relationship between defendant's conduct and the likely and actual harm, degree of reprehensibility, removal of defendant's profit, defendant's wealth, costs of litigation, and mitigation for criminal and civil sanctions already imposed.[74]

The previous United States Supreme Court, federal and Wyoming cases provided the framework for a new limitation on punitive damages.[75] While courts discussed nonparty harm in earlier cases, the United States Supreme Court directly addressed use of such harm when it set a new due process standard in *Philip Morris USA v. Williams* for punitive damage awards.[76]

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[73] Farmers Ins. Exch. v. Shirley, 958 P.2d 1040, 1043-44 (Wyo. 1998). In *Shirley*, an insurance company appealed a jury verdict finding for the plaintiff motorist in a claim involving breach of the duty of good faith and fair dealing in collecting underinsured motorist benefits. *Id.* at 1042, 1045. The court reversed and remanded the case, ordering a new trial. *Id.* at 1053.

[74] *Shirley*, 958 P.2d at 1044 (citing Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989)). The U.S. Supreme Court listed the factors:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in the mitigation of punitive damages awards.

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21-22 (1991). In *Shirley*, the Wyoming Supreme Court not only acknowledged the guidelines endorsed by United States Supreme Court in *Haslip*, but it mandated the guidelines be given to juries determining punitive damages in the form of jury instructions. *Shirley*, 958 P.2d at 1053.

[75] See *supra* notes 23-74 and accompanying text.

[76] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065 (2007).

PRINCIPAL CASE

Philip Morris USA v. Williams, the United States Supreme Court's most recent case involving punitive damages, evaluated the constitutionality of using alleged nonparty harm in punitive damages calculations.[77] Justice Breyer authored the majority opinion, joined by Chief Justice Roberts, Justices Kennedy, Souter, and Alito.[78] Justices Stevens, Thomas, and Ginsburg each wrote separate dissenting opinions.[79] Justice Thomas and Justice Scalia, however, each joined Justice Ginsburg's dissenting opinion as well.[80]

The Majority Opinion

In *Philip Morris*, the United States Supreme Court stated the purpose of punitive damages is to punish unlawful conduct and deter future unlawful conduct.[81] However, the Court held states engaged in such punishment and deterrence must provide defendants with fair notice of a penalty's potential severity.[82] Likewise, the Court advised that without proper safeguards, a state, in its punitive damage awards, could impose its policy choice on other states, which may have different policies.[83] Furthermore, the Court held the Fourteenth Amendment Due Process Clause prohibits a state from using a punitive damage award to punish a defendant for nonparty injuries.[84] The Court based its holding on the view that the Due Process Clause does not allow a state to punish a defendant without offering that defendant the opportunity to present every defense possible.[85] The Court reasoned if a state allowed juries to consider nonparty harm in the damage calculation, the state would effectively sanction the defendant for this alleged harm without providing the defendant with the opportunity to defend such allegations.[86] Therefore, the Court held that juries may only use potential harm *to the plaintiff*, not nonparties, in determining punitive damages.[87]

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[77] *Id.* at 1060.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 1062.

[81] *Philip Morris*, 127 S. Ct. at 1062.

[82] *Id.*

[83] *Id.* A state imposes its policy preference on other states, if it punishes a defendant for harm to alleged nonparty victims residing in other states. *See id.* ("[W]here the [punitive damages] amounts are sufficiently large, it may impose one state's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies."). *Id.*

[84] *Id.* at 1063.

[85] *Id.*

[86] *Philip Morris*, 127 S. Ct. at 1063.

[87] *Id.* The term "potential harm" reflects harm that *could have been* suffered by the plaintiff. *Id.*

The Court, however, stated that juries may use potential harm to nonparties to show the defendant's reprehensible conduct, which posed a risk to the general public.[88] The Court considered conduct risking harm to a large number of people more reprehensible than conduct risking harm to only a small number of people.[89] The Court drew an analogy between recidivism statutes and reprehensibility determinations, stating that such statutes do not punish a criminal defendant for additional past crimes, but make the penalty harsher for the current crime based on the repetitive conduct.[90] Juries, similarly, can consider nonparty harm in punitive damages cases, not to punish the defendant for past or future harm, but to determine the reprehensibility of his or her conduct with respect to the plaintiff bringing the claim.[91]

The Oregon Supreme Court found the task of deciding whether a jury used the reprehensibility determination to directly punish defendants for nonparty injuries unworkable.[92] The *Phillip Morris* Court responded by holding state courts may not allow procedures that risk such confusion.[93] The Court found a high risk for confusion, and instructed courts to guard against misunderstanding in the evidence presented and arguments made to the jury.[94] The Court clarified that while states have some flexibility in deciding the procedures they will institute, they must offer some protection against confusion under this federal constitutional standard.[95] The Court remanded the case to the Oregon Supreme Court.[96] Because the case could face a new trial, the United States Supreme Court declined to decide whether the award was grossly excessive.[97]

The Dissenting Opinions

In his dissent, Justice Stevens asserted that no identifiable reason existed why nonparty harm cannot be considered in determining the appropriate punishment

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[88] *Id.* at 1064.

[89] *Id*. at 1065.

[90] *Id.*

[91] *Philip Morris*, 127 S. Ct. at 1064.

[92] *Id.*

[93] *Id.* at 1065 ("State courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring.").

[94] *Id.* at 1064. Courts may prohibit counsel from making arguments suggesting harm to parties may be multiplied by a number of known nonparties. *Id.* Courts may also allow evidence of nonparty harm only for reprehensibility analysis. *Id.* at 1065. Courts may also choose to use explicit jury instruction language that prohibits use of nonparty harm in the calculation of a punitive damages award. *Id.*

[95] *Id.* at 1065. The upcoming analysis section provides suggestions for such procedures for practitioners and judges. *See supra* notes 150-168 and accompanying text.

[96] *Philip Morris*, 127 S. Ct. at 1065.

[97] *Id.*

for reprehensible conduct.[98] He identified the differences between punitive and compensatory damages: punitive damages are a punishment for public harm the defendant threatened or caused, and compensatory damages assess the harm the defendant's conduct caused the plaintiff.[99]

Looking at punitive damages from the perspective of a sanction for public harm, Justice Stevens claimed little difference exists between the rationale for a criminal sanction and a punitive damages award, and that both were historically available in cases involving a private citizen.[100] Unlike compensatory damages, he asserted both punitive damages and criminal sanctions serve retribution and deterrence purposes.[101] Justice Stevens found no reason to exclude nonparty harm, as a factor, in the punitive damage assessment for reprehensible conduct.[102] He endorsed a jury increasing a punitive damages award based on nonparty harm to *directly* punish the defendant for that additional harm.[103] He concluded the plaintiff properly presented the jury with the evidence of possible harm to other Oregon citizens.[104]

Justice Thomas's brief dissenting opinion asserted the "Constitution does not constrain the size of punitive damage awards."[105] He characterized the Court's holding as a confusing substantive, rather than procedural, change in due process law.[106] Justice Thomas further noted that no specific procedures were needed at common law to constrain the jury's power to award punitive damages.[107]

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[98] *Id.* at 1066 (Stevens, J., dissenting).

[99] *Id.* (Stevens, J., dissenting).

[100] *Id.* (Stevens, J., dissenting); *See* Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 127-28 (1998) (Stevens, J., concurring).

[101] *Philip Morris*, 127 S. Ct. at 1066 (Stevens, J., dissenting) (citing State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003)).

[102] *Id.* (Stevens, J., dissenting).

[103] *Id.* at 1067 (Stevens, J., dissenting) ("When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant-directly-for third-party harm."); Justice Stevens did not find use of criminal recidivism statutes helpful, "[b]ut if enhancing a penalty for a present crime because of prior conduct that has already been punished is permissible, it is certainly proper to enhance a penalty because the conduct before the court, which has never been punished, injured multiple victims." *Id.* n.2 (Stevens, J., dissenting).

[104] *See id.* at 1066 (Stevens, J., dissenting).

[105] *Id.* at 1067 (Thomas, J., dissenting) (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429-30 (2003)).

[106] *Philip Morris*, 127 S. Ct. at 1067 (Thomas, J., dissenting).

[107] *Id.* (Thomas, J., dissenting). Justice Thomas cited Justice Scalia's concurring opinion in *Haslip*: "In . . . 1868 punitive damages were undoubtedly an established part of the American common law torts. It is . . . clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Id.* at 1067-68 (Thomas, J., dissenting) (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 26-27 (1991) (Scalia, J., concurring)).

Justice Ginsburg authored the final dissenting opinion, joined by Justices Scalia and Thomas.[108] Justice Ginsburg's dissent reiterated the purpose of punitive damages: to punish and not to compensate.[109] The dissent asserted the Oregon courts correctly applied the Court's accepted reprehensibility inquiry under *Gore* and *Campbell*.[110]

Justice Ginsburg's dissent also asserted that Philip Morris only objected to the trial court's failure to present the defendant's requested jury instruction, charge number thirty-four, and that the Court did not address the trial court's denial of this instruction.[111] The proposed instruction required the punitive damages award exhibit a reasonable relationship to the plaintiff's harm.[112] The instruction would have theoretically allowed the jury to use nonparty harm to determine reprehensibility, but prohibited similar consideration in assessing the award amount.[113] Justice Ginsburg asserted a trial court judge would not give such a confusing instruction.[114] By going beyond Philip Morris's only preserved objection, this dissent asserted the Court was overreaching in this case.[115]

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[108] *Id.* at 1068 (Ginsburg, J., dissenting).

[109] *Id.* (Ginsburg, J., dissenting).

[110] *Id.* (Ginsburg, J., dissenting) (supporting the Court's definition of reprehensibility, "the harm that Philip Morris was prepared to inflict on the smoking public at large"); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 429-50 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996).

[111] *Philip Morris*, 127 S. Ct. at 1068-69 (Ginsburg, J., dissenting).

[112] *Id.* (Ginsburg, J., dissenting).

[113] *Id.* at 1068-69 (2007) (Ginsburg, J., dissenting). The requested charge thirty-four read:

> If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set the amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is not a set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection:
>
> (1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit. . . .
>
> (2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct-that is, how far the defendant has departed from accepted societal norms of conduct.

Id. (Ginsburg, J., dissenting). The charge indicates there are factors a jury *may* consider, but it prohibits direct punishment based on nonparty harm when (and if) the jury considers the reasonable relationship. *Id.* (Ginsburg, J., dissenting).

[114] *Id.* at 1069 (Ginsburg, J., dissenting).

[115] *Id.* (Ginsburg, J., dissenting).

ANALYSIS

This section discusses the mistake the Court made in creating a new due process standard in light of the purposes of punitive damages.[116] It further examines the difficulty in using nonparty injuries solely to inform the reprehensibility determination.[117] This note subsequently provides practical guidance to courts and practitioners to avoid due process violations under the new standard.[118]

The New and Confusing Due Process Standard

The Court made a grave mistake in attempting to fashion a compromise that allows juries to use nonparty harm for limited purposes in cases involving punitive damages.[119] The objective of punitive damages is to punish, not to compensate.[120] The *Restatement (Second) of Torts* states, that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."[121] As Justice Stevens wrote in his dissent, "punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened."[122] Justice Stevens compared such damages to criminal sanctions, which historically have considered nonparty harm.[123] The Court's decision allows juries to look at nonparty harm to determine if the defendant's conduct posed a significant risk to the general public in a reprehensibility determination.[124] Nevertheless, the information used in this reprehensibility determination, may not be used in the punitive damages calculation to directly punish the defendant.[125]

The United States Supreme Court previously held that a defendant's *similar* past conduct informs the reprehensibility evaluation.[126] *Gore* gave three guideposts for evaluating excessiveness of an award, the first of which deter-

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[116] *See infra* notes 119-130 and accompanying text.

[117] *See infra* notes 131-149 and accompanying text.

[118] *See infra* notes 150-168 and accompanying text.

[119] Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007); *See* Erwin Chemerinsky, *More Questions about Punitive Damages, Supreme Court Review*, 43 TRIAL 72, 74 (May 2007) ("[O]ne thing that is absolutely clear is that the ruling will engender enormous confusion in the lower courts . . . .").

[120] *Philip Morris,* 127 S. Ct. at 1068 (Ginsburg, J., dissenting).

[121] RESTATEMENT (SECOND) OF TORTS, § 908(2) (1979).

[122] *Philip Morris,* 127 S. Ct. at 1066 (Stevens, J., dissenting).

[123] *Id.* (Stevens, J., dissenting).

[124] *Id.* at1064.

[125] *Id.*; Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual Private Wrongs*, 87 MINN. L. REV. 583, 675 (2003).

[126] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1991).

mines reprehensibility of the defendant's conduct.[127] *Gore* asserted that evidence of a defendant's out-of-state conduct could be used in the reprehensibility assessment.[128] Because an evil motive or *recklessness toward others* is the basis for punitive damages, the jury is well informed if it is presented with evidence of recklessness toward nonparties.[129] Nonetheless, juries can no longer use this harm to punish the defendant directly.[130]

Difficulty inheres in asking a jury to use nonparty harm to assess reprehensibility, only to discard that determination in deciding the proper punishment.[131] The Court commanded that a trial court must provide assurances that a jury will "ask the right question, not the wrong one."[132] It charged trial courts with guarding against confusion from evidence and arguments presented at trial.[133] However, the Court appeared to soften this new standard when it asserted that state courts will have flexibility in implementing this protection.[134] Nevertheless, such flexibility may result in an increased threat of appellate review rather than a clear due process standard.[135] The important flexibility touted by the Court fails to clarify how a jury can disregard nonparty harm when it calculates punitive damages after using such harm in its reprehensibility determination.[136]

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[127] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996).

[128] *Id.* at 574 n.21.

[129] *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1067 (2007) (Stevens, J., dissenting) ("[T]here is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands cigarette smokers statewide should not include consideration of the harm to those 'bystanders' as well as harm to the individual plaintiff.").

[130] *Id.* at 1064.

[131] Daniel Susler Agle, *Working the Unworkable Rule Established in* Philip Morris*: Acknowledging the Difference Between Actual and Potential Injury to Nonparties*, 2007 BYU L. REV. 1317, 1355 (2007) ("If jurors consider injury to nonparties when determining reprehensibility, and if, at the same time, they consider reprehensibility to determine the amount of punitive damages to assess, naturally jurors ultimately will consider injury to nonparties when determining the total punitive damages.").

[132] *Philip Morris,* 127 S. Ct. at 1064.

[133] *Id.* at 1065.

[134] *Id.* at 1065.

[135] *Id.* at 1068 (Thomas, J., dissenting) (arguing the Court's decision is evidence that the "Court's punitive damages jurisprudence is 'insusceptible of principled application'") (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563 (1996) (Scalia, J., dissenting)); *see* Farmers Ins. Exch. v. Shirley, 958 P.2d 1040, 1045 (Wyo. 1998). The Wyoming Supreme Court reasoned that without objective standards for calculating punitive damages "we hazard litigants in our courts to future reversal by the Supreme Court of the United States because of the denial of due process of law resulting from the application of our current process." *Id.* at 1045. *See also* Michael I. Krauss, *Punitive Damages and the Supreme Court: A Tragedy in Five Acts*, 2007 CATO SUP. CT. REV. 315, 334 (2007) ("We can look forward to years of litigation and circuit splits trying to sort out what the Court hath wrought.").

[136] *See* Agle, *supra* note 131, at 1355.

In spite of the Court's ruling, juries may use nonparty harm from the reprehensibility analysis in calculating punitive damage awards.[137] Also, the new prohibition in calculation may lead juries to obscure the reasoning behind award calculation.[138] If juries act accordingly, the awards generally may decrease or even increase.[139]

The jury in one United States Court of Appeals case, without guidance, multiplied the plaintiff's harm by the number of alleged nonparties injured to reach a punitive award.[140] Despite insignificant compensatory harm suffered by the plaintiff, the court upheld the punitive damage award based on significant nonparty harm.[141] The *Philip Morris* Court rejected the Seventh Circuit's reasoning stating, "it is appropriate to consider the reasonableness of a punitive damages award in light of *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused the *plaintiff*."[142] When a jury now engages in punitive damages calculation, it may not use alleged numbers of potentially affected nonparties in any way.[143] Juries may still be inclined to use numbers of nonparty harm in punitive damage calculations, even though counsel or courts attempt to comply with the new due process standard.[144] Additionally, without the restraint of a number, such as alleged nonparty injuries, juries may award even higher, more arbitrary awards.[145] Or, juries may also use nonparty harm in calculations, but hide this fact from courts and parties.[146] In *Mathias*, Judge Posner explained that because no punitive

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[137] *See* Jeff Bleich, Michelle Friedland, Dan Powell, & Aimee Feinberg, *Smoke Signals*, 67-Jun. OR. ST. B. BULL. 24, 29 (June 2007) ("[W]hile juries cannot directly count harm to non-litigants, they could continue to impose, under the *mantle of reprehensibility*, hefty damages judgments on defendants whose conduct affects many people.") (emphasis added).

[138] *Id.*

[139] *See* Ben Figa, Note, *The New Due Process Limitation in Philip Morris: A Critique and an Alternative Rule Based on Prior Adjudication*, 85 DENV. U. L. REV. 179, 190 (2007) ("[J]ury instructions that are in accordance with *Philip Morris* may confuse the jury and lead to erroneous verdicts.").

[140] Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003). In *Mathias*, there were no damage guidelines, but nonetheless, the jury awarded a punitive damages award that, combined with the compensatory award, neatly equaled a $1,000 penalty for each hotel room. *Id.* at 678.

[141] *Id.* at 677.

[142] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007).

[143] *Id.* at 1065. *See supra* note 131 and accompanying text for a discussion of the difficulty juries will face with limiting instructions.

[144] *See* Chemerinsky, *supra* note 119, at 74 (noting the distinction between reprehensibility determination and punishment may be clear to the Court, but it may be too confusing for juries to understand and administer). The number the jury may have used in *Mathias* is the number of rooms in the hotel, arguably a proxy number of third party victims. *See, e.g.,* Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003); *see supra* note 140 for a facts of *Mathias.*

[145] *Mathias,* 347 F.3d at 678; Chemerinksy, *supra* note 119, at 74.

[146] *See, e.g.*, *Mathias,* 347 F.3d at 678.

damages guidelines exist, similar to criminal federal and state sentencing guidelines, the amounts of punitive damage awards will be arbitrary.[147]

Commentators suggest the Court is now moving beyond just limiting punitive damage awards, and moving toward questioning the purpose of punitive damage awards generally.[148] However, the Court only took a step in that direction in *Philip Morris* when it set a new standard that courts of all states, including Wyoming, must implement.[149]

Application to Wyoming

While Wyoming is not bound by statutory limits governing punitive damages, Wyoming, like all states, must now provide assurances that juries do not violate the Due Process Clause by punishing defendants for nonparty harm.[150] The Wyoming Supreme Court required courts to deliver objective jury instruction standards in *Shirley*.[151] Adhering to *Gore*, the Wyoming court sought to give juries more specific factors when awarding punitive damages.[152] The jury instruction proposed below alters the instructions given by the Wyoming Supreme Court in *Shirley* in light of *Philip Morris*.[153]

In Wyoming, mandatory bifurcation of the determination of whether punitive damages should be awarded from the punitive damage calculation occurs at trial.[154] This mandatory bifurcation may help Wyoming juries to draw the confusing, yet required, line between the reprehensibility analysis and the damage award calculation.[155] Bifurcating the trial for punitive damages mandates that juries assess punitive damages in two parts, first assessment of liability and whether the plaintiff is entitled to punitive damages and second, calculation of

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[147] *Id.* ("[I]t is inevitable that the specific amount of punitive damages awarded whether by judge or jury will be arbitrary.").

[148] Bleich, Friedland, Powell, & Feinberg, *supra* note 137, at 24.

[149] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1064 (2007).

[150] *Id.*

[151] Farmers Ins. Exch. v. Shirley, 958 P.2d 1040, 1043-44 (Wyo. 1998);

[152] *Id.* at 1052. The Court adopted the factors from *Green Oil*, approved in *Haslip*. *See also supra* notes 37 and 74 and accompanying text for an examination of the factors.

[153] See *infra* note 160 and accompanying text for the proposed jury instruction.

[154] Campen v. Stone, 635 P.2d 1121, 1132 (Wyo. 1981).

[155] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1064 (2007). *See* Wyoming Civil Pattern Jury Instructions 4.06, Exemplary or Punitive Damages—Phase I of Bifurcated Trial, and 4.06A, Exemplary or Punitive Damages—Phase II of Bifurcated Trial (2003) (showing bifurcated trial procedure currently used to determine liability for punitive damages before the award calculation). *But see* Elizabeth A. Davis, *Providing Greater Integrity for Punitive Awards*, 2 OHIO TORT L. J. 91, 91 (2007) ("[B]ecause the guideposts [for determining reprehensibility and punitive damages calculations] are interrelated and require balancing, it is difficult to see how a court could separate the presentation of evidence so that a jury could determine each post.").

the punitive award.[156] Courts must take steps, as required by *Philip Morris*, to guard against due process violation.[157]

Guidance for Courts

Trial courts now have an obligation to bar jury instructions that allow consideration of nonparty harm in punitive damages calculation.[158] This obligation extends to preventing counsel from presenting opening statements, closing arguments, or evidence that will allow jurors to use nonparty harm for more than reprehensibility determinations.[159] In light of *Philip Morris*, a suggested jury instruction for the calculation of punitive damages is provided below:

> In calculating the punitive damage award you should consider the following:
>
> 1) The award should bear a reasonable relationship to the potential or actual harm suffered by the plaintiff.
>
> 2) Reprehensibility of the defendant's conduct—You may consider harm to nonparties in *determining the reprehensibility* of the defendant's conduct, but you *may not use this harm to punish the defendant directly*. You may not multiply the defendant's harm by the number of other alleged victims not party to this lawsuit who may bring suits of their own and receive their own punitive damage awards.
>
> 3) If the wrongful conduct was profitable for the defendant, the damages should remove only the profit derived from the individual plaintiff's harm.
>
> 4) You may consider the financial position of the defendant.
>
> 5) The costs of litigation should be considered to encourage the plaintiffs to litigate such cases.
>
> 6) If criminal sanctions have been imposed, the award should be reduced to take into account such sanctions.[160]

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[156] *Campen*, 635 P.2d at 1132; Davis, *supra* note 155, at 91.

[157] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1064 (2007).

[158] *Id.*

[159] *Id.* at 1065; J. David Prince & Paula Duggan Vraa, *Focusing the Penalty: New Limits on Punitive Damages*, 64-APR BENCH & B. MINN. 24, 28 (2007).

[160] *Philip Morris*, 127 S. Ct. at 1064. The instructions were adapted from the Wyoming Civil Pattern Jury Instructions 4.06A (2003). Section seven of the pattern instruction is now obsolete,

In guarding against now-prohibited arguments and evidence presented by counsel, such a jury instruction will enable the State to provide due process assurances to defendants facing punitive damages.[161] Additionally, the new due process standard prohibits juries from removing profits gained by the defendant for any conduct beyond that which directly harmed the plaintiffs in punitive damage calculation.[162] Therefore, the proposed instruction only modifies the previous standards set by the Wyoming Supreme Court in *Shirley*.[163]

Guidance for Practitioners

While the line between using nonparty harm in determining reprehensibility and punishing directly may not be clear, practitioners must attempt to make this distinction.[164] The Due Process Clause prohibits a state from using punitive damages to punish a defendant without giving that defendant the opportunity to raise every possible defense.[165] Counsel must be aware of this danger when presenting reprehensibility arguments and evidence.[166] Counsel may need to

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because in the absence of other pending civil actions against the defendant, consideration of nonparty harm is still a due process violation according to *Philip Morris*. This instruction comports with Farmers Ins. Exch. v. Shirley, 958 P.2d 1040, 1043-44 (Wyo. 1998).

[161] *Philip Morris*, 127 S. Ct. at 1064-65; *see* Colby, *supra* note 125, at 674-75 (arguing that such a change comporting with due process requires recognition that the purpose of punitive damages is not punishment for a public wrong, but punishment for a private wrong, the injury to the plaintiff); *see also* Prince & Vraa, *supra* note 159, at 28 ("[T]he protections . . . may include . . . strongly worded jury instructions, more explicit special verdict forms, or even special admonitions to the jury.").

[162] *See* Colby, *supra* note 125, at 675-76. Colby argues that courts should not instruct juries to take away the defendant's profits for an "entire course" of conduct, only the profit earned associated with the parties injured. *Id.*

[163] Farmers Ins. Exch. v. Shirley, 958 P.2d 1040, 1043-44 (Wyo. 1998).

[164] Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065 (2007). *See* Chemerinsky, *supra* note 119, at 74 ("[The jury] can be told that it can consider harm to nonparties in assessing the reprehensibility of a defendant's conduct and that reprehensibility is the most important factor in determining the size of the punitive damages award. But the jury also must be told that it cannot punish the defendant for harm to nonparties."); Colby, *supra* note 125, at 675-76 (The jury should be instructed that it may consider the harm to other victims only for the purpose of ascertaining the degree of reprehensibility of the wrong to the plaintiff, but it may not punish the defendant for the wrong done, or the harm caused, to persons not before the court; nor should it endeavor to remove the profits illicitly gained at the expense of victims not before the court.); Agle, *supra* note 131, at 1319; Prince & Vraa, *supra* note 159, at 28 (noting *Philip Morris* may place most of the burden on the defendant to request appropriate protections).

[165] *Philip Morris*, 127 S. Ct. at 1063 (holding defendant should be allowed to defend claims of alleged nonparty harms, either by joining nonparties or excluding such allegations from consideration in punitive damage calculation). Colby, *supra* note 125, at 675.

[166] *See Philip Morris*, 127 S. Ct. at 1065; (holding a court, upon request, must protect against the introduction of certain evidence and the presentation of arguments that risk due process violation); *see* Colby, *supra* note 125, at 675.

request that a limiting jury instruction accompany evidence of nonparty harm, prohibiting its use in punitive damages calculation.[167] The line between assessing reprehensibility and directly punishing is a line practitioners must attempt to draw to avoid constitutional due process violations.[168]

CONCLUSION

The *Philip Morris* Court's distinction between using nonparty harm to punish directly and to assess reprehensibility sets a confusing and difficult standard for states to implement; a mistake by the *Philip Morris* Court. However, practitioners and courts must try to identify the distinction to avoid violating the Fourteenth Amendment Due Process Clause. In Wyoming, juries should receive specific jury instructions similar to the proposal set forth in this case note. Courts must also guard against statements made by counsel and evidence introduced, and if needed, qualify its purpose solely for reprehensibility analysis. Practitioners also must heed the new standard in presenting arguments, introducing evidence, requesting limiting instructions, and proposing jury instructions.

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[167] Colby, *supra* note 125, at 675; Prince & Vraa, *supra* note 159, at 28 ("[W]hile the decision charges the state courts to ensure appropriate protections are used, it also appears to put most of the burden on the defendant to request such appropriate protections."); Philip Morris, 127 S. Ct. at 1065 (holding that when confusion between the use of nonparty harm for reprehensibility and damage calculation of the award is great, "a court, *upon request*, must protect against that risk.") (emphasis added).

[168] *Philip Morris*, 127 S. Ct. at 1064 (holding risk of failure to make a distinction between using nonparty harm for reprehensibility determination and punishing directly must be guarded against in plaintiff's arguments and evidence presented at trial); *see* Colby, *supra* note 125, at 675-76 (asserting juries should be instructed to base punitive awards solely based on harm suffered by plaintiffs).

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CASE NOTE

SECURITIES LAW — How Strong is Strong Enough?: The *Tellabs* Court Lacked the Needed Strength for Pleading Scienter in Securities Fraud; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007).

*James B. Fipp**

Introduction

Tellabs, Inc. (Tellabs), a publicly traded company, manufactures, and markets specialized optical networks, broadband access, and voice-quality enhancement equipment to telecommunications carriers and internet service providers globally.[1] Tellabs became another company of public notoriety when respondents (Shareholders), a group of Tellabs' stockholders, accused Tellabs and its chief executive officer (CEO), Richard Notebaert (Notebaert), of making false statements in an attempt to deceive investors about the actual value of Tellabs stock.[2]

Shareholders claimed Notebaert misled investors in multiple press releases by stating demand for Tellabs' "core optical products . . . remain[ed] strong," and Tellabs was on track to meet its revenue projections.[3] From December 11, 2000 until June 19, 2001, Shareholders alleged Notebaert consciously deluded the public in four ways.[4] First, Notebaert made statements indicating demand for Tellabs' core product, the TITAN 5500 ("5500"), continued to grow when demand actually fell.[5] Second, he made false statements that Tellabs' new product, the TITAN 6500 ("6500"), was available and in strong demand, when it was

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* Candidate for J.D., University of Wyoming, 2009. I would like to thank the entire Wyoming Law Review Board and Professor Gelb for their invaluable assistance with the editing and revising of this case note. I would also like to express my immeasurable love and gratitude to my parents for their unconditional love, support, guidance, and all the opportunities they have provided me. Finally, and most importantly, I would like to thank JC for everything He has provided me in my life. I owe everything to Him.

[1] Tellabs, Inc. v. Makor Issues & Rights, Ltd. (*Tellabs II*), 127 S. Ct. 2499, 2505 (2007); Makor Issues & Rights, Ltd., v. Tellabs, Inc. (*Tellabs I*), 437 F.3d 588, 591 (7th Cir. 2006); Brief for Petitioners at 3, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007) (No. 06-484), 2007 WL 432763; Brief for Respondents at 1, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007) (No. 06-484), 2007 WL 760412.

[2] *Tellabs II*, 127 S. Ct. at 2505; *Tellabs I*, 437 F.3d at 591. Shareholders accused several other executives including Tellabs' chairman and former CEO, Richard Birck (Birck). *Tellabs II*, 127 S. Ct. at 2505; *Tellabs I*, 437 F.3d at 591.

[3] *Tellabs I,* 437 F.3d at 592.

[4] *Tellabs II*, 127 S. Ct. at 2505.

[5] *Tellabs I*, 437 F.3d at 593. Tellabs core business founded itself on the TITAN 5500, Tellabs' flagship networking device. *Id.* at 596. "[I]n Tellabs 2000 Annual Report, published in February, 2001, Notebaert and Birck responded to a frequently asked question ('[A]re you worried that [the

not yet ready for delivery.[6] Third, Notebaert misrepresented Tellabs' financial outlook for the fourth-quarter of 2000 by fraudulently inflating the sales results.[7] Finally, he made multiple overstated earnings and revenue projections.[8] These misrepresentations, contended the Shareholders, resulted in the recommended buying of Tellabs' stock by market analysts.[9]

Evidence of the business struggling did not surface publicly until March 2001, when Tellabs reduced its first-quarter sales projections.[10] Downward projections continued on April 6, 2001, when Tellabs reduced its first-quarter projections for a second time.[11] On June 19, 2001, Notebaert informed investors that sales for the 5500 had dropped dramatically.[12] Once again, Tellabs reduced its sales projections, this time for the second-quarter as a result of the decreased demand for the 5500.[13] The following day, "the price of Tellabs stock, which had reached a high of $67 during the [class] period, plunged to a low of $15.87."[14]

TITAN 5500] has peaked?') by stating flatly, "No . . . . Although we introduced the product nearly 10 years ago, it's still going strong." *Id.* at 597. In addition, on March 8, 2001, a Deutsche Bank analyst asked Notebaert whether Tellabs was experiencing any reduction in TITAN 5500 sales. *Id.* "Notebaert responded: [W]e're still seeing that product continue to *maintain its growth rate*; it's still experiencing strong acceptance." *Id.*

[6] *Id.* The TITAN 6500 is Tellabs' next-generation networking device, designed to replace the TITAN 5500. *Id.* On December 11, 2000, Notebaert stated : "[T]he TITAN 6500 system is available now." *Id.* at 598. Additionally, "[o]n March 8, 2001, Notebaert told analysts, 'Interest in and demand for the 6500 continues to grow . . . . We continue to ship the . . . 6500 through the first quarter. We are satisfying very strong demand and growing customer demand.'" *Id.*

[7] *Tellabs I*, 437 F.3d at 593. Shareholders alleged Tellabs inflated its fourth-quarter results by channel stuffing, a process where the company produces false purchase orders and then sends customers products they never ordered. *Id.* at 598. "This practice . . . creates a short-term illusion of increased demand between the time when the company sends the extra product down the line and the time when the distributors return the unwanted excess." *Id.*

[8] *Id.* Tellabs reduced its first-quarter sales projections of $830 to $865 million to $772 million. *Id.* at 592-93. Tellabs also reduced its second-quarter revenue projection to $500 million from a previous projection of a range between $780 to $820 million. *Id.* at 593.

[9] *Id.* at 592; *see also Tellabs II*, 127 S. Ct. at 2505.

[10] *Tellabs I*, 437 F.3d at 592. Tellabs reduced its first-quarter sales projections from a range of $865 to $890 million to a range of $830 to $865 million. *Id.* Notebaert, however, attributed this reduction to poor growth in another division of the business and still made positive comments regarding demand for its networking products, specifically the TITAN 6500, and his belief that Tellabs would meet the adjusted projections. *Id.*

[11] *Id.* at 593. Tellabs reduced its first-quarter sales projections of $830 to $865 million to $772 million a month later. *Id.* Again, Notebaert reassured investors that demand for the 6500 was still strong, but customers pushing orders from the first-quarter to the second-quarter of 2001 resulted in a decreased projection of Tellabs' results. *Id.*

[12] *Tellabs II*, 127 S. Ct. at 2505.

[13] *Tellabs I*, 437 F.3d at 593. Tellabs reduced its second-quarter sales projections to $500 million from a previous projection of a range between $780 and $820 million. *Id.*

[14] *Tellabs II*, 127 S. Ct. at 2505. The class period is from December 11, 2000 until June 19, 2001. *Id.*

On December 3, 2002, the Shareholders filed their first complaint against Tellabs in the United States District Court for the Northern District of Illinois.[15] The complaint stated Tellabs and Notebaert committed securities fraud, violating § 10(b) of the Securities Exchange Act of 1934 and SEC rule 10b-5.[16] The district court granted Tellabs' motion to dismiss for failure to state a claim, without prejudice.[17] The district court found the Shareholders failed to plead their case with particularity as required by the Private Securities Litigation Reform Act of 1995 (PSLRA).[18] Additionally, the court found the Shareholders failed to meet the scienter requirement for a securities fraud pleading, "which requires that . . . [the defendant] likely intended 'to deceive, manipulate, or defraud.'"[19] On July 2, 2003, the Shareholders filed a second amended complaint; the district court dismissed the complaint with prejudice upon Tellabs' motion.[20] The district court found the Shareholders met the particularity pleading standard with respect to Notebaert's misleading statements.[21] These particular facts, however, failed to establish a "strong inference" of scienter, a requirement in a securities fraud pleading.[22]

The Shareholders appealed to the United States Court of Appeals for the Seventh Circuit claiming the district court erred in its judgment because "(1) some of the statements the court dismissed as 'mere puffery' [were] legally actionable; [and] (2) their complaint provided enough detail to support a strong inference of scienter for each of the defendants . . . ."[23] The Seventh Circuit affirmed in part and reversed in part.[24] The Seventh Circuit agreed with the district court

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[15] Johnson v. Tellabs, Inc., 303 F. Supp. 2d 941 (N.D. Ill. 2004).

[16] *Tellabs II*, 127 S. Ct. at 2505-06.

> Their complaint stated, *inter alia*, that Tellabs and Notebaert had engaged in securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934, and SEC rule 10b-5, also that Notebaert was a 'controlling person' under § 20(a) of the 1934 Act, and therefore derivatively liable for the company's fraudulent acts.

Id. (citations omitted). The complaint also "allege[d] that Brick engaged in illegal insider trading in violation of § 20A of the Act." *Tellabs I*, 437 F.3d at 594 (citation omitted).

[17] *Johnson*, 262 F. Supp. 2d at 959.

[18] *Id.*; *Tellabs I*, 437 F.3d at 593.

[19] *Tellabs I*, 437 F.3d at 593 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976)).

[20] *Johnson*, 303 F. Supp. 2d at 971; *Tellabs II*, 127 S. Ct. at 2506; *Tellabs I*, 437 F.3d at 594. The district court found that Shareholders pled with particularity that Notebaert's statements were misleading but failed to show he acted with scienter. *Tellabs II*, 127 S. Ct. at 2506; *see also* Johnson v. Tellabs, Inc., 303 F. Supp. 2d 941 (N.D. Ill. 2004).

[21] *Johnson*, 303 F. Supp. 2d at 956-57; *Tellabs II*, 127 S. Ct. at 2506; *Tellabs I*, 437 F.3d at 594.

[22] *Johnson*, 303 F. Supp. 2d at 961, 969; *Tellabs II*, 127 S. Ct. at 2506.

[23] *Tellabs I*, 437 F.3d at 594.

[24] *Id.* at 605.

that the Shareholders had pled with particularity that Notebaert's statements were misleading.[25] The Seventh Circuit, however, used its reasonable person test, and overruled the district court finding the Shareholders adequately alleged a "strong inference" of scienter with respect to Notebaert's actions.[26]

The United States Supreme Court granted certiorari "to resolve the disagreement among the circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint gives rise to a 'strong inference' of scienter."[27] In an eight-to-one decision delivered by Justice Ginsburg, the Court held "[a] complaint will survive . . . only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[28] Thus, the Court vacated the Seventh Circuit's judgment, and remanded the case for further proceedings.[29]

This case note examines the evolution of the heightened pleading standard for securities fraud actions and the disagreement among the circuits in interpreting this standard.[30] First, it traces the heightened pleading standard for securities fraud up to *Tellabs*.[31] Next, it argues the Court developed an improper rule.[32] Additionally, it contends Justice Alito and Justice Scalia's concurrences proposed the proper standard for pleading requirements.[33] Finally, this case note discusses the impact the *Tellabs* decision will have on the Tenth Circuit in the future.[34]

BACKGROUND

Reacting to the market crash in 1929, Congress enacted two federal statutes to regulate securities transactions.[35] These securities laws sought to protect investors and to maintain confidence in the securities markets, which seemed to have eroded after the market crash.[36] Congress enacted the Securities Act of

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[25] *Id.* at 596-600.

[26] *Id.* at 603-05. The Seventh Circuit remanded the case to the district court for further proceedings consistent with the Seventh Circuit's opinion. *Id.* at 605.

[27] *Tellabs II*, 127 S. Ct. at 2506.

[28] *Id.* at 2510.

[29] *Id.* at 2513.

[30] *See infra* notes 51-87 and accompanying text.

[31] *See infra* notes 51-87 and accompanying text.

[32] *See infra* notes 197-235 and accompanying text.

[33] *See infra* notes 197-235 and accompanying text.

[34] *See infra* notes 236-250 and accompanying text.

[35] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 727 (1975); Securities Act of 1933, 15 U.S.C. § 77l (2006); Securities Exchange Act of 1934, 15 U.S.C. § 78b (2006).

[36] H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.).

1933 (1933 Act) to protect investors against fraud, ensure disclosure of material information concerning public offerings of securities, and to promote honesty and fair dealing in the market.[37] The Securities Exchange Act of 1934 (1934 Act) complemented the 1933 Act by protecting investors in two ways.[38] First, it protected investors from unfair practices by regulating securities exchanges and over-the-counter markets operating in commerce.[39] Second, it protected investors by imposing standardized reporting requirements on publicly traded companies.[40] As part of the 1934 Act, Congress created the Securities Exchange Commission (SEC) and gave it the power to enforce the Acts.[41] Section ten of the 1934 Act (§ 10(b)) makes it

> unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[42]

In 1942, acting under the authority granted by § 10(b) of the 1934 Act, the SEC promulgated rule 10b-5.[43] Rule 10b-5 allows the SEC to regulate

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[37] *Ernst & Ernst*, 425 U.S. at 195 (citing H.R. REP. NO. 73-85, at 1-5 (1933)); *see also Blue Chip Stamps*, 421 U.S. at 728; 15 U.S.C. § 77l.

[38] *Ernst & Ernst*, 425 U.S. at 195; S. REP. NO. 73-792, at 1-5 (1934); *Blue Chip Stamps*, 421 U.S. at 728; 15 U.S.C. § 78b.

[39] *Ernst & Ernst*, 425 U.S. at 195 (stating the 1934 Act intended to protect investors from the manipulation of stock prices in securities markets); S. REP. NO. 73-792, at 1-5 (stating the purpose of the 1934 Act was to protect investors by the regulation of securities exchanges); *Blue Chip Stamps*, 421 U.S. at 728 (stating the 1934 Act intended to protect investors from inequitable and unfair practices by the regulation of securities exchanges); 15 U.S.C. § 78b.

[40] *Ernst & Ernst*, 425 U.S. at 195; S. REP. NO. 73-792, at 1-5; *Blue Chip Stamps*, 421 U.S. at 728; 15 U.S.C. § 78b.

[41] Securities Exchange Act of 1934, 15 U.S.C. 78j (2006); *Ernst & Ernst*, 425 U.S. at 195; *Blue Chip Stamps*, 421 U.S. at 728-29.

[42] 15 U.S.C. § 78j.

[43] *Ernst & Ernst*, 425 U.S. at 195; *Blue Chip Stamps*, 421 U.S. at 729. Allowing standing for securities fraud actions,

Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

securities fraud.[44] Although § 10(b) of the 1934 Act and Rule 10b-5 allow the SEC to regulate securities fraud, neither permits private actions for such fraud.[45] Nevertheless, in 1946, the United States District Court for the Eastern District of Pennsylvania held an implied private right of action existed under the statute.[46] Twenty-five years later the Supreme Court ruled on this issue in *Superintendent of Insurance of the State of New York v. Bankers Life and Casualty Company*.[47] The Supreme Court confirmed the overwhelming opinions of the district courts and the courts of appeals when it established a private right of action is available under § 10(b).[48] In 1976, the Supreme Court clarified another rule when it held, in *Ernst & Ernst v. Hochfelder*, that to establish liability under § 10(b) and 10b-5 negligence was insufficient, and the plaintiff must prove the defendant acted with scienter.[49] The circuits adopted the scienter standard; however, the adoption of a private right of action created a split among the circuits regarding pleading requirements under the Federal Rules of Civil Procedure.[50]

> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1951).

[44] 17 C.F.R. § 240.10b-5.

[45] *Ernst & Ernst*, 425 U.S. at 196 ("[Section] 10(b) does not by its terms create an express civil remedy for its violation . . . ."); *Blue Chip Stamps*, 421 U.S. at 729 ("Section 10(b) of the 1934 Act does not by its terms provide an express civil remedy for its violation.").

[46] Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 513-14 (E.D. Pa. 1946). The court based its reasoning on the well-established notion that a violation of a statute constitutes a wrongful act and a tort. *Id.* Thus, Congress would have made it clear in the statutory language if it intended to prevent recovery from private parties injured by securities fraud. *Id.* Because Congress did not make it clear in the statutory language, Congress must have intended to follow general tort law, thus allowing civil actions under § 10(b). *Id.*

[47] Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

[48] *Id.* at 13 n.9. The Court stated, in its opinion, a private right of action is recognized under Rule 10b-5 as a remedy for securities fraud actions. *Id.* at 13. Then, in footnote 9, the Court acknowledged that a private right of action under § 10(b) of the 1934 Act is "now established." *Id.* at 13 n.9. This decision remained consistent with the Supreme Court's earlier recognition in dictum of *J. I. Case Company v. Borak* that "[p]rivate enforcement of . . . [securities laws] provides a necessary supplement to Commission [(SEC)] action." J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

[49] *Ernst & Ernst*, 425 U.S. at 193. The Court defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 193 n.12. Every court of appeals has recognized that the plaintiff may meet the scienter requirement by showing that defendant acted reckless, however, the Supreme Court is yet to rule on this issue. *Tellabs II*, 127 S. Ct. at 2507 n.3; *Ernst & Ernst*, 425 U.S. at 193 n.12.

[50] *Tellabs II*, 127 S. Ct. at 2507; *Ernst & Ernst*, 425 U.S. at 193 n.12; *Superintendent of Ins. of State of N.Y.*, 404 U.S. at 13 n.9.

Pleading Requirements Under The Federal Rules Of Civil Procedure

All of the circuits have consistently recognized that Federal Rule of Civil Procedure "9(b) applies to actions brought under the federal securities laws."[51] Compared to Federal Rule of Civil Procedure 8(a)(2), Federal Rule of Civil Procedure 9(b) is a heightened pleading standard, requiring the circumstances constituting fraud be stated with particularity.[52] However, it provides "[m]alice, intent, knowledge, and other condition of mind of a person, may be averred generally."[53] Although the circuits agreed Rule 9(b) governs pleadings for securities fraud actions, the courts divided on its interpretation.[54] The Ninth Circuit merely required plaintiffs to state scienter existed.[55] The First Circuit's pleading requirement proved more stringent, requiring a plaintiff to state facts that give rise to an inference of scienter.[56] The Second Circuit had the strongest pleading

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[51] *In re* GlenFed, Inc. Securities Litigation, 42 F.3d 1541, 1545 (9th Cir. 1994); *accord* Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1127-28 (2nd Cir 1994) (acknowledging Federal Rule of Civil Procedure 9(b) applies to securities fraud); Greenstone v. Cambex Corp., 975 F.2d 22, 25 (1st Cir. 1992) (holding Federal Rule of Civil Procedure 9b applies to actions brought under the federal securities laws).

[52] FED. R. CIV. P. 9(b). Federal Rule of Civil Procedure 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.* Conversely, Federal Rule of Civil Procedure 8(a)(2) merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

[53] FED. R. CIV. P. 9(b).

[54] *Tellabs II*, 127 S. Ct. at 2507. The Second Circuit required the plaintiff to allege facts that give rise to a "strong inference" that the defendant acted with "fraudulent intent." *E.g.*, *Shields*, 25 F.3d at 1128 (requiring plaintiffs to allege facts that give rise to a "strong inference" that the defendant acted with "fraudulent intent"); Cosmas v. Hassett, 886 F.2d 8, 12-13 (2nd Cir. 1989) (requiring a complaint to allege facts that give rise to a "strong inference" that the defendant "possessed the requisite fraudulent intent"); Ross v. A. H. Robins Co., 607 F.2d 545, 558 (2nd Cir. 1979) (holding plaintiffs must state facts that give rise to a "strong inference" that defendant acted with fraudulent intent). The Ninth Circuit's interpretation was at the opposite end of the spectrum of the Second Circuit. *Compare* In re *GlenFed, Inc. Sec. Litig.*, 42 F.3d at 1547 ("[P]laintiffs may aver scienter generally, just as the rule states-that is, simply by saying that scienter existed."), *with Shields*, 25 F.3d at 1128-29. The First, Fifth and Seventh Circuits choose a middle ground. Brief for the United States as Amicus Curiae Supporting Petitioners at 14, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007) (No. 06-484), 2007 WL 460606. These circuits used different language, but they all required the plaintiff to allege facts that supported a reasonable inference that the defendant acted with the required state of mind. *See Greenstone*, 975 F.2d at 25; Brief for the United States, *supra* note 54, at 14-15 (citing Tuchman v. DSC Comm'cns Corp., 14 F.3d 1061, 1068 (5th Cir. 1994); DiLeo v. Ernst & Young, 901 F.2d 624, 629 (7th Cir. 1990)).

[55] In re *GlenFed, Inc. Sec. Litig.*, 42 F.3d at 1546-47 ("We are not permitted to add new requirements to Rule 9(b) simply because we like the effects of doing so. This is a job for Congress, or for the various legislative, judicial, and advisory bodies involved in the process of amending the Federal Rules.").

[56] *Greenstone*, 975 F.2d at 25 (holding the complaint must "set forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading.").

requirement, requiring plaintiffs to state, with particularity, facts that give rise to a "strong inference" of scienter.[57] The split between circuits triggered the need for change and established the importance of uniform pleading requirements in securities fraud actions.[58] Thus, following the Ninth Circuit's dicta that stated Congress had the responsibility to develop a uniform standard for pleading requirements in securities fraud actions, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA).[59]

Congress's Enactment of the Private Securities Litigation Reform Act of 1995

In addition to setting a uniform pleading standard among the circuits for § 10(b) actions, Congress enacted the Private Securities Litigation Reform Act in an effort to reduce frivolous securities fraud litigation while allowing meritorious claims to proceed.[60] Congress acknowledged private securities actions provided defrauded investors with a necessary relief for their losses.[61] In addition, Congress noted frivolous lawsuits have run rampant and the PSLRA seeks to maintain confidence in markets while protecting investors.[62] Although the PSLRA provided

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[57] *Shields*, 25 F.3d at 1128; *Ross*, 607 F.2d at 558.

[58] H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.); *see also Tellabs II*, 127 S. Ct. at 2504; Ottman v. Hanger Orthopedic Group, Inc., 353 F.3d 338, 344 (4th Cir. 2003); Nathenson v. Zonagen, Inc., 267 F.3d 400, 407 (5th Cir. 2001); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1282 (11th Cir. 1999).

[59] In re *GlenFed, Inc. Sec. Litig.*, 42 F.3d at 1546; Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4 (2006).

[60] H.R. REP. NO. 104-369, at 31 (Conf. Rep.) (stating that "[t]his legislation implements needed procedural protections to discourage frivolous litigation," while noting the importance of private securities litigation); *Tellabs II*, 127 S. Ct. at 2508; PSLRA, 15 U.S.C. § 78u-4 (2006).

[61] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 126 S. Ct. 1503, 1510 (2006); H.R. REP. NO. 104-369, at 31 (Conf. Rep.).

[62] *See Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 126 S. Ct. at 1510-11 (noting abuses like nuisance filings had run rampant and the PSLRA emerged as an effort to curb these abuses); H.R. REP. NO. 104-369, at 31 (Conf. Rep.). Congress had heard significant evidence of abusive practices in four forms:

> (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep-pocket defendants . . . without regard to their culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.

H.R. REP. NO. 104-369, at 31 (Conf. Rep.).

both "substantive and procedural controls," one of the most notable additions was Congress's attempt to standardize the PSLRA pleading requirements.[63] Section 1 of the PSLRA states in relevant part that:

> [i]n any private right of action . . . the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.[64]

Section 2 of the PSLRA states in relevant part that "[i]n any private action . . . the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[65]

Although Federal Rule of Civil Procedure 9(b) and § 78u-4(b)(1) of the PSLRA both require pleading the circumstances constituting fraud with particularity, there exists a notable difference between the pleading requirements of the two.[66] Rule 9(b) has a weaker standard with regard to the pleading requirements pertaining to the defendant's state of mind, allowing it to be "averred generally."[67] Conversely, § 78u-4(b)(2) of the PSLRA has a stringent requirement, demanding the plaintiff to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[68]

Congress had great intentions in enacting the PSLRA.[69] However, Congress's failure to codify the Second Circuit's case law or "throw much light on what facts

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[63] 15 U.S.C. § 78u-4(b)(1)-(2); *Tellabs II*, 127 S. Ct. at 2508. In addition to pleading requirements, "Congress prescribed new procedures for the appointment of lead plaintiffs and lead counsel. This innovation aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs." *Id.* Additionally, Congress provided "provisions limit[ing] recoverable damages and attorney's fees, provide[d] a 'safe harbor' for forward-looking statements, . . . mandate[d] imposition of sanctions for frivolous litigation, and authorize[d] a stay of discovery pending resolution of any motion to dismiss." *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 126 S. Ct. at 1511; *see also* 15 U.S.C. § 78u-4.

[64] 15 U.S.C. § 78u-4(b)(1).

[65] 15 U.S.C. § 78u-4(b)(2).

[66] 15 U.S.C. § 78u-4(b)(1)-(2); FED. R. CIV. P. 9(b).

[67] FED. R. CIV. P. 9(b). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.*

[68] 15 U.S.C. § 78u-4(b)(1)-(2).

[69] H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.).

will suffice to create [a strong] inference" has left the circuits divided again, this time in defining the term "strong inference."[70]

Three different approaches developed among the circuits in determining the facts a plaintiff must plead to meet the required "strong inference" of scienter.[71] The Second and Third Circuits reasoned Congress intended to adopt the Second Circuit's pleading standard.[72] In the case of *In re Advanta Corp. Securities Litigation*, the Third Circuit reasoned Congress's use of the Second Circuit's language in enacting the PSLRA indicated that Congress intended to adopt the Second Circuit's pleading standard.[73] Additionally, the court argued that adoption of the Second Circuit's restrictive pleading standard in most jurisdictions would be consistent with Congress's intentions in strengthening the pleading standards and reducing frivolous litigation.[74] Thus, under the Second Circuit's standard, a plaintiff would succeed if he or she stated a claim that "establish[ed] a motive and an opportunity to commit fraud, or by setting forth facts that constitute[d] circumstantial evidence of either reckless or conscious behavior."[75]

Turning to the other extreme, the Ninth and Eleventh Circuit rejected the Second Circuit's standard and opted instead for an even stricter standard, requiring "strong circumstantial evidence of deliberately reckless or conscious misconduct."[76] The Ninth Circuit in *In re Silicon Graphics Inc. Securities Litigation*, reasoned that rejection of the Second Circuit's standard was proper because Congress intended

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[70] *See Tellabs I*, 437 F.3d at 601 (stating "Congress did not . . . throw much light on what facts will suffice to create [a strong] inference"); *Tellabs II*, 127 S. Ct. at 2509.

[71] *Tellabs I*, 437 F.3d at 601; *In re* Silicon Graphics Inc. Securities Litigation, 183 F.3d 970, 974 (9th Cir. 1999).

[72] *See, e.g.,* Novak v. Kasaks, 216 F.3d 300, 309-10 (2nd Cir. 2000) ("The statute effectively adopts the Second Circuit's pleading standard for scienter wholesale, and thus plaintiffs may continue to state a claim by pleading either motive and opportunity or strong circumstantial evidence of recklessness or conscious misbehavior."); *In re* Advanta Corp. Sec. Litig., 180 F.3d 525, 534-35 (3rd Cir. 1999) (holding plaintiffs may "plead scienter by alleging facts establishing a motive and an opportunity to commit fraud").

[73] In re *Advanta Corp. Sec. Litig.*, 180 F.3d at 533-34; *accord Novak*, 216 F.3d at 309-10 (Congress's use of the Second Circuit's language in the PSLRA indicates a standard equal to the Second Circuit's standard.).

[74] In re *Advanta Corp. Sec. Litig.*, 180 F.3d at 534; *accord Novak*, 216 F.3d at 309-10. The Second Circuit had the most stringent pleading standard, and therefore, the adoption of the Second Circuit's standard would be consistent with Congress's intentions in strengthening the pleading standards. *Novak*, 216 F.3d at 309-10.

[75] In re *Advanta Corp. Sec. Litig.*, 180 F.3d at 534-35; *see also Novak*, 216 F.3d at 309-10 (stating a plaintiff may succeed by "pleading either motive and opportunity or strong circumstantial evidence of reckless or conscious misbehavior").

[76] In re *Silicon Graphics Inc. Sec. Litig.*, 183 F.3d at 974; *see also Bryant*, 187 F.3d at 1285-87 (rejecting the Second Circuit's standard and instead requiring a strong showing of severe recklessness).

to elevate the pleading requirement above any standards in existence at the time of the PSLRA's enactment.[77] Furthermore, the court stated its reasoning best explains Congress's adoption of the Second Circuit's "strong inference standard" for the PSLRA while expressly refusing to codify the Second Circuit's case law interpreting that standard.[78]

Finally, the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits interpreted the PSLRA by creating a middle ground.[79] These circuits adopted a case-by-case approach, requiring courts to look at the totality of the facts to determine if the allegations gave rise to a strong inference of fraudulent intent.[80] The cases that follow the middle ground approach argued Congress did not intend to adopt the Second Circuit's pleading standard.[81] In addition, these cases stated that the Act's language indicated, "Congress plainly contemplated that scienter could be proven by inference, thus acknowledging the role of indirect and circumstantial evidence."[82] Furthermore, the courts held the PSLRA's language does not require "nor prohibit the use of any particular method to establish an inference of

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[77] In re *Silicon Graphics Inc. Sec. Litig.*, 183 F.3d at 974.

[78] *Id.*

[79] City of Philadelphia v. Fleming Companies, Inc., 264 F.3d 1245, 1261-62 (10th Cir 2001).

[80] *Id.* at 1261; *accord Ottmann*, 353 F.3d at 345 (agreeing a case-by-case approach is appropriate); Florida State Bd. of Admin. v. Green Tree Financial Corp., 270 F.3d 645, 659-60 (8th Cir. 2001) (holding the Eighth Circuit will follow the middle ground approach); Helwig v. Vencor, Inc., 251 F.3d 540, 550-52 (6th Cir. 2001) (holding the case-by-case approach best reflects Congress's intent); Greebel v. FTP Software, Inc., 194 F.3d 185, 195-97 (1st Cir. 1999) (holding the First Circuit analyzes the facts of each case to determine whether those facts alleged support a "strong inference" of scienter); Nathenson v. Zonagen, Inc., 267 F.3d 400, 410-12 (5th Cir. 2001) (stating it followed the approach taken by the Sixth Circuit).

[81] *Greebel*, 194 F.3d at 195-97; *accord City of Philadelphia*, 264 F.3d at 1261-62 (holding a fact-specific approach best reflects Congress's intent); *Ottmann*, 353 F.3d at 345 (holding the legislative history regarding the adoption of the Second Circuit standard inconclusive); *Florida State Bd. of Admin.*, 270 F.3d at 659-60 (holding the PSLRA "adopted only the strong-inference-of-scienter standard, without codifying the particular methods of satisfying the standard."); *Helwig*, 251 F.3d at 550-52 (stating the PSLRA never refers to motive and opportunity); *Nathenson*, 267 F.3d at 410-12 (holding the legislative history on whether Congress intended to adopt the motive and opportunity approach is ambiguous).

[82] *Greebel*, 194 F.3d at 195; *accord City of Philadelphia*, 264 F.3d at 1261-62 (holding the Act's language indicates Congress's belief that scienter could be proven by inference); *Ottmann*, 353 F.3d at 345 (holding the court must examine all of the allegations to determine if they give rise to a "strong inference" of scienter); *Florida State Bd. of Admin.*, 270 F.3d at 659-60 (holding the primary effect of the PSLRA "is to require a pleading to state facts giving rise to a 'strong inference of scienter.'"); *Helwig*, 251 F.3d at 551 (quoting *Greebel* that "Congress plainly contemplated that scienter could be proven by inference, thus acknowledging the role of indirect and circumstantial evidence."); *Nathenson*, 267 F.3d at 410 (quoting *Greebel* that "Congress plainly contemplated that scienter could be proven by inference, thus acknowledging the role of indirect and circumstantial evidence.").

scienter."[83] Finally, the courts argued Congress mandated inferences of scienter only survive if both reasonable and "strong."[84] Considering the "strong" aspect of the PSLRA, the First Circuit and the Sixth Circuit raised its middle ground standard to a higher level.[85] In *In re Credit Suisse First Boston Corp.*, the First Circuit held that when considering the complaint as a whole, a plaintiff has not met the "strong inference" standard where "there are legitimate explanations for the behavior that are equally convincing."[86] In *Helwig v. Vencor, Inc.*, the Sixth Circuit held "plaintiffs are entitled only to the most plausible of competing inferences," but the inference does not have to be "irrefutable."[87] The circuit splits regarding the interpretation of the PSLRA's "strong inference" standard led the United States Supreme Court's decision to grant certiorari in the *Tellabs* case.[88]

PRINCIPAL CASE

In *Tellabs I*, the Seventh Circuit adopted the middle ground standard, requiring an examination of all the complaint's allegations to decide whether they gave rise to a "strong inference" of scienter.[89] However, the Seventh Circuit failed to adopt the Sixth Circuit's standard for the survival of a complaint.[90] According to the Sixth Circuit's standard, "plaintiffs are entitled only to the most plausible of competing inferences," but the inference does not have to be "irrefutable."[91] Worried the Sixth Circuit's standard might infringe on the plaintiff's Seventh Amendment rights to a jury trial, the Seventh Circuit adopted its own standard for the survival of a complaint.[92] Reversing the decision of the district court, the

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[83] *Greebel*, 194 F.3d at 195-96; *accord Ottmann*, 353 F.3d at 345 (holding the Act's language does not specify any particular method to establish an inference of scienter); *Florida State Bd. of Admin.*, 270 F.3d at 659-60 (holding Congress did not mandate a particular method of satisfying the "strong inference" standard); *Helwig*, 251 F.3d at 551 (quoting *Greebel* that "'the words of the act neither mandate nor prohibit the use of any particular method to establish an inference of scienter.'"); *Nathenson*, 267 F.3d at 411 (citing *Greebel* that the "PSLRA neither mandated nor prohibited *any* particular method of establishing a strong inference of scienter.").

[84] *Greebel*, 194 F.3d at 195; *accord Florida State Bd. of Admin.*, 270 F.3d at 660 (holding inferences only survive if they are both strong and reasonable); *Helwig*, 251 F.3d at 553 (holding inferences must be reasonable and strong).

[85] *See In re* Credit Suisse First Boston Corp., 431 F.3d 36, 49 (1st Cir. 2005) (holding plaintiff fails to meet the "strong inference" standard where "there are legitimate explanations for the behavior that are equally convincing."; *Helwig*, 251 F.3d at 553 (holding "the 'strong inference' requirement means plaintiffs are entitled only to the most plausible of competing inferences.").

[86] In re *Credit Suisse First Boston Corp.*, 431 F.3d at 49; *see also Helwig*, 251 F.3d at 553 (holding "the 'strong inference' requirement means that plaintiffs are entitled only to the most plausible of competing inferences.").

[87] *Helwig*, 251 F.3d at 553.

[88] *Tellabs II*, 127 S. Ct. 2499, 2506 (2007).

[89] *Tellabs I*, 437 F.3d 588, 601 (7th Cir. 2006).

[90] *Id.* at 601-02.

[91] *Helwig*, 251 F.3d at 553.

[92] *Tellabs I*, 437 F.3d at 602.

Seventh Circuit found the complaint survived because "it allege[d] facts from which, if true, a reasonable person could infer that the defendant acted with the required intent."[93] Consequently, Tellabs appealed the decision of the Seventh Circuit and the United States Supreme Court granted certiorari "to resolve the disagreement among circuits on whether, and to what extent, a court must consider competing inferences in determining whether a securities fraud complaint gives rise to a 'strong inference' of scienter."[94]

In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the United States Supreme Court acknowledged it must develop a more workable PSLRA "strong inference" pleading standard while still maintaining the PSLRA's goals of reducing frivolous claims but allowing meritorious ones to proceed.[95] The Court held the determination of whether a complaint survives a motion to dismiss is not whether an individual allegation, viewed in isolation, meets the "strong inference" standard.[96] Rather, courts must look at all of the facts alleged to determine if those facts give rise to a "strong inference" of scienter.[97]

Because of the circuit split and Congress's failure to provide an explanation as to the facts needed to meet the "strong inference" standard, the *Tellabs* Court settled the disagreement.[98] The Court decided that in determining whether the pled facts met the "strong inference" requirement, a court must look at reasonable opposing inferences.[99] The Court noted the Seventh Circuit failed to take this step when it determined the Shareholders met the "strong inference" requirement.[100] The Seventh Circuit mistakenly held a complaint could survive if it "allege[d] facts from which, if true, a reasonable person could infer that the defendant acted with the required intent . . . ."[101] Conversely, when Congress enacted the PSLRA, one of the Act's main purposes involved heightening the pleading standards required in a securities fraud action.[102] Congress determined it insufficient to allege facts from which a reasonable person could find an inference of scienter.[103] Thus, the

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[93] *Id.*

[94] *Tellabs II*, 127 S. Ct. at 2506.

[95] *Id.* at 2509.

[96] *Id.* The Court first reiterated that when dealing with a Rule 12(b)(6) motion to dismiss a § 10(b) action, a court must accept all the factual allegations in the complaint as true. *Id.*

[97] *Id.*

[98] *Id.*

[99] *Tellabs II*, 127 S. Ct. at 2509.

[100] *Id.*

[101] *Id.* (quoting *Tellabs I*, 437 F.3d at 602).

[102] *Tellabs II*, 127 S. Ct. at 2508.

[103] *Id.* at 2510. *See also In re* Cerner Corp. Sec. Litig., 425 F.3d 1079, 1084, 1085 (8th Cir. 2005) (holding inferences of scienter do not survive a motion to dismiss unless the inferences are both reasonable and strong).

Court stated, "Congress required plaintiffs to plead with particularity facts that give rise to a 'strong' *i.e.*, a powerful or cogent-inference."[104]

In evaluating the strength of an inference, the Court stated, "it cannot be decided in a vacuum."[105] Furthermore, the Court determined that in addition to looking at inferences that favor the plaintiff, a court must also consider possible explanations for the defendant's conduct.[106] However, the Court noted "[t]he inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the 'smoking-gun' genre, or even the 'most plausible of competing inferences.'"[107] The Court determined this because the PSLRA pleading standards contained only one constraint among many that heightened the requirements in instituting a securities fraud action.[108] Despite this reasoning, the Court again noted the importance that "the inference of scienter must be more than merely 'reasonable' or 'permissible'—it must be cogent and compelling, thus strong in light of other explanations."[109] As a result, the Court held a plaintiff will succeed only if a reasonable person would find the inference of scienter "cogent and at least as compelling" as any inference favoring the defendant.[110]

In other words, the Court held in addition to looking at inferences that favor the plaintiff, a court must weigh the plaintiff's deductions against other possible inferences favoring the defendant's conduct.[111] The Court acknowledged, however, the inferences favoring the plaintiff do not need to be a dead give away, nor do they even need to be the most realistic of the competing inferences.[112] But, the Court highlighted the importance the inference of scienter must be more than "permissible," it must be convincing to a reasonable person.[113] Therefore, for a complaint to survive, a reasonable person must find the inference of scienter at least as convincing as any inference favoring the defendant.[114]

Before concluding its discussion on scienter, the Court addressed two of Tellabs' contentions.[115] First, Tellabs contended when considering competing

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[104] *Tellabs II*, 127 S. Ct. at 2510.

[105] *Id.*

[106] *Id.*

[107] *Id.* (quoting Fidel v. Farley, 392 F.3d 220, 227 (6th Cir. 2004)).

[108] *Tellabs II*, 127 S. Ct. at 2510.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* ("The inference that defendant acted with scienter need not be irrefutable, *i.e.*, of the 'smoking-gun' genre, or even the 'most plausible of competing inferences.'").

[113] *Tellabs II*, 127 S. Ct. at 2510.

[114] *Id.*

[115] *Id.* at 2511.

inferences, Notebaert's lack of personal financial gain proved dispositive.[116] The Court noted the defendant's motive is an important consideration and proof of defendant's financial gain might "weigh heavily in favor of a scienter inference."[117] However, in agreeing with the Seventh Circuit, the Court held the absence of allegations proving a motive is not dispositive.[118] The Court noted the presence or absence of motive accounts for only one allegation, and it reiterated the importance of taking all of the allegations, as a whole, to determine if the plaintiff met the "strong inference" of scienter.[119]

Next, Tellabs argued four claims in the Shareholders' complaint proved too vague to give rise to a "strong inference" of scienter with respect to Notebaert's actions.[120] First, regarding the false inflation of fourth-quarter results for 2000, the Shareholders failed to allege whether Notebaert knew about the illegal channel stuffing as opposed to the legal channel stuffing.[121] Second, the Shareholders failed to state particular dates proving Notebaert knew about the dropping demand for the 5500 when he made multiple statements about the strong demand.[122] Third, the Shareholders failed to prove the weekly or monthly reports, reviewed by Notebaert, mentioned the TITAN 6500 was not ready for delivery.[123] Thus, the Shareholders failed to prove Notebaert knew the falsity of his statement that the product was ready for delivery and demand was strong.[124] Finally, because the Shareholders failed to prove that Notebaert or the company benefited from the alleged fraud, both Tellabs and Notebaert lacked motive.[125] The Court agreed with Tellabs that vague and ambiguous statements would weigh against the Shareholders in their attempt to meet the "strong inference" requirement.[126]

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[116] *Id.* S*ee also* Brief for Petitioners, *supra* note 1, at 50. Tellabs stated that the complaint failed to identify any motive on the part of Notebaert to commit fraud because he never sold any stock during the class period which would have personally benefited him. *Id.*

[117] *Tellabs II*, 127 S. Ct. at 2511.

[118] *Id.*

[119] *Id.*

[120] *Id.* S*ee also* Brief for Petitioners at, *supra* note 1, at 43-50.

[121] Brief for Petitioners, *supra* note 1, at 43-50. Legal channel stuffing includes offering customers discounts in an attempt to increase sales. *Id.* at 44. Writing purchase orders for products customers never ordered, and then shipping the customers those products in an attempt to increase sales fraudulently exemplifies illegal channel stuffing. *Id.*

[122] *Id.* at 46-48.

[123] *Id.* at 48-49.

[124] *Id.*

[125] *Id.* at 49-50.

[126] *Tellabs II*, 127 S. Ct. at 2511. Vague and ambiguous statements would count against Shareholders in inferring scienter because 15 U.S.C. § 78u-4(b)(2) requires plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (2006). Again, the court reiterated the importance of reviewing all of the allegations collectively and not viewing each allegation individually. *Tellabs II*, 127 S. Ct. at 2511.

The Court, however, summarized by stating the reviewing court must weigh all allegations and determine if a reasonable person would find the inference of scienter at least as strong as any opposing inference.[127]

Before concluding its opinion, the Court addressed the Seventh Circuit's constitutional argument.[128] Justifying its ruling on the "strong inference" standard, the Seventh Circuit stated that weighing opposing inferences and making a decision is a role for the jury.[129] It also noted that failing to allow jury review would impinge upon the Shareholders' Seventh Amendment right to a trial by jury.[130] The Court disagreed with the Seventh Circuit, stating it lies within Congress's power to determine what the plaintiff must plead to state a claim, and the Court has never questioned that power.[131] Furthermore, the Court has never held the Seventh Amendment prohibits Congress from establishing heightened pleading requirements for particular claims.[132] The Court stated the Seventh Amendment is not violated because the "heightened pleading rule simply 'prescribes the means of making an issue,' and that, when '[t]he issue [was] made as prescribed, the right of trial by jury accrues.'"[133]

The Court concluded by overruling the Seventh Circuit's scienter test.[134] The Court did not determine, however, whether the Shareholders' allegations met the scienter requirement pursuant to the new rule handed down in its decision.[135] Instead, the Court remanded the case back to the Seventh Circuit for further proceedings consistent with the new rule.[136]

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[127] *Tellabs II*, 127 S. Ct. at 2511. The Seventh Circuit held allegations of scienter must be made with respect to each defendant individually. *Tellabs I*, 437 F.3d at 602-03. The Court did not address whether allegations of scienter made against one defendant can be imputed to all the other individual defendants. *Tellabs II*, 127 S. Ct. at 2511, n.6.

[128] *Tellabs II*, 127 S. Ct. at 2511-12. The Supreme Court stated the Seventh Circuit unnecessarily raised this issue on its own accord since Shareholders never raised it. *Id.* at 2512 n.7.

[129] *Id.* at 2511-12.

[130] *Id.*

[131] *Id.* at 2512.

[132] *Id.*

[133] *Tellabs II*, 127 S. Ct. at 2512 (quoting Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902)). *Fidelity & Deposit Co.* dealt with a similar Seventh Amendment contention regarding the Supreme Court of the District of Columbia's rule established pursuant to the rulemaking power Congress delegated that required defendants to state with particularity their grounds for defense. *Id.* The Court entered judgment for the plaintiff because of the defendant's affidavit lacked sufficiency. *Id.* The United States Supreme Court upheld the District of Columbia's holding that the rule did not violate the Seventh Amendment. *Id.* The Court stated the right to a trial by jury would begin once the defendant properly stated his grounds for defense. *Id.*

[134] *Id.* at 2512.

[135] *Id.*

[136] *Id.*

Justice Scalia's Concurrence

Unhappy with the new rule the Court developed, Justice Scalia concurred.[137] In his concurring opinion, Justice Scalia disagreed with the Court's opinion that an inference "'at least as compelling as any opposing inference,'" can be considered a "strong inference."[138] Justice Scalia reasoned the Court must give the phrase "strong inference" its normal meaning.[139] The proper test, therefore, "should be whether the inference of scienter (if any) is *more plausible* than the inference of innocence."[140] He argued the Court's rejection of his test fell on two erroneous lines of reasoning.[141] First, irrefutable facts are not required to prove a "strong inference" of scienter.[142] Justice Scalia began his analysis by noting that Congress should determine the proper pleading standard, and Congress did so by using the phrase "strong inference."[143] According to Justice Scalia, it is now the Court's job to give that phrase its normal meaning.[144] Justice Scalia noted the Court abandoned the statutory text in favor of judicial inference when the Court enacted a test allowing a tie to go to the plaintiff.[145] Justice Scalia concluded by stating that enacting the PSLRA's heightened pleading standards Congress did not intend to allow plaintiffs to win in a close case.[146]

Justice Scalia stated the second erroneous reason the Court rejected his test lies in the contention that "the inference of scienter . . . [must be] at least as compelling as any opposing inference."[147] The effect of this rule would allow a tie to go to the plaintiff, an outcome contrary to the ordinary rule of tort law.[148] Justice Scalia argued that if Congress meant to depart from the ordinary rule in which a tie goes to the defendant, the statute would have indicated it.[149] He concluded by noting that the contrary proves true because Congress "explicitly strengthen[ed] [the] rule by extending it to the pleading stage of a case."[150]

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[137] *Id.* (Scalia, J., concurring).

[138] *Tellabs II*, 127 S. Ct. at 2513 (Scalia, J., concurring) (quoting *Tellabs II*, 127 S. Ct. at 2505).

[139] *Id.* at 2513-14 (Scalia, J., concurring).

[140] *Id.* (Scalia, J., concurring). Justice Scalia stated that his test and the Court's test will seldom produce different results because two opposing inferences rarely prove exactly equal. *Id.* at 2514.

[141] *Id.* at 2513 (Scalia, J., concurring).

[142] *Id.* (Scalia, J., concurring).

[143] *Tellabs II*, 127 S. Ct. at 2513-14 (Scalia, J., concurring).

[144] *Id.* at 2514 (Scalia, J., concurring).

[145] *Id.* (Scalia, J., concurring).

[146] *Id.* (Scalia, J., concurring).

[147] *Id.* at 2510; *Id.* at 2513 (Scalia, J., concurring).

[148] *Tellabs II*, 127 S. Ct. at 2510; *Id.* at 2513 (Scalia, J., concurring).

[149] *Id.* at 2514 (Scalia, J., concurring).

[150] *Id.* (Scalia, J., concurring).

Justice Alito's Concurrence

Justice Alito agreed with Justice Scalia that the proper test for pleading requirements would demand an inference slightly stronger than no inference of scienter.[151] Justice Alito stated Justice Scalia's test for the pleading requirements acts similar to the test used at the summary-judgment and judgment-as-a-matter-of-law stages.[152] Differing from the Court, Justice Alito believed Congress did not intend to develop a new test.[153] Rather, Justice Alito thought the test should run consistent with the one used at the summary-judgment stage, one with which the courts remain familiar.[154]

Additionally, Justice Alito disagreed with the Court's decision that all of the facts must be taken into consideration when determining whether the plaintiff met the "strong inference" of scienter.[155] Instead, Justice Alito concluded only those facts pled with particularity should determine the sufficiency of the inference of scienter.[156] He stated that because the clear language requires the inference of scienter to arise from facts stated with particularity, "[i]t follows that facts not stated with the requisite particularity cannot be considered in determining whether the strong-inference test is met."[157] Justice Alito criticized the Court for stating non-particularized facts should determine whether the plaintiff met the scienter requirement.[158] In addition to contradicting the statute's clear language, Justice Alito stated the Court's holding would allow plaintiffs to benefit from alleging facts that do not meet the particularity requirement.[159] Finally, he criticized the Court for its interpretation of the particularity requirement.[160] Justice Alito reasoned the Court stripped the word "of all meaning" because its particularity requirement equaled a normal pleading review.[161] Consistent with the Court's interpretation, under a normal pleading review the court gives more weight to particularly pled facts than those pled ambiguously.[162] Thus, there existed no distinction between

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[151] *Id.* at 2516 (Alito, J., concurring).

[152] *Id.* (Alito, J., concurring). Justice Alito's test examines the pleadings to determine whether "no genuine issue" exists "as to any material fact" that the defendant possessed the required strong inference of scienter. FED. R. CIV. P. 56(c); *Tellabs II*, 127 S. Ct. at 2510 n.5.

[153] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring).

[154] *Id.* (Alito, J., concurring).

[155] *Id.* at 2515-16.

[156] *Id.* (Alito, J., concurring).

[157] *Id.* at 2516 (Alito, J., concurring). Section 78u-4(b)(2) states that "the complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. 78u-4(b)(2) (2006).

[158] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring).

[159] *Id.* (Alito, J., concurring).

[160] *Id.* (Alito, J., concurring).

[161] *Id.* (Alito, J., concurring).

[162] *Id.* (Alito, J., concurring).

the Court's interpretation of the particularity requirement and a normal pleading review.[163]

In conclusion, Justice Alito stated, "Questions certainly may arise as to whether certain allegations meet the statutory particularity requirement, but where that requirement is violated, the offending allegations cannot be taken into account."[164] Thus, a court may only use those facts pled with particularity to meet the "strong inference" standard.[165]

Justice Stevens's Dissent

Justice Stevens began his dissent by stating that since Congress left the phrase "strong inference" undefined, it would follow implicitly that Congress gave the judiciary lawmaking authority to determine its meaning.[166] He acknowledged the Court developed a workable definition of the phrase, however, his "probable-cause" standard would prove less complicated in application and more consistent with statutory interpretation."[167] Under Justice Stevens's test, the facts must show probable cause that the defendant acted with a "strong inference" of scienter.[168] Justice Stevens admitted that his definition does not have an exact measurement, but the concept is familiar to judges.[169] Furthermore, the meaning is similar to that of "strong inference."[170] He criticized Justice Scalia's test by stating Congress would not have intended the Court to adopt a standard that would make it more difficult to bring a civil case than a criminal one.[171] Justice Stevens noted his definition would beneficially omit the weighing of opposing inferences when easily deemed a strong inference.[172] Justice Stevens gave this example to illustrate his point:

> [I]f a known drug dealer exits a building immediately after a confirmed drug transaction, carrying a suspicious package, a judge could draw a strong inference that the individual was involved in the aforementioned drug transaction without debating whether the suspect might have been leaving the building at that exact time for another unrelated reason.[173]

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[163] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring).

[164] *Id.* (Alito, J., concurring).

[165] *Id.* (Alito, J., concurring).

[166] *Id.* at 2516-17 (Stevens, J., dissenting).

[167] *Tellabs II*, 127 S. Ct. at 2517 (Stevens, J., dissenting).

[168] *Id.* (Stevens, J., dissenting).

[169] *Id.* (Stevens, J., dissenting).

[170] *Id.* (Stevens, J., dissenting).

[171] *Id.* (Stevens, J., dissenting).

[172] *Tellabs II*, 127 S. Ct. at 2517 (Stevens, J., dissenting).

[173] *Id.* (Stevens, J., dissenting).

Justice Stevens applied this example to the channel stuffing allegations in the *Tellabs* case and decided taking the facts as true, they clearly established "probable cause to believe" Notebaert acted with the necessary intent.[174] Thus, he would have affirmed the judgment of the Seventh Circuit.[175]

ANALYSIS

In deciding *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the United States Supreme Court correctly overruled the Seventh Circuit's test for a complaint's survival.[176] In addition, the Court correctly determined the need for considering plausible opposing inferences when determining if the plaintiff met the "strong inference" of scienter.[177] The Court erred, however, in the new test it developed for determining whether the facts alleged have met the required "strong inference" of scienter.[178] The new test merely requires the plaintiff to allege facts that support an inference of scienter "at least as likely as" any credible opposing inference in favor of the defendant.[179] The Court erred by allowing a tie in inferences to go to the plaintiff, instead of adopting a test like the one proposed by Justice Scalia.[180]

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[174] *Id.* (Stevens, J., dissenting). Justice Stevens found that taking the channel stuffing allegations as true, they are proof that Notebaert had knowledge of illegal practices occurring. *Id.* at 2517 n.2. For example, Notebaert worked directly with the sales personnel to channel stuff its customer, SBC. *Id.* In addition, customers returned orders they did not want, and because of the high returns, Tellabs had to rent storage space to accommodate all the returns. *Id.*

[175] *Id.* at 2518 (Stevens, J., dissenting).

[176] Supreme Court Clarifies Standards for Stock-Fraud Plaintiffs, 23 No. 2 ANCODLLR 3 (2007); David Stras, A Lingering Thought on *Tellabs*, http://www.scotusblog.com/movabletype/archives/2007/06/a_lingering_tho.html (June 23, 2007, 10:08 EST) (David Stras, a former United States Supreme Court clerk for The Honorable Clarence Thomas, currently works as a professor of law at the University of Minnesota Law School).

[177] *See* Supreme Court Clarifies Standards for Stock-Fraud Plaintiffs, *supra* note 176; A Lingering Thought on Tellabs, *supra* note 176.

[178] *See infra* notes 197-212, 217-235 and accompanying text.

[179] *Tellabs II*, 127 S. Ct. at 2513.

[180] John C. Coffee, Jr., *Federal Pleading Standards after* 'Tellabs,' *Bell Atlantic*', 7/19/2007 N.Y.L.J. 5, (col.1), 4 (2007); Posting of Joe Grundfest to WSJ Law Blog, Tellabs: Securities Lawyers React, http://blogs.wsj.com/law (June 21, 2007, 13:03 EST). Joe Grundfest posted the blog on The Wall Street Journal Online. Joe Grundfest, a Securities Law Professor at Stanford Law School and a former SEC Commissioner acknowledged that the decision constituted a clear victory for the defendants but proved not as "thorough a thrashing of the plaintiffs as some plaintiff lawyers had feared." S*ee* Grundfest, *supra* note 180. Professor Grundfest acknowledged the downfall of the opinion, leaving room for lower courts to determine that the inference of scienter, is equally in favor of plaintiff, allowing a tie to go to the plaintiff. *Id.* Professor Grundfest acknowledged this approach would ignore the Court's holding that the inference of scienter "must be cogent and compelling, thus strong in light of other explanations." *Id.* He concluded the Court's decision would lead to a new split of the lower courts over the proper interpretation of *Tellabs'* pleading standard. *Id.* Justice Scalia's test is "whether the inference of scienter (if any) proves *more plausible* than the inference of innocence." *Tellabs II*, 127 S. Ct. at 2513 (Scalia, J., concurring).

The second error pertains to the facts used to determine if the plaintiff met the "strong inference" of scienter.[181]

Where the Court Correctly Ruled

Although uncertain whether the Supreme Court's test will provide a workable outcome to the "strong inference" standard, the Court correctly held the Seventh Circuit's rule did not meet the heightened pleading standards Congress intended when it enacted the PSLRA.[182] The Seventh Circuit's test "contradicts both the language and the purpose of the PSLRA."[183] The Seventh Circuit required the complaint allege facts that "a reasonable person could infer that the defendant acted with the required intent."[184] The statute's plain language, however, requires a "strong inference," not a "reasonable" or "permissible" inference as required by the Seventh Circuit.[185] The Seventh Circuit's test reflects the approach taken prior to the PSLRA where any reasonable inference of fraud would support a claim.[186] This standard previously proved unworkable, and resulted in Congress

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[181] *See* A Lingering Thought on *Tellabs*, *supra* note 176.

[182] In re *Silicon Graphics Inc, Sec. Litig.*, 183 F.3d at 978-79 (explaining Congress intended to adopt a standard higher than the Second Circuit's, the highest standard at the time of enacting the PSLRA). This means the Seventh Circuit's standard which is lower than the Second Circuit's does not meet the heightened pleading standards intended by Congress. S*ee also Tellabs II*, 127 S. Ct. at 2504 (acknowledging that the Seventh Circuit's standard does not meet the stricter intent of Congress in enacting the PSLRA); *supra* notes 89-104 and accompanying text.

[183] *See* Coffee, *supra* note 180, at 4; In re *Silicon Graphics Inc, Sec. Litig.*, 183 F.3d at 978-79; Brief for New England Legal Found. as Amicus Curiae in Support of Pet'rs at 11, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007) (No. 06-484), 2007 WL 445337; *see also In re* Credit Suisse First Boston Corp., 431 F.3d 36, 49 (1st Cir. 2005) ("Scienter allegations do not pass the 'strong inference' test when . . . there are legitimate explanations for the behavior that are equally convincing."); Gompper v. VISX, Inc., 298 F.3d 893, 896-97 (9th Cir. 2002) (holding a consideration of inferences only favorable to the plaintiff would undermine the PSLRA's strong inference requirement); Helwig v. Vencor, Inc., 251 F.3d 540, 553 (6th Cir. 2001) (holding "plaintiffs are entitled only to the most plausible of competing inferences").

[184] *Tellabs I*, 437 F.3d 588, 602 (7th Cir. 2006).

[185] *Helwig*, 251 F.3d at 551, 553 ("[T]he 'strong inference' requirement means that plaintiffs are entitled only to the most plausible of competing inferences. This represents a significant strengthening of the pre-PSLRA standard under Rule 12(b)(6), which gave the plaintiff 'the benefit of all reasonable inferences . . . .'"); *In re* Cabletron Systems, Inc. 311 F.3d 11, 38 (1st Cir. 2002) ("Under the PSLRA, the complaint must state with particularity facts that give rise to a 'strong inference' of scienter, rather than merely a reasonable inference."); Brief for the United States, *supra* note 54, at 20-21; 15 U.S.C. § 78u-4(b)(2) (2006); *see* In re *Credit Suisse First Boston Corp*., 431 F.3d at 48 (holding "[t]hat the statute, by its terms, requires a 'strong,' rather than merely a 'reasonable,' inference that the defendant acted with scienter is more than an odd linguistic quirk.").

[186] Brief of Technet, The Info. Tech. Ass'n of Am., The Semiconductor Indus. Ass'n, Aea, Baybio, The Cal. Healthcare Inst. and The Nat'l Venture Capital Ass'n as Amici Curiae in Support of Pet'r at 12, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007) (No. 06-484), 2007 WL 445338; *see also* H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.); S. REP. NO. 104-98, at 15 (1995).

enacting the PSLRA.[187] Furthermore, a "reasonable" inference is inconsistent with Congress's intent in requiring heightened pleading standards under the PSLRA because a reasonable inference is less than a "strong inference."[188] Therefore, the Court correctly rejected the Seventh Circuit's test.[189]

Additionally, the Court correctly determined "[t]he strength of an inference cannot be decided in a vacuum" and requires a consideration of "plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff."[190] The Court's decision follows many of the circuits on this issue requiring an inquiry into possible opposing inferences of the defendant's conduct.[191] Moreover, the Court's ruling remains consistent with the PSLRA's plain language, which requires a "strong inference" of scienter.[192] "Strong" means "striking or superior of its kind . . . ."[193] Thus, a "strong inference" reigns "superior" to other possible inferences.[194] Since a "strong inference" holds superior to other inferences, determining whether an inference proves "strong" would require a

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[187] H.R. Rep. No. 104-369, at 31 (Conf. Rep.); S. REP. NO. 104-98, at 15.

[188] Brief of Technet, *supra* note 186, at 15; H.R. REP. NO. 104-369, at 31 (Conf. Rep.) (stating the PSLRA has implemented needed procedural protections to reduce frivolous litigation); In re *Silicon Graphics Inc, Sec. Litig.*, 183 F.3d at 979. The *In re Silicon* court noted that Congress adopted the Second Circuit's language of strong inference because it held a higher standard than the reasonable standard of other circuits. *Id.* However, Congress did not adopt the Second Circuit's two-prong test because it did not meet the heightened pleading standards the PSLRA intended. *Id.* Thus, a reasonable inference proves less convincing than a "strong inference," and therefore, not in-line with Congress's intent in enacting the PSLRA. *See Id.*

[189] *See* Supreme Court Clarifies Standards for Stock-Fraud Plaintiffs, *supra* note 176; *see also* In re *Credit Suisse First Boston Corp.*, 431 F.3d at 48 (holding "that the statute, by its terms, requires a 'strong,' rather than merely a 'reasonable,' inference that the defendant acted with scienter is more than an odd linguistic quirk."); *Tellabs II*, 127 S. Ct. at 2504 (acknowledging that the Seventh Circuit's standard does not meet the stricter intent of Congress in enacting the PSLRA).

[190] *Tellabs II*, 127 S. Ct. at 2510; *accord Helwig*, 251 F.3d at 553; Pirraglia v. Novell, Inc., 339 F.3d 1182, 1187-88 (10th Cir. 2003).

[191] *See, e.g.*, In re *Credit Suisse First Boston Corp.*, 431 F.3d at 51 (holding the court should not "turn a blind eye" to other possible conclusion arising from the facts alleged); *Pirraglia*, 339 F.3d at 1187 (holding a court must consider all reasonable inferences, even those inferences which are not favorable to the plaintiff); *Gompper*, 298 F.3d at 896-97 (holding a consideration of inferences only favorable to the plaintiff would undermine the PSLRA's strong inference requirement); *Helwig*, 251 F.3d at 553 (holding "plaintiffs are entitled only to the most plausible of competing inferences").

[192] Brief for New England Legal Found., *supra* note 183, at 12; 15 U.S.C. 78u-4(b)(2) (2006).

[193] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2265 (Una Dlx ed 1986).

[194] Brief for New England Legal Found., *supra* note 183, at 12; *see Helwig*, 251 F.3d at 553 ("'Strong inferences' nonetheless involve deductive reasoning; their strength depends on how closely a conclusion of misconduct follows from a plaintiff's proposition of fact. [T]he 'strong inference' requirement means that plaintiffs are entitled only to the most plausible of competing inferences.").

comparison of other possible opposing inferences.[195] Therefore, the Court correctly held the determination of whether an inference is strong requires a comparison of the plaintiff's inferences with competing inferences relating to the defendant's conduct.[196]

Justice Scalia's Test, the Proper Interpretation

Although the Court's test reflects the heightened pleading standard Congress intended in enacting the PSLRA, Justice Scalia's test remains the most "workable construction of the 'strong inference' standard."[197] Justice Scalia's test properly follows the statute's "natural reading" and provides more guidance.[198]

The Court's test requires the "inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[199] This rule proves flawed because it "leaves room for lower courts to reason 'gee, the story in support of scienter seems as cogent as the story in opposition to scienter, and that's good enough.'"[200] This

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[195] Brief for New England Legal Found., *supra* note 183, at 12; *see also Helwig*, 251 F.3d at 553 ("'Strong inferences' nonetheless involve deductive reasoning; their strength depends on how closely a conclusion of misconduct follows from a plaintiff's proposition of fact. [T]he 'strong inference' requirement means that plaintiffs are entitled only to the most plausible of competing inferences."); *Gompper*, 298 F.3d at 896-97 (holding a consideration of inferences only favorable to the plaintiff would undermine the PSLRA's strong inference requirement).

[196] *See Helwig*, 251 F.3d at 553; *Gompper*, 298 F.3d at 896-97 (holding that consideration of an "equally if not more plausible" inference of the defendant's innocence "clearly impedes the plaintiffs' progress toward building the requisite strong inference of scienter."); Brief for New England Legal Found., *supra* note 183, at 12 (stating a strong inference is superior to other inferences); *Tellabs II*, 127 S. Ct. at 2509-10 (holding the determination of whether plaintiff meets the strong inference standard requires consideration of opposing inferences).

[197] *See* Darquea v. Jarden Corp., 2007 WL 2584744, 1-2, 2 n.2 (S.D.N.Y. 2007) (stating that the court agrees with the "persuasive" reasoning of Justice Scalia).

[198] *See Darquea*, 2007 WL 2584744, 1-2, 2 n.2 (noting the persuasiveness of Justice Scalia's reasoning because it follows the natural statutory language); Communications Workers of Am. Plan for Employees' Pensions and Death Benefits v. CSK Auto Corp., 525 F. Supp 2d 1116, 1120 n.2 (D. Ariz. 2007) (stating an inference cannot be strong if it is equal to an innocent explanation, it is the same).

[199] *Tellabs II*, 127 S. Ct. at 2504-05.

[200] Grundfest, *supra* note 180 (quoting *Tellabs II*, 127 S.Ct. at 2502); *see also* Transit Rail, LLC v. Marsala, 2007 WL 2089273, 13 (W.D.N.Y. 2007) (reasoning that a reasonable person could just as easily infer facts in favor of the defendant as the plaintiff); Sherrie R. Savett, *Plaintiffs' Vision of Securities Litigation: Trends/Strategies in 2005-2007*, 1620 PLI/Corp 57, 97 (2007) ("[C]ourts will no doubt continue to grapple with major issues relating to the 'strong inference' language, including the manner in which allegations sufficient to give rise to a 'strong inference' of scienter may be pleaded."); Thomas O. Gorman, Tellabs Inc. v. Makor Issues & Rights, Ltd.: *Pleading a Strong Inference of Scienter*, 1620 PLI/Corp 151, 184 ("The standard gives the District Court significant discretion in construing the allegations contained in a plaintiff's securities law complaint."); F. Hodge O'Neal & Robert B. Thompson, *Resisting Squeeze-outs and Oppression:Remedies Under Federal Law*, OPPMINSH S 8:14 (stating the Court's test "leaves open multiple outcomes").

reasoning would allow a tie to go to the plaintiff, ultimately ignoring the Court's warning that "'the inference of scienter must be more than merely 'reasonable' or 'permissible' it must be cogent and compelling, thus strong in light of other explanations.'"[201] Therefore, it seems likely this rule will lead to another split between the circuits on the interpretation of *Tellabs's* pleading standard.[202]

Conversely, Justice Scalia's test requires the inference of scienter to be slightly stronger than the inference of no scienter.[203] A test that demands an inference slightly stronger than any opposing inference would eliminate the possibility of a tie between inferences.[204] This would resolve potential splits in the circuits on their interpretation of the inferences.[205] The way the rule currently stands, some courts might interpret the inferences in favor of plaintiffs while other courts would interpret those same inferences in favor of defendants.[206]

Not only does Justice Scalia's test resolve potential disputes between the circuits, it also is consistent with a natural reading of the statute.[207] "Courts . . . *must* give the statute its single, most plausible, reading."[208] In analyzing Justice

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[201] *See* Grundfest, *supra* note 180; Coffee, *supra* note 180, at 4; *Tellabs II*, 127 S. Ct. at 2510.

[202] *Compare* Ross v. Abercrombie & Fitch Co., 501 F. Supp. 2d 1102, 1117 (S.D. OH. 2007) (ruling in favor of the plaintiff because "the plaintiff's allegations are at least as compelling" as defendant's), *with* Frank v. Dana Corp., 525 F. Supp. 2d 922, 927-28, 930, 932-33 (N.D. OH. 2007) (ruling in favor of defendant because plaintiff's inferences were not "more plausible and powerful" than competing inferences or the "most plausible" of competing inferences); *see* Savett, *supra* note 200, at 97 (stating courts continue to struggle with what allegations give rise to a "strong inference"); Gorman, *supra* note 200, at 184 (stating the Court's test gives the lower courts great discretion); O'Neal & Thompson, *supra* note 200 (stating the Court's test "leaves open multiple outcomes"); Grundfest, *supra* note 180.

[203] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring).

[204] *Id.* at 2513-14 (Scalia, J., concurring); *see* Coffee, *supra* note 180, at 4.

[205] *See* Coffee, *supra* note 180, at 4; *see Darquea*, 2007 WL 2584744, 1-2, 2 n.2 (stating this is a case where Justice Scalia's test would make a difference in the outcome of the case).

[206] *See* Coffee, *supra* note 180, at 4; Savett, *supra* note 200, at 97 ("[C]ourts will no doubt continue to grapple with major issues relating to the 'strong inference' language, including the manner in which allegations sufficient to give rise to a 'strong inference' of scienter may be pleaded."); Gorman, *supra* note 200, at 184 ("The standard gives the District Court significant discretion in construing the allegations contained in a plaintiff's securities law complaint."); O'Neal & Thompson, *supra* note 200 (stating the Court's test "leaves open multiple outcomes").

[207] Benefits v. CSK Auto Corp., 525 F. Supp 2d 1116, 1120 n.2 (D. Ariz. 2007) (explaining an inference cannot be strong unless it is greater than a competing inference).

[208] *Tellabs II*, 127 S. Ct. at 2515 (Scalia, J., concurring); *see, e.g.,* State of N.J. v. State of N.Y. 1997 WL 291594, 23 (U.S. 1997) ("The most important and well-established [rule of statutory construction] is that, if possible, the Court will undertake a plain-language reading of the terms of [the statute]."); U.S. v. Granderson, 511 U.S. 39, 74 (1994) (stating an elementary canon of construction requires the plain statutory language to control); Mukaddam v. Permanent Mission of Saudi Arabia to United Nations, 111 F. Supp. 2d 457, 467 n.65 (S.D.N.Y. 2000) ("[T]he Court follows basic principles of statutory construction and looks first to the plain language of the statute.").

Scalia's test, § 21D(b) of the PSLRA requires the plaintiff to plead facts which give rise to a "strong inference."[209] The Supreme Court defines "strong" as "cogent," "persuasive," and "powerful."[210] Accordingly, a strong inference outweighs, by power or persuasion, an opposing inference.[211] Thus, the normal reading of the statute would demand a test like Justice Scalia's which requires that the inference of scienter prove slightly stronger than the inference of no scienter.[212]

Additionally, Justice Scalia's test equates with many circuits that hold a "strong inference" of scienter is not met if a competing inference is just as plausible.[213] In

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[209] 15 U.S.C. § 78u-4(b)(1)-(2) (2006); *see also Darquea*, 2007 WL 2584744, 1-2, 2 n.2 (noting the persuasiveness of Justice Scalia's test because the language of the statute requires a "strong inference," thus the test should require a more plausible inference than one of innocence).

[210] *Tellabs II*, 127 S. Ct. at 2510.

[211] *CSK Auto Corp.*, 525 F. Supp 2d at 1120 n.2 (explaining an inference cannot be considered strong unless proven greater than an opposing inference); Brief for New England Legal Found., *supra* note 183, at 12; *see also Tellabs II*, 127 S. Ct. at 2513 n.* (Scalia, J., concurring) (stating a possibility "that B is responsible is not a strong *inference* that B is responsible"); *Helwig*, 251 F.3d at 553 (holding plaintiff's inferences must be compared to opposing inferences and plaintiff is entitled only to the strongest of opposing inferences); In re *Credit Suisse First Boston Corp.*, 431 F.3d at 49 ("[S]cienter allegations do not pass the 'strong inference' test when . . . there are legitimate explanations for the behavior that are equally convincing."); *Gompper*, 298 F.3d at 896-97 (holding that consideration of an "equally if not more plausible" inference of the defendant's innocence "clearly impedes the plaintiffs' progress toward building the requisite strong inference of scienter."); *Ottman*, 353 F.3d at 350 (holding a plaintiff has failed to meet the "strong inference" standard where a misstatement "was just as likely the result of an overgeneralization as it was the product of intentional deception or recklessness.").

[212] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring); *see also Tellabs II*, 127 S. Ct. at 2513 n.* (Scalia, J., concurring) (stating a possibility "that B is responsible is not a strong *inference* that B is responsible"); *Helwig*, 251 F.3d at 553 (holding "plaintiffs are entitled only to the most plausible of competing inferences. This represents a significant strengthening of the pre-PSLRA standard under Rule 12(b)(6), which gave the plaintiff 'the benefit of all reasonable inferences . . . .'"); In re *Credit Suisse First Boston Corp.*, 431 F.3d at 49 (holding an inference is not strong if there are equally legitimate explanations); *Gompper*, 298 F.3d at 896-97 (holding consideration of an equal inference of the defendant's innocence impedes plaintiff's meeting the "strong inference" requirement); *Ottman*, 353 F.3d 350 (holding a plaintiff has failed to meet the "strong inference" standard where a misstatement "was just as likely the result of an overgeneralization as it was the product of intentional deception or recklessness."); Brief for New England Legal Found., *supra* note 183, at 12 (stating a "strong inference" is superior to other inferences). Additionally, Justice Stevens criticized Justice Scalia's test by stating that Congress would not have intended the Court to adopt a standard that would make it more difficult to bring a civil case than a criminal one. *Tellabs II*, 127 S. Ct. at 2517 (Stevens, J., dissenting).

[213] *See, e.g.*, In re *Credit Suisse First Boston Corp.*, 431 F.3d at 49 (holding "scienter allegations do not pass the 'strong inference' test when . . . there are legitimate explanations for the behavior that are equally convincing."); *Gompper*, 298 F.3d at 896-97 (holding that consideration of an "equally if not more plausible" inference of the defendant's innocence "clearly impedes the plaintiffs' progress toward building the requisite strong inference of scienter."); *Ottman*, 353 F.3d 350 (holding a plaintiff has failed to meet the "strong inference" standard where a misstatement "was just as likely the result of an overgeneralization as it was the product of intentional deception or recklessness."); Fidel v. Farley, 392 F.3d 220, 227 (6th Cir. 2004) (holding the "strong inference" requirement only entitles the plaintiff to the "most plausible of competing inferences"); *CSK Auto Corp.*, 525 F. Supp 2d at 1120 n.2 (explaining an inference equal to an opposing inference is not strong, it is equal).

the case of *In re Credit Suisse First Boston Corp.*, the court noted the PSLRA meant to establish a strict standard for pleading in a securities fraud action to meet the "strong inference" requirement.[214] Following the strict standard of the PSLRA, the First Circuit in *In re Credit Suisse First Boston Corp.* held when considering the complaint as a whole, a "strong inference" is not met where "there are legitimate explanations for the behavior that are equally convincing."[215] The Court's opinion should have followed the lead of these circuits that gave the statute its normal reading, and therefore, used Justice Scalia's test.[216]

Justice Alito's Particularity Requirement, the Correct One

In addition to making an erroneous ruling by not following Justice Scalia's test, the Court erred again when it failed to utilize Justice Alito's particularity requirement.[217] Justice Alito's requirement only allowed consideration of those facts stated "with particularity" in determining if the "strong inference" standard was met.[218] Unfortunately, the Court developed a flawed rule by failing to recognize the PSLRA's "particularity" requirement.[219] First, although the Court reiterated that the PSLRA requires facts to be pled with "particularity," the Court's opinion weakened this standard.[220] This was evidenced when the Court stated, "omissions and ambiguities [only] count against inferring scienter," but stressed "that a court should consider all allegations of scienter, even nonparticularized ones, when considering whether a complaint meets the 'strong inference' requirement."[221]

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[214] In re *Credit Suisse First Boston Corp.*, 431 F.3d at 48.

[215] *Id.* at 49.

[216] *See Darquea*, 2007 WL 2584744, 1-2, 2 n.2 (agreeing with the reasoning of Justice Scalia and Justice Alito).

[217] *See In re* K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 889 (8th Cir. 2002) (noting that ambiguous facts which do not live up to the particularity requirement are discarded); *In re* Trex Co., Inc. Sec. Litig., 454 F. Supp. 2d 560, 572 (W.D. Va. 2006) (stating plaintiffs may not benefit from facts not pled with the requisite particularity).

[218] *Tellabs II*, 127 S. Ct. at 2515-16 (Alito, J., concurring).

[219] *Gompper*, 298 F.3d at 896-97 (Congress made it clear that the PSLRA requires facts pled with particularity to give rise to a "strong inference" of scienter); In re *K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d at 889 (stating the PSLRA requires the court to disregard those facts which are not pled with particularity); Brief of Technet, *supra* note 186, at 12; Brief for the United States, *supra* note 54, at 21; *see* A Lingering Thought on *Tellabs*, *supra* note 176 (stating the language of the statute implies that only facts pled with particularity can be used to meet the strong inference standard).

[220] *See* In re *Credit Suisse First Boston Corp.*, 431 F.3d at 49 (holding the PSLRA requires that the plaintiff plead facts with particularity); *Gompper*, 298 F.3d at 897 (holding only complaints with particularized facts that meet the strong inference standard survive a motion to dismiss); *Helwig*, 251 F.3d at 548 (holding under the PSLRA the plaintiff must plead facts with particularity); *Ottman*, 353 F.3d 350 (holding the PSLRA requires the plaintiff to plead the facts in the complaint with particularity).

[221] *Tellabs II*, 127 S. Ct. at 2515-16 (Alito, J., concurring); *see also Tellabs II*, 127 S. Ct. at 2511 (The Court allowed consideration of ambiguous facts in the determination of a "strong inference" of scienter when the Court "agree[d] that omissions and ambiguities count against inferring scienter . . . .").

Congress used the "particularity" requirement to prevent plaintiffs from defeating a motion to dismiss for failure to state a claim by merely pleading vague or ambiguous facts.[222] Considering non-particularized facts in determining whether plaintiff met the "strong inference" standard undermines Congress's purpose, thus allowing the plaintiff to evade the "particularity" requirement altogether.[223] Conversely, Justice Alito's standard enforces Congress's purpose and upholds the particularity requirement by allowing only those facts pled with particularity in determining whether the plaintiff met the "strong inference" requirement.[224]

Additionally, the Court's interpretation is flawed because it contradicts the plain statutory language.[225] Before Congress enacted the PSLRA, Rule 9(b) governed the pleading requirements for fraud demanding that facts be pled with

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[222] *See Gompper*, 298 F.3d at 897 ("Congress made it crystal clear that the [PSLRA's] pleading requirements were put in place so that only complaints with particularized facts giving rise to a strong inference of wrongdoing survive a motion to dismiss . . . ."); Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1278 (11th Cir. 1999) (Congress "structur[ed] the [PSLRA] to permit the dismissal of frivolous cases at the earliest feasible stage of litigation . . . ."); H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.) (stating Congress has enacted needed procedural protections to reduce the amount of frivolous lawsuits); S. REP. NO. 104-98, at 15 (1995) (stating Congress developed the PSLRA to enact stringent pleading requirements to deter frivolous suits); Brief of Technet, *supra* note 186, at 12; Brief for the United States, *supra* note 54, at 21-22; A Lingering Thought on Tellabs, *supra* note 176.

[223] S*ee* H.R. REP. NO. 104-369, at 31 (Conf. Rep.) (Congress recognized a need to strengthen pleading standards to reduce frivolous litigation); S. REP. NO. 104-98, at 15 (Congress enacted the PSLRA to establish a stringent pleading requirement); Winer Family Trust v. Queen, 503 F.3d 319, 327 (3rd Cir. 2007) (stating "Congress did not merely require plaintiffs to 'provide a factual basis for [their] scienter allegations'. . . . Congress required plaintiffs to plead with particularity facts that give rise to a 'strong—*i.e.,* a powerful or cogent-inference."); *Gompper*, 298 F.3d at 897 (stating the PSLRA only allows complaints pled with particular facts that give rise to a "strong inference" of scienter to survive a motion to dismiss); In re *K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d at 889 (stating the PSLRA requires the court to disregard those facts not pled with particularity); *Bryant*, 187 F.3d at 1278 (stating the PSLRA is meant to dismiss those complaints at the earliest possible stage which have not pled particular facts that rise to a "strong inference" of scienter); Brief of Technet, *supra* note 186, at 12; Brief for the United States, *supra* note 54, at 21-22; A Lingering Thought on Tellabs, *supra* note 176.

[224] S*ee* H.R. REP. NO. 104-369, at 31 (Conf. Rep.) (stating the PSLRA has strengthened pleading requirements to reduce frivolous litigation); *Gompper*, 298 F.3d at 896-97 (stating the PSLRA requires facts pled with particularity to give rise to a "strong inference" of scienter); In re *Trex Co., Inc. Sec. Litig.*, 454 F. Supp. 2d at 572 (stating plaintiffs may not benefit from vague or ambiguous facts); *In re* Rockefeller Ctr. Properties, Inc. Sec. Litig., 311 F.3d 198, 224 (3d Cir. 2002) (stating according to the PSLRA plaintiffs may not benefit from vague or ambiguous facts).

[225] S*ee also Gompper*, 298 F.3d at 896-97 (Congress made it clear the PSLRA requires facts pled with particularity to give rise to a "strong inference" of scienter); In re *K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d at 889 (stating the PSLRA requires the court to disregard those facts not pled with particularity); Brief of Technet, *supra* note 186, at 12; Brief for the United States, *supra* note 54, at 21; A Lingering Thought on Tellabs, *supra* note 176.

"particularity."[226] Congress enacted the PSLRA in an attempt to curb frivolous litigation by making the pleading standards higher.[227] With this purpose in mind, Congress kept the "particularity" requirement of Rule 9 in the PSLRA.[228] Section 78u-4(b)(2) of the PSLRA states "the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference the defendant acted with the required state of mind."[229] According to the statutory language, the plaintiff may only meet the "strong inference" standard by those facts stated in the complaint with particularity.[230] Therefore, "[i]t follows that facts not stated with the requisite particularity cannot be considered in determining whether the strong-inference test is met."[231] However, the Court allowed the use of nonparticularized facts when it held that a court must consider all of the facts in determining whether a complaint meets

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[226] In re *GlenFed, Inc. Sec. Litig.*, 42 F.3d at 1545; *accord* Greenstone v. Cambex Corp., 975 F.2d 22, 25 (1st Cir. 1992) (according to Federal Rule of Civil Procedure Rule 9(b) the facts constituting fraud must be pled with particularity); Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1127-28 (2nd Cir 1994) (holding when fraud is asserted the complaint must meet the requirements of Federal Rule of Civil Procedure 9(b)); FED. R. CIV. P. 9(b).

[227] H.R. REP. NO. 104-369, at 31 (Conf. Rep.).

[228] H.R. REP. NO. 104-369, at 31 (Conf. Rep.).

[229] 15 U.S.C. § 78u-4(b)(2) (2006).

[230] *See* A Lingering Thought on Tellabs, *supra* note 176 (stating the language of the statute implies that only facts pled with particularity can be used to meet the strong inference standard); *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring); *see also Winer Family Trust*, 503 F.3d at 327 (stating "Congress did not merely require plaintiffs to 'provide a factual basis for [their] scienter allegations'. . . . Congress required plaintiffs to plead with particularity facts that give rise to a 'strong'—*i.e.,* a powerful or cogent-inference."); Key Equity Investors, Inc. v. SEL-LEB Mktg., Inc., 246 Fed. Appx. 780, 785 (3d Cir. 2007) (holding plaintiff may not benefit from vague or ambiguous facts that do not live up to the PSLRA's particularity requirement); *Gompper*, 298 F.3d at 896-97 (stating the PSLRA clearly states that only those facts pled with particularity must give rise to a "strong inference" of scienter); In re *K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d at 889 (stating the PSLRA only allows those facts pled with particularity to be used in determining if the plaintiff met the "strong inference" standard); In re *Rockefeller Ctr. Properties, Inc. Sec. Litig.*, 311 F.3d at 224 (stating according to the PSLRA the "strong inference" standard must be met by those facts pled with particularity); Brief of Technet, *supra* note 186, at 12; Brief for the United States, *supra* note 54, at 21.

[231] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring); *see Key Equity Investors, Inc.*, 246 Fed. Appx. at 785 (holding plaintiff may not benefit from vague or ambiguous facts that do not live up to the PSLRA's particularity requirement); California Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 145 (3d Cir. 2004) (holding plaintiff may only benefit from particular facts and cannot benefit from vague facts in meeting the PSLRA's "strong inference" standard); *Gompper*, 298 F.3d at 896-97 (stating the PSLRA requires facts pled with particularity to give rise to a "strong inference" of scienter, thus facts not pled with the requisite particularity will not suffice) *In re* Navarre Corp. Sec. Litig., 299 F.3d 735, 741 (8th Cir. 2002) (holding the court must disregard ambiguous facts that do not live up to the PSLRA's "particularity" requirement); Brief of Technet, *supra* note 186, at 12; Brief for the United States, *supra* note 54, at 21-22; A Lingering Thought on *Tellabs*, *supra* note 176.

the "strong inference" standard.[232] Thus, the Court's interpretation did not follow the statute's plain language because it did not limit the consideration of facts to only those facts pled with particularity.[233] Conversely, Justice Alito's interpretation correctly followed the plain language of the statute by only allowing those facts pled "with particularity" to be viewed in determining whether the "strong inference" had been met.[234] Therefore, Justice Alito's interpretation proved proper.[235]

The Tellabs *Impact on the Tenth Circuit*

The *Tellabs* decision received mixed reactions; some articles announced a win for corporate America, while others proclaimed no clear win for either side.[236] Although the overall impact may not materialize for some time, the potential influence of *Tellabs* on the Tenth Circuit deserves discussion.

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[232] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring); *Id*. at 2511. After the Court noted that ambiguities count against inferring scienter, the Court "reiterate[d], however, that the court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically." *Id.* at 2511; *see* A Lingering Thought on *Tellabs*, *supra* note 176 (stating the Court ignored the particularity requirement); Gregg L. Weiner, Esq., *Supreme Court Raises The Bar For Securities Fraud Plaintiffs, But Questions Remain*, 18 No. 1 ANMALAR 12, 4 (2007) (stating the Court allows the use of ambiguous facts in determining if plaintiff met the strong inference requirement).

[233] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring); *see* A Lingering Thought on *Tellabs*, *supra* note 176, (stating the statutory language implies that only facts pled with particularity can be used to meet the strong inference standard, which the Court failed to follow); *see also Key Equity Investors, Inc.*, 246 Fed. Appx. at 785 (holding plaintiff may not benefit from vague or ambiguous facts that do not live up to the PSLRA's particularity requirement); *Gompper*, 298 F.3d at 896-97 (stating the PSLRA clearly requires that facts must be pled with particularity to give rise to a "strong inference" of scienter); In re *K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d at 889 (stating the PSLRA only allows facts pled with particularity to determine if the plaintiff met the "strong inference" standard); In re *Rockefeller Ctr. Properties, Inc. Sec. Litig.*, 311 F.3d at 224 (stating that according to the PSLRA the plaintiff must meet the "strong inference" standard by those facts pled with particularity).

[234] *Tellabs II*, 127 S. Ct. at 2516 (Alito, J., concurring); *see supra* note 233 and accompanying text; *California Pub. Employees' Ret. Sys.*, 394 F.3d at 145 (holding plaintiff may only benefit from particular facts and cannot benefit from vague facts in meeting the PSLRA's "strong inference" standard); *Florida State Bd. of Admin.*, 270 F.3d at 660 (holding the court must disregard ambiguous facts that do not live up to the PSLRA's "particularity" requirement).

[235] S*ee* A Lingering Thought on Tellabs, *supra* note 176 (stating Justice Alito's particularity argument follows the plain language of the statute which implies that only facts pled with particularity can be used to meet the strong inference standard); *see also Key Equity Investors, Inc.*, 246 Fed. Appx. at 785 (holding plaintiff may not benefit from vague or ambiguous facts that do not live up to the PSLRA's particularity requirement); *California Pub. Employees' Ret. Sys.*, 394 F.3d at 145 (holding plaintiff may only benefit from particular facts and cannot benefit from vague facts in meeting the PSLRA's "strong inference" standard); *Gompper*, 298 F.3d at 896-97(Congress was clear the language of the PSLRA requires facts to be pled with particularity); *Florida State Bd. of Admin.*, 270 F.3d at 660 (holding the court must disregard ambiguous facts that do not live up to the PSLRA's "particularity" requirement).

[236] *See, e.g.,* Weiner, *supra* note 232, at 4; Tellabs: *Securities Lawyers React*, http://blogs.wsj.com/law (June 21, 2007, 13:03 EST); Tony Mauro*, High Court Raises the Bar for Investors Alleging Securities Fraud* (June 22, 2007), http://biz.yahoo.com/law; Greg Stohr*, Top U.S. Court*

City of Philadelphia v. Fleming Companies, Inc., was the first securities fraud case the Tenth Circuit ruled on after the passage of the PSLRA.[237] The court began by rejecting the arguments upheld by the Second and Third Circuits; these arguments held "pleading motive and opportunity, without more, provides an alternative method to establish scienter."[238] Instead, the Tenth Circuit followed the middle ground approach of the First and Sixth Circuits that required the court to "look to the totality of the pleadings to determine whether the plaintiffs' allegations permit a strong inference of fraudulent intent."[239] The court also noted plaintiffs could plead scienter by "setting forth facts raising a 'strong inference' of intentional *or* reckless misconduct."[240]

Pleading scienter in securities fraud continued to evolve in the Tenth Circuit.[241] Following the Tenth Circuit's decision in *Pirraglia v. Novell, Inc.*, the Tenth Circuit took a notable step in considering whether the plaintiffs met the scienter requirement.[242] The court held that in determining whether plaintiffs established scienter, it "'must consider *all* reasonable inferences to be drawn from the allegations, including inferences unfavorable to the plaintiffs.'"[243] However, the court rejected the Sixth Circuit's standard that "'plaintiffs are entitled only to the most plausible of competing inferences.'"[244] The court reasoned the Sixth Circuit's standard would "invade the traditional role of the fact finder."[245]

Major adjustments by the Tenth Circuit prove unnecessary to align with the pleading standards set forth in the *Tellabs* decision.[246] The Tenth Circuit currently looks at inferences unfavorable to the plaintiff to determine whether he or she met the scienter standard, but it does not weigh competing inferences.[247] Following the *Tellabs* decision, the Tenth Circuit must "consider all competing inferences

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Tightens Limits on Shareholder Suits (June 21, 2007), http://bloomberg.com; *Supreme Court Issues* Tellabs *Opinion,* http://dandodiary.blogspot.com/2007/06/supreme-court-issues-tellabs-opinion.html (June 22, 2007, 8:17 EST).

[237] City of Philadelphia v. Fleming Companies, Inc., 264 F.3d 1245, 1249 (10th Cir 2001).

[238] *Id.*

[239] *Id.* at 1261-62.

[240] *Id.* at 1259.

[241] *See* Pirraglia v. Novell, Inc., 339 F.3d 1182, 1187 (10th Cir. 2003) (holding the court must consider all reasonable inferences, including inferences favoring the defendant).

[242] *Id.*

[243] *Id.* (quoting *Gommper*, 298 F.3d at 897).

[244] *Pirraglia*, 339 F.3d at 1188 (quoting *Helwig*, 251 F.3d at 553).

[245] *Pirraglia*, 339 F.3d at 1188.

[246] *More* Tellabs *Thoughts: Does it Change D & O Exposure?,* http://dandodiary.blogspot.com (July 2, 2007 10:23 EST) (the author, Kevin LaCroix, has nearly 25 years of experience counseling clients concerning director and officer liability issues).

[247] *Pirraglia*, 339 F.3d at 1187-88.

of scienter which can be drawn from the complaint's factual allegations, and determine whether the inference suggested by the plaintiff is cogent and 'at least as compelling as any opposing inference of nonfraudulent intent.'"[248] Formerly, the Tenth Circuit felt this step would "invade the traditional role of the fact finder."[249] The Tenth Circuit's rule permitting the pleading of scienter through recklessness, however, will remain unchanged unless and until the Supreme Court takes a stance.[250]

CONCLUSION

When the United States Supreme Court developed a new test for determining whether the facts alleged have met the "strong inference" of scienter, the Court failed to follow the statute's plain language, thus frustrating Congress's intentions in enacting the statute.[251] The Court should have followed the strict test developed by many circuits and argued for by Justice Scalia in his dissent.[252] This test required the inference of scienter to be slightly stronger than the inference of no scienter.[253] Adopting Justice Scalia's test compared to the Court's test would eliminate a tie going to the plaintiff, thereby eliminating the potential for a future split in circuits on the application of the Court's test.[254] Furthermore, the Court's failure in only considering those facts pled with particularity, as argued for by Justice Alito, directly contradicts the statute's natural language.[255] This failure reduced the heightened pleading standard Congress intended in enacting the PSLRA by allowing plaintiffs to benefit from facts not pled with particularity.[256] Although the outcome of this test is currently unknown, time will likely prove that the Court's failures lead to another split among circuits.[257]

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[248] Britton v. Parker, 2007 WL 2871003, *4 (D. Colo. 2007) (quoting *Tellabs II*, 127 S. Ct. 2499, 2504-05 (2007)).

[249] *Pirraglia*, 339 F.3d at 1188.

[250] City of Philadelphia v. Fleming Companies, Inc., 264 F.3d 1245, 1259 (10th Cir 2001); *Tellabs II*, 127 S. Ct. at 2507 n.3; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976); *see supra* note 49.

[251] *See supra* notes 199-212, 217-223 and accompanying text.

[252] *See supra* notes 203-216 and accompanying text.

[253] *See supra* notes 203-212 and accompanying text.

[254] *See supra* notes 203-206 and accompanying text.

[255] *See supra* notes 225-234 and accompanying text.

[256] *See supra* notes 219-223 and accompanying text.

[257] *See supra* notes 199-202 and accompanying text.

CASE NOTE

CRIMINAL LAW—Competency to Be Executed: *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

*Jodanna L. Haskins**

Introduction

On September 8, 1992, Scott L. Panetti dressed in camouflage, shaved his head, and made the trek with his rifle to the home of his in-laws, Joe and Amanda Alvarado.[1] He proceeded to shoot both Joe and Amanda, at close range, in front of his estranged wife, Sonya, and their young daughter.[2] Panetti then took both his wife and daughter hostage, though he eventually released both unharmed and surrendered to police.[3] The State of Texas charged Panetti with the murder of his in-laws.[4]

Panetti suffered from a long, documented history of mental-illness including schizophrenia, depression, and delusions.[5] Prior to shooting his in-laws, Panetti quit taking his anti-psychotic medication.[6] Before his murder trial began, the judge ordered a psychiatric evaluation to determine Panetti's competence to stand trial.[7] Although the psychiatrist noted Panetti suffered from a "fragmented personality, delusions, and hallucinations," the psychiatrist determined Panetti was competent to stand trial.[8] A jury ultimately agreed with the psychiatrist, and found Panetti competent to stand trial at a competency hearing.[9]

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* Candidate for J.D., University of Wyoming, 2009.

[1] Brief of Petitioner-Appellant at 7, Panetti v. Quarterman, 127 S. Ct. 2842, No. 06-6407 (Feb. 22, 2007).

[2] *Id.* at 7.

[3] *Id.*

[4] Panetti v. Quarterman, 127 U.S. 2842, 2848 (2007).

[5] Brief of Petitioner-Appellant, *supra* note 1, at 7.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 8.

[9] *Id.* at 10-11. Pursuant to Texas law, competency hearings occur before a jury. Tex. Code Crim. Proc. Ann. Art. 46B.051(a) (Vernon 2001). The first competency hearing resulted in a 9-3 vote and the judge declared a mistrial. *Id.* at 9. The second competency hearing, after a venue change, resulted in a finding of competence. *Id.*

Approximately seven months later, Panetti claimed he had a "revelation that God had cured his schizophrenia" and refused, once again, to take his antipsychotic medication.[10] Despite knowing of this revelation, the trial court judge granted Panetti's request to represent himself at trial over objections from both prosecuting and defending attorneys.[11] Panetti proceeded to put on a bizarre performance at trial, and on September 21, 1995, a jury found Panetti guilty of capital murder.[12] At the sentencing hearing, the jury sentenced Panetti to death.[13]

After Panetti's state and federal habeas petitions were denied, the state trial court set Panetti's execution date.[14] Prior to the scheduled execution date, Panetti's counsel filed a motion in state trial court pursuant to Texas statute asserting his incompetency to be executed, which had not been included in his previous habeas petition.[15] The trial judge rejected the motion, holding Panetti had failed to raise substantial doubt of his competency to be executed.[16]

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[10] Brief of Petitioner-Appellant, *supra* note 1, at 10-11.

[11] *Id.* at 11.

[12] *Id.* at 15. Panetti assumed an alternate identity, referred to as "Sarge" when he testified at trial. *Id.* at 14.

> Mr. Panetti made bizarre and inappropriate statements to the jury; went on irrelevant, irrational, and illogical reveries; exhibited sudden flights of ideas; asked questions that were incomprehensible or burdened with excessive and extraneous detail; rambled incessantly; perseverated; recited senseless, fragmented aphorisms and anecdotes; badgered the judge, the prosecuting attorney, and witnesses; and was unable to control his behavior despite the judge's repeated efforts. *Id.*

In addition, Panetti proceeded to represent himself at the murder trial wearing cowboy attire and applied for over two-hundred subpoenas, including John F. Kennedy, Jesus, and the Pope. *Id.* at 10-11.

[13] *Id.* Panetti then requested a waiver of his right to direct appeal. *Id.* The judge denied this request and appointed counsel to represent Panetti on direct appeal. *Id.*

[14] *Panetti*, 127 S. Ct. at 2844. Panetti filed his first state habeas petition in 1999 and asserted fourteen grounds for relief, including incompetency to waive counsel and stand trial, but failed to allege his incompetency to be executed. Panetti v. Dretke, 401 F. Supp. 2d 702, 703 (W.D. Tex. 2004) [hereinafter *Dretke I*]. Panetti filed this petition pursuant to 28 U.S.C. § 2254 (1996). The petition was denied and Panetti then filed a federal habeas petition asserting the same fourteen grounds for relief. Brief of Respondent-Appellee at 5, Panetti v. Quarterman, 127 S. Ct. 2842, No. 06-6407 (Mar. 29, 2007). The federal district court, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court all rejected the petition. *Panetti*, 127 S. Ct. at 2844.

[15] *Id.* Panetti referred to the Texas Code of Criminal Procedure Art. 46.05(h)(i), (ii), requiring a defendant claiming incompetency to be executed must not understand he/she is to be executed imminently, and the reason for that execution. Panetti's attorney claimed he understood the State's reason for execution, but believed that reason was a sham. Panetti believed he was being executed to prevent him from preaching the gospel. *Dretke I*, 401 F. Supp. 2d at 708.

[16] *Dretke I*, 410 F. Supp. 2d at 703.

Despite these rejections, Panetti's counsel filed a second application for a federal writ of habeas corpus alleging Panetti's incompetence to be executed.[17] The federal district court stayed Panetti's execution, and the state trial court appointed two mental health experts who filed a joint report declaring Panetti was aware of, and had the capacity to, understand the reason for his imminent execution.[18] Based on these findings, Panetti's counsel requested an evidentiary hearing.[19] The state court, however, refused and found Panetti competent to be executed.[20] Panetti then went back to the federal district court to challenge the court's refusal to hold an evidentiary hearing.[21]

Despite the district court's *de novo* review, the district court relied on the Fifth Circuit's competency-to-be-executed standard, which requires an individual to both know of his looming execution and the reason for it.[22] While Panetti did not believe the State's purported reason for executing him, the court found him aware of his impending execution, thereby satisfying the requisite Fifth Circuit standard.[23]

After the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision, Panetti sought an appeal from the United States Supreme Court, which reversed the Fifth Circuit in a five-to-four decision.[24] The

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[17] *Dretke I*, 401 F. Supp. 2d at 703. Panetti filed this second application on January 26, 2004. *Id.* A claim of incompetency to be executed refers specifically to the case *Ford v. Wainwright*, 477 U.S. 399 (1986). *See infra* notes 64–77 and accompanying text.

[18] *Panetti*, 127 S. Ct. at 2844; Panetti v. Dretke, 448 F.3d 815, 816 (5th Cir. 2006), [hereinafter *Dretke II*].

[19] *Dretke II*, 448 F.3d at 816.

[20] *Id.* The state court made its determination of competency based on the aforementioned report drafted by the state-appointed psychiatrists. *Id.*

[21] *Id.* Panetti filed a federal habeas petition pursuant to 28 U.S.C. § 2254, and it is in the § 2254 petition that Panetti sought to resolve with the federal district court. *Panetti*, 127 S. Ct. at 2844.

[22] *Dretke I*, 401 F. Supp. 2d at 709 (citing Fearance v. Scott, 56 F.3d 633, 640 (5th Cir. 1995)). The United States District Court for the Western District of Texas reviewed the case *de novo* since it found the state court's failure to hold a competency hearing constituted a violation of Texas criminal code. *Dretke I*, 401 F. Supp. 2d at 704. This decision was handed down on July 20, 2004. *Id.* Article 46.05 of the Texas criminal code, as referenced by the court, deals specifically with competency to be executed. TEX. CODE CRIM. PROC. ANN. Art. 46.05 (Vernon 2001). Article 46.05(f) requires that if a defendant can make a substantial showing of incompetency, the court must order psychiatric evaluations by at least two mental health experts. *Id.* In addition, 46.05(e) states if a defendant has been previously found competent, then a presumption of competency arises and the defendant is not entitled to a hearing unless the defendant can show there has been a substantial change in circumstances. *Id.*

[23] *Dretke I,* 401 F. Supp. 2d at 712.

[24] *Dretke II*, 448 F.3d at 821; *Panetti*, 127 S. Ct. at 2852.

Supreme Court determined the state court had erred when it failed to provide constitutionally required procedures to Panetti.[25] The Court also found the Fifth Circuit's standard, which requires an individual to both know of his looming execution and the reason for it, to be overly restrictive.[26]

This case note evaluates the impact of *Panetti v. Quarterman*. First, the case note examines the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) on the habeas corpus process, including, specifically, the requirements of filing second or successive petitions.[27] Next, it discusses the relationship between insanity and the death penalty.[28] Third, this note walks through the principal case and the rationale the Court used in determining the Fifth Circuit erred in its application of *Ford v. Wainwright*.[29] Finally, it analyzes the interpretation of the "second or successive" language in AEDPA, the standards for determining when a prisoner is incompetent to be executed, and whether the United States Supreme Court succeeded in providing a clearer standard for making this determination.[30] This note proposes that while the Court ultimately came to the right conclusion, efforts to identify a bright-line rule for defining the standards of AEDPA and determine competency are still unclear. The Court also failed to provide guidance to lower courts likely to deal with similar issues in the future.

BACKGROUND

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—The Beginning

On April 24, 1996, President Clinton signed AEDPA into law.[31] Among other things, AEDPA meant to restrict a prisoner's ability to seek relief through a writ of habeas corpus.[32] This Act drew both passionate support and harsh criticism.[33] Proponents of habeas reform argued the bill was essential in rectifying prisoners' continued abuse of the writ system by preventing the filing of numerous and frivolous claims.[34] Conversely, opponents of reform contended many poor

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[25] *Panetti*, 127 S. Ct. at 2848.

[26] *Id.*

[27] Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, PL 104-132 (1996). *See infra* notes 31–60 and accompanying text.

[28] *See infra* notes 61–80 and accompanying text.

[29] *See infra* notes 81–123 and accompanying text.

[30] *See infra* notes 124–195 and accompanying text.

[31] Felker v. Turpin, 518 U.S. 651, 656 (1996). Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, PL 104-132 (1996) [hereinafter AEDPA].

[32] Lisa M. Seghetti & Nathan James, *Federal Habeas Corpus Relief: Background, Legislation, and Issues*, CRS Report for Congress (RL 33259), 1 (Feb. 1, 2006).

[33] *Id.* at 2.

[34] *Id.*

defendants failed to receive adequate representation and the writ of habeas corpus allowed those defendants the opportunity to obtain justice.[35] These opponents argued the proposed restrictions would disproportionately affect offenders who could not afford adequate representation, resulting in injustice.[36]

AEDPA made significant changes to American habeas corpus law.[37] The Act contains numerous procedural provisions related to federal habeas corpus.[38] The most significant changes, however, dealt with the procedures for filing a second or successive petition for habeas relief.[39]

"Second or Successive" Petitions under AEDPA

AEDPA's passage in 1996 stripped the courts of discretionary power to hear "second or successive" petitions.[40] According to AEDPA, a court must dismiss a "second or successive petition" unless it falls under one of two narrow exceptions.[41] Under the first exception, the claim must rely on a new constitutional standard; under the second exception, there must be a showing the facts underlying the claim could not have been discovered prior and those facts would establish that the defendant would not have been found guilty of the crime.[42] In addition, a defendant must now seek, and obtain, authorization from the appropriate appellate court before he or she may file a "second or successive" petition in district court.[43]

Shortly after AEDPA's passage, the United States Supreme Court heard *Felker v. Turpin*.[44] *Felker* became the first case decided by the Supreme Court addressing

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[35] *Id.*

[36] *Id.*

[37] James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 412 (2001).

[38] Seghetti, *supra* note 32, at 5. AEDPA made some significant changes to the previous law. *Id.*

[39] David P. Saybolt, Jo-Ellyn Sakowitz Klein, Matthew Umhofer, & Amanda Amann, *Habeas Relief for State Prisoners*, 85 GEO. L.J. 1507, 1510-11, 1531 (April 1997).

[40] Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1122 (1998); *see infra* notes 41–43 and accompanying text.

[41] *Id.* at 1122-23.

[42] *Id.*

[43] Saybolt, *supra* note 39, at 1531.

[44] Felker v. Turpin, 518 U.S. 651, 651 (1996). The petitioner, Ellis Felker, received the death penalty after his conviction of a waitress's rape and murder in 1981. *Id.* at 655. The Georgia Supreme Court affirmed both the conviction and execution, and the United States Supreme Court denied certiorari. *Id.* Felker then filed a petition for a writ of habeas corpus, but the federal district

the new "second or successive" restrictions.[45] The Court held AEDPA prohibited the Court from adjudicating claims such as this because AEDPA contained no reference to the Court's authority to undertake habeas petitions originally filed in the Supreme Court.[46] In addition to the holding, the Court indicated the newly adopted restrictions on "second or successive" petitions resulted in a modified rule aimed at preventing "'abuse of the writ.'"[47]

Two years later, the United States Supreme Court again interpreted AEDPA in the context of "second or successive" petitions in *Stewart v. Martinez-Villareal*.[48] In his federal habeas petition, the defendant asserted his incompetency to be executed under *Ford v. Wainwright*.[49] The district court dismissed the defendant's claim as premature because execution was not yet imminent.[50] The United States Supreme Court determined that while the defendant had requested that the courts rule on his *Ford* claim on two separate occasions, these did not qualify as two separate applications because at the time each claim ripened, the claim had been adjudicated.[51] The Court found the implications of defining Martinez-Villareal's claim as a "second or successive" application too overreaching, and found such

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court denied the petition. *Id.* at 656. The United States Court of Appeals for the Eleventh Circuit affirmed, and the United States Supreme Court denied certiorari. *Id.*; Felker v. Zant, 502 U.S. 1064, *cert. denied*. On April 24, 1996, President Clinton signed AEDPA into law, containing numerous changes to federal habeas corpus law. *Felker*, 518 U.S. at 656. On May 2, 1996, Felker filed a motion for a stay of execution and a motion for permission to file a second or successive habeas petition. *Id.* at 657. Felker made this motion pursuant to 28 U.S.C. § 2254 (1996). *Id.* The Eleventh Circuit denied both motions and held that because Felker raised claims in the second application which he neglected to raise in the first, he failed to meet the standards set forth by AEDPA. *Id.* at 658; 28 U.S.C. § 2244(b)(2) (1996).

[45] Stahlkopf, *supra* note 40, at 1125.

[46] *Felker,* 518 U.S. at 661.

[47] *Id.* at 664 (quoting McCleskey v. Zant, 499 U.S. 467 (1991)).

[48] Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). The jury convicted Martinez-Villareal, the defendant, on two counts of first-degree murder and sentenced him to death. *Id.* at 639.

[49] *Id.*; Ford v. Wainwright, 477 U.S. 399 (1986). Martinez-Villareal unsuccessfully appealed his conviction and sentence, and proceeded to file a series of habeas petitions in state court. *Stewart*, 523 U.S. at 640. The court denied all of the petitions. *Id.* Martinez-Villareal also filed three petitions in federal court which were also dismissed because he failed to exhaust available state remedies. *Id.* Not until his fourth petition for federal habeas relief did Martinez-Villareal raise his *Ford* claim of incompetency to be executed. *Id.* In *Ford v. Wainwright*, a jury found Ford guilty of murder and sentenced him to death. *Ford,* 477 U.S. at 399. Ford failed to raise a claim on incompetence to be executed at trial or sentencing, but began displaying behavioral changes indicating a mental disorder. *Id.* After an evaluation by court-appointed psychiatrists, the governor signed the death warrant. *Id.* The Supreme Court granted certiorari and found the State's procedures for determining sanity to be lacking and reversed the decision of the lower court. *Id.* at 417-18.

[50] *Stewart*, 523 U.S. at 640, 644; Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 747 (2002).

[51] *Stewart*, 523 U.S. at 643.

an interpretation would prevent Martinez-Villareal from attaining federal habeas review.[52] Therefore, the Court determined the subsequent application did not fall under the prohibition on "second or successive" petitions.[53]

While *Stewart v. Martinez-Villareal* appears to find a way around the "second or successive" requirement, the holding itself is narrow.[54] The Court limited its opinion to the specific and unique facts of the case.[55] Martinez-Villareal was only able to circumvent these seemingly clear requirements because he raised his *Ford* claim initially, and the district court had dismissed the claim due to its premature nature.[56] The Court's interpretation was not broadly applicable.[57]

Despite the Court's consideration of several cases involving "second or successive" habeas petitions, no clear interpretation has emerged to aid lower courts in determining what qualifies as a "second or successive" claim under AEDPA.[58] The Court continues to evaluate whether a claim is "second or successive" on a case-by-case basis.[59] The Court weighs the judicial efficacy against the infringement on the individual's rights guaranteed by the Constitution or established Supreme Court precedent.[60]

The Eighth Amendment, Insanity, and the Death Penalty

The Supreme Court's death penalty jurisprudence is extensive, particularly in regard to the death penalty as it relates to insanity. Common law recognized executing an insane person would not satisfy the goals of deterrence or retribution.[61] In addition, the Court has consistently recognized the execution of the insane

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[52] *Id.* at 645.

[53] *Id.*

[54] Stahlkopf, *supra* note 40, at 1133.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Panetti*, 127 S. Ct. at 2855.

[59] *See id.*

[60] *Id.*

[61] Eric M. Kniskern, *Does* Ford v. Wainwright's *Denial of Executions of the Insane Prohibit the State From Carrying Out its Criminal Justice System?*, 26 S.U. L. REV. 171, 171 (1999). Sir Edward Coke, often referenced in relation to the value of executing a person deemed insane, stated, "[b]y intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream humanity and cruelty, and can be no example to others." *Ford,* 477 U.S. at 407 (quoting Sir Edward Coke, 3 E. Coke, Institutes 6 (6th ed. 1680)).

offends the conscience.[62] The Court developed such policies on sanity and its relationship to the death penalty through cases spread out over the course of a century. Despite the Court's long history in considering death penalty cases, *Gregg v. Georgia*, decided in 1976, became one of the first cases addressing the Eighth Amendment as it related to the death penalty and held the imposition of the death penalty for the crime of murder does not, under any circumstances, violate the Eighth or Fourteenth Amendments of the Constitution.[63]

The Court again took on the issue of the death penalty's constitutionality in 1986 in *Ford v. Wainwright*.[64] In 1974, Ford's murder conviction led to a sentence of death for his crimes.[65] Ford failed to raise claims of incompetence at the time of the murder, the trial, or the sentencing; shortly thereafter, Ford began to display behavioral changes indicative of a mental disorder.[66] The governor, who had the ultimate authority to determine competency, signed the death warrant and the state court denied Ford's request for a new competency hearing.[67] The United States Supreme Court determined Ford was entitled to an evidentiary hearing on the question of his competency.[68] Referring to the repugnant practice of executing an insane prisoner numerous times throughout the opinion, the Supreme Court found Florida's procedures for determining sanity to be lacking and reversed and remanded the decision.[69] In addition, the Court clearly indicated the repulsive nature of imposing the death penalty on one who, because of his mental illness, cannot understand the reasons for, or the implications of, his death sentence.[70]

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[62] *Ford*, 477 U.S. at 409. "[N]o less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Id.*

[63] Gregg v. Georgia, 428 U.S. 153, 153-54 (1976); Anthony A. Avey, *Criminal Law—Cruel and Unusual Punishments—Use of Excessive Physical Force Against An Inmate May Constitute Cruel and Unusual Punishment Even Though the Prisoner Does Not Suffer Significant Injury*, 24 ST. MARY'S L.J. 539, 545 (1993). In *Gregg*, the defendant, sentenced to death after a jury conviction on two counts of robbery and two counts of murder, challenged the constitutionality of the death sentence. *Gregg*, 428 U.S. at 153. Gregg argued the death penalty violated the Eighth Amendment. *Id.* at 153-54.

[64] Ford v. Wainwright, 477 U.S. 399 (1986).

[65] *Id.* at 399.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 400.

[69] *Ford*, 477 U.S. at 417-18.

[70] *Id.* at 417.

Ford continues as the principal case in the execution of the insane.[71] Although a landmark decision, the Court failed to issue a majority opinion in *Ford*; instead, there existed only a four-Justice plurality.[72] Perhaps the most oft-referenced portion of *Ford* is the concurrence submitted by Justice Powell.[73] Justice Powell specifically spoke to the death penalty's retributive value.[74] He wrote the value of the death penalty lies in the defendant's awareness and understanding of its existence and purpose.[75] Justice Powell's concurrence offers a more limited holding of the standard for an execution.[76]

> [O]nly if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.[77]

While *Ford* continues as the foremost opinion on the execution of the insane, the evolution of court cases involving this issue did not end with the *Ford* decision. For instance, in 1992, the Supreme Court of Louisiana heard *State v. Perry*.[78] The central issue in that case focused on whether a State can forcefully medicate a prisoner deemed incompetent in order to constitutionally carry out a death sentence.[79] The Supreme Court of Louisiana held that forcibly medicating

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[71] Rhonda K. Jenkins, *Fit To Die: Drug-Induced Competency for the Purpose of Execution*, 20 S. ILL. U. L.J. 149, 157 (1995). Justice Powell stated the following test that both state and federal courts have continued to adhere: "'[T]he Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* (quoting *Ford*, 477 U.S. at 422 (Powell, J. concurring)).

[72] *See Panetti*, 127 S. Ct. at 2856.

[73] *Id.* at 2855-56. The Court acknowledged there was only a four-Justice plurality in *Ford*. *Id.* at 2855. Justice Powell's concurrence offered a more "limited holding." *Id.* at 2856. Therefore the Court reasoned "[w]hen there is no majority opinion, the narrower holding controls." *Id.* (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

[74] *Ford,* 477 U.S. at 421 (Powell, J., concurring).

[75] *Id.* (Powell, J., concurring).

[76] *Panetti*, 127 S. Ct. at 2856. "Justice Powell's opinion constitutes 'clearly established' law for purposes of § 2254 and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim." *Id.*

[77] *Ford,* 477 U.S. at 422 (Powell, J., concurring).

[78] State v. Perry, 610 So. 2d 746 (La. 1992).

[79] *Id.* at 747. Michael Perry, the defendant, convicted of murdering his mother, father, nephew and two of his cousins in 1983, received a death sentence in 1985. *Id.* at 748. The court summoned medical experts to evaluate Perry's competency to be executed and determined without the aid of antipsychotic medication, Perry could not understand the connection between his crimes and the ordered punishment. *Id.* The trial court ordered Perry continue to be given this medication, forcibly if necessary, to carry out the death penalty. *Id.* Perry appealed to the United States Supreme Court, who proceeded to vacate the decision of the trial court. *Id.* However, upon remand the trial court once again ordered that forcible medication continue. *Perry,* 610 So. 2d at 748. Perry then appealed again and the Supreme Court of Louisiana granted a writ to review. *Id.*

the defendant to avoid the constitutional prohibition on execution of the insane violated the defendant's constitutional rights.[80] It remains significant that cases involving the execution of the insane have continued to evolve beyond the rules set forth in *Ford v. Wainwright* and have comported with the prominent policy justifications of punishment.

PRINCIPAL CASE

Panetti v. Quarterman affirmed the *Ford* decision and went a step further in reiterating not only is executing a mentally-ill prisoner constitutionally prohibited, but the procedures afforded those prisoners must be adhered to, given the finality of the death penalty.[81] The United States Supreme Court first concluded Panetti's claim of incompetence to be executed, addressed in the second habeas petition, was not barred under the provisions of AEDPA.[82] In addition, the Court determined the State failed to afford Panetti the procedures granted to him by the United States Constitution.[83] Finally, the Court held Panetti's documented delusions should have been a factor in determining his competency to be executed.[84]

Majority Opinion (Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer)

The Court began by addressing the jurisdictional issue.[85] This issue centered on AEDPA's required dismissal of second or successive habeas corpus applications.[86] The Court acknowledged Panetti had previously filed two habeas corpus applications in federal court.[87] But, the Court indicated the label of "second or successive" was not necessarily self-defining.[88] The Court concluded Congress did not intend AEDPA's "second or successive" language to apply in this unique circumstance.[89]

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[80] *Id.*

[81] *Panetti*, 127 S. Ct. at 2861-62.

[82] *Id.* at 2855.

[83] *Id.* at 2858.

[84] *Id.* at 2860.

[85] *Id.* at 2852.

[86] *Panetti*, 127 S. Ct. at 2852; 28 U.S.C. § 2254(b)(2) (1996).

[87] *Panetti*, 127 S. Ct. at 2852. The State maintained the full adjudication of Panetti's first application despite Panetti's failure to raise a *Ford* claim in the first application. *Id.* Although the second application raised a new *Ford* claim, 28 U.S.C. § 2254 required dismissal of second or successive claims. *Id.* The State, therefore, concluded the claim should be dismissed. *Id.*

[88] *Id.* at 2853.

[89] *Id.* The Court stated Congress did not intend AEDPA to apply to a situation such as Panetti's, in which a prisoner filed a *Ford*-based incompetency claim filed as soon as it became ripe. *Id.*

Congress designed AEDPA, in part, to promote judicial efficiency, but, according to the Court, interpreting the statutory language in self-defining terms counters this goal.[90] The State's proffered interpretation, asserted the Court, effectively requires prisoners to file premature claims or lose them altogether.[91] The Court declared *Ford*-based incompetency claims may not become ripe until after the time to file a federal habeas petition has elapsed.[92] An execution may not be imminent until after that time.[93] Furthermore, the mental conditions of prisoners often deteriorate over time.[94] Specifically, competency-to-be-executed claims are unripe at the beginning stages of the trial and, therefore, it is appropriate for such prisoners to wait for the claim to ripen before initiating the petition.[95]

While the Court opined as to when a *Ford*-based claim may become ripe and how that correlates with the "second or successive" language of AEDPA, it failed to provide a clear interpretation of "second or successive."[96] Instead, the Court argued for the existence of exceptions, and held the bar on "second or successive" applications did not apply to a *Ford*-based claim brought for the first time once it became ripe, despite the fact a prisoner may have already filed a previous federal habeas corpus petition.[97] According to the Court, such an interpretation would have the practical effect of stripping prisoners of their right to have unexhausted claims reviewed by federal courts.[98]

The Court next addressed whether the state court properly provided Panetti with the procedures outlined in the Eighth and Fourteenth Amendments.[99] The Court determined the state court's failure to properly apply those procedures required under *Ford* resulted in an erroneous application of established law.[100] The Court referred directly to *Ford's* four-Justice plurality indicating if a question arises concerning a prisoner's sanity and execution, then courts must investigate and resolve this fact with the utmost regard for discovering the truth.[101] The

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[90] *Id.* at 2854.

[91] *Id.*

[92] *Panetti*, 127 S. Ct. at 2852.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 2855.

[96] *Id.*

[97] *Panetti*, 127 S. Ct. at 2855.

[98] *Id.* at 2854.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 2855-56 (quoting Ford v. Wainwright, 477 U.S. 399, 411-12 (1986)).

> [I]f the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.

state court failed to provide the proper procedures to Panetti when it determined Panetti's competency based strictly on the court-appointed psychiatrists' report, and then, again, failed to provide Panetti with the opportunity to respond by cross-examining the psychiatrists.[102]

The Court then turned briefly to the issue of deference to the lower court's determination of sanity.[103] Despite the aforementioned failures of the lower courts, the Court interpreted AEDPA to allow a federal court to grant habeas relief if the state court's decision resulted in an unreasonable application of the law.[104] If such an unreasonable application occurs, the federal court must evaluate the claim without deference to the state court.[105] Thus, in this situation, the state court's competency determination, based on the report of the court-appointed psychiatrists, becomes irrelevant, and the federal court evaluates the claim *de novo*.[106]

The Court then addressed the question of whether the Eighth Amendment permits the execution of an inmate who cannot understand the reason for his execution.[107] The United States Court of Appeals for the Fifth Circuit indicated the competency standard rests on the prisoner's awareness of the pending execution and the reason the execution is being carried out.[108] The competency standard, as interpreted by the Fifth Circuit, required Panetti only to be aware of his execution and the State's purported reason for that execution.[109] The Court found the Fifth Circuit's standard too restrictive, and thus a violation of the Eighth Amendment.[110] This interpretation, suggested the Court, put the principles of *Ford* at risk.[111] Accordingly, the Fifth Circuit should have considered Panetti's contention that he could not comprehend the reasoning behind his pending execution.[112]

> Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. *Id.*

[102] *Panetti*, 127 S. Ct. at 2857

[103] *Id.* at 2858-59.

[104] *Id.* at 2858; *see also* 28 U.S.C. § 2254(d)(1).

[105] *Panetti,* 127 S. Ct. at 2858; Wiggins v. Smith, 539 U.S. 510, 534 (2003).

[106] *Panetti,* 127 S. Ct. at 2859.

[107] *Id.*

[108] *Id.* at 2860 (citing Barnard v. Collins, 13 F.3d 871, 877 (5th Cir. 1994)).

[109] *Id.* at 2860.

[110] *Id.*

[111] *Panetti,* 127 S. Ct. at 2861. The Court determined the interpretation that "deems delusions relevant only with respect to the State's announced reason for a punishment of the fact of an imminent execution, as opposed to the real interests the State seeks to vindicate" put the principles set forth in *Ford* at risk. *Id.*

[112] *Id.* at 2862.

While the Court rejected the standard articulated by the Fifth Circuit, it declined to declare a bright-line rule applicable to all competency determinations.[113] It reversed and remanded the case to provide the district court with an opportunity to further evaluate Panetti's incompetency claims.[114]

Dissenting Opinion (Justice Thomas, with Chief Justice Roberts and Justices Scalia and Alito joining)

The dissenters argued AEDPA required the dismissal of Panetti's claim because he did not raise his *Ford*-based claim until his second habeas application.[115] Specifically, the dissent directed attention to the provision of AEDPA that requires permission from a court of appeals before an applicant may file a second or successive federal habeas application.[116] Panetti admitted he neither sought nor received permission from the court of appeals to file the application.[117] The dissenters asserted there was no way around seeing Panetti's second federal habeas application as anything but a violation of AEDPA and the Court should adopt the plain meaning of "second or successive."[118]

The dissent further asserted the Court lacked jurisdiction under AEDPA to even consider Panetti's claim.[119] The dissent reasoned that even if such jurisdiction did exist, the state court did not unreasonably apply federal law.[120] In *Ford*, the dissent articulated, the issue was the existence of actual knowledge, and not the existence of a rational understanding.[121] Therefore, the dissent chose not to address the accuracy of the Fifth Circuit's standard.[122] The dissent concluded the Court misinterpreted AEDPA, refused to defer to the state court, and rejected the Fifth Circuit's interpretation without further constitutional analysis, and, therefore, decided the case incorrectly.[123]

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[113] *Id.*

[114] *Id.* at 2863.

[115] *Id.* at 2864 (Thomas, J., dissenting); 28 U.S.C. § 2244(b)(2) (1996).

[116] *Panetti*, 127 S. Ct. 2864 (Thomas, J., dissenting) (citing 28 U.S.C. § 2244(b)(3)).

[117] *Id.* at 2864 (Thomas, J., dissenting).

[118] *Id.* at 2867 (Thomas, J., dissenting).

[119] *Id.* at 2873 (Thomas, J., dissenting). The dissenters indicated that because this was a second or successive petition, dismissal was required, and therefore the Court lacked jurisdiction. *Id.*

[120] *Id.* (Thomas, J., dissenting).

[121] *Panetti*, 127 S. Ct. at 2873 (Thomas, J., dissenting).

[122] *Id.* (Thomas, J. dissenting).

[123] *Id.* at 2874 (Thomas, J., dissenting).

ANALYSIS

This case does not revolve around whether or not it is permissible to execute a prisoner found insane.[124] Executing a legally insane individual has never been acceptable at common law, and is constitutionally prohibited by the Eighth Amendment.[125] Rather, the issues in this case center on the requisite competency standard to execute, preserving the death penalty's integrity, and reaffirming the judicial system's adherence to procedure.[126]

This case note analyzes two topics the Court addressed in *Panetti*: second or successive petitions under AEDPA and the requisite competency standard to be executed.[127] This note also briefly addresses the Court's missed opportunity to provide the lower courts with a bright-line rule to determine competency.[128] In addition, the analysis offers that implicit in the Court's opinion in *Panetti v. Quarterman* was a message directed at lower courts regarding the importance of adherence to proper procedure in capital cases.[129] The analysis argues that while the Court ultimately came to the right conclusions, the Court failed in its efforts to provide lower courts with guidance in the form of any bright-line rules.

"Second or Successive" Habeas Petitions

Due to the changes made to habeas corpus law after the passage of AEDPA in 1996, as well as subsequent litigation in courts across the country, including the United States Supreme Court, many could foresee the problems that would eventually arise in the context of incompetency-to-be-executed claims.[130] Specifically, the problem involved the question of when a petitioner had to file such a claim.[131] In order to guarantee the opportunity to raise a *Ford*-based claim, a prisoner had to preserve that claim in the first habeas petition, regardless of the claim's ripeness.[132] Such a requirement struck many as unreasonable for years before the Court ever granted certiorari in *Panetti v. Quarterman*.[133]

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[124] *Id.* at 2848. The Court in *Panetti* quoted *Ford* and made clear that the Eighth Amendment "prohibits a State from carrying out a sentence of death upon a prisoner who is insane." *Id.* at 2848 (quoting Ford v. Wainwright, 477 U.S. 399, 409-10 (1986)).

[125] *Id.*; Anthony Bishop, Ford v. Wainwright: *Insanity of the Death Row Inmate—A Second Chance*, 11 AM. TRIAL ADVOC. 311, 318-19 (1988).

[126] *Panetti*, 127 S. Ct. at 2847-48.

[127] *See infra* notes 129–186 and accompanying text.

[128] *See infra* notes 187–190 and accompanying text.

[129] *See infra* notes 191–195 and accompanying text.

[130] Stevenson, *supra* note 50, at 750.

[131] *Id.*

[132] *Id.*

[133] *Id.*

The *Panetti* Court's interpretation allows prisoners the right to exhaust their resources without clogging the court dockets with unripe and frivolous claims.[134] Prisoners should file claims ripe for adjudication in the first habeas application.[135] But the Court noted defense attorneys should not be expected to foresee the future deterioration of their clients' mental states so as to preserve a *Ford*-based claim.[136]

Ultimately, the *Panetti* Court interpreted the statute in a reasonable manner.[137] In the context of this particular case, potential abuse of the writ on the part of Panetti was never an issue.[138] Thus, because Panetti filed his claim when it became ripe, the Court deemed Congress did not intend to bar a claim of this nature.[139] The State's interpretation of the statute, on the other hand, leads to unreasonable results, and, furthermore, to results that the Court rightly held Congress never intended.[140] In fact, the legislative history of AEDPA reveals Congress intended for prisoners to be provided with one full and fair opportunity to have their constitutional claims heard by the federal courts.[141] It follows, then, that a prisoner should have that opportunity to fully and fairly present their claims, even if that claim arises in the second petition.[142] Adopting the State's interpretation would force the defendant into a senseless decision by requiring the defendant to look into the future and assume his or her mental state would deteriorate over the course of time.[143] This would ultimately leave a defendant in a position to either lose the opportunity to raise his *Ford* claim, or, as predicted, file it in the first habeas petition and, therefore, risk having the claim dismissed as premature.[144]

Given the purpose of AEDPA, judicial efficiency is certainly not promoted by requiring prisoners seeking habeas relief to simply throw in a *Ford* claim as a "placeholder" so as to preserve the claim on the off-chance the petitioner decides to pursue it at a later date.[145] In fact, doing so would not guarantee that the petitioner

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[134] *Panetti,* 127 S. Ct. at 2855.

[135] *Id.*

[136] *Id.* at 2852.

[137] Michael Mello, *Executing the Mentally Ill: When is Someone Sane Enough to Die?* 22 FALL CRIM. JUST., 30, 40 (2007).

[138] *Id.*

[139] *Id.*

[140] *Id.* The State's interpretation effectively requires defendants to file *Ford*-based claims prematurely, so as to preserve that claim on the off-chance that it may become applicable down the road. *Panetti*, 127 S. Ct. at 2854. If a prisoner failed to preserve this claim, it would be lost. *Id.*

[141] Stevenson, *supra* note 50, at 772.

[142] *Id.*

[143] *Id.* at 750.

[144] Mello, *supra* note 137, at 40.

[145] Stevenson, *supra* note 50, at 750.

would be able to revive that claim in a later habeas petition.[146] Habeas corpus rules provide the State with the opportunity to motion for summary judgment if claims within a habeas petition are not supported by adequate facts.[147] Thus, if a petitioner files a *Ford*-based claim simply for the purpose of preserving the claim for a later date, despite that claim not being ripe, the State will likely move for summary judgment.[148] The initial habeas petition, then, will have been denied on the merits, and the provisions of AEDPA would then preclude the petitioner from raising that claim in a "second or successive" petition.[149] Therefore, despite having preserved that claim at an unripe stage, it would be lost.[150]

The dissent, which advocated that the Court did not have jurisdiction to adjudicate Panetti's claim due to the "second or successive" restrictions of AEDPA, is disturbing.[151] This disturbance lies in the dissent's practical application regarding those prisoners seeking to raise *Ford* claims.[152] It simply makes little sense to require prisoners to raise unripe claims in a first habeas petition for the sake of preserving the claims.[153] In addition, the dissent seems to overlook the fact counsel will likely be unaware of the fact they must raise these unripe claims, which will then result in the loss of valid and ripe incompetency-to-be-executed claims.[154] The Court's conclusion that the insertion of a pro forma *Ford* claim is unreasonable ultimately preserves the purpose of AEDPA and the opportunity for a prisoner to bring such a claim when it becomes ripe.[155]

In regard to the qualification of a habeas petition as "second or successive," the Court's decision in *Stewart v. Martinez-Villareal* is enlightening. In *Stewart*, the Court held, the defendant's habeas petition did not fall under the purview of "second or successive" because the *Ford* claim had been raised in the first habeas

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[146] *Id.*

[147] *Id.* at 750-51; *see* 28 U.S.C. § 2244(b)(1) (1996).

[148] Stevenson, *supra* note 50, at 751.

[149] *Id.*

[150] *Id.* at 751.

[151] *Panetti*, 127 S. Ct. at 2864 (Thomas, J., dissenting); Richard J. Bonnie, Panetti v. Quarterman: *Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 264 (2007) [hereinafter Bonnie I].

[152] Bonnie I, *supra* note 151, at 263-64.

[153] *Id.*

[154] *Id.* at 264.

[155] Kyle P. Reynolds, *"Second or Successive" Habeas Petitions and Late-Ripening Claims After* Panetti v. Quarterman, 74 U. CHI. L. REV. 1475, 1493-94 (2007); Bonnie I, *supra* note 151, at 263. The Court identifies this purpose as furthering the "'principles of comity, finality, and federalism.'" *Panetti*, 127 S. Ct. at 2854 (quoting Miller-El v. Cockrell, 537 U.S. 322, 337 (2003)).

petition, and then simply renewed in a second petition.[156] Therefore, the renewed petition was really only a continuation of the first, and did not require dismissal.[157] Despite the difference in the filing order of the *Ford* claim, the Court's decisions in both *Stewart* and *Panetti* addressed the impractical consequences of interpreting the language of "second or successive" to constitute a non-negotiable ban on a habeas petition filed secondly or successively.[158] The cases are not identical, but the decision in *Panetti* is consistent with the decision in *Stewart*. The Court in *Stewart* did not consider what to do when a prisoner raises a *Ford* claim for the first time in a second habeas petition, having already had the initial petition adjudicated on the merits.[159] However, in *Stewart,* the Court found it unreasonable to prohibit courts from ruling on a *Ford* claim once it becomes ripe, despite the dismissal of a previous habeas petition on a technicality.[160] Given this ruling, it does not make sense to then permit a court to refuse to rule on a *Ford* claim simply because the prisoner opted not to raise that unripe claim in his first petition.[161] The Court, in *Panetti*, agreed.[162]

Despite the dissent's assertions, arguing that a plain language reading of "second or successive" is required, many lower courts have addressed the issue of what kind of habeas petition falls within the purview of "second or successive."[163] While a consensus among the lower courts appears absent, the majority of lower courts that have undertaken the "second or successive" issue have interpreted AEDPA in a permissive manner.[164] The Court, in *Panetti*, followed the trend of the various courts of appeal and also interpreted AEDPA permissively—Panetti's *Ford* claim, raised for the first time in a second petition, does not violate AEDPA's provisions because the claim was not ripe at the time of the first habeas application.[165] Furthermore, Congress did not intend for the restrictions on "second or successive" applications to apply to *Ford*-based claims.[166] Despite the fact the Court reached the right result, this rule is narrow and not widely applicable to the

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[156] Jordan T. Stanley, *"Deference Does Not Imply Abandonment or Abdication of Judicial Review": The Evolution of Habeas Jurisprudence Under AEDPA and the Rehnquist Court*, 72 UMKC L. REV. 739, 748 (2004); *Stewart*, 523 U.S. at 645. The Court dismissed the initial claim as unripe. *Id.* at 645.

[157] *Stewart*, 523 U.S. at 645.

[158] *Id.* at 644; *Panetti*, 127 U.S. at 2852.

[159] Sarah A. Sulkowski, *The AEDPA and the Incompetent Death-Row Prisoner: Why* Ford *Claims Should Be Exempt From the One-Year and One-Bite Rules*, 6 LOY. J. PUB. INT. L. 57, 78 (2004).

[160] *Id.*

[161] *Id.*

[162] *Panetti*, 127 S. Ct. 2852.

[163] Reynolds, *supra* note 155, at 1487.

[164] *Id.*

[165] *Panetti*, 127 S. Ct. at 2855.

[166] Reynolds, *supra* note 155, at 1496.

various situations under which the "second or successive" requirement applies.[167] In fact, *Panetti* is not at all relevant to claims that fall outside of *Ford.*[168]

Claims involving incompetency to be executed, in the context of AEDPA provisions, are not new.[169] In fact, as the drastic changes in habeas corpus law brought on by the passage of AEDPA in 1996 began to play out in the court system, it became clear what problems would arise in the future.[170] The lower courts have certainly not been uniform in their interpretation of AEDPA's "second or successive" language.[171] However, while the Court ultimately came to the right conclusion in allowing Panetti's second habeas petition to move forward, the rule is narrow.[172]

The Court's Standard—Competency to be Executed

The Court arrives at the issue of competency to be executed toward the end of the opinion.[173] While the Court did make it clear Justice Powell's concurrence remains controlling law, the Court conceded *Ford* failed to provide a patent threshold for competency.[174] Despite the lack of a comprehensible standard, the Court struck down the Fifth Circuit's restrictive standard and asserted both that delusions were relevant, and that simple awareness of impending execution and the reason for that execution is insufficient.[175]

The Court addressed the question of whether the Eighth Amendment allows the execution of a mentally ill individual incapable of understanding the reason for his execution.[176] The Court correctly ruled the Fifth Circuit's standard too restrictive, and inconsistent with *Ford*.[177] The Fifth Circuit effectively ignored Panetti's delusions because Panetti ultimately knew, though did not believe, that he was being executed for his crimes.[178] Ignoring this aspect of a prisoner's competency, as the Court asserted in *Ford*, puts the penological goals of the death

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[167] *See id.* at 1492.

[168] Reynolds, *supra* note 155, at 1496.

[169] Stevenson, *supra* note 50, at 741.

[170] *Id.* at 750.

[171] *Id*. at 748-49.

[172] Reynolds , *supra* note 155, at 1496.

[173] *Panetti*, 127 S. Ct. at 2859.

[174] *Eighth Amendment—Death Penalty—Execution of the Presently Incompetent*, 121 HAR. L. REV. 204, 209-10 (2007).

[175] *Id.* at 208-09.

[176] *Panetti*, 127 S. Ct. at 2859.

[177] *Eighth Amendment*, *supra* note 174, at 209; *Panetti*, 127 S. Ct. at 2860.

[178] *Panetti,* 127 S. Ct. at 2861.

penalty at risk—especially the goal of retribution.[179] Furthermore, the standard advocated by the Fifth Circuit is too restrictive because even those who are severely mentally ill may still be capable of understanding they will die for the crime(s) they committed.[180] This standard is insufficient.[181]

The dissent concentrated its attention on the procedural aspect of AEDPA, and whether the Supreme Court had the jurisdiction to undertake Panetti's claim, but failed to discuss the competency standard.[182] The dissent opted, instead, to simply reject the Court's analysis on this constitutional issue.[183] The dissent does not, however, reject the logistical framework of *Ford*, which speaks volumes about the *Panetti* Court's conclusion.[184] *Ford* held that executing a prisoner who cannot comprehend why he is being put to death undermines the retributive goal of the death penalty.[185] If the *Panetti* Court continues with this logic, which it does, it would then follow that no penological purpose is served in executing an individual who cannot understand the ultimate reason for his imminent execution.[186] Relying on this framework, executing Panetti in his current mental capacity would undermine the purpose of the death penalty.

The Court Missed the Opportunity to Provide a Bright-Line Rule

The Court's adherence to procedure in this case is admirable, but, ultimately, *Panetti v. Quarterman*, as did *Ford v. Wainwright*, has left lower courts with little guidance as to a standard for determining incompetence.[187] The Court has, once again, passed on an opportunity to provide lower courts with a workable and substantive test for determining competency to be executed.[188] This is significant, at the very least, because of the pervasiveness of mental illness on death row, and the likelihood that a prisoner's mental state will deteriorate over time.[189] This case

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[179] *Eighth Amendment, supra* note 174, at 210.

[180] Lindsay A. Horstman, *Commuting Death Sentences of the Insane: A Solution For A Better, More Compassionate Society*, 36 U.S.F. L. REV. 823, 824 (2002).

[181] *Id.*

[182] *Eighth Amendment*, *supra* note 174, at 209; *Panetti*, 127 S. Ct. at 2873 (Thomas, J., dissenting).

[183] *Panetti*, 127 S. Ct. at 2873 (Thomas, J., dissenting).

[184] *Eighth Amendment*, *supra* note 174, at 210.

[185] Gordon L. Moore, III, Ford v. Wainwright: *A Coda in the Executioner's Song*, 72 IOWA L. REV. 1461, 1477 (1987); *Ford*, 477 U.S. at 409.

[186] *Eighth Amendment*, *supra* note 174, at 210.

[187] Richard J. Bonnie, *Mentally Ill Prisoners On Death Row: Unsolved Puzzles For Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1171 (2005) [hereinafter Bonnie II]; Ford v. Wainwright, 477 U.S. 399 (1986).

[188] Bonnie I, *supra* note 151, at 270.

[189] Bonnie II, *supra* note 187, at 1192. The percentage of death row prisoners suffering from mental illness could be as high as five to ten percent. *Id.*

appears to be a victory for the defendant only because the case was remanded to afford Panetti with the proper procedures; but, in fact, the only hard-and-fast rule the Court seems to commit to is that it cannot commit to a hard-and-fast rule.[190] Given the lack of a clear rule, there is still the chance Panetti will ultimately be executed.

A Message to the Lower Courts

Panetti v. Quarterman did not redefine the competency standard, nor did it unnecessarily expand the universe of what would be acceptable when inmates file second or successive habeas petitions.[191] This case did, however, contains significant language on the procedural inadequacies afforded Panetti by the lower courts.[192] Indeed, throughout the entirety of the *Panetti* litigation, the Texas courts and the Fifth Circuit demonstrated their "unwillingness" to afford Panetti the procedures due to him under the Constitution.[193] It appears to be more of a message to lower courts regarding similar death penalty cases.[194] The Court discussed the lackluster effort by the lower courts to adequately afford Panetti the processes due him as required by established United States Supreme Court law on several occasions throughout the opinion.[195]

CONCLUSION

The United States Supreme Court came to the right conclusion. *Panetti* reaffirms the Court's desire to provide those prisoners sentenced to death with every opportunity to defend themselves when their lives are on the line.[196] Death

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[190] *Panetti*, 127 S. Ct. at 2862. "Although we reject the standard followed by the Court of Appeals, we do not attempt to set down a rule governing all competency determinations." *Id.*

[191] *Id.* at 2853. The Court clearly indicates that the meaning of "second or successive" has evolved through case law, even cases that pre-dated the AEDPA. *Id*. The Court states that "[t]he statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claims is first ripe." *Id.* at 2855. In addition, the Court refers to Justice Powell's concurring opinion in *Ford* and cites the relevant standard as "[o]nce a prisoner seeking a stay of execution has made a 'substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Panetti,* 127 S. Ct. at 2856 (citing *Ford*, 477 U.S. at 426, 424). The Court did not reverse this standard, but asserted the Fifth Circuit's application was too restrictive. *Id.* at 2860.

[192] Karl Keys, Panetti v. Quarterman: *The Latest Installment of Goldilocks & Kennedy's Capital Jurisprudence*, Capital Defense Weekly (Jun. 28, 2007) *available at* http://capitaldefenseweekly.com/blog/2007/06/28/panetti-v-quarterman-the-latest-installment-of-goldilocks-kennedys-capital-jurisprudence/.

[193] Bonnie I, *supra* note 151, at 258.

[194] Keys, *supra* note 192, at ¶ 1.

[195] *Panetti*, 127 S. Ct. at 2858, 2862.

[196] Bishop, *supra* note 125, at 335.

is irreversible, and while walking through the steps the system requires is often mind-numbing, these steps are necessary if one wishes to preserve the purpose for which the death penalty stands.

The narrow rule invoked by the Court regarding "second or successive" applications is not particularly useful to claims not involving incompetency to be executed. The lower courts in the United States would have been better guided had the Court articulated a more broadly applicable definition of "second or successive" claims. Instead, lower courts are left with a narrow interpretation applicable to a limited group of cases.

In addition, while the Supreme Court has effectively reiterated its position that inmates will be afforded their rights established by the Supreme Court law, the competency-to-be-executed standard remains unnecessarily vague. The Court indicated a rational understanding, rather than just awareness, is necessary, but failed to go any further. *Panetti* simply will not be remembered as a case articulating a clear and useful test for determining a prisoner's competence to be executed.[197]

Scott Panetti deserves to be punished for his crimes. But, if Panetti is incompetent to be executed, he should be afforded every opportunity the system allows to prove that. The Supreme Court correctly decided that the lower court's expedited procedures were not good enough. Both the district court and the Fifth Circuit were too quick to cast aside Panetti's claims of incompetence. Only once Panetti is afforded the procedures due to him can he, in good conscience, be executed for his crimes. Furthermore, only once those procedures are satisfied can the penological goals of the death penalty be preserved. *Panetti* is a reaffirmation of the Court's loyalty to procedure, but only a 'baby step' toward developing a clear competency standard.

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[197] Bonnie I, *supra* note 151, at 283.

CASE NOTE

ECONOMIC LAW—Vertical Minimum Pricing in *Leegin*—Adrift With the Rule of Reason; Sinking With Stare Decisis; *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.,*127 S. Ct. 2705 (2007).

*Ryan T. Jardine**

Introduction

Antitrust law in the United States sprouted from the Sherman Act of 1890.[1] Congress passed the Sherman Act out of a growing concern over increasing prices caused by concentrated businesses, monopoly power, and cartels.[2] Typical American values such as entrepreneurial independence, freedom to contract, and free competition created the idealistic support for the Act's passage.[3]

The spring of 1911 provided the opportunity for the U.S. Supreme Court to decide four cases addressing the scope of the Sherman Act.[4] One of these decisions, *Dr. Miles Medical Company v. John D. Park & Sons Co.*, changed the analytical landscape of antitrust litigation.[5] The Court held it per se illegal for "a manufacturer to agree with its distributor to set the minimum price the distributor can charge for manufacturer's goods."[6] Nearly 100 years later, the Court faced this issue once again in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[7] The *Leegin* Court rejected the established precedent of *Dr. Miles*, and directed a return to the rule of reason for governing vertical minimum price fixing.[8]

Leegin Creative Leather Products, Inc. (Leegin) sold women's clothing and accessories.[9] Leegin, under the Brighton brand, sold a wide variety of women's

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* Candidate for J.D., University of Wyoming, 2009. I thank my loving wife, Sonja for her unwavering support, consistent encouragement and listening ear; and our children Benjamin, Brayden and Madison for their patience and welcome diversions during this project. I thank Dean Dee Pridgen for her priceless insights and guidance. In addition, special thanks to Mr. Mark Roszkowski for sharing his valuable experience and perspectives.

[1] E. Thomas Sullivan & Jeffrey L. Harrison, Understanding Antitrust And Its Economic Implications 3 (Matthew Bender & Co. 4th ed 2003).

[2] *Id.*

[3] *Id.*

[4] Rudolph J.R. Peritz, *"Nervine" and Knavery: The Life and Times of* Dr. Miles Medical Company, *in* Antitrust Stories 61-62 (Eleanor M. Fox & Daniel A. Crane eds., Foundation Press 2007).

[5] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[6] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007).

[7] *Leegin*, 127 S. Ct. at 2710.

[8] *Id.*

[9] *Id.*

fashion accessories to over 5,000 retail stores throughout the United States.[10] Leegin believed that by selling to small and independent boutiques, rather than large retailers, customers received more service and a better shopping experience.[11] Beginning in 1995, PSKS sold Brighton goods at Kay's Kloset located in Lewisville, Texas.[12] To promote the Brighton brand, Kay's Kloset invested thousands of dollars in television, newspaper, and direct mail ads.[13] As a result, Kay's Kloset became their market's premier place to buy Brighton products.[14]

In 1997, Leegin instituted the Brighton Retail Pricing and Promotion Policy forcing retailers to sell Brighton products at Brighton's suggested prices at all times.[15] In accordance with this policy, Leegin refused to do business with retailers who discounted Brighton products.[16] After instituting this policy, Leegin pursued Brighton Heart Store Agreements with all of their retailers.[17] In these agreements, Leegin offered retailers incentives to sell Brighton products at the suggested price every day of the year.[18] Leegin hoped this would prevent retailers from discounting their brand, thus harming its image and reputation as a high-quality product.[19] Leegin believed this would also induce retailers to use the extra funds, generated by a higher price, to improve customer service.[20]

In late 2002, after discovering that Kay's Kloset sold Brighton Products at a discount, Leegin stopped supplying Brighton goods to Kay's Kloset.[21] This resulted in damages to Kay's Kloset, including nullifying the benefit of all of Kay's Kloset's advertising.[22] PSKS filed suit in the United States District Court for the Eastern District of Texas, and argued Leegin violated the Sherman Act by entering into vertical minimum price fixing agreements.[23] The district court

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[10] *Id.*

[11] *Id.* at 2710-11.

[12] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2711 (2007).

[13] Brief of Respondent-Appellee at 4, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621855.

[14] *Id.*

[15] *Leegin*, 127 S. Ct. at 2711.

[16] *Id.*

[17] *Id.*

[18] Brief of Respondent-Appellee at 1, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621855.

[19] *Leegin*, 127 S. Ct. at 2711.

[20] *Id.* In a letter establishing this policy, Leegin stated: "In this age of mega stores . . . consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. . . . We, at Leegin, choose to break away from the pack by selling [at] specialty stores." *Id.*

[21] *Id.*

[22] Brief of Respondent-Appellee at 5, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621855.

[23] *Leegin*, 127 S. Ct. at 2712.

held the economic justifications for vertical minimum pricing are irrelevant under the *Dr. Miles* per se rule.[24] Thus the court refused to consider any possible pro-competitive justifications for this anti-competitive behavior.[25] The jury found PSKS had agreed to fix Brighton Products' retail price and injuring PSKS's.[26] Therefore, the jury awarded damages of $1.2 million.[27] The district court trebled damages and entered a judgment for $3,975,000.80.[28]

Leegin appealed to the United States Court of Appeals for the Fifth Circuit arguing the court should adjudicate vertical minimum price restraints using the rule of reason, and not the per se rule.[29] The court did not accept this argument and upheld the per se rule.[30] The court based its ruling on the United States Supreme Court's application of the per se rule to vertical minimum price fixing.[31]

The U.S. Supreme Court granted certiorari to determine whether courts should continue applying the per se rule for vertical minimum price fixing.[32] Ultimately, the U.S. Supreme Court reversed the Fifth Circuit and, in a five-four decision, overruled the precedent established in *Dr. Miles*.[33] The Court held vertical minimum price fixing is no longer per se illegal, but courts must analyze these types of agreements under a rule of reason test.[34]

This case note examines the significance of this decision.[35] First, this case note introduces a few basic economic principles, which principles are essential to understanding the decision in *Leegin*.[36] Second, this case note addresses the significance and potential impact of *Leegin* by comparing it to an earlier decision, which is strikingly similar.[37] Based upon that analysis, this case note evaluates how

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[24] *Id.*

[25] *Id.*

[26] *Id.*; Brief of Respondent-Appellee at 1, Leegin Creative Leather Prod. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 621855.

[27] *Leegin*, 127 S. Ct. at 2712.

[28] *Id*; The Sherman Act, 15 U.S.C. § 15(a) (2000).

[29] *Leegin*, 127 S. Ct. at 2712.

[30] *Id.*

[31] *Id.* The U.S. Supreme Court in its opinion validated the Fifth Circuit's holding in this case. *Id.* The Court determined the Fifth Circuit correctly upheld the per se rule based upon the law at that time. *Id.*

[32] *Leegin*, 127 S. Ct. at 2712.

[33] *Id.* at 2710, 2712, 2725.

[34] *Id.* at 2720.

[35] *See infra* notes 36-39 and accompanying text.

[36] *See infra* notes 39-60 and accompanying text.

[37] *See infra* notes 168-179 and accompanying text.

Leegin may affect lower courts and practitioners.[38] Finally, this case note examines why courts so often ignore or discount stare decisis in antitrust decisions.[39]

BACKGROUND

The Sherman Act is the first and foremost antitrust doctrine in the U.S.[40] This Act seeks to avoid, "business concentration, acquisition of monopoly power, and cartels that might lead to increased prices and overcharges to consumers."[41] Section I of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[42] From the broad brushstrokes of the Sherman Act, courts endeavored to create workable rules and guidelines for determining the legality of various agreements.[43] This section discusses how the Court historically analyzed vertical restraints under the Sherman Act, how that analysis transformed over the last 100 years and *Leegin's* place in that metamorphosis.

Vertical Restraints of Trade

From the Sherman Act's broad brushstrokes, the Court struggled to find the acceptable boundaries for vertical restraints of trade.[44] These restraints begin with a vertical commercial relationship that consists of the chain of supplier, manufacturer, distributor, and retailer.[45] Minimum price fixing, in a vertical relationship, "refers to an agreement between manufacturers and retailers under which the retailers are obligated to sell that manufacturer's products to consumers only at or above the prices specified by the manufacturer."[46] These agreements are

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[38] *See infra* notes 180-86 and accompanying text.

[39] *See infra* notes 187-214 and accompanying text.

[40] *See* Stephen Labaton, *Sherman's Act's 100 Years of Protecting* Competition, N.Y. TIMES, July 6, 1990, at A12, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0CE1DF163CF935A35754C0A966958260.

[41] *See* Sullivan & Harrison, *supra* note 1, at 3.

[42] The Sherman Act, 15 U.S.C. § 1 (2000).

[43] *See generally* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2714 (2007) (example of the court attempting to create workable guidelines for governing vertical restraints).

[44] *See infra* notes 55-86 and accompanying text.

[45] ANDREW I. GAVIL, WILLIAM E. KOVACIC & JOHNATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 340 (2002).

[46] An Open Letter to the U.S. Supreme Court of the United States from Commissioner Pamela Jones Harbour, 2 n.5, (Feb. 26, 2007) (citing Thomas K. McCraw, *Competition and "Fair Trade": History and Theory,* 16 RES. IN ECON. HISTORY, 185, 185 (1996)), *available at* www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf. Ms. Harbour explained:

> Those who favor vertical minimum price fixing agreements often refer to them using less pejorative terms, such as resale price maintenance, margin maintenance, or even retailer incentives. *Id.* ("It is no accident that proponents of legalizing resale price

also known as resale price maintenance.[47] After *Dr. Miles*, the Court considered these agreements per se illegal, regardless of the possible competitive benefits.[48]

In addition to vertical minimum price restraints, there are other types of vertical restraints such as vertical maximum price restraints, and non-price restraints.[49] Vertical maximum price restraints occur when a manufacturer sets a maximum price at which the distributor or the retailer can sell its goods.[50] Vertical non-pricing agreement occurs when a manufacturer enters into an agreement with a retailer based on something other than price.[51] The U.S. Supreme Court historically held vertical maximum price fixing and vertical non-pricing agreements were per se illegal.[52] However, it relaxed this standard in favor of the rule of reason, requiring courts distinguish between unreasonable and reasonable restraints.[53] Courts balance factors, such as the agreement's competitive effects, on a case by case basis.[54]

> maintenance have used 'fair trade' as a synonym, while opponents have preferred terms such as 'vertical price fixing'").

Id.; see also Gavil, Kovacic & Baker, *supra* note 45, at 341-343 (providing additional clarification on what vertical minimum price fixing requires of manufacturers and distributors).

[47] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705 *passim* (2007).

[48] *Leegin,* 127 S. Ct. at 2712-13. The Supreme Court introduced per se illegality and its counterpart the rule of reason in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Legally a per se rule establishes that once two parties reach an agreement, "the anticompetitive effect is presumed." Gavil, Kovacic & Baker, *supra* note 45, at 96-98. Economically, the per se rule exhibits a decision that the cost of identifying a few exceptions to the rule "outweigh[s] the cost of occasionally condemning conduct that might upon further inspection prove to be acceptable . . . ." *Id.* at 96.

[49] Gavil, Kovacic & Baker, *supra* note 45 at 343.

[50] *Id*.

[51] *Id.* These restrictions are typically territorial restrictions or customer allocations amongst manufacturers or distributors. *Id.*

[52] U.S. v. Arnold, Schwinn & Co., 388 U.S. 365, 373-74 (1967) (holding vertical non-price restraints are subject to a per se rule); Albrecht v. Herald Co., 390 U.S. 145, 151-52 (1968) (holding vertical maximum price restraints are subject to a per se rule).

[53] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977) (holding vertical non-price restraints are no longer subject to a per se rule, and the rule of reason now applies); State Oil Co. v. Khan, 522 U.S. 3, 7, 22 (1997) (finding vertical maximum price fixing is no longer a per se violation but should be judged based upon the rule of reason); Sullivan & Harrison, *supra* note 1, at 127-28.

[54] The best case to explain the rule of reason is *Chicago Board of Trade v. United States,* 221 U.S. 1 (1911). Justice Brandeis explained the broad rule of reason test as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business . . . ;its conditions before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.

Id. at 238.

Vertical Minimum Price Restraints Initially Ruled Per Se Illegal

Before *Leegin* and the rule of reason, the Supreme Court, in *Dr. Miles Medical Company,* held a distributor or manufacturer could not fix the minimum resale price.[55] The Dr. Miles Medical Company sold different types of medicines throughout the United States, utilized various wholesale dealers, and attempted to fix the price wholesalers and retailers could charge for Dr. Miles's products.[56] Dr. Miles Medical Company maintained those prices by using serial numbers to track product's pricing.[57] The Court found this behavior restrained trade as the Dr. Miles Medical Company attempted to control the entire trade of their product.[58] The Court in *Dr. Miles* emphasized these types of restraints are related to the restraints on alienation.[59]The Court stated:

> The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.[60]

In establishing vertical minimum price fixing as per se illegal, the Court in *Dr. Miles* noted there is very little public policy support for vertical minimum price fixing.[61]

Court Overturns Per Se Illegality In Favor of the Rule of Reason for Vertical Non-price Restraints

After *Dr. Miles*, the Court determined what rules should govern other forms of vertical agreements, such as vertical non-price restraints.[62] In 1967, the Supreme Court ruled non-price restraints were also per se illegal in *United States v. Arnold, Schwinn & Co*.[63] Nevertheless, ten years later, in *Continental T.V., Inc. v. GTE Sylvania*, the Court overruled that decision and determined non-price restraints were subject to the rule of reason analysis.[64]

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[55] *Id.*; Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 384-85 (1911).

[56] *Dr. Miles*, 220 U.S. at 374-75.

[57] *Id.* at 395-96.

[58] *Id.* at 400.

[59] *Id.* at 404.

[60] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911) (quoting John D. Park & Sons Co. v. Hartman, 153 F. 24, 39 (6th Cir.)).

[61] *Dr. Miles*, 220 U.S. at 408.

[62] *Id.*

[63] U.S. v. Arnold, Schwinn & Co., 388 U.S. 365, 372-73 (1967).

[64] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

Like *Leegin*, *GTE Sylvania* overruled established precedent in *Schwinn* and decided the rule of reason governed non-price vertical restraints.[65] The *GTE Sylvania* decision created tension and controversy in antitrust law by drawing a distinction between vertical non-price restraints and vertical minimum price restraints.[66] It left *Dr. Miles's* per se rule against vertical minimum *price* restraints unchanged.[67] However, *GTE Sylvania* determined courts should adjudicate vertical *non-price* restraints under the rule of reason rather than a per se rule.[68] Because of these similarities, many commentators and scholars struggled to justify different rules for non-price and minimum price restraints.[69]

Justice White's concurring opinion in *GTE Sylvania* recognized this strain and predicted this decision could pressure the Court to overrule *Dr. Miles*.[70] Justice White recognized "the per se illegality of price restrictions . . . involves significantly different questions of analysis and policy" and the Court would struggle to justify the distinction between vertical price and non-price restraints.[71] Ultimately Justice White correctly predicted "[t]he effect, if not the intention, of the Court's opinion is necessarily to call into the question the firmly established per se rule" of *Dr. Miles*.[72]

Court Overturns Per Se Illegality in Favor of Rule of Reason for Vertical Maximum Price Restraints

The Court in *Albrecht v. Herald Co.* extended the per se rule of *Dr. Miles* to apply to vertical maximum price fixing.[73] As with *GTE Sylvania*, the Court later, in *State Oil Co. v. Khan*, overruled the per se rule of *Albrecht* in favor of the rule of reason.[74] The Court justified its decision for many of the same reasons as *GTE Sylvania* and *Leegin*.[75] These justifications included the possible pro-competitive effects of maximum price restrictions, increased economic knowledge and subsequent decisions weakening *Albrecht*'s precedential underpinnings.[76]

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[65] *Id.* at 58.

[66] *Id.* at 56.

[67] *Id.* at 57-58.

[68] *Id.*

[69] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 48 nn.13-14 (1977).

[70] *Id.* at 69-70 (White, J., concurring).

[71] *Id.* (White, J., concurring)

[72] *Id.* at 70.

[73] Albrecht v. Herald Co., 390 U.S. 145, 148 153-54 (1968).

[74] State Oil Co. v. Khan, 522 U.S. 3, 7 (1997).

[75] *Id.* at 13.

[76] *Id.* at 13-15.

Congress Addresses Vertical Restraints

Congress engaged in determining the legality of vertical minimum price fixing.[77] In 1937, Congress passed the Miller-Tydings Fair Trade Act and the McGuire Act, which allowed individual states to adopt laws that permitted vertical minimum price fixing.[78] However, in 1975, Congress repealed both acts.[79] When Congress repealed the Acts, thirty-six states had legalized vertical minimum price fixing.[80]

Trend From Per Se Illegality to Rule of Reason

Since the Sherman Act, the Court moved from the per se rule to the rule of reason in analyzing vertical restraints.[81] Initially, the Court determined the per se illegality governed cases like *Dr. Miles, Schwinn* and *Albrecht*.[82] Slowly, as discussed above, the Court whittled away per se illegality until it is inapplicable to nearly any vertical agreements.[83] Congress contributed by attempting to legislate the most effective way to deal with vertical agreements.[84] With this backdrop and with weakened precedential underpinnings, the *Leegin* Court took the stage to determine whether the per se rule still applied to vertical minimum price fixing.[85] Many recognize this decision as being a potential watershed case in antitrust law with broad and wide-reaching effects.[86]

PRINCIPAL CASE

In *Leegin Creative Leather Products Inc. v. PSKS, Inc.*, the Court considered overturning nearly 100 years of precedent established by *Dr. Miles.*[87] In *Dr. Miles,* the Court decided vertical minimum pricing fixing was per se illegal under

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[77] *See infra* notes 78-80 and accompanying text (stating the laws Congress adopted to address vertical restraints).

[78] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2727-28 (2007).

[79] *Id.*

[80] *Id.*

[81] *See supra* notes 40-72 and accompanying text (stating the trend away from the per se rule in antitrust litigation).

[82] *Leegin*, 127 S. Ct. at 2714.

[83] *See supra* notes 59-65 and accompanying text (explaining the disintegration of the per se rule in antitrust litigation).

[84] *See supra* notes 66-70 and accompanying text.

[85] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007).

[86] *Id.* at 2714; An Open Letter to the U.S. Supreme Court of the United States from Commissioner Pamela Jones Harbour, 2 n.5, (Feb. 26, 2007) *available at* www.ftc.gov/speeches/harbour/070226verticalminimumpricefixing.pdf.

[87] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2714 (2007).

the Sherman Act, Section One.[88] In a five-four split decision, the *Leegin* Court overruled *Dr. Miles* and decided to judge vertical minimum price fixing by the rule of reason.[89]

Rule of Reason and Per Se Tests

Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, wrote the majority opinion.[90] The Court began by discussing the rule of reason's purpose.[91] According to the Court, the rule of reason appropriately governed whether behavior restrains trade and violates section one of the Sherman Act.[92] When applying the rule of reason, the Court instructed, a court "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[93] The rule of reason analysis, according to the *Leegin* Court, balances the pro-competitive or anti-competitive effects of the behavior.[94]

Pro-competitive Justifications for Vertical Minimum Price Fixing

While acknowledging the divergence of economic consensus, the Court found numerous situations where vertical minimum price fixing may have pro-competitive effects.[95] The Court justified vertical minimum price fixing based upon inter- and intra-brand competition.[96] Inter-brand competition occurs between competing brands such as Burger King's "Whopper" and McDonald's "Big Mac."[97] Intra-brand competition is between "sellers of the same brand —such as rival . . . Burger King franchises."[98] The Court determined vertical minimum restraints eliminate competition between sellers of the same brand or inter-brand competitors.[99] Thus, the Court supposed eliminating this type of competition encouraged retailers to provide additional customer service to assist the manufacturer competition against rival manufacturers.[100]

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[88] *Id.* at 2713.

[89] *Id.* at 2710.

[90] *Id.* at 2710.

[91] *Id.* at 2712-13.

[92] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007).

[93] *Id.* (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977)).

[94] *Leegin*, 127 S. Ct. at 2713.

[95] *Id.* at 2714-15.

[96] *Id.* at 2715.

[97] Gavil, Kovacic & Baker, *supra* note 44, at 340.

[98] Gavil, Kovacic & Baker, *supra* note 44, at 341.

[99] *Leegin*, 127 S. Ct. at 2715.

[100] *Id.* at 2715.

The Court also discussed another possible benefit vertical minimum price fixing, the elimination of "free riding."[101] Free riding occurs when a retailer receives the benefit of another's investment.[102] An example of free riding is when a consumer learns about a product from a retailer who invested in high-quality showrooms and superior customer service and then the customer purchases the product from a different discount retailer.[103] According to the Court, vertical agreements would help to eliminate this problem by preventing a discount retailer from undercutting the high quality service provider.[104]

Economic Effects of Vertical Minimum Price Fixing

The Court proceeded to analyze whether the per se rule should apply given its various economic effects.[105] As discussed above, vertical minimum price fixing has both pro-competitive and anti-competitive effects depending on the circumstances.[106] Therefore, the Court held the per se rule is not appropriate for cases of vertical minimum price fixing.[107] The Court asserted the per se rule should only apply where price fixing would always or almost always tend to restrict competition and decrease output.[108] This is clearly not the case with vertical minimum price fixing, the court declared in its opinion.[109]

Although the Court found the per se rule inappropriate for vertical price fixing, it also recognized its potential for economic danger.[110] As a result, the Supreme Court cautioned the lower courts to exercise diligence in applying the rule of reason to these restraints.[111] Factors to consider include the size of the market, whether competing manufacturers adopt the restraint, the source of the restraint, and the relative market power of the restraining firm.[112]

According to the Court, as lower courts apply the rule of reason they will build a litigation structure that allows the pro-competitive effects of vertical minimum price restraints while eliminating the possible anticompetitive side effects.[113]

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[101] *Id.*

[102] *Id.*

[103] *Id.* at 2715-16.

[104] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2716 (2007).

[105] *Id.* at 2717.

[106] *Id.* at 2717-18.

[107] *Id.*

[108] *Id.* at 2713.

[109] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2717 (2007).

[110] *Id.*

[111] *Id.* at 2719.

[112] *Id.* at 2719-20.

[113] *Id.* at 2720.

Stare Decisis and Overturning Dr. Miles

The Court acknowledged stare decisis could justify upholding *Dr. Miles.*[114] The Court recognized, "stare decisis reflects a policy judgment that in most matters, it is more important that the applicable rule of law be settled than that it be settled right."[115] However, the Court suggested stare decisis is applied differently to common-law statutes, such as the Sherman Act.[116] Therefore, the Sherman Act's application should change in response to a changing economic landscape.[117] Consequently, the Court examined the current economic views of vertical minimum price restraints, and asserted that many economic scholars believe vertical minimum price fixing has widespread benefits.[118] In addition, the Department of Justice and the Federal Trade Commission both advised the Court to abandon the per se rule in favor of the rule of reason.[119] These agency's significant antitrust expertise persuaded the Court to accept their advice.[120] Ultimately, the Court concluded the economic landscape justified using the rule of reason in evaluating vertical minimum price fixing.[121]

Justice Breyer's Dissent

Justice Breyer wrote the opinion for the dissent.[122] The dissent recognized *Dr. Miles* made it illegal, under Section One of the Sherman Act, for a manufacturer and the dealer to fix prices.[123] The dissent found the Court had "consistently read *Dr. Miles* as establishing a bright-line rule that agreements fixing minimum resale prices are per se illegal."[124] In fact, the dissent pointed out, stare decisis not only compels support for the per se rule, but Congress has also continually and consistently refused to overturn that per se rule.[125] The dissent asserted the Court mistakenly overturned *Dr. Miles* and the per se rule.[126]

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[114] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720 (2007).

[115] *Id.* at 2720 (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

[116] *Leegin,* 127 S. Ct. at 2720.

[117] *Id.*

[118] *Id.* at 2721.

[119] *Id.* at 2721.

[120] *Id.*

[121] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2725 (2007).

[122] *Id.* (Breyer, J., dissenting).

[123] *Id.* (Breyer, J., dissenting).

[124] *Id.* (Breyer, J., dissenting).

[125] *Id.* at 2725-26. (Breyer, J., dissenting).

[126] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2725-26 (2007) (Breyer, J., dissenting).

The Benefit of the Per Se Rule over the Rule of Reason

The dissent began its discussion with an analysis of the per se and rule of reason tests.[127] The dissent acknowledged courts often applies the "rule of reason" in these situations by balancing the possible anticompetitive effects with other justifications.[128] However, when the probable anticompetitive risks are so severe and the justifications so hard to prove, the Court imposed per se unlawfulness, which "instructs courts to find the practice unlawful all (or nearly all) the time."[129]

The dissent examined the methods by which courts analyze questions of vertical minimum price fixing.[130] The dissent discussed three typical arguments for and against using the per se rule.[131] Those arguments involve three considerations: 1) possible anticompetitive effects and higher consumer prices, 2) potential benefits, and 3) administration.[132]

Vertical Price Agreements Means Higher Consumer Prices

The dissent looked at historical data regarding the repeal of the Miller-Tydings Fair Trade Act and the McGuire Act to support the argument against vertical minimum price fixing.[133] These acts gave states the power to authorize vertical minimum price fixing.[134] In states that allowed vertical minimum price fixing, the price rose by nineteen to twenty-seven percent.[135] Following the 1975 repeal of these acts, the Federal Trade Commission and economists generally agreed, "resale price maintenance tends to produce higher consumer prices than would otherwise be the case."[136]

Stare Decisis and Retaining Dr. Miles

The dissent stated the precedent for the per se rule began with *Dr. Miles* and continued for a century, resulting in great reliance from attorneys, their clients, and business executives.[137] The dissent noted *Dr. Miles* has "been cited dozens of

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[127] *Id.* at 2726 (Breyer, J., dissenting).

[128] *Id.* (Breyer, J., dissenting).

[129] *Id.* (Breyer, J., dissenting).

[130] *Id.* (Breyer, J., dissenting).

[131] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2726 (2007) (Breyer, J., dissenting).

[132] *Id.* at 2726-27 (Breyer, J., dissenting).

[133] *Id.* at 2727.

[134] *Id.* (Breyer, J., dissenting). When Congress repealed these acts in 1975 thirty-four states allowed minimum resale price maintenance. *Id.* (Breyer, J., dissenting).

[135] *Leegin*, 127 S. Ct. at 2728 (Breyer, J., dissenting).

[136] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2728 (2007) (Breyer, J., dissenting).

[137] *Id.* at 2731 (Breyer, J., dissenting).

times in this Court and hundreds of times in lower courts."[138] In fact, the dissent pointed out it was unaware of another case where the Supreme Court overturned such a well-established precedent.[139]

The dissent argued that while a change in economic or legal circumstances could justify the Court's position, no such change occurred.[140] In fact, according to the dissent, the most relevant change supports the maintenance of the per se rule.[141] This change occurred in 1975 when Congress repealed the McGuire and Miler-Tyding Acts.[142] The dissent argued that by repealing those Acts, Congress intended a return to the *Dr. Miles*' per se rule, making vertical minimum price fixing per se illegal.[143]

The dissent concluded the only certainty from this decision is that the price of goods will rise at retail and "it will create considerable legal turbulence as lower courts seek to develop workable principles."[144]

ANALYSIS

Introduction

Unfortunately a law student, judge or, a practitioner trying to master antitrust litigation is "in an *Alice and Wonderland* world where words do not always mean what they say. Nowhere is this more true [sic] than with respect to what is known as the rule of reason."[145] This analysis section explores that Wonderland.[146] First, this case note will argue the rule of reason in *Leegin* will become a standard of "de facto" per se legality, as it has with other vertical restraints.[147] Second, stare decisis in antitrust litigation is not a potent argument for keeping legal precedent.[148]

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[138] *Id.* (Breyer, J., dissenting).

[139] *Id.* (Breyer, J., dissenting).

[140] *Id.* (Breyer, J., dissenting).

[141] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2731 (2007) (Breyer, J., dissenting).

[142] *Id.* (Breyer J., dissenting).

[143] *Id.* at 2732 (Breyer J., dissenting).

[144] *Id.* at 2737 (Breyer J., dissenting).

[145] Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L. J. 495, 520 (2000).

[146] *See infra* notes 149-188 and accompanying text.

[147] *See infra* notes 151-88 and accompanying text.

[148] *See infra* notes 189-216 and accompanying text.

The Leegin *Court Announced a Return to the Rule of Reason*

The *Leegin* Court determined "vertical price restraints are to be judged by the rule of reason."[149] In explaining the rule of reason standard, the Court cites to cases such as *GTE Sylvania* and *Chicago Board of Trade*.[150] These cases express a formal rule of reason.[151] In applying the rule of reason, the Court explained the fact finder should examine whether the vertical restraint is unreasonable on a case-by-case basis.[152] If a court determines the restraint is unreasonable, then it is illegal.[153] The *Leegin* Court energetically advises the lower courts in their application of the rule of reason, and encourages lower courts to develop "litigation structure" so the rule of reason can "eliminate anticompetitive restraints from the market and []provide guidance to businesses."[154] In addition, the Court predicts lower courts will strive for a rule of reason that is a "fair and efficient way to prohibit anticompetitive restraints and to promote pro-competitive ones."[155] Although the *Leegin* Court set forth the full rule of reason as a fair way to govern vertical minimum restraints, when applied the restraint is almost always reasonable, so the defendant almost always win.[156]

Lower courts will struggle to adhere to the *Leegin* Court's explanation of the rule of reason.[157] While the explanation of the rule of reason in *Leegin, GTE Sylvania* and *Chicago Board of Trade* appears to be "an elegant assignment of responsibilities," litigators, practitioners, and judges have difficulty applying the full rule of reason standard.[158] Examples of these difficulties include complex balancing of factors such as the market effects of the restraint, identifying pro and anticompetitive effects and predicting the consequences after the imposition of the restraint[159] Therefore, instead of applying the rule of reason, the lower courts developed different approaches or filters.[160] The use of these filters to adjudicate

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[149] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2710 (2007).

[150] *See, e.g.*, *id.* at 2712-13.

[151] *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

[152] *Id.*; S*ee, e.g., Leegin*, 127 S. Ct. at 2726 (Breyer J., dissenting); Nat'l Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109-110 & n.39 (1984); Nat'l Soc. of Prof'l Eng'r v. U.S., 435 U.S. 679, 688-92 (1978); Board of Trade of Chicago v. U. S., 246 U.S. 231, 238 (1918).

[153] *See Leegin*, 127 S. Ct. at 2712.

[154] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2720 (2007).

[155] *Id.*

[156] Calkins, *supra* note 145, at 521.

[157] *See infra* notes 159-162 and accompanying text.

[158] Calkins, *supra* note 145, at 521 (stating legal practitioners have problems identifying market effects of the restraint).

[159] Calkins, *supra* note 145, at 521.

[160] Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 ANTITRUST L. J. 67, 73-75 (1991).

these cases ultimately resulted in a de facto per se legality for vertical non-price agreements.[161]

One of the primary filters through which the lower courts apply the rule of reason is that of market power.[162] However, proving market power in an antitrust case challenges any plaintiff.[163] In addition, a plaintiff in market power litigation "faces the prospect of long, expensive discovery, extensive motions practice and then merger-like battle over market power."[164] The battle rages as defendants hire expert economists, who testify about factors such as lack of market power, ease of entry, powerful buyers, and market situations.[165] If the plaintiff fails to prove the defendant has market power, then many of the lower courts will find for the defendant without engaging in a full rule of reason analysis set out by the Court.[166] The use of filters such as market power have formed the basis for what has been identified as the "truncated," "quick look," "abbreviated, "structured," or "flexible" rule of reason.[167]

GTE Sylvania—*Rule of Reason*

GTE Sylvania is an example of lower courts applying filters when instructed by the U.S. Supreme Court to apply the full rule of reason.[168] Because the Court's analyzed and decided *GTE Sylvania* and *Leegin* in a similar manner, *GTE Sylvania* is useful to predict the impact of the *Leegin* decision on lower courts, practitioners, and business people.[169] The *GTE Sylvania* Court reversed precedent by overturning the per se rule and determined that vertical non-price restraints should be adjudicated under the rule of reason.[170] In the formal rule of reason, the *GTE Sylvania* Court advised lower courts in applying the formal rule of reason by balancing the circumstances of a case to determine "whether a

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[161] *See* Ginsburg, *supra* note 160, at 67.

[162] Ginsburg, *supra* note 160, at 74. "One approach is to use a market power screen: no power, no foul." *Id.*

[163] Calkins, *supra* note 145, at 521-22.

[164] Calkins, *supra* note 145, at 521.

[165] Calkins, *supra* note 145, at 521.

[166] Calkins, *supra* note 145, at 521.

[167] Calkins, *supra* note 145, at 522; s*ee, e.g.,* Veronica G. Kayne, *Vertical Restraints: Resale Price Maintenance, Territorial and Customer Restraints*, 1648 PLI/CORP 45, 52 (2008); Philip F. Zeidman, *Franchising and Other Methods of Distribution: Regulatory Pattern and Judicial Trends*, 1648 PLI/CORP 473, 646 (2008); Gosta Schindler, *Wagging the Dog? Reconsidering Antitrust-Based Regulation of IP-Licensing*, 12 MARQ. INTELL. PROP. L. REV. 49, 72 (2008); Marc Edelman & C. Keith Harrison, *Analyzing the WNBA'S Mandatory Age/Education Policy from a Legal Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape,* 3 NW. J. L. & SOC. POL'Y 1, 40 (2008).

[168] *See infra* notes 168-79 and accompanying text.

[169] *See supra* notes 170-79 and accompanying text.

[170] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977).

restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[171] The Court cites with approval to Justice Brandies and his comprehensive explanation of the rule of reason in *Chicago Board of Trade*.[172] The *GTE Sylvania* Court evidently intended that lower courts should "return to the rule of reason that governed vertical restrictions prior to *Schwinn*."[173] In order to comply with the Court's decision in *GTE Sylvania,* lower courts needed to engage in a complex balancing test to determine the reasonableness of each restraint.[174]

However, the majority of lower courts have not engaged in the complex balancing test envisioned in *GTE Sylvania*.[175] From a statistical survey done in 1991 and summaries of cases decided under *GTE Sylvania*, "it is apparent that the courts of appeals are generally not engaging in the balancing . . . that the Supreme Court envisioned.[176] This commentator in 1991 examined the forty-five cases decided under *GTE Sylvania* which applied the rule of reason on its merits.[177] In forty-one, or more than ninety percent of those cases, the Court decisions favored the defendant.[178] In other words, the Court determined the restraint was reasonable in these cases.[179]

Leegin *"De Facto" Per Se Legal Test*

The *Leegin* Court's description of the "rule of reason" is similar to the description of the formal rule of reason in *GTE Sylvania*.[180] Despite the strong language of the *Leegin* Court, the lower courts will not apply the full rule of

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[171] *GTE Sylvania Inc.*, 433 U.S. at 49. The Court also cites to Justice Brandeis's explanation of the rule of reason in *Chicago Board of Trade*:

> The true test of legality is whether the restraint imposes is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 49 n.15 (quoting Chicago Board of Trade v. U.S., 246 U.S. 231, 238 (1918)).

[172] *GTE Sylvania Inc.*, 433 U.S. at 49.

[173] *Id.* at 59.

[174] *Id.*

[175] Ginsburg, *supra* note 160, at 76.

[176] Ginsburg, *supra* note 160, at 76.

[177] Ginsburg, *supra* note 160, at 70-71.

[178] Ginsburg, *supra* note 160, at 71.

[179] *See* Ginsburg, *supra* note 160, at 71.

[180] *See* Michael L. Denger & Joshus Lipton, *The Rule of Reason and "*Leegin *Policies": The Supreme Court's Guidance*, 22-FALL ANTITRUST 45, 45 (2007).

reason.[181] Instead the lower courts will judge vertical minimum resale price maintenance, as they do other vertical restraints, under a rule of "de facto" per se legality based upon filters such as market power.[182] *GTE Sylvania* and *Kahn* are two cases that exemplify the Court stating a rule of reason that in actuality becomes "de facto" per se legality.[183]

Because of the similarities between *Leegin*, *GTE Sylvania* and *Kahn,* law students, judges and practitioners can expect the significant majority of vertical minimum restraints will be "de facto" per se legal.[184] The formal rule of reason is now nothing but legal fiction in most situations.[185] The rule of reason has become a "toothless legal standard" most likely to be applied through a filter, such as market power, and in favor of the defendant.[186]

Stare Decisis—Weak Antitrust Argument

The Sherman Act, on its face, is a deceptively simple statute.[187] It makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[188] Antitrust litigation heaped complex layers of "judicial gloss" on this single sentence.[189] Lawyers and judges are not completely responsible for the increased complexity.[190] Economics, as a science, has also

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[181] *See generally supra* notes 158-169 and accompanying text (discussing the possible reasons lower courts will not apply the full rule of reason).

[182] *See* Ginsburg, *supra* note 160, at 76.

[183] State Oil Co. v. Khan, 522 U.S. 3, 22 (1997); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977); *see generally supra* notes 144-183 and accompanying text (analyzing how these cases are likely to be "de facto" per se legal).

[184] Mark E. Roszkowski, *The Sad Legacy of* GTE Sylvania *and Its "Rule of Reason": The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129, 134 (1989).

> [It] clearly indicate[s] the bankruptcy of GTE Sylvania and its rule of reason standard. . . . GTE Sylvania has further created a business climate: in which virtually any restraint of trade that arguably can be characterized as "vertical," except the barest and most blatant forms of resale price maintenance, is per se legal.

Id.

[185] *Id.*

[186] *Id.*

[187] *See* Andrew S. Oldham, *Sherman's March (In)To the Sea*, 74 TENN. L. REV. 319, 320 (2007).

[188] 15 U.S.C. § 1 (2000).

[189] *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977); Oldham, *supra* note 187, at 320.

[190] *See* Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, 22 FALL-ANTITR 21, 21-23 (2007); John McGaraghan, *A Modern Analytical Framework for Monopolization in Innovative Markets for Products With Network Effects*, 30 HASTINGS COMM. & ENT. L.J. 179, 184.

changed and evolved since the beginning of antitrust litigation in the United States as "over-time, empirical evidence and cutting edge research discredit old theories and supplant them with new ones."[191] Therefore, the courts are faced with divergent economic views that often contradict established precedent.[192] While the Sherman Act and economic decisions like *Dr. Miles* have existed unchanged for nearly a hundred years, since then, the knowledge and understanding of economics and antitrust has increased dramatically.[193] This increased understanding jeopardizes the safety and strength of these early precedents by putting them in conflict with modern reality.[194] This evolution in economics created tension in the Court seeking to maintain modern antitrust policy based upon current knowledge and prior rulings weighted with stare decisis.[195]

Changing Economic Circumstances Justifies Ignoring Stare Decisis

The Court in *Khan* recognized "the very nature of antitrust law creates a tension which puts it in conflict with the principle of stare decisis."[196] In this decision, the Court explained that in antitrust cases courts must balance the weight of precedent against "changed circumstances and the lessons of accumulated experience."[197]

The *Leegin* case exemplifies a Court dealing with that tension.[198] The *Dr. Miles* Court relied upon antiquated doctrines such as restraints on alienation.[199] However, since that time the Court and economic commentators determined that reliance upon this "ancient rule" is unfounded when applied to antitrust analysis.[200] In *Leegin*, the Court warned dispositive weight should not be placed

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[191] Bruce Abramson, *Intellectual Property and the Alleged Collapsing of Aftermarkets*, 38 RUTGERS L.J. 399, 423 (2007).

[192] Abramson, *supra* note 191, at 423.

[193] Brief for Economists as Amici Curiae Supporting Petitioner, Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007), 2007 WL 173681.

[194] *See* Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 366-370 (2007).

[195] *See id.*

[196] Alan H. Silberman, *Vertical Price, Customer and Territorial Limitations*, 1602 PLI/CORP 421, 429 (2007); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

[197] *Khan*, 522 U.S. at 20.

[198] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2714 (2007).

[199] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-05(1911); *See* Harvard Law Review Association, *Minimum Resale Price Maintenance*, 121 HARV. L. REV. 425, 428 (2007); *See* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 687 (1962).

[200] *See Khan,* 522 U.S. at 13 (citing R. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 295-96 (1975)).

upon antiquated doctrines.[201] Citing *GTE Sylvania*, the Court reasserted "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today."[202] In *Leegin*, the Court relied upon current economic understanding to trump well-established and overwhelming precedent.[203]

There are Significant Benefits in Allowing Flexibility in Antitrust Litigation

There are significant benefits for flexibility in stare decisis for antitrust litigation.[204] While stare decisis is not a strict command, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[205] However, there are also benefits of setting stare decisis principles to the side in antitrust litigation.[206] By setting stare decisis aside the Court will modernize and put to rest aged antitrust law and adapt to new economic understanding which benefits consumers.[207] The Court can also adjust as knowledge of market conditions increase "and as alternative scenarios arise within different market conditions, courts [can] adapt antitrust law to account for and adjust to the different applications."[208]

It is therefore instructive to practitioners and businesses to realize that building upon stare decisis in antitrust litigation is building upon an unstable foundation.[209] It is much more reliable to stay abreast of modern economic scholarship.[210] It is increasingly likely the Court relies more upon modern economic thinking than principles of stare decisis.[211] While in many instances the law is better settled than right, in antitrust litigation it may be more important that something be settled right than settled at all.[212]

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[201] *See Leegin*, 127 S. Ct. at 2714.

[202] *Id.* (quoting Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53, n.21 (1977)).

[203] *Leegin,* 127 S. Ct. at 2714.

[204] *See infra* notes 207–13 and accompanying text.

[205] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (Brandeis, J., dissenting).

[206] *See infra* notes 207-13 and accompanying text.

[207] *See* Kathryn M. Fenton, *From the Section Chair*, 22 ANTITRUST 3 (2007); *see also* Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 SCARL 69, 81 (2007).

[208] Richman & Murray, *supra* note 207, at 81.

[209] *See supra* notes 196-208 and accompanying text.

[210] *See supra* notes 196-208 and accompanying text.

[211] *See supra* notes 204-08 and accompanying text.

[212] *See supra* notes 196-212 and accompanying text; *but see* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

The Supreme Court likely anticipated the impending legal turbulence and recognized lower courts will have to "work out" the law in this area.[213] *Leegin,* while typifying a trend in antitrust law away from per se rules and toward the rule of reason, it is also another significant example of the instability of stare decisis in antitrust law.[214]

CONCLUSION

The rule of reason continues to be an area where courts struggle in a sea of complex and demanding legal standards.[215] Stare decisis is ill-equipped to anchor the antitrust litigation for the benefit of students, practitioners and judges.[216] The U.S. Supreme Court attempts to provide stability and flexibility through the comprehensive full blown rule of reason set forth in *Chicago Board of Trade*, but that test is difficult, if not impossible, to apply effectively.[217] Therefore, lower courts seized upon the spirit of the rule of reason by using different filters, such as market power.[218] However, until the U.S. Supreme Court provides additional stability and greater direction for the application of the rule of reason, the lower courts will drift in their application of this rule and continue to rule in favor of defendants without market power.[219]

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[213] *Burnet*, 285 U.S. at 405-06.

[214] *See supra* notes 34-78, 180-95 and accompanying text.

[215] *See supra* notes 55-86 and accompanying text.

[216] *See supra* notes 187-214 and accompanying text.

[217] *See supra* notes 149-61 and accompanying text.

[218] *See supra* notes 156-61 and accompanying text.

[219] *See supra* notes 160-61, 174-86 and accompanying text.

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