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RECENT TRENDS IN DEFAMATION LAW: FROM THE STRAIGTFORWARD ACTION IN *VENTURA V. KYLE* TO UNMASKING AN ANONYMOUS POSTER IN THE "*FUBOY*" CASE

by David P. Twomey*

I. INTRODUCTION

Internet and mobile platforms have radically changed how society consumes and shares news, opinions and other content. The Internet is now seen by some as the "Wild West" where anything goes and the preponderance of speech is either hyperbolic or acerbic, with speakers enabled to "sound off", often with harsh and unbridled invective.[1] A carry-over effect exists to cable television and satellite radio. The First Amendment protects freedom of speech and the long enduring right to speak anonymously in a lawful manner.[2] However, when vigorous criticism descends into defamation, constitutional protection is no longer available.[3] This paper presents, in a current context, a discussion of the elements and defenses in civil defamation cases. It then presents the special issues regarding online defamation cases including identifying anonymous posters of defamatory statements through nonjudicial and judicial actions. Further it identifies a framework for determining whether a statement is protected vigorous criticism or defamation, with true facts and pure opinions broadly protected and mixed opinions susceptible to its speaker being

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[1] Bentley Reserve L.P. v. Papaliolios, 160 Cal. Rptr.3d 423, 431 (Cal. App. 2014).

[2] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

[3] *Bentley* at 431.

unmasked in the pretrial defamation process. The paper concludes with brief admonishing for informed carefulness as we express our broadly protected First Amendment freedoms.

II. DEFAMATION ELEMENTS AND DEFENSES

Defamation is an injurious false statement by one party about another to a third party. Slander is spoken defamation. Libel is a false publication by writing, printing, picture or other fixed representation to the eye, which exposes any person to hatred, contempt or ridicule, or which has a tendency to injure the individual in his or her occupation.[4]

A. Elements of a Cause of Action in Defamation

The elements of defamation are (1) the making of defamatory statement, (2) publication of the defamatory material; and (3) damages that result from the statement.[5]

In cases in which the victim is a public figure, such as a well-known entertainer, a professional athlete or political figure, another element is required – the element of *malice*, which means that the statement was made by the defendant with knowledge that it was false, or with reckless disregard for whether it was true or false.[6] For example, former wrestler and Governor of Minnesota, and a former Navy SEAL Jesse Ventura sued Chris Kyle the author of the bestselling autobiography entitled *American Sniper* for defamation.[7] Kyle, also a former Navy SEAL, wrote that a character named "Scruff Face" holding court in a Coronado California bar said, "he hates America," the SEALS "were killing men and women and children and murdering" and SEALS "deserve to lose a few"; at which point Kyle "laid him out".[8] While not naming Ventura in the book, Kyle confirmed on the *O'Reilly Factor* cable network television show and the *Opie & Anthony* satellite

[4] *See* Wong v. Jing 117 Cal.Rptr. 3rd (Cal. App. 2010).

[5] Regarding damages, where one publishes a false statement of fact that imputes to another a communicable disease, or would adversely affect that person's fitness for the proper conduct of a lawful business, trade, or profession, the words are actionable in themselves, and the law implies compensatory damages. Once compensatory damages are established the jury will assess punitive damages to punish the party who committed the wrong and to deter others from committing similar wrongs in the future. See *Tanner v. Ebbole,* 2011 WL 4425540 (Ala. App. 2011) where the jury returned "nominal" compensatory damages of $1 and punitive damages of $100,000 against Paul Averette, the owner of a competing tattoo business, for statements to several patrons that his competitor Chassity Ebbole had hepatitis, syphilis, gonorrhea, and AIDS and that she used "nasty needles."

[6] *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[7] *Ventura v. Kyle*, 2014 WL 6687499 at *1 (D. Minn. Nov, 26, 2014).

[8] *Id.*

talk radio program that "Scruff Face" was Ventura.[9] Kyle was later killed by a troubled veteran, and his wife, as executor of his estate, was substituted as defendant.[10] The case, brought by public figure Jesse Ventura, boiled down to a creditability contest with several witnesses testifying that Ventura's version of events was true, while several other witnesses testified that Kyle's version of events was true.[11] The jury decided the case for Ventura, with the court concluding that in believing Ventura's version of the facts, then Kyle's writing and telling of the story of punching out Ventura was itself a basis for the jury to make a finding of actual malice.[12] On the defamation claim, the jury awarded $500,000 in damages. Some $1,345,477 in damages was assessed for unjust enrichment for the money made in defaming Ventura in the book *American Sniper*.[13]

B. Defenses: Truth and Privilege

1. Truth

Truth is a complete defense to a defamation action and "true statements of fact however disparaging are not actionable.[14] The First Amendment also broadly protects pure opinion from defamation claims.[15] In *McKee v. Laurion* Dr. McKee brought a defamation action against the son of a patient who posted statements regarding Dr. McKee on various "rate-your-doctor" websites after his father's release from the hospital.[16] The court reviewed the statements in question and found that the statements were substantially true, pointing out that the common law approach to falsity in the context of libel "overlooks minor inaccuracies"[17] Regarding a final statement published as follows: "When I mentioned Dr. McKee's name to a friend who is a nurse, she said, 'Dr. McKee's is a real tool!!'"[18] The parties dispute whether this statement is protected opinion. The court stated that referring to someone as "a real tool" falls into the category of pure opinion because the term "real tool" cannot be reasonably interpreted

[9] *Id*. at *2.
[10] *Id*.
[11] *Id*. at *3.
[12] *Id*.
[13] *Id*. at *2.
[14] McKee v. Laurion, 825 N.W.2d 725, 730 (Minn. 2013*). See also* Miller v. Central Indiana Community Foundation, 11 N.E.3d 944 (Ind. App. 2014) where statements made by a community foundation president to a third party that an organization was being audited were true and thus not defamatory in nature.
[15] *Id*. at 733.
[16] *Id*. at 729.
[17] *Id*. at 730.
[18] *Id*. at 733.

as stating a fact and it cannot be proven true or false.[19] The court concluded that it is an opinion amounting to "mere vituperation and abuse" or "rhetorical hyperbole" that cannot be the basis for a defamation action.[20] Accordingly, truth is an absolute defense, and pure opinion cannot be basis for a defamation lawsuit.

2. Privilege

Some statements are privileged, and this privilege provides a defense to the tort of defamation. Absolute privilege applies to witnesses in court proceedings to encourage witnesses with information to come forward and testify. In *Mixter v. Farmer*, Attorney Farmer was so upset with Mixter's behavior during a trial that he sent letters to twenty other attorneys discussing Mixter's "unprofessional behavior" and seeking information from them about negative experiences with Mixter for a potential complaint to the Attorney Grievance Committee.[21] Mixter retaliated with a defamation lawsuit against Farmer.[22] An absolute privilege protected Farmer to make potentially defamatory statements; it serves the purpose of fostering the free and unfettered administration of justice.[23]

Where a witness granted immunity from prosecution testifies before a governmental agency, the witness is entitled to immunity from defamation lawsuits. Thus, when Roger Clemens sued his former trainer, Brian McNamee, for defamation, contending that McNamee falsely stated to a congressional committee that Clemens had used steroids during his professional baseball career, his defamation claim was dismissed because McNamee's statements were entitled to absolute immunity because that the proper administration of justice requires full disclosure from witnesses without fear of retaliatory lawsuits.[24]

III. ONLINE ISSUES: IDENTIFYING ANONYMOUS POSTERS

When false negative comments appear in social media, companies and individuals are faced with identifying anonymous posters of defamatory statements. Injured parties may pursue non-judicial means to identify the speaker of the alleged defamatory remarks, or seek judicial help to unmask the identity of the offending speakers.

[19] *Id.*
[20] *Id.*
[21] Mixter v. Farmer, 81 A.3d 631, 634 (Md. App. 2012).
[22] *Id.*
[23] *Id.*
[24] Clemens v. McNamee, 608 F. Supp. 2d 811 (S.D. Tex. 2009). On June 18, 2012, Clemens was acquitted of all six counts of lying to Congress.

A. Nonjudicial Identifications

In *Avepoint, Inc. v. Power Tools, Inc. d/b/a Acceler*, the plaintiff, Avepoint, based on the identification work of cyber investigators filed viable complaints against its competitor Axceler for posting multiple messages on Twitter referring to Avepoint as the "Red Dragon" which has long been associated with the People's Republic of China and Acceler's claiming that the plaintiff's products were made in China, that the made in China statements were false, and designed to hurt the plaintiff's sales to the U.S. Government which prefers to buy American software under the Buy American Act.[25]

In *Saunders v. Walsh*, Cheryl Saunders was successful in her defamation suit against Constance Walsh regarding anonymous defamatory postings on three websites stemming from an aborted sale of a wig at Walsh's Wiggin Out store.[26] Walsh admitted authorizing a posting on Ripoffreport.com in discovery. The plaintiff presented expert testimony tying the email address used in Yelp.com and MerchantCircle.com postings to Walsh and Wiggin Out.[27] Plaintiff Saunders was awarded $10,000 on her defamation claim and $4,000 in punitive damages.[28] The very nature of a posting on google.com two days after a wedding entitled "Disaster!!!!! Find a different wedding service" required no judicial intervention to identify the individual who posted the review.[29] The court determined that the operator of the wedding venue established a *prima facie* case of defamation against the reviewer.[30]

B. Judicial Action to Unmask Anonymous Speakers

Vigorous criticism of persons, employers, products and services by anonymous speakers may or may not descend to such a point that their remarks are no longer protected by the First Amendment and are actionable defamation. The illusion of anonymity can lead to speakers asserting ill-considered statements that may be actionable defamation. The reality is, however, that what is said online is capable of being traced back to the speaker. If the Internet service provider (ISP) of the speaker can be identified the ISP in turn can identify the speaker, using the email address given when registering to post and the webserver's record of the IP address and the time of each online action

[25] Avepoint Inc. v. Power Tools Inc. d/b/a Acceler, 981 F. Supp 2d 496 (W.D. Va. 2013).
[26] Saunders v. Walsh, 162 Cal.Rptr. 3d 188 (Cal. App 2013).
[27] *Id.* at 193.
[28] *Id.*
[29] Neumann v. Liles, 323 P.3d 521, 524 (Or. App. 2014).
[30] *Id*. at 529.

and may yield as well the computer used to access the message board.[31] Interactive websites themselves are immune from liability for content created by third party users, unless the website actively edits the content.[32] However, most ISPs will not voluntarily disclose a user's identity. Thus, it will often be necessary to obtain a court order to require the ISP to disclose the speaker's confidential identity information.

The First Amendment prohibits the government from abridging the freedom of speech and it also protects anonymous speech.[33] Courts must strike a balance between the right to anonymous speech and the right of those harmed by anonymous speech to seek legal redress. Before a plaintiff can compel disclosure of the identity of an anonymous Internet speaker the plaintiff must demonstrate to a court that he or she has a credible claim, and the anonymous speaker must be given an opportunity to defend himself before the court will order the unveiling of his or her identity.[34] Courts may apply an evolving *Dendrite test* to make its determination on whether to unmask a speaker's identity as follows:[35]

- Give notice to the anonymous speaker and allow a reasonable time to respond. [This step allows the defendant time to hire counsel, and appear anonymously in such a proceeding without revealing his or her identity.]
- Plaintiff must identify the exact statements made by the speaker.
- The plaintiff must set forth a *prima facie* cause of action to win a case, barring any defenses.
- The plaintiff must submit sufficient evidence for each element of its defamation claim. [The plaintiff is excused from presenting evidence that a plaintiff cannot be expected to show without the opportunity for discovery.]
- The court must balance the speaker's First Amendment right to anonymous free speech against the strength of the *prima facie* case

[31] *See* Paul Alan Levy "*Litigate Civil Subpoenas to Identify Anonymous Internet Speakers Litigation",* LITIGATION, Vol. 37, No. 3, spring 2011 p. 2.

[32] Section 203(c)(1) of the Communication Decency Act of 1996.

[33] McInytre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995). "Anonymous is a shield from the tyranny of the majority." *Id*. at 357.

[34] Doe v. Coleman, 436 S.W.3d 207 (Ky. App. 2014).

[35] *See* The Reporters Committee for Freedom of the Press which took the *Dendrite test* set forth in the 2001 New Jersey appellate case *Dendrite International Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) as condensed by the Delaware Supreme Court in *Doe v. Cahil*, 884 A.2d 451,461 (Del. 2005) with clarifying explanations by the author in brackets in the following format. http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/anonymous-speech-online-when-must-identify

presented and the necessity for the disclosure of the speaker's identity.[36]

C. Application of the Dendrite and Similar Tests

In *Doe v. Coleman*, the chairman of the Pike County Airport Board of Directors, William Hickman brought defamation actions against several anonymous users of the website Topix for posting allegedly defamatory statements about him.[37] The trial court denied the motions of John Doe 1 and John Doe 2 to quash subpoenas requiring the disclosure of their identities. The appeals court overturned the trial court stating Hickman had failed to demonstrate a prima facie case for defamation under standards essentially similar to the modified *Dendrite* test.[38]

In *Stone v. Paddock Publications Inc.*, the mother of a newspaper website commentator, Jed Stone, who is the mother's minor son, filed a petition seeking discovery of the identity of another commentator on the website with the user name "Hipcheck16" alleging he had made defamatory comments regarding her son.[39] The trial court ordered that the identity of Hipcheck16 be revealed.[40] The court of appeals reversed the trial court stating that encouraging those easily offended by online commenting to sue to find the names of their tormentors would have a chilling effect on society and is a noxious concept that offends our country's long history of protecting anonymous speech.[41]

In contrast to these cases the Lesters filed a lawsuit against anonymous posters on the Internet forum Topix who had accused the Lesters of being sexual deviants, molesters and drug dealers. Stating that a credible claim was established, the court ordered Topix to turn over identifying information including Internet Protocol (IP) addresses, which led to the identity of the posters, and ultimately a jury awarding $13.78 million in damages against the posters.[42]

D. True Facts, Pure Opinion and Mixed Opinions: Vigorous Criticism Versus Defamation

As stated in part II.B. of this paper truth is a complete defense to a defamation action. True statements of fact, however damaging, are not actionable. Pure opinions are opinions based on true disclosed facts and

[36] *Id.*
[37] Doe v. Coleman, 436 S.W.3d 207, 209 (Ky. App. 2014).
[38] *Id.* at 212.
[39] Stone v. Paddock Publications Inc., 961 N.E.2d 380,383 (Ill. App. 2011).
[40] *Id.* at 394.
[41] *Id.*
[42] Ki Mae Heussner, "*Anonymous Posters to Pay $13 Million in Suit*" http://abcnews.go.com /business/jury-awards-13-million-texas-defamation-suit-anonymous/print?id=16194071.

are broadly protected under the First Amendment. "Mixed opinion" statements can be actionable defamation however. A mixed opinion statement implies the existence of undisclosed facts and can be defamatory. In *Hadly v. Doe,* an anonymous defendant using the pseudonym "Fuboy" posted to a newspaper's message board a comment about Bill Hadly, a candidate for the Stephenson County Board that: "Hadly is a Sandusky waiting to be exposed. Check out the view he has of Empire [Grade School] from his front door."[43] A "Sandusky" is a figurative term for a child molester.[44] The court stated to whatever degree Fuboy's comment can be thought of as an opinion, it is a mixed opinion—it implies the existence of defamatory facts but does not disclose them.[45] The terms "waiting to be exposed implies the existence of undisclosed facts.[46] The appeals court affirmed the trial court's order that Comcast provide the identity and last known address of Doe aka "Fuboy".[47]

Legitimate customer complaints based on opinion are not actionable defamation. Futhermore, hyperbole, figurative language and rhetoric expression is protected opinion such as a posting "the worst wedding experience of my life," however, a factual assertion that "the bridal suite was a tool shed…" in context may be actionable in some courts.[48] Other courts are less willing to interpret comments as assertions of fact. In *Krinsky v. Doe 6*, a defendant using a concealing screen name on an Internet discussion forum, felt free to claim a corporate president was part of a management team of " 'boobs, losers, and crooks'" and " 'has fat thighs, a fake medical degree, … and has poor… hygiene'".[49] The plaintiff served a subpoena on the forum's host seeking the defendant's identity and the defendant, appearing through counsel as "Doe 6," moved to quash.[50] The appellate court, viewing the defendant's post in the context of what was a particularly "[h]eated" discussion forum in which numerous other posts questioned defendant's creditability, and noting the defendant's "crude, ungrammatical" language, satirical tone, and vituperative, "juvenile name-calling," concluded the defendant's railing was nonactionable opinion and ordered the subpoena quashed.[51]

[43] Hadly v. Doe, 12 N.E.3d 75,79 (Ill. App. 2014).
[44] *Id*. at 91.
[45] *Id.*
[46] *Id.*
[47] *Id*. at 96.
[48] Neumann v. Liles, 261 Or. App. 567 (2014).
[49] Krinsky v. Doe, 72 Cal.Rptr.3d 231, 235 (2008).
[50] *Id*.
[51] *Id*. at 250, 252.

IV. CONCLUSION

We are sometimes disappointed by the services rendered or the performance of the products purchased and sold to us in our personal and business careers; and, in a tiff, the temptation exists to pummel perceived wrongdoers in anonymous online postings. The paper has established that truth is a complete defense to a defamation action and anonymous speech is constitutionally protected. Write or speak with appropriate vigor but with reasonable care. Be sure of your facts. Feel free to strongly express your pure opinions. Carefully avoid mixed opinions that may draw you into the hassle of contesting litigation to unveil your identity. Chances are writing online that the court will not be willing to find your writing to be a “mixed opinion” implying the existence of an undisclosed defamatory fact. Remember, however, that it is not true that “anything goes” online.

THE BUSINESS OF BEACHES: PUBLIC ACCESS TO BEACHES ON PRIVATE COASTAL PROPERTY

by Margaret T. Campbell*

I. INTRODUCTION

Access to the ocean has been important for fishing and other industries for thousands of years.[1] Similarly, the right of landowners to block trespass over their property has been a long-standing legal principle.[2] This article examines the issue of legal right of access to the ocean and the recent litigation in Maine by private landowners asking the court to quiet the title[3] to the intertidal zone[4] and ownership of their coastal beaches. The answer to the question of title to the intertidal zone lies in reconciling a Colonial Ordinance that is over three hundred and fifty years old with more recent doctrines, statutes and modern beach usage. This analysis is by necessity one which must be done on a state-by-state basis, as the title and access rights or easements have developed independently in each state, and Maine's history in this regard is unique. Although Maine and Massachusetts

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[1] O'Connor, S., Ono, R., & Clarkson, C. (2011). *Pelagic Fishing at 42,000 Years Before the Present and the Maritime Skills of Modern Humans*, SCIENCE, November 25, 2011, at 1117.

[2] *See* PLUCKNETT, THEODORE FRANK THOMAS. A CONCISE HISTORY OF THE COMMON LAW 366, 1956.

[3] M.R.S.A. tit. 14, § 6651.

[4] "The law treats a beach as having three discrete areas: the submerged land below the mean low-water mark; the intertidal zone, wet sand, consisting of the shore and flats between the mean low-water mark and the mean high-water mark, to the extent that distance does not exceed 100 rods; and the upland, dry sand, above the mean high-water mark." Almeder v. Town of Kennebunkport, ME 139, 106 A.3d 1099 (Me 2014) .

share a common starting point, their laws and judicial interpretation have followed different paths.[5]

Since the 1980's, Maine has seen an increased number of cases where either the public or landowners ask the courts for a definitive answer on rights to the intertidal zone. Maine's slogan on its license plates is "Vacationland"[6], with its coast and beaches among its most valuable resources.[7] Coastal property in Maine is prime real estate for both business and private owners, and clarifying the issue of ownership of the land, beach, and intertidal zone as well as the existence and scope of any easements over that land is essential to the valuation, marketability and use of that land.

The ownership of property and its appurtenant rights, such as access, is determined by an examination of the chain of title. In Maine, this is done by researching the record title and reviewing each document in the chain of title.[8] This article will first examine the issue of ownership of the intertidal zone and any public easements through the eyes of a title examiner, by examining the history of title and access to the intertidal zone in Maine to answer the question of who owns the beaches. It will next analyze the recent cases with respect to current ownership of land and easements looking at the question of applicability of the Public Trust Doctrine. Then it will review whether a prescriptive easement has been established, whether Maine can now establish a public access right, whether activities in the intertidal zone are limited, and finally conclude with how these issues should be addressed moving forward.

II. HISTORY OF ACCESS TO THE SEA IN MAINE

Much of modern day American real estate law devolved from the feudal system, which rose up as a result of the chaos caused by the fall of the Roman Empire in England after the year 410:

> "During this period man's time was mostly occupied with the task of staying alive. Since there was no government and so no authority, the law of the jungle prevailed; bands of marauding chieftains would confiscate lands and divide the plunder among their most favored and valued followers to reward them for their support in the past and to

[5] *See* Bell v. Town of Wells, 510 A.2d 509, 512 (Me. 1986).

[6] 29-A M.R.S.A. §451.

[7] *See generally* Almeder v. Town of Kennebunkport, 2014 ME 12, ¶ 16 opinion amended and superseded, 106 A.3d 1099 and reconsideration granted in part, 106 A.3d 1115 (Me. 2014).

[8] Title standards, such as those adopted by the Maine State Bar Association, generally guide title searches. PAUL G. CREATU, MAINE SUPPLEMENT TO PRINCIPLES OF REAL ESTATE LAW 12–6 (1978) ; see generally MAINE STATE BAR ASSOCIATION, STANDARDS OF TITLE (2007).

> insure their continued loyalty in the future. This was the beginning of a political institution known as feudalism which, born of the violence of the times, had its roots in the land."[9]

After the victory of William the Conqueror in 1066, English feudal *tenure* developed, to provide for the basic needs of security (military), serjeanty (service) subsistence (crops), and frankalmoign (salvation).[10] In this system, the King granted a tenure or use of the land (not ownership) to knights in exchange for their service, by granting land tenancy in exchange for their military service, and similarly tenures were granted to farmers for crops, servants for service, and for religious use.[11] This severance of land into various usage rights formed the basis for English Common Law, which the colonists brought with them when they settled the New World.[12] This law was in effect at the time of the American Revolution[13], and thus, American property law "evolved from the English feudal system."[14]

Pursuant to section 6 of the Act of Separation between Maine and Massachusetts in 1819[15], all Massachusetts laws were to remain in effect "until altered or repealed by the government thereof, such parts only excepted, as may be inconsistent with the situation and condition of said new state, or repugnant to the constitution thereof."[16] Therefore, the existing Colonial Ordinance of 1647,[17] which was in

[9] PAUL G. CREATU, MAINE REAL ESTATE LAW 19 (1969).

[10] *See Id.* 21-22.

[11] *Id.*

[12] See *Id.* at 29.

[13] "In the United States, each of the thirteen original colonies, following the Revolution, acquired title to all lands within its borders not previously granted to individuals by foreign sovereigns in rightful possession. From portions of the lands of these states, five new states (Maine, Vermont, Kentucky, Tennessee, West Virginia) were eventually created, each, as the original thirteen, having title to unappropriated lands within its borders. With these five exceptions, and that of Texas, title to most land outside the original states is derived from the federal government. New states formed from federal public lands take no title to unclaimed lands within their borders; such title remains in the federal government which by Congressional grants, or by patents issued pursuant to general acts, may convey such land to the states or to corporations and individuals. *See generally* 2 C. Patton, Land Titles §§ 281-307 (1957); 3 H. Tiffany, The Law of Real Property § § 938-49 (1939); 1 L. Dembitz, A Treatise on Land Titles in the United States § § 65-74 (1895)." *See* Note, *Boundary Disputes Between States: The Impact on Private Rights*, 69 Colum. L. Rev. 129, 145 (1969).

[14] *Id.* at 30.

[15] An Act of the Commonwealth of Massachusetts relating to the separation of the district of Maine from Massachusetts Proper, and Forming the Same into a Separate and Independent State, Ch. 161, 1861.

[16] *Id*. Section 6.

[17] *See The Book of the General Lawes and Libertyes, Liberties Common,* (1648), *Liberties Common* (1641-1647).

effect in Massachusetts at the time of the separation, became the law of the State of Maine. This law provided:

> "Everie Inhabitant who is an hous-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers, so far as the Sea ebbs and flows, within the precincts of the town where they dwell, unless the Free-men of the same town or the General Court have otherwise appropriated them . . . where the Sean ebbs and flows, the Proprietor of the land adjoining, shall have proprietie to the low water mark, where the Sea doth not ebb above a hundred Rods, and not more wheresoever it ebs farther."[18]

Thus, as the law stood in 1647, owners of land adjoining the sea were granted ownership of land to the low water mark, as long as this line was not more than "a hundred Rods".[19]

Since the separation of Maine from Massachusetts in 1819, Maine has enacted its own statutes regarding the conveyance of real estate:

> "A person owning real estate and having a right of entry into it, whether seized of it or not, may convey it or all his interest in it, by a deed to be acknowledged and recorded as provided in this chapter."[20]

By the time Maine became a state, the law regarding ownership of property was firmly established, and the courts are "bound, just as much as the legislative branch, by the constitutional prohibition against the taking of private property for public use without compensation."[21] The next section will trace the title of intertidal land from the formation of the State of Maine to the current day.

III. WHO OWNS THE BEACHES IN MAINE?

The question of ownership of beaches first requires a determination of which of three zones the land falls. The property on which dwellings adjoining the beach are constructed is referred to as "upland property", the middle portion of the beach is referred to as the "dry" or "upland sand", while the lower portion of the beach is referred to as the "intertidal" or "wet sand" zone.[22] The question of ownership is particularly important from a commercial standpoint, as land may not be readily sold unless title to the property is "marketable", which is defined in Maine as "a title which a reasonable, prudent, well-informed purchaser, guided by competent legal advice, would be willing to accept and take at its full value."[23] Thus, establishing clear title to beaches

[18] *Id.* Section 2.
[19] 1,650 feet.
[20] ME. REV. STAT. ANN. Tit. 33 § 151 (1983).
[21] Bell v. Town of Wells, 557 A.2d 168, 176 (Me. 1989).
[22] *See* Britton v. Donnell, 12 A.3d 39, 42 (Me. 2011).
[23] *See* Creteau, *supra* note 23, at 267.

in Maine is essential for maintaining the value and commerce of coastal property and businesses.

As described previously, the historical title to what is referred to as the "intertidal land" derives from the Colonial Ordinance of 1647.[24] Early Massachusetts commerce had a significant effect upon the law relating to intertidal land, as described in the 1810 case of *Storer v. Freeman*:

> "When our ancestors emigrated to this country, their first settlements were on harbors or arms of the sea; and commerce was among the earliest objects of their attention. For the purposes of commerce, wharves erected below high water mark were necessary. But the colony was not able to build them at the public expense. To induce persons to erect them, the common law of *England* was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb more than one hundred rods, but not more where the tide ebbs to a greater distance. This ordinance was annulled with the charter by the authority of which it was made; but, from that time to the present, a usage has prevailed, which now has force as our common law, that the owner of lands bounded on the sea or salt water shall hold to low water mark, so that he does not hold more than one hundred rods below high water mark; but the rights of others to convenient ways are saved, agreeably to a provision in the ordinance."[25]

This history was expanded upon in 1822 by the Massachusetts Court:

> ""The desire and necessity of wharves, quays or piers was soon felt by individuals and the community, and the occupation of flats became indispensable. The government then, to encourage these objects, and to prevent disputes and litigations, transferred its property in the shore of all creeks, coves, and other places upon the salt water, where the sea ebbs and flows, giving to the proprietor of the land adjoining the property of the soil to low-water mark, where the sea does not ebb above one hundred rods."[26]

This was confirmed by the Massachusetts Supreme Court in 1851, when it expanded on its previous discussion:

> "In Massachusetts, by virtue of an ancient colonial enactment, commonly called the Ordinance of 1641, but really passed in 1647, and remaining in force to this day, the title of the owner of land bounded by tide water extends from high water mark over the shore or flats to low water mark, if not beyond one hundred rods. The private right thus created in the flat is not a mere easement, but a title in fee, which will support a real action, or an action of trespass *quare clausum fregit,* and which may be conveyed by its owner with or without the upland; and which he may build upon or enclose, provided he does not

[24] See *Infra,* Section II.
[25] 6 Mass. 435, 438 (1810).
[26] Commonwealth v. Inhabitants of Charlestown, 18 Mass. 180, 188 (1822).

> impede the public right of way over it for boats or vessels. But his title is subject to the public rights of navigation and fishery; and therefore, so long as the flats have not been built upon or enclosed, those public rights are not restricted or abridged.... It is because of the ordinance vesting the title in fee of the flats in the owner of the upland, that a conveyance of his land bounding on the tide water, by whatever name, whether "sea," "bay," "harbor" or "river," has been held to include the land below high water mark as far as the grantor owns."[27]

This long-standing Massachusetts judicial interpretation of the Colonial Ordinance of 1647 has been carried forward in numerous judicial opinions, which were concisely set forth in the 1974 Opinion of the Massachusetts Supreme Court Justices:

> "The language of the ordinance well illustrates the notion, previously alluded to, of reserved public right. It expressly specifies that the public is to retain the rights of fishing, fowling and navigation. Notwithstanding these limitations and the use of such ambiguous terms as 'propriety' and 'liberty,' there is ample judicial authority to the effect that the ordinance is properly construed as granting the benefitted owners a fee in the seashore to the extent described and subject to the public rights reserved. It is unnecessary to cite more than a few of the many cases to that effect. In Commonwealth v. Alger, 7 Cush. 53 (1851), probably the leading case on the subject, Chief Justice Shaw wrote, '(The ordinance) imports not an easement, an incorporeal right, license, or privilege, but a jus in re, a real or proprietary title to, and interest in, the soil itself, in contradistinction to a unufruct, or an uncertain and precarious interest.' Id. at 70. '(It created) a legal right and vested interest in the soil, and not a mere permissive indulgence, or gratuitous license, given without consideration, and to be revoked and annulled at the pleasure of those who gave it.' Id. at 71. In Butler v. Attorney Gen., 195 Mass. 79, 83, 80 N.E. 688, 689 (1907), it was said, 'Except as against public rights, which are protected for the benefit of the people, the private ownership is made perfect,' and in Boston v. Boston Port Dev. Co., 308 Mass. 72, 78-79, 30 N.E.2d 896 (1941), this ownership in tidal land was deemed property of a 'substantial nature.' See, e.g., Walker v. Boston & Maine R.R., 3 Cush. 1, 21 (1849); Henry v. Newburyport, 149 Mass. 582, 584-585, 22 N.E. 75 (1889); Jubilee Yacht Club v. Gulf Ref. Co., 245 Mass. 60, 140 N.E. 280 (1923)."[28]

The Maine courts have followed a similar history of interpretation of the Colonial Ordinance, and in 1831 the Maine Supreme Judicial Court referenced the *Storer* case stating that "[e]ver since that decision, as well as long before, the law on this point has been considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question."[29]

[27] Commonwealth v. Alger, 61 Mass. 53, 53 (1851).

[28] *See* Opinion of the Justices, 365 Mass. 681, 685-86, 313 N.E.2d 561, 566 (1974).

[29] Lapish v. President, etc., of Bangor Bank, 8 Me. 85, 93 (1831).

In 1986, the Maine Supreme Judicial Court also cited the *Storer* case with approval in the first *Bell v. Wells* appeal when it found that "[t]hus, under the Colonial Ordinance the owner of the upland holds title in fee simple to the adjoining intertidal zone subject to the public rights expressed in the Ordinance."[30] Chief Justice Mckusisk concisely stated in the second *Bell v. Wells* appeal in 1989 that "[i]n sum, we have long since declared that in Maine, as in Massachusetts, the upland owner's title to the shore [is] as ample as to the upland."[31] Similarly, the Maine Title Standards provide for a conveyance of the tidal flats abutting the premises if the description expressly describes them or if the description runs to "low water and thence by low water" to a bound.[32]

This reasoning was echoed by the Maine Court when the issue became the subject of extensive litigation beginning in the 1980's. In 1989, Chief Justice McKusick succinctly stated in *Bell v. Wells*:

> "We agree with the Superior Court's declaration of the state of the legal title to Moody Beach. Long and firmly established rules of property law dictate that the plaintiff oceanfront owners at Moody Beach hold title in fee to the intertidal land subject to an easement, to be broadly construed, permitting public use only for fishing, fowling, and navigation (whether for recreation or business) and any other uses reasonably incidental or related thereto. Although contemporary public needs for recreation are clearly much broader, the courts and the legislature cannot simply alter these long-established property rights to accommodate new recreational needs; constitutional prohibitions on the taking of private property without compensation must be considered."[33]

Despite this clear statement from one of Maine's most respected jurists, there have been continued challenges to the Colonial Ordinance's grant of title to the upland owners, as well as attempts to overburden the reserved public easement for fishing, fowling and navigation. More recently, the upland owners on Goose Rocks Beach in Kennebunkport filed quiet title actions in the *Almeder v. Kennebunkport* cases.[34] However, the Maine Supreme Judicial Court has remained consistent in its analysis that the upland owners may trace their record title in the intertidal zone to the Colonial Ordinance of 1647, which title they retain unless it was lost in the intervening

[30] Bell v. Town of Wells, 510 A.2d 509, 515 (Me. 1986), (citations omitted).

[31] Bell v. Town of Wells, 557 A.2d 168, 173 (Me. 1989), (citations omitted).

[32] *See supra* Note 8, Standard No. 506.

[33] *See supra* Note 31.

[34] Almeder v. Town of Kennebunkport, 2014 ME 12, ¶ 16 opinion amended and superseded, 106 A.3d 1099 and reconsideration granted in part, 106 A.3d 1115 (Me. 2014).

years either by failure to properly convey or by the public overcoming the presumption of permission to establish a prescriptive easement.

Arguments against this legal analysis propose that reliance on the Colonial Ordinance is misplaced, and that either it did not actually grant title of the intertidal zone to the upland owners, or that the Maine Constitution should not incorporate its original limited language. [35] The suggestion that the Colonial Ordinance did not intend grant a fee simple interest to the upland owners ignores the rationale which led to this unusual act. The Massachusetts Chapter of the American Planning Association undertook an analysis of this from a planning perspective and found that:

> "The Colonial Ordinances granted upland landowners title to private tidelands, the area between the high and low water marks, but reserved for the public the rights of fishing, fowling, and navigation in this intertidal area and retained full public ownership for Commonwealth tidelands, the areas seaward of the low- water mark. The impetus for the Colonial Ordinances was the unwillingness of the King of England to invest in the new colony by building public piers and docks. To spur private investment and support trade with other countries, the colony needed to allow the construction of private docks and piers. The ordinances granted the ownership rights necessary to allow private investors to construct the required infrastructure."[36]

Without investment from the sovereign, there were important economic needs addressed by the grant in the ordinance to encourage private development. This arrangement was so successful in spurring construction, the Massachusetts courts found that "[t]his convergence of private profit and public benefit stimulated such rapid commercial development in Boston Harbor that by 1835 the Legislature perceived a need for regulation of further harbor development."[37] As a result, colonial waterfront development in Massachusetts, particularly the Boston area, became recognized worldwide:

> "Small, swampy, and hilly, the Shawmut peninsula was a less than ideal choice for the establishment of an agrarian-based economy.

[35] *See Generally* Orlando E. Delogu, *Intellectual Indifference -- Intellectual Dishonesty: The Colonial Ordinance, the Equal Footing Doctrine, and the Maine Law Court*, 42 Me. L. Rev. 43 (1990); Mark Cheung, *Rethinking the History of the Seventeenth Century Colonial Ordinance: A Reinterpretation of an Ancient Statute*, 42 Me. L. Rev. 115 (1990), Sidney St. F. Thaxter, Will Bell v. Town of Wells Be Eroded with Time?, 57 ME. L. REV. 117, 140 (2005), Orlando E. Delogu, *Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in Maine's Intertidal Zone*, 16 Ocean & Coastal L.J. 47, 113 (2010).

[36] *See* Jamie M. Fay, AICP, *Public Access, Chapter 91, the Massachusetts Public Waterfront Act*, NEW ENGLAND PLANNING, July/August 2010 at 3.

[37] Boston Waterfront Dev. Corp. v. Com., 378 Mass. 629, 638, 393 N.E.2d 356, 361 (1979).

> What Boston did possess was a harbor 'deep enough for the largest vessels from across the sea to anchor near the peninsula yet shallow enough along the shoreline of the Great Cove (Dock Square) to allow easy construction of wharves and piers'. By virtue of the harbor and its strong cultural and economic ties to London, Boston became the distribution center for New England's mercantile trade. When England's 1641 civil war disrupted this trade, the Massachusetts Bay Company opened lucrative trading routes to the West Indies. By the 1670s, Boston's maritime trade extended to the British Isles, continental Europe, and the West Indies. This formed the Triangle Trade of lumber and produce from North America, finished goods from England, and sugar and molasses from the West Indies."[38]

This data is more than just historically interesting; it shows the important effect this assurance of title had on the growth of the Massachusetts Colony. Without the grant of title to the intertidal zone, construction would have been on land owned by the sovereign, which clearly would have been a significantly different undertaking than construction on land owned by the upland owner. Thus, a careful analysis of the rationale behind the enactment of the ordinance supports the historical and recent interpretation of that ordinance by the Maine Supreme Judicial Court which properly recognizes over three hundred years of reasoned jurisprudence.

IV. DOES THE PUBLIC TRUST DOCTINE APPLY?

The ownership of beaches and the intertidal zone has always been a contentious issue, as it requires a balance between the needs of the public and the need of individuals to have dominion over their own land that they have worked to develop. The public clearly had a historical need for access to the sea for food and transportation, and this need was recognized in the Colonial Ordinance of 1647.[39] These public needs continue to this day, and such needs are argued to have grown to include the need for recreation.[40] Private ownership rights are an

[38] MBTA GREEN LINE EXTENSION PROJECT HISTORIC AND ARCHAEOLOGICAL RESOURCES RECONNAISSANCE SURVEY AND HISTORIC RESOURCES INTENSIVE SURVEY VOLUME I, Chapter 5, pg. 58, May, 201., citations omitted.

[39] *See supra* note 17.

[40] "Jus publicum access rights certainly include fishing, fowling, and navigation (broadly defined). Historically, they included sitting, walking, lateral passage, the temporary grazing of animals, and today they would almost certainly include general beach-related recreation activities: bathing, surfing, kite-flying, and scuba diving-not to mention structures that house or support water-related recreational pursuits. This list is not intended to be exclusive, and it will, as history shows us, evolve over time." Orlando E. Delogu, *Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in Maine's Intertidal Zone*, 16 Ocean & Coastal L.J. 47, 113 (2010).

important incentive for individuals to be industrious, and such productiveness in turn benefits the public. Chief Justice John Marshall warned of the dangers of a government that "takes away the incitements to industry, by rendering property insecure and unprotected . . [and] was convinced that strong protection for property and investment capital would promote national prosperity."[41]

The Public Trust Doctrine has been applied with varied results in different states due to dissimilar legislative histories, as "[a]ll fifty states enforce some version of the public trust doctrine along their shores."[42] Thus, a determination as to the applicability of this doctrine is dependent upon the state in which the land lies. In Maine, litigation on this issue began in earnest in1986 with the first *Bell v. Town of Wells* (*Bell I*) case[43], which led to the second *Bell v. Town of Wells* (*Bell II*) case[44] and continues to the ongoing *Almeder v. Town of Kennebunkport* case (*Almeder I*)[45] which February, 2014 opinion was amended and superseded in December, 2014 (*Almeder II*)[46] and is still being litigated on remand.

The need for clarity on this issue with respect to the intertidal land has been addressed by the Maine Law Court repeatedly since the recreational challenges began in earnest in the 1980's when they forcefully stated in 1989 that the original grant of title subject only to specifically delineated public rights must be strictly construed to provide certainty instead of the request for a public easement which adapts to changing public uses:

> "Our answer is the same as the unanimous opinion of the Massachusetts justices: "[T]he grant [of a fee interest] to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from such an interpretation." [47]

Prior to the *Bell v. Wells* cases the Maine Court had not seen any attempts to establish a public easement for such recreational uses as simply walking on the beach, swimming or sunbathing.[48] However, the Massachusetts courts had been dealing with that question for some time. The Massachusetts judicial history on this issue was used by the

[41] James W. Ely, Jr. *The Marshall Court and Property Rights: A Reappraisal*, 33 J. Marshall L. Rev. 1023, 1027 (2000).

[42] William J. Bussiere, *Extinguishing Dried-Up Public Trust Rights*, 91 B.U.L. Rev. 1749, 1753 (2011).

[43] *Bell I* 510 A.2d 509 (Me. 1986).

[44] *Bell II* 557 A.2d 168 (Me. 1989).

[45] *Almeder I* 2014 ME 139, 106 A.3d 1099.

[46] *Almeder II* 106 A.3d 1115 (Me. 2014). .

[47] *Bell II* at 174.

[48] *Id*.

Maine Court in the *Bell* opinion, where they cited two Massachusetts cases with approval[49] while finding that the public easement does not include such activities as sunbathing. They restated the reasoning of the Massachusetts court:

> "In the seashore the entire property, under the colonial ordinance, is in the individual, subject to the public rights. Among these is, of course, the right of navigation, with such incidental rights as pertain thereto. We think that there is a right to swim or float in or upon public waters as well as to sail upon them. But we do not think that this includes a right to use for bathing purposes, as these words are commonly understood, that part of the beach or shore above low water mark, where the distance to high water mark does not exceed one hundred rods, whether covered with water or not. It is plain, we think, that under the law of Massachusetts there is no reservation or recognition of bathing on the beach as a separate right of property in individuals or the public under the colonial ordinance."[50]

This reasoning was restated in *Almerder I* [51]by pointing out that "The public trust doctrine states that 'the owner of shoreland above the mean high water mark presumptively [holds] title in fee to intertidal land subject only to the public's right to fish, fowl, and navigate."[52] Therefore, in Maine the Public Trust Doctrine recognizes the title of the upland owners, subject to the public's right to the stated activities in the intertidal zone. It does not recognize an unlimited public right, or title by the sovereign, in the intertidal zone (although as stated earlier this may be the case in other states).

The Public Trust Doctrine has been recognized in Maine; however, it has been found to be limited to the specific public needs reserved in the Colonial Ordinance of 1647, and does not include the newer public wants (as opposed to needs) of various recreational uses. The position of the Maine Supreme Judicial Court has been consistent in its avoidance of those "uncertain and ephemeral rights"[53], and this is important not only under recognition of the doctrine of stare decisis, but also to avoid the market instability that would result from opening the door to potential redefinition of this doctrine with respect to Maine coastal property.

[49] *See* Butler v. Attorney General, 195 Mass. 79, 80 N.E. 688 (1907), and Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 259, 173 N.E.2d 273, 278 (1961).

[50] Bell v. Town of Wells, 557 A.2d 168, 175 (Me. 1989), citing Butler v. Attorney General, 195 Mass. 79, 80 N.E. 688, 689 (1907).

[51] Almeder v. Town of Kennebunkport, 106 A.3d 1099, 1114 (Me. 2014).

[52] *Id.*

[53] *Supra,* note 50 at 174.

V. HAS A PRESCRIPTIVE EASEMENT BEEN ESTABLISHED?

While it may be common knowledge that the public has made use of Maine's beaches for centuries, that is not necessarily an adequate basis for a claim of a general prescriptive easement. Maine law sets forth clear statutory prerequisites before adverse possession ripens into a prescriptive easement. [54] One of the essential elements of this claim is that of adversity.[55]

The argument that the public is entitled to a prescriptive easement for recreational beach access on a particular parcel is the proper vehicle for recognizing those situations where such use has developed for a statutorily adequate period. This is where all the evidence set forth regarding the extensive history of public use of the beaches becomes pertinent (as opposed to under the argument that the uses set forth under the Colonial Ordinance should be broadened).

Maine statutes state that the prescriptive easement requirements include continuous and uninterrupted usage for at least twenty years.[56] At first glance, it would appear that the obvious long-term public use of the beaches in Maine should easily satisfy this requirement. However, Maine particularly encourages private owners to welcome the public on their property and in return provides those

[54] "No person, class of persons or the public shall acquire a right-of-way or other easement through, in, upon or over the land of another by the adverse use and enjoyment thereof, unless it is continued uninterruptedly for 20 years. If a person apprehends that a right-of-way or other easement in or over his land may be acquired by custom, use or otherwise by any person, class of persons or the public, he may give public notice of his intention to prevent the acquisition of such easement by causing a copy of such notice to be posted in some conspicuous place upon the premises for 6 successive days, or in the case of land in the unorganized territory, by causing a copy of such notice to be recorded in the registry of deeds for the county where his land lies, and such posting or recording shall prevent the acquiring of such easement by use for any length of time thereafter; or he may prevent a particular person or persons from acquiring such easement by causing an attested copy of such notice to be served by an officer qualified to serve civil process upon him or them in hand or by leaving it at his or their dwelling house, or, if the person to whom such notice is to be given is not in the State such copy may be left with the tenant or occupant of the estate, if any. If there is no such tenant or occupant, a copy of such notice shall be posted for 6 successive days in some conspicuous place upon such estate. Such notice from the agent, guardian or conservator of the owner of land shall have the same effect as a notice from the owner himself. A certificate by an officer qualified to serve civil process that such copy has been served or posted by him as provided, if made upon original notice and recorded with it, within 3 months after the service or posting in the registry of deeds for the county or district in which the land lies, shall be conclusive evidence of such service or posting." ME. REV. STAT. ANN. Tit 14 § 812 (1971).

[55] "Proof of the owner's acquiescence is an essential element in the establishment of a prescriptive easement." Glidden v. Belden, 684 A.2d 1306, 1317 (Me. 1996).

[56] *Id.*

private owners with certain assurances to protect from loss of property rights through adverse possession.[57]

As with the way it treats the intertidal zone, Maine is unlike many other states in the way it treats public use of private property. In Maine "[t]he presumption of permission derives from the 'open lands tradition' that Maine shares with a minority of other states."[58] This "open lands tradition" is applicable based upon the nature of the use (recreation) as opposed to the type of land which is being used.[59] This view is also found in the Maine statutes, which establish a landowner relations program, and state that:

> "A. The program must:
> (1) Encourage landowners to allow outdoor recreationists access to their property to hunt, fish or engage in other outdoor recreational pursuits;
> (2) Foster good relationships between landowners and outdoor recreationists; and
> (3) Promote high standards of courtesy, respect and responsibility by outdoor recreationists in their relations with landowners."[60]

The purpose of the statutes regarding public recreational use of private property was "to encourage owners and occupiers of land to make their land available to the public without charge for recreational activities."[61] This important relationship between landowners and public recreation in Maine can only be maintained by continued adherence this "rule that public recreational uses are presumed to be permissive"[62] and "is predicated on the notion that such use by the general public is consistent with, and in no way diminishes, the rights of the owner in his land."[63]

In such cases, the level of adversity required is not satisfied by a simple, casual, occasional usage, but "for purposes of creation of a prescriptive easement, a use is adverse to the owner 'when a party ...

[57] *See Infra* note 59.

[58] *See Supra* note 54 citing Weeks v. Krysa, 955 A.2d 234 (Me. 2008); D'Angelo, 868 A.2d 239 (Me. 2005); S.D. Warren Co., 697 A.2d 1280 (1997).

[59] "It is the public recreational uses of land, not the nature of the land alone, that triggers application of the rebuttable presumption of permissive use in public prescriptive easement cases. The presumption that public recreational uses of open, unposted land are permissive applies equally to children playing on a vacant lot in town, hunters and snowmobilers crossing a cultivated field after the harvest, or families camping on privately owned wood lots . . ." Lyons v. Baptist Sch. of Christian Training, 804 A.2d 364, 372 (Me. 2002).

[60] ME. REV. STAT. ANN. Tit. 12, § 10108 (2013).

[61] Noel v. Town of Ogunquit, 555 A.2d 1054, 1056 (Me. 1989), citing Stanley v. Tilcon Maine, Inc., 541 A.2d 951, 953 (Me.1988).

[62] Lyons v. Baptist Sch. of Christian Training, 804 A.2d 364, 370 Me. 2002).

[63] *Id.*

has received no permission from the owner of the soil, and uses the way as the owner would use it, disregarding his claims entirely, using it as though he owned the property himself....'" [64]

Maine cases have been explicit with respect to the type of uses which satisfy this adversity requirement, and "[w]hether specific possessory acts are sufficient to establish title through adverse possession can only be resolved in light of the nature of the land, the uses to which it can be put, its surroundings, and various other circumstances."[65] Furthermore, the use must not be of such a nature that may be considered to be permissive at the option of the owner as with a license, and the use "may continue only as long as the owner continues to consent to it."[66] Members of the general public would have to show that their use of the beach was not in any way conditioned upon the permission of the upland owner, and was with the belief that such owner had no right to tell them to move along. Thus, evidence as to the nature of the use, particularly as to any evidence which might overcome the presumption of permission, is crucial in each case.

In the Almeder cases,[67] the defendants initially argued that it was not necessary to evaluate the historical recreational use on a parcel-by-parcel basis, but that it was sufficient to introduce evidence as to the general public use of the beach. However, the Court disagreed and remanded for further findings for each individual parcel as "A finding that a public prescriptive easement exists is no small matter. Such an easement necessarily deprives a private landowner of some property rights, most notably by limiting the owner's ability to exclude the public from his or her property."[68] In vacating the Superior Court's award of a prescriptive easement and public access to the private intertidal zone, the Court found that it had failed to properly apply the presumption of permission in public recreational use in Maine. When the Town and State moved for reconsideration of that decision, the Court reaffirmed its stance that the trial court did not conduct adequate proceedings regarding the rebuttable presumption of permission when determining if the elements of a prescriptive easement had been met. On remand, it instructed the trial court to make a determination of record title and any prescriptive easement "on a parcel-by-parcel basis."

[64] *Id. at* 369, citing S.D. Warren Co., 1997 ME 161, ¶ 11, 697 A.2d at 1283 (quoting Blanchard v. Moulton, 63 Me. 434, 437 (1873)).

[65] Emerson v. Maine Rural Missions Ass'n, 560 A.2d 1, 2 (Me.1989) citing McMullen v. Dowley, 418 A.2d 1147, 1154 (Me.1980).

[66] Stickney v. City of Saco,, 770 A.2d 592 (Me. 2001).

[67] *See supra* note 45-46.

[68] Almeder v. Town of Kennebunkport, 106 A.3d 1115, 1120 (Me. 2014).

The Court's reasoning made it clear that each landowner is entitled to detailed findings of fact with respect to the public use of their parcel, and the public is required to overcome the presumption of permission with respect to each such landowner. Thus, the actions of each landowner must be judged independently of the actions of other similarly situated landowners, as they will necessarily be faced with different degrees of adversity. As establishing a prescriptive easement is a permanent reduction in the landowner' rights and

> "as such a reduction in the landowner's property rights should be recognized and enforceable, a trial court must be meticulous in assuring that sufficient facts have been demonstrated linking the particular use alleged to the particular property at issue. This determination is completely dependent on the facts in a given matter—including the nature, duration, and type of use proved. It is not possible to establish the existence of a public prescriptive easement on a parcel of property without reference to the individual lot or lots on which the use is alleged to have occurred."[69]

Although requiring that a prescriptive easement on a parcel-by-parcel basis may seem to be an onerous requirement for the public, we cannot ignore due process requirements when taking rights from private landowners just for expediency's sake. If the public has made recreational use of private property with the requisite adversity for the requisite period of time, then they should be entitled to a prescriptive easement. Requiring adherence to due process protects landowners from loss of their property for permissive use, encourages continued permissive use for recreation, and eliminates reduction in marketability of coastal property which would result from the threat of prescriptive easements based on blanket pubic use assertions.

VI. CAN MAINE NOW ESTABLISH A PUBLIC ACCESS RIGHT?

When faced with contentious issues, the idea of legislating them away may appear to be an attractive solution. This is one of the ideas behind the Public Trust in Intertidal Land Act,[70] which "declared that 'the intertidal lands of the State are impressed with a public trust,' and that those rights of the public include a right to use intertidal land for recreation."[71]

Although the idea of resolving this issue quickly and definitively is important for all concerned, there are essential interests which cannot be ignored. One of the ideals upon which our country was formed was the prohibition of confiscation of private property. The Constitutions

[69] *Id.*
[70] ME. REV. STAT. ANN. Tit 12 §§ 571-573 (1985).
[71] Bell v. Town of Wells, 557 A.2d 168, 176 (Me. 1989).

of both the United States and Maine prohibit the government from taking private property for public use without paying just compensation.[72] While the public may feel that a piece of legislation proclaiming their right to walk the entire length of a particular beach is justified, they should not lose sight of the fact that the upland property owners purchased their land, and that purchase price was determined in part by the ocean "frontage" it was said to contain. Any reduction on their use of that "frontage" is taking from them property rights for which they paid very dearly, and have been taxed upon.[73]

Maine has an established procedure for eminent domain proceedings, which adhere to the constitutional requirements of due process. The Maine Constitution sets forth that "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it."[74] Due process is required in all cases of takings, and the Maine Court has found attempts to bypass this through legislation "giving public right to use privately owned intertidal land for recreation without compensating fee owners, was unconstitutional taking under United States and Maine Constitutions."[75] The prohibition against taking without compensation has always been an essential component of our laws. As Chief Justice Marshall said: 'It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of legislative power is well worthy of serious reflection."[76] Such important property rights should not be easily abridged.

The intertidal land in Maine is extremely valuable and compensation of the upland owners for any taking of their rights for public use would be an expensive proposition. However, there are

[72] U.S. CONST. amend. V; ME. CONST. art. I, § 21.

[73] *See generally* Town of Bristol Taxpayers' Ass'n v. Bd. of Selectmen/Assessors for Town of Bristol, 957 A.2d 977, 978 (2008) "The factors were different for various areas of the Town, depending upon the distance of a particular area from the ocean. The new factors called for assessments of oceanfront land to be multiplied by a factor of 2.25 and properties that sat one or two lots back from the ocean to be multiplied by a factor of 2. Buildings were assessed separately, and all other land values in the Town were multiplied by a factor of 1.25 or 1.5 depending upon the location of the property. For example, lakefront lots were reassessed using a factor of 1.5." *Id.*

[74] ME. CONST. art. I, § 21.

[75] Bell v. Town of Wells, 557 A.2d 168 (Me. 1989), citations omitted.

[76] Fletcher v. Peck, 10 U.S. 87, 135 (1810).

several options available other than an outright purchase of access rights for the public. The first option would be the status quo, where Maine's open lands tradition encourages landowners to allow public access without the threat of losing rights to their property. This tradition has served Maine very well over the hundreds of years it has been the unrecognized policy, as well as since it has been more formally recognized.[77]

A second option has been playing out in the courts, where either individual landowners, groups or towns attempt to establish their rights to the intertidal zone.[78] For many reasons this is not the most efficient use of resources, especially considering that many of these cases are veiled attempts at attacking the well-established intertidal zone precedent. However, if there is a claim of prescriptive easement, this is the only option (other than by agreement) that expanded public access to specific land may be established.

The reference to agreement brings up the third, and best, option for resolving access issues. Alternative dispute resolution is becoming a more recognized alternative to the typical litigation/trial/appeal process, and holds great potential as a means to solve the problem of beach access. One of the benefits of utilizing a mediation framework for dispute resolution is that the end result may be tailored to the needs of the parties, thus allowing for both respect of the upland owner's property rights and the changing uses of beaches by the public. While court orders are by necessity a final determination, mediated agreements can be more fluid arrangements, including temporary arrangements as well as more permanent easements which could include tax breaks for the upland owners. The ability to adapt agreements to allow both private and public needs to be met, without the expenditure of the time or expense of protracted litigation, would be a significant improvement on the current litigation. It also would allow for the certainty and control upon which stable market prices of property are dependent. However, this will not be a viable option while the challenges by towns and public interest groups to the upland owner's title continues. Once this litigation settles to the point it was prior to the *Bell I* case, reasonable resolution through mediation will be a more feasible option.

VII. ARE ACTIVITIES IN THE INTERTIDAL ZONE LIMITED?

Granting the intertidal zone to upland owners and reserving to the public rights to fishing, fowling and navigation was of important

[77] *See supra* notes 53-60.

[78] *See supra* notes 33-34.

historical significance to Colonial Massachusetts.[79] The Massachusetts court explained the thinking behind this reservation in 1822:

> "The exceptions and provisions in this ordinance show clearly, that the principles of the common law relating to this kind of property were well understood by the colonial legislature. Those who thus acquired the property of the shore were restricted from such a use of it as would impair the public right of passing over the water, in boats or other vessels, through any sea, creeks, or coves, to other men's houses or lands; by which it was intended to reserve a free passage over the water in such places, in the same manner as it existed before the public property in the shore was transferred."[80]

Much debate has arisen regarding how narrowly those terms should be interpreted, and some commentators have even gone to so as to criticize the Maine Supreme Judicial Court's close reading of that very specific language, with one going so far as to assert that "[w]e had a right to look for more from the state's highest court."[81] Contrary to the repeated and vigorous claims that the Maine Court "ignored almost all of the long history delineating and balancing public and private rights in intertidal lands" [82] the Court has very carefully considered that history. Referring to their analysis in *Bell I*[83] the court related that "we examined in detail the historical sources of the legal regime governing the ownership of intertidal land in Maine . . . [and] [t]he elaborate legal and historical researches reflected in the extensive briefs filed with us on this second appeal fail to demonstrate any error in the conclusions we reached less than three years ago." [84]

The "extensive briefs" include multiple amicus briefs for each of the cases referenced in this article, which make numerous arguments including an assertion that somehow the public rights reserved in the grant of the intertidal zone to the upland owners should grow with time. This argument is set forth by Professor Orlando Delogu as follows:

> "Bell II's crabbed, too literal reading of the 'public easement' needlessly, and erroneously, cuts off the fundamental strength of the

[79] See supra notes 18, 28-38.

[80] Commonwealth v. Inhabitants of Charlestown, 18 Mass. 180, 188 (1822).

[81] Orlando E. Delogu, *Intellectual Indifference -- Intellectual Dishonesty: The Colonial Ordinance, the Equal Footing Doctrine, and the Maine Law Court*, 42 Me. L. Rev. 43 (1990) at 22.

[82] Orlando E. Delogu, Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in Maine's Intertidal Zone, 16 Ocean & Coastal L.J. 47, 59 (2010).

[83] *See* Bell v. Town of Wells, 510 A.2d 509 (Me. 1986).

[84] Bell v. Town of Wells, 557 A.2d 168, 171 (Me. 1989).

> common law, i.e., its ability to evolve over time to encompass new and/or changed conditions within a framework of law. Bear in mind, new and/or changed conditions are often not foreseen, or anticipated, when the letter of a law is crafted, but if the new/changed condition is within the spirit of the law, the common law adjusts to assimilate the new reality-that's what gives both beauty and vitality to the common law. Bell II, unfortunately, leaves little room for such adjustments."[85]

Although there is a "beauty and vitality to the common law", it is not just adjusting the common law to modern views which is at issue here, but rather a taking of property. What is being suggested is not just a limitation on the uses to which the owner may put his property, but actually taking from him the right to limit recreational use of it by the public. This is not an evolution of the common law, but a taking of private property for pubic use without due process or just compensation. The original upland owners obtained specific title with specific limitations, and as part of its opinion in Bell II the Court pointed out that there were no prior cases where an extension of the original public easement for recreational uses such as sunbathing had been asserted;[86] however it found that the long history of such cases in Massachusetts found that the easement should not be so extended, adopting the following language from early Massachusetts reasoning:

> "in 1974 the justices of the Massachusetts court rendered a well reasoned opinion that walking along privately owned intertidal land, except to the extent it is incidental to fishing, fowling, or navigation, does not fall within the public easement reserved out of the grant of private ownership by the Colonial Ordinance. The Massachusetts justices unanimously informed the Massachusetts House of Representatives that a proposed statute creating a "public on-foot free right-of-passage" along the state's seashore between the mean high water line and the extreme low water line would constitute an unconstitutional taking of private property."[87]

Thus, the recreational expansion which has been repeatedly argued to the Maine Court clearly is not included in the original public easement and should be subjected to the due process requirements for a taking under Eminent Domain. This is a reasonable interpretation of the law, for if the public were allowed to expand the original limitations to include additional uses such as recreation based on changed conditions, then it would stand to reason that the upland owners should be able to take the original easement away from the public because "fowling" is no longer a common use. Such an analysis

[85] *Infra* note 81 at 56.
[86] *Supra,* note 84.
[87] *Id.* at 175.

would result in a conceptual change of the nature of property ownership, which may be attractive to those who desire the authority to take whatever they may decide they would like in the future, but it is not a realistic concept for the passing of title ownership. Economic truths include the requirement that real estate values be determined by the assessed worth of the ownership rights, and thus market stability requires stability of those ownership rights.

The law of real estate titles is especially dependent upon certainty, and the Maine State Bar Association adopted Title Standards as a means of promoting just such certainty:

> "We are all aware that land titles are neither wholly good or wholly bad; that determining marketable title involves in essence the evaluation of possible risks . . . the title examiner must decide whether or not to conclude from a reasonable and prudent investigation of the facts, if record owner has merchantable title."[88]

The importance of title searches in the determination of marketability of title is underscored in the seminal text *Maine Real Estate Law*:

> "For a title to be "marketable" or "merchantable" it need not be a perfectly clear title . . . A "marketable title" is a title free from a reasonable doubt as to matters of law and fact. It is a title which a reasonable, prudent, well-informed purchaser, guided by competent legal advice, would be willing to accept and take at its full value. A mere possibility or suspicion of a defect is not enough to render a title unmarketable . . . [b]ut a reasonable probability of litigation will render the title unmarketable."[89]

A view of the protracted litigation involving attempts to establish public access over private beaches, as well as the stance of towns in their attempts to block the upland owners' efforts to clarify their title through quiet title actions, is a potential litigation threat which could render title unmarketable. Such unmarketability could be a serious threat to the coastal property market in Maine.

Therefore, the exploration of the public uses to which the intertidal zone is subject must be undertaken with a respect for the rules of the law of real estate titles in Maine. The public right to use the intertidal zone for fishing, fowling and navigation as set forth in the Colonial Ordinance of 1647 has been determined to be "denominated an easement".[90] The Court has examined this easement in several cases, and has "given a sympathetically generous interpretation to what is

[88] MAINE STATE BAR ASSOCIATION, STANDARDS OF TITLE, original preface.

[89] PAUL G. CREATU, MAINE REAL ESTATE LAW Ch. 11 at 267 note 32 (1969) John J. Aromando, Standing to Foreclose in Maine: Bank of America, N.A. v. Greenleaf, 29 Me. B.J. 186, 190 (2014).

[90] Bell v. Town of Wells, 557 A.2d 168, 173 (Me. 1989).

encompassed within the terms 'fishing,' 'fowling,' and 'navigation,' or reasonably incidental or related thereto"[91]. The Court in *Bell II* went on to list several such instances:

> "For example, the operator of a power boat for hire may pick up and land his passengers on the intertidal land, Andrews v. King, 124 Me. 361, 129 A. 298 (1925); and "navigation" also includes the right to travel over frozen waters, French v. Camp, 18 Me. 433 (1841), to moor vessels and discharge and take on cargo on intertidal land, State v. Wilson, 42 Me. at 24; and, after landing, "to pass freely to the lands and houses of others besides the owners of the flats," Deering v. Proprietors of Long Wharf, 25 Me. 51, 65 (1845). Similarly, we have broadly construed "fishing" to include digging for worms, State v. Lemar, 147 Me. 405, 87 A.2d 886 (1952), clams, State v. Leavitt, 105 Me. 76, 72 A. 875 (1909), and shellfish, Moulton v. Libbey, 37 Me. 472 (1854). We have never, however, decided a question of the scope of the intertidal public easement except by referring to the three specific public uses reserved in the Ordinance. The terms "fishing," "fowling," and "navigation," liberally interpreted, delimit the public's right to use this privately owned land."[92]

Review of any additional public uses of the intertidal zone must therefore be done in the context of the three specifically listed easement rights of fishing, fowling and navigation. It was certainly within the power of the drafters to have used more general public rights, or simply to have used language to suggest that the public rights were to include but not be limited by the listing. They did not do so. If they had drafted a broader, or less definitive, easement we would be in an entirely different situation. Whether Boston and the rest of the Massachusetts coast would have developed into a major world shipping destination in the years following this grant is anyone's guess, but it is an interesting question. However, the suggestion that this grant "was not the product of any bargain; there was no sale, no consideration, no language of conveyance"[93] is defeated by the admission that "[i]t was a gift-an inducement to 'wharf out'.[94] Thus the suggestion is that this inducement or gift may be rescinded now that the public wants recreation instead of wharfs.

The Maine Court has done an admirable job of balancing the changing needs of the public with the established property rights of the upland owner subject to this easement. It directed "[a]lthough we must avoid placing any additional burden upon the shoreowner, there is no

[91] *Id.*

[92] *Id.*

[93] Orlando E. Delogu, Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in Maine's Intertidal Zone, 16 Ocean & Coastal L.J. 47, 56 (2010).

[94] *Supra,* note 90.

reason to confine, nor have we in the past confined, the rights of the public strictly to the usage prevailing in the 17th Century."[95] However, an extension of that easement to include recreational uses would be an overburdening of an easement which specific wording and intent contain no suggestion of such uses.

VIII. CONCLUSION

Commentators espousing the theory that the sovereign has ownership of intertidal lands, and thus that the public has similar rights, overlook the reality that the sovereign specifically granted those rights to the upland owners. The reason for that grant was to encourage commerce, and a similar commerce rationale may be applied to the need for clarifying title to the intertidal zone to solidify the value and marketability of coastal property. While arguments for a modernization of the permitted public activities in the intertidal zone may be a laudable and egalitarian position, this is not how property rights are established or interpreted under Maine law. Instead the body of law in Maine clearly dictates that property rights are determined by an examination of the historical title, tracing the original source of title and all subsequent out conveyances.

Under this analysis, the upland owners received title in fee simple, subject to a limited easement for public fishing, fowling and navigation, to the intertidal zone. Any taking of those rights, or expansion of the activities described in the limited easement, would require due process and just compensation under eminent domain procedures. The Maine Supreme Judicial Court has consistently and correctly issued opinions in accordance with the doctrine of stare decisis. Any other interpretation of the law would seriously impede the marketability and value of one of Maine's most valuable commodities, its coastal property. The Court recognized the legitimate and important reasons behind the grant of intertidal land to stimulate development, and further recognized that the terms cannot be changed after those needs were met and new ones have arisen. Were it not for the grant of intertidal land, Boston may not have risen into such an important port and business center. The needs of the public were not ignored in that grant, and reservation for fishing, fowling and navigation were deemed important necessities to be retained by the public. As long as towns and public interest groups are convinced that they can retroactively change the terms of property ownership simply because the public now wants to include recreation in those needs, or because owners have been generous in their permissive use, we will be doomed to repeat this

[95] Bell v. Town of Wells, 557 A.2d 168, 188 (Me. 1989).

prolonged litigation. A recognition of the well-established title to the upland owners' land, and the need for due process (on a parcel-by-parcel basis) in any taking for public use or establishment of prescriptive easements will remove the incentive to gamble on the possibility hitting the jackpot and getting free recreational access to valuable coastal property through litigation. This will also encourage towns to enter into negotiations with landowners for public access on equitable terms for both the public and the owners.

The value of Maine's coastal property is an important part of its economy, and instability and uncertainly can easily erode its marketability. Harsh criticism of the Maine Court and suggestions that its decisions on this line of cases are anything other than well-founded in stare decises fuels a continuation of the onerous litigation which threatens the marketability of Maine coastal property.

MISCLASSIFICATION OF EMPLOYEES: COSTS AND SOLUTIONS

by David A. Goodof* and Andrew G. Christensen**

INTRODUCTION

Hughes Amero began delivering oil for Townsend Oil Co. (Townsend) as an independent contractor in 2000 under a three year contract which was renewed in 2003 to extend through 2008.[1] Townsend hired seasonal employees and independent contractors during its busy season. Amero was required to have his truck painted with Townsend's logo, made deliveries as ordered by Townsend, had no say in the price charged per gallon and had to sign a noncompetition agreement that he would not deliver oil for anyone else all of which are indicative of employee status.[2] On the other hand, Amero was paid on a per gallon delivered basis instead of hourly and had to provide his own truck (which Townsend would purchase for him and deduct the cost from checks for deliveries), which is indicative of an independent contractor.[3] In 2005, Amero was injured when he fell from the truck. He sought compensation from Townsend for his injuries and for the costs of hiring someone to deliver oil for him. Townsend refused and, after a meeting in November, 2005, the parties terminated their

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1 Amero v. Townsend Oil, Co. 25 Mass. L. Rptr. 115 (2008)
2 Id.
3 Id.

contract.[4] Is Amero an employee or an independent contractor? The classification or misclassification of independent contractor is critical for Amero as employers don't have to provide benefits including workers' compensation for independent contractors. The answer is "it depends." It depends on the jurisdiction in which his lawsuit is filed and even under which statute he is bringing his complaint.

"Competitive advantage grows out of value a firm is able to create for its buyers that exceeds the firm's cost of creating it. Value is what buyers are willing to pay, and superior value stems from offering lower prices than competitors for equivalent benefits or providing unique benefits that more than offset a higher price. There are two basic types of competitive advantage: cost leadership and differentiation."[5] For example, competitive advantage usually arises from the introduction of new products or services, from securing a patent, having the ability to produce a product at a cheaper price, being first into a new market, or having a niche product. Competitive advantage can also arise from the careful use of independent contractors and in a number of cases from the misclassification of employees as independent contractors. The use of independent contractors is not illegal. On the contrary, if properly used, it can lead to a great deal of flexibility and can lead to cost savings.[6] There are a number of ramifications, however, when employees are misclassified as independent contractors.

It is the widespread use of improper misclassification of employees as independent contractors to avoid the benefits due employees that has given rise to inappropriate competitive advantage for companies. If a company does not have to pay health insurance, Federal Insurance Contribution Act (FICA), workers' compensation and other benefits, it gains the ability to sell its products or services at a lower price than competitors who must absorb those costs. It can then bid on projects at a lower price and still make a larger profit than those properly classifying their employees. A number of federal and state laws are violated by misclassification. There are assorted definitions in those statutes of what constitutes an independent contractor. Protection of employee benefits and preservation of government revenue streams require that classification of employees or independent contractors be clarified and then enforced.

An independent contractor should be exactly what the name describes, independent.[7] The definition from Black's Law Dictionary

[4] Id.

[5] MICHAEL PORTER, COMPETITIVE ADVANTAGE, 3 (Free Press, New York, 1985).

[6] James M. Patterson, Jr, *Independent Contractor or Employee*, 48-JUN TENN. B. J. 26, 26 (2012).

[7] Jenna Amato Moran, *Independent Contractor or Employee? Misclassification of*

defines the independent contractor as one assigned a specific task but left alone to determine how to accomplish it.[8] This definition gives no help in determining who is an independent contractor. The Internal Revenue Service and the states have dealt with the definition issue for a number of years. In the society in which we now live, the tax ramifications have been huge. Independent contractors pay their own taxes whereas employees have their taxes withheld by their employers.[9] The issue of who is or is not an independent contractor does not solely impact the area of employee benefits and owners' profits, but also the collection of taxes in this era of budget deficits.

This article will examine the issues surrounding the use of independent contractors, the current tests used by the different branches of the federal government including the Internal Revenue Service and several different states. It will also look at some of the recent cases that have helped define the status of certain employees/independent contractors. The article will look at the costs of misclassification and the steps taken by some states to reduce or eliminate these costs. It will also make some basic recommendations for reducing the inappropriate misclassification of employees in the future and provide some continuity between states and the federal government definitions and tests to determine independent contractor status. It is important to look at solutions to the many different tests used in determining a worker's status so that benefits for workers and government revenues are not impacted due to misclassification.

MISCLASSIFICATION

Costs and Benefits

Misclassification occurs when an employer is deemed by the employee to be an independent contractor. Very rarely is the independent contractor misclassified as an employee but in theory, it could happen. The benefit to employers of classifying individuals as independent contractors can be great. It has been estimated that it may save the employer between twenty to forty percent of labor costs.[10] As previously discussed, these costs include payroll taxes, FICA, state taxes if any, workman's compensation insurance, unemployment insurance, and health insurance now required under the Affordable

Workers and its Effect on the State, 28 BUFF. PUB. INT. L.J. 105 (2009-2010).

[8] Black's Law Dictionary 839 (9th ed. 2011).

[9] Stephen M. Cunningham, *Death and Taxes: (Over?)Reaction to Section 1706 of the Tax Reform Act,* 62 SYRACUSE L. REV. 451, 454-56 (2012).

[10] Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An analysis of Employees and Employers who Operate in the Borderland between an Employer-And-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 609 (2012).

Care Act. These savings give a great advantage to the employer in the marketplace. Also being able to hire independent contractors gives the employer flexibility in a fluctuating or cyclical market.

Although the employer benefits from such misclassification, employees do not. If misclassified as an independent contractor, an employee loses the right to have his taxes withheld, the right to FICA payments, unemployment, workman's compensation and health insurance. The employee also loses the right to paid vacations and the right to participate in any pension and profit sharing plans offered by the employer.[11] In addition to these costs avoided by the employer, the employee also loses out on those protections provided by the Fair Labor Standards Act such as minimum wage, overtime pay, and holiday pay among others.

The tax ramification of the use of independent contractors is great. In a legitimate employer-independent contractor relationship, the independent contractor will be required to pay taxes quarterly to the Internal Revenue Service as well as the state government taxing authorities if the state has an income tax.[12] The independent contractor will also have to pay insurances and costs of the employment. These will be deductions for the independent contractor for tax purposes. There are also numerous deductions of which the independent contractor can avail himself.[13] As stated above, employees have taxes withheld by the employer and have very little flexibility to underreport income. On the other hand, the employee only has to file taxes once a year and pay once a year.[14]

The Government Accountability Office estimated that the cost to the federal government in 2006 because of misclassification was greater than 2.72 billion dollars.[15] The Harvard Study report issued in 2004 relative to the construction industry in Massachusetts indicated that between fourteen and twenty-four percent of Massachusetts construction workers were misclassified as independent contractors between 2001 and 2003 and for those construction employers who misclassified workers, they misclassified nearly half of their workforce.[16] In 2007, the Program Evaluation Division of the Office of the Legislative Auditor of the State of Minnesota audited the state's unemployment insurance division. It found that fourteen percent of all

[11] Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification,* 9 U.C. DAVIS BUS. L.J. 111, 111-12 (2009).

[12] Cunningham, *supra* note 5, at 455

[13] Id.

[14] Id. at 456.

[15] Patterson, *supra* note 2, at 27.

[16] Buscaglia, *supra* note 7, at 115.

Minnesota employers misclassified at least one employee in 2005.[17] The study also found that the construction industry had higher incidences of misclassification than other industries up to about twenty-eight to thirty-eight percent.[18]A Maine study of the construction industry in 2005 using data from 1999 through 2002 found a higher percentage than the Massachusetts study.[19] In 2007, Governor Elliot Spitzer of New York ordered a study of misclassification. The study found misclassification to be prevalent, 10.3 percent across all industries with 14.9 percent in the construction industry resulting in a cost of about $489 million dollars.[20]

It is clear from the above studies that the benefits enjoyed by employers are outweighed by the costs incurred by the states and the federal government. Although misclassification alone may not violate the law, the results of misclassification have serious costs for individuals as well. For instance, an independent contractor injured on the job does not qualify for workman's compensation from the employer which can lead to tremendous expenses for the seriously injured person in the construction trades. In addition, the above studies have not included a very important new group, undocumented immigrants who are playing an important role in a number of industries but are especially prevalent in the construction industry and the hospitality industry.

Determining Independent Contractor Status

Federal Government Agency Definitions

There is no universally accepted standard for determination of independent contractor status. The Employer's Supplemental Tax Guide defines independent contractors as "people such as doctors, veterinarians, and auctioneers who follow an independent trade, business, or profession in which they offer their services to the public, are generally not employees."[21] However, whether such people are employees or independent contractors depends on the facts in each case. The general rule is that an individual is an independent contractor when the person for whom the services are performed only has the right to control or direct the result of the work and not the means and methods of accomplishing such result.[22] In addition, there

[17] Id. at 117.
[18] Id. at 118.
[19] Id. at 117.
[20] Id. at 119.
[21] Employer's Supplemental Tax Guide, I.R.S. Pub. No. 15-A, at 5 (2013).
[22] Id.

are a number of tests that are used depending on the government entity examining a case.

The Internal Revenue Service had a twenty factor test that was utilized to determine the proper classification of an independent contractor.[23] The twenty factors were divided into three categories; behavioral control, financial control and relationship of the parties. Some of the factors included, inter alia, instructions, training, order or sequence, assistance, furnishing of tools or equipment and materials, reports, payment by salary, work on premises, set hours, not working for others or for the public, lack of investment, payment of business expenses, not realizing profit or loss, rendering services personally, continuing relationship, right to discharge or terminate.[24] The IRS has now simplified its test into the following three factors: (i) behavioral control (directing how the job is done), (ii) financial control (controlling the business aspects of the job) and (iii) relationship between the parties (how the parties perceive themselves).[25]

One of the other major areas affected by the misclassification of employees as independent contractors is the application of the Fair Labor Standards Act (FLSA) which regulates wages and hours for employees without defining employee other than as anyone employed by an employer.[26] The FLSA uses a narrowly drawn economic reality test to determine if the employee is under the control of the employer as well as the degree of economic dependency the employee has with the employer.[27] There are six factors in this test which include, among others, how much investment the individual makes, the opportunity for profit or loss, the degree of control over the work by others, permanency and skill.[28] In contrast with the economic reality test and its separate business consideration, the National Labor Relations Board uses the common law right to control test that attempts to determine the control that the employer has over what work is done and how it is done.[29] Among the factors that can be considered are: the extent of control over details of the work, whether the individual is engaged in a distinct occupation or trade, skill required in the occupation, who supplies the tools needed, length of time of employment, method of payment and other factors.[30]

[23] Moran, *supra* note 3, at 109.
[24] Moran, *supra* note 3, at 109-12.
[25] Id. at 113.
[26] Id. at 116.
[27] Id. at 116.
[28] Id. at 116-17.
[29] Id. at 109.
[30] Id. at 108.

The D.C. Circuit Court of Appeals overruled the right of control test in *FedEx Home Delivery v NLRB*.[31] The case involved an appeal from a preliminary finding by the NLRB that single route drivers with whom FedEx had independent contractor agreements were employees entitled to vote for representation.[32] In this case, the Court emphasized the opportunity for entrepreneurial gain.[33] Although FedEx may have controlled the manner in which deliveries were made and the appearance of the vehicle and uniform of the driver, these independent contractors could deliver in any way they wanted, use their vehicles for other purposes (as long as they hid the FedEx logo), bequeath or sell the business and hire employees.[34]

The Family and Medical Leave Act defines an employee as "any individual employed by the employer" as do Title I of the Employee Retirement Income Security Act (ERISA), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and Americans with Disabilities Act.[35] Almost all of the above tests have a right to control element. Some use that as the sole requirement or as a substantial consideration in determining independent contractor status while others add other factors in the equation.

State Status

Most states that do not have an independent contractor statute use the common law right to control test. The issue in these states arises only when a misclassified employee files for unemployment or workman's compensation, where a worker contests receiving a 1099, is audited or contests the failure to receive overtime or minimum wage.[36] These states may have different tests depending on the type of claim filed. Some have a presumption of employee status and some put the burden of proving independent contractor status on the employer while others do not.[37] Regardless of the test or definition employed by the state, the determination of status is always reactive. For the most part, these states are not proactive in pursuing misclassification of employees. There may be some legal action that results from an employee claim but the harm has already occurred to both the

[31] FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009).
[32] Id. at 495.
[33] Id. at 502.
[34] Id. at 497-500.
[35] 29 U.S.C. § 1002(6) (2014) [ERISA]; 42 U.S.C. § 2000(e)(f) (2014) [Title VII]; 29 U.S.C. § 630f (2014) [ADEA]; 42 U.S.C. § 12111(4) (2014) [ADA]; 29U.S.C. § 2611(3) (2014) [FMLA].
[36] Buscaglia, *supra* note7, at 120.
[37] Id. at 121.

employee and the state.[38] Where is the disincentive for employers to cheat? Why would they not attempt to cut costs by misclassifying employees as independent contractors? Why not try to gain that competitive advantage when the chances of punishment are so small? Because enforcement of statutes at the federal and state level is random at best and the chances of being caught are slim, potential penalties are deemed to be a cost of doing business as they are small compared to potential profits.

Through 2009, only five states had statutes that punished misclassification of employees. Those five were Kansas, Massachusetts, Minnesota, New Jersey and New Mexico.[39] Of the five, only Massachusetts punished for misclassification in all industries. For willfully violating the statute, Massachusetts instituted a fine of not more than twenty-five thousand dollars or imprisonment for up to a year or both for a first time violation.[40] A second offense may call for up to double the first time punishments. The penalties are lower for violations without willful intent. Also, the statute allows an alternative to criminal proceedings. The attorney general can issue a civil citation. For each violation, the infraction must be rectified, victims compensated and a fine paid. [41]Massachusetts, New Jersey and New Mexico all contain provisions for possible criminal sanctions.[42] The Kansas statute is restricted to those who intentionally violate the statute for tax and workman's compensation purposes.[43] Minnesota, New Jersey and New Mexico statutes apply only to the construction industry.[44] The Minnesota statute is interesting because it applies specifically to public or private sector commercial or residential building construction or improvement services and then defines both the employee-employer relationship and the independent contractor.[45] The statute basically calls for the preregistration of independent contractors if an employer wants to claim them as independent contractors.[46] It has an extensive list of requirements to qualify as an independent contractor including maintaining a separate business

[38] Id. at 120.

[39] KAN. STAT. ANN. § 44-766(a) (2008), MASS. GEN. LAWS ch. 149, §148B (2008), MINN. STAT. ANN. § 181.723 (2008), N.J. STAT. ANN. §34-20 (2008), N.M. STAT. ANN § 60-13-3.1 (2008).

[40] MASS. GEN. LAWS, ch. 149 §27C (2014).

[41] MASS. GEN. LAWS, ch. 149 §27C (2014).

[42] Buscaglia, *supra* note 7, at 122.

[43] KAN. STAT. ANN. § 44-766(a) (2008).

[44] MINN. STAT. ANN. § 181.723 (2008), N.J. STAT. ANN. §34-20 (2008), N.M. STAT. ANN § 60-13-3.1 (2008).

[45] MINN. STAT. ANN. § 181.723 (subd. 2,3,4) (2008).

[46] MINN. STAT. ANN. § 181.723 (subd. 2,3,4) (2008).

with its own office, equipment, etc., which has a federal identification number, operates under contract, incurs the main expenses related to the covered services, receives compensation for services on a commission or per job or bid basis, may realize a profit or loss from the services and others.[47]

The Massachusetts statute was the first to utilize a three prong test for independent contractor status. The three criteria are:

1. The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
2. The service is performed outside the usual course of the business of the employer; and
3. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[48]

Since 2010, a number of states have enacted statutes to regulate the classification of employees. The Colorado statute's own language provides the reasons for the enactment of such laws. First, misclassification of employees as independent contractors "may pose a significant problem in this state and leads to underpayment of employment taxes and premiums that employers are obligated to pay the state for covered employment".[49] Second, businesses that misclassify gain an "unfair advantage over businesses that properly classify employees and pay appropriate taxes and premiums to the state."[50] Third, that protections for employees are lost to those employees who are misclassified as independent contractors.[51] In the Construction Industry Fair Play Act of 2010, New York's state legislature stated its finding that the "construction industry is experiencing dangerous levels of employee misclassification fraud" and its intent to curb this underground economy.[52] Citing a number of recent studies in support of the statute, the legislature declared that, in New York City, as many as fifty thousand construction workers are either misclassified as independent contractors or are completely off the books.[53] The related costs include reduced government revenue and a shift of "tax and workers' compensation to law-abiding

[47] MINN. STAT. ANN. § 181.723 (subd. 2,3,4) (2008).
[48] MASS. GEN. LAWS, ch. 149, § 148B.
[49] COLO. REV. STAT. § 8-72-114 (1)(a) (2012).
[50] COLO. REV. STAT. § 8-72-114 (1)(b) (2012).
[51] COLO. REV. STAT. § 8-72-114 (1)(c) (2012).
[52] N.Y. Labor Law § 861-a (McKinney, 2010).
[53] N.Y. Labor Law § 861-a (McKinney, 2010).

employees, lower working conditions and steal[ing] jobs from legitimate employers and their employees."[54]

Maine has enacted a statute that requires the imposition of fines of not less than $2000.00 nor more than $10,000.00 per violation for an intentional or knowing misclassification.[55] The requirements to qualify as an independent contractor are more specific than others. One has to satisfy five separate criteria: (i) right to control his own work; (ii) being customarily engaged in an independently established trade, occupation, profession or business; (iii) having the opportunity for profit or loss; (iv) paying one's own assistants; and (v) being available to some client or customer community.[56] At least three others from the following list of seven factors must also be satisfied: (i) substantial investment in facilities, tools, etc.; (ii) not required to work exclusively for the other person; (iii) responsibility for completion of the work; (iv) contract defining the relationship; (v) payment not based solely on time spent; (vi) work outside that that of the business for which service is performed; or (vii) determined to be an independent contractor by the federal Internal Revenue Service.[57]

Colorado has enacted statute that allows for private actions for those aggrieved by a misclassification and also provision for fines for misclassification with willful disregard of up to $5000.00 per misclassified employee and up to $25,000.00 for subsequent misclassification.[58] Illinois' statute call for civil penalties for misclassification with a fine not to exceed $1,500 for each violation and up to $2,500 for each subsequent violation.[59] It also has a debarment provision for second violations within a five year period.[60] For willful and knowing violations, the statute calls for double the penalties and punitive damages to the employee.[61] The New York statute calls for civil and criminal penalties including possible incarceration for willful violations.[62] New Jersey amendments provide for criminal and civil penalties for misclassification whether knowing or unknowing.[63] Numerous other states have now enacted statutes both defining independent contractor status and enumerating penalties for both non-willful violations as well as willful violations.

[54] N.Y. Labor Law § 861-a (McKinney, 2010).
[55] ME. REV. STAT. tit.5.26, § 591-A (2012).
[56] ME. REV. STAT. tit. 6.26, § 1043, sub-§ 11, E (2012).
[57] ME. REV. STAT. tit. 8.39-A, §102, sub-§13-A (2012).
[58] COLO. REV. STAT. § 8-72-114 (2012).
[59] ILL. COMP. STAT. 185/40 (2008).
[60] ILL. COMP. STAT. 185/42 (2008).
[61] ILL. COMP. STAT. 185/45 (2008).
[62] N.Y. Labor Law § 861-e (McKinney, 2010).
[63] N.J. STAT. ANN. §34:20-1 (West 2007).

RECENT COURT CASES

A number of recent court cases have found in favor of plaintiffs suing to be classified as employees. In Massachusetts, the statute enacted in 2008 has led to a number of cases interpreting the law.[64] In the case of *Somers v. Converged Access, Inc.*, Robert Somers had twice applied for a position with the defendant. He did not receive a job offer from the defendant but was hired as an independent contractor. After applying again for a full time position and having his contract terminated, Somers brought an action against Converged Access, Inc., one count of which was misclassification. He claimed that he should have been classified as an employee with all the rights and benefits of an employee, including overtime pay.[65] The Massachusetts Supreme Judicial Court ruled that a person hired as an independent contractor was in fact an employee for purposes of the Massachusetts Wage Statute as the defendant could not prove by a preponderance of the evidence that the plaintiff was free from control and direction, that the service was performed outside the usual course of business of the employer, and that he was customarily engaged in an independent occupation.[66] The Court stated that the employer had to prove all three prongs of the test.[67]

An interesting aspect of this case which arises in a number of cases brought under the Massachusetts Wage Act is that the wage act calls for mandatory punitive damages of three times the wages not paid.[68] The defendant argued that the plaintiff was paid more than he would have been paid as an employee so there were no damages as a result of the misclassification and that giving him overtime pay would have resulted in a windfall. The court stated that "had the Legislature been concerned with this risk, it would not have written the independent contractor statute or the wage act to impose strict liability on employers.[69]

Massachusetts has even applied its three prong test to a situation involving a franchisor/franchisee relationship where the franchise status was nothing more than a sham.[70] In this matter, the franchisee had no control over how it performed its tasks and did not perform any services outside of the franchisor's business. The three prong test was used and the court concluded that the franchisees were actually

[64] MASS. GEN. LAWS, ch. 149, § 148B.
[65] Somers v. Converged Access, Inc. 911 N.E.2d 739, 743 (Ma. 2009).
[66] Id. at 747.
[67] Id.
[68] MASS. GEN. LAWS, ch. 149, § 150. (2014).
[69] Somers v. Converged Access, Inc., 911 N.E.2d 739, 750 (Ma. 2009).
[70] Uwuah v. Coverall North America, Inc., 707 F.Supp.2d 80, 82-83 (D. Mass. 2010).

employees and, therefore, entitled to be paid wages. This was true despite there being a franchise agreement contracts with the franchisor.[71]

In the case of *Craig v. FedEx Ground Package System, Inc.*, the Kansas Supreme Court discussed the nature of determining whether an individual is an employee or an independent contractor.[72] In the class action lawsuit, plaintiffs sought overtime pay and expenses. Kansas uses a twenty factor test to determine the right to control the individual as the means to determine employment status.[73] The court discussed other similar cases and determined that the individuals were employees for purposes of the Kansas employment statutes. The court also determined that the economic reality test used under the Fair Labor Standards Act contains several criteria that were among the Kansas right to control twenty factor test and that the principle difference was in the fact that under the economic reality test, right to control was not the single most important factor in determining status.[74]

The case of *Thomas E. Perez, Secretary of Labor, U.S. Department of Labor v. Oak Grove Cinemas, Inc.* involved an action under the Fair Labor Standards Act for failure to pay overtime wages, recordkeeping violations and retaliation.[75] Two corporations both owned by a husband and wife paid their workers as independent contractors by the number of hours worked. The individuals worked significantly more than forty hours per week and would have been entitled to overtime pay. The court found that for purposes of the Fair Labor Standards Act, they were employees and that the corporations were actually one enterprise.[76] The FLSA's economic realities test was used to determine employment status relying on six factors to analyze the economic realities of the relationship: "(1). The degree of alleged employer's right to control the manner in which work is to be performed, (2) alleged employee's opportunity for profit or loss depending upon his managerial skill, (3) alleged employee's investment in equipment or materials required for his task, or his employment of helpers, (4) whether service rendered requires a special skill, (5) degree of

[71] Id. at 81-82
[72] Craig v. FedEx Ground Package System, Inc., 335 P.3d 66 (Kan. 2014).
[73] Id. at 75-76.
[74] Id. at 76.
[75] Perez v. Oak Grove Cinemas, Inc., No. 03:13 – CV – 00728-HZ, 2014 WL 7228983 at 4 (D.Or. Dec. 17, 2014).
[76] Id. at 4-6.

permanence of the working relationship, and (6) whether service rendered is integral part of alleged employer's business."[77]

These cases show that different tests are currently being used to determine independent contractor status, sometimes even within a single jurisdiction. The courts have attempted to clarify the differences in classification and the test to be used in a given framework; however, these decisions have done very little to deter businesses from misclassifying employees as independent contractors. The benefits to employers still seem to outweigh the risks associated with misclassification. Those benefits, as previously discussed, include avoiding the provision of health insurance, life insurance, FICA payment, tax withholding, workers compensation insurance and other benefits such as paid vacations and sick time. The lack of these benefits puts a burden on the individual who is also subject to termination without cause due to such misclassification. Although the case law demonstrates that courts often find that misclassification has occurred, any attempt by an individual to contest his status may take considerable time and money (including attorney fees which is increasingly becoming an additional issue). Massachusetts has its nonpayment of wages statute which requires punitive damages (triple plus attorney fees).[78] Other states have enacted statutes but they are still in the minority and they haven't included the requirement of punitive damages.

Why do employers feel emboldened to continue to misclassify individuals? As stated in the previous paragraph, other than Massachusetts, few states have provisions for punitive damages and attorney fees for employees who prevail in their lawsuits. A number of states have now put penalty provisions in their statutes regarding misclassification but since the chances of being caught are minimal, employers ignore those provisions. Some state statutes do not outlaw misclassification in all industries.[79] Those states without statutes have no penalties at all under common law. Some workers feel they are making more money if they are classified as independent contractors since there is no withholding from paychecks and no deductions for insurances. As stated previously, independent contractors can take advantage of a greater number of deductions to reduce their taxable income.[80] Several studies show that misclassified independent

[77] Id. at 4.
[78] MASS. GEN. LAWS, ch. 149, § 150.
[79] Buscaglia, *supra* note 7, at 127.
[80] Cunningham, *supra* note 5 at 454-55.

contractors do not report thirty percent of their income.[81] The only time they complain is when there is some adverse personnel action.

CONCLUSION

From the examination of the common law, statutes and cases that are in place to curb the excessive use of independent contractor status, it would appear that business should be reluctant to utilize this practice to gain competitive advantage or increase profits. The statutes seem to be clear but there is still a great deal of confusion about the factors that allow an employer to designate one individual an employee and another an independent contractor. There are multiple state and federal statutes that use different definitions of independent contractor, thus providing businesses with greater opportunity to attempt to misclassify individuals to obtain greater increases in profits and flexibility for business planning. Even within an individual state, there may be multiple definitions of independent contractor status. Massachusetts has several tests other than the three prong test discussed above and there are at least four separate government agencies that utilize these tests to enforce these statutes.[82] There are different tests for workers' compensation insurance, unemployment insurance and tax withholding as well as the previously discussed three prong test for wages and overtime.[83] The different definitions and tests result in confusion and lack of enforcement. The result of this ambiguity is lost revenue for states and the federal government in this time of budgetary difficulty. There needs to be simplification and uniformity.

The central question yet to be answered is how to control such misclassification. There are a number of possible suggestions. Communication within and between states must improve and such improved communication should include, without limitation, efforts to coordinate a cohesive and consistent statutory definition of independent contractors.[84] In states like Massachusetts where there are multiple agencies affected by misclassification, there should be one simple definition of independent contractor that all use in determination of status. The test should focus on the independent contractor's status with items such as maintaining a separate business, federal identification number, operating under contracts, incurring expenses, compensation as dictated in a contract or

[81] Jane P. Kwak, *Employee Versus Independent Contractors: Why States Should Not Enact Statutes That Target The Construction Industry,* 39 J. LEGIS. 295, 303 (2012-2013).
[82] Buscaglia, *supra* note 7 at 129-30.
[83] Id. at 129.
[84] Buscaglia, *supra* note 7 at 130.

commission, realization of profit or loss, and entrepreneurship.[85]There should be communication between the different agencies especially where there is a determination that a misclassification has occurred in one area that would also impact another. The Maine statute giving the powers and duties to the Commissioner of Labor includes a provision for federal and state cooperation.[86] This could be expanded to provide for cooperation and communication between state agencies as well.

A uniform statute should provide a statutory definition of independent contractor as well as a provision for cooperation and sharing of information. There should be communication between all state and federal government agencies and a coordinated effort to combat misclassification. In the past several years, federal government agencies (usually the United States Department of Labor) and states (13 as of 2012) have entered into memoranda of understanding to share information and coordinate enforcement of misclassification.[87] When one shares information with the others, there is a greater likelihood of success. With a uniform definition of independent contractors along with communication between federal and state agencies, there is a greater chance of stopping misclassification or, at the very least, increasing the likelihood of penalties for those businesses who are successful simply because of misclassification.

If there is to be a reduction of misclassification, audits by both the IRS and the Department of Labor as well as state agencies must increase in number. Unfortunately, this is expensive. In fact, the number of audits by the IRS has decreased over the past few years as a result of budget cuts and there have been reports that there will be fewer audits this year.[88] The estimated number is about one million, down about 17% from five years ago. The reduction in audits simply gives some businesses the opportunity to continue illegal actions.

Another solution is to model Minnesota's proactive statute which requires preapproval of independent contractor status.[89] Although it currently applies only to the construction trade, there is no reason this requirement cannot become more universal.[90] Prior to hiring a worker as an independent contractor, the employer would be required to file an application with the state in which it is doing business.[91] The employer would provide documentation that would satisfy the

[85] Id. at 130-31.
[86] ME. REV. STAT. tit. 26, § 1082 (11) (2012).
[87] Patterson, *supra* note 2 at 26.
[88] http://money.cnn.com/ pf/taxes/irs-tax-audits/2015/01/15 (last visited April 3, 2015).
[89] MINN. STAT. ANN. § 181.723 (2008).
[90] Buscaglia, *supra* note 7, at 129.
[91] Buscaglia, *supra* note 7 at 131.

definition adopted by the state.[92] This solution would come at a cost, however, with the additional manpower required to approve the applications.

With a combination of statutory coordination, preapproval, more audits and cooperation among the affected parties, the widespread use of misclassification of employees as independent contractors may be reduced. This would result in an increase in taxes and other employer payments to the government. It would also lead to greater protection for employees.

[92] Id. at 131.

THE EUROPEAN UNION'S "RIGHT TO BE FORGOTTEN"

by Carter Manny*

I. INTRODUCTION

The "right to be forgotten" is a phrase closely associated with a decision issued in May 2014 by the Court of Justice of the European Union ordering Google to remove a link to a Spanish newspaper's web page which contained sixteen-year-old information about a previously-resolved debt collection matter involving a Spanish citizen.[1] The court's decision applied provisions set forth in the EU's 1995 Data Protection Directive[2] which provides a framework for privacy law. The decision was immediately criticized on numerous grounds including interference with freedom of speech,[3] opening the door to censorship[4] and facilitating the rewriting of history.[5] An editorial in the New York

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[1] Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, *available at* http://curia.europa.eu/ juris/celex.jsf/celex=62012CJ0131&lang1=en&type =TXT&ancre= (May 13, 2014)(last visited Feb. 10, 2015.)

[2] *See* Council Directive 95/46, 1995 O.J. (L281) 31 [hereinafter *Directive* or *Data Protection Directive*.]

[3] *See, e.g.,* Francis Robinson, Sam Schechner and Amir Misroch, *EU Orders Google to Let Users Erase Past,* WALL ST. J., May 14, 2014, at A1. ("Tech companies and free speech advocates say the decision could lead to a chilling effect on free expression. . . .")

[4] *See, e.g.,* David Streitfeld, *European Court Lets Users Erase Records on Web,* N.Y. TIMES, May 13, 2014 at A1. (quoting the head of the Brussels office for the Computer and Communications Industry Association, James Waterworth, as saying, "This ruling opens the door to large-scale private censorship in Europe. . . .")

[5] *See, e.g., id.* (Quoting Emma Carr, acting director of the London-based civil liberties group, Big Brother Watch, as saying "The principle that you have a right to be forgotten is

Times argued that removal of search links "would leave Europeans less well informed and make it harder for journalists and dissidents to have their voices heard."[6] While the editorial acknowledged that "[t]here are good reasons to let people remove embarrassing photos and posts they published on social media as children or young adults . . ." it concluded that "lawmakers should not create a right so powerful that it could limit press freedoms. . . ."[7]

A right to delete a link to a web page in a search engine result involves the larger issue of the extent to which a person can exercise control over access to information about his or her activities, a subject that is treated differently in Europe and the U.S. This article begins with an examination of possible justifications for a limited "right to be forgotten," especially with respect to information that is readily available online. Those justifications will then be considered in the context of the Court of Justice of the European Union's decision in *Google Spain*. There will also be an analysis of the possible expansion of the "right to be forgotten" in the European Union's Proposed Data Protection Regulation, both according to the version published by the European Commission in January, 2012, [8] and an amended version adopted by the European Parliament in March, 2014. [9] This article considers the issues as of March, 2015, prior to the adoption of the Data Protection Regulation.

II. POTENTIAL BENEFITS OF "FORGETTING"

Through millennia of human experience, forgetting has been the rule and remembering has been the exception.[10] People tend to forget things with the passage of time. However, through the development of "external memory" starting with cave drawings, and progressing to writing, the printing press, photography and sound recording, humans have been able to "remember" through mechanisms outside the brain.[11] Those mechanisms, however, capture memories selectively. Not

a laudable one, but it was never intended to be a way for people to rewrite history. . . .)

[6] *Ordering Google to Forget*, N.Y. TIMES, May 13, 2014, at A26.

[7] *Id.*

[8] EUR. PARL. DOC. (COM 2012) 11 (2012), *available at* http://ed.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf (last visited Mar. 27, 2015) [hereinafter *Proposed Data Protection Regulation* or *Proposed Regulation*].

[9] European Parliament, Texts Adopted 12 March 2014, Protection of individuals with regard to the processing of personal data, available at http://www.europarl.europe.eu/sides/getDoc.do?purRef=//EP//NONSGML+TA+20140312+SIT-01+DOC+WORD+VA//EN&language=EN (last visited Mar. 27, 2015) [hereinafter *Amendments*].

[10] *See* VIKTOR MAYER-SCHONBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE 2 (2009).

[11] *Id.* at 29-48.

everything is recorded on paper or other media. Furthermore, information can be difficult to retrieve. Finding information on paper in filing cabinets in a government office, or on microfilm images of old newspapers in a library, can be tedious and unproductive. The difficulty of retrieving such information limits its availability to the general public and has been described as "practical obscurity,"[12] which can be considered to be a type of "forgetting."

During the past few decades, advances in digital technology have made "remembering" easy. Inexpensive storage and automated systems have tended to cause the historical default of "forgetting" to change to a new default whereby everything is saved and "remembered."[13] Today, it is often more convenient to save digital content rather than delete it.[14] Moreover, full-text searches and other automated retrieval systems make finding things quick and easy.[15] Of course, digital technology has an enormous number of benefits. It can also have some drawbacks.

Some of those drawbacks can be found in human experience. For example, a small number of people have a condition known as hyperthymesia, the medical term for superior autobiographical memory.[16] People with the condition remember almost everything. Rather than experiencing joy, however, a person with perfect memory can be unhappy as he or she spends an unusual amount of time focused on the past rather than enjoying the present.[17] Furthermore, preoccupation with the past can preclude changing one's mind[18] and contribute to indecision,[19] especially when a person is focused more on avoiding prior unpleasant experiences than on taking advantage of current opportunities.

The "perfect memory" of the Internet can impose some of these effects on people in general. It can have a chilling effect on expression, and lead to self-censorship, as people become concerned that a record of their behavior will be permanently available online to a world-wide audience.[20] There also is a concern that social media have shifted the predominant source of personal information from the person himself or

[12] *Id.* at 101.
[13] *Id.* at 68.
[14] *Id.*
[15] *Id.* at 72-76.
[16] *See* Bert-Jaap Koops, *Forgetting Footprints, Shunning Shadows. A Critical Analysis of the "Right To Be Forgotten" in Big Data Practice,* 8 SCRIPTED (2011), *available at* http://ssrn.com/abstract=1986719 (last visited Mar. 26, 2015).
[17] MAYER-SCHONBERGER, *supra* note 10, at 21.
[18] *See Id.* at 125. *See also* KOOPS, *supra* note 16.
[19] *See* MAYER-SCHONBERGER, *supra* note 10, at 117.
[20] *See Id.* at 5.

herself, to a system in which others provide most of the information. One scholar has described the former as a "digital footprint" and the latter as a "digital shadow."[21] Arguably, the "digital footprint" of information created by one's self is now being overridden by the larger "digital shadow" of information about that person which has been created by others.[22]

Scholars have summarized the operation of the "right to be forgotten" in three general categories: (1) a right to have information deleted after the passage of time, (2) a right to have a "clean slate," meaning a fresh reputational start, and (3) an individual interest in unrestrained expression.[23] The first two categories are indirectly connected to the development of privacy law in continental Europe which originated with concerns about dignity, honor and respect.[24] In France, the culture of dignity originated in the seventeenth century during the reign of Louis XIV, but benefited only persons of high social status.[25] In the French Constitution of 1791, legal protection against an insult to private life was extended to the masses at the same time as the introduction of freedom of the press.[26] By the mid-nineteenth century, the phrase "private life must be walled off" was a standard slogan in continental Europe.[27] In Germany, privacy as a value was articulated in the 1880s and grew out concepts of honor and respect for the exercise of free will, resulting in the concept that one's "personality" deserved legal protection.[28] By the early twentieth century, the German Civil and Criminal Codes included protections against insults, and a right to respond to statements in the press.[29] Since the late 1970s, a modern "right to be forgotten" or "right to oblivion" developed in France and Italy as a "right to silence on past events in life that are no longer occurring," such as crimes for which a person was later exonerated.[30] These long-standing cultural values provide an important context for the approach the Court of Justice of the European Union took in interpreting data protection law in *Google Spain.*

[21] *See* KOOPS, *supra* note 16.
[22] *Id.*
[23] *Id.*
[24] *See* James Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L. J. 1151, 1164 (2004).
[25] *Id*. at 1165.
[26] *Id.* at 1172.
[27] *Id.* at 1173.
[28] *Id.* at 1182.
[29] *Id.* at 1186.
[30] *See* Paul A. Bernal, *A Right to Delete?*, 2 EUROPEAN J. OF L. AND TECHNOLOGY, *available at* http://ejlt.org/article/view/75/144 (2011)(last visited Mar. 30, 2015).

III. THE GOOGLE SPAIN CASE

The case began in 2010, when Mr. Costeja, a Spanish citizen, filed a complaint with the Spanish Data Protection Authority against a Spanish newspaper which had published debt collection notices against him in 1998, twelve years prior to the complaint.[31] Because the debt collection matter had been resolved for a number of years prior to 2010, he contended that the matter had become irrelevant.[32] Mr. Costeja requested that the Spanish Data Protection Authority order the newspaper to remove or alter the notices in its online archive so that his name would no longer appear.[33] He also named Google, and its Spanish subsidiary, Google Spain, in the complaint and requested that they be ordered to delete links to the collection notices that appeared in a Google search using his name.[34] The Data Protection Authority denied the request with respect to the newspaper archive[35] but granted the request with respect to Google and Google Spain, thus ordering the removal of the links from search results.[36] Google and Google Spain appealed to the National High Court of Spain[37] which referred the case to the Court of Justice of the European Union for a ruling under European Union law involving interpretation of the Data Protection Directive.[38]

The court was faced with three issues regarding interpretation of the Directive: (1) whether a search engine could be regulated as a "controller," (2) the territorial scope of the Directive with respect to a search engine with a parent company outside the EU and subsidiaries inside the EU, and (3) the extent to which specific provisions within the Directive establish a "right to be forgotten" allowing for removal of links from search results.[39] With respect to the issue of whether a search engine is a "controller," the court began the analysis with the definition in the Directive which provides that a controller is someone who determines the purposes and means of the processing of personal

[31] Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, ¶14, *available at* http://curia.europa.eu/juris/celex.jsf/celex=62012CJ0131&lang1=en&type=TXT&ancre= (May 13, 2014)(last visited Feb. 10, 2015.)

[32] *Id.* at ¶15.

[33] *Id.*

[34] *Id.*

[35] *Id.* at ¶16.

[36] *Id.* at ¶17.

[37] *Id.* at ¶18.

[38] *See generally* Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, *available at* http://curia.europa.eu/juris/celex.jsf/celex=62012CJ0131&lang1=en&type=TXT&ancre= (May 13, 2014)(last visited Feb. 10, 2015.)

[39] *See* David Lindsay, *The 'Right to be Forgotten' by Search Engines under Data Privacy Law: A Legal Analysis of the Costeja Ruling,* 6 J. MEDIA L. 159, 161-162 (2014).

data.[40] It emphasized that the provision should be interpreted broadly to promote the Directive's objective of ensuring "effective and complete protection of data subjects," which would be thwarted if search engines were excluded from the definition on the ground that they do not "exercise control over the personal data published on web pages of third parties."[41] The court noted that search engines were likely to affect privacy rights even more than publishers of web pages, because of the search engines' role in overall dissemination of personal data through their ability to organize and aggregate information.[42] It also addressed the ability of web page publishers to exclude information from searches by using "exclusion codes," that automatically cause search engines to ignore specified data. [43] The court asserted that the use or non-use of such codes does not alter its conclusion that the purposes and means of processing are still determined by the operator of the search engine.[44] Accordingly, the court concluded that the functions of a search engine in finding information on the Internet, indexing it, storing it temporarily and making it available to Internet users, constitutes processing of personal data which makes the operator of a search engine a "controller" under the Directive.[45]

With respect to the territorial scope of the Directive, the court began its analysis by explaining how a Google search operates. A Spanish language search from a computer located in Spain, even one using the U.S. website "google.com," automatically directs the user to the Spanish website "google.es" which gives access to websites which have been indexed by robotic computer programs that temporarily store web page content on computer servers whose locations are not disclosed "for reasons of competition."[46] Google earns money by selling advertising associated with users' search terms which is displayed along with the search results.[47] The advertising is sold to third parties in Spain through Google's subsidiary, Google Spain.[48] In addition, Google has designated Google Spain as a "controller" in filings with the Spanish

[40] Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, ¶32, *available at* http://curia.europa.eu/juris/celex.jsf/celex=62012CJ0131&lang1=en&type =TXT&ancre= (May 13, 2014)(last visited Feb. 10, 2015).

[41] *Id.* at ¶34.

[42] *Id.* at ¶37-38.

[43] *Id.* at ¶39. The court gave several examples of exclusion codes, including "noindex" and "noarchive." *Id.*

[44] *Id. at* ¶40.

[45] *Id. at* ¶41.

[46] *Id. at* ¶43.

[47] *Id.*

[48] *Id.*

Data Protection Authority.[49] The court focused on how the sale of advertising relates to language in the Directive that specifies that its provisions apply when "processing is carried out in the context of activities of an establishment of the controller on the territory of the Member State. . . ."[50] Rather than focusing on search engine functions, which do not involve Google Spain,[51] the court interpreted the language broadly to mean that Google's processing (the search) is carried out "in the context of the activities" of Google Spain when Google Spain sells advertising that enables the service offered by the search engine to be profitable.[52] Hence, it is the sale of advertising, rather than the search operation, which provides the territorial basis for application of the Directive to Google.

On the final issue, the question of whether the Directive creates a "right to be forgotten" that requires deletion of links identified by the search engine, the court began its analysis by emphasizing the Directive's purpose in ensuring a high level of protection of fundamental rights, particularly the right to privacy, with respect to the processing of personal data.[53] It also cited provisions in the Charter of Fundamental Rights of the European Union guaranteeing a right to respect for private life and the protection of personal data.[54] The court then looked to specific provisions of the Directive.

The provision granting a person the right to have a controller erase data[55] was interpreted broadly to include any situation in which there is violation of a requirement set forth in the Directive.[56] The court noted that although the provision mentions incomplete or inaccurate data, those examples do not constitute the only situations justifying erasure.[57] The analysis then turned to the provisions on data quality requiring that data be processed "fairly and lawfully," that data be "adequate, relevant and not excessive" in connection with the purposes

[49] *Id.*

[50] Directive, *supra* note 2, Art. 4(1)(a).

[51] Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, ¶51, *available at* http://curia.europa.eu/juris/celex.jsf/celex=62012CJ0131&lang1=en&type=TXT&ancre= (May 13, 2014)(last visited Feb. 10, 2015).

[52] *Id.* at ¶55.

[53] *Id. at* ¶66.

[54] *Id. at* ¶69. Article 7 of Charter states: "Everyone has the right to respect for his or her private and family life, home and communications." Article 8(1) provides: Everyone has the right t to the protection of personal data concerning him or her." Charter of Fundamental Rights of the European Union, 2000 O.J. (C364) 1, Arts. 7 & 8.

[55] *See* Directive, *supra* note 2, at Art. 12(b)

[56] Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, ¶70, *available at* http://curia.europa.eu/juris/celex.jsf/celex=62012CJ0131&lang1=en&type=TXT&ancre= (May 13, 2014)(last visited Feb. 10, 2015).

[57] *Id.* at ¶70.

for which they are collected and processed, that data be "accurate" and "up to date," and that data be kept in a form which permits identification of data subjects for "no longer than is necessary" for the purposes for which the data were collected or for which the data are further processed. [58] The court focused on interpreting two additional provisions and explained that both require a balancing of interests. The first provision involves criteria for making processing "legitimate," and requires that data be processed only if necessary for "legitimate interests" of the controller, except where such interests are "overridden" by the privacy rights of the data subject protected by the Directive.[59] The other grants a person the right to object "on compelling legitimate grounds" to the processing of data relating to him or her.[60]

Applying these provisions in the context of the activities of a search engine, the court noted that a search on the basis of a person's name can result in the aggregation of vast numbers of aspects of a person's private life that would otherwise have been difficult to assemble.[61] The collection of those items into a detailed profile is likely to have a significant effect on the person's right to privacy.[62] The court concluded that in light of the potential seriousness of interference with privacy rights, search results cannot be justified "by merely the economic interest" which the search engine operator has in the processing.[63] The court explained that the balancing may depend upon various factors including "the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public to having that information, [and that] an interest may vary, in particular, according to the role played by the data subject in public life."[64]

The court considered differences between publishers of web pages and operators of search engines. It rejected the suggestion that a search engine could be required to delete a link to a web page only if the information on the web page itself also had to be deleted. For example, the web page might qualify for exceptions in the Directive for journalistic purposes which would not apply to the search engine.[65]

[58] *Id.* at ¶72.
[59] *Id.* at ¶74.
[60] *Id.* at ¶76.
[61] *Id.* at ¶80.
[62] *Id.* at ¶80. For an analysis of potential harm to privacy caused by aggregation of personal data, *see, e.g.,* Daniel Solove, *A Taxonomy of Privacy,* 154 U. PA. L. REV. 477, 508 (2006).
[63] Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, ¶81, *available at* http://curia.europa.eu/juris/celex.jsf/celex=62012CJ0131&lang1=en&type=TXT&ancre= (May 13, 2014)(last visited Feb. 10, 2015).
[64] *Id.* at ¶81.
[65] *Id.* at ¶85. The journalistic exception appears in Article 9 of the Directive which

Furthermore, the balancing of interests may be different with respect to a web publishers and search engine operators, both with respect to their own interests and the consequences of the processing for the data subject.[66]

The court summarized its interpretation of the Directive by stating that even the initial lawful processing of accurate data may, through the passage of time, become incompatible with the Directive when the data are no longer necessary in the light of the purposes for which the data were initially collected or processed.[67] Applying its interpretation to the facts of the case, the court concluded that because of the passage of time, the search engine's inclusion of links to the web pages containing debt collection information had become "inadequate, irrelevant or no longer relevant, or excessive" and that the links must be deleted.[68] It stressed that proof of harm to the data subject is not required in order to exercise a right of deletion.[69] The court also noted that in this case there did not appear to be a "preponderant interest of the public" in having access to the information through a search engine.[70]

IV. IMPLEMENTING THE COURT'S DECISION

Practical issues surrounding implementation of the court's decision have been the subject of two studies: (1) Guidelines issued by the Working Party of EU data protection commissioners in November 2014,[71] and (2) a report of a Google advisory council issued in February 2015.[72] The two reports are similar in some respects, but contain

states: "Member States shall provide for exceptions . . . for the processing of personal data carried out solely for journalistic purposes . . . only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression." *See* Directive*, supra* note 2, at Art. 9.

[66] Case C-131/12, Google Spain SL v. Agencia Espanola de Proteccion de Datos, ¶86, *available at* http://curia.europa.eu/juris/celex.jsf/celex=62012CJ0131&lang1=en&type=TXT&ancre= (May 13, 2014)(last visited Feb. 10, 2015).

[67] *Id.* at ¶93.

[68] *Id.* at ¶94.

[69] *Id.* at ¶96.

[70] *Id.* at ¶98.

[71] Article 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costaja Gonzalez" D-131/12* (2014), *available at* ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf (last visited Feb. 21, 2015)[hereinafter *Working Party Guidelines*].

[72] *The Advisory Council to Google on the Right to be Forgotten*, *available at* https://drive.google.com/a/google.com/file/d/OB1ugZshetMd4cEI3sjlvVohNbDA/view?pli=1 (last visited Feb. 23, 2015)[hereinafter *Advisory Council Report*].

significant differences. They are largely similar in the criteria to be used in making a decision to remove a search link. Both focus on the data subject's role in public life, the nature of the information in the linked web page, the source of the information, and the amount of time that has passed since the web page was published. The Working Party Guidelines state that it is difficult to establish with certainty the type of role in public life an individual must have in order to justify public access to information about the person through a search engine, and then list several occupations where such justification would usually be present.[73] These include politicians, senior public officials and members of regulated professions.[74] The Guidelines suggest that a good rule of thumb is that access through a search in the data subject's name would be justified when the information revealed by the search would protect the searching parting against "improper public or professional conduct."[75] The Advisory Council Report is generally consistent with the Guidelines, but is more specific in that it outlines three categories: (1) people with clear roles in public life (including celebrities, religious leaders, sports stars and performing artists, in addition to the examples given by the Working Party,) (2) people with no discernable role in public life and (3) people with a limited or context-specific role in public life (which could include school directors, some kinds of public employees, people whose professions may give them a public role in a community, and people "thrust into the public eye because of events beyond their control.")[76]

The two reports also take similar approaches in evaluating the nature of the information revealed by a search. The Guidelines focus on whether the information relates to the person's "private life" or "working life." In the case of the latter, there should be a determination as to whether the person is still engaged in the same professional activity, as well as an assessment of whether information about the person's working life is "excessive," which would be true in instances of hate speech or defamation.[77] Another relevant criterion is whether the information reflects the person's opinion or whether it appears to be a "verified fact."[78] The Guidelines mention the importance of protecting information relating to a person's health, sexuality or religious beliefs, which qualifies for special protection in the

[73] *Working Party Guidelines*, *supra* note 71, at 13.
[74] *Id.*
[75] *Id.*
[76] *Advisory Council Report*, *supra* note 72, at 8.
[77] *Working Party Guidelines*, *supra* note 71, at 16.
[78] *Id.* at 17.

Directive.[79] There should also be a determination of whether information resulting from a search puts the person at risk, for example, by facilitating stalking or identity theft.[80] With respect to information relating to a crime, deletion requests will need to comply with relevant national practices, although de-listing requests are much more likely to be granted when they relate to minor offenses that happened in the distant past.[81] The Advisory Council Report is similar to the Working Party Guidelines with respect to information relating to crimes and the importance of protecting information regarding a person's religious and political beliefs.[82] Similar approaches are also taken with respect to the distinction between factual information and opinion, and with respect to whether the information puts a person at risk of harm.[83] The Advisory Council Report, however, notes the public interest in maintaining search results which relate to public health, consumer protection, industrial disputes and fraudulent practices.[84]

Both groups took similar approaches to the effect that the identity of the publisher of the information has on the deletion request and the effect of the passage of time. The Working Party Guidelines note that publication of information for journalistic purposes, by a journalist whose job is to inform the public, is an important factor, but that this criterion alone is not a sufficient basis for refusing a deletion request made to a search engine, consistent with the court's analysis in *Google Spain*.[85] The Advisory Council Report makes a similar point about the significance of a journalistic entity operating under journalistic norms, as well as publication by a governmental organization, but omits reference to other factors such as those applied in *Google Spain*.[86] Both groups expressed similar views about the effect of the passage of time in evaluating a request for deletion.[87] However, the Advisory Council Report noted situations in which strong public interest in maintaining access to old information would justify denying a deletion request. For example, denial would be justified when the information relates to a severe crime, especially when the perpetrator might be in a position to

[79] *Id.*
[80] *Id*. at 18.
[81] *Id*. at 20.
[82] *Advisory Council Report*, *supra* note 72, at 11.
[83] *Id*, at 12.
[84] *Id.* at 11-12.
[85] *Working Party Guidelines*, *supra* note 71, at 19.
[86] *Advisory Council Report*, *supra* note 72, at 13.
[87] *Working Party Guidelines*, *supra* note 71, at 15, 18; Advisory Council Report, *supra* note 72, at 14.

repeat the crime.[88] Examples of such crimes include sexual assault and fraud.[89]

The most significant difference between the two reports is in the geographic scope of deletion of search results. The Working Party of EU data protection commissioners stressed that deletion decisions must be implemented in a way that assures complete protection of data subjects' rights.[90] Accordingly, the Working Party concluded that it would not be sufficient to limit deletion to EU Internet domains on the ground that users tend to obtain access to search engines via their national domains.[91] It emphatically stated that deletion should be effective on all relevant domains, including ".com."[92] The Google Advisory Council Report, however, contended that the court's decision is "not precise" on this point, and that Google has chosen to implement deletions only "from all its European-directed search services."[93] The Advisory Council Report notes that when computer users in Europe type "google.com" into a browser, the computer is automatically directed to a local version of the Google search engine.[94] However, the Report also states that this is true on "over 95% of all queries originating in Europe,"[95] thus acknowledging that limitations in search engine technology justify the Working Party's position that deletion across all domains is necessary to achieve compliance with the court's judgment in all cases. One of the members of Google's Advisory Council emphasized this point in a section for comments by individual council members at the end of the Report.[96]

Another difference between the two reports is in the extent to which the search engine should provide information to web publishers, data subjects and others of deletion requests and decisions. The Working Party stated that search engines should not, as a general practice, notify web publishers of the pages affected by the deletion of a link.[97] In some cases, however, the Working Party felt it is permissible for a search engine to contact a web publisher prior to making a deletion decision in order to gather more information for assessment of the

88 *Advisory Council Report*, *supra* note 72, at 14.

89 *Id.*

90 *Working Party Guidelines*, *supra* note 71, at 3.

91 *Id.*

92 *Id.*

93 *Advisory Council Report*, *supra* note 72, at 19.

94 *Id.*

95 *Id.*

96 *See Advisory Council Report*, *supra* note 72, at 26 (comments of Sabine Leutheusser-Schnarrenberger, member of the German parliament and former German Federal Justice Minister).

97 *Advisory Council Report*, *supra* note 72, at 17.

circumstances surrounding the deletion request.[98] The Google Advisory Council noted that it received conflicting input about the legality of a search engine operator informing a web publisher of the deletion of a link to its web page.[99] The Advisory Council took the position that web publishers have valid concerns supporting such notification, and therefore concluded that search engine operators should notify web publishers of deletions "to the extent allowed by law."[100] With respect to the general public, the Working Party stated that notification of deletion is permissible only in a general sense, as long as the public cannot determine that a particular person has asked for deletion of a search link to information about him or her.[101] The Advisory Council generally agreed, but also recommended that search engines be as transparent as possible within legal limits.[102] It recommended disclosing information about deletion requests and decisions through anonymized and aggregated statistics.[103] Google has already done this through a web site that reports deletion requests from Europe.[104] As of March, 2015, the website reported that Google had received over 230,000 deletion requests from Europe since May 2014, causing it to evaluate over 850,000 search links.[105]

V. "FORGETTING" IN THE FUTURE

As of March, 2015, European data protection law was in transition from the Directive to the Proposed Data Protection Regulation which was not yet in final form. The "right to be forgotten" would be clarified and strengthened under both versions of the Proposed Data Protection Regulation: the one published by the European Commission in January, 2012,[106] and the Amendments approved by the European Parliament in March, 2014.[107] Both versions would establish a right of deletion that is broader than the right which the Court of Justice of the European Union inferred from various provisions in the 1995 Data Protection Directive in its decision in *Google Spain*.

[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Advisory Council Report*, *supra* note 72, at 3.
[102] *Id.* at 21.
[103] *Id.*
[104] *See* Google, *Transparency Report: European privacy requests for search removals, available at* http://www. google.com/transparencyreport/removals/europeprivacy/?hl=en (last visited Mar. 29, 2015).
[105] *Id.*
[106] *See Proposed Regulation, supra* note 8, at Art. 17.
[107] *See Amendments, supra* note 9, at Art. 17.

Article 17 of the Commission's version of the Proposed Regulation, which is titled "Right to be forgotten and to erasure," gives the data subject the right to obtain from the controller the right to erasure and the right to prevent further dissemination of data under four situations.[108] As amended by Parliament, the title of Article 17 is shortened to "Right to erasure."[109] More significantly, the amended version clearly states that the data subject's rights can be asserted directly against third parties as well as the controller.[110] The change is important because it makes clear that any third party will have a duty to delete, regardless of whether it fits within the definition of "controller."

Three of the provisions triggering the right of erasure are identical in both versions of Article 17. Under Article 17(1)(a), erasure is required when "the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed."[111] The use of the word "necessary" makes this provision broader than the one in the Directive, which defines one of the requirements of permissible data processing using the phrase "adequate, relevant and not excessive in relation for the purposes for which they are collected and/or further processed."[112] Application of the standard of what is "necessary" would require a balancing of interests, similar to what the court did in *Google Spain*. Another situation which is identical in both versions is the one requiring erasure "when the storage period consented to has expired and there is no other legal ground for the processing of the data."[113] The other identical situation is one requiring erasure when a data subject objects to processing in several situations.[114] One of those situations, direct marketing, is unconditional,[115] but the others (involving vital interests of the data subject, public interest and legitimate interests of the controller) [116] can limit the data subject's right to object when a controller demonstrates "compelling legitimate grounds for processing which override the interests or fundamental

[108] *See Proposed Regulation, supra* note 8, at Art. 17.
[109] *See Amendments, supra* note 9, at Art. 17.
[110] *Id.* at Art 17(1)(a).
[111] *Id*.
[112] *Directive, supra* note 2, at Art. 6(1)(c).
[113] *Id*. at Art. 17(1)(a).
[114] *See Proposed Regulation, supra* note 8, at Arts. 19 & 6.
[115] *See id.* at Art. 19(2).
[116] *See Proposed Regulation, supra* note 8, at Art. 6(1)(d)-(f). (The three provisions are: (d) "processing necessary in order to protect the vital interests of the data subject," (e) "processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller," and (f) "processing necessary for the purposes of the legitimate interests pursued by a controller . . . .")

rights and freedoms of the data subject."[117] In other words, by placing the burden of proof on the controller, the data subject's objection has a good chance of resulting in erasure of the data. However, in these instances there will need to be a balancing of interests, even though the scales are weighted in favor of the data subject.

Another provision triggering the right of erasure is different in the two versions of Article 17. The Commission's proposal requires erasure when processing "does not comply with this Regulation for other reasons"[118] (i.e. for reasons not specified in Article 17.) Parliament, however, used broader language stating that erasure is required when "the data has been unlawfully processed,"[119] which would include other sources of law (e.g. The Charter of Fundamental Rights and Freedoms, other regulations and directives, etc.)

The most significant difference between the two versions of Article 17 involves third parties. In the Commission's version, the data subject has an explicit right of erasure only against a controller. When the controller has made the data public, it is only obligated to take "reasonable steps" to inform third parties which are processing the data that the data subject requests them to "erase any links to, or copy or replication of that personal data."[120] Parliament's Amendment, however, clearly states that the data subject's right of erasure applies directly to a third party as well as to a controller.[121] It does, however, retain the language obligating a controller to inform third parties of the erasure request.[122] In addition, the Amendment obligates the controller to "inform the data subject, where possible," of the erasure by relevant third parties.[123] Consequently, if the final version of the Data Protection Regulation incorporates Parliament's language, data subjects will have broad erasure rights against anyone who has the data.

In addition to proposed changes in EU law, other ways of improving the process of "forgetting" have been suggested. One proposal would allow people who post their own information online to specify an expiration date for the information.[124] Another suggestion is to establish a process enabling people to wipe out their personal information through "reputation "bankruptcy" once every ten years.[125]

[117] *See Proposed Regulation, supra* note 8, at Art. 19(1).
[118] *Id.* at Art. 17(1)(d).
[119] *See Amendments, supra* note 9, at Art. 17(1)(d).
[120] *See Proposed Regulation, supra* note 8, at Art. 17(2).
[121] *See Amendments, supra* note 9, at Art. 17(1).
[122] *Id.* at Art. 17(2).
[123] *Id.*
[124] *See* MAYER-SCHONBERGER, *supra* note 10, at 170.
[125] *See, e.g.,* Lilian Mitrou and Maria Karyda, *EU's Data Protection Reform and the*

With respect to implementation of the Google Spain decision, the Google Advisory Council received some interesting proposals during public hearings held in Europe. One involved the possibility of search engine operators collaborating to standardize the link removal process and jointly funding an arbitration board that would resolve disputed deletion requests.[126]

Other proposals involved technological responses. One suggestion was to establish a mechanism for a data subject to post responses to inadequate, irrelevant, inaccurate or outdated information.[127] Another proposal was to create a process for demoting, rather than deleting, search links so that links to older, less relevant, information would appear further down the list of links displayed after a search.[128] Currently, search engines put links to the most sensational information at the top of the list of search results, regardless of the age of the web pages to which the links relate.[129] This type of modification of search results is an example of a process described by one scholar as "rusting," in which technology gradually obscures the digital "memory" in a way that is similar to the way in which the human brain gradually forgets information over time.[130] Other suggested technological "rusting" mechanisms include slowing retrieval times for older information,[131] and requiring more information to be entered into a search query to obtain links to older information.[132] These suggestions would restore some of the "practical obscurity" mentioned above that existed before the invention of search engines and the Internet.[133]

The importance of freedom of expression is also noted in the Commission's and Parliament's versions of the Proposed Data Protection Regulation. Both versions state that EU Member States shall provide for exceptions to the Regulation under national law in order to reconcile the right to data protection with rules governing freedom of expression.[134] The Commission's version specifies that the

right to be forgotten - A legal response to a technological challenge?, available at http://ssrn.com/abstract=2165245 (last visited Mar. 26, 2015) (explaining a proposal by Jonathan Zittrain.)

126 *See Advisory Council Report*, *supra* note 72, at 34, 36.

127 *See id.* at 37. This proposal is similar to a provision of the Fair Credit Reporting Act, which allows U.S. a consumer to add a short statement to a credit report giving of his or her version of facts regarding a disputed debt. *See* 15 U.S.C. § 1681i(c).

128 *See Advisory Council Report*, *supra* note 72, at 37.

129 *See* MITROU, *supra* note 125, at 17.

130 *See* MAYER-SCHONBERGER, *supra* note 10, at 193.

131 *Id.*

132 *Id.*

133 *See supra* text accompanying note 12.

134 *See Proposed Regulation, supra* note 8, at Art. 80(1); *Amendments, supra* note 9, at Art. 80(1).

exceptions are to be "solely" for "journalistic purposes" or "artistic or literary expression."[135] Parliament's amended version uses broader language stating that exceptions be based on "rules governing freedom of expression in accordance with the Charter of Fundamental Rights of the European Union.[136] Accordingly, application of the "right to be forgotten" in the Proposed Regulation will, in many instances, include consideration of limitations protecting freedom of expression.

VI. CONCLUSION

The European Union's "right to be forgotten" is rooted in a culture which has a tradition of placing a high value on human dignity. Criticism in the U.S. of the European Court of Justice's decision in *Google Spain*, and concern about a strengthened right to be forgotten in the Proposed Data Protection Regulation, are partially explained by the high value that American culture places on freedom of expression. While both cultures acknowledge the need to strike a balance between the two values, the balancing process will reach different results in many situations. European data protection law, under both the Data Protection Directive and the Proposed Regulation, includes privacy protection based largely on dignity. Moreover, the balancing of rights of privacy and freedom of expression in Europe by data protection agencies and courts reflects the underlying culture. American businesses can benefit by understanding the importance of the cultural foundation of European data protection law in order to better adapt their practices to legal requirements that differ significantly from those in the U.S.

[135] *See Proposed Regulation, supra* note 8, at Art. 80(1)
[136] *See Amendments, supra* note 9, at Art. 80(1).

GREED TRUMPS ETHICS IN THE SPORTS WORLD: INDIVIDUALS AS PROPS

by David Missirian, Scott Thomas, and Mystica Alexander*

I. INTRODUCTION

Caddies on the Professional Golf Association Tour (Tour)[1] carry golf clubs, read greens, rake bunkers, repair divots, estimate yardage to the pin, assist in club selection, console, motivate, strategize, coach, and act as human billboards for tournament sponsors of the Tour.[2] The Tour, not the players the caddies represent, converts the caddies into human billboards by requiring the wearing of bibs displaying the logo of the tournament sponsor without compensation to the caddies.

Converted to individual props for Tour advertising, the caddies began to object in 2014. Failed negotiations with the Tour commissioner[3] ultimately led to a class action lawsuit filed in February, 2015. At the latest count, the class includes 167 caddies objecting to the Tour's failure to compensate them for the advertising revenue generated for the Tour by the bibs the caddies wear during Tour play. While this case may be grabbing the headlines at the moment, the legal and ethical implications of this case go far beyond

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[1] The Tour operates through PGA TOUR, Inc., a Maryland corporation with a permanent place of business in San Francisco, California.

[2] Douglas Coate & Michael Toomey, *Do Professional Golf Tour Caddies Improve Player Scoring?* 15(3) J. OF SPORTS ECON. 303, 303 (2014).

[3] Karen Crouse, *In a Game of Honor, the Supporting payers Demand their Fair Share*, N.Y. TIMES SP7 (Feb. 8, 2015).

the golf links. In fact, upon further exploration, it becomes clear the problem is almost endemic in the sports world in which one can find repeated instances of individuals treated as props, as profit-generating entities without any acknowledgement of the individual's entitlement to share in the pie. Recent cases brought against the NCAA and the Ultimate Fighting Championship (UFC) similarly reflect a disregard of the individuals that serve as sources of revenue for their respective organizations.

This paper explores the legal and ethical implications that arise from an organization's use of another as a revenue stream without compensation. Part II will explore the legal implications of use of another's name or likeness without permission and/or compensation and the violation of another's right of publicity. Part III explores the potential antitrust implications that necessarily arise in such situations. The legal implications notwithstanding, the ethical considerations in such cases make clear the injustice of failing to compensate those who have contributed to the creation of revenue. Part IV explores that ethical dimension. Ultimately, this paper concludes that the siren's song of power and riches, coupled with some men's insatiable greed, can at times overwhelm the human quality of compassion for one's fellow man, leading men to treat some human beings more like objects than as the feeling sentient beings they are.

II. DEFENDING YOUR NAME, LIKENESS, AND "PERSONAL REAL ESTATE"

Those who use another's name, likeness, or image without permission and for an exploitative purpose may be found liable for such actions under the laws of most states.[4] While those actions generally must be for a commercial benefit in order to violate state law, in some states such actions for personal benefit will also be prohibited.[5] In the sports world, athletes and other participants have wrestled sports organizations for the use of their names, likenesses, and images. Now, caddies would like to extend that coverage to protection from demands to place Tour sponsor advertisements on the bibs they wear as they walk the course with their players.

[4] *Using the Name or Likeness of Another*, DIGITAL MEDIA L. PROJECT, http://www.dmlp.org/legal-guide/using-name-or-likeness-another (last visited Apr. 2, 2015).

[5] *Id.*

A. Early History and Development of the Law

Concerned with unwarranted intrusions of the Boston press, Samuel D. Warren and Louis D. Brandeis prepared an essay in the Harvard Law Review arguing for a common law or state statutory right to privacy. "The press is overstepping in every direction the obvious bounds of propriety and of decency," they wrote.[6] Their essay led to further development of a right to privacy.

Twelve years after the publication of the Warren and Brandeis essay appeared, Abigail Roberson brought a lawsuit against Rochester Folding Box Co. for using her picture in a flour advertisement.[7] The New York appellate court ruled that she had no recognized protected interest at that time.[8] The decision led to a public outcry and the emergence of legislation protecting the use of a person's name, portrait or picture for advertising purposes or for purposes of trade, without first obtaining that person's written consent.[9]

The enactment of the New York statutes may have provided the needed impetus for other states to acknowledge that a person's likeness may constitute a protected interest. Three years after Abigail Roberson's New York lawsuit, the Georgia Supreme Court ruled that Paolo Pavesich could recover from New England Life for using his likeness in an advertisement without compensation or permission.[10]

In 1953, the Second Circuit coined the name used for this right today, the right of publicity. In *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*,[11] the Second Circuit wrote

> In addition to and independent of that right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . This right might be called a "right of publicity."[12]

After this decision, Melville B. Nimmer wrote *The Right of Publicity*.[13] In this article, Nimmer, counsel to Paramount Pictures at the time, argued for a separate right of publicity to meet the particular needs of actors. Nimmer sought the recognition of the right of publicity as a distinct right to protect the commercial interests in identity.[14]

[6] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

[7] Roberson v. Rochester Folding Box Co., 64 N.E. 442 (1902).

[8] *Id.*

[9] N.Y. Civ. Rights Law § 51 (McKinney 1909).

[10] Pavesich v. New England Life Insurance Co., 50 S.E. 68 (1905).

[11] 202 F.2d 866 (2d Cir. 1953).

[12] *Id.* at 868.

[13] Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

[14] Lindsay Korotkin, *Finding Reality in the Right of Publicity*, CARDOZO L. REV. DE

In 1960, William L. Prosser published an analysis of privacy law that formed the basis of many decisions that followed and defined each of the rights of privacy.

> Without any attempt to exact definition, these four torts may be described as follows:
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[15]

Courts, such as the Second Circuit in *Haelan*, had already recognized some or all of the four torts described in Prosser's analysis, and others followed in the years since. It is the fourth tort that concerns us when we consider the rights of individuals used as props. Following the Second Circuit's language in *Haelan* and Nimmer's article, the courts have adopted the "right of publicity" as an apt description of the fourth tort.

Today, the right of publicity, in the words of the Restatement (Third) of Unfair Competition section 46, bars people from "appropriat[ing] the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade."[16] Similarly, statutes such as California Civil Code section 3344 bar "us[ing] another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent."[17]

B. Elements of the Right to Publicity Claim

Plaintiffs pursuing right to publicity claims must establish the elements of the claim and contend with First Amendment defenses.

1. Making a Prima Facie Case

A right of publicity claim requires that a plaintiff must prove the defendant's use of the plaintiff's identity; the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; lack of consent; and a resultant injury.[18]

NOVO 268, 278 (2013), http://www.cardozolawreview.com/content/denovo/KOROTKIN_2013_268.pdf.

[15] William L. Prosser, *Privacy,* 48 CAL. L. REV. 383, 389 (1960).

[16] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

[17] Cal. Civ. Code § 3344(a) (West 1971).

[18] In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268,

Use of the plaintiff's identity has often involved matters where the parties to the case debated whether the plaintiff's identity is identifiable. These disputed matters have included situations where plaintiffs believed they could be identified by their name, biographical information, persona, voice, mannerisms, or otherwise.[19]

The second element, commercial exploitation of a plaintiff's identity, was originally confined to celebrities because they had created substantial value in their identity.[20] However, the courts later shifted their focus from the celebrity of the plaintiff to whether the defendant received a commercial advantage.[21]

The third element, lack of consent, simply means the defendant used the plaintiff's identity without permission and failed to compensate the plaintiff for such use. More recently, the unequal bargaining power of plaintiffs and defendants has led to numerous questions with respect to whether the plaintiff has consented to the use of his or her identity.[22]

Finally, the resultant injury standard requires that a plaintiff prove damages as a result of the invasion of the plaintiff's right of publicity. Similar to the second element, the application to non-celebrity plaintiffs has been disputed. In the context of non-celebrities, the courts have debated whether the right of publicity has any application or whether it merely factors into a discussion of the relative amount of damages or resultant injury. Courts adopting the latter viewpoint have held that a non-celebrity has a right of publicity and the mere fact of the defendant's use proves there is a commercial value to the identity.[23] Supporting the right of publicity for non-celebrities, the Restatement of the Law of Unfair Competition does not restrict this right to celebrities.[24]

1273 n.4 (9th Cir. 2013) *cert. dismissed sub nom.* Elec. Arts Inc. v. Keller, 135 S. Ct. 42 (2014) (citing Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 679 (2010)).

[19] James J. S. Holmes & Kanika D. Corley, *Defining Liability for Likeness of Athlete Avatars in Video Games*, LOS ANGELES LAWYER, May 2011, at 17, 18.

[20] Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983).

[21] Henley v. Dillard Dep't Stores, 46 F.Supp. 2d 587, 597 (N.D. Tex. 1999).

[22] *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-3329 CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014). In their complaint, the members of the class alleged that student-athletes signed away their licensing rights through Form 08-3a "under duress and without informed consent." Complaint at 4, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-3329 CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014) (No. CV 09 3329).

[23] Jennifer L. Carpenter*, Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3 (2001), *available at* http://www.vjolt.net/vol6/issue1/v6i1a03-Carpenter.html.

[24] RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46 cmt. d. (1995).

2. First Amendment Defenses

If the plaintiff is able to make the prima facie showing described above, the court will then balance the plaintiff's right of publicity claim against First Amendment defenses. When the right of publicity conflicts with the First Amendment, courts have applied one of four tests to analyze the competing interests of the rights holder and the public. These tests include the transformative use test, the balancing test, the artistic relevance test, and the predominant purpose test.[25]

Under the transformative use test, work that depicts an individual's identity enjoys First Amendment protection if it represents an artist's creative expression rather than merely an imitation of the individual's identity.[26] Under the balancing test, courts balance the defendant's First Amendment rights against the plaintiff's right of publicity.[27] Under the artistic relevance test, use of an individual's name or likeness will be protected by the First Amendment as long as it is not "wholly unrelated" to the contents of the work.[28] Finally, under the predominant purpose test, an unauthorized use of another's identity is protected if the purpose of the work is predominantly expressive, but it infringes on the right of publicity if the purpose of the work is predominantly commercial.[29]

In addition, the Restatement (Third) of Unfair Competition has limited the scope of the protection afforded plaintiffs in recognition of the application of a potential First Amendment defense. Section 47 of the *Restatement* limits the scope of section 46 in the following manner:

> The name, likeness, and other indicia of a person's identity are used "for purposes of trade" under the rule stated in § 46 if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use "for purposes of trade" does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.[30]

C. Application to Cases in the Sports World

Charges of invasion of the right of publicity have been asserted in a variety of cases in the sports world in recent years.[31] Most notably,

[25] Lindsay Korotkin, *supra* note 14, at 306-9.

[26] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 809 (Cal. 2001).

[27] Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 972 (10th Cir. 1996).

[28] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989).

[29] Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003) (en banc).

[30] RESTATEMENT (THIRD) OF UNFAIR COMPETITION §47 (1995).

[31] *See, e.g.*, Abdul-Jabbar v. General Motors Corp., 75 F.3d 1391 (9th Cir. 1996); ETW

recent litigation concerning NCAA players with avatars appearing in videogames have made the headlines and provided some instruction to plaintiffs considering their response to having their likenesses used by governing organizations.

1. NCAA Players as Videogame Props

In the *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*,[32] the Ninth Circuit considered whether Electronic Arts (EA) violated a former college football player, Sam Keller's right of publicity under California law by using the player's likeness as part of a video game, *NCAA Football*.[33] In *NCAA Football*, an avatar represents each football player on a school's team. Although the name and hometown of the real player is not listed for the avatar, the avatar is nearly identical to the player in all other respects such as actual jersey number, height, weight, build, skin tone, hair color, and home state.[34] The defendant in the case, EA, conceded that Keller stated a right of publicity claim under the common law and statutory law of California.[35]

Relying on the First Amendment, EA maintained that its use of a player's likeness contained significant transformative elements taking into account the game as a whole and the ability of the players of the game to modify the avatars' features. However, the Ninth Circuit held the depiction of Keller was not sufficiently transformative to provide First Amendment protection.[36] EA also argued the court should apply the more lenient artistic relevance or "Rogers test" to right of publicity claims. The Ninth Circuit refused to adopt this test, reasoning "the right of publicity ... does not primarily seek to prevent consumer confusion and therefore the artistic relevance test was not an appropriate assertion in a right of publicity claim."[37]

Ryan Hart, a former Rutgers quarterback, brought a similar right of publicity claim against EA in October 2009, alleging EA used his likeness as an avatar in *NCAA Football*. The New Jersey district court granted summary judgment in EA's favor, finding the use of Hart's

Corp. v. Jireh Publishing, Inc., 99 F.Supp. 2d 829 (N.D. Ohio 2000); O'Bannon, *supra* note 22.

[32] 724 F. 3d. 1268 (9th. Cir. 2013), *cert. dismissed sub nom*. Elec. Arts Inc. v. Keller, 135 S. Ct. 42 (2014).

[33] *Id*. at 1271.

[34] *Id*.

[35] *Id*.

[36] *Id*. at 1276.

[37] *Id*. at 1282 (looking for guidance from other circuits, the court noted that the Sixth Circuit has applied the Rogers Test in right-of-publicity cases but has only done so inconsistently).

likeness was sufficiently transformative to warrant First Amendment protection and outweighed Hart's right of publicity in his likeness.[38]

In May 2013, the Third Circuit reversed the decision of the lower court, holding the First Amendment did not shield EA from liability.[39] The Third Circuit applied the transformative use test to find *NCAA Football* did not sufficiently alter Hart's identity. Therefore, EA was not entitled to First Amendment protection. In part, the court reasoned the videogame avatar possessed many of Hart's physical attributes and contextual similarities, such as hair color, skin tone and Rutgers uniform accessories.[40]

2. Tour Caddies as Props

Bibs worn by the Tour caddies serve multiple purposes. While the bibs act as a repository of tees, pencils, and score cards, they also serve as a marketing tool, a canvas for advertising by an event's sponsor. The recent lawsuit seeks $50 million in damages from the PGA Tour to compensate for the requirement that the caddies wear such bibs during tournament play. The lawsuit was filed after the Tour board of directors refused to consider a proposal by the caddies for permission to use some of the space to advertise products they endorse.[41] Kenny Harms, one of the parties to the lawsuit, explained the reason for bringing the case: "I know that bib should be ours, that you should be able to control your own real estate on your body and your likeness."[42]

As it relates to the right of publicity, the complaint alleges, among other issues, the following:

> By forcing Plaintiffs to wear the bibs, Defendant knowingly and intentionally used the images and likenesses of Plaintiffs for marketing purposes without Plaintiffs' consent. Specifically, Defendant used Plaintiffs' likenesses and images at professional golf tournaments and in broadcasts of those tournaments to endorse the products and services of bib sponsors. Defendant also used Plaintiffs' likenesses and images to market bib space to potential Endorsement Consumers.[43]

[38] Hart v. Elec. Arts, Inc., 808 F.Supp.2d 757 (D.N.J. Sept. 9, 2011) *rev'd* 717 F.3d 141 (3d Cir. 2013).

[39] Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013), *cert. dismissed*, 135 S. Ct. 43 (2014).

[40] *Id.* at 170.

[41] John Strege, *How a Caddie Bib Led to a $50 Million Lawsuit Against the PGA Tour*, GOLF DIGEST (Feb. 10, 2015), http://www.golfdigest.com/blogs/the-loop/2015/02/how-a-caddie-bib-led-to-a-50-m.html.

[42] *Id.*

[43] Complaint at 20, Hicks v. PGA TOUR, Inc., No. 3:15-cv-00489 (N.D.Cal. filed Feb. 3, 2015), 2015 WL 436042.

> Plaintiffs never consented to Defendant's use of their likenesses and images for commercial purposes. Rather, Defendant PGA TOUR forced Plaintiffs to wear the bibs by threatening to interfere with Plaintiffs' relationships with their respective players and individual sponsors. Defendant threatened to impose further limits on Plaintiffs' right to endorse their individual sponsors if Plaintiffs refused to wear the bibs.[44]
>
> Had Plaintiffs been paid for the use of their likenesses and images, Plaintiffs could have collectively earned over $50 million during the 2013-2014 golf season and similar sums during other seasons at issue in this lawsuit. Plaintiffs seek to recover the sums they would have earned had they been paid for the use of their likenesses and images in promoting the goods and services advertised on the bibs.[45]

On its face, the caddies' complaint appears to assert the elements of a prima facie case for a right of publicity action against the Tour. In other words, the complaint asserts the Tour intentionally used the caddies' likenesses, without consent, for commercial advantage, resulting in injury. Delays followed after the Tour requested a change of venue. To date the Tour has not yet filed an answer. However, we should anticipate challenges to the elements of the caddies' claim. There likely will be lively debates with regard to whether the caddies' likenesses were used, whether the caddies consented, whether the caddies lack of celebrity factors into their ability to recover, and whether there is commercial value to the caddies' claims. Stated differently, the court will face the following questions: Has the Tour appropriated the likenesses of the caddies by converting them to billboards and renting space on their bibs to Tour sponsors? Does the economic coercion asserted by the caddies constitute a lack of consent? Will the caddies' status as non-celebrities bar the claim, or lead to a conclusion of no commercial value from which the caddies can recover?

Although it is premature to handicap the results, we can identify some of the strengths and weaknesses of the caddies' case. It is unclear whether the invasion of "person real estate" constitutes an appropriation of the name and likeness of the caddies. This litigation may constitute a case of first impression. The unequal bargaining power of the caddies and the Tour appears comparable to issues that have faced courts in other matters, which may result in a finding of a lack of consent.[46] Finally, as the law in this area has developed, the availability of right of publicity claims for non-celebrities has expanded. Although non-celebrities lacked recourse initially, most

[44] *Id.* at 20-21.
[45] *Id.* at 21.
[46] *See, e.g.*, O'Bannon, *supra* note 22.

courts believe non-celebrity status currently operates as an element for measuring a claim rather than a bar to a claim of right to publicity.[47]

III. THE LEGAL CONSEQUENCES IN ANTITRUST

In order to understand the antitrust laws and how they apply to the sporting world and the individual athletes engaged in that world of sports, one needs to briefly review the origins of antitrust law as it applied to the world of business in the late 1800s.

A. The States, Congress and the Courts try to Corral a Simpler Time in the World of Business

In the era predating antitrust laws, the American economy was largely agricultural.[48] That sector, though geographically large, was depressed economically and was looking for a source of its economic woes.[49] In contrast to the agricultural sector, the railroads and other companies, held in the form of large concentrated trusts, were doing well.[50] "At that time, Standard Oil and its affiliates controlled more than 90 percent of the oil refining capacity and most of the oil marketing facilities in the U.S.[51] Large trusts were also established in numerous other industries, some of the largest of which were sugar, tobacco, railroads, steel and meatpacking."[52] This was a post-civil war era where mass production and control of large sectors of the economy by monopolies or cartels were increasingly prevalent.[53] There was abusive behavior, industries colluding and acting unilaterally for their own benefit at the expense of another. Then, as now, the law stepped in to curb abuses.[54]

In response to this monopolistic economic environment Congress passed various antitrust legislation, including the Sherman Act, the Clayton Act and the Robinson-Patman Act, all of which were designed to stem the tide of monopolistic and anticompetitive behavior which had become so prevalent. Initially, antitrust violations were brought against major companies and trusts who attempted to control or limit competition, such as Standard Oil and AT&T. Professional sports

[47] *See*, Carpenter, *supra* note 23.

[48] George J. Stigler, *The Origins of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985).

[49] *Id.*

[50] *Id.* at 2.

[51] *The Sherman Antitrust Act*, LINUX INFO. PROJECT (June 17, 2004), http://www.linfo.org/sherman.html.

[52] *Id.*

[53] *The Sherman Anti-Trust Act of 1890*, STATE DEP'T BUREAU OF INT'L INFO. PROGRAMS (Apr. 3, 2008), http://iipdigital.usembassy.gov/st/english/publication/2008/04/20080423212813eaifas0.42149.html#axzz3VEbuSsNz.

[54] *Id.*

organizations remained relatively free from antitrust entanglements. In fact, in 1922 the U.S. Supreme Court declared in *Federal Baseball Club of Baltimore Inc. v. National League of Professional Baseball Clubs*,[55] that professional baseball was exempt from antitrust litigation because the legislation being Federal in character required there be an effect on interstate commerce. Though the teams crossed state lines in an effort to give exhibitions of baseball, these are purely State affairs where traveling from state to state is only incidental to the game.[56] This decision was further solidified in 1953 in *Toolson v. New York Yankees, Inc.*[57] in which the U.S. Supreme Court reaffirmed its prior decision made thirty years earlier in *Federal Baseball Club* by stating "that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws" and the Court would not retrospectively change Congress' failure to act.[58] Despite the Court's position outlined in *Toolson* in 1953, twenty years later in *Flood v. Kuhn*,[59] the Supreme Court began what can be considered the eventual demise of the professional sports' protection from antitrust litigation.[60] In *Flood*, the Court's tenor seemed to change. It seemed uneasy with the fact that its prior decisions made in *Federal Baseball* and in *Toolson* were being used in other business environments to exempt those companies from antitrust treatment.[61] It seemed the Court wanted to limit the expanse of these cases to baseball alone.[62]

Flood was a turning point for the court where the court would no longer allow the business of professional sports to be segregated. The Court stated, "[p]rofessional baseball is a business and it is engaged in interstate commerce."[63]

"It (*Toolson* and *Federal Baseball*) is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and

[55] 259 U.S. 200 (1922).
[56] *Id*. at 209.
[57] 346 U.S. 356 (1953).
[58] *Id.* at 357.
[59] 407 U.S. 258 (1972).
[60] *Id*.
[61] *Id.* at 279.
[62] *Id.* ("[S]ince Toolson and Federal Baseball are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, i.e., the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to - but not extend - the interpretation of the Act made in those cases") (quoting Radovich v. Nat'l Football League, 352 U.S. 445 (1957)).
[63] *Id.* at 282.

an acceptance of baseball's unique characteristics and needs."[64] "Other professional sports operating interstate - football … boxing, basketball, and, presumably, hockey and golf- are not so exempt."[65]

The die was cast and the protections so long enjoyed by various sports organizations would no longer be tolerated. Despite the clear message conveyed by the Supreme Court in *Flood*, that it would only be giving antitrust protection to baseball, the other professional sports organizations either failed to hear the message or decided that potential profits required they not heed the message.

B. The Basic Workings of a Complex Antitrust System

Violations under the Sherman Act and its various amendments take one of two forms: either as a per se violation or as a violation of the rule of reason.[66] Section 1 of the Sherman Act delineates and prohibits specific means of anticompetitive conduct, characterizing them as per se violations.[67]

A per se violation requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice.[68] "To justify a per se prohibition a restraint must have manifestly anticompetitive effects … and lack ... any redeeming virtue."[69] Certain actions have such a negative effect on competition that they are almost always per se violations.[70] These include arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These "per se" violations of the Sherman Act generally have no defense or justification.[71] Other section 1 violations at times constitute anticompetitive behavior and at other times encourage competition within the market, thus a rule of reason analysis is performed.[72] "Under this rule, the fact finder weighs all of

[64] *Id.*

[65] *Id.* at 283.

[66] *Antitrust*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/antitrust (last visited Apr. 3, 2015).

[67] *Id. See also* 15 U.S.C. § 1 (1890) ("[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce…is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony").

[68] *Antitrust*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/antitrust (last visited Apr. 3, 2015).

[69] *Id.*

[70] *The Antitrust Laws,* FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Apr. 3, 2015).

[71] *Id.*

[72] *Antitrust*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/antitrust (last visited Apr. 3, 2015).

the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[73]

Section 2 of the Sherman Act prohibits any person from monopolizing or attempting to monopolize or from conspiring with any other person to monopolize any part of trade or commerce.[74] "A monopoly conviction requires proof of the individual having intent to monopolize with the power to monopolize, regardless of whether the individual actually exercised the power."[75]

The goal of this intricate antitrust web was to balance the needs of diverse groups while at the same time to protect consumers by giving them access to a diverse quality and quantity of goods and services only available through a competitive marketplace.

C. Some Sports Organizations Want More Than Their Fair Share of the Pie

As professional sports and elite level collegiate sports began making large amounts of revenue from televising their sporting events and marketing various sports merchandise, it became apparent the disproportionate share of the spoils from these revenue streams were being reaped by a select few organizations and being denied to the players. The various types of revenue enhancing schemes have been going on for some time in both the professional and collegiate sporting world, and have ranged from controlling entire teams as a commodity to most recently using individuals on that team as mere pawns in a revenue game run by a few large cartels or a "select few" individuals.

A recent case in point involves the NCAA, the EA, and Ed O'Bannon, a former UCLA basketball star. Ed O'Bannon, and other present and past collegiate athletes, challenged NCAA rules "that bar student athletes from receiving a share of the revenue the NCAA and its member schools earn from the sale of licenses to use student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage" as a violation of the Sherman Act prohibition on restraint of trade.[76] These present and former students, in return for receiving school scholarships, athletic coaching, and access to the highest quality athletics services and facilities, agree to transfer to the NCAA member schools, and by extension the NCAA, all rights to the

[73] Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

[74] 15 U.S.C. § 2 (2004).

[75] *Antitrust*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/antitrust (last visited Apr. 3, 2015).

[76] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F.Supp.3d 955, 963 (2014).

use of their names, images, and likenesses for commercial and promotional purposes.[77]

As discussed in Part II of this paper, after stripping the students of their ability to control their individual identities, the NCAA then sold these identities to the highest bidder, EA, a video game developer. EA used the images to produce basketball and football video games which were sold to the general public.[78] From 1997 until 2013, EA sold these games, and therefore the images of these college players, earning EA 1.3 billion dollars on the football games alone.[79] In a similar fashion, the NCAA also sold the rights to televise their games to various television entities for a whopping 666 million dollars in 2012, and 681 million dollars in 2013.[80]

The NCAA defended the accusation that its actions were a violation of the Sherman Act as being "necessary to uphold its educational mission and to protect the popularity of the sport."[81] It is unclear how the NCAA and its member schools while earning millions of dollars at the expense of the student athletes (who received none of the licensing dollars) were acting in a way "necessary" to uphold the NCAA's educational mission.

Prior to the trial date, EA settled the case with O'Bannon and others for 40 million dollars. Clearly, EA saw the writing on the wall.[82] After trial, Judge Wilkens, U.S. District Court Judge for the Northern District of California, found "that the challenged NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools. The procompetitive justifications that the NCAA offers do not justify this restraint and could be achieved through less restrictive means."[83] The NCAA's action of attempting to earn huge profits, under the guise of educational opportunity and the preservation of collegiate sports integrity, was thankfully unsuccessful.

The potential for large amounts of money to be made in the sporting arena is a concept not lost on Zuffa, LLC dba Ultimate Fighting

[77] *Id.* at 966.

[78] *Id.* at 965.

[79] Roger Groves, *EA Sports Will Still Score Even More Financial Touchdowns Without the NCAA*, FORBES (Sept. 28, 2013 10:47 AM), http://www.forbes.com/sites/rogergroves/2013/09/28/ea-sports-will-still-score-even-more-financial-touchdowns-without-the-ncaa/.

[80] *Revenue of the NCAA from Television Broadcast Payments and Licensing Rights from 2010 to 2018*, STATISTICA, http://www.statista.com/statistics/219608/ncaa-revenue-from-television-rights-agreement/ (last visited Apr. 3, 2015).

[81] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F.Supp.3d 955, 963 (2014).

[82] *NCAA Settles with Former Athletes*, ESPN (June 9, 2014), http://espn.go.com/college-sports/story/_/id/11055977/ncaa-reaches-20m-settlement-video-game-claims.

[83] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F.Supp.3d 955, 963 (2014).

Championship (UFC), a mixed martial arts promoter being sued by many of its' individual fighters who participate in the arena of mixed martial arts. The fighters allege the UFC has engaged in a monopolistic scheme which has foreclosed to the fighters the possibility of fighting in any other mixed martial arts arena or venue, by systematically acquiring all available competition in the mixed martial arts arena.[84] The President of the UFC, Dana White, in 2010 boasted that UFC had essentially eliminated all of its competition.[85] White also proclaimed: "There is no competition."[86] As part of the UFC scheme, the fighters allege not only has the UFC eliminated competition, either by its contractual practices or by acquisition, but also UFC requires that in order to join the UFC, each fighter must assign all his likeness rights over to the UFC.

This requirement gives the UFC complete control over the marketing of each fighter's likeness, and given that the UFC controls over 90 percent of the fighting venues, there is little choice but to acquiesce to the UFC's demands.

As an example of a sports King running roughshod over its kingdom, "the UFC negotiated a deal with THQ, Inc. for the development of a UFC video game.[87] Zuffa required its athletes, for no compensation, to assign exclusively and in perpetuity their likeness rights for video game use.[88] Fighters who wished to negotiate this request were terminated, including Plaintiff, Jon Fitch.[89] White also publicly threatened to permanently ban all mixed martial arts fights, even those not under contract with Zuffa, from competing in the UFC if the fighter chose to sign with EA Sports."[90] The result of the UFC's actions are to turn the fighters in mixed martial arts into nothing more than expendable commodities, to be paid whatever the UFC chooses, a method used by other previously mentioned notables such as the NCAA.

The UFC earned over 500 million dollars last year.[91] Yet, because of lack of an alternative market, a situation purposely created by the UFC, mixed martial arts fighters have no other choice but to fight under the terms and conditions set by the UFC.[92] Some fighters are

[84] Complaint at 1, Cung Le v. Zuffa, LLC, No. 5:14-cv-05484 (N.D.Cal. filed Dec. 16, 2014), 2014 WL 7156838.

[85] *Id.* at 3.

[86] *Id.*

[87] *Id.* at 38.

[88] *Id.* at 38.

[89] *Id.* at 38.

[90] *Id.* at 38.

[91] *Id.* at 24.

[92] *Id.* at 26.

paid over $100,000 dollars per fight, while others as low as $6,000.[93] Though in boxing there is a federal law which requires promoters to disclose to the fighters how much their fights generate, giving the fighters a sense of their net worth, no such law exists for mixed martial arts.[94] "The top 5 percent [of fighters] are definitely making good money, but you've got to look at the guys at the bottom of the card," one fighter said. "They can't fight anywhere else. If they make $10,000 a fight, and fight every six months, they can't make ends meet."[95]

The above quote is a lament too often heard and is equally often ignored. Remembered is the premier player who is paid a decent sum, but forgotten are the many who are not at the top and who play for scraps, all while the few, like Mr. Zeritta, CEO of Zuffa LLC, sit and enjoy the view.

In a recent suit filed by the caddies of professional golfers against the PGA Tour, the professional caddies alleged the Tour's requirement that the caddies wear large bibs displaying corporate Tour sponsors violates the Sherman Act by restraining trade.[96] The caddies allege that because they are required to wear the sponsored bibs of the Tour, it inhibits their ability to obtain and display sponsorship of their own. The caddies state in their complaint that the value of the bib advertising is in excess of 50 million dollars.[97] This advertising revenue is a source of potential additional revenue being denied to the caddies by the Tour's policies. The caddies themselves earn on average $52,000.00 a year.[98] This right of the caddies to obtain independent endorsement opportunities is one which is granted to the caddies in the Tour's enforcement policy, yet this right is being infringed upon by the requirement that the caddies wear the Tour's logoed bibs.[99] The caddies contend that by restricting what the caddies may wear, the Tour is artificially reducing the relevant size of the marketplace, and therefore affecting the competition which would normally be present.[100]

[93] John Barr & John Gross, *UFC Fighters Say Low Pay Simply Brutal,* ESPN (Jan. 15, 2012), http://espn.go.com/espn/otl/story/_/page/UFCpay/ufc-fighters-say-low-pay-most-painful-hit-all.

[94] *Id.*

[95] *Id.*

[96] Complaint at 17, Hicks v. PGA TOUR, Inc., No. 3:15-cv-00489 (N.D.Cal. filed Feb. 3, 2015), 2015 WL 436042.

[97] *Id.* at 19.

[98] Matt Woolsy, *Top-Earning Caddies*, Forbes (June 11, 2007 12:00 PM), http://www.forbes.com/2007/06/08/caddy-golf-pro-forbeslife-cx_mw_0611caddy.html.

[99] Complaint at 6, Hicks v. PGA TOUR, Inc., No. 3:15-cv-00489 (N.D.Cal. filed Feb. 3, 2015), 2015 WL 436042.

[100] *Id.*

The caddies also allege the Tour is engaging in acts which unreasonably restrain trade in violation of Section 1 of the Sherman Act by threatening to interfere with the caddies' relationship with their respective players and with the caddies' individual sponsors if the caddies do not wear the bibs and endorse the Tour's sponsors without compensation.[101] If the caddies can prove this allegation the Tour would be guilty of a per se violation of Section 1 and could potentially incur fines of up to one hundred million dollars.[102]

The caddies' complaint also alleges the Tour is attempting to create a monopoly by engaging in conduct that will control all of the available endorsement space available in the Endorsement Market.[103] This allegation, if proved, would be a violation of Section 2 of the Sherman Act. The caddies themselves perform a critical service to the professional golfers. Some caddies' services are highly coveted. The actions of the Tour transform the caddies from individuals with rights of being and likeness into inanimate objects akin to walking billboards to be used by the Tour in any manner the Tour chooses.

IV. THE ETHICS OF IT ALL

To begin discussing whether the conduct of the various collegiate and professional sporting organizations is ethical we need to define what we mean by acting ethically. Is acting ethically different from acting morally?

Ethics is generally defined as "a set of moral principles, or in the area of study that deals with ideas about what is good and bad behavior."[104] Morality can be seen as a "conformance to a recognized code, doctrine, or system of rules of what is right or wrong and to behave accordingly."[105] Thus ethics can be thought of as an examination or study of moral principles or codes. What is unusual about this discussion is that some view a moral code as a fixed set of rules that transcends our common everyday experience while others see morality and moral conduct as being intimately linked to what society believes is moral and proper at that time and under those circumstances.

[101] *Id.* at 18.

[102] 15 U.S.C. § 1 (1890).

[103] Complaint at 19, Hicks v. PGA TOUR, Inc., No. 3:15-cv-00489 (N.D.Cal. filed Feb. 3, 2015), 2015 WL 436042.

[104] *Ethic Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ethic (last visited Apr. 3, 2015).

[105] *Morality Definition*, BUS. DICTIONARY, http://www.businessdictionary.com/definition/morality.html (last visited Apr. 3, 2015).

Alfred North Whitehead wrote: "What is morality in any given time or place? It is what the majority then and there happen to like, and immorality is what they dislike."[106] This quote suggests that morality is a fluid thing, which society creates rather than which exists independently of what society believes.

However, Confucius said "a gentleman takes as much trouble to discover what is right as lesser men take to discover what will pay."[107] For Confucius, what is right (or moral) is something we must discover, suggesting what is "right" exists independently of what society believes. Confucius feels those who fail to seek the "right" and only seek pay or profit, are the lesser men, a moral commentary potentially on some of our sporting coordinators!

Most ethical theories can be divided into two general groups, they are either duty based theories (deontology) or consequence based theories (teleology).[108] A duty based system measures conduct in terms of what ought to be done, the consequences notwithstanding, while a consequence based system evaluates ethical conduct based on the outcome. Some ethical theories contain elements of both duty based systems and consequence based systems.[109]

St. Thomas Aquinas, the father of natural law theory, has elements of both consequence theory and duty based theory in his approach.[110] Aquinas felt all thought was directed towards achieving good. "Good is to be done and evil is to be avoided."[111] For Aquinas this "good" or natural state is one which originates from the eternal law.[112] "The eternal law refers to God's providential ordering of all created things to their proper end."[113] Therefore, for Aquinas, our moral code originates with God and is incorporated in us. The difficulty here is that we view and interpret this heavenly moral code with our decidedly imperfect human eyes, which is clouded by that of original sin.[114]

[106] ALFRED NORTH WHITEHEAD, DIALOGUES OF ALFRED NORTH WHITEHEAD, 177 (1954).

[107] *The Analects of Confucius*, E. ILL. U., http://www.ux1.eiu.edu/~cfdks/confucius.htm, (last visited Apr. 3, 2015).

[108] GERALD R. FERRARA ET AL., THE LEGAL AND ETHICAL ENVIRONMENT OF BUSINESS 45 (2014).

[109] *Theory in Detail*, RELIGIOUS STUD. REVISION, http://www.rsrevision.com/Alevel/ethics/natural_law (last visited Apr. 3, 2015).

[110] *Id.*

[111] Shawn Floyd, *Thomas Aquinas: Moral Philosophy*, INTERNET ENCYCLOPEDIA OF PHIL., http://www.iep.utm.edu/aq-moral/#H4 (last visited Apr. 3, 2015).

[112] *Id.*

[113] *Id.*

[114] William S. Brewbaker III, *Thomas Aquinas and the Metaphysics of Law*, 58 ALA. L. REV. 575, 591, 610 (2007).

John Stuart Mill is a philosopher who uses the outcome based theory of Utilitarianism. The theory of utilitarianism is based on the notion of utility, which holds that "actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness."[115] For Mill, a morally correct action would be one which maximizes utility or the good for the greatest number of people.[116] Mill believed individuals should be free to develop themselves as individuals as long as they cause minimal or no harm to others.[117] John Stuart Mill is looking at our individual actions in the context of how they affect others.

The last major philosophical theorist to consider is Immanuel Kant. Kant created the philosophical theory known as the categorical imperative. "Act only on that maxim whereby thou canst at the same time will that it should become a universal law."[118] Or, to put it another way, act only in those ways where if your action were to become universal law you would still find the outcome morally acceptable. He also felt one should never use a person as means to an end, nor should one ever lie.[119] Kant viewed each person's duty to be one where they would treat themselves and therefore others with respect. Kant believed each action should begin with an intention to respect the moral law regardless of its consequence.[120]

Given this moral backdrop, let us examine, the various sporting organizations discussed thus far and see how their conduct sparkles under an ethical light. Will they be, to use Confucius' comparison, "gentlemen" of the sporting world or will they be "lesser men" searching only for that which will pay?

The NCAA stated in a prior antitrust suit in 1981 and in its present 2014 suit that its goal was to "…maintain intercollegiate athletics as an integral part of the educational program, and the athlete as an integral part of the student body, and by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports."[121] So to paraphrase, the NCAA's goal is to make intercollegiate

[115] Colin Heydt, *John Stuart Mill (1806-1873)*, INTERNET ENCYCLOPEDIA OF PHIL., http://www.iep.utm.edu/milljs/#SH2d (last visited Apr. 3, 2015).

[116] *Id.*

[117] *Id.*

[118] Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*, PROJECT GUTENBURG, http://www.gutenberg.org/cache/epub/5682/pg5682.html (last visited Apr. 3, 2015).

[119] *Id.*

[120] Tim Jankowiak, *Immanuel Kant*, INTERNET ENCYCLOPEDIA OF PHIL., http://www.iep.utm.edu/kantview/, (last viewed Apr. 2, 2015).

[121] Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L.

athletics a part of a student's collegiate learning experience as opposed to one which is a money making endeavor such as in a professional sport. In fact the issue of compensation is generally what divides an amateur sport from one which is professional.[122]

Despite the NCAA's purported commitment to its athletes and their scholastic achievement, apparently the NCAA's interpretation of its goal to maintain an amateur standing merely means the student athlete should be the only one not making money. For the NCAA it is completely acceptable to earn over half a billion dollars per year on television licensing without giving any significant portion of that money to the students who make the game possible. It is also completely ethical to sell the images of students to a video game designer, Electronic Arts Inc., so that company can earn over 81 million dollars per year in revenue, again without giving any of that revenue to the student players depicted in that game.

But "wait," cries the NCAA, we are being maligned. We are not the heartless money craving individuals you depict us as. We have provided those students with a free education!

Yet, but if that were the case, why do the students cry out: "I felt like an athlete masquerading as a student during my college years."[123] Why do professors state: "the time demands of their athletic obligations prevent many of them from achieving significant academic success."[124] Is this the greatest good for the greatest number of people as John Stuart Mill would have? Is this a behavior we would want everyone to emulate as stated in Kant's theory on determining ethical conduct? We think not. In an effort to potentially realign the NCAA's moral compass, possibly the NCAA could attend some of the college courses it makes so difficult for student athletes to fully participate in, Ethical Philosophy for example.

Though the collegiate sporting behavior may be questionable, is it any different in the professional sporting arena? After all this is a profession, a business, and therefore all participants' conduct should be, to put it simply, professional. The comforting nature of the word "professional" unfortunately hides the grim reality of the situation. Rather than behaving as a good corporate citizen, who considers the "effects of its actions not only on its shareholders, but on its customers,

REV. 837, 838 (2014).

[122] *Amateur Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/amateur (last visited Apr. 3, 2015).

[123] O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-3329 CW, 2014 WL 3899815 at *981 (N.D. Cal. Aug. 8, 2014).

[124] *Id.*

employees…. and the community…,"[125] today's professional sports organization seems to take a more limited view of its obligation to others. For most sporting professional organizations, the only stakeholder that is of import is the organization itself.

The Tour, which supervises and regulates the Game of Kings, treats only the royalty of the game with dignity and respect. Caddies, though an integral part of the game for some, are for the Tour mere servants, relegated to carrying the bags of their nobles, or sometimes lesser nobles. They are nothing more than a means to an end. Their function is to carry, to support, or to do or apparently be anything their noble or more importantly the King desires. The Tour sees no apparent conflict in promising the caddies the ability to acquire their own sponsors and promote those sponsors during tournament events, while at the same time forcing the caddies to display prominently the advertising of the Tour sponsors on large bibs, making it impossible for the caddies to display their own advertising. This substitution of sponsors would not be so egregious if not for the fact that the Tour gives none of the 50 million dollars it reaps for the bib advertising to the caddies. The Tour apparently views duplicity, contrary to Kant's admonition that one should never lie, to be an acceptable method of being professional. The King might proclaim "the caddies still have the soles of their feet to place their own sponsor's placards upon." This is yet another example of where participants in a sporting event are marginalized and minimized so much that they soon fail to exist as people at all. The Tour's treatment of caddies and the Tour's restrictive policies demonstrate how individuals can be minimized so much that they cease to become people we should concern ourselves with, but rather a means to an end, an odd state of the case for the Game of Kings, then again maybe not.

The UFC, as a profession apparently controlled almost solely by one man, fairs no better, and in many respects far worse. In this monarchy, the King creates no illusion of freedom. The participants in the sport are required to sign away all rights of likeness to the UFC. Their pay is set by the promoter who is the UFC. Though it might seem the participants have the ability to fight elsewhere once their contractual obligation is up, these people are fighting on a virtual competitive island, which is owned by the King, the UFC. There is nowhere for the participants to go. They receive only what scraps the King allows them to receive. Any additional monies they might receive from promoting their likeness or image for subsequent sale have been sold to the King in perpetuity. They have made a bargain with the devil, in the hopes

[125] FERRARA, *supra* note 105 at 164.

of achieving singular stardom and the possibility of wealth. But that possibility of wealth is only an illusion not realized by the many. "The top 5 percent [of fighters] are definitely making good money, but you've got to look at the guys at the bottom of the card," the fighter said. "They can't fight anywhere else. If they make $10,000 a fight and fight every six months, they can't make ends meet."[126] Again the participant's lament falls on deaf ears. Is this an action which St. Thomas Aquinas would consider Godly? Is this an action which promotes the Utilitarian idea of doing good for the many or is it a behavior of someone who only considers how the action affects the one? I suspect the owner of the UFC would say that he is only responsible for himself, and let the others eat cake.[127]

V. CONCLUSION

The story remains the same whether it is in the collegiate sporting arena or the professional one. The participants of the sport start out as athletes filled with the hope of success. There are also those who are integral parts of the game, the caddies, who today have the potential of enhancing their earnings through associated sporting promotions. These individuals sacrifice their time and themselves to fulfill a dream based on the promises of glory and riches of their promoters, their schools and their professional organizers. But the sad reality is that many of these athletes are forgotten and only a very select few ever succeed or are remembered. The glory, if any, is short lived and the riches promised are garnered by the few. The actions of the Tour, the UFC, and the NCAA regarding the treatment of their participants is much like that of Cain, who once asked, "Am I my brother's keeper?"[128] Clearly, they believe the answer is no.

[126] John Barr & John Gross, *UFC Fighters Say Low Pay Simply Brutal,* ESPN (Jan. 15, 2012), http://espn.go.com/espn/otl/story/_/page/UFCpay/ufc-fighters-say-low-pay-most-painful-hit-all.

[127] http://www.history.com/news/ask-history/did-marie-antoinette-really-say-let-them-eat-cake, (last visted April 3, 2015).

[128] *Genesis* 4:9.

EQUITABLE REMEDIES UNDER ERISA
THE SIXTH CIRCUIT'S POSITION IN *ROCHOW*

by John F. Robertson* and Patricia Quinn Robertson**

I. INTRODUCTION

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA)[1] to regulate employee benefit plans such as pension plans, health insurance plans, and disability insurance plans.[2] Before Congress enacted ERISA, state laws in the areas of trusts, contracts, employment, and insurance were the primary sources of law that governed employee benefit plans.[3] Prior to the enactment of ERISA, employers often engaged in practices that favored the employer, such as using "weasel clauses"[4] that described the benefits as "future gifts" from the employer instead of contractual agreements of the employer.[5]

Congress enacted ERISA to ensure that covered employee benefit plans are fair and financially sound.[6] These plans receive preferential tax treatment, impact interstate commerce, and affect the security of millions of employees and their dependents.[7] ERISA establishes

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1 29 U.S.C. §§1001-1461 (2012).
2 *Id.*
3 Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C.L. REV. 459, 468 (2014).
4 *Id.*
5 *Id.*
6 29 U.S.C. §1001(a) (2012).
7 *Id.*

minimum reporting requirements and standards of conduct for fiduciaries of employee benefit plans.[8] ERISA also includes vesting requirements and minimum funding requirements.[9]

ERISA provides various remedies to plaintiffs in the federal courts in § 502, and courts have held that these remedies for violation of ERISA preempt state law.[10] ERISA §502(a)(1)(B) empowers covered participants and beneficiaries of employee benefit plans to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[11] ERISA §502(a)(3) permits civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."[12]

This article discusses the struggle courts may experience in connection with the equitable remedies under ERISA[13] as illustrated by a March 5, 2015, opinion of the Sixth Circuit Court of Appeals in *Rochow v. Life Insurance Company of North America.*[14] The issue in *Rochow* is whether an employee should be able to obtain equitable relief under §502(a)(3) in addition to amounts recovered under §502(a)(1)(B) in cases of fiduciaries' "arbitrary and capricious denial of long-term disability benefits."[15] This article discusses the pros and cons of permitting plaintiffs to recover under both §502(a)(3) and §502(a)(1)(B) in connection with a denial of benefits and gives policy suggestions that arise from the *Rochow* case.

[8] *Id*. at §1001(b).

[9] *Id*. at §1001(c).

[10] 29 U.S.C. §1132. *See* 29 U.S.C. §1001(b); Aetna Health Ins. V. Davila, 542 U.S. 200, 214 (2004); Pilot Life Ins. Co. v. Dedeaux, 482 U.S. 41, 52 (1974). The remedies in ERISA §502 preempt state law remedies. *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995); Jillian Redding, *ERISA: Remedies, Preemption and the Need for More State Regulatory Oversight,* 18 CONN. INS. L.J. 169 (2011).

[11] 29 U.S.C. §1132(a)(1)(B).

[12] *Id.* at §1132(a)(3).

[13] *See, e.g.,* LaRue v. DeWolff, Boberg & Assoc., 552 U.S 248 (2008); Metro. Life Ins. v. Glenn, 128 S. Ct. 2343 (2008). Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004); Varity Corp. v. Howe, 516 U.S. 489 (1996); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985); Redding, *supra* note 10, at 182.

[14] 780 F.3d 364 (6th Cir. 2015).

[15] *Id*. at 370.

II. *ROCHOW V. LIFE INSURANCE COMPANY OF NORTH AMERICA*

Rochow sold his interest in an insurance company to Arthur J. Gallaher & Co. ("Gallagher") and became President of Gallagher.[16] He was President of Gallagher for ten years.[17] While he was President of Gallagher, employee Rochow began to suffer from a rare brain infection which caused memory problems and other problems, making it impossible for Rochow to perform his job duties.[18] In 2001 Rochow was demoted to Sales Executive - Account Manager after he became ill. His duties "included budgeting revenue, developing sales plans, and identifying new clients or new products for existing clients."[19] Rochow was forced to retire in 2002 because he could not perform these job duties.[20] Rochow began seeking long-term disability benefits under an employee benefit plan in 2002.[21] Life Insurance Company of North America (LINA) denied Rochow's claim for long-term disability benefits,[22] and subsequently LINA denied Rochow's three appeals of this denial.[23]

Rochow brought suit against LINA's parent company, claiming that LINA violated ERISA by failing to pay the long-term disability benefits and breaching its fiduciary duty.[24] The district court granted Rochow's

[16] Rochow v. LINA., 482 F.3d 860, 863-64 (6th Cir. 2007).

[17] *Id.* Rochow had a disability insurance policy as an employee of Gallagher issued by Life Insurance Company of North America that "for disability benefits if an employee gave 'satisfactory proof' that 'solely because of Injury or Sickness [the employee is] unable to perform all material duties of [his or her] Regular Occupation or a Qualified Alternative[.]'." *Id.*

[18] Rochow*,* 780 F.3d. at 366-67.

[19] Rochow, 482 F.3d at 862.

[20] Rochow*,* 780 F.3d. at 366.

[21] Rochow*,* 780 F.3d at 382 (Stranch, J., dissenting).

[22] Rochow*,* 780 F.3d. at 367.

[23] *Id.*

[24] *Id*. at 364. 29 U.S.C. §1104(a)(1) provides as follows:

> (1) Subject to sections 403(c) and (d), 4042, and 4044 [29 USCS §§1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

motion for summary judgment and the Sixth Circuit affirmed,[25] holding that LINA "acted arbitrarily and capriciously" when denying the disability benefits to Rochow.[26] Finally, after waiting more than five years, Rochow received over $300,000 in benefits in 2007.[27] Rochow died in 2008, and eight months after his death his estate received an additional $420,000 in benefits that were originally withheld by LINA.[28] Meanwhile, during that long-term period between 2002 and 2009, LINA continued to profit by its retention and use of the benefit dollars that were wrongfully withheld from Rochow.[29]

The subject of this article is Rochow's request that in addition to the payment of benefits, LINA disgorge profits that LINA earned on the benefits retained in breach of LINA's fiduciary duty.[30] Rochow argued that allowing LINA to retain these profits would result in unjust enrichment of LINA.[31] An expert calculated that LINA earned between 11 percent and 39 percent annually on the benefits that should have been paid to Rochow.[32] Therefore, Rochow argued that as a result of LINA's breach of fiduciary duty, LINA earned millions of dollars which should be disgorged to Rochow.[33] However, LINA argued that LINA should only pay $32,732 to Rochow, based upon the amount of interest that would be earned on the funds withheld from Rochow, and not the millions of dollars of profits earned.[34]

The federal district court held that since Rochow's funds were not segregated into a separate investment account, but could be used by LINA for any business purpose, LINA must disgorge $3,797,867.92.[35] A panel of the Sixth Circuit affirmed this award in 2013,[36] but in its 2015 *en banc* decision, the Sixth Circuit vacated the disgorgement award. The Sixth Circuit decided on March 5, 2015, that Rochow was

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

[25] Rochow*,* 482 F.3d at 860.

[26] *Id.* at 862.

[27] Rochow*,* 780 F.3d at 382 (Stranch, J., dissenting).

[28] *Id.* After Rochow's death, representatives of his estate were substituted as plaintiff, and, for the sake of convenience we refer to both the original plaintiff and the substituted plaintiffs as "Rochow."

[29] *Id.*

[30] Rochow*,* 780 F.3d at 364, 368.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Rochow*,* 780 F.3d at 369.

[35] Rochow*,* 851 F.Supp.2d 1090 (E. D. Mich. 2012). *See also Rochow,* 737 F.3d 415, 420 (6th Cir. 2013).

[36] Rochow*,* 737 F.3d at 415.

not entitled to disgorgement of profits and should receive only the benefits that were originally withheld from him, plus attorney's fees, and possibly prejudgment interest.[37] The Sixth Circuit remanded the case to the district court to determine whether Rochow should receive prejudgment interest.[38]

The Sixth Circuit, in its 2015 *Rochow* opinion, held that Rochow was not entitled to disgorgement of profits, as this would constitute a duplicative recovery.[39] The Sixth Circuit further held that Rochow did not show that the §502(a)(1)(B) remedy was inadequate "to make Rochow whole."[40] According to the Sixth Circuit, "Rochow is made whole under 502(a)(1)(B) through recovery of his disability benefits and attorney's fees, and potential recovery of prejudgment interest."[41] According to the court, allowing a plaintiff the equitable relief under §502(a)(3) in addition to the recovery under §502(a)(1)(B) would result in a "duplicative recovery" prohibited by previous case law in the United States Supreme Court and Sixth Circuit Court of Appeals.[42]

According to the *Rochow* interpretation of the United States Supreme Court opinion in *Varity Corp. v. Howe,*[43] §502(a)(3) is a "safety net" for plaintiffs without adequate remedy, but if federal statutes provide sufficient relief to an injured beneficiary, awarding further equitable relief is not necessary or appropriate.[44] According to *Rochow,* the *Varity* opinion instructs courts to look at the adequacy of the relief to the plaintiff instead of focusing on the wrongful actions of the defendant.[45] Although Rochow made "one claim to recover benefits arbitrarily and capriciously denied by LINA, and one claim for disgorgement of profits realized by LINA as a result of its breach of fiduciary duty consisting of the arbitrary and capricious denial of benefits," the injuries from the wrongful denial of benefits to Rochow and the actual withholding of the benefits were not distinct or separate injuries according to the Sixth Circuit in *Rochow*.[46] The plaintiff in *Rochow* has already received the wrongfully withheld benefits and attorney's fees, and in addition prejudgment interest may be awarded

[37] Rochow, 780 F.3d at 364.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 371-72.
[41] *Id.*
[42] *Id.* at 371.
[43] 516 U.S. 489 (1996).
[44] *Id.* at 513-5; Rochow, 780 F.3d at 371-72.
[45] Rochow, 780 F.3d at 373-74.
[46] *Id*. at 370-1.

by the district court on remand.[47] In its decision the Sixth Circuit made clear that this prejudgment interest must not be a punitive amount.[48]

III. ARGUMENTS THAT THE SIXTH CIRCUIT WAS RIGHT

Sound arguments in favor of the Sixth Circuit's holding exist, even though the Sixth Circuit's refusal to require disgorgement of approximately $3.8 million in profits may not play well with those who are sympathetic to the disabled plaintiff Rochow.

The Sixth Circuit did make a reasonable attempt at interpreting established precedent in its 2015 *Rochow* decision.[49] Although many may desire that the insurance company be punished for its arbitrary and capricious action in *Rochow*, the Sixth Circuit did attempt to follow the precedent set by the United State Supreme Court's opinion in *Varity Corp. v. Howe.*[50] Furthermore, *Rochow* is not inconsistent with the Supreme Court's opinion in other similar cases.[51] The Sixth Circuit's adherence to the precedent under the doctrine of *stare decisis* promotes judicial efficiency, and it promotes fairness and uniformity in treatment for all ERISA plaintiffs.

As a policy and fairness matter, it could be argued that plaintiffs should not receive a windfall from extraordinarily large awards or duplicative awards.[52] It is unlikely that Rochow would have earned $3.8 million if he had invested the unpaid benefits. Prejudgment interest may be a much better measure of the amount Rochow could have earned on those benefits. Rochow waited five years to receive some of his benefits, and more than half of his benefits were not paid until after his death.[53] Thirteen years after the initial claim was filed, the litigation still continues.[54] Rochow's estate has still not received the interest on the benefits that were wrongfully withheld, but upon remand the district court may award this interest.[55] The wheels of justice are sometimes slow, and Rochow's final days might have been more financially comfortable if the insurance company had paid his benefits sooner. It may be questioned whether benefits plus attorney's

[47] *Id*. at 376.
[48] *Id.*
[49] *Id*. at 364.
[50] 516 U.S. 489 (1996).
[51] Rochow*,* 780 F.3d at 364. *See* Redding, *supra* note 10, at 170, 181-197. *See, e.g.,* LaRue v DeWolff, Boberg & Assoc., 552 U.S 248 (2008); Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985).
[52] Rochow*,* 780 F.3d at 364.
[53] *Id.*
[54] *Id.*
[55] *Id.*

fees and prejudgment interest is enough to make Rochow whole. However, Rochow did not convince the court that he was not made whole by this remedy.[56]

The disgorgement of the $3.8 million could be characterized as a penalty akin to a punitive damage award. Although there is some justification in punishing an insurance company for breach of fiduciary duty, the cost of such a disgorgement award may ultimately be paid by other plan beneficiaries and participants in the form of higher insurance premiums.[57] As a result, some may argue that the deterrent effect of such an award may be less than desired. However, presumably employers would consider switching to a company with a lower premium, and the potential loss of customers could be an incentive for insurance companies to avoid taking actions such as arbitrary and capricious denial of benefits if such actions result in disgorgement. On the other hand, the incentive to arbitrarily and capriciously deny benefits may still exist because so many denials are not appealed or litigated.[58] Research indicates that denial of claims is "linked" to higher net profits for insurance companies.[59] Therefore, the insurance company may determine that even the risk of a disgorgement (and the cost resulting therefrom) is less than the financial savings that accrues to the insurance company when it denies claims, especially given the large numbers of claims that are not appealed or litigated.[60]

If Congress feels that plaintiffs are not receiving justice and fiduciaries are not being deterred from arbitrary and capricious denial of benefits, Congress could clarify or strengthen the remedies provisions in ERISA. However, Congress has not done this, after years of case law narrowly construing the remedies provisions in ERISA.[61] Therefore, given the precedent and the failure of Congress to amend ERISA, the Sixth Circuit opinion in *Rochow* is not surprising.

[56] *Id.*

[57] *See* Christopher Smith, *It's a Mistake: Insurer Cost Cutting, Insurer Liability, and the Lack of ERISA Preemption within the Individual Exchanges,* 62 CLEV. ST. L. REV. 75, 124 (2014).

[58] Katherine T. Vukadin, *Delayed and Denied: Toward an Effective ERISA Remedy for Improper Processing of Healthcare Claims,* 11 YALE J. HEALTH POL'Y L. & ETHICS 331, 338, 362-3 (2011).

[59] *Id.* at 338.

[60] *Id.* at 338, 362-3.

[61] Redding, *supra* note 10, at 170.

IV. ARGUMENTS THAT THE SIXTH CIRCUIT COURT WAS WRONG

In the 1985 case *Massachusetts Mutual Life Insurance Cop. v. Russell*,[62] the Supreme Court of the United States ruled that ERISA did not provide a cause of action beyond the underlying contract for claims stemming from the denial of benefits.[63] ERISA litigation also looks to *Varity Corp. v. Howe* for the assertion that an individual beneficiary may bring a claim for equitable relief under §502(a)(3).[64] What is not perfectly clear is whether an individual plaintiff may bring a claim, and receive a recovery, under both §502(a)(1)(B) and §502(a)(3). The law remains unsettled, and plaintiffs and courts are still struggling with what types of claims and remedies are permitted under ERISA. The *Rochow* case allowed the Sixth Circuit Court of Appeals to review ERISA remedies in light of recent case law, including *CIGNA Corp. v. Amara*.[65]

In her 2011 article, Jillian Redding identified three different arguments to support additional remedies under ERISA.[66] First identified was the argument that trust law could form a basis for equitable relief under §502(a)(3).[67] The second argument holds that the ERISA preemption of state law should not apply to §502(a)(3), and the third argument is that the federal RICO statute could provide a remedy.[68] Dr. Redding herself agreed with the first and second arguments. Dr. Redding writes that the second and third arguments are unlikely to be sustained by the Supreme Court of the United States.[69] Dr. Redding appears to be correct based on the Court's previous narrow construction of the remedies provisions in §502.[70] Dr. Redding suggests that more thorough monitoring and careful supervision of ERISA insurers is more likely to protect beneficiaries.[71]

[62] 473 U.S. 134 (1985).
[63] *Id.* at 148.
[64] Varity Corp. v. Howe, 516 U.S. 489 (1996).
[65] CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011).
[66] Redding, *supra* note 10, at 196-203.
[67] *Id.*
[68] *Id*. A discussion of ERISA preemption is beyond the scope of this paper. We refer you to Dr. Redding's article for a discussion of preemption and her views that State regulators should be more active in protecting the participants in employee plans. Redding, *supra* note 10, at 171-6, 220.
[69] Redding, *supra* note 10, at 203.
[70] *Id. See, e.g.,* LaRue v DeWolff, Boberg & Assoc., 552 U.S 248, 254 (2008); Aetna Health, Inc. v. Davila, 542 U.S. 200, 213-7 (2004); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-8 (1987); Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144-148 (1985).
[71] Redding, *supra* note 10, at 203.

Other commentators have made excellent arguments that the remedies available under ERISA §502(a)(3) should include all remedies available for breach of trust other than those remedies that are already available under §502(a)(2).[72] Remedies for breach of trust include enforcement of the trustee's personal liability for trust property wrongfully decreased or transferred and for profits from the trustee's use of the trust property.[73] The remedy of disgorgement necessarily requires a monetary award. Some courts have suggested that such an award would be a legal remedy, and, thus, not be available under §502(a)(3).[74] The Third Circuit Court of Appeals revisited this concept in *Edmonson v. Lincoln Nat. Life Ins. Co.*[75] and concluded that disgorgement was in fact an equitable remedy.[76] The Third Circuit also

[72] *See* Eduard A. Lopez, *Equitable Remedies for Breach of Fiduciary Duty under ERISA after Varity Corp. v. Howe*, 18 BERKLEY J. EMP. & LAB. L. 323, 342 (1997). ERISA §502(a)(2) provides that an action may be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." 29 U.S.C. §1132(a)(2). Section 1109 provides in part as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. §1109(a).

[73] *Id.* at 340. Remedies for breach of trust include removal of the trustee, injunction, and enforcement of the trustee's personal liability for trust property wrongfully decreased or transferred and for profits from the trustee's use of the trust property, tracing of trust property and constructive trust. *Id.*

[74] *See* Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450, 457 n.3 (3d Cir. 2003).

[75] 725 F.3d 406, (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014).

[76] *Id.* at 419. Citing the Restatement (Third) on Restitution and Unjust Enrichment §51(4), the Third Circuit found that disgorgement was similar to a better-know equitable remedy, an accounting, also called an accounting for profits. The Eighth Circuit has stated, "[i]t is undisputed that an accounting for profits—the remedy that allows for disgorgement of profits awarded by the district court—is a type of relief that was typically available in equity and therefore is appropriate under §1132(a)(3)(B)." Parke v. First Reliance Standard Life Ins. Co., 368 F.3d 999, 1008 (8th Cir. 2004). One court describes an accounting as follows:

> [A]n **accounting** can be an **equitable** tool that allows an aggrieved plaintiff to follow the money and develop other theories of recovery. The **accounting** claim was an **equitable** alternative for recovering misappropriated funds had the actions at law failed. At its core, an **accounting** is "[a]n action for **equitable** relief against a person in a fiduciary relationship to recover profits taken in a breach of the relationship.

22nd Century Prop. v. FPH Prop., 160 So. 3d 135 (Fla. Ct. App. 2015) (quoting BLACK'S LAW DICTIONARY 21 (8th ed. 2004)).

found that the plaintiff did not need to prove a financial loss, as individual loss is not a requirement for an equitable claim, such as disgorgement.[77] As Dr. Lopez notes in his 1997 article, the remedies under §502(a) are similar to breach of trust remedies and it is reasonable to include those remedies as "other appropriate equitable relief"[78] in §502(a)(3).[79] For this reason, Lopez concludes that such equitable relief may include a monetary award as equitable restitution.[80]

Judge Stranch, writing for the minority in *Rochow*, pointed out that Rochow had pled and proven two separate injuries. The first of these was that LINA had breached the plan obligations by denying his valid claim, and the second was that LINA had breached its fiduciary duty by a pattern of conduct relating to the denial of benefits,[81] and that by retaining in its general fund the benefits that should have gone to Rochow profits were generated for the benefit of the insurance company.[82] The minority maintains that if there is an injury in the form of breach of fiduciary duty, that injury requires a remedy.[83] Although the majority in *Rochow* specifically rejects it, the reasoning followed by the Third Circuit suggests that disgorgement is a proper remedy for breach of fiduciary duty.[84]

V. CONCLUSION

The size of the district court's award of corporate profits in *Rochow* should attract a great deal of attention in the legal, insurance, and employee benefits community, even though the Sixth Circuit later reversed the district court's award.[85] The Sixth Circuit majority

[77] Edmonson, 725 F.3d at 419. The Third Circuit quoted extensively from the Restatement (Third) on Restitution and Unjust Enrichment and non-ERISA cases. Much of this discussion involved the idea that the remedy of disgorgement was intended to prevent the defendant from profiting from bad behavior. Bringing the defendant back to his starting point may be different from a punitive damage award if punitive damages are designed to cause the defendant to suffer a financial loss from his starting position. However, neither of these remedies is designed to make the plaintiff whole for harm that the defendant caused. *Id.*

[78] 29 U.S.C. §1132(a) (2012).

[79] Lopez, *supra* note 72, at 346.

[80] *Id.*

[81] Rochow was required to meet policy requirements that did not exist, the company created a false reason to deny his benefits on appeal, and the company acted to deny benefits without medical evidence. *Rochow*, 780 F.3d at 390 (citing *Rochow,* 851 F.Supp. 2d at 1101).

[82] Rochow, 780 F.3d at 382.

[83] *Id.* at 390-1.

[84] Edmonson, 725 F.3d at 406.

[85] Rochow, 780 F.3d at 364.

opinion focused on the idea that the claim for additional equitable relief under §502(a)(3) was nothing more than a ". . . repackaged claim for benefits wrongfully denied. . ."[86] Broadly, the *Rochow* decision looks to whether the plaintiff was adequately compensated by the award of back benefits, attorney's fees, and possibly prejudgment interest. ERISA is a statutory solution to issues involving contractual arrangements between employees and their employers. As such, the equitable provisions should be read to fill in areas where the plan document is silent or unclear.

Case law is unclear as to how the remedy provisions of §502(a)(1)(B) and §502(a)(3) work together. The *Rochow* decision does not provide a final answer. In *Rochow*, Judge White pointed out that the majority opinion created a two part standard for claims for additional equitable relief.[87] She points out that the majority standard requires either an additional injury, separate from any claim for denial of benefits under the plan, or a showing that the remedy available under §502(a)(1)(B) is inadequate to make the plaintiff whole.[88] This second prong creates a facts and circumstances test.[89] Other circuits could reach different results, such as completely denying the possibility of an equitable remedy (in cases where §502(a)(1)(B) remedies are awarded) or allowing the equitable remedy in addition to the §502(a)(1)(B) remedy.

Plaintiffs do not have a clear legal standard to use in formulating their pleadings in ERISA cases which may cover many critical benefits for employees, including health insurance, disability insurance, retirement plans. The discussion in the 2015 opinion in *Davidson v. Henkel Corp.*,[90] a class action about a supplemental retirement benefits plan for management, illustrates the confusion.[91] The district court decided that employer Henkel was liable for wrongfully reducing these benefits, but subsequently the district court is required to decide the appropriate remedy for this reduction of benefits.[92] The defendant employer argues that the Sixth Circuit's opinion in *Rochow* indicates that equitable remedies are not an issue, while the plaintiffs argue that *Rochow* supports the plaintiffs' position that the plaintiffs are entitled to remedies under both §502(a)(1)(B) and §502(a)(3) because the plaintiffs will not be "made whole" unless they receive both remedies.[93]

[86] Rochow*,* 780 F.3d at 375.
[87] Rochow*,* 780 F.3d at 381-82 (White, J., concurring in part, dissenting in part).
[88] *Id.*
[89] *Id.*
[90] 2015 U.S. Dist. LEXIS 36940 (E.D. Mich. Mar. 24, 2015).
[91] *Id.*
[92] *Id.* at *18-19.
[93] *Id.*

Certainly, attorneys representing employees in ERISA cases should watch the development of the ERISA remedies case law in their jurisdictions. A wise course of action may be to seek the remedies available under §502(a)(1)(B) and §502(a)(3) and to plead that plaintiffs will not be made whole unless they receive both remedies and to show that the use of both remedies would not result in a duplicative recovery.

This lack of clarity in the law could be easily rectified by either Congress or the Supreme Court of the United States. Congress has not amended ERISA to clarify the legal standard as to how the remedy provisions of §502(a)(1)(B) and §502(a)(3) work together. If such an amendment is not desirable to Congress, Congress could engage in ERISA reform to provide specific monetary penalties (instead of the less certain equitable remedies) for arbitrary and capricious denials of claims under employee benefit plans.[94] The Supreme Court has not clarified the legal standard as to how the remedy provisions of §502(a)(1)(B) and §502(a)(3) work together, either. ERISA claims frequently come before the Supreme Court, so if Congress does not act, it seems likely that the Court will have the opportunity to clarify this issue in the near future.

[94] Vukadin, *supra* note 58, at 338.

NIL TO LOSE: STUDENT-ATHLETE ANTITRUST CHALLENGES TO THE NCAA AMATEURISM MODEL FOR COLLEGE ATHLETICS

by Charles E. Thomas*

"Power concedes nothing without a demand. It never did and it never will."
– Frederick Douglass

I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") has made recent reforms aimed at providing greater equity to the student-athletes that participate in the multi-billion dollar intercollegiate athletics industry. Many of these reforms directly address the financial hardships of student-athletes, such as: the reinstatement of four-year athletic scholarships;[1] broadened academic expenses included in athletic scholarships;[2] the allocation of travel funds for

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[1] *See* Michelle Brutlag Hosick, *Multiyear Scholarships to be Allowed*, NCAA.com, Feb. 17, 2012, *available at* http://www.ncaa.com/news/ncaa/article/2012-02-17/multiyear-scholarships-be-allowed (last visited Mar. 29, 2015).

[2] *See* Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY, Jan. 17, 2015, *available at* http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/ (last visited Mar. 29, 2015).

families of players involved in championship events;[3] and unlimited snacks and meals for student-athletes.[4] Similarly, the NCAA has made reforms to curtail its activities that capitalize on the use of the name, image and likeness rights ("NIL Rights") of its student-athletes, such as: discontinuing licensing agreements with video game makers;[5] halting the sale of jerseys of star players on its website;[6] and removal of the name-likeness release from the Student-Athlete Statement required for participating in NCAA events.[7] These reforms represent notable progress in the effort to establish greater equity for student-athletes. However, they must not be viewed without considering the legal challenges that necessitated action on the part of the NCAA. The NCAA has been far from magnanimous in making reforms related to student-athletes. To the contrary, it has resisted modification of its relationship with student-athletes in an effort to preserve "amateurism," which is viewed as a key distinction between its product and professional sports leagues.

Historically, the courts have been deferential to the NCAA's rules relating to amateurism, stemming from the Supreme Court decision in *NCAA v. Board of Regents of the University of Oklahoma*[8] ("*Board of Regents"*). The NCAA has consistently maintained that the *Board of Regents* decision forecloses any antitrust challenges to its regulations on amateurism and student-athlete eligibility for competition. However, recent antitrust cases have forced the NCAA to defend its pro-competitive justifications for its draconian amateurism rules. This comment serves to highlight how these recent cases attempt to address the ongoing tension between the rise of commercialization in

[3] *See* NCAA, *NCAA to Pay for Family Travel Under Pilot Program*, NCAA.com, Jan. 6, 2015, *available at* http://www.ncaa.org/about/resources/media-center/news/ncaa-pay-family-travel-under-pilot-program (last visited Mar. 29, 2015).

[4] *See* Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA.com, Apr. 15, 2014, *available at* http://www.ncaa.org/about/resources /media-center/news/council-approves-meals-other-student-athlete-well-being-rules (last visited Mar. 29, 2015).

[5] *See* Steve Berkowitz, *NCAA Ending Deal With Video Game Maker EA*, USA TODAY, Jul. 17, 2013, *available at* http://www.usatoday.com/story/sports/ncaaf/ 2013/ 07/17/ncaa-ending-videogame-contract-with-ea-electronic-arts/2525843/ (last visited Mar. 29, 2015).

[6] *See* Mark Schlabach, *NCAA Puts End to Jersey Sales*, ESPN.com, Aug. 9, 2013, *available at* http://espn.go.com/college-sports/story/_/id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritical (last visited Mar. 29, 2015).

[7] *See* Dan Wolken & Steve Berkowitz, *NCAA Removes Name-Likeness Release from Student Athlete Forms*, USA TODAY, Jul. 18, 2014, *available at* http://www.usatoday.com/ story/sports/college/2014/07/18/ncaa-name-and-likeness-release-student-athlete-statement-form/12840997/ (last visited Mar. 29, 2015).

[8] 468 U.S. 85 (1984). *See* discussion *infra* Part III(B).

intercollegiate athletics and the NCAA's coerced reforms. Part II offers a brief history of the NCAA and its amateurism rules. Part III provides a background for antitrust analysis under the Sherman Antitrust Act, along with its historic application to the NCAA. Part IV focuses on recent antitrust challenges to NCAA restrictions on compensation for NIL Rights, specifically considering *O'Bannon v. NCAA* (currently under review before the Ninth Circuit), and considers any enactment issues implicated by the district court's injunction. Part V considers the litigation horizon for the NCAA post *O'Bannon* and foreshadows changes to the NCAA's view of amateurism to provide greater equity to student-athletes.

II. EVOLUTION OF THE NCAA AND ITS AMATEURISM RULES

It is instructive to begin with a brief history of the NCAA as the primary rulemaking organization for intercollegiate athletics, the development and evolution of its amateurism provisions, and the nature of the business of intercollegiate athletics in modern times.

A. Development of the NCAA

Arguably the first recorded intercollegiate athletic event was an ivy-league regatta between Harvard and Yale in 1852, billed as a race to the finish buoys.[9] From the start, there was a need for regulation, as the Harvard team enlisted the skills of a coxswain who was not a student.[10] The management of sporting events presented difficulty for universities as intercollegiate athletics developed into the twentieth century.[11] Universities developed rules committees and conferences for intercollegiate competition; however, they lacked a centralized focus.[12] In response to serious injuries and deaths in intercollegiate football, President Theodore Roosevelt convened a meeting of intercollegiate conference representatives at the White House to discuss standardized regulations.[13] The outgrowth of this meeting was the founding of the Intercollegiate Athletic Association ("IAA"), comprised of sixty-two universities.[14] The IAA developed rules relating to amateurism,

[9] *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10 (2000).

[10] *Id.* at 11.

[11] See MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS AND PROBLEMS 100 (2d ed. 2009).

[12] *See* W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 9 (2000).

[13] Smith, *supra* note 9, at 12.

[14] MITTEN, *supra* note 11, at 101.

education and sportsmanship.[15] In 1910, the IAA changed its name to the NCAA.[16]

As intercollegiate athletics gained popularity and became inextricably intertwined with the identity of higher education, the NCAA expanded its regulatory efforts.[17] Increased access to higher education (spurred by the GI Bill) as well as the increased accessibility of intercollegiate events to the general population through television broadcasts served to commercialize college sports. In response to the increasingly commercial nature of intercollegiate sports during the 1950s, the NCAA created the Committee on Infractions, which authorized the NCAA to sanction university athletic programs for exploiting student-athletes.[18] As the demand for telecasts of college football grew, the NCAA feared telecasts would impact football ticket sales and created the NCAA Television Steering Committee, which established rules limiting the number of games that could be broadcast each season.[19]

In 1952, the NCAA Television Steering Committee negotiated a one-year agreement with the National Broadcasting Company ("NBC") for the television broadcast rights to all intercollegiate football games for $1.2 million, with 60% of the revenues going to the NCAA and the remainder to the competing universities.[20] This partnership continued in various iterations, and the rights fees steadily rose – to a high of $31 million in 1982.[21] As the rights fees increased, tension developed among the major college football programs regarding the revenue split under the NCAA's television contract. In 1977, the sixty-two largest college football programs formed the College Football Association ("CFA") to coordinate their internal NCAA lobbying efforts.[22] NBC offered the CFA a four-year, $180 million agreement to exclusively telecast CFA member games; however, the NCAA threatened to expel colleges that agreed with the offer.[23] In response, the University of Oklahoma and the University of Georgia filed an antitrust suit on behalf of CFA members, arguing that the NCAA rules unreasonably

[15] Carter, *supra* note 12, at 11.

[16] *Id.*

[17] MITTEN, *supra* note 11, at 101.

[18] *Id.* at 102.

[19] *See* Philip Hochberg & Ira Horowitz, *Broadcasting and CATV: The Beauty and the Bane of Major College Football*, 38 LAW & CONTEMP. PROBS. 112, 114 (1973).

[20] *Id.*

[21] *See* JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 40 (2006).

[22] See John J. Siegfried & Molly Gardner Burba, *The College Football Association Television Cartel*, 49 ANTITRUST BULL. 799, 802 (2004).

[23] *Id.* at 803.

restrained the television broadcast market.[24] As discussed in Part III(B) *infra*, the Supreme Court ruled in favor of the CFA, which served to eliminate the NCAA's exclusive television broadcast agreements for college football.

In 1991, the CFA entered into a five-year broadcast rights deal with the American Broadcasting Company ("ABC") for $210 million.[25] The financial prosperity of the CFA also led to internal pressure from member schools and conferences as broadcasters offered more lucrative deals outside the CFA.[26] Predictably the incentives for schools to participate in the CFA rapidly diminished and the organization folded in 1997.[27] Today regional college conferences have established telecast rights deals and in some cases network deals with broadcasters.

B. Evolution of NCAA's Amateurism Rules

The NCAA views amateurism as an essential element of its product, necessitating a brief history of the NCAA's amateurism rules for student-athletes. An amateur is generally defined as someone "who does something (such as a sport or hobby) for pleasure and not as a job."[28] The definition of amateur for the purpose of participation in intercollegiate athletics has evolved over time. In 1916 the NCAA defined an amateur as "one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom."[29] Member institutions were prohibited from offering any form of remuneration to such athletic participants, including scholarships.[30] Despite the restrictions on benefits, many schools skirted the rules and offered payments to student-athletes.[31]

In response to abuses by member institutions, in 1948 the NCAA revised its rule to permit scholarships for collegiate student-athletes for tuition and fees (not room and board), provided the student demonstrated financial need and met the institutions' normal

[24] *Id.* at 804.
[25] *Id.* at 819.
[26] *Id.*
[27] *Id.*
[28] Amateur Definition, Mirriam-Webster.com, *available at* http://www.merriam-webster.com/dictionary/amateur (last visited Mar. 29, 2015).
[29] *See* ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 34-35 (1998).
[30] *See* Kristin R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 260 (2003).
[31] *Id.*

admission requirements.[32] These rules attempted to regulate any payment to student-athletes, yet some athletic programs (in the form of boosters and alumni) sought competitive advantages for their programs through illegal payments.[33] To mitigate the advantages of boosters and alumni illegal payments, the NCAA agreed to allow student-athletes full scholarships of grants-in-aid, which covered tuition, fees, room and board, and books.[34] The "grant-in-aid" athletic scholarships allowed by the NCAA guidelines still fail to cover the true cost of attendance, as they do not cover transportation and miscellaneous expenses.[35] In an effort to bridge the gap between "grant in aid" and "cost of attendance," since 1991 the NCAA has offered additional financial assistance through its Student-Athlete Special Assistance Fund.[36]

In 2012, largely in response to the lawsuits outlined in Part IV *infra*, the NCAA attempted to allow member institutions to offer student-athletes $2000 stipends in addition to full grant-in-aid scholarships. However this rule change was rejected by a vote of the 1100 member institutions.[37] In response to this vote, in 2014 the members of the five largest conferences (comprised of the 64 schools termed the "Power 5 Conferences") sought and obtained from the NCAA the autonomy to create their own rules, including those related to scholarships.[38] Among the first rules adopted by the Power 5 Conference group in 2015 was to allow its members to offer athletic scholarships covering the full cost of attendance for its student-athletes.[39]

Similarly, the length of an athletic scholarship has changed over the history of the NCAA. In an effort to curb prohibited payments to student-athletes, the NCAA adopted four-year athletic scholarships in 1956.[40] In response to complaints from its member institutions, in 1973

[32] SACK & STAUROWSKY, *supra* note 29, at 34.

[33] Muenzen, *supra* note 30, at 260.

[34] *Id.*

[35] Berkowitz, *supra* note 2.

[36] *See* Steve Wieberg, *NCAA's Extra Funding Benefits Athletes*, USA TODAY, Dec. 23, 2003, *available at* http://usatoday30.usatoday.com/sports/college/2003-12-23-ncaa-athlete-welfare_x.htm (last visited Mar. 29, 2015).

[37] *See* Associated Press, *NCAA Shelves $2,000 Athlete Stipend*, ESPN.com, Dec. 16, 2011, *available at* http://espn.go.com/college-sports/story/_/id/7357868/ncaa-puts-2000-stipend-athletes-hold (last visited Mar. 29, 2015).

[38] *See* Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN.com, Aug. 8, 2014, *available at* http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (last visited Mar. 29, 2015).

[39] Berkowitz, *supra* note 2.

[40] *See* Ben Straus, *Colleges' Shift on Four Year Scholarships Reflects Players' Growing Power*, NY TIMES, Oct. 28, 2014, *available at* http://www.nytimes.com/2014/10/29 /sports/colleges-shift-on-four-year-scholarships-reflects-players-growing-

the NCAA capped athletic scholarships at one-year, which were renewable at the option of the institution.[41] These rules were further revised in 1991, where the NCAA allowed severely injured players to remain on scholarship without counting against a team's scholarship limit, and required member institutions to have appeal policies for student-athletes where scholarships were not renewed.[42] In response to the lawsuits outlined in Part IV *infra* and inquiries from the US Justice Department, the NCAA lifted the one-year cap on athletic scholarships in 2011.[43] While multi-year scholarships were available to institutions, they were initially offered sparingly.[44] Recently some member institutions (such as University of Southern California, Indiana University and the University of Maryland) and some athletic conferences (such as the Big Ten and the Pacific-12 conferences) have agreed to offer guaranteed four-year athletic scholarships to all student-athletes.[45]

Beyond athletic scholarships, student-athletes are strictly prohibited from receiving any additional benefits. This is enforced through a Student-Athlete Agreement Form[46] that all student-athletes must sign annually.[47] These rules extend beyond merely competing in a professional league or receiving additional benefits from alumni or athletic boosters. NCAA Bylaw 12.5.2.1 prohibits a student-athlete

power.html?_r=0 (last visited Mar. 29, 2015).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* Jon Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, But Many Don't*, CBSSPORTS.com, Sep. 16, 2014, *available at* http://www.cbssports.com/collegefootball/writer/jon-solomon/24711067/schools-can-give-out-4-year-scholarships-to-athletes-but-many-dont (last visited Mar. 29, 2015).

[45] Straus, *supra* note 40.

[46] The Student-Athlete Statement is issued each year as form [Year]-3a. For example, the form for academic year 2014-2015 is entitled "14-3a." *See* Student-Athlete Statement (Form 14-3a), NCAA.org, http://www.ncaa.org/sites/default/files/DI%20Form%2014-3a%20-%20Student-Athlete%20Statement_0.pdf (last visited Mar. 29, 2015 and hereinafter referred to as "Student-Athlete Statement"). Most scholarship refers to this form as "Form 08-03a" as this was operative Student-Athlete Statement at the time of the O'Bannon antitrust suit, discussed in Part IV *infra*.

[47] There are some special exemptions for Olympic athletes and tennis players. *See* NCAA Bylaw 12.1.2.4.2.1 (allowing tennis players prior to collegiate enrollment to accept up to $10,000 per calendar year in prize money) and 12.1.2.1.4.3.2 (allowing members of an Olympic team to receive nonmonetary benefits and awards, provided they are available to all team members). In comparison, money obtained from endorsements is strictly prohibited in all sports, resulting in loss of athletic eligibility. *See* Steve Eubanks, *Olympic Cash Muddles NCAA Eligibility Waters*, FOXSPORTS.com, Aug. 22, 2012, *available at* http://www.foxsports.com/south/story/olympic-cash-muddles-ncaa-eligibility-waters--082212 (last visited Mar. 29, 2015).

from accepting payment or permitting the use of his or her name or picture in connection with the sale, endorsement or use of any commercial product or service.[48] A representative example of the strict application of these rules by the NCAA involves Joel Bauman, a wrestler for the University of Minnesota. Mr. Bauman fashions himself as more than a wrestler – he is also a rapper.[49] When Joel placed his song video, "Ones in the Sky," on iTunes for 99 cents, he suddenly found himself in violation of NCAA Bylaw 12.5.2.1, and lost his athletic eligibility.[50]

In contrast to the blanket prohibition on student-athletes promoting commercial products or services, NCAA Bylaw 12.5.1.1 permits the NCAA, or a third party acting on the behalf of the NCAA, to use the name or picture of an enrolled student-athlete to generally promote NCAA championships, events, activities or programs.[51] Prior to participation in intercollegiate competition each year, student-athletes must sign a release authorizing the use of their name or picture in accordance with NCAA Bylaw 12.5.[52] Failure to complete and sign the Student-Athlete Statement results in the student-athlete's ineligibility for participation in all intercollegiate competition.[53] The NCAA eliminated the name and likeness release from the most recent version of the Student-Athlete Statement, in direct response to *O'Bannon* discussed in Part IV *infra*. While the explicit release within the Student-Athlete Statement has been removed, NCAA Bylaw 12.5.1.1 remains, permitting the use of student-athletes to promote NCAA activities.

C. NCAA Revenues in the Modern Era

There are over 460,000 student-athletes competing at NCAA member institutions, in twenty-three distinct sports.[54] The NCAA

[48] NCAA, 2014-15 NCAA Division I Manual, art 12.5.2.1 at 71 (2014), available at http://www.ncaapublications.com/productdownloads/D115.pdf (last visited Mar. 29, 2015 and hereinafter referred to as "NCAA Bylaws").

[49] *See* Pat Borzi, *Minnesota Wrestler Loses His Eligibility by Selling a Song*, NY TIMES, Feb. 27, 2013, *available at* http://www.nytimes.com/2013/02/28/sports/wrestler-hoping-to-inspire-through-song-loses-eligibility.html?_r=0 (last visited Mar. 29, 2015).

[50] *Id.* Ironically, the song has an inspirational message urging people to pursue their dreams. University of Minnesota wrestling coach, J. Robinson, believes in at least one of Joel's dreams. "He came here to be a wrestler, not a singer. He's got to decide what he wants to do. You can't do three or four things well." Coach Robinson clearly has never heard of Paul Robeson.

[51] NCAA Bylaws, *supra* note 48, at art. 12.5.1.1.

[52] Student-Athlete Statement, *supra* note 46.

[53] NCAA Bylaws, *supra* note 48, at art. 14.01.3.

[54] *See* NCAA-Investing Where it Mattes, NCAA, *available at* http://www.ncaa.org /about/resources/media-center/investing-where-it-matters (last visited Mar. 29, 2015).

estimates that only 1.7% of these student-athletes will continue their athletic careers as professionals, supporting the NCAA's oft-quoted, "the majority of [student-athletes] will go pro in something other than sports."[55] Notably, only two of the twenty-three sports supported by the NCAA, football and men's basketball, generate profits for member institutions and the NCAA.

In the context of pure revenues, the NCAA and intercollegiate athletics are big business. From 2011-12 (the last year for which audited financials are available) the NCAA generated $871.6 million in revenues.[56] A remarkable 96% of these revenues are distributed to Division I member institutions, to provide support to intercollegiate members and their programs benefiting their student-athletes.[57] The lion's share of these revenues (81%) comes from a $10.8 billion, fourteen-year agreement with Columbia Broadcasting System ("CBS") Sports and Turner Broadcasting for the exclusive television rights to the NCAA men's basketball tournament.[58] Beyond the NCAA, college athletic programs of member institutions generate an estimated $6.1 billion from "ticket sales, radio and television receipts, alumni contributions, guarantees royalties and NCAA distributions."[59] The NCAA estimates "another $5.3 billion is considered allocated revenue, which comes from student fees allocated to athletics, direct and indirect institutional support, and direct government support."[60]

Since NCAA amateurism rules prohibit remuneration to the student-athletes, where are all of these revenues going? Member institutions use the revenues generated from football and men's basketball to: fund their other athletic programs; make capital improvements building state of the art stadiums, training facilities and housing for its student-athletes;[61] and retain top-notch coaches whom often make similar salaries to their professional counterparts.[62] Viewed in this context, there appears to be a significant inequity for

[55] *Id.*

[56] *See* NCAA-Revenues, NCAA, *available at* http://www.ncaa.org/about/resources/finances/revenue (last vistited Mar. 29, 2015).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Multimillion dollar training facilities are common in Division I intercollegiate sports. For example, the University of Colorado has a proposed $143 million dollar upgrade to its existing athletic facility.

[62] For example, Nick Saban, the head coach of Alabama's Crimson Tide's football team, makes over $7 million a year. Coach Krzyzewski, the head coach of Duke University's men's basketball team, has over 1000 NCAA victories and is paid in excess of $9.5 million a year.

student-athletes within the existing NCAA economic structure as it relates to football and men's basketball.

III. ANTITRUST LAW AND THE NCAA

In light of the apparent economic disparities to student-athletes in intercollegiate athletics, a review of Federal antitrust law is appropriate. This part starts with an overview of the Sherman Antitrust Act, followed by a review of the historical application of antitrust law to the NCAA.

A. Overview of the Sherman Antitrust Act

Congress enacted the Sherman Act in 1890 aimed at deterring unreasonable restraints on free competition.[63] Section 1 of the Sherman Act prohibits every "contract, combination . . . or conspiracy, in restraint of trade."[64] Since virtually all contracts that bind parties to an agreed course of action serve to restrain trade, the Supreme Court has limited the application of §1 to bar only "unreasonable restraints on trade."[65] Further, the Supreme Court has delineated two kinds of Sherman Act violations: *per se* violations and agreements courts deem violations as they create unreasonable restraints on competition based on a three-step analysis termed the "rule of reason."

The Sherman Act aims to preserve economic liberty through the protection of trade and free competition.[66] A freely competitive market allows businesses to compete with each other to attract customers on the basis of price and the quality of the goods or services they offer.[67] The Sherman Act is based on the idea that free competition leads to the best allocation of economic resources, the lowest prices, the best quality goods and services, and promotes an atmosphere supportive of American democratic political and social institutions.[68] The Sherman

[63] *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 490-93 (1940) (noting that the Sherman Act's intended goal was "the prevention of restraints to free competition in business and commercial transactions which tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury").

[64] 15 U.S.C. § 1 (2013).

[65] *See* NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 98 (1984).

[66] *See* N.P.R. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade").

[67] *See* U.S. DEPT. OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER, *available at* http://www.justice.gov/atr/public/div_stats/antitrust-enfor-consumer.pdf (last visited Mar. 29, 2015) (explaining the economic results of a freely competitive market).

[68] *See* N.P.R. Co. v. United States, 356 U.S. 1, 4 (1958) (noting how the "unrestrained

Act serves to protect the public from market failures.[69] Market failures occur when businesses distort the allocation of resources through the use of price constraints or domination of a marketplace, preventing competitors from entering the market.[70] The Sherman Act serves to ensure free competition, which in turn protects competing businesses and the public from the negative consequences of a restricted marketplace.[71]

Sherman Act violations require: (1) an agreement, combination, or conspiracy; (2) an unreasonable restraint on market competition; and (3) a nexus to interstate commerce.[72] Courts apply the first and third elements fairly straightforwardly. The second element requires a thoughtful analysis of whether the challenged actions are unreasonable restraints on trade.[73]

Per se violations of the Sherman Act occur when "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[74] Trade restraints deemed *per se* violations are actions that almost always tend to inhibit market competition and output.[75] The current categories of agreements that rise to *per se* violations include horizontal market division, horizontal price fixing and horizontal boycotts.[76] Horizontal market division results from an agreement between competitors not to compete in identified markets to the

interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions").

[69] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

[70] *See* U.S. DEPT. OF JUSTICE, *supra* note 67 (explaining how restrictions on a freely competitive market harm consumers).

[71] *See* N.P.R. Co. v. United States, 356 U.S. 1, 4 (1958) (stating "the policy unequivocally laid down by the [Sherman] Act is competition").

[72] *See* Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996).

[73] *See* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997) (explaining that under the rule of reason analysis, the court determines, "whether the restrains in the agreement are reasonable in light of their actual effect on the market and their pro-competitive justifications").

[74] *See* NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 103-04 (1984).

[75] *See* Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877, 886-87 (2007) (explaining that courts only resort to *per se* rules when a restraint of trade is always or almost always going to restrict competition and decrease output).

[76] ABA SECTION – ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 55 (6th ed. 2007). Vertical price fixing is no longer a per se violation of the Sherman Act and is analyzed under the rule of reason. *See also id.* at 882 ("[V]ertical price restraints are to be judged by the rule of reason.").

detriment of consumers.[77] Horizontal price fixing is the product of actions among competitors that serve to artificially set consumer prices.[78] Horizontal boycotts occur when there is a concerted agreement to refuse to deal with individuals or companies, deal only on certain terms, or coerce suppliers not to deal with competitors.[79] Plaintiffs alleging *per se* antitrust violations must prove that the alleged conduct occurred and such conduct resulted in market restraints that have manifestly anticompetitive effects lacking of any redeeming value.[80] The Supreme Court has noted that courts do not find *per se* violations of the Sherman Act in the absence of considerable experience with the relationships and agreements at issue.[81] This is not to say that the *per se* categories are immutable. Rather, application of the "rule of reason" analysis is more appropriate in newly developing market relationships and circumstances.[82]

In the absence of a clear *per se* violation of the Sherman Act, agreements may still be violations if the restrained trade is deemed unreasonable under the circumstances, utilizing the three-part "rule of reason" analysis: (1) first the plaintiff must establish that the agreement resulted in an adverse effect on competition as a whole in the relevant market; (2) assuming the burden of the first step is met, the defendant is provided the opportunity to establish the procompetitive virtues of its action; and (3) assuming the defendant

77 *See, e.g.,* Palmer v. BRG of Georgia, 498 U.S. 46 (1990) (holding an agreement to allocate the Georgia bar review course market to one of two competitors a *per se* violation of the Sherman Act as the agreement led to an immediate $250 increase in the cost of review courses to consumers in the affected market).

78 *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (holding an agreement among major oil companies to purchase surplus gasoline from independent refiners in a spot market to prevent dramatic price decreases a per se violation of the Sherman Act, even without an agreement on the specific prices to be maintained).

79 *See, e.g.*, Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (holding an agreement by a group of attorneys not to work for wages below a certain floor was a boycott and a *per se* violation of the Sherman Act). *See also* Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.").

80 *See Leegin Creative Leather Products*, 551 U.S. at 886 ("To justify a per se prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack . . . any redeeming virtue'.") (internal citations omitted).

81 *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."), *abrogated on other grounds by In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3rd Cir. 2010).

82 *See Leegin Creative Leather Products*, 551 U.S. at 899-900 (explaining how it would not make sense to allow the "rule of reason" to evolve with new circumstances without also allowing the line of *per se* illegality to shift with new circumstances or wisdom).

has met its burden under the second step, the plaintiff must demonstrate that there are alternative means to achieve the same procompetitive effect resulting in less restricted competition.[83] Courts find agreements that unreasonably restrain trade unlawful.[84] The "rule of reason" test focuses on considering whether the restraints on the market are reasonable by balancing any anticompetitive effects against any procompetitive justifications.[85]

B. Historic Application of the Sherman Act to the NCAA

Non-profit regulatory groups like the NCAA previously enjoyed a blanket exemption from antitrust scrutiny.[86] However the broad protections afforded the NCAA has slowly eroded. In 1984, the Supreme Court considered an antitrust challenge raised by two member institutions challenging the NCAA's restrictions on the number of football games that could be broadcast each year.[87] As discussed in Part II(A) *infra*, in 1952 the NCAA sold the television broadcast rights to all member football games to NBC, a relationship that spanned 30-years.[88] NBC proposed to the CFA a television rights deal that threatened to dilute the value of the NCAA's own television pact. In response to threats by the NCAA to expel member institutions that participated in the CFA television deal, the University of Oklahoma and the University of Georgia filed an antitrust lawsuit on behalf of CFA members.[89]

While the NCAA's restraints on the quantity of television rights available for sale constituted horizontal price fixing, the Supreme Court declined to find a *per se* antitrust violation.[90] The Court reasoned that the "rule of reason" antitrust analysis was more appropriate, as some industries, such as sports leagues, depend on some degree of horizontal restraint on competition, "if the product is to be available at all."[91] The Court recognized that the NCAA's challenged product, college football, could not be preserved as distinct from professional football without a mutual agreement among the NCAA members.[92] While acknowledging the NCAA's need to establish procompetitive

[83] *See* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997).
[84] *Id.*
[85] *Id.*
[86] *See* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 215-16 (1990).
[87] NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984).
[88] Siegfried & Burba, *supra* note 22, at 804.
[89] *Id.*
[90] Board of Regents, 468 U.S. at 100-101.
[91] *Id.* at 101.
[92] *Id.*

restraints to establish college football, the Court held that the television output restrictions violated the Sherman Act.[93]

The Court in *Board of Regents* drew a distinction between commercial and non-commercial activities of the NCAA.[94] The Court determined that business activities of the NCAA, such as the challenged television marketing plan, are subject to antitrust scrutiny.[95] In contrast, non-business activities, such as controls on student-athletes, were necessary constraints to protect amateurism and to preserve the product of college football. Specifically, the Court stated:

> [T]he NCAA seeks to market a particular brand of football – college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like.[96]

Since *Board of Regents* concerned challenges to NCAA's commercial activities, this quote regarding the NCAA's non-commercial activities was not part of the case, was never briefed by the parties, and not necessary to the decision reached, thereby meeting the Court's own definition of dicta.[97] Nonetheless, many courts have relied upon the dicta from *Board of Regents* to decide cases challenging NCAA amateurism rules. For example, in *McCormack v. NCAA*, the Fifth Circuit upheld the NCAA's right to impose sanctions against Southern Methodist University's ("SMU") football program for extensive amateurism violations, specifically payments to student-athletes beyond athletic scholarships.[98] The penalty imposed by the NCAA required SMU to temporarily suspend operations, and all NCAA schools were ordered not to play SMU.[99] While the NCAA's penalty against SMU's football program would fit the definition of a group boycott, the court found that the NCAA has the power to maintain a

93 *Id.* at 120.

94 *Id.* at 117.

95 *Id.*

96 Id. at 102.

97 *See* Kastigar v. United States, 406 U.S. 441, 454-55 (1972) (noting that broad language not necessary to the court's opinion in a particular case is dicta and not binding authority).

98 McCormack v. NCAA, 845 F.2d 1338, 1343-44 (5th Cir. 1988). NCAA's sanctions against member institutions have also been upheld in response to challenges by affected student-athletes. *See* Justice v. NCAA, 577 F.Supp. 356 (D. Ariz. 1983).

99 *See McCormack*, 845 F.2d at 1343-44.

system of athletics "containing some amateur elements" and thus could not be subject to antitrust scrutiny in those areas.[100]

The *Board of Regents* dicta has been used in a variety of contexts, including upholding NCAA student-athlete transfer restrictions,[101] no-agent and no-draft rules,[102] minimum academic standards for eligibility,[103] and rules prohibiting student-athletes from using their name, image or likeness.[104] In each case, the respective courts merely cited the *Board of Regents* dicta without examination of the NCAA's practices in support of amateurism. Recent cases have shown courts are increasingly receptive to examining amateurism rules that reflect the commercial nature of the relationship between NCAA student-athletes and the academic institutions they attend. Courts have acknowledged the commercial nature of many of the NCAA's amateurism rules, including limitations on the number of full scholarships awarded by member institutions[105] and capping financial awards below the cost of attendance.[106]

[100] *Id.* at 1345.

[101] *See* Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1997). Smith had graduated from one NCAA member institution, yet wanted to continue her volleyball career at another member institution where she enrolled in graduate school, within the allowed five-year athletic eligibility window. *Id.* at 183. NCAA rules require the student-athlete to forfeit at least one year of eligibility upon transfer, and the court found this policy survived antitrust scrutiny. *Id.* at 190.

[102] *See* Banks v. NCAA, 977 F.2d 1081, 1088 (10th Cir. 1992); Gaines v. NCAA, 746 F.Supp. 738, 743-44 (M.D. Tenn. 1990). Banks and Gaines sought to have their college football eligibility reinstated after declaring for the NFL draft, in direct violation of NCAA rules.

[103] *See* Bowers v. NCAA, 9 F.Supp. 2d 460, 497-98 (D. N.J. 1998). Bowers unsuccessfully challenged the NCAA's academic qualification rules, as they failed to account for his learning disability.

[104] *See* Bloom v. NCAA, No. 02CA2302 (Colo. Ct. App. Div. V. 2004). Bloom, an Olympic and professional World Cup skier, contested his loss of eligibility as a University of Colorado football student-athlete for monies earned from skiing endorsements. Bloom argued unsuccessfully that the NCAA's restrictions on endorsements and media appearances constituted a restrain of trade.

[105] *See In re* NCAA I-A Walk-On Football Players Litigation, 398 F.Supp. 1144 (W.D. Wash. 2005), *class certification denied, In re*: NCAA I-A Walk-On Football Players Litig., 2006 U.S. Dist. LEXIS 28824 (W.D. Wash. 2006). Walk-on football players challenged the NCAA's limitations on the number of full grant-in-aid football scholarships. The court denied a motion to dismiss by the NCAA, recognizing that financial aid to students is commercial activity as contemplated by the Sherman Act. *Id.* at 1147-52.

[106] *See* White v. NCAA, 2006 Dist. LEXIS 101366 (C.D. Cal. 2006). A plaintiff class of major football and basketball players challenged the NCAA's grant-in-aid cap on financial awards to student-athletes. The court denied the NCAA's motion to dismiss, ruling the plaintiffs had sufficiently alleged the NCAA had market power in the relevant market and harm to competition. After class certification was granted, the NCAA settled the case for $10 million. *See* Jack Carey & Andy Gardiner, *NCAA Agrees to $10M*

Two cases, *Agnew v. NCAA*[107] and *Rock v. NCAA*,[108] distinguish NCAA eligibility rules from financial aid rules; reasoning that eligibility rules should be entitled to a presumption of reasonableness in preserving amateurism, while financial aid rules do not merit such a presumption.[109] While the *Agnew* and *Rock* plaintiffs failed to sufficiently identify a relevant commercial market in their complaints, the courts both acknowledged there might be a relevant "labor market for student-athletes," where students-athletes obtain scholarships in exchange for the myriad financial benefits the schools obtain from their participation in athletic programs.[110] Since *Agnew* and *Rock*, no court has thoroughly examined whether the NCAA's financial aid rules could survive analysis under the "rule of reason." That is, until *O'Bannon v. NCAA*.[111]

IV. NIL TO LOSE: THE ANTITRUST CLAIMS FOR STUDENT-ATHLETE NIL RIGHTS

O'Bannon v. NCAA is the first antitrust case to rule that the NCAA's amateurism rules violate the Sherman Act by prohibiting student-athletes from profiting from their name, image or likeness.[112] After an extensive bench trial, the district court concluded that the NCAA and its member institutions obtain financial benefits from the NIL Rights of current and former student-athletes in a variety of revenue streams, including but not limited to: media rights for televising games, video-clip sales to corporate advertisers and others, video games, and rebroadcasts of classic games.[113] Moreover, NCAA rules serve as a group boycott against student-athletes, impermissibly setting the value of their NIL Rights to zero.[114]

The district court issued an injunction prohibiting the NCAA from enforcing any rules that restrict member institutions or conferences from offering certain football and basketball recruits a limited share of revenue derived from NIL Rights, to be held in trust accounts payable upon completion of their intercollegiate careers.[115] While the NCAA

Settlement in Antitrust Lawsuit, USA TODAY, Jan. 30, 2008, *available at* http://usatoday30.usatoday.com/sports/college/2008-01-29-ncaa-settlement_N.htm (last visited Mar. 29, 2015).

107 683 F.3d 328 (7th Cir. 2012).

108 928 F.Supp. 2d 1010 (S.D. Ind. 2013).

109 *See Agnew*, 683 F.3d at 342-345. *See also Rock*, 928 F.Supp. 2d at 1017.

110 *Id.*

111 7 F.Supp. 3d 955 (N.D. Cal. 2014).

112 *Id.* at 1007-08.

113 *Id.* at 968-71.

114 *Id.* at 1007.

115 *Id.* at 1008.

may institute rules capping NIL Rights payments, any such cap cannot be less than a student-athlete's cost of attendance plus $5,000 (in 2014 dollars, adjusted for inflation).[116] This section explores the antitrust analysis employed by the court in *O'Bannon*, briefly analyzes the NCAA's arguments on appeal to the Ninth Circuit, and considers the potential enactment issues implicated by the district court's injunction.

A. Antitrust Analysis of NIL Rights in O'Bannon

The district court in *O'Bannon* found "the challenged NCAA rules unreasonably restrained trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools."[117] Moreover, the procompetitive rationales offered by the NCAA did not justify the NCAA's restraints, as the NCAA's goals of preserving amateurism in intercollegiate athletics could be achieved thru less restrictive means.[118] As outlined in Part III(A) *supra*, violations of the Sherman Act require: (1) an agreement, combination or conspiracy; (2) an unreasonable restraint on market competition; and (3) a nexus to interstate commerce. The District Court dispatched with elements (1) and (3) quickly, and focused on whether the agreements amounted to an unreasonable restraint in violation of the Sherman Act.[119] While the challenged NCAA rules amounted to a group boycott or refusal to deal with student-athletes, *per se* activity under the Sherman Act, the district court, consistent with *Board of Regents*, analyzed the NCAA's concerted actions under the "rule of reason."[120]

1. Negative Impacts of NCAA's Rules on Competition in a Relevant Market(s).

The first step required O'Bannon to establish that the NCAA's rules had an impact upon competition in a relevant market. In contrast to the plaintiffs in *Agnew* and *Rock,* the district court concluded that O'Bannon established at trial two distinct markets:

> (1) the "college education market," in which colleges and universities compete to recruit student-athletes to play [Football Bowl Subdivision] "FBS" football or Division I basketball; and

[116] *Id.*
[117] *Id.* at 963.
[118] *Id.*
[119] The District Court noted: "The NCAA does not dispute that these rules were enacted and enforced pursuant to an agreement among its Division I member schools and conferences. Nor does it dispute that these rules affect interstate commerce. Accordingly, the only remaining question here is whether the challenged rules restrain trade unreasonably." *Id.* at 985.
[120] *Id.*

> (2) the "group licensing market," in which videogame developers, television networks, and others compete for group licenses to use the names, images, and likenesses of FBS football and Division I men's basketball players in videogames, telecasts, and clips.[121]

As it relates to the "college education market," O'Bannon distinguished FBS football and Division I men's athletics as a distinct market, where NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits, "specifically the opportunity to earn a higher education while playing for FBS football or Division I men's basketball teams." In exchange, the recruits provide the schools with their athletic services and acquiesce in the school's use of their NIL Rights. The Court found there was no comparable substitute market for elite football and basketball recruits. FBS football and Division I men's basketball market is distinct from other college institutions in level of athletic competition, training facilities, compensation of coaches, and exposure to compete in front of large crowds and on national television. Professional sports leagues do not offer recruits opportunities to earn a higher education and regularly showcase their athletic talents on national television. While the NBA and NFL provide the latter, these leagues restrict high school recruits from participation in these marketplaces. Stated simply, other schools and leagues are not suppliers in the "college education market." Consequently, the NCAA's rules amount to a buyer's cartel where colleges collude to artificially set the value of athletic scholarships and restrain the market to the detriment of elite football and basketball recruits.

The "group licensing market," are national submarkets of a broader national group licensing market to use student-athlete's NIL Rights in: (1) live game telecasts, (2) videogames, and (3) game re-broadcast rights. NCAA restricts student-athletes from licensing their NIL Rights and forces them to assign these same rights to the NCAA and/or its member institutions, in essence shutting them out of these markets to the benefit of the NCAA and its members. However, the district court failed to find that the NCAA's actions harm elite football and basketball recruits, as there is no evidence that, in the absence of the challenged restraint, teams of student-athletes would compete against one another to sell group licenses. To the contrary, these markets necessitate licenses from all participants in a particular athletic event. The district court explains:

[121] *Id.* at 986.

> For instance, a network seeking to telecast a conference basketball tournament would have to obtain group licenses from all the teams in that conference. Under those circumstances, none of the teams in the conference would compete against each other as sellers of group licenses because group licenses would constitute perfect complements: that is, every group license would have to be sold in order for any single group license to have value. . . . At the same time the teams in that conference would never have to compete with teams outside the conference because those teams – as non-participants in the conference tournament – would not be able to sell their group licenses with respect to that event in the first place. Thus, in this scenario, teams of student-athletes would never actually compete against each other as sellers of group licenses, even if the challenged rules no longer existed.[122]

In the absence of incentives for teams to compete against each other in these markets, elimination of the challenged NCAA restrictions would fail to benefit elite football and basketball recruits.

2. NCAA's Procompetitive Justifications for its Rules

Since the district court concluded that the NCAA's rules impose a restraint on competition in the "college education market," the court next considered the procompetitive justifications proffered by the NCAA: (1) protecting amateurism; (2) maintaining competitive balance; (3) integration of academics and athletics; and (4) increased output.

a. Protecting Amateurism: The district court found the NCAA's rules play a limited role in driving consumer demand for FBS football and Division I basketball related products. While NCAA rules may justify restrictions against large-payments to student-athletes during school, they fail to justify a blanket restriction on compensating student-athletes, in the present or in the future, for their NIL Rights.

b. Maintaining Competitive Balance: In the district court's view, the NCAA failed to present evidence that its restrictions on student-athlete compensation have any effect on competitive balance, much less that they produce an optimal level of competitive balance. To the contrary, the evidence at trial supported the conclusion that the primary drivers of consumer demand for intercollegiate sports are school loyalty and geography.

c. Integration of Academics and Athletics: The district court acknowledged the NCAA has a narrow procompetitive goal in the integration of student-athletes into academic communities at their schools, as it serves to improve the quality of the educational services that they receive. This goal supports some restrictions on student-

[122] *Id.* at 995.

athlete compensation but not a sweeping prohibition on NIL Rights revenue participation.

d. Increased Output: The NCAA also failed to establish that its rules enable more schools to participate in FBS football and men's Division I basketball. Neither the NCAA nor its member conferences require high-revenue schools to subsidize lower-revenue schools. Moreover there is no evidence that NCAA rules lead to additional academic scholarships or Division I institutions. Moreover the *O'Bannon* plaintiffs sought an optional payment for NIL Rights, rather than a mandatory one. This provides schools the option to decide whether to re-allocate their resources toward student-athlete NIL Rights compensation. The record showed that schools in the relevant market already invest heavily in coaches and facilities, calling into question the assertion that these programs would be placed into financial ruin or leave Division I if the NCAA restraints were eliminated.

3. Less Restrictive Alternatives to Achieve the NCAA's Procompetitive Objectives

Having found that the NCAA established circumscribed restrictions on student-athlete compensation may yield procompetitive benefits, the district court finally considered whether the *O'Bannon* plaintiffs could demonstrate that these benefits can be achieved through less restrictive alternatives. The *O'Bannon* plaintiffs offered two legitimate less restrictive alternatives: (1) the NCAA could permit FBS football and Division I basketball schools to award stipends to student-athletes up to the cost of attendance, to cover educational costs not included in existing athletic scholarships; and (2) the NCAA could permit its schools to hold any NIL Rights revenue payments for student-athletes in trust, to be distributed upon the end of their intercollegiate careers.

As for the first goal, the Power 5 Conferences, which comprise most of the schools in relevant market, have already approved rules allowing their members to offer athletic scholarships covering the full cost of attendance to its student-athletes.[123] This buttresses the view that these increases will not destroy the procompetitive objectives of the NCAA. Similarly, the trust system offered by the *O'Bannon* plaintiffs is already utilized in another amateur context - the Olympic games - with success.

In summary, the district court's order effectuates the *O'Bannon* plaintiffs' less restrictive alternatives to achieve the NCAA's

[123] *See* Berkowitz, *supra* note 2.

procompetitive objectives. Moreover, recognizing the NCAA's legitimate procompetitive goal of restricting the size of student-athlete compensation, the district court's order permits the NCAA to set a cap on NIL Rights revenue offered to student-athletes. The established cap floor of $5,000 per year was actually offered by the NCAA's own witnesses at trial as an amount posing little threat to undermining intercollegiate athletics.

B. NCAA's Issues on Appeal to the Ninth Circuit.

The NCAA predictably appealed the district court ruling. There are three basic themes to be gleaned from its' appellate briefs: (1) *Board of Regents* precludes any antitrust examination into the NCAA's amateurism rules; (2) the First Amendment precludes student-athletes from asserting NIL Rights during live game telecasts; and (3) the $5,000 per year NIL Rights cap floor ordered by the district court is arbitrary, and replaces one price restraint for another.

The NCAA contends that *Board of Regents* forecloses the application of antitrust law to its amateurism rules, noting the oft-quoted dicta, "In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[124] The NCAA's reliance on *Board of Regents* appears misplaced, as it ignores the consistent body of precedent distinguishing NCAA eligibility rules from financial aid rules articulated in *White*, *Agnew* and *Rock*.[125] In the thirty years since *Board of Regents*, courts have become increasingly receptive to examining the commercial nature of intercollegiate athletics, and have readily acknowledged that some of the NCAA's eligibility rules, such as NIL Rights prohibitions, have an undeniable commercial nature.

The NCAA's argument that the First Amendment precludes student-athlete NIL Rights has already been rejected by the Ninth and Third Circuits in *Keller v. NCAA* [126]and *Hart v. Electronic Arts*,[127] at least as it relates to student-athlete's likenesses in video games. These suits concerned claims of student-athlete likeness appropriation in violation of their protected rights of publicity. While the challenged video games did not use the student-athlete names or images, they did attempt to mirror the NCAA team rosters in game avatars. Both courts rejected defenses based on the Transformative Use Test, finding the user's ability to alter the game avatar's appearances insufficient. It is unclear whether *Keller* and *Hart* will be extended to live television

124 NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 101 (1984).
125 *See* notes 108-110 *supra* and accompanying text.
126 724 F.3d 1268 (9th Cir. 2013).
127 717 F.3d 141 (9th Cir. 2012).

broadcasts, yet this only represents one of the relevant markets (albeit, the most financially significant) for student-athlete NIL Rights. The modest NIL Rights payments ordered by the district court could likely survive regardless of the merits of the NCAA's First Amendment arguments. Furthermore, athletes financially participate in very similar television rights agreements for professional sports.[128] The NCAA lacks a valid justification for differential treatment for intercollegiate athletics.

Finally, the NCAA questions the logic of the district court's NIL Rights cap floor, as merely exchanging one price-restraint for another. This argument, however, runs afoul of the balancing purpose of the "rule of reason" antitrust analysis of less restrictive alternatives to achieve the procompetitive benefits the NCAA seeks to protect. The district court's injunctive order not only considers the less restrictive alternatives presented by the *O'Bannon* plaintiffs at trial, but also accords the NCAA's own witness testimony regarding modest levels of student-athlete NIL Rights payments not destroying intercollegiate athletics. In light of the extensive findings of fact in *O'Bannon*, the Ninth Circuit may limit its standard of review concerning the scope of the district court's injunction to abuse of discretion.[129]

C. Enactment Issues if the O'Bannon Decision is Upheld

Assuming *O'Bannon* is upheld, intercollegiate athletics and the NCAA will certainly continue to be lucrative enterprises. First, as previously noted, the Power 5 Conferences have obtained rule-making autonomy from the NCAA and have already authorized their members to offer athletic scholarships up to the cost of attendance at their institutions. The Power 5 Conferences represent the majority of the schools implicated by the district court's injunction, and there is little evidence indicating that the remaining schools will be unwilling or unable to re-allocate their expenditures to provide student-athletes at least modest NIL Rights payments.

Moreover, the injunction does not mandate that schools provide additional benefits to student-athletes. Rather it states that the NCAA may not prohibit schools from doing so. In this respect, the affected

[128] For example, the new NBA television contract has created a dramatic spike in the NBA's salary cap. *See* Andrew Keh, *With TV Deals Ahead, Players Reject Salary Cap Limits*, NY TIMES, Mar. 11, 2015, *available at* http://www.nytimes.com/2015/03/12/sports/basketball/with-tv-deals-ahead-players-reject-salary-cap-limits.html?_r=0 (last visited Mar. 29, 2015).

[129] *See* Rabkin v. Or. Health Scis. Univ., 350 F.3d 967, 977 (9th Cir. 2003). "'Abuse of discretion' has been defined as 'plain error,' that is, 'a judgment that clearly against the logic and effect of the facts as are found." *Id.*

schools have the choice, but not the obligation, to provide modest student-athlete NIL Rights compensation. Similar to the NCAA reforms related to multi-year scholarships, a NIL Rights compensation market will slowly evolve, whereby schools and conferences may offer additional benefits in the active recruitment of elite football and basketball recruits, consistent with antitrust principles.

The district court order prohibits member institutions from offering differential NIL Rights payments to student-athletes in the same recruiting class, supporting the NCAA's procompetitive objectives. This still does not foreclose exceptional student-athletes from utilizing trademark law to protect some limited NIL Rights (such as names, nicknames and slogans attributed to them) under current NCAA rules, provided they either file an "intent to use" trademark registration or avoid commercial use of their registered trademarks during their intercollegiate careers.[130]

Finally, market-based NIL Rights payments to student-athletes likely create fewer Title IX enforcement issues for member institutions. Under Title IX, member institutions may not offer differential benefits to men and women student-athletes. For example, the $2,000 stipend payment contemplated by the NCAA in 2012 would have required member institutions to offer such stipends equally to male and female student-athletes. In contrast, NIL Rights are the product of independent market forces, which suggest that differential payments to men and women reflect the relative economic value of their respective NIL Rights, and should survive Title IX challenges.[131]

[130] *See* Christie Cho, *Protecting Johnny Football®: Trademark Registration for Collegiate Athletes*, 13 NW J. TECH. & INTELL. PROP. 65 (2015); John Grady & Mark S Nagel, *Keep Calm and Johnny Football: The Evolving Trademark Rights of College Athletes*, 22 SPORT MARKETING Q., 246 (2013); Ryan Hilbert, *Maintaining the Balance: Whether a Collegiate Athlete's Filing of a Federal Trademark Application Violates NCAA Bylaws*, 2 BERKELEY J. ENT. & SPORTS L. 120 (2013).

[131] *See generally*, Stanley v. University of Southern California, 178 F.3d 1069 (9th Cir. 1999) (holding that differential pay to men's and women's basketball coaches fails to violate the Equal Pay Act and Title IX, as the differential was based on a factor other than sex).

V. THE NCAA LITIGATION HORIZON BEYOND *O'BANNON*

Regardless of the outcome of the Ninth Circuit's review in *O'Bannon*, the struggle for greater equity for student-athletes in intercollegiate athletics continues on at least two legal fronts - *Jenkins v. NCAA* and *Northwestern v. College Athletes Players Association ("CAPA")*. *Jenkins* is an antitrust challenge similar to *O'Bannon*, and seeks the removal of all caps to the remuneration and benefits to recruits in football and men's basketball markets, essentially allowing for unfettered negotiations between recruits and member institutions. Like *O'Bannon* learned from *White*, *Agnew* and *Rock, Jenkins* will take guidance from the Ninth Circuit's ruling in *O'Bannon*, in advance of the jury trial requested by the plaintiffs in *Jenkins*. *Northwestern v. CAPA* is a challenge to the National Labor Relations Board (Region 13) decision declaring Northwestern scholarship football players are employees under section 2(3) of the National Labor Relations Act.[132] Although the implications of this case may only lead to Northwestern football player unionization, it points to a still unaddressed inequity for student-athletes within intercollegiate athletics, the general lack of sustained medical coverage for injuries sustained as student-athletes at member institutions.[133] Recent studies have closely examined the impact of concussions and the general physical toll of college football.[134] In response the Power 5 Conferences have recently allowed students-athletes to independently purchase loss-of-value insurance.[135]

[132] *See* Barbara Jean D'Aquila & Margaret Rudolph, *NLRB Director Finds Scholarship Athletes are Employees*, 40 EMPLOYEE REL. L.J. 27 (2014).

[133] Coincidentally, the term "student-athlete" was crafted in the 1950s by the then NCAA president, Walter Byers, in response to the *University of Denver v. Nemeth*, a 1953 Colorado Supreme Court upholding a decision granting workers compensation benefits to a football player for injuries sustained at practice. Walter Byers later wrote: "[The] threat was the dreaded notion that NCAA athletes could be identified as employees by state industrial commissions and the courts. [To address that threat, w]e crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. We told college publicists to speak of 'college teams,' not football or basketball 'clubs,' a word common to the pros."

[134] *See* Jon Solomon, *Studies Show Magnitude of College Football's Concussion Problem*, CBS SPORTS, Oct. 2, 2014, *available at* http://www.cbssports.com /collegefootball/writer/jon-solomon/24734520/studies-show-magnitude-of-college-footballs-concussion-problem (last visited Mar. 29, 2015).

[135] *See* Molly Geary, *NCAA Approves Waiver to allow Purchase of Loss-of-Value Insurance*, SPORTS ILLUSTRATED, Oct. 15, 2014, *available at* http://www.si.com /college-football/2014/10/15/ncaa-waiver-draft-stock-loss-of-value-insurance (last visited Mar. 29, 2015).

The NCAA has walked away from video games and jersey sales markets, effectively foreclosing these opportunities for student-athletes to participate in the group licensing market. Some could question the NCAA's motives for exiting these profitable markets. One could also point to the recent reforms, such as the Power 5 Conference increasing scholarships to the cost of attendance and allowing student-athletes to purchase loss-in value insurance. These are all steps in the right direction from an athlete equity perspective. However, it must be noted that these are voluntary reforms, which are subject to change and do not provide enforceable rights to the student-athletes. In contrast, the aforementioned cases demand the NCAA vigorously defend its relationship with the student-athletes it purportedly supports. Look, student-athletes got nil to lose.[136]

[136] The words of Sam Cooke ring true, "It's been a long, a long time coming. But I know a change gone come. Oh, yes it will." *See* Sam Cooke, Ain't That Good News (RCA Victor Records 1964).