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1. Papers should be no more than 20 single-spaced pages, including footnotes. For fonts, use 12 point, Times New Roman.
2. Skip lines between paragraphs and between section titles and paragraphs. Indent paragraphs 5 spaces. Right-hand justification is desirable, but not necessary.
3. Margins: left - 1 1/2 inches; right, top, bottom (except first page) - 1 inch.
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6. Footnotes should conform to *The Bluebook: A Uniform System of Citation,* 21st Edition, 2020.
7. E-mail a copy of the final version of your paper in Microsoft Word to hansenm@husson.edu

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SOTO V. REMINGTON
AN ATTEMPT TO INFLUENCE THE INVESTMENT IN CIVILIAN ASSAULT WEAPON MANUFACTURERS

by Mary Papazian[*] and Christine M. Westphal[**]

INTRODUCTION

Victoria Soto was a 27-year-old teacher at the Sandy Hook elementary school on the morning of December 14, 2012[1] when a shooter entered the school. He was armed with a Bushmaster Model XM15—E2S semi-automatic rifle manufactured and sold by Remington; a Glock 20, 10 mm semi-automatic pistol; and a Sig Sauer P226, 9 mm semi-automatic pistol.[2] The shooter used the Bushmaster rifle to kill twenty first-grade pupils and six adults including Victoria Soto, in less than 11 minutes (although the actual shooting of the victims lasted only 5 minutes) and then used the Glock pistol to kill himself.[3]

Initially, the families of the victims hoped that the horror of this mass shooting would convince the United States Congress to pass gun control legislation.[4] They hoped that Congress would reinstate the ban on the sale of assault weapons that had been in effect from 1994 until 2004 when a 10-year sunset provision caused the ban to expire.[5] The Sandy Hook families felt that the use of assault weapons had increased the body counts in mass shootings and they wanted to impact future mass shootings by limiting the availability of semi-automatic assault weapons.

When their efforts in Congress were unsuccessful, they decided to sue Remington[6]. Their goal was to discourage the manufacture and sale of assault weapons by limiting financial investment in the companies that sell military-style assault weapons to civilians. As their lawyer

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[1] Stephen J. Sedensky, III, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012* (2013), https://portal.ct.gov/-/media/DCJ/SandyHookFinalReportpdf.
[2] *Id*. at 2.
[3] *Id.*
[4] Elizabeth Williamson, *How They Did It: Sandy Hook Families Gain Long-Awaited Legal Wins,* NY TIMES, (Feb. 21, 2022), https://www.nytimes.com/2022/02/20/us/politics/sandy-hook-legal-victories.html.
[5]Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. § 921(a)(30) (1994).
[6] Pls.' Compl. (Feb. 3, 2015). *See also* Williamson, *supra* note 4.

noted: "Since this case was filed in 2014, the families' focus has been preventing the next Sandy Hook," Mr. Koskoff said. "An important part of that goal has been showing banks and insurers that companies that sell assault weapons to civilians are fraught with financial risk."[7]

This paper reviews the highlights of the legal case as it worked its way through the courts to the settlement and tries to determine if the case had any impact on investment in gun manufacturers. While it is not possible to determine the attitude of banks and insurance companies toward gun manufacturers who sell military-style assault weapons to civilians, it is possible to determine the attitude of investors in general by looking to see if the case has had any impact on the stock price of such companies. Using the stock price of two publicly traded manufacturers, Smith and Wesson Brands, Inc. (Smith & Wesson) and Sturm, Ruger & Company, Inc. (Sturm Ruger), both of whom sell military-style assault weapons, it looks at the key dates in the progress of the lawsuit to determine if developments in the case impacted the stock prices of gun manufacturers.

It then looks briefly at the response to the settlement by the investment community, the gun industry, and those seeking to impose liability for gun violence on the gun manufacturers.

Background

The challenge for victims of a shooting who try to sue gun manufacturers is the 2005 law, the Protection of Lawful Commerce in Arms Act (PLCAA)[8] which protects gun manufacturers from most civil liability for damages caused by their products. It is described in the legislation as:

> An Act to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others…[9]

There are narrow exceptions to the protection from liability for "qualified civil liability actions" provided by PLCAA. and they include:

(i) An action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law… (i.e. illegal sale)
(ii) An action brought against the seller for negligent entrustment or negligence per se;
(iii) An action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate

[7] Tom Hals & Jonathan Stempel, *Remington Offers $33 Million to Families of Sandy Hook School Shooting Victims*, REUTERS, Jul. 27, 2021, https://www.reuters.com/world/us/remington-offers-33-million-families-sandy-hook-school-shooting-victims-2021-07-27.
[8] Protection of Lawful Commerce in Arms Act, 15 U.S.C.S. § 7901 (2022).
[9] *Id.*

> cause of the harm for which relief is sought…
> (iv) An action for breach of contract or warranty in connection with the purchase of the product;
> (v) An action for death, physical injuries, or property damage resulting directly from a defect in design or manufacture of the product when used as intended or in a reasonably foreseeable manner …
> (vi) An action or proceeding commenced by the Attorney General to enforce provisions of chapter 44 of title 18 or chapter 53 of title 26, United States Code.[10]

PLCAA goes on to define negligent entrustment

> As used in subparagraph (A)ii, the term 'negligent entrustment' means the supplying of a qualified product by a seller for use by another person when the seller knows or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.[11]

The Sandy Hook plaintiffs initially sought relief[12] using a negligent entrustment argument based on the 1977 Michigan Supreme Court decision *Moning v. Alfono*[13] which held that negligent entrustment

> …is grounded in the general principle that a reasonable person will have in mind the immaturity, inexperience, and carelessness of children. If, taking those traits into account, a reasonable person would recognize that his conduct involves a risk of creating an invasion of the child's or some other person's interest, he is required to recognize that his conduct does involve such risk. 'He should realize that the inexperience and immaturity of young children may lead them to act innocently in a way which an adult would recognize as culpably careless, and that older children are peculiarly prone to conduct that they recognize as culpably careless or even reckless.'

Moning v. Alfono, 254 N.W. 2d 759 768-769 (Mich. 1977) (citation omitted). The Michigan Court considered "…the magnitude of risk and the utility of the conduct..."[14] and held that it was up to a jury to determine whether or not to hold a slingshot manufacturer liable for Royal Moning's (age 12) loss of the sight in an eye when his playmate Joseph Alfono (age 11) shot a slingshot pellet at him, under a theory of negligent entrustment.[15]

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[10] *Id.*
[11] *Id.* § 7903.
[12] Soto v. Bushmaster Firearms Int'l, LLC (Pls.' Compl. Feb. 3, 2015).
[13] Moning v. Alfono, 254 N.W. 2d 759 (Mich. 1977).
[14] *Id.* at 774.
[15] *Id.*

While there were several obvious problems with using this case[16] as the basis of their complaint, the plaintiffs were hoping to have the Connecticut Court apply the Michigan Court's balancing test and allow the case to go to a jury.[17] If they could get the case in front of a jury, and ask the jury to balance the utility of the conduct (selling military-style assault weapons to civilians) against the magnitude of the risk (mass shootings involving multiple deaths) they might get a favorable verdict from the jury. Much of the original complaint is devoted to showing that military-style weapons have no civilian utility and that both the military and the police departments that use such weapons require extensive training before they 'entrust' the weapons to their members. They argued in their complaint that when the weapons are sold to civilians no training is required, and the weapons are not suitable for either hunting or personal protection.[18] They also argued that Remington's Bushmaster Model XM15—E2S semi-automatic rifle and other, similar military-style assault rifles have been used repeatedly in mass shootings, and therefore the use of the Bushmaster Model XM15—E2S semi-automatic rifle in the Sandy Hook mass shooting was foreseeable.

The initial Complaint also included a single allegation that the defendants had violated the Connecticut Unfair Trade Practices Act (CUPTA): "190. Upon information and belief, the Bushmaster Defendants' conduct as previously alleged constituted a knowing violation of the Connecticut Unfair Trade Practices Act, Connecticut General Statutes Section 42-110a et seq."[19]

Ultimately the plaintiffs would rely on their claim that Remington violated the CUPTA to bring the case to trial but it would take seven years from the filing of the original complaint to the settlement.

The delays were a result of appeals by the parties and the delays caused by Remington's bankruptcy proceedings[20]. Over the seven years of active litigation, Remington filed Bankruptcy twice. In March of 2018 Remington filed for Chapter 11 Bankruptcy protection.[21] At the time it had net sales of close to a billion dollars.[22] Then in July of 2020 Remington again sought Chapter 11 Bankruptcy protection.[23] The July 2020 Bankruptcy filing resulted in a $159 million-dollar bankruptcy sale of the Remington assets. When the Sandy Hook plaintiffs objected to the sale the Bankruptcy Judge ordered that a portion of the sale proceeds would be used to keep Remington's insurance intact because that could be used to compensate the plaintiffs if their lawsuit proved successful. This proved significant because ultimately it was the insurance companies who could

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[16] Both the plaintiff and the defendant in Moning were minors; the case focuses on entrustment to a minor; the case involved a slingshot, which could be viewed as a child's toy, not a gun, and therefore was not covered by PLCAA. PLCCA *supra* note 8 at 760.

[17] Pls.' Compl. (Feb. 3, 2015).

[18] Pls.' Compl. at pp. 9-10 (Feb. 3, 2015).

[19] *Id*.

[20] Soto v. Bushmaster Firearms Int'l, LLC, 139 F. Supp. 3d 560. Remington Outdoor Company, Inc. *et al* U.S Bankr. Ct. Dist. of Delaware Case No. 18-10684 (BLS) Remington Outdoor Company, Inc. *et al* U.S. Bankr. Ct. N. Dist. of Alabama N. Div. Case No. 20-81688-CRJ-11.

[21] Remington Outdoor Company, Inc. *et al* U.S Bankr. Ct. Dist. of Delaware Case No. 18-10684 (BLS)

[22] Rob Ryser, *Timeline: How Sandy Hook-Remington case went from unlikely to $73 million settlement,* NEWSTIMES, Feb. 15, 2022, https://www.newstimes.com/news/article/Timeline-How-Sandy-Hook-Remington-case-went-from-16921310.php.

[23] Remington Outdoor Company, Inc. *et al* U.S. Bankr. Ct. N. Dist. of Alabama N. Div. Case No. 20-81688-CRJ-11

enter into a settlement with the Sandy Hook plaintiffs.[24] This has allowed other gun manufacturers to distance themselves from the settlement by claiming that it was not a gun manufacturer who settled the case but an insurance company.[25]

The original complaint *Soto vs. Bushmaster Firearms* was filed in the Connecticut Superior Court in December 2014[26]. That Court granted a motion to strike the amended complaint in October 2016[27] finding that Plaintiffs had not shown sufficient facts to meet either the negligent entrustment exception in PLCAA or the negligent entrustment standard under Connecticut Common Law. The trial court also found that the plaintiffs had not established sufficient facts to demonstrate a violation of CUPTA.[28] The appeal from the Judges' dismissal of the complaint eventually reached the Connecticut Supreme Court[29], which upheld the dismissal of the negligent entrustment claims holding "…that there is no allegation in this case that there was any reason to expect that Lanza's mother was likely to use the rifle in an unsafe manner."[30] Since the mother was the actual purchaser of the weapon, and her son was not present during the purchase the Connecticut Supreme Court went on to state "We decline the plaintiffs' invitation to stretch the doctrine of negligent entrustment so far beyond its historical moorings."[31]

The Connecticut Supreme Court affirmed the trial court's decision that "…most of the plaintiff's claims should have been dismissed…" it reversed the trial court ruling holding that PLCAA did not bar the plaintiffs' claims under CUPTA stating:

> Once we accept the premise that Congress did not intend to immunize firearms suppliers who engage in truly unethical and irresponsible marketing practices promoting criminal conduct, and given that statutes such as CUPTA are the only means available to address those types of wrongs, it falls to a jury to decide whether the promotional schemes alleged in the present case rise to the level of illegal trade practices and whether fault for the tragedy can be laid at their feet.[32]

While the initial complaint focused primarily on the negligent entrustment argument, the Connecticut courts ultimately dismissed that claim, leaving just the plaintiff's wrongful marketing claims under CUPTA to go forward.[33] As the case progressed through the court system the plaintiff's focus turned to the marketing practices Remington used to increase sales of the Bushmaster Model XM15.[34] The Plaintiffs lawyers focused on the changes Remington made to its

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[24] *Id*.

[25] Bob Sanders, *Sturm, Ruger reports another boom year with $730 million in firearms sales* NH BUSINESS REVIEW (Feb. 28, 2022), https://www.nhbr.com/sturm-ruger-reports-another-boom-year-for-its-firearms/.

[26] Pls.' Compl. (Dec. 13, 2014) and Pls' First Am. Compl. (Oct. 29, 2015).

[27] Soto v. Bushmaster Firearms Int'l, LLC, 2016 WL 8115354 (Conn. 2016).

[28] *Id*.

[29] Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 282, (Conn. 2019).

[30] *Id*. at 282.

[31] *Id*.

[32] *Id*. at 156 and 324-325.

[33] *Id*.

[34] Pls.' Revised Am. Second Compl. (May 19, 2020).

marketing practices after the firm was acquired by Cerberus Capital Marketing, a private equity firm. Starting in 2006 Cerberus acquired several American gun makers, including Bushmaster, and placed them under the Remington umbrella.[35] By 2009 increasing the sales of the Bushmaster Model XM15 was one of the company's priorities, and they tied executive bonuses "…to implementing a plan to hit specific sales targets for the Bushmaster weapon…"[36] To achieve these sales goals Remington changed its sales strategy.

> Staid, technical ads for the Bushmaster were replaced by an aggressive marketing campaign targeting young men admiring the military, known in the trade as 'couch commandos'… militaristic pitches with macho slogans like 'forces of opposition, bow down,' 'Clear the room' and 'Consider your man card reissued' ran in men's magazines… and combat video games like Call of Duty.[37]

These marketing techniques were successful, and sales of the Bushmaster grew "…exponentially between 2005 and the 2012 shooting."[38] The Plaintiffs argued that marketing the Bushmaster to "troubled young men" violated the Connecticut Unfair Practices Act.

Defendants appealed the Connecticut Supreme Court's decision to the U.S. Supreme Court and the U.S. Supreme Court denied *certiorari* on March 19, 2019[39] which allowed the case to move forward in the Connecticut Courts. The case returned to the Connecticut Superior Court. The Defendants then offered to settle the case for $33 million, which the Plaintiffs rejected.[40] The Plaintiffs began discovery in anticipation of bringing the case to trial. Finally, on February 15, 2022, the parties agreed to settle the case.[41]

Once the Plaintiffs focused on the marketing strategy that Remington used, they became committed not just to economic recovery but also to obtaining the internal company documents that they believed would demonstrate that the gun industry knew it was marketing military-style semi-automatic weapons to a population of "troubled young men" and that it would result in an increase of mass shootings.[42] The desire to have Remington's internal marketing and strategy documents made public was the main reason the Plaintiffs refused an initial settlement offer of $33 million[43]. They wanted full discovery of internal company documents and they wanted the

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[35] Williamson, *supra* note 4.
[36] Rick Rojas & Kristin Hussey, *How Sandy Hook Families Hope to Pierce the Gun Industry's Legal Shield*, N.Y. TIMES, Apr. 8, 2019, https://www.nytimes.com/2019/04/08/nyregion/sandy-hook=gun-lawsuit.html.
[37] Williamson, *supra* note 4.
[38] *Id.*
[39] Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262 (Conn. 2019). *cert. denied*, Remington Arms Co., LLC v. Soto, 140 S. Ct. 513 (2019).
[40] *Sandy Hook Families Achieve Key Victories Against Remington Including $73M Settlement,* NEWTOWN BEE, Feb. 15, 2022, https://www.newtownbee.com/02152022/sandy-hook-families-achieve-key-victories-against-remington-including-73m-settlement/.
[41] Kevin Breuninger*, Sandy Hook families reach $73 million settlement with rifle maker Remington over 2012 school massacre*, CNBC, Feb. 15, 2022, 11:12 AM, https://www.cnbc.com/2022/02/15/emington-agrees-to-settle-with-sandy-hook-mass-shooting-families.html.
[42] Pls' Mot. to Compel (July 2, 2021).
[43] Rick Rojas & Kristen Hussey, *Is Remington's $33 Million Offer Enough to End Sandy Hook Massacre Case?,* NYTIMES*,* July 29, 2021, https://www.nytimes.com/2021/07/29/nyregion/sandy-hook-shooting-remington-settlement.html.

total available amount of the insurance so that the insurance companies would realize the risk of insuring gun manufacturers. The final settlement achieved both goals.

Did Soto v. Remington Effect Investment in Gun Manufacturers?

Ultimately, as noted above, the Plaintiffs hoped to discourage investment in gun manufacturers.[44] To determine if there was an immediate effect on investment in gun manufacturers, we looked at the fluctuations in the stock price of two publicly traded gun manufacturers. We choose Smith & Wesson and Sturm Ruger because they are American gun manufacturers who also sell military-style assault weapons. As noted above, at the time of the 2012 Sandy Hook shooting Remington was privately held and therefore the direct impact on Remington could not be measured.

Methodology

Using timelines for the Sandy Hook case provided by Rob Ryser[45] and the Business & Human Rights Resource Centre[46], we established 10 significant dates in the case's progress through the courts. We then analyzed the stock trading behavior of the two well-known gun manufacturers, Smith & Wesson Brands, Inc. (SWBI)[47] and Sturm, Ruger & Co., Inc. (RGR)[48] as well as the overall market returns over the 10 years involved in the Sandy Hook shootings and the subsequent court case.

We compared the two companies' stock trading performance against the Standard & Poor 500 (S&P 500) index which is a proxy or benchmark to the overall market performance. The S&P 500 index is the best-known market proxy for the U.S. stock market and is used to perform numerous research on stock market behavioral patterns. This index is a broad proxy of the stock market based on 500 companies traded on the New York Stock Exchange (NYSE) and NASDAQ stock exchange.[49] This helped us see very quickly any dynamic market moves of the two stocks, both positive or negative reactions that did not pertain to an overall market upturn or downturn.

We then focused on analyzing the market at least 7 days before and 7 days after a legal announcement to see if there was any consistent correlation to any legal announcements. For example, we looked for a negative stock performance, the stock price moving down, in response

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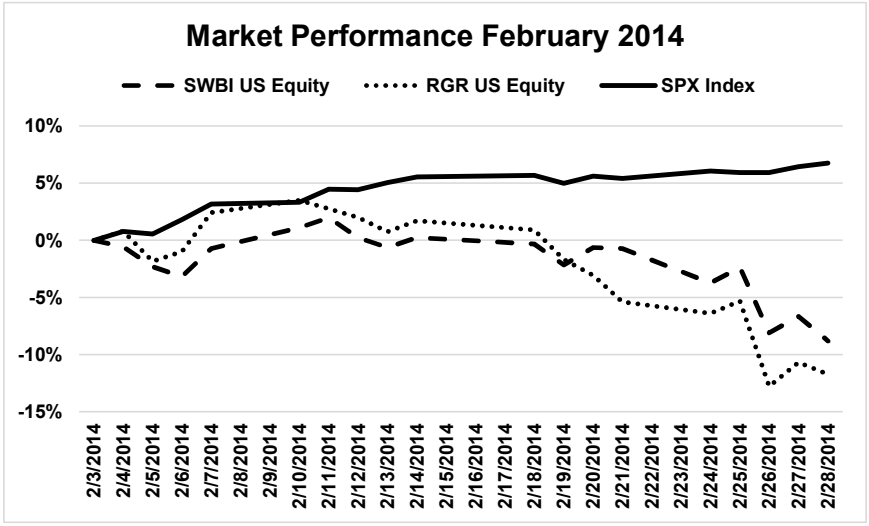
[44] Hals & Stempel, *supra* note 7.
[45] Ryser, *supra* note 14.
[46] Business & Human Rights Resource Centre, *Gun Industry Lawsuit (re Sandy Hook Shooting in USA)* https://www.business-humanrights.org/en/latest-news/gun-industry-lawsuit-re-sandy-hook-shooting-in-usa/ (last visited July 21,2022).
[47] In November 2016, the shareholders of Smith & Wesson voted to change the company name to American Outdoor Brands Corp. The brand name Smith & Wesson remained for its firearms products. On June 1, 2020, in preparation for the spin-off of its outdoor products and accessories business as an independent, publicly-traded company later in the year, the corporation's name was changed to Smith & Wesson Brands, Inc. and its ticker symbol on the Nasdaq became SWBI. The spin-off was completed on August 24, 2020, at which time Smith & Wesson Brands, Inc. became a pure-play firearms company. Smith-Wesson, https://ir.smith-wesson.com/ir-resources/investor-faqs (last visited May 18, 2022).
[48] Sturm, Ruger & Co., http://www.ruger.com/corporate/index.html (last visited May 18, 2022).
[49] S&P Dow Jones Indices, *S&P 500 Ticker SPX,* https://www.spglobal.com/spdji/en/documents/additional-material/sp-500-brochure.pdf. (last visited July 21, 2022)

to legal news that was not supportive of the gun industry. We were also very aware of reviewing many of these announcements during a 30-day window to compensate for the "announcement effect" which refers to the impact that any type of news good or bad has on the financial markets.

What we found was that virtually all of the stock moves of these companies over the entire period of the lawsuit were due to political announcements or company earnings forecasts or releases and could not be attributed to negative investment sentiment caused by developments in the case.

We have provided a representative sample of these findings below. All data points and market performance were obtained directly from Bloomberg[50].

"On February 1, 2014, relatives of victims of the Sandy Hook shooting filed a lawsuit in the US against Bushmaster Firearms (part of Remington Outdoor), Camfour, Inc., and Riverview Gun Sales, a retail gun shop in East Windsor, CT."[51]

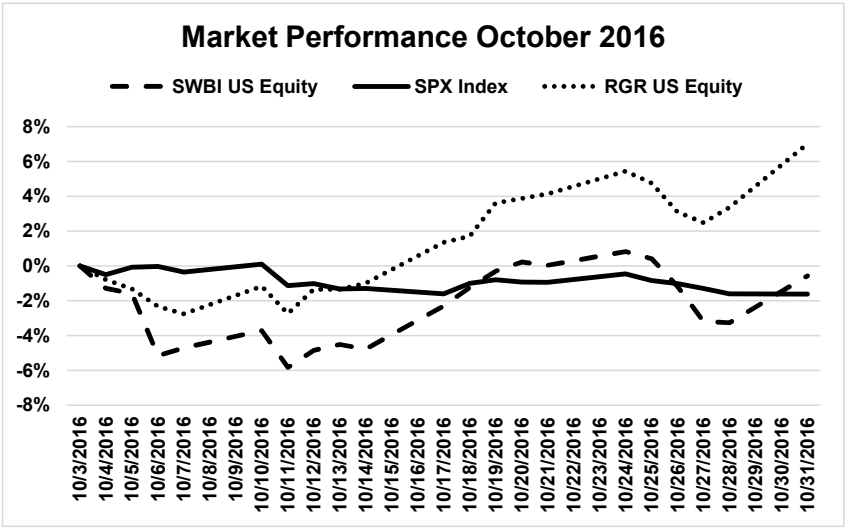


Smith and Wesson Brands (SWBI), Sturm, Ruger & Co. (RGR), the S&P 500 (SPX Index) prices and data were pulled from Bloomberg database for the period 02/01/2014 – 02/28/2014.

[50] Bloomberg, L.P., *Bloomberg Terminal*, https://www.bloomberg.com/professional/solutions/bloomberg-terminal (last visited July 21, 2022).
[51] Business & Human Rights Resource Centre, *supra* note 46.

Although you can see slight volatility from the graph above at the beginning of the month, it should be noted that the volatility started at the end of January 2014 not due to the victims filing the lawsuit. U.S. stocks closed down sharply with their biggest monthly percent loss since May of 2012. This downturn was due to the overall market and not the gun sector or industry. The major drop that you can see is February 24th when Sturm Ruger missed earnings for the first time in four years. We also found that these two companies were highly correlated in their trading patterns. If earnings were negative for one company, the other company's stock price moved in the same direction. This correlation and trading pattern between the two firms consistently continues throughout our research.

"In October 17, 2016 the Connecticut Superior Court dismissed the case based on the Protection of Lawful Commerce in Arms Act, ruling that the companies could not be held liable for harm caused solely by the criminal misuse of a weapon."[52]



Smith and Wesson Brands (SWBI), Sturm, Ruger & Co. (RGR), the S&P 500 (SPX Index) prices and data were pulled from Bloomberg database for the period 10/1/2016-10/31/2016.

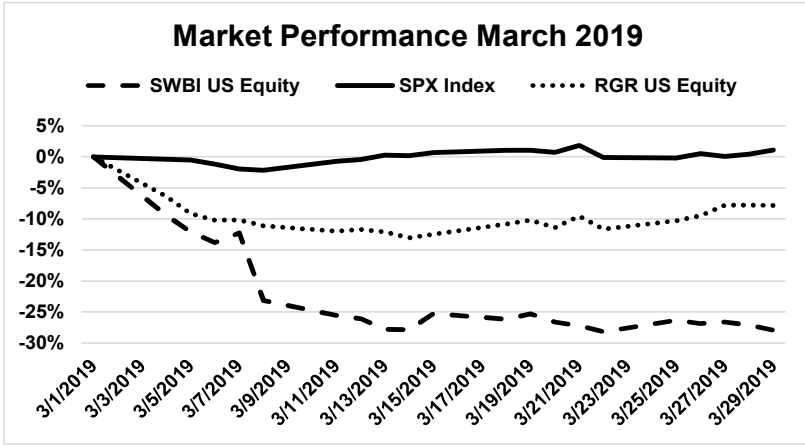
Looking at the stock price volatility and news announcements during October, the industry analysts did not talk about the Connecticut Superior Court's decision to dismiss the case but about Smith & Wesson being downgraded on October 6th from a "Buy" to a "Hold" from an equity

[52] *Id.*

analyst at Wunderlich Securities due to a lower future target price of $29.00 per share.[53] You can see the stock price moving lower after this announcement. In the middle of the month, you see the stock price moving higher due to the "pre-Hillary sale". A mid-month article from Bloomberg stated:

> A more particular theory that I've heard from gun industry insiders is that firearm owners have resigned themselves to the election this November of Democratic Party presidential nominee Hillary Clinton. The argument from industry experts like Richard Feldman, president of the Independent Firearm Owners Association goes that, having concluded Clinton will defeat her Republican opponent, Donald Trump, gun enthusiasts are running out to buy one more firearm before she has a chance to push her oft-articulated gun-control agenda.[54]

In March 15, 2019, the Connecticut Supreme Court revived the lawsuit, saying that the families could sue for wrongful marketing under the Connecticut Unfair Trade Practices Act.[55]



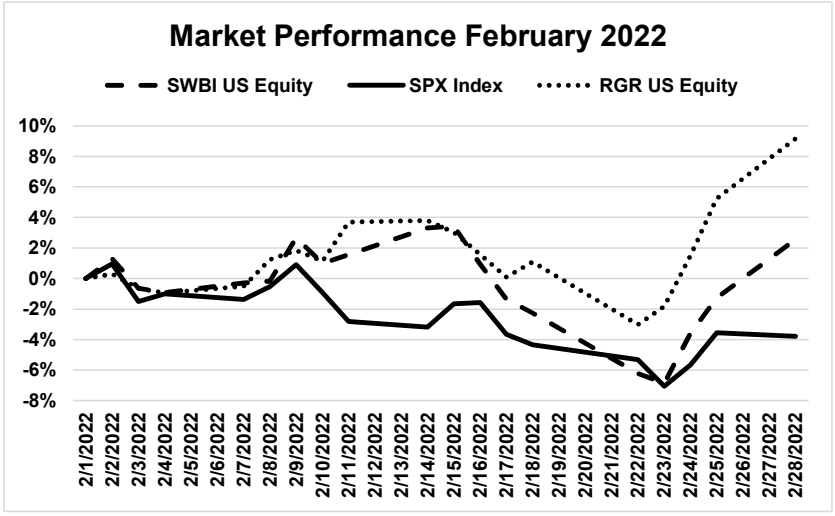
Smith and Wesson Brands (SWBI), Sturm, Ruger & Co. (RGR,) the S&P 500 (SPX Index) prices and data were pulled from Bloomberg database for the period 3/1/2019-3/29/2019.

As you can see from the graph above, the stock price started to slide due to Sturm Ruger earnings being released the week prior. Christopher John Killoy, President and CEO of Sturm

[53] Tomi Kilgore, *Smith & Wesson's Stock Drops After Analyst Downgrade on Demand Concerns*, MARKETWATCH https://www.marketwatch.com/story/smith-wessons-stock-drops-after-analyst-downgrade-on-demand-concerns-2016-10-06 (last visited July 21, 2022).
[54] Paul Barrett, *Is Hillary Clinton Selling Guns for Smith & Wesson?* BLOOMBERG (Sept. 2, 2019), https://www.bloomberg.com/news/articles/2016-09-02/is-hillary-clinton-selling-guns-for-smith-wesson.
[55] Business & Human Rights Resource Centre, *supra* note 46.

Ruger was quoted on the earnings call, "In terms of demand, 2018 was a challenging year for the firearms industry. The National Instant Criminal Background Check System or NICS background checks, as adjusted by the National Shooting Sports Foundation decreased 6%, which indicates a modest overall decline in the firearms market."[56]

On February 15, 2022, the families of nine victims announced they had agreed to a $73 million settlement on the lawsuit against Remington.[57]



Smith and Wesson Brands (SWBI), Sturm, Ruger & Co. (RGR,) the S&P 500 (SPX Index) prices and data were pulled from Bloomberg database for the period 2/1/2022-2/28/2022.

At this time the U.S. stock market slid with the S&P 500 Index having its worst day of 2022 due to concerns with Russia and Ukraine.[58] Near the end of February, it was announced that Sturm Ruger reported another boom year with $730 million in firearms sales. The company reported income rose 73 percent in 2021.[59] Both company stock prices took off with no concern about the settlement.

[56] Sturm, Ruger, *Earnings Q4 2018 Earnings Call Teleconference*, Feb. 20, 2020, RUGER, https://www.ruger.com/corporate/PDF/ER-2019-02-20.pdf.
[57] Breuninger, *supra* note 41.
[58] Reuters Business (@ReutersBiz), TWITTER (Feb. 17, 2022, 5:19PM), https://twitter.com/ReutersBiz/status/1494436408219639816.
[59]Sanders, *supra* note 25.

Conclusion

Our research has shown that virtually all of the negative stock price movement of the two publicly traded companies we studied was caused by company earnings, political election forecasts and outcomes, and not by any legal announcement or development in *Soto v. Remington*. In fact, analysts who follow the gun industry are continuing to recommend investment in the companies. Therefore, based on our review of the firearms industry stock movement for the ten years before the settlement of *Soto v. Remington*, it does not appear that the case had an immediate impact on investment in the firearms industry.

What cannot be determined is whether the case will have a long-term effect on investment in the firearms industry. Several commentators[60] have suggested that the case will provide a blueprint for other plaintiffs to launch similar suits. Several states have begun the process of modifying their consumer protection laws to reflect the parts of the Connecticut CUTPA law that allowed the suit to move forward to settlement;[61] these include New York, California, and New Jersey.[62] While it should be noted that the Connecticut Supreme Court thought proving the link between Remington's advertising practices and the shooter's actions might "…prove to be a Herculean task…"[63] they were willing to let the case go to a trial. The release of internal Remington documents may make proving that claim easier for future Plaintiffs. Certainly, by studying the internal Remington documents plaintiffs' attorneys will have a clear indication of what to seek during discovery, if they can bring an action that survives PLCAA. Additionally, several major national retailers have begun to limit their sales of military assault-style weapons voluntarily, including Dick's Sporting Goods and Walmart.[64]

Unfortunately, both the gun industry and gun advocacy groups have downplayed the settlement. The National Shooting Sports Foundation (NSSF) issued a statement immediately after the settlement saying:

> The decision to settle… orchestrated by insurance companies has no impact on the strength and efficacy of the Protection of Lawful Commerce in Arms Act (PLCAA), which remains the law of the land. PLCAA will continue to block baseless lawsuits that attempt to blame lawful industry companies for the criminal acts of third parties.[65]

There is a sense in the announcements that no solvent gun manufacturer would have settled the case.[66] Or as Sturm Ruger CEO Killoy said in a recent earnings call, "We're not involved in that

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[60] Robert J. Spitzer, *Sandy Hook-Remington Gun Marketing Settlement Shows How to Fight Gun Companies*, NBCNEWS (Feb. 19, 2022, 5:41 AM) https://www.nbcnews.com/think/opinion/sandy-hook-remington-gun-marketing-settlement-shows-how-fight-gun-ncna1289375. See also Williamson *supra* note 4.
[61] Spitzer *supra* note 60.
[62] *Id.*
[63] Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262 (Conn. 2019).
[64] *Id.*
[65] Caleb Giddings, *Remington Settlement with Sandy Hook Families Worth $73 Million,* TACTICAL LIFE (Feb. 15, 2022), www.tactical-life.com/firearms/brands/remington-settlement-with-sandy-hook-families-worth-73-million.
[66] Andrew Ross Sorkin et al., *A Blueprint for Suing Gun Makers Emerges*, NY TIMES (Feb. 15, 2022), https://www.nytimes.com/2022/02/16/business/dealbook/remington-sandy-hook-settlement.html.

case, and I think it's important to recognize what the settlement was and what it wasn't. There was no finding of liability there. The case never went to a jury, and this is a decision by the insurance companies to settle. So, I really can't speak to their thinking on the matter."[67]

It is still too early to know if *Soto v. Remington* will have a long-term negative impact on gun manufacturers, but the $73 million settlement has attracted significant notice and the Connecticut Supreme Court's decision is certain to be cited in the future as a way around the constraints of PLCAA.

[67] Sanders, *supra* note 25.

THE RIPPLE AND MORE: DEVELOPMENTS IN CRYPTOASSETS AND SECURITIES LAW

by Patricia Quinn Robertson Johnston*

INTRODUCTION

John graduated summa cum laude with a bachelor's degree in Business Administration with an Emphasis in Finance and Accounting in 2016.[1] He started a new job in an insurance company after college, and he also began trading in cryptoassets.[2] John described himself as "pretty financially sophisticated" and "tech savvy."[3] John was so successful in trading cryptoassets that he convinced many of his friends and family to let him manage and invest their funds in cryptoassets.[4] After great early success in cryptoasset trading, John quit his job in early 2018 so he could focus exclusively on cryptoassets.[5] Unfortunately, between December 2017 and May 2018, the cryptoasset market declined about 85%.[6] John began gambling in casinos and investing in even more volatile forms of cryptoassets to try to recoup losses that he had incurred.[7] Finally, John confessed to friends and family that he had lied to them about their funds, and this sad story ends with John filing Chapter 7 bankruptcy, listing assets of $18,772.29 and liabilities of $993,402.21.[8]

Commercials such as "Fortune Favors the Brave" featuring Matt Damon[9] and "Don't Miss Out on Crypto" featuring Larry David[10] appeal to our fear of missing out. News reports state that "surveys show that roughly 16% of adult Americans — or 40 million people — have invested in

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[1] In re Reichmeier, No. 18-21427-7, 2020 WL 1908328, at *1 (Bankr., D. Kan. April 15, 2020).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at *2.

[6] *Id.*

[7] *Id.* at *3.

[8] *Id.* at *4.

[9] Crypto.com, *Fortune Favors the Brave,* YOUTUBE (Oct. 28, 2021), https://www.youtube.com/watch?v=9hBC5TVdYT8.

[10] FTX Official, *Don't Miss Out on Crypto: Larry David FTX Commercial,* YOUTUBE (Feb. 13, 2022), https://youtu.be/BH5-rSxilxo.

cryptocurrency. And 43% of men age 18-29 have put their money into cryptocurrency."[11] These statistics about the age of investors in cryptoassets support the notion that university business faculty should add coverage of cryptoassets to curriculum when possible because it is interesting and relevant to college students.[12] This evolving and growing segment of our economy will affect our financial future and our national and global security.[13]

Cryptocurrency regulation is in the news, and government officials and others are discussing how to better coordinate regulatory efforts for cryptoassets.[14] In March 2022, President Joe Biden signed an "Executive Order Ensuring Responsible Development of Digital Assets".[15] The Executive Order included a focus on the following objectives; consumer and business protection; global and U.S. financial stability; lessening national security risks and prevention of unlawful financial activities; continuation of U.S competitiveness and leadership in global systems of finance; promotion of financial services that are both secure and affordable; and "support[ing] technological advances that promote responsible development and use of digital assets."[16] On March 23, 2022, Federal Reserve Chair Jerome Powell stated that new rules will be necessary to protect U.S. investors and the financial system.[17] Previous joint statements from the FDIC and the Board of Governors of the Federal Reserve have indicated that they intend to collaborate with various agencies to develop cryptoasset policies for the banking industry.[18] In addition, the U.S. Secret Service has initiated a Cryptocurrency Awareness Hub.[19]

The Securities and Exchange Commission (SEC) has been engaging in enforcement actions against various cryptoasset issuers as illustrated in this article.[20] In addition, other agencies, including the Commodities Futures Trading Commission (CFTC), the Financial Crimes Enforcement Network (FinCEN), and the Internal Revenue Service (IRS), have also been regulating cryptoassets in various ways.[21] This paper discusses the SEC regulation of cryptoassets based upon the Securities and Exchange Commission's categorization of a cryptoasset as an investment contract under the Securities Acts.[22] In addition, this paper considers a recent action

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[11] *Biden Signs Order on Cryptocurrency as Its Use Explodes*, ABCNEWS.COM, Mar. 9, 2022, https://abcnews.go.com/Politics/wireStory/biden-signing-order-cryptocurrency-explodes-83336765.
[12] *Id.*
[13] *Id.* As President Biden's 2022 Executive Order notes, digital assets (other than those issued by a state) increased from $14 billion in November 2016 to $3 trillion five years later. Exec. Order No. 14067, 87 Fed. Reg.14143 (March 9, 2022).
[14] *Id.*
[15] Exec. Order No. 14067, 87 Fed. Reg.14143 (March 9, 2022).
[16] *Id.*
[17] *Powell: Digital Currencies Will Require New Regulations,* ABCNEWS.COM, Mar. 23, 2022, https://abcnews.go.com/Business/wireStory/powell-digital-currencies-require-regulations-83620881.
[18] Fed. Rsrv., Joint Statement On Crypto-Asset Policy Sprint Initiative And Next Steps (2021), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20211123a1.pdf.
[19] Secret Svc., U.S. Secret Service Launches Cryptocurrency Awareness Hub (2022), https://www.secretservice.gov/newsroom/releases/2022/02/us-secret-service-launches-cryptocurrency-awareness-hub.
[20] Danielle Bolong, Annotation, *Virtual Currency or Cryptocurrency as Investment Contract, Under 15 U.S.C.A. § 77b(a)(1), Requiring Registration Under Securities Act of 1933 for Public Offering*, 67 A.L.R. Fed.3d Art. 15 (2022).
[21] Lindsay Sain Jones, *Beyond the Hype: A Practical Approach to Cryptoreg*, 25 Va. J.L. & Tech. 175, 182 (2022).
[22] SEC, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS (2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets.

against a cryptocurrency issuer Ripple Labs, Inc. and two of its officers by the SEC that illustrates the problems with the current SEC system of regulation and litigation. Finally, this paper describes some of the possible changes in the regulatory scheme that could help give more predictability, fairness, transparency, and protection to issuers and investors in cryptoassets.

SEC CRYPTOCURRENCY CASE LAW AND THE HOWEY TEST

"Investment contracts" are securities that are generally subject to the registration and other requirements of the Securities Act of 1933[23] and the Securities Act of 1934.[24] The test adopted by the U.S. Supreme Court in *SEC v. W.J. Howey Co*.[25] is typically used to determine the threshold question of whether a cryptoasset is an investment contract.[26] In *Howey*, strips of land in a large orange grove were sold to investors, many of whom were out of state, and these sales included a contract for management services for the orange grove.[27] Although this type of sale on its face looks different from the issuance of stock in a corporation, the *Howey* court determined that this was an "investment contract." governed by the Securities Act of 1933.[28] In this historic case, the U.S. Supreme Court said "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."[29] Unless it falls within an exemption, the investment contract is subject to costly and time-consuming registration requirements of the SEC and the anti-fraud provisions and other provisions of the Securities Acts.[30]

In April 2019, the SEC published a document that "provided a gloss"[31] on the *Howey* test as its test for determining whether a cryptoasset is an investment contract in its *"Framework for 'Investment Contract' Analysis of Digital Assets."*[32] According to the *Bibox* court:

> The Framework provides a means of assessing whether purchasers of crypto-assets invested money, participated in a common enterprise, expected profits, and expected that those profits would be solely derived from the managerial efforts of others, as set forth in *Howey*. With respect to the "expect[ed] profits" and "profits solely from the efforts of [another]" elements of Howey, the Framework sets forth lengthy non-exhaustive lists of characteristics of crypto-assets that should be considered in assessing whether a given crypto-asset satisfies those elements of the Howey test.[33]

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[23] 15 U.S.C. § 77b(a)(1); , 15 U.S.C. §§ 77a-77mm.
[24] 15 U.S.C. § 78c(a)(10); 15 U.S.C. § 78a-78qq.
[25] 328 U.S. 293, 301.
[26] *See, e.g.,* Digilytic Int'l FZE v. Alchemy Fin., Inc., 20 Civ. 4650 (ER), 2022 WL 912965, at *11 (S.D.N.Y. Mar. 29, 2022)*;* SEC *v. Kik Interactive Inc.,* 492 F. Supp. 3d 169, 178 (S.D.N.Y. 2020); *Balestra v. ATBCOIN LLC,* 380 F. Supp. 3d 340, 357 (S.D.N.Y. 2019).
[27] *Howey,* 328 U.S. 293, 301 (1946).
[28] *Id.*
[29] *Id*.
[30] 15 U.S.C. §§ 77a-77mm; 15 U.S.C. § 78a-78qq.
[31] In re Bibox Group Holdings Limited Securities Litigation, 534 F. Supp. 3d 326, 333 (S.D. N.Y. 2021) *reconsideration denied in part*, 2021 WL 2188177 (S.D. N.Y. May 28, 2021).
[32]SEC, FRAMEWORK FOR "INVESTMENT CONTRACT" ANALYSIS OF DIGITAL ASSETS, https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets.
[33] *Bibox,* 534 F. Supp. 3d at 333. *See also* SEC, Framework For "Investment Contract" Analysis Of Digital Assets, https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets; Bolong, *supra* note 20.

The *Howey* test requires that juries and courts examine the facts of each case, and the outcomes will vary depending on the characteristics of each cryptoasset issuance.[34] Even though a cryptoasset may be called a currency in some cases, it could also be a security.[35] Typically, cryptoassets are categorized in one of three ways: currency, tokens that can be exchanged for entertainment or something else of value, or investments; however, the uniqueness of each cryptoasset, the unfamiliarity of courts and juries with how a cryptoasset operates, and the fact that some cryptoassets have characteristics of two or more of these three general categories make the application of *Howey* determination interesting and challenging.[36]

Currently, the reported cases have generally held that the cryptoassets are investment contracts.[37] However, "that all cases thus far answer the question in the affirmative, does not make all cryptoassets investment contracts. It likewise does not necessarily mean that those digital assets ruled as securities for purposes of an injunction or a motion to dismiss, are such for purposes of disposing with finality the securities action."[38] Much of the current reported case law relates to motions to dismiss, temporary injunctive relief and similar matters, but those decisions often do not completely dispose of the matter as a jury may make the final determination based on the facts of each case.[39]

For one example of how the *Howey* test may be applied, consider the case of *SEC v. NAC Foundation, LLC*.[40] The *NAC* court examined the cryptoasset issuer's white paper to determine whether value would increase for investors via trading.[41] Further, the White Paper "failed to apprise participants of *any* practical ABTC token use: while they could be redeemed for AML BitCoin at some future point, they were, at the time of the transaction, solely objects for trading."[42] Its investors reasonably expected that the value or price would be based "almost exclusively on market perception of defendants' work product" and therefore "the final *Howey* prong" requiring an expectation of profits solely from the efforts of others was satisfied.[43] Such might not always be the case, depending on the characteristics of a particular cryptoasset.[44] For example, a cryptoasset issuer might argue that profits do not solely come from the efforts of others in cases where "the ability to mine, control, and sell one's own coins without the efforts from others to

[34] *See Bibox,* 534 F. Supp. 3d at 336; Bolong, *supra* note 20.
[35] Note that the author of this paper uses the term "cryptoasset" for convenience purposes with a recognition that the fact that each cryptoasset has unique characteristics that may or may not subject it to the requirements of registration under the Securities Act of 1933. Cryptocurrency is one type of cryptoasset.
[36] Chris Brummer, Introduction, *in* CRYPTOASSETS: LEGAL, REGULATORY, AND MONETARY PERSPECTIVES 1-2 (Chris Brummer ed., 2019); Bolong, *supra* note 20. *See also* Jones, *supra* note 21.
[37] Bolong, *supra* note 20.
[38] *Id. See, e.g.,* SEC v. Shavers, No. 4:13–CV–416, 2013 WL 4028182 at *1-2 (E.D. Tex. Aug. 6, 2013), *adhered to on reconsideration*, 2014 WL 12622292 (E.D. Tex. Aug. 26, 2014). In *Shavers* the district court denied a defendant's challenge to its subject matter jurisdiction and stated that Bitcoin can be a security. *Id.*
[39] Bolong, *supra* note 20; Owen v. Elastos Found., No. 1:19-CV-5462-GHW, 2021 WL 5868171 (S.D.N.Y. Dec. 9, 2021).
[40] 512 F. Supp. 3d 988, 995-997 (N.D. Cal. 2021).
[41] *Id.* at 992.
[42] *Id.* at 997.
[43] *Id.*
[44] Bolong, *supra* note 20.

raise the price of one's crypto-assets" is present.[45]

When applying the *Howey* test, generally courts are broadly defining "investment of money" to include investment of other things of value, not just money.[46] Therefore, an investment of cryptoassets, such as bitcoin, is an investment of money.[47] Also, courts in these cases typically opine that the cryptoasset satisfies the "expectation of profits solely from the efforts of others."[48]

Many cases discuss the "common enterprise" element of the *Howey* test.[49] Horizontal commonality "describes the relationship shared by two or more investors who pool their investments together and split the net profits and losses in accordance with their pro rata investments" while "vertical commonality may be established by showing that the fortunes of the investors are linked with those of the promoters."[50] There is some confusion about which of these types of commonality are required for a cryptoasset to be classified as an investment contract. Courts in the Second Circuit have stated that horizontal commonality is sufficient to satisfy the *Howey* test.[51] In *SEC v. Shavers* the court stated that "the Fifth Circuit requires interdependence between the investors and the promotor, which "may be demonstrated by the investors' collective reliance on the promotor's expertise even where the promotor receives only a flat fee or commission rather than a share in the profits of the venture.""[52] Courts in the Ninth Circuit have held that either horizontal or vertical commonality will satisfy the *Howey* test's commonality prong.[53] The Eleventh Circuit courts have required vertical commonality.[54] Combining purchasers' funds and using those funds for operation of the cryptocurrency business, purchaser dependence on the promoters' expertise, advertising that promises an increase in value of the cryptoasset, and purchaser motivation may be used as evidence in these cases.[55]

According to Jones, "If the test is applied consistently, all cryptocurrencies would initially qualify as securities under the test" because "[a] cryptocurrency cannot exist without a "common

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[45] Justin Henning, *The Howey Test: Are Crypto—Assets Investment Contracts?*, 27 U. MIAMI BUS. L. REV. 51, 71 (2018) (quoted in Bolong, *supra* note 20).
[46] Bolong, *supra* note 20.
[47] *Id.*
[48] *Id.*
[49] Henning, *supra* note 45, at 62-67; Bolong, *supra* note 20 (describing a Circuit Split about whether a "vertical" common enterprise or "horizontal" common enterprise is required).
[50] *Id. See also NAC,* 512 F.Supp. 3d at 996; In Re BitConnect Securities Litigation, No. 18-cv-80086, 2019 WL 9104318 at *7 (S.D. Fla. Aug. 23, 2019).
[51] *See Kik*, 492 F. Supp. 3d at 178; *Balestra*, 380 F. Supp. 3d at 353; *U.S. v. Zaslavskiy,* No. 17 Cr. 647, 2018 WL 4346339, at *5 (E.D.N.Y Sep. 11, 2018). *See also* SEC v. Telegram Group Inc., 448 F. Supp. 3d 352, 369-371 (S.D. N.Y. 2020)*, appeal withdrawn by stipulation,* No. 20-1076, 2020 WL 3467671 (2d Cir. May 22, 2020) (in which both horizontal and vertical commonality were present).
[52] *Shavers, 2013* WL 4028182 at *2, quoting *Long v. Shultz Cattle Co., 8*81 F.2d 129, 141 (E.D. Tex. 2013).
[53] *See NAC*, 512 F. Supp. 3d at 996; Hunichen v. Atonomi LLC, No. C19-0615-RAJ-MAT, 2019 WL 7758597 at * 13 (W.D. Wash. October 28, 2019), *report and recommendation adopted*, 2020 WL 1929372 (W.D. Wash. April 21, 2020). *See also* SEC v. Blockvest, LLC, No. 18CV2287-GPB(BLM), 2018 WL 4955837 at *4 (S. D. Cal. Oct. 5, 2018).
[54] Hodges v. Harrison, 372 F. Supp. 3d 1342, 1348 (S.D. Fla. 2019); SEC v. *Unique Financial Concepts, Inc.*, 196 F.3d 1195, 1199 (11th Cir. 1999); *BitConnect*, 2019 WL 9104318 at *7; Rensel v Centra Tech, Inc., No. 17-24500-CIV, 2018 WL 4410126 at *5 (S.D. Fla. June 25, 2018).
[55] *See, e.g., Hodges*, 372 F. Supp. 3d at 1348; *Unique,* 196 F.3d at 1199; *BitConnect* 2019 WL 9104318 at *7-8; *Rensel*, 2018 WL 4410126 at *5.

enterprise" or central figure to initially develop and issue the currency."[56] Jones further notes that "based on recent market trends, a purchaser of cryptocurrency could reasonably expect that the value of the asset might rise without any effort on the investor's part."[57] A problem with the current SEC method of enforcement highlighted in the *SEC v. Ripple Labs, Inc*.[58] case discussed below is that "the subjective nature of the *Howey* test leads to inconsistent enforcement and a lack of clarity for market participants."[59] In addition, as this paper discusses later, while regulation may be needed, that regulation should be clearly stated and coordinated to take into account the differences between cryptoassets and stock and the differences between various types of cryptocurrencies.[60]

RIPPLE, CRYPTOCURRENCY, AND THE FAIR NOTICE DEFENSE

The *Ripple*[61] case involves XRP, a "Top Ten Cryptocurrency" according to Forbes.[62] Ripple Labs, Inc. is a company "founded in 2012 as a privately-held payments technology company that uses blockchain innovation ... to allow money to be sent around the world instantly, reliably, and more cheaply than traditional avenues of money transmission."[63] Ripple developed XRP and it holds a large percentage of XRP.[64] The SEC alleges that Ripple and two of its leaders have offered and sold securities in violation of the Securities Act of 1933.[65] Ripple's 100-page answer starts with a preliminary statement that explains why, in their view, the SEC's legal theory that XRP is an investment contract is flawed.[66] In its answer, Ripple states the case for less regulation of its cryptocurrency.[67]

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[56] Jones, *supra* note 21, at 179-180.
[57] *Id.*
[58] No. 20-cv-10832(AT), 2022 WL 748150 (S.D.N.Y. March 11, 2022).
[59] Jones, *supra* note 21, at 181. *See also* Answer of Defendant Ripple Labs, Inc. at 3, SEC v. Ripple Labs, Inc., No. 20-cv-10832(AT) (S.D.N.Y. March 4, 2021). Jones further notes:

> Further complicating matters, the SEC has inconsistently applied the Howey test to cryptocurrencies. When William Hinman of the SEC described Bitcoin's network as decentralized, he overlooked the fact that Bitcoin was centrally launched by Satoshi Nakamoto. Hinman also put "aside the fundraising that accompanied the creation of Ether" to describe the Ethereum network as decentralized. As the disparity in the treatment of XRP and other cryptocurrencies exemplifies, the subjective nature of the Howey test leads to inconsistent enforcement and a lack of clarity for market participants.

Jones, *supra* note 21, at 181.
[60] *See* Aurelio Gurrea-Martinez & Nydia Remolina, The Law and Finance of Initial Coin Offerings, *in* CRYPTOASSETS: LEGAL, REGULATORY, AND MONETARY PERSPECTIVES 117-156 (Chris Brummer ed., 2019); Chris Brummer, Trevor I. Kiviat & Jai Massari, What Should Be Disclosed in an Initial Coin Offering?, *in* CRYPTOASSETS: LEGAL, REGULATORY, AND MONETARY PERSPECTIVES 157-201 (Chris Brummer ed., 2019); Jones, *supra* note 21, at 179-240.
[61] SEC v. Ripple Labs, Inc., No. 20-cv-10832(AT), 2022 WL 748150 (S.D.N.Y. March 11, 2022).
[62] Kat Tretina, *10 Of The Best Cryptocurrencies In May 2022,* Forbes Advisor, https://www.forbes.com/advisor/investing/top-10-cryptocurrencies/ (last accessed May 13, 2022) states that "At the beginning of 2017, the price of XRP was $0.006. As of May 12, 2022, its price reached $0.39, equal to a rise of more than 6,400%." As of March 2002, Forbes stated that XRP's market cap was $37 billion, and the price of XRP had risen more than 12,600 % between 2017 and March 2022. *Id.* (accessed April 2, 2022).
[63] Answer of Ripple at 4 (March 4, 2021).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id*.

For example, Ripple gives a description of XRP as a "medium of exchange," not a security.[68] In addition, they explain that no other regulators throughout the world have required securities registration for XRP.[69] "To require XRP's registration as a security is to impair its main utility.[70] That utility depends on XRP's near-instantaneous and seamless settlement in low-cost transactions.[71] Treating XRP as a security, by contrast, would subject thousands of exchanges, market-makers, and other actors in the gigantic virtual currency market to lengthy, complex and costly regulatory requirements never intended to govern virtual currencies."[72]

In addition, Ripple refers to determinations by the US Dept of Justice and US Dept of the Treasury's earlier determinations that XRP is a legal "virtual currency" and at the time of that determination, the SEC did not comment.[73] In addition, XRP holders do not share Ripple's profits.[74] The SEC filed the Complaint 8 years after Ripple created XRP.[75] Further, in a 2019 meeting with a digital asset platform seeking advice about whether XRP is a security, the SEC did not advise the platform that XRP was a security, and subsequently the platform listed XRP on its exchange.[76] Ripple's Answer further states as follows: "The SEC's filing, based on an overreaching legal theory, amounts to picking virtual currency winners and losers as the SEC has exempted bitcoin and ether from similar regulation."[77] In addition, international and U.S. "agency peers" will be at odds with the SEC on this issue relating to XRP.[78] The SEC action has damaged XRP holders, and it may harm "U.S. competitiveness and innovation, at a time when the United States has national security concerns about China's efforts to control bitcoin and ether mining pools and seize control of the global payments market."[79]

One defense raised by *Ripple* is the "fair notice defense."[80] Although the SEC filed a motion to strike this defense, the *Ripple* Court refused to strike the defense at this point, stating "that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[81] The Ripple court stated that "Laws fail to comport with due process when they "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited," or when they are "so standardless that they authorize or encourage seriously discriminatory enforcement."[82] However, the *Ripple* court also stated that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to

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[68] *Id.* at 2.
[69] *Id. See also* Siamak Masnavi, *Ripple CEO Names 5 Jurisdictions That 'Have Acknowledged XRP is a Currency',* Cryptoglobe, https://www.cryptoglobe.com/latest/2022/03/ripple-ceo-names-5-jurisdictions-that-have-acknowledged-xrp-is-a-currency/ (March 18, 2022).
[70] Answer of Ripple at 2 (March 4, 2021).
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Ripple,* 2022 WL 748150 at *2.
[77] Answer of Ripple at 2 (March 4, 2021).
[78] *Id.*
[79] *Id.* at 3.
[80] *Ripple,* 2022 WL 748150 at *4.
[81] *Id.* (quoting FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012)).
[82] *Id.* (citation omitted).

consult relevant legislation in advance of action"[83] In addition the *Ripple* court noted that "The Supreme Court has also expressed greater tolerance of enactments with civil penalties because "the consequences of imprecision are qualitatively less severe.""[84]

Some cryptoassets are classified primarily as cryptocurrencies and some are more like investments.[85] For example, at least as of the writing of this paper, bitcoin and ether have been considered as cryptocurrencies (and not investment contracts) by the SEC, and therefore those have not been required to register under the Securities and Exchange Act.[86] Ripple argues that XRP is very similar is nature to Bitcoin and Ether and that by initiating the *Ripple* lawsuit the SEC is "picking virtual currency winners and losers as the SEC has exempted bitcoin and ether from similar regulation."[87]

The *Ripple* court denied the SEC's motion to strike the "fair notice" defense, and held that the Court shall consider, not a challenge to the securities statutes on their face, but instead the fair notice defense in connection with the SEC's application of its statute to XRP.[88] The court did not adopt the position of the SEC even though introduction of the fair notice defense may burden the SEC and the court with even more discovery and other complexity in this case. [89]

Courts have denied defendants' fair notice defense in cases such as *SEC v. Zaslavskiy*.[90] In *Zasalvskiy*, the court noted that securities laws must be "interpreted flexibly" to promote disclosure of truthful information and encourage confidence in the market.[91] The court cited decades of case law interpreting and applying the *Howey* test, and stated that this gives adequate notice to cryptoasset issuers about what is an investment contract subject to the requirements of the securities laws.[92]

While some news articles state that the refusal to strike Ripple's fair notice defense was a major victory for Ripple, we will need to wait and see whether Ripple wins not just this initial motion-to-strike battle, but also the war.[93] The "fair notice defense" may be examined again by the court at a later stage in the litigation. As the *Ripple* court stated in its March 2022 opinion, although the SEC cited cases in which the fair notice defense has failed, the "SEC has cited no caselaw where a court has stricken a fair notice affirmative defense at the pleadings stage, and the Court is not persuaded that doing so is appropriate here."[94]

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[83] *Id. (*quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982)) (footnotes omitted).
[84] *Id. (*quoting *Hoffman*, 455 U.S. at 498-99).
[85] Answer of Ripple at 3 (March 4, 2021).
[86] *Id.*
[87] *Id.*
[88] *Ripple,* 2022 WL 748150 at *4-5.
[89] *Id.* at *6.
[90] *Zaslavskiy,* 2018 WL 4346339, at *9.
[91] *Id.*
[92] *Id.*
[93] Mark R. Hake, *Ripple's Recent Win Against the SEC Provides Hope for Its XRP Coin,* Investorplace, https://investorplace.com/2022/04/ripple-recent-win-against-the-sec-provides-hope-for-its-xrp-coin/ (April 4, 2022).
[94] *Ripple,* 2022 WL 748150 at *5.The *Ripple* Court further stated as follows:

> None of the cases cited by the SEC support a contrary result. In some of these cases, the courts assessing a fair notice defense did so when ruling on a motion to dismiss, where the court was

Time will tell whether Ripple's fair notice defense succeeds.[95] In the meantime, that challenge and others like it bring to light the difficulty in planning the issuance of cryptoassets and the challenges and inefficiencies facing the SEC as it enforces cases one by one in the courts.[96] It illustrates the incredible burden and the possible inefficiencies and inequities that can arise when the SEC initiates litigation that requires a seemingly subjective case-by-case fact determination about whether a cryptoasset is an investment contract subject to federal securities regulation.[97] The *Ripple* litigation and its discovery process will be complicated even more by the fair notice defense.[98] SEC commencement of litigation years after an alleged securities law violation occurs adds significant unpredictability to the cryptocurrency sector.[99]

RECOMMENDATIONS FOR REGULATORY REFORM

Consider again the case of John at the beginning of this article.[100] John's educational achievements and initial gains in the cryptoasset market created an impression to some that he was "pretty financially sophisticated", but John may have lacked the necessary information to make sound investment decisions or detect fraud and opportunism by some cryptoasset issuers.[101] While many cryptoasset issuers are not acting in a fraudulent manner, they often provide a white paper for the initial coin offering instead of more extensive disclosures that are required by the Securities and Exchange Commission for issuance of securities.[102] White papers typically do not contain as much disclosure of information as that required by the Securities and Exchange Commission for issuance of securities, thus making it more difficult for investors to compare one cryptoasset to another cryptoasset or to some other investment opportunity and increase the risks of opportunism

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obligated to draw presumptions and inferences in favor of the SEC. *See SEC v. Fife,* No. 20 Civ. 5227, 2021 WL 5998525, at *7 (N.D. Ill. Dec. 20, 2021); *Zaslavskiy*, 2018 WL 4346339, at *8; *U.S. v. Bowdoin,* 770 F. Supp. 2d 142, 146–49 (D.D.C. 2011). Other courts analyzed this issue in ruling on motions for summary judgment, with the benefit of a fully developed factual record. *See SEC v. Keener,* No. 20 Civ. 21254, 2022 WL 196283, at *13–14 (S.D. Fla. Jan. 21, 2022); *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169, 182–84 (S.D.N.Y. 2020). And, a couple of courts addressed facial challenges to the term "investment contract," where the courts' analysis did not depend on the particular facts of the case. *See SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052 n.6 (2d Cir. 1973); *Bowdoin*, 770 F. Supp. 2d at 149. Moreover, the cases cited by the SEC in which courts did strike affirmative defenses at the pleadings stage dealt with equitable defenses that generally cannot be brought against the SEC. *See* SEC Reply Mem. at 7–8, ECF No. 205; *see also*, *e.g.*, *SEC v. KPMG LLP,* No. 03 Civ. 671, 2003 WL 21976733, at *2–4 (S.D.N.Y. Aug. 20, 2003) (striking estoppel, waiver, and unclean hands defenses); *SEC v. McCaskey,* 56 F. Supp. 2d 323, 327 (S.D.N.Y. 1999) (striking laches defense).

Id.

[95] *Ripple,* 2022 WL 748150 at *6.

[96] *See id*. at *1.

[97] *See id.* at *5-6.

[98] *See id.* at *6.

[99] *See id.* at *1.

[100] Reichmeier, 2020 WL 1908328, at *1.

[101] *See* Brummer et al., *supra* note 60, at 152-187.

[102] *Id.*

or fraud.[103] It is a common understanding by economists that "if one party to a deal has inside information and the other does not, then markets may not work as well as we would hope."[104]

Detecting fraud and providing more information and education to potential investors are legitimate concerns.[105] Development of a coordinated regulatory system for cryptoassets appear to be necessary to protect investors and cryptocurrency issuers, and we may draw from lessons learned during development of securities laws over the last century[106] while simultaneously maintaining a sensitivity and awareness of the fast, innovative and evolving nature of the cryptocurrency segment of the economy.[107] Opponents of regulation may argue that regulation stifles innovation and creates competitive disadvantages in the international marketplace; however, news reports stated that after President Biden signed the Executive Order on cryptocurrency in March 2022, "Bitcoin and cryptocurrency related stocks got a boost."[108] News reports further stated that "Riot Blockchain, which focuses on cryptocurrency mining, jumped 11.5%. Digital payments platforms also rose. PayPal added 4.9% and Block climbed 10.55%."[109]

In addition to concerns about protecting investors, other concerns include the use of cryptoassets for money laundering, avoiding sanctions, and other illegal activities and the difficulty in tracing those cryptoassets.[110] Increased use of cryptoassets instead of government issued currency could harm the federal government's ability to use monetary policy to impact the economy.[111] There are also concerns about widespread effects on our economy if commercial banks and institutional investors invest heavily in volatile cryptoassets. [112]

Aside from the case-by-case litigation approach and its burden on the courts, the SEC, and the cryptocurrency issuers and the other concerns mentioned above, current securities law governance of cryptoassets has some other weaknesses to be addressed.[113] One weakness arises from the fact that cryptoasset tokens are different than shares in a corporation; for example, cryptoasset token holders do not have the protections of corporate law (unlike shareholders).[114] A

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[103] *Id.*

[104] TIM HARTFORD, THE UNDERCOVER ECONOMIST: EXPLORING WHY THE RICH ARE RICH, THE POOR ARE POOR—AND WHY YOU CAN NEVER BUY A DECENT USED CAR! 110, 125-126 (2006). *See also* Brummer et al., *supra* note 60, at 157-202.

[105] Gurrea-Martinez, *supra* note 60, at 117, 130-131. *See also* Brummer et al., *supra* note 60 at 157-202; Jones, *supra* note 21, at 195-204.

[106] *See* Brent J. Horton, *In Defense of a Federally Mandated Disclosure System: Observing Pre-Securities Act Prospectuses,* 54 AM. BUS. L.J. 743 (2017).
Prior to the Securities Act of 1933 and 1934, a solid argument can be made that corporate disclosures about securities offerings were "inadequate" and that any changes to the regulatory system "should be informed by a proper understanding of the disclosure evils it was meant to address." *Id.* at 746.

[107] *See* Jones, *supra* note 21, at 182.

[108] *Biden Signs Order on Cryptocurrency as Its Use Explodes*, ABCNEWS.COM, Mar. 9, 2022, https://abcnews.go.com/Politics/wireStory/biden-signing-order-cryptocurrency-explodes-83336765. For example, "the price of Bitcoin was up 9.8%..., and [s]hares in cryptocurrency exchange Coinbase Global surged 9.3% in midday trading, while online brokerage Robinhood Markets rose 4.5%." *Id.*

[109] *Id.*

[110] *See* Brummer et al., *supra* note 60, at 157-202; Gurrea-Martinez, *supra* note 60 at 117-156.

[111] Gurrea-Martinez *supra* note 60, at 131.

[112] *Id.*

[113] Gurrea-Martinez, *supra* note 60, at 117-156; Brummer et al., *supra* note 60, at 157-202.

[114] Gurrea-Martinez *supra* note 60, at 132-133.

promoter of cryptoassets cannot be removed for poor governance through corporate control, and cryptoassets have less analysts and investors and less (or no) secondary market so there is less information for investors.[115] Asymmetries of information exist because cryptoasset projects can be complex and the market does not provide information.[116] Also, investor decisions may be influenced by cryptoasset's "hype."[117] In addition, some cryptoassets may not be regulated by the SEC.[118] In cases where a cryptoasset is not deemed a security, then the SEC would not protect token holders[119] and even when it deemed a security SEC enforcement is challenging.[120]

For these reasons, Gurrea-Martinez and Remolina recommend a simple electronic form for disclosure of all token issuances to aid the regulators and encourage honest behavior.[121] In addition, they opine that regulators should protect consumers with cooling off periods, special litigation rules, and other rules.[122] They also recommend prohibiting commercial banks and pension funds from purchasing tokens at a pre-sale because there are so many risks and scams in pre-sales.[123] In addition, they advocate the allocation of more resources for educating cryptoasset purchasers of the risks in this market.[124]

In addition to the recommendations by Gurrea-Martine and Remolina for most cryptoassets, it may be wise to treat cryptocurrency, a subcategory of cryptoassets, differently from other cryptoassets.[125] Cryptocurrency such as Bitcoin and Ether, has been classified by the CFTC as a commodity.[126] According to Jones, "Unlike the SEC, which has adopted an ad hoc approach in determining that some cryptocurrencies are securities, the CFTC determined that all cryptocurrencies were commodities at the outset."[127]

Lindsay Sain Jones recommends that, in the case of the subset of cryptoassets known as cryptocurrency, the laws should be amended to clearly provide that cryptocurrency is not an investment contract regulated by the SEC and instead give the CFTC a broadened and more well-defined regulatory authority over cryptocurrency.[128] Jones makes an excellent proposal in her research, recommending that Congress enact new legislation to do the following:

> 1) declare that cryptocurrencies are not securities, 2) establish a framework for determining which digital assets are genuine cryptocurrencies, 3) extend the CFTC's full regulatory authority to cryptocurrency spot markets, 4) prohibit self-certification of cryptocurrency derivative products, 5) require all cryptocurrency exchanges to register with FinCEN as MSBs [Money Service Businesses], and 6)

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[115] *Id.* at 133.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 133-134.
[121] *Id.* at 135.
[122] *Id.* at 136.
[123] *Id.*
[124] *Id.*
[125] Jones, *supra* note 21, at 239-240.
[126] Jones, *supra* note 21, at 229.
[127] *Id.* at 182-3.
[128] *Id.* at 183.

> tax cryptocurrencies according to their use and provide for a *de minimis* exception.[129]

According to Jones this "would not only address gaps in the regulation of cryptocurrencies but would also provide much-needed certainty to market participants and allow cryptocurrencies to develop as a viable payment option."[130]

Development of a clear framework for this differentiation between cryptocurrencies to be regulated by the CFTC (instead of the SEC) is critical so that issuers of cryptocurrency will be able to make sound decisions at the outset of the issuance rather than being required to react years later in an expensive and time-consuming court proceeding filed by the SEC.[131] Cryptocurrency issuers and regulators will benefit from a framework that is more clear (and less likely to end up in front of a jury) than the fact-intensive *Howey* analysis required by the SEC.[132]

CONCLUSION

Until a more efficient and effective regulatory and statutory scheme is developed, cryptoassets are likely to keep the courts and the SEC busy as cases alleging violations of existing securities laws are filed.[133] The SEC is making efforts to regulate cryptoassets by litigating these matters, but it appears that a more coordinated and comprehensive effort among various regulatory authorities will be needed to balance the safety of investors and our economy with encouraging valuable innovation by honest issuers of cryptoassets.[134] Regulators will need to work together to consider the different types of cryptoassets and how to balance the interests of all stakeholders in this industry.[135] Hopefully, pursuant to President Biden's Executive Order and other governmental initiatives, great progress will be made in the months and years to come.[136]

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[129] *Id. at* 240.
[130] *Id.* at 240. Currently, the CFTC has full authority over regulation of commodity interests, but only the authority to prevent fraud and manipulation in spot markets. *Id.* at 183.
[131] *See* Gurrea-Martinez, *supra* note 60, at 117-156; Brummer et al., *supra* note 60, at 157-202; Jones, *supra* note 21, at 222-240.
[132] *See* Jones, *supra* note 21, at 222-240.
[133] *Id.* at 179-185.
[134] *See* Gurrea-Martinez, *supra* note 60, at 117-156; Brummer et al., *supra* note 60, at 157-202; Jones, *supra* note 21, at 222-240.
[135] *See* Gurrea-Martinez, *supra* note 60, at 117-156; Brummer et al., *supra* note 60, at 157-202; Jones, *supra* note 21, at 222-240.
[136] Exec. Order No. 14067, 87 Fed. Reg.14143 (March 9, 2022).

INCREASING PHARMCEUTICAL ACCESS BY LEVERAGING THE TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS) AGREEMENT

by Anthony A. Smith[*] and Alvaro G. Menendez[**, ***]

INTRODUCTION

Medical science progress has led to the development of innovative diagnostic and therapeutic alternatives for hematological and oncological diseases such as precision medicine. Examples of precision medicine include immunotherapy and targeted cancer treatment therapy. These modalities have improved outcomes, life expectancy, and quality of life in a variety of cancers.[1] Its predicted benefit relies on immunohistochemical analysis to which Central American countries (herein referred to as CAc) do not have universal access. There is a possibility a limited amount of people could get free tumor marker assays (such as EGFR and KRAS, important markers in lung and colorectal malignancies) for early disease detection. Because of limited distribution, this poses a theoretical obstacle to incorporating precision medicine and perpetuates the use of sometimes outdated cytotoxic therapies. Access to precision medicine is also limited by the fragility of CAc public health systems and limited

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[1] *See* F. Stephen Hodi, et al., *Improved Survival with Ipilimumab in Patients with Metastatic Melanoma*, 363 NEW ENG. J. MED. 711 (2010); Philip W. Kantoff, et al., *Sipuleucel-T Immunotherapy for Castration-Resistant Prostate Cancer*, 363 NEW ENG. J. MED. 411 (2010); Alfred L. Garfall, et al., *Chimeric Antigen Receptor T Cells Against CD19 for Multiple Myeloma*, 373 NEW ENG. J. MED. 1040 (2015); Stephan A. Grupp, et al., *Chimeric Antigen Receptor – Modified T Cells for Acute Lymphoid Leukemia*, 368 NEW ENG. J. MED. 1509 (2013); Robert L. Ferris, et al., *Nivolumab for Recurrent Squamous-Cell Carcinoma of the Head and Neck*, 375 NEW ENG. J. MED. 1856 (2016).

financial resources. PD1/PDL1[2] checkpoint inhibitors, a sub-type of precision medicine, for instance, were reported to cost between $12,500 and $13,100 per month in 2017.[3] The lack of efficient public health strategies, further deepened by differences in the expenditure and per capita income of each CAc (which remain well below developing countries), has led to above average out-of-pocket expenditure for these countries and prevented them from securing access to precision medicine.[4]

In a region riddled with one of the world's largest health inequalities, where over 50 percent of habitants live below poverty lines, independent acquisition of precision medicine is near impossible.[5] Even if a limited number of patients can afford out-of-pocket expenses related to precision medicine, its import can be limited. (Obtaining a permit for temporary approval or isolated or private importation can take several weeks, and not to forget the inability to assure standard storing conditions are met). The appearance of generic pharmacological alternatives, initially perceived as a solution to the lack of financial access despite the lack of untraceable quality control, might have ended up further widening the gap, potentially causing desertion from large pharmaceutical companies from Central American countries (herein referred as CAc).[6] In other words, no competition, and the possibility to set their own prices. All of this has led to CAc and other developing countries to quickly become spectators but not active participants or beneficiaries of this important, life-saving medical progress.

This paper explores the pharmaceutical access gap for the developing world and examines how the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement could be leveraged to lessen this access gap. Further, the authors would like to spark discussions, and suggest potential solutions to this life-saving issue. Having some type of coordination and cooperation from CAc will narrow the accessibility gap for pharmaceutical access.

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[2] Program death ligand – once activated, this programs a cell to kill itself.

[3] Deena Beasley, *The Cost of Cancer: New Drugs Show Success at a Steep Price*, REUTERS (Apr. 3, 2017, 8:03 AM), https://www.reuters.com/article/us-usa-healthcare-cancer-costs/the-cost-of-cancer-new-drugs-show-success-at-a-steep-price-idUSKBN1750FU.

[4] This is an issue that this paper proposes needs addressed. Oncologists should have some general idea of the retail/private insurance price of drugs. Contract agreements have tended to limit access to this information by the consumer, but the prevailing attitudes, both social and political, seem to veer towards informed consent and awareness of pricing details.

[5] Alicia Bárcena Ibarra & Winnie Byanyima, *Latin America is the World's Most Unequal Region. Here's How to Fix It*, WORLD ECONOMIC FORUM (Jan. 17, 2016), https://www.weforum.org/agenda/2016/01/inequality-is-getting-worse-in-latin-america-here-s-how-to-fix-it/; Rhonda Marrone, *Poverty in Central America: Advancements and Needs*, BORGEN PROJECT (Aug. 1, 2016), https://borgenproject.org/poverty-in-central-america/.

[6] *See Worldwide Facilities*, BRISTOL MYERS SQUIBB, https://www.bms.com/about-us/our-company/worldwide-facilities.html (last visited Feb. 13, 2022); *Contact Us*, ELI LILLY AND COMPANY, https://www.lilly.com/contact-us (last visited Feb. 13, 2022); *Contact Us*, AMGEN, https://www.amgen.com/contact-us/locations (last visited Feb. 13, 2022); *Pfizer Global Sites*, PFIZER, https://www.pfizer.com/general/global_sites (last visited Feb. 13, 2022).

BETTER UNDERSTANDING THE PANORAMA:

Eight of the twenty most economically unequal countries are in Latin America (herein referred as LAc), where over 50 percent of its habitants live below the poverty line. CAc reproduce the high levels of inequality in the region.[7] The Gini coefficient or index is the summary indicator of inequality used most often in the literature. The value of the Gini index ranges between zero (perfect equality) and one (perfect inequality). On the basis of the Comision Electronica para America Latina (CEPAL 2012), the Gini coefficient was higher in Guatemala (0.585), followed by Honduras (0.580), Nicaragua (0.532), Costa Rica (0.501) and lastly El Salvador (0.478). These updated and improved coefficients are partly due to macroeconomic improvements that have directly increased employment.[8] Macroeconomic improvements include a wage premium for more educated workers, increases in public social spending, and increased cash transfers to the poor.[9] Despite the decrease in inequality, it is reported that up to sixty percent of Latin Americans are employed in the informal sector, many without access to employment benefits or guarantees.[10] Some CAc report this percentage to be as high as 85 percent, with about 15 percent having access to the Social Security Institute, reserved for those who work and contribute a monthly quota for that right, and the rest having individual financial access to the private sector medical care.[11] This translates into a large majority of the population being treated at the mercy of public healthcare systems, many of which are unable to offer access to precision medicine and other innovative treatments for hematological and oncological diseases amongst others. Some reports indicate that 21 percent of Latin American countries (LAc) populations are even lacking basic health services, contributing to 700,000 annual preventable deaths.[12] LAc invest only $7 or $8 per patient with cancer, whereas the corresponding figures for the United Kingdom, Japan, and the United States are $183, $244, and $460, respectively.[13] LAc are increasingly enacting universal healthcare policies that when considering this expenditure discrepancy, even marginal per patient monetary increases could have dramatic improvements in morbidity outcomes. However, efforts are still undergoing, and a different solution may need to be explored.

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[7] *See* T. H. Gindling & Juan Diego Trejos, *The Distribution of Income in Central America* (IZA Discussion Paper Series, Paper No. 7236, 2013), https://docs.iza.org/dp7236.pdf.

[8] *See* Nora Lustig, Luis F. Lopez-Calva, & Eduardo Ortiz-Juarez, *The Decline in Inequality in Latin America: How Much, Since When and Why* (ECINEQ Working Paper Series, Paper No. 211, 2011), http://www.ecineq.org/milano/WP/ECINEQ2011-211.pdf; Leonardo Gasparini & Nora Lustig, *The Rise and Fall of Income Inequality in Latin America* (ECINEQ Working Paper Series, Paper No. 213, 2011), http://www.ecineq.org/milano/WP/ECINEQ2011-213.pdf; ALICIA BÁRCENA, ET AL., PANORAMA SOCIAL DE AMÉRICA LATINA (2011), https://repositorio.cepal.org/bitstream/handle/11362/1241/1/S1100927_es.pdf.

[9] *Id.*

[10] Linnea Sandin, *Covid-19 Exposes Latin America's Inequality*, CENTER FOR STRATEGIC & INT'L STUD. (Apr. 6, 2020), https://www.csis.org/analysis/covid-19-exposes-latin-americas-inequality.

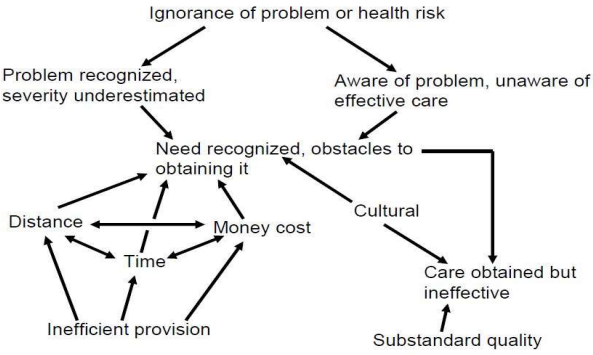
[11] *Lack of Access to Medicine in Latin America Taken to Rights Body*, MEDICAL XPRESS (Dec. 7, 2016), https://medicalxpress.com/news/2016-12-lack-access-medicine-latin-america.html.

[12] *Id.*

[13] Pedro N. Aguiar Jr. & Gilberto L. Lopes Jr., *Barriers to Access to New Lung Cancer Drugs in Latin America*, INT'L ASS'N FOR THE STUDY OF LUNG CANCER (Apr. 5, 2018), https://www.ilcn.org/barriers-to-access-to-new-lung-cancer-drugs-in-latin-america/.

When thinking about medical disparities, a question that one should consider: why is healthcare not obtained by the individual? By understanding a population's attitude and potential barriers to pharmaceutical access, it is more likely that leaders and policymakers can implement more effective measures. In addition, resources can be mobilized to best serve a particular population. The following chart (Fig.1) provides an illustration of the barriers that may be faced by someone in a CAc.[14]

Figure 1: Reasons why needed health care is not obtained



The lack of awareness of a problem or health risk, complimented by limitations on access (Fig.1), could worsen health disparities even more. The first stems not only from cultural but also prevalent socioeconomic characteristics of CAc where literacy rates have been reported to be 80 percent or lower.[15]

THE TRIPS AGREEMENT NEEDS TO BE FULLY LEVERGED

The major obstacle to LAc obtaining these newer technologies is their high cost. It can be argued that the high cost of the hematological and oncological innovations and availability are limited by the country's patent law and observance of international patent protection measures, including the Trade-Related Aspects of Intellectual Property Rights Agreement (known as the TRIPS Agreement). All member states of the World Trade Organization (WTO), including most LAc, must abide by the TRIPS Agreement. [16]

This agreement has long been heralded as a victory for intellectual property owners. "The Agreement establishes minimum standards for intellectual property rights; for example, patent

[14] Philip Musgrove, Challenges and Solutions in Health in Latin America (Sept. 12, 2007) (unpublished working paper), https://www.copenhagenconsensus.com/sites/default/files/health_musgrove_sp_final.pdf.
[15] Lesley Bartlett, et al., *Adolescent Literacies in Latin America and the Caribbean*, 35 Rev. Rsch. Educ. 174 (2011).
[16] Maria Auxiliadora Oliveira, et al., *Has the Implementation of the TRIPS Agreement in Latin America and the Caribbean Produced Intellectual Property Legislation That Favours Public Health?* 82 BULL. WORLD HEALTH ORG. 815, 816 (2004).

protection on pharmaceutical products must last for a minimum of 20 years."[17] As LAc have adopted and legislated the provisions included in TRIPS, studies on this legislation indicate that LAc may not be fully utilizing all tools available to them, including the use of compulsory licenses.[18] Compulsory patent licenses for the end-goal of improving public health outcomes is permitted under TRIPS and this provision should be fully leveraged and included in health legislative efforts.

The authors recognize that there are criticisms in the literature regarding the use of compulsory licenses and that they have a negative effect of reducing innovation. However, countries that have leveraged the use of compulsory licenses have seen no such decline. In addition, they have been able to save well into the millions in drug costs.

In the 1990s, antiretroviral medicines to combat HIV/AIDS became common and due to widespread patenting of these medicines, their prices became astronomical and out of reach for most of the developing world.[19] Because of the growing need for these medicines and concerns over skyrocketing drug pricing, factions ensured that the WTO would allow flexibilities to TRIPS for the purposes of procuring low-priced medicines.[20] In 2001, to address these concerns related to medicine pricing and importance of intellectual property protection, the Doha Declaration was adopted.[21] This declaration was ratified by the WTO's Council for TRIPS in 2002.[22]

Paragraph 4 of the Declaration affirms "that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health, and that it should be interpreted accordingly:

> *We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' rights to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.*[23]

Reports in the literature indicate that TRIPS flexibilities are rarely used; however, at least one study has proven that they are utilized more commonly than previously reported.[24] Because they are utilized more commonly than previously reported, it could be argued that exercising

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[17] *Id.*
[18] *Id.* at 818-19.
[19] Ellen FM 't Hoen, et al., *Medicine Procurement and the Use of Flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights, 2001–2016*, 96 BULL. WORLD HEALTH ORG. 185 (2018).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Carlos M. Correa, *TRIPS Agreement and Access to Drugs in Developing Countries*, INT'L J. HUM. RTS., Jan. 2005, at 24.
[24] Hoen, *supra* note 16, at 190.

TRIPS flexibilities is a viable solution to increasing pharmaceutical access in the developing world.

However, one major concern for the use of TRIPS flexibilities is for countries that need their use are likely to lack the manufacturing and storage capabilities. "No Latin American country has notified the Council for TRIPS of its interest in using the mechanism established by the [Doha] Decision as an eligible importing country."[25] Some have argued that the system created by the Doha Decision is complex and fails to generate enough financial incentives to supply low-cost medicines.[26]

DISCUSSION

A major barrier for CAc in having a robust administration of intellectual property is their relative size and economic power compared to richer countries. So, a logical solution is to look at CAc as a cohesive unit with similarly aligned interests in terms of access to medicines and procurement for its populations. Because of the Central American Free Trade Agreement (CAFTA), many countries in the region have conformed their IP laws in line with international standards.[27] However, these countries are woefully underprepared to accept and prosecute foreign entity intellectual property rights.[28] Developing a centralized system in which IP rights can be administered will not only provide a greater efficiency but may attract foreign direct investment in the region.

Further, by having a centralized IP office and reducing complications to the IP application process would incentivize foreign applications. For example, El Salvador requires that "applicants must provide a power of attorney legalized by the local Consulate of El Salvador."[29] These barriers are unnecessary and discourage foreign companies from seeking IP protection and distributing their products in the region. Regional IP offices have the potential to establish a regional collaborative strategy to navigate the difficulties that the TRIPS Agreement and Doha Declaration present. Regional cooperation is not an entirely new concept, the European Union provides an excellent model of a successful regional effort in terms of IP right management.

Some argue that governments who have worked with international organizations, such as WIPO (World Intellectual Property Organization), in drafting their national legislation have restricted and penalized the production of what might be infringing or generic products.[30] Of course, everyone understands the need for innovation to be rewarded and those who put a great risk into this pursuit should be allowed to recoup and profit off such endeavors. However, how

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[25] Carlos M. Correa, *The Use of Compulsory Licenses in Latin America*, SOUTH CENTRE (Feb. 28, 2013), https://www.southcentre.int/question/the-use-of-compulsory-licenses-in-latin-america/.
[26] *Id.*
[27] Cecily Anne O'Regan & Patrick T. O'Regan, *Using GATT-TRIPs to Improve Development Opportunities: A Proposal for Central America*, 7 HASTINGS SCI. & TECH. L.J. 1, 8 (2015).
[28] *Id.*
[29] *Id.* at 7.
[30] *Id.*

far are we willing to go in the pursuit of profits? Allowing other producers and manufacturers a limited provision to produce for regional need is allowed by both international law and is the right thing to do.

So, this paper would propose that laws and policies be revised to reflect the spirit of this possible solution. A concern might be that these biosimilars or generics would be diverted to more developed markets and thus, usurping those markets. Perhaps a compromising position might be to have stiff penalties for exportation to more developed nations that undercut these markets. A solution from pharma could, as a humanitarian effort, export so many of its patented drugs at cost or for marginal profit. There seem to be examples where pharma is exploiting the disorganized nature of the region, commanding even higher prices for products that cost fractions in the neighboring United States.

Regional bargaining systems need to be put into place

One obvious solution to increasing access of drugs in LAc is for the countries to negotiate as one entity. In other words, placing larger orders for reduced overall costs. To this end, the Central American Integration System (SICA) is a promising effort to address drug price equity and availability in LAc. LAc governments have authorized this organization to negotiate drug prices on behalf of this country block. Some estimate that this has saved LAc US$60 million since 2010.[31]

One glaring issue when undertaking this type of research is the lack of available data for Lac. Only a few population-based cancer registries in the region have high-quality data published in the Cancer Incidence in Five Continents (C15) series.[32] This suggests that a good starting point is to institute some type of national registry systems among LAc.

The necessity for LAc to band together to negotiate bulk purchases for the region cannot be emphasized enough. This requires a cooperative nature that admittedly has political obstacles. However, the increasing globalization of the world seems to lend itself to a more unified effort towards reducing things like drug costs and increasing drug access. The World Health Organization may be in the best position to undertake such an effort.

[31] Thomas Andrew O'Keefe, *Latin America Takes on Big Pharma*, AULA BLOG (Feb. 19, 2019), https://aulablog.net/2019/02/19/latin-america-takes-on-big-pharma/.
[32] Mónica S. Sierra & David Forman, *Cancer in Central and South America: Methodology*, 44 CANCER EPIDEMIOLOGY 11 (2016).

Increased public sponsorship and participation in clinical trials

The clinical regulatory environment in LAc has exploded in recent years. So much so that, "Three Latin American countries – Brazil, Mexico, and Argentina – have been continuously ranked in the top 25 countries with high participation in pharmaceutical phase 2/3 clinical trials since 2007."[33] However, it is important to note that of the 1,665 clinical trials in Latin America, 66 percent of those were funded by industry.[34] The heavily invested private sector could pose significant ethical issues in the region including issues of informed consent and later availability of approved new therapies and treatments.[35]

In all clinical research, best ethical practices must be followed. Further, increasing public sponsorship or clinical research can help reduce these ethical quandaries. It could also be argued that subsequently approved therapies should be widely and readily available to the populations who contributed to its success. Further research is necessary to understand why LAc populations do not participate as heavily in clinical trials. Further, physician shortages mean that research interests often must be tabled for the sake of focusing on patient care and administrative tasks.

What can oncologists do to stymie big pharma from capitalizing?

Oncologists are in a unique position to influence the cost of cancer treatment drugs. The largest barrier in exercising this influence is awareness of the treatment costs that are being prescribed. One example of this in practice is when doctors from Memorial Sloan-Kettering Cancer Center refused to prescribe a drug that treated colorectal cancer.[36] At the time, this drug was priced at over $11,000 per month and only partially covered by Medicare.[37] The doctor's protest, coupled with the subsequent ban from the Memorial Sloan-Kettering hospital formulary, resulted in the manufacturer cutting the price in half.[38]

Another example of unsustainable pricing practice is with imatinib (trade name: Gleevec), a treatment for chronic myeloid leukemia (CML). The annual cost of Gleevec had reached $92,000 in 2012, $132,000 in 2013, and then $146,000 in 2016.[39] In response to the cost, 100 experts in the treatment of CML indicated that these costs "(1) are too high, (2) are

[33] Rossana Ruiz, et al., *Improving Access to High-cost Cancer Drugs in Latin America: Much to Be Done*, 123 CANCER 1313, 1320 (2017).
[34] Paul E. Goss, et al., *Planning Cancer Control in Latin America and the Caribbean*. 14 LANCET ONCOLOGY 391, 422 (2013).
[35] *Id.* at 406.
[36] Andrew Pollack, *Cancer Specialists Attack High Drug Costs*, N.Y. TIMES, Apr. 26, 2013, at B1.
[37] *Id.*
[38] *Id.*; Nancy Berlinger, *Why Clinical Oncologists Should Talk About the Price of Cancer Drugs*, 15 VIRTUAL MENTOR 677 (2013).
[39] Roxanne Nelson, *Prices Drop at Last for Transformative Cancer Drug*, MEDSCAPE (Dec. 19, 2019), https://www.medscape.com/viewarticle/922912.

unsustainable, (3) may compromise access of needy patients to highly effective therapy, and (4) are harmful to the sustainability of our national healthcare systems." [40]

Oncologists in more developed nations should aim to educate themselves on the cost of therapies and leverage their position to influence pricing. In addition, by making the public more aware of the pricing strategy of drug treatments, the more evident inequities become. The disinfecting light of knowledge can be leveraged to pressure big pharma into more sustainable pricing practices.

Advocating the Benefit Corporation status to provide cost-effective drugs to CAc:

A Benefit Corporation, or B Corp, is a profit-driven company that modifies its mission and is "legally required to consider the impact of their decisions on their workers, customers, suppliers, community, and the environment."[41] This certification is increasingly sought after by for-profit companies as consumers become more sophisticated and aware of the supply chain of the goods they consume.

Pharmaceutical companies could benefit from the positive public relations of certifying themselves as B corporations. "These entities sell equity to private investors who expect a return on their investments, but they also promise to adhere to a social mission. Their directors are held to a fiduciary duty to advance the company's mission, which is enforceable by law, but is balanced by a responsibility to shareholders to generate profits."[42] Research on companies with this B-corporation status suggest that mission-driven companies can generate the same type of investment returns as their non-B corporation counterparts.[43] In fact, some investors choose their investment strategy based on a company's mission and overall societal impact. For big pharma, the social mission would be to make life-saving medicines affordable and to distribute these products to the developing world.

CONCLUSION

In conclusion, LAc and other developing countries find themselves in a difficult situation in terms of providing their citizens access to the most innovative diagnostic and therapeutic technologies in cancer and many other diseases. It is not hard to realize this problem affects poor countries all around the world since economic limitations are seen everywhere and public health care is rarely a top priority of their political and economic agendas. On a different magnitude the impact of the prices of oncology drugs is felt in rich countries as well, promoting discussions in the political arena, looking for ways to reduce prices and improve availability

[40] Experts in Chronic Myeloid Leukemia, *The Price of Drugs for Chronic Myeloid Leukemia (CML)is a Reflection of the Unsustainable Prices of Cancer Drugs: From the Perspective of a Large Group of CML Experts*, 121 *BLOOD* 4439 (2013).
[41] *B Lab Global Site*, B LAB, https://bcorporation.net/ (last visited Feb. 13, 2022).
[42] Arnold R. Eiser & Robert I. Field, *Can Benefit Corporations Redeem the Pharmaceutical Industry?* 129 AM. J. MED. 651 (2016).
[43] *Id.*

of the drugs. Solutions for developing countries should originate through a combination of efforts from both governments and the pharmaceutical industry; certainly, price reductions should play a role.

In recent years public institutions in some Central American countries have joined together to buy different medicines resulting in one bigger order with a lower price. Priorities should be established in terms of level of evidence, efficacy, and real benefit for our oncology communities (a convenient cost/benefit ratio) and last but not least, developing countries should improve their prevention programs to reduce cancer incidence and increase early detection. The way we currently see it, with the current political will, advanced therapies like CAR-T cells will only be in LAc's dreams for a very long time.

ARE JOINT GRIEVANCE COMMITTEE DECISIONS INVOLVING INDIVIDUAL EMPLOYEE STATUTORY RIGHTS PROPERLY SUBJECT TO THE NLRB'S DEFERRAL TO ARBITRATION POLICY? THE BOARD'S *UNITED PARCEL SERVICE* DECISION

by David P. Twomey*

I. INTRODUCTION:

Employer actions may result in both a claim of a violation of employee contractual rights under the parties' collective bargaining agreement (CBA) and also a claim of a violation of statutory rights under the National Labor Relations Act (NLRA).[1] For example, a union may claim that the discharge of an employee is both a violation of the parties' "just cause" provision in its collective bargaining agreement and also assert the discharge is an unfair labor practice in violation of Sections 8(a)(3) and 8(a)(1) of the NLRA.[2] Where provisions of the collective bargaining agreement and sections of the NLRA both apply to a workplace dispute should the National Labor Relations Board (NLRB or Board) be precluded from adjudicating unfair labor practice charges where the matter has been the subject of an arbitration proceeding and award?

Section 10(a) of the National Labor Relations Act expressly provides that the Board is not precluded from adjudicating unfair labor practice charges even though they might have

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[1] 29 U.S.C. §§1151-169 (2018).

[2] 29 U.S.C. §§158 (a)(1), 158 (a)(3)(2018).

"(a) It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

…

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: …."

been the subject of an arbitration proceeding and award.[3] And, the courts have uniformly so held.[4] It is well settled that the Board has discretionary authority to establish or modify standards for deferring to arbitral decisions involving alleged violations of Sections 8(a)(3) and (1) of the NLRA.[5] Some sixty-seven years ago, in its *Spielberg Mfg. Co*.[6] decision, the Board held that it would defer, as a matter of discretion, to arbitral decisions in cases in which the proceedings (1) appear to have been fair and regular, (2) all parties agreed to be bound, and (3) the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. [7] The deferral doctrine announced in *Spielberg* was intended to reconcile the Board's obligation under Section 10(a) of the Act to prevent unfair labor practices with the federal policy of encouraging the voluntary settlement of labor disputes through arbitration.[8] Some thirty years later, in its *Olin Corp*. decision the Board modified the deferral standard, holding that deferral is appropriate where the contractual issue is "factually parallel" to the unfair labor practice issue, the arbitrator was presented generally with the facts relevant to resolving that issue and the award is not "clearly repugnant" to the Act.[9]

In 2014, in the Board's *Babcock & Wilcox Construction Co. Inc.* case,[10] the Board majority announced a new standard for deferring to post-arbitral decisions in Section 8(a)(1) and (3) cases, and in doing so, the Board modified its standard for prearbitral deferrals and deferral to grievance settlements.[11] Under the *Babcock* standard the party urging deferral must demonstrate that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, (or was prevented from doing so by the party opposing deferral) and (3) Board law reasonably permits the arbitral award .[12] And it is important to underscore that *Babcock* placed the burden of proving that each element of the deferral standard was satisfied on the party urging deferral, typically the employer.[13] The Board declared that its new standard would apply only prospectively. Thus, the Board applied the existing *Spielberg/Olin* standard to the facts of the *Babcock & Wilcox* case.[14]

On December 23, 2019, with two vacancies on the NLRB, the three Trump era members of the Board overturned the *Babcock* standard and returned to the *Spielberg/Olin* deferral standard with retroactive application.[15]

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[3] 29 U.S.C.§ 160 (a)(2018) provides, "The Board is empowered … to prevent any person from engaging in any unfair labor practice… affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise…."

[4] *International Harvester Co*., 138 N.L.R.B. 923, 925-26 (1962), *enfd*. 327 F.2d 784(7th Cir. 1964), denied, 377 U.S. 1003 (1964), cited with approval in *Carey v. Westinghouse Electric Corp*., 375 U.S. 261, 271 (1964).

[5] *Id.*

[6] 112 N.L.R.B. 1080 (1955).

[7] *Id.* at 1082.

[8] *See International Harvestor Co*., 138 N.L.R.B. 923, 926-27 (1962).

[9] *Olin Corp*., 268 N.L.R.B. 573, 574 (1984).

[10] 361 N.L.R.B. No. 132 (Dec. 15, 2014), at 1.

[11] *Id.* at 4, 12, 13.

[12] *Id.* at 2.

[13] *See* Memorandum General Counsel 15-02 (Feb. 10, 2015) at 2.

[14] *Babcock*, 361 N.L.R.B. at 13, 14.

[15] United Parcel Service, Inc., 369 N.L.R.B. No. 1 (2019). In *Atkinson v. N.L.R.B*. 2021 U.S. App. LEXIS 33417 (3d. Cir. Nov. 9, 2021) the Third Circuit Court of Appeals remanded the case to the Board to address Atkinson's argument that the dispute resolution panel proceedings were not "fair and regular." Foundationally,

II. THE BOARD'S DECISION DEFERRING TO THE UPS-TEAMSTERS JOINT GRIEVANCE PANEL

In *United Parcel Service, Inc. and Robert Atkinson Jr*. [16] the three member Board panel overruled the *Babcock* decision and reinstated the *Spielberg/Olin* post-arbitral deferral standard that existed prior to *Babcock*.[17] In accordance with the Board's established policy not to overrule an administrative law judge's creditability findings, the Board found no basis for reversing Judge Carter's findings of fact. [18] Concerning the October 28 discharge of Atkins for a methods infraction of failing to download "EDD" (a computer program guiding each driver's route) before leaving the facility and starting his route on October 27, Judge Carter ultimately determined:

> …[T]he fact remains that UPS's decision to discharge Atkinson on October 28 was tainted by UPS's unlawful plan to use its rules to single out and get rid of Atkinson because of his union and protected concerted activities. Indeed, although Bartlett was no longer assigned to the New Kensington center, DeCecco and Alakson were still present and were directly involved in both UPS's initial response to Atkinson's failure to get EDD, and in in UPS's decision to discharge Atkinson. Because of the persisting taint from the plan to get rid of Atkinson and because UPS lacks a clear track record of disciplining drivers for not downloading EDD, UPS's affirmative defense falls short, and I find that UPS violated Section 8(a)(3) and (1) when it discharged Atkinson on October 28, 2014.[19]

Nevertheless, applying *Spielberg/Olin*, rather than *Babcock* standards, the Board deferred to the January 14, 2015 UPS joint grievance panel decision upholding the decision of the joint panel.[20]

The Labor Board stated:

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however, the court affirmed the Board's re-adoption of the *Olin* standard, in part believing that, "the party bringing the unfair labor practice charge will still have an opportunity to present the charge before a *neutral body* that can decide the issue, even if the Board itself does not hear the case." *Id.* at 4 (emphasis added). The focus of this paper contends that joint grievance panels, such as the *Atkinson* and *Beneli* panels, are not a "neutral body" that can properly decide statutory rights of American workers under the National Labor Relations Act. They have no demonstrable background, training and experience in Labor Law. They are not exposed to, or bound by, the Code of Professional Responsibility for Arbitrators of Labor Management Disputes. The panels are made up of an equal number of union and management personnel, without a qualified neutral arbitrator to make certain that the matters before the panel are fully and fairly adjudicated on the merits. And an environment is possible without a qualified neutral presence on the panel, of *ex-parte* evidence, grievance trading, political motivation and bias.

[16] United Parcel Service, Inc., and Robert Atkinson, 369 N.L.R.B. No. 1 (Dec. 23, 2019).

[17] *Id*. at 1.

[18] *Id. See also* n. 2.

[19] *Id*. at 38.

[20] *Id*. at 10.

> [U]nder *Spielberg/Olin*, the Board defers when (1) all parties have agreed to be bound by the arbitrator's decision, (2) the proceedings appear to have been fair and regular, (3) the contractual issue is factually parallel to the unfair labor practice issue, (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue, and (5) the arbitral decision is not clearly repugnant to the Act – i.e., the decision is susceptible to an interpretation that is consistent with the Act. In addition, under *Spielberg/Olin*, the burden rests on the party opposing deferral – here, the Charging Party – to show that the above standards were not met.[21]

The grievance panel denied Atkinson's grievances and upheld Atkinson's October 28 discharge. The grievance panel's decision in its entirety stated:

> Based on the facts presented and the grievant's own testimony the committee finds no violations of any contract articles therefore the grievances (#22310 and #22311) are denied. NRNP.[22]

The Board concluded that the decision of the grievance panel was considered, and the grievance panel rejected the contention that the discharge was motivated by union activities and found that Atkinson was discharged for failing to follow company procedures. Accordingly, the Board dismissed the complaint.[23]

III. BOARD TREATMENT OF STATUTORY SECTION 8(a) (3) AND (1) CASES

In a situation where an individual has been disciplined or discharged by an employer allegedly in retaliation for employee activity specifically protected by the NLRA in a work environment where no collective bargaining agreement is in effect, the case will come before the Board members after: (1) unfair labor practice charges are filed with the Board's regional office alleging violations of Sections 8 (a)(3) and (1); (2) an investigation is conducted and the Regional Director finds that formal action on the unfair labor practice allegations should be taken; (3) the General Counsel issues a complaint; (4) a hearing is held before an administrative law judge (ALJ) [24] with a "Board attorney" representing the General Counsel (and the employee) and a retained attorney representing the employer, and the ALJ issues a decision and order in the case; and (6) an exception to the ALJ's decision and order is filed with the Board, at which point the Board will find the employer either guilty of the

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[21] *Id*.
[22] *Id*. at 32.
[23] *Id*. at 10.
[24] The Administrative Law Judge (ALJ) function was created by the Administrative Procedure Act of 1946 to ensure fairness in administrative proceedings before Federal Government agencies. ALJs serve as independent, impartial triers of fact in formal proceedings requiring a decision on the record after a hearing. ALJs must have a full seven years of experience as a licensed attorney involving litigation in the government sector, and pass an examination testing their competency, knowledge, skills and abilities essential to their work. ALJs are held to a high standard of conduct to maintain the integrity and independence of the administrative judiciary. *See U.S. Office of Personnel Management*, http://www.opm.gov/services-for-agencies/administrative-law-judges/.

unfair labor practice and order appropriate remedial action or find the employer not guilty and dismiss the case. [25]

IV. DEFERRAL TO JOINT EMPLOYER – UNION GRIEVANCE COMMITTEE DECISION INVOLVING STATUTORY RIGHTS UNDER THE NLRB: ROBERT ATKINSON'S PLIGHT

In *United Parcel Service* (UPS) *and Atkinson* Judge Carter determined based on an extensive evidentiary record, that UPS's decision to discharge Atkinson was tainted by UPS's unlawful plan to use its rules to single out and get rid of Atkinson because of his union and protected activities.[26] And he concluded that "…UPS violated Section 8 (a)(3) and (1) of the NLRB when it discharged Atkinson on October 28, 2014.[27]" However, the Board overruled *Babcock* and applied *Spielberg/Olin* Corp, asserting that the joint panel's unanimous decision is controlling![28] The panel's decision states in its entirety:

> Based on the facts presented and the grievant's own testimony the committee finds no violations of any contract articles therefore the grievances (#22310 and #223110 are denied. NRNP.[29]

It is impossible to tell from these few words why the joint panel held what it did. Under *Spielberg/Olin* the burden rests on the party opposing deferral – the charging party, Atkinson – to show that the deferral standards were <u>not</u> met.[30] There is simply nothing in the one sentence "decision" to contradict any interpretation whatsoever. And the Board's decision flies in the face of the actual facts of record as determined by the ALJ that Atkinson was fired for his union and protected activities in violation of Section 8(a)(3) and (1) of the NLRA.

A. Arbitration

"Arbitration" according to *Roberts' Dictionary of Industrial Relations* is a "procedure whereby parties agree to submit a dispute to a third party known as an arbitrator for a final and binding decision." [31] Usually this involves mutual selection of the third party by the parties themselves. The Federal Mediation and Conciliation Service, the American Arbitration Association and the National Mediation Board maintain panels of qualified labor arbitrators from which the parties can select an arbitrator acceptable to both parties who will be guided in conduct and procedures by the *Code of Professional Responsibility for*

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[25] *Babcock*, *See* 361 N.L.R.B. No. 132, at 9; *See also* DAVID P. TWOMEY and STEPHANIE GREENE, LABOR & EMPLOYMENT LAW 65 (2020).
[26] *United Parcel Service,* 369 N.L.R.B., at 38.
[27] *Id*.
[28] *Id*. at 10.
[29] *See* id. at 10.
[30] *See* id. at 3.
[31] ROBERTS' DICTIONARY OF INDUSTRIAL RELATIONS, 47 (BNA Books 4th ed., 1994).

Arbitration of Labor Management Disputes of the National Academy Arbitrators, The American Arbitration Association and the Federal Mediation and Conciliation Service.[32] The American Arbitration Association lists the qualification for admittance to the AAA Labor Panel as follows:

> a. Must have a minimum of 10 years senior-level business or professional experience or legal practice directly related to the labor industry.
>
> b. **Cannot be an active advocate for labor or management.**
>
> c. Must possess significant hands-on knowledge about Labor Relations.
>
> d. Must have a judicial temperament.
>
> e. Must have strong writing skills. The AAA may ask for a writing sample.
>
> f. Educational degree(s) and/or professional license(s) appropriate to your field of expertise.
>
> g. Honors, awards, and citations indicating leadership in your field.
>
> h. Training and experience in arbitration and/or other forms of dispute resolution.
>
> i. Membership in a professional association(s).
>
> j. Other relevant experience or accomplishments (e.g. published articles, part of a mentoring program). [33]

Additionally, candidates must meet or exceed the requirements of neutrality, judicial capacity, reputation and commitment to the ADR process. [34]

B. The Makeup of the UPS-Teamsters Joint Grievance Panel

The grievance panel that conducted the hearing on January 15, ruled on Atkinson's grievances regarding UPS's decision to discharge him on October 28 for not downloading EDD consisted of two union business agents from the Western Pennsylvania Teamsters who sat in on the WPA contract negotiations which Mr. Atkinson opposed in the Vote No movement he in part had lead as a shop steward. Two UPS managers including co-chair of the grievance panel Dennis Gandee also served on the four person grievance panel.

Long time business agent of Local 538 Betty Fischer presented the case of Mr. Atkinson to the grievance panel. Judge Carter noted in his decision:

> In October 2014, Teamsters Local 538, held its election for the position of business agent. Fischer prevailed over Atkinson in the election, and thus

[32] *Code of Professional Responsibility for Arbitrators of Labor Management Disputes of the National Academy of Arbitrators, The American Arbitration Association and the Federal Mediation and Conciliation Service.* https://www.adr.org.
[33] *Id*.
[34] *Id*.

> continued serving as Teamsters Local 538's business agent. UPS was aware that Atkinson's Vote No Facebook page remained up and active during this timeframe. … (posting on Vote No page by Kerr to voice unhappiness about UPS management).[35]

It was later discovered Ms. Fischer forwarded one of Atkinson's Facebook posts, celebrating a campaign event in his run for business agent, to a member of UPS management and commented, "Hum, wonder if his 'time' at Asbury [was] while he was delivering," speculating that perhaps the event occurred while he was on the clock – which if it had been accurate, Atkinson would have engaged in a "cardinal infraction" warranting immediate termination.[36] Joint panel management member Gandee forwarded the material of Vote No signs placed on several workers' cars, identified Atkinson as a "ring leader" and asked upper management "Do we have to allow this and/or do we have any recourse?"[37]

C. Lack of a Fair and Impartial "Arbitral Tribunal"

In the *General Counsel's Brief of Position on the Standard for Post-Arbitral Deferral* in favor of returning to the *Olin* post-arbitral deferral standard, dated April 29, 2019, quoting Member Johnson's dissent in *Babcock,* the author stated that "presuming that arbitrators will not sufficiently protect statutory rights is inconsistent with Supreme Court precedent and unsupported by any evidence."[38] The brief continued:

> As the Supreme Court has noted, "arbitral tribunals are readily capable of handling… factual and legal complexities and there is no reason to assume at the outset that arbitrators will not follow the law. *14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 268 (2009)* (citations omitted)"[39]

And, the brief points out that:

> The General Counsel's office has, since *Babcock*, devoted considerable resources to training labor arbitrators in the finer points of labor law – including a 155-page presentation to the conference of the National Academy of Arbitrators -- … *See National Academy of Arbitrators SEW Binder*, https/www.nlrb.gov/how-we-work/national-labor-relations-act/manuals (Oct. 2015)"[40]

The grievance panel in the *Atkinson* case was <u>not</u> an "arbitral tribunal readily capable of handling … factual and legal complexities" and "there is no reason to assume at the outset

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[35] *United Parcel Svce*., *369 N.L.R.B.* at 28.
[36] CPX 4, p. 1; CPX 4; CPX5; CPX7. Tr: 206-07. *See* also Atkinson v. N.L.R.B., 2021 U.S. App. LEXIS 33417 at 5.
[37] CPX 1; RX p. 11 of PDF; Tr. 4.663, 838. *See* also *Atkinson* v. *N.L.R.B*., 2021 US App. LEXIS 33417, at 5.
[38] General Counsel's Brief of Position on the Standard for Post-Arbitral Deferral, J. M. Psotka, April 29, 2019, at 9.
[39] *Id*.
[40] *Id*. at 13.

that arbitrators will not follow the law," as cited in the General Counsel's brief referencing the *14 Pen Plaza v. Pyett* decision.[41] And of course it is true that the General Counsel's office had since *Babcock* devoted resources to training labor arbitrators in the fine points of labor law as evident by the 155 page presentation to the conference of the National Academy of Arbitrators.[42] However, the General Counsel has not devoted any resources to training union management grievance committee members on even basics points of labor law. Grievance committees are not arbitrators, and often have limited qualifications of the nature required for listing on the Labor Panels of the American Arbitration Association or any other arbitration panels.[43] In this particular case, the entire grievance committee lacked neutrality. All four members of the UPS joint panel had participated in the negotiation of the contract that Atkinson notoriously opposed, contrary to their interests, which ultimately required the Union to amend its constitution so that it could accept unratified local supplements.[44] And, as stated, Betty Fischer had forwarded Atkinson's activity to management on possible campaigning on company time.[45] And, joint panel co-chair Gandee forwarded material to upper management identifying Atkinson as a "ring leader" and asked if UPS needs to tolerate the Vote No activities.[46]

V. CONCLUSION: JOINT GRIEVANCE PANELS ARE NOT "ARBITRAL TRIBUNALS"

In the NLRB's "Notice and Invitation to File Briefs on Whether the Board Should Abandon *Babcock* and Return to *Olin*," the Board's invitation noted "the standard for deferral to a joint grievance panel is identical to that generally applicable to arbitration awards."[47] Under *Olin*, it is presumed, until proven otherwise by the charging party (Atkinson) that any arbitration award, including the joint grievance committee decision discussed in this paper, is now elevated to an "arbitration award."[48] And it is presumed that the alleged arbitrators considered and appropriately decided all of the statutory issues involving Section 7 and Section 8(a)(3) and (1) of the of the National Labor Relations Act in the case before them.[49]

The *UPS-Teamsters* joint panel decision stated in its entirety:

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[41] *Id*. at 9.
[42] *Id*. at 13.
[43] *See* http//www.adr.org.
[44] United Parcel Service UPS, 369 N.L.R.B., at 33.
[45] *See* CPX 4, p. 1; CPX 4; CPX5; CPX7; Tr. 2:206-07; *See also Atkinson*, 2021, U.S. App LEXIS 33417, at 5.
[46] *See* CPX 1; RX at 11; Tr. 4:663, 838. *See* also *Atkinson* 2021 US App. LEXIS 33417, at 5.
[47] The Board's Invitation notes "the Standard for deferral to a joint grievance panel is identical to that generally applicable to arbitration awards." Notice and Invitation to File Briefs, at 1, n. 1 *citing, Airborne Freight Co*., 343 N.L.R.B. 550, 580 (2004).
[48] See *Olin Corp*., 268 N.L.R.B. 573, 574 (1984).
[49] *Id*.

> Based on the facts presented and the grievant's own testimony the committee finds no violation of any contract articles therefore the grievances (#22310 and #22311) are denied. NRNP[50]

It is impossible for Atkinson to tell from the joint panel (now arbitral tribunal) why the tribunal did what it did in its one sentence decision. But under *Olin* with the burden now resting on Atkinson to show that the deferral standard was **not** met, it is impossible for him to do so.

The qualifications of the four members of the *UPS* joint committee were certainly not that of "an arbitration tribunal readily capable of handling factual and legal complexities."[51] And, the union and employer jointly rid themselves of a dissident member-employee, foreclosing his statutory rights under Section 7 and Sections 8(a)(3) and (1) of the NLRA.

Joint committees are pre-arbitral steps of a grievance procedure and lack the essential attributes of a real arbitral hearing referenced in the General Counsel's brief before the *UPS* Board.

"Justice" is the goal of every tribunal, including arbitral tribunals. Professor Clyde Summers years ago expressed the view that:

> The joint grievance committee process gives no assurance that the individual contract rights will be fully and fairly adjudicated on their merits. Although most cases may be properly decided, the process is structured to allow exparte evidence, reliance on irrelevant considerations, grievance trading, political motivations and personal bias.[52]

The decision of the joint grievance panel should not be given the creditability and weight given to neutral arbitrators**.**

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[50] See *United Parcel Svce*., 369 N.L.R.B. at 32.
[51] Reference to the General Counsel's Brief of Position on the Standard for Post-Arbitral Deferral, p. 9 referencing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268 (2009) that "arbitral tribunals are readily capable of handling… factual and legal complexities."
[52] Clyde Summers, *Teamsters Joint Grievance Committees: Grievance Disposal Without Adjudication,* 7 INDUS. REL. L. J. 313, 333 (1985).

THIRTY YEARS AFTER THE ADA WAS PASSED: ARE DISABLED AMERICAN WORKERS BETTER OFF?

by Alix Valenti*

I. Introduction

In July 1990, President George H. W. Bush signed the Americans with Disabilities Act (ADA),[1] which he called "the most sweeping civil rights statute since the 1964 Civil Rights Bill."[2] In his speech delivered during the signing ceremony, President Bush said that the ADA "signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."[3] Nearly twenty years later, the ADA Amendments Act of 2008 (ADAAA) was signed into law by his son, President George W. Bush, on September 25, 2008, and became effective on January 1, 2009.[4] According to the preamble and legislative history, the amendments were needed because previous decisions by the U.S. Supreme Court had "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."[5] Nevertheless, disabled Americans continue to face barriers to gainful employment. While progress has been made toward eliminating the stigma of disability, disabled Americans still have a long way to go for full and equal access, according to Deborah Dagit, president of Deb Dagit Diversity LLC in Washington, N.J.[6] Part of the problem in reaching this goal is the approach taken by the judiciary in interpreting the application of the law to persons claiming discrimination. Despite the clear language of the amendments, several courts continued to cite

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[1] Pub. L. No. 101-336, 104 Stat. 328.

[2] President George H. W. Bush, ADA Signing (July 20, 1990).

[3] *Id*.

[4] Pub. L. No. 110–325, 122 Stat. 3554.

[5] Pub. .L. No. 110-125, § 2(a)(4)-(7) (citing Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and Toyota Motor Mfg., Kentucky Inc. v. Williams, 534 U.S. 184 (2002)).

[6] Allen Smith, Despite Significant Progress for U.S. Workers with Disabilities, Many Barriers Remain, SHRM, May 27, 2020, https://www.nod.org/the-ada-at-30-looking-back-and-ahead/ (last retrieved on Jan. 18, 2022). According to Statista, the unemployment rate of persons with a disability fell dramatically in the years following passage of the ADAAA (from 14.5% in 2009 to 7.3% in 2019), although the rate increased in 2020 due to the COVID-19 pandemic. Statista, Unemployment Rates of Persons with a Disability in the United States from 2009 to 2020, https://www.statista.com/statistics/1219046/us-unemployment-rate-disabled-persons/ (last retrieved on Jan. 18, 2022).

to the pre-amendment decisions that were overturned by the ADAAA.[7] This paper highlights some of the obstacles faced by plaintiffs claiming discrimination based on a disability from an employment law perspective. It discusses the definition of a disability as interpreted both before and after the amendments, including the various elements needed to establish that an employee is in fact disabled. It also discusses the need for a plaintiff to otherwise show the ability to perform the essential functions of the job with or without accommodation and that an adverse employment action was taken. The paper concludes with some practical tips for employers and employees when considering an ADA claim.

II. Definition of Disability

In the ADAAA, the primary way in which Congress broadened the scope of ADA coverage was to expand the law's definition of the term disability. Congress stated that the purpose of the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage.[8] Pre-amendment decisions of the Supreme Court were inconsistent with that mandate.[9]. In particular, said Congress, the Supreme Court, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,*[10], , "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress."[11] In *Toyota*, the Court held that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job."[12]

While the amended statute and accompanying regulations clearly intended that the terms "disabled" and "disability" are to be broadly construed, it was also clear that not every impairment was intended to qualify as a disability. Indeed, the regulations specified a number of conditions that would not be considered a disability.[13] For example, the condition of a gender identity disorder that does not result from a physical impairment is expressly excluded from the definition of disabilities covered by the Americans with Disabilities Act.[14]

Moreover, the amendments did not change the requirement that the employer must have actual knowledge of a disability at the time of an adverse employment action. The employee must show that the employer was aware of the disability;[15] constructive knowledge of a disability is

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[7] *E.g.,* Kruger v. Hamilton Manor Nursing Home, 10 F. Supp. 3d 385, 389 (W.D.N.Y 2014).
Clark v. Boyd Tunica, Inc., No. 3:14-cv-00204-MPM-JMV, 2016 WL 853529 *4 (N.D. Miss. March 1, 2016).
[8] Pub. L. No. 110-325, § 2 (a)(1); EEOC, Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA, https://www.eeoc.gov/laws/guidance/fact-sheet-eeocs-final-regulations-implementing-adaaa (last retrieved on Jan. 21, 2022).
[9] *Id.* § 2 (a)(6).
[10] 534 U.S. 184 (2002).
[11] Pub. L. No. 110-325, § 2 (a)(7).
[12] 534 U.S. at 200-201.
[13] 29 CFR § 1630.3.
[14] *Id.* § 16.30.3(d)(1); *Doe* v. Northrop Grumman Sys. Corp., 418 F. Supp. 3d 921, 930 (N.D. Ala. 2019).
[15] Payne v. Goodyear Tire & Rubber Co., 766 F. App'x 337 (11th Cir. 2019).

not sufficient.[16] Nor did it change the requirement that the plaintiff must request an accommodation in order to claim that he was improperly denied an accommodation.[17]

A. Substantially Limits a Major Life Activity

While the ADAAA did not change the requirement that to be a disability the impairment must substantially limit a major life activity, the preamble made it clear that the term "substantially limits" should be construed broadly in favor of expansive coverage.[18] The regulations issued after passage of the ADAAA provide as follows: "An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population . . . ."[19]

After the amendments it was expected that employers would no longer focus on whether or not an employee or applicant was disabled, but rather on making a reasonable accommodation without undue hardship.[20] Nevertheless, many challenges to ADA claims continued to focus on whether or not the plaintiff was disabled.[21] Most of these arguments were based on the inability to demonstrate that the impairment substantially limited a major life activity, which remained a hurdle for plaintiffs even after the amendments.[22] Indeed, many post-amendment cases continued to cite the *Toyota*[23] case as setting the standard for this requirement. Relying on that case, a district court in Pennsylvania stated:

> In determining whether an individual is substantially limited in a major life activity ... the following factors should be considered: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impact.[24]

Similarly, a 2014 court decision in Ohio stated that the *Toyota* case required it to interpret the ADA in a strict manner to insure a high threshold to qualify as disabled.[25]

The Tenth Circuit's decision in *Crowell v. Denver Health and Hospital Authority*,[26] is a good example of the courts' continued narrow application of the law. In *Crowell*, the plaintiff

[16] Scott v. Shoe Show, Inc., 38 F. Supp. 3d 1343, 1360 (N.D. Ga. 2014).
[17] McKay v. Vitas Healthcare Corp. of Ill., 232 F. Supp. 3d 1038, 1045 (N.D. Ill. 2017).
[18] *See* note 8 *supra*.
[19] 29 CFR §1630.2(j)(1)(ii).
[20] Id. § 1630.2(j)(1)(iii).
[21] *E.g.,* Heuton v. Ford Motor Co., 930 F.3d 1015, 1019 (8th Cir. 2019); Povey v. City of Jeffersonville, Ind., 697 F.3d 619, 622 (7th Cir. 2012).
[22] *E.g.,* EEOC v. BNSF Ry. Co., 853 F.3d 1150, 1159 (10th Cir.2017); Weaving v. City of Hillsboro, 763 F.3d 1106, 1112 (9th Cir. 2014).
[23] Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).
[24] Rathy v. Wetzel, No. 13–72, 2014 WL 4104946 at *6 (W. D. Pa. Aug. 19, 2014) (citing Toyota, 534 U.S. at 196). While this was not an employment law case it illustrates the reluctance of the lower courts to break from overturned precedent.
[25] Roebuck v. Summit Cty Dep't of Jobs and Family Servs., No. 5:13 CV 2816, 2014 WL 2442650 at *2 (N.D. Ohio May 30, 2014).
[26] 572 F. App'x 650 (10th Cir. 2014).

claimed that her ability to lift, sit, and walk was substantially limited due to an injury.[27] She testified that she could only lift about five pounds and that she could walk about a hundred feet without pain and indicated how far she walked from her parking spot on the day of trial.[28] Such testimony, said the court does not sufficiently link her inability to lift and walk as of the time that she alleged she should have been reasonably accommodated.[29] Moreover, the court found that her physician's testimony belied a claim of disability. He testified that if the plaintiff needed to switch positions after sitting for an hour or two, that this was similar to people who had not been injured.[30]

Mental disorders are particularly difficult to establish as a disability under the ADA, even as amended,[31] in part because courts continued to apply pre-amendment standards.[32] For example a New York District Court held that an employee who suffered from anxiety, depression, and post-traumatic stress disorder was not disabled within meaning of the ADA, absent evidence supporting the employee's contention that her mental condition substantially limited her in performing any major life activity.[33] Similarly, stress and anxiety as a result of a psychological disorder that restricted the plaintiff to driving only within ten miles of his home did not constitute a limitation of a major life activity.[34] Even when a plaintiff was regularly seeing a psychiatrist, was taking medications, and had been hospitalized for mental health problems, the court found that he failed to show how these substantially limited any major life activity.[35] It is also difficult to prove that sleep disorders or migraine headaches substantially limit any major life activity.[36]

Obesity standing alone does not substantially limit a major life activity and will not be considered a disability, according to the Fifth Circuit.[37] Similarly, the Seventh Circuit held that extreme obesity is a physical impairment, and thus an actionable disability, under the ADA, only if it is the result of an underlying physiological disorder or condition.[38] Being extremely short in stature (4 feet, 5 inches) was also not considered a disability because it did not limit the plaintiff in her major life activities.[39]

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[27] *Id*. at. 658.
[28] *Id.*
[29] *Id*.
[30] *Id*.
[31] Kelly Kagan, *To Trigger or Not to Trigger: The Catch-22 of the Americans with Disabilities Act's Interactive Process*, 57 SAN DIEGO L. REV. 501, 540 (2020); Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection*, 26 HEALTH MATRIX 205 (2016).
[32] Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years after the ADAAA: A Story of Ignorance, Incompetence and Possibly Animosity*, 26 GEORGETOWN J. ON POVERTY L. AND POL'Y 383, 395 (2019).
[33] Robinson v. Purcell Const. Corp., 859 F. Supp. 2d 245 (N.D.N.Y. 2012).
[34] Laface v. Eastern Suffolk BOCES, 349 F.Supp.3d 126 (E.D.N.Y 2018).
[35] O'Neill v. St. John's River Water Mgmt. Dist., 341 F. Supp. 3d 1292 (M.D. Fla. 2018).
[36] Lewis v. City of Union, Georgia, 934 F.3d 1169 (11th Cir, 2019); Allen v. Southcrest Hosp., 455 F. App'x 827 (10th Cir. 2011); Anderson v. Discovery Commc'ns, LLC, 814 F. Supp. 2d 562 (D. Md. 2011).
[37] Tucker v. Unitech Training Acad, Inc., 783 F. App'x 397 (5th Cir. 2019).
[38] Richardson v. Chicago Transit Auth., 926 F.3d 881 (7th Cir. 2019).
[39] Morey v. Windsong Radiology Grp., P.C., 794 F. App'x 30 (2d Cir. 2019).

Mere pain or discomfort will not be sufficient to establish a disability. The ADAAA did not change this result.[40] In *Anderson v. National Grid, PLC*,[41] a district court in New York held the plaintiff's inability to sit for long periods without experiencing back pain was not a substantial limitation. Similarly, the Connecticut District Court held that difficulty in sitting or standing was not a disability because the inability to sit or stand for an indeterminate amount of time does not limit a major life activity under the ADA.[42] Moderate difficultly in walking or climbing stairs was not sufficient to bring the plaintiff under the protection of the ADA.[43] A plaintiff who suffered from a series of conditions that may have affected his ability to walk and stand does not necessarily qualify him as having a disability.[44]

While sleep is considered a major life activity, allegations of fatigue without a showing how tiredness substantially limits that major life activity will be insufficient to prove a disability.[45] A plaintiff's inability to lie down must be sufficiently long-lasting to be treated as chronic, profound insomnia required to establish a substantial limitation on the major life activity of sleeping.[46]

To survive a summary judgment motion in an ADA case, a plaintiff must present concrete and sufficient evidence showing that he or she is disabled within the ADA's definition,[47] **and the disability must relate to a period of time during which the plaintiff was employed.**[48] Plaintiffs cannot rely solely on their own testimony to establish a disability; doctors' reports and other evidence must conclusively prove that he or she has a physical impairment that substantially limits major life activities.[49] Without a doctor's diagnosis of an immune system disability, a plaintiff's claim that her allergies and chemical sensitivity were derived from such a disability was not sufficient to prove that such **conditions substantially impaired the functioning of her immune system.**[50] **Similarly, a plaintiff's affidavit that his depression caused anxiety making it difficult for him to breathe was inadmissible to establish that his depression substantially limited his ability to breathe; a doctor's opinion was required to establish that his depression caused the shortness of breath.**[51] Further, a doctor's note clearing the employee to return to work or stating that there are no

[40] Danielle-DiSerafino v. Dist. Sch. Bd. of Collier County, Florida, 756 F. App'x 940 (11th Cir. 2018); Shoemaker v. ConAgra Foods, Inc., 219 F.Supp.3d 719 (E.D. Tenn. 2016); Lindsay v. Pa. State Univ., No. 4:06–CV–01826, 2009 WL 691936 (M.D. Pa. March 11, 2009).
[41] Anderson v. Nat'l Grid, PLC, 93 F. Supp. 3d 120 (E.D.N.Y. 2015).
[42] De La Noval v. Papa's Dodge, No. 3:14–CV–00460 (VLB), 2015 WL 1402010 at *5 (D. Conn. March 26, 2015).
[43] Sampson v. Methacton Sch. Dist., 88 F.Supp.3d 422 (E.D. Pa. 2015).
[44] Gavurnik v. Home Properties, L.P., 227 F. Supp. 3d 410 (E.D. Pa.), *aff'd*, 712 F. App'x 170 (3d Cir. 2017).
[45] Tsuji v. Kamehameha Schs., 154 F. Supp. 3d 964 (D. Haw. 2015), *aff'd*, 678 F. App'x 552 (9th Cir 2017).
[46] De La Noval v. Papa's Dodge, No. 3:14–CV–00460 (VLB), 2015 WL 1402010 at *6 (D. Conn. March 26, 2015).
[47] Lang v. Wal-Mart Stores E., L.P., 813 F.3d 447, 454 (1st Cir. 2016).
[48] Williams v. Kennedy, 38 F. Supp. 3d 186 (D. Mass. 2014).
[49] Dancause v. Mount Morris Cent. Sch. Dist., 590 F. App'x 27, 29 (2d Cir. 2014); Parrotta v. PECO Energy Co., 363 F. Supp. 3d 577, 593 (E.D. Pa. 2019).
[50] Hustvet v. Alina Health Sys., 283 F.Supp.3d 734 (D. Minn. 2017).
[51] Russell v. Phillips 66 Co., 687 F. App'x 748 (10th Cir 2017).

limitations on the employee's daily activities will contradict the employee's claim of disability.[52]

Work can be considered a major life activity both before and after the amendments.[53] While the ADAAA did not change this, the language in the regulations issued after the amendments removed a discussion of the major life activity of working.[54] Instead, the Interpretive Guidance of the amended regulations notes that the "broad class of jobs" restriction remains in place even after the amendment to the regulations.[55] When an individual must demonstrate that an impairment substantially limits him or her in working, the individual can do so only by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities.[56]

> Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working.[57]

Based on this directive, to show that a disability affects the major life activity of working, it is still not sufficient to allege a condition that only affects the plaintiff's work in a particular occupation,[58] for a single employer,[59] for a particular store or supervisor,[60] or in a particular office.[61] The Sixth Circuit stated if a particular diagnosis does not limit the ability to work a broad class of jobs but relates only to the ability to work under a specific manager, the plaintiff is not disabled under the ADA.[62] Similarly in *Porter v. Sebelius*,[63] the court held that panic attacks, a generalized anxiety disorder, depression, and post-traumatic stress disorder only inhibited the plaintiff from working for one supervisor and thus did not qualify as disabilities. Interactions with other employees may be considered a major life activity, but to be considered disabled, a plaintiff must show that he was severely limited in his ability to communicate on a regular basis or that his relations with others were consistently characterized by high levels of hostility or social withdrawal; mere trouble getting along with coworkers is not sufficient to show a substantial limitation.[64]

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[52] Gardner v. SEPTA, 410 F. Supp. 3d 723, 735-36 (E.D. Pa. 2019); Hartman v. Lafourche Parish Hosp., 262 F.Supp.3d 391 (E.D. La. 2017); Castagnozzi v. Phoenix Beverages, Inc., 208 F. Supp. 3d 461 (E.D.N.Y 2016); Redmon v. United States Capitol Police, 80 F. Supp. 3d 79 (D.D.C. 2015).
[53] Kevin Barry, Brian East & Marcy Karin, *Pleading Disability after the ADAAA*, 31 HOFSTRA LAB. & EMP. L. J 1 (2013); John N. Ohlweiler, *Disability and the Major Life Activity of Work: An Un-Work-Able Definition*, 60 BUS. L. 577 (2004).
[54] Barry, *supra* note 53, at 50.
[55] 29 CFR Pt. 1630.
[56] *Id.*
[57] *Id.*.
[58] Carothers v. County of Cook, 808 F.3d 1140 (7th Cir. 2015).
[59] Allen v. SouthCrest Hosp., 455 F. App'x 827, 833-34 (10th Cir. 2011).
[60] Summers v. Target Corp., 382 F. Supp. 3d 842 (E.D. Wisc. 2019).
[61] Scott v. District Hosp. Partners, LP., 60 F. Supp. 3d 156 (D.D.C. 2014), *aff'd*, 715 F. App'x 6 (D.C. Cir.), *cert. denied*, 139 S. Ct. 326 (2018).
[62] Tinsley v. Caterpillar Fin. Servs. Corp., 766 F. App'x 337, 343 (6th Cir 2019).
[63] 192 F. Supp. 3d 8, 16 (D.D.C. 2016).
[64] Weaving v. City of Hillsboro, 763 F.3d 1106, 1113 (9th Cir. 2014).

Driving and commuting to and from work are not major life activities, and thus, the inability to drive or take public transportation will not render a plaintiff disabled.[65] Inability to work overtime is also not a substantial limitation on the ability to work.[66] When an employee claimed that the repetitive nature of the task of data entry was impeded by his ADHD, the court found that his waiting until the end of the week to log in all of the week's activity made the task repetitive and thus, the impairment was at issue only because of his own doing; summary judgment for the employer was granted.[67]

Actually returning to work and holding several jobs after an accident will contradict a plaintiff's claim that she was substantially limited in the activity of working.[68] Interestingly, one court decided that even if the plaintiff cannot demonstrate that an ailment affects a condition of employment that applies to a broad class of jobs, an applicant's allegation that the employer construed a limitation as a disabling condition satisfied the third prong of the statute that it regarded the plaintiff as disabled.[69] In this case the court found that the plaintiff's failure to pass a weight test for a journeyman carpenter job did not render him unable to perform a broad range of jobs; however, by construing the plaintiff's weightlifting restriction as a disabling condition, the employer regarded him as disabled.[70]

B. *Episodic Impairments or Impairments in Remission*

The ADAAA also changed the law to provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.[71] Thus, in *Feldman v. Law Enforcement Assocs. Corp.* ,[72] the court held that an employee who suffered from episodic flare ups of multiple sclerosis (MS) was disabled under the ADAAA because, when active, the MS substantially limited the employee's normal neurological functions, which is a major life activity under the amended Act.[73] In general, courts have concluded that episodic impairments or diseases that are under remission will nevertheless be considered a disability if they would otherwise substantially limit a major activity, for example in the case of cancer, normal cell growth.[74] This conclusion is not automatic, however. As noted in *Alston v. Park Pleasant, Inc*., "cancer can—and generally will—be a qualifying disability under the ADA. Nevertheless, '[t]he determination of whether an impairment substantially limits a major life activity requires an individualized assessment.'"[75] Although the court noted that in the case of cancer the ADAAA makes the individualized assessment fairly straightforward, an

[65] Dechberry v. N.Y.C. Fire Dep't, 124 F Supp. 3d 131 (E.D.N.Y 2015).
[66] Namako v. Acme Mkts., Inc., No. 08–3255, 2010 WL 891144 (E.D. Pa. Mar. 11, 2010).
[67] Nadolski v. Assocs. in Sleep Med., Inc., 160 F.Supp.3d 1051, 1057 (N. D. Ill. 2016).
[68] Hudson v. Tyson Farms, Inc., 769 F. App'x 911 (11th Cir. 2019); Cunningham v. Nordisk, 615 F. App'x 97 (3d Cir. 2015).
[69] Chi. Reg'l Council of Carpenters v. Thorne Assocs., Inc., 893 F. Supp. 2d 952, 963, (N.D. Ill. 2012).
[70] *Id*.
[71] 42 U.S.C. § 12102(4)(D).
[72] Feldman v. Law Enf't Assocs. Corp., 779 F. Supp. 2d 472 (E.D.N.C. 2011).
[73] *Id.* at 483.
[74] *E.g*., Monce v. Marshall Cty. Bd. of Educ., 307 F. Supp. 3d 805 (M.D. Tenn. 2018); Allen v. City of Balt., Maryland, 91 F.Supp.3d 722 (D. Md. 2015); Horgan v. Simmons, 704 F. Supp. 2d 814 (N.D. Ill. 2010); Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976 (N.D. Ind. 2010).
[75] 679 F. App'x 169, 172 (3d Cir. 2017) (citations omitted).

individualized assessment must nevertheless take place.[76] The plaintiff had relied solely on the fact that her termination occurred shortly after her diagnosis of breast cancer.[77] Absent any allegation in the pleadings or in the evidence before the court that the plaintiff's cancer substantially limited the plaintiff in any life activity the Third Circuit affirmed the summary judgment for the defendant, finding that she failed to prove a *prima facie* case of discrimination.[78]

C. Mitigating Measures

In cases prior to the ADAAA, the Supreme Court held that if plaintiffs were able to mitigate the effects of their disability, they would not be considered to have a physical impairment that impacts a major life activity. In *Sutton v. United Airlines, Inc*.,[79] the plaintiffs had uncorrected vision of 20/200 or worse in the right eye and 20/400 or worse in the left eye.[80] With corrective lenses, however, they had vision of 20/20 or better and thus could function the same as individuals without a vision impairment.[81] Although the plaintiffs otherwise met United Airlines' requirements for commercial airline pilots, it refused to hire them because the plaintiffs did not meet the company's minimum vision requirements of an uncorrected visual acuity of 20/100 or better.[82] In a 7-2 decision, Justice Sandra Day O'Connor held that corrective measures to mitigate, a physical or mental impairment, the effects of those measures must be taken into account when deciding whether that person is disabled' under the Act.[83] In so holding, the Court rejected the position taken by the EEOC that persons be judged in their uncorrected or unmitigated state.[84]

In a second case, *Murphy v. United Parcel Service, Inc*.,[85] a mechanic was fired from his position with UPS because of his high blood pressure. When untreated, the plaintiff's blood pressure was approximately 250/160, exceeding the U.S. Department of Transportation's recommendations for certification.[86] With medication, however, the plaintiff could function with no limitations, except for lifting heavy objects.[87] Following *Sutton*,[88] the Court evaluated the plaintiff's condition in his corrected state and affirmed the lower court's decision that he was not substantially limited and therefore not disabled under the ADA.[89]

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[76] *Id*.
[77] *Id*.
[78] *Id*. at 173.
[79] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).
[80] *Id.* at 475.
[81] *Id.*
[82] *Id.* at 476.
[83] *Id.* at 481.
[84] *Id.* at 482-83.
[85] Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).
[86] *Id.* at 519.
[87] *Id.*
[88] Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).
[89] *Id.* at 521.

The amendments to the ADA effectively overturned these decisions by stating that except in the case of eyeglasses to correct vision impairments, the determination of whether a person is disabled must be considered without regard to the availability of mitigating measures.[90] Empirical analyses of court decisions after the ADAAA suggest that courts will no longer rule in favor of employers who raise this issue in their motions for summary judgment.[91] For example, in *Orne v. Christie*,[92] the court considered whether the plaintiff's sleep apnea was a disability and noted that the use of a CPAP machine, which provided the plaintiff with of oxygen, is a mitigating measure whose effect is to be disregarded. Nevertheless, even after the ADAAA, some courts continued to address whether mitigating measures impact the substantial limitation issue.[93] In *DeBacker v. City of Moline*,[94] the court noted that the plaintiff's conditions of depression, anxiety, and hypothyroidism were impairments under the ADA.[95] Nevertheless, said the court, he failed to establish that he was actually disabled especially since he admitted that his problems were ameliorated by medication and counseling.[96] In a Pennsylvania district court case, the court found that a truck driver was not disabled despite his being unable to work in cold weather due to frostbite in his hands; his disability affected only "prolonged" exposure to cold weather and he could work provided he wore gloves.[97]

A court can consider whether a treatment can completely eliminate the condition. For example, in *Lewis v. Florida Default Law Group, LC*,[98] the plaintiff argued that the H1N1 virus should be viewed as giving rise to an impairment substantially limiting a major life activity because, if untreated, it could lead to serious complications.[99] The district court rejected this argument stating that the mitigating efforts provision applies only to efforts to mitigate the symptoms of an impairment, not a treatment that alleviates a condition in its entirety.[100]

D. *Temporary Disabilities*.

Neither the ADA nor the amendments to the ADA expressly address the issue whether a disability must be permanent in order to be protected under the law. Before the amendments, it was fairly well-accepted that temporary disabilities would not be covered.[101] After the amendments were enacted, the EEOC regulations were amended to specifically provide that the former six-month condition for the determination of whether a person is disabled no longer applied,[102] and that temporary impairments may in fact be considered covered by the ADA.

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[90] Pub. L. No. 119-325, § 3(4)(E); Barry, *supra* note 53, at 40.
[91] Stephen F. Befort, *An Empirical Examination of Case Outcomes Under The ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2058 (2013), https://scholarlycommons.law.wlu.edu/wlulr/vol70/iss4/7 (last visited July 25, 2021).
[92] Orne v. Christie, No. 3:12–cv–00290–JAG, 2013 WL 85171 *3 (E.D. Va. Jan. 7, 2013).
[93] *E.g.*, Rathy v. Wetzel, No. 13–72, 2014 WL 4104946 at *6 (W.D. Pa. Aug. 19, 2014).
[94] 78 F. Supp. 3d 916 (C.D. Ill 2015).
[95] *Id.* at 924.
[96] *Id.*
[97] Wilson v. Iron Tiger Logistics, Inc., 62 F. Supp. 3d 412, 416 (E.D. Pa. 2014), *aff'd*, 628 F. App'x 832, 3rd Cir. 2015).
[98] No. 8:10–cv–1182–T–27EAJ, 2011 WL 4527456 (M.D. Fla. Sept. 16, 2011).
[99] *Id.* at *5.
[100] *Id.*
[101] Burch v. Coca-Cola Col., 119 F.3d 305 (5th Cir. 1997).
[102] 29 CFR §1630.2(j)(1)(ix).

The Fourth Circuit affirmed this interpretation in *Summers v. Altarum Institute, Corp*.[103] when it upheld the EEOC's guidelines defining disabilities to include severe temporary impairments. The court noted that the EEOC's clarification that the ADAAA encompasses temporary disabilities achieves the goal of the amendments for broad application of the law.[104]

Nevertheless, some courts continue to apply a permanent standard under which plaintiffs must show that their disability is a permanent, long term condition that substantially impairs a major life activity.[105] For example, in *Clark v. Boyd Tunica, Inc*.,[106] a Pennsylvania district court acknowledged that the six-month threshold was no longer a decisive factor in determining the disability issue. Still, the court looked at the duration of the impairment, noting that temporary impairments are covered only if sufficiently severe.[107] The court found that a broken foot which healed within five months was not as severe when compared to similar injuries, and therefore the six-month threshold should still apply.[108] Absent a showing of any long-term impact, the plaintiff failed to establish that she suffered an injury so as to qualify her as disabled.[109] Similarly, in *Kruger v. Hamilton Manor Nursing Home*,[110] the court held that a broken arm was a temporary disability and thus not covered under the ADA, even though the injury occurred in 2012, after the effective date of the amendments to the Act.

Courts have determined that the following were short-term impairments and not qualifying as a substantially limiting disability under the ADA: injuries to plaintiff's shoulder and knee were too brief and too minor to qualify as disabilities;[111] ankle sprain was a temporary and non-severe impairment,[112] the small duration and effect of a heart condition on plaintiff's ability to lift contradicts a finding that the impairment substantially limits this life activity;[113] one migraine per week does not qualify as a disability;[114] several serious medical events within a single school year that were not chronic and did not develop and worsen over time did not substantially limit the ability to work or engage in other life activities;[115] kidney stone requiring nine days in hospital followed by three weeks at home was not a disability;[116] dehydration was anything besides a one-time occurrence and thus did not substantially limit a limit a major life annuity;[117] inability to drive for six months was a transitory impairment;[118] plaintiff's hernia surgery and six-week recovery period did not substantially limit a major life

[103] 740 F.3d 325, 330 (4th Cir. 2014).
[104] *Id.* at 332.
[105] Sampson v. Methacton Sch. Dist., 88 F. Supp. 3d 422, 437 (E. D. Pa. 2015); Rodriguez v. Rochester Genesee Reg'l Transp. Auth., No. 14–CV–6038T, 2014 WL 3819229 at *3 (W.D. N.Y. Aug. 4, 2014).
[106] No. 3:14-cv-00204-MPM-JMV, 2016 WL 853529 (N.D. Miss. March 1, 2016).
[107] *Id.* at *4.
[108] *Id.*
[109] *Id.*
[110] 10 F. Supp. 3d 385, 389 (W.D.N.Y 2014).
[111] Francis v. Hartford Bd. of Educ., 760 F. App'x 34 (2d Cir. 2019).
[112] Shaughnessy v. Xerox Corp., No. 12–CV–6158T, 2015 WL 1431687 at *4 (W.D.N.Y. Mar. 27, 2015).
[113] Baum v. Metro Restoration Servs., Inc., 240 F. Supp. 3d 684 (W.D. Ky. 2017).
[114] Palmer v. Fed. Express Corp., 235 F. Supp. 3d 702 (W.D. Pa. 2016).
[115] Boutillier v. Hartford Pub. Schs., 221 F. Supp. 3d 255 (D. Conn. 2016).
[116] Perez-Maspons v. Stewart Title P.R., Inc., 208 F. Supp. 3d 401 (D. P.R. 2016).
[117] Willis v. Nobel Envtl. Power LLC, 143 F. Supp. 3d 475 (N.D. Tex. 2015).
[118] Randall v. United Petroleum Transps., Inc., 131 F. Supp.3d 566 (W.D. La. 2015).

activity;[119] inflammation of tissue in one or both mammary glands inside the breast caused by a bacterial infection was not chronic but temporary and of short duration;[120] a short-term impairment caused by kidney stones was not considered a disability;[121] H1N1 (Swine flu) was similar to the ordinary flu and is not a disability because it is transitory and minor.[122]

III. Essential Functions

Plaintiffs must also be able to show that they are able to perform the essential functions of the job with or without an accommodation.[123] Lack of physical presence is a commonly-accepted disqualification for ADA protection.[124] An employee cannot be considered otherwise qualified if he or she is unable to report to work at the time required because that is an essential function of a job.[125] Courts have repeatedly upheld terminations for falling asleep at work, particularly in safety-sensitive positions, on the basis that the plaintiff was unable to perform the essential functions of the job.[126] Being able to stay awake and to be alert and conscious is an essential function of a job and frequent napping and nodding off will be sufficient to support a summary judgment motion for the defendant.[127]

Nothing in the ADAAA appears to have changed the courts' rulings in this area. As noted in *Clark v. Champion National Security., Inc.,*[128] maintaining consciousness is an essential element of any job.[129] The court found that the plaintiff was unable to complete any essential functions of his job if he could not remain awake.[130] Thus, he was unable to prove that he could perform the essential functions of his job in spite of his disability.[131] Similarly, the inability to attend mandatory meetings rendered the plaintiff unable to perform the essential duties of her job.[132] When the nature of the plaintiff's duties changed after a merger such that telecommuting was no longer feasible, the court upheld the defendant's claim that the plaintiff was not able to perform the essential functions of the job which included face-to-face interactions with other team-members.[133]

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[119] Brodzic v. Contractors Steel, Inc., 48 F.Supp.3d 1183 (N.D. Ind. 2014).
[120] McKenzie–Nevolas v. Deaconess Holdings LLC, No. CIV–12–570–D, 2014 WL 518086, at *5 (W.D. Okla. Feb.7, 2014).
[121] Mastrio v. Eurest Servs., Inc., No. 3:13–CV–00564 VLB, 2014 WL 840229, at *5 (D. Conn. Mar.4, 2014).
[122] Lewis v. Florida Default Law Grp., No. 8:10–cv–1182–T–27EAJ, 2011 WL 4527456, at *6-7 (M.D. Fla. Sept. 16, 2011).
[123] 42 U.S.C. § 12111(8) (2018).
[124] Rogers v. Int'l Marine Terminals, Inc.,87 F.3d 755, 759 (5th Cir.1996); Jackson v. Veterans Admin., 22 F.3d 277, 279 (11th Cir.1994); Amato v. St. Luke's Episcopal Hosp., 987 F. Supp. 523, 530 (S.D. Tex. 1997).
[125] Lewis v. N.Y.C. Police Dep't, 908 F. Supp. 2d 313, 327 (E.D.N.Y.2012), *aff'd*, 537 F. App'x 11 (2d Cir. 2013).
[126] Leonberger v. Martin Marietta Materials, Inc., 231 F.3d 396, 399 (7th Cir. 2000); Cannon v. Monsanto Co., No. 05–5558, 2008 WL 236922, at *4 (E.D. La. Jan.28, 2008); Brown v. Triboro Coach Corp., 153 F.Supp.2d 172, 185 (E.D.N.Y. 2001).
[127] Grubbs v. Sw. Airlines, 296 F. App'x 383, 388 (5th Cir. 2008).
[128] 952 F.3d 570 (5th Cir. 2020).
[129] *Id.* at 584.
[130] *Id.*
[131] *Id.*
[132] Quick v. VistaCare, Inc., 864 F.Supp.2d 492 (N. D. Tex. 2012).
[133] Belinsky v. Am. Airlines, Inc., 928 F.3d 565 (7th Cir.2019).

Other situations where a plaintiff was held unable to perform the essential duties included a legally blind applicant for a case manager position where driving was an essential function of the job[134] and a sports reporter and photographer who, because of an injury, was no longer able to carry or use a video camera.[135] Conversely, if an employee is able to complete the essential tasks without taking more than "occasional" overtime, the court will find that he or she is qualified to do the essential functions of the position with or without reasonable accommodation.[136]

Generally, courts give substantial weight to the employer's characterization of a job to determine its essential functions, but the employer's testimony is not exclusively determinative.[137] The EEOC instructs courts to consider whether: "(1) the reason the position exists is to perform the function; (2) there are a limited number of employees available among whom the performance of the job function can be distributed; and (3) the function is highly specialized so that the incumbent in the position was hired for his or her expertise or ability to perform the particular function."[138] Relevant evidence of whether a function is essential includes the employer's judgment and written job descriptions.[139] The court of appeals for the Eleventh Circuit added to this direction, stating that it also must examine: "any written job description prepared before advertising or interviewing applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the employee to perform the function; . . . the work experiences of past employees in the job; and the current work experience of employees in similar jobs."[140] An unsubstantiated assertion by the plaintiff that he had "heard" that other employees holding his job were not required to perform a certain procedure was not sufficient to contradict the employer's evidence that the procedure was in fact an essential function.[141]

IV. "Regarded as" Prong of the Definition of Disability

Under the third prong of the definition of a disability, an individual is "regarded as having [a disabling] impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity.[142] The Sixth Circuit stated that this part of the definition was intended to address the myths, biases, and stereotypes regarding individuals with a disability that the ADA was designed to combat.[143] In contrast to the pre-amendment statute, under the ADAAA, a plaintiff proceeding under the "regarded as" prong of the disability definition need only prove the existence of a perceived impairment that is neither transitory (*i.e.,* having an actual or expected duration of 6 months or less) nor minor

[134] Galloway v. Aletheia House, 509 F. App'x 912 (11th Cir. 2013).
[135] Tetteh v. WAFF Television, 638 F. App'x 986 (11th Cir. 2016).
[136] Cruz v. R2Sonic, LLC, 405 F. Supp. 3d 676, 691 (W.D. Tex. 2019).
[137] Adair v. City of Muskogee, 823 F.3d 1297, 1307-08 (10th Cir. 2016).
[138] 29 C.F.R. § 11630.2(n)(2).
[139] *Id.* § 1630.2(n)(3)(i), (ii).
[140] Samson v. Fed. Express Corp., 746 F.3d 1196, 1201 (11th Cir. 2014).
[141] Leme v. S. Baptist Hosp. of Fla., Inc., 248 F. Supp. 3d 1319, 1342-43 (M.D. Fla. 2017).
[142] 42 U.S.C. § 12102(1)(C); 29 C.F.R. § 1630.2(1)(1).
[143] Neely v. Benchmark Family Servs., 640 F. App'x 429, 436 (6th Cir. 2016).

to be covered under the ADAAA.[144] The individual no longer is required to prove that the employer regarded his impairment as substantially limiting a major life activity.[145] Interestingly, some courts continued to apply the pre-ADAAA standards in cases where the facts clearly occurred after the effective date of the amendments.[146] One author noted that in at least 34 cases, the courts continued to examine whether the perceived impairment would substantially limit a major life activity.[147] If the employer restricted the plaintiff's duties according to a physician's recommendation, the claim is likely to fail because the perception was not wrongful.[148]

Under the amendments, the plaintiff must present sufficient evidence that his or her employer believed, however erroneously, that the plaintiff suffered from an impairment that, if it truly existed, would be covered under the ADA, regardless of whether the impairment could meet the substantial limitation on a major life activity requirement.[149] At the outset, it must be proven that the employer regarded the employee as disabled at the time of the adverse employment action.[150] In the case of obesity, which is generally not considered a disability,[151] the plaintiff must show that the employer believed that his weight condition was caused by an underlying physiological disorder or condition and was not merely a physical characteristic that made it unsafe for the plaintiff to drive.[152] The fact that an employer placed restrictions on the tasks assigned to an employee or granted the employee's request for sick leave does not, standing alone demonstrate that the employer regarded the employee as disabled.[153] Similarly, the employer's knowledge that a plaintiff was taking medications is not enough evidence that the employer regarded the plaintiff as disabled.[154] Because the "regarded as" prong of the disability definition requires evidence of an employer's subjective state of mind, it can be difficult to prove an ADA case on this basis.[155]

The plaintiff must also establish that the adverse employment action was a direct consequence of the employer's perception of a disability.[156] The fact that the employer was aware of the plaintiff's surgery and use of a cane and made a few "stray remarks" made about his ability to perform his job were not sufficient to demonstrate that the employee's termination, which occurred several months later pursuant to reduction in force, was because of his disability.[157] Similarly, an expression of concern that the plaintiff would not be able to physically perform the more demanding aspects of the job does not establish that the employer

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[144] 42 U.S.C. § 12102(3)(B) (2018); 29 C.F.R. § 1630.
[145] 42 U.S.C. § 12102(3)(A) (2018); 29 C.F.R. § 1630.2(g)(3).
[146] *E.g*., Sharp v. Profitt, 674 F. App'x 440, 450 (6th Cir. 2016); O'Neill v. St. John's River Water Mgmt. Dist., 341 F. Supp. 3d 1292, 1301 (M.D. Fla. 2018).
[147] Porter, *supra* note 32 at 397.
[148] Mullenix v. Eastman Chem. Co., 237 F. Supp. 3d 695, 707 (E.D. Tenn. 2017).
[149] 29 C.F.R. Pt. 1630 App.
[150] Tarochione v. Roberts Pipeline Co., 62 F. Supp. 3d 821, 826 (N.D. Ill. 2014).
[151] *See* notes 37-39 and accompanying text, *supra*.
[152] Richardson v. Chi. Transit Auth., 926 F.3d 881, 893 (7th Cir. 2019).
[153] Lumar v. Monsanto Co., 395 F. Supp. 3d 762, 780 (E.D. La. 2019), *aff'd*, 795 F. App'x 293 (5th Cir. 2020).
[154] Voss v. Hous. Auth. of Magnolia, Ark., 917 F.3d 618, 625 (8th Cir. 2019).
[155] Baum v. Metro Restoration Servs., Inc., 240 F. Supp. 3d 684, 693 (W.D. Ky, 2017). *But see* 29 C.F.R. Pt. 1630 App. which stated that coverage under the "regarded as prong "should not be difficult to establish."
[156] *Id.*
[157] Collier v. Harland Clarke Corp., 379 F. Supp. 3d 1191 (N.D. Ala. 2019).

regarded the plaintiff as having an actionable impairment.[158] Finally, under the "regarded as" definition of a disability, minor or transitory disabilities are not covered.[159] For example, when an employee returned to work two days after knee surgery, the district court in Dallas ruled that the employee was neither disabled nor regarded as disabled.[160]

Whether the ADA's "regarded as" prong covers a situation where an employer views a job applicant as at risk for developing a qualifying impairment in the future has been an issue. In an example in the Equal Employment Opportunity Commission's compliance manual, an employer who refused to hire an applicant because it appeared that he or she may develop a disease based on genetic profiling was treating the applicant as having an impairment that substantially limits a major life activity and thus was covered under the third part of the definition of a disability.[161] The EEOC had argued that this example supported its contention that future impairments may be covered under the "regarded as" prong.[162]The Seventh Circuit disagreed,[163] stating that the compliance manual was inconsistent with the EEOC's own interpretive guidance which stated that the definition of an impairment does not include a predisposition to illness or disease.[164] Similarly, the Eleventh Circuit ruled that the "regarded as" definition of a disability in the ADA does not cover a situation where an employer perceives a person to be presently healthy with only a potential to become ill and disabled in the future due to overseas travel.[165] That reasoning also applies to perceptions of past impairments that are not ongoing.[166]

A. Adverse Employment Action

The amendments did not change the requirement that for a valid claim of disability discrimination, the plaintiff must allege and prove an adverse employment action.[167] As in any discrimination lawsuit, summary judgment will be awarded to the defendant if the plaintiff does not show that the employer's action sufficiently affected the employee's compensation or terms, conditions, or privileges of employment.[168] In the case of claims arising under the ADA, courts have held that reassignment of duties without a reduction in pay or benefits or restrictions on duties for safety concerns will not be viewed as materially adverse.[169] Denial of summer school teaching or a lateral transfer that did not involve "a demotion, a disadvantage,

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[158] Castagnozzi v. Phoenix Beverages, Inc., 208 F. Supp. 3d 461 (E.D.N.Y. 2016).
[159] 29 C.F.R. § 1630.2(j)(1)(ix).
[160] Weems v. Dall. Indep. Sch. Dist., 260 F. Supp. 3d 719 (N.D. Tex. 2017).
[161] EEOC Compl. Man. § 902.8, 2009 WL 4782113.
[162] Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 337 (7th Cir. 2019).
[163] *Id*.
[164] 29 C.F.R. Pt. 1630, App. § 1630.2(h).
[165] EEOC v. STME, LLC, 938 F.3d 1305, 1315 (11th Cir. 2019).
[166] EEOC v. UPS Ground Freight, Inc., Case No. 17-2453-JAR, 2020 WL 1984293 at *4 (D. Kan. April 27, 2020).
[167] 29 C.F.R. Pt. 1630 App.
[168] 42 U.S.C. § 2000e-2(a)(1) (2018). When an employee's claim is based on failure to accommodate, some legal scholars argue that proof of a separate adverse employment action is not necessary. Megan I. Brennan, *Need I Prove More: Why an Adverse Employment Action Prong Has No Place in a Failure to Accommodate Disability Claim*, 36 HAMLINE L REV. 7 (2013).
[169] Voss v. Hous. Auth. of Magnolia, Ark., 917 F.3d 618 (8th Cir. 2019).

or a setback" with respect to the plaintiff's career was not an adverse employment action.[170] Conversely, modification of the plaintiff's job responsibilities, requiring labor intensive tasks outside the scope of the plaintiff's job classification, and deliberate sabotage of her work by her supervisors were sufficiently adverse employment actions to survive a motion to dismiss.[171]

V. Implications for Employers and Employees

Despite the liberal language of the amendments to the ADA, plaintiffs continue to struggle to avoid adverse rulings at the summary judgment stage. Thus, the critical issue whether an employer made an adequate accommodation for the employee is never addressed by the court.[172] One author has commented that the reason for which the ADA has not achieved its potential is because unlike Title VII, the ADA was not enacted to achieve equality but rather to enable persons with disabilities to become gainfully employed by making it more difficult for employers to discriminate against them.[173] Nevertheless, implicit bias in the workplace continues to exist for disabled persons. The trend in court decisions to perpetuate this prejudice has implications for both employers and employees.

Employers would be well-advised to adhere to the guidelines of the EEOC when an employee requests an accommodation which provides as follows: "The employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation."[174] An employer is not required to provide the accommodation requested by the employee; the employer has the final discretion to choose between two or more effective accommodations and any reasonable offer of accommodation is acceptable.[175] An accommodation cannot cause the employer undue hardship. While the question of hardship is often dependent on the size and resources of the employer, in most cases the accommodation will not be expensive. According to a study of 1,188 employers across numerous industries from 2008 to 2017, over half of the respondents reported that the accommodations provided had no cost, and 36 percent reported a one-time cost of, on average, $500. The average overall cost of an accommodation was $300.[176]

Should the employer and the employee be unable to reach an agreement on an accommodation and the employee brings a lawsuit under the ADA, the employer can take some comfort that it is likely to prevail. If the employer acted in good faith and offered a reasonable accommodation, it can most likely avoid any liability or, at worst, mitigate the amount of

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[170] Flieger v. E. Suffolk BOCES, 693 F. App'x 14, 17 (2d Cir. 2017).
[171] Vale v. Great Neck Water Pollution Control Dist., 80 F. Supp. 3d 426 (E.D.N.Y. 2015).
[172] Stephen F. Befort, in *an Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013).
[173] Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819, 877 (2015).
[174] EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, Notice 9915-002 (2002), https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#N_24_ (last retrieved Sept. 4, 2021).
[175] 29 C.F.R. § 1630.9(d) (2021); Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997).
[176] Beth Loy, *Accommodation and Compliance Series Workplace Accommodations: Low Cost, High Impact. Job Accommodation Network*, Sept. 1, 2017, https://askjan.org/media/lowcosthighimpact.html (last retrieved Sept. 4, 2021).

damages awarded.[177] The employer may also be able to demonstrate that even with an accommodation the employee could not perform the essential duties of the job or that the accommodation requested is not feasible or would cause undue hardship.[178] For example, if the duties of a job required regular, full-time presence, a modified work schedule would not be a workable accommodation.[179] Finally, the employer can argue, based on prior case law as discussed in this paper, that the employee did not meet the definition of disabled.

Employees should not set the bar too high or have unreasonable expectations of what their employers are able and willing to offer. The best time to achieve a win-win result is during the interactive stage with the employer when reasonable accommodations can be discussed and negotiated.[180] Litigation should be a last resort. If the parties cannot agree and the employee decides to sue, the employee and his or her attorney must carefully and clearly plead the definition of disability and have solid evidence that the employee is disabled as defined in the law and interpreted by the courts.[181] This includes written diagnosis from a doctor of the impairment plus a detailed statement as to how the impairment limits the employee from performing one or more major life activities.[182] A one-page report will not be sufficient.[183] The statement should also place a time-frame on the impairment; the longer the impairment is expected to last, the better the chance that it will be viewed as a disability.[184] Further, the timing of when the employee suffered the impairment must coincide with when the accommodation was requested.[185] Evidence must also show that the employee was able to perform the essential duties of the job[186] and that the employee suffered a materially adverse employment action.[187] In short, the hurdles that employees face in ADA claims continue to be difficult even after the amendments.

VI. Conclusion

Based on the findings of this paper, it appears that the purpose of the ADAAA to broaden the applicability of the Act[188] was not fully achieved. Several legal scholars studying the amendments have arrived at similar conclusions[189] and recommended several areas for change including heightened education of lawyers and judges,[190] improved quality of

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[177] EEOC, *supra* note 175, n.24.
[178] 29 C.F.R. § 1630.2(o)(1)(ii), (4).
[179] Evans v. Cooperative Response Center, Inc., 996 F.3d 539, 547 (10th Cir. 2021).
[180] Kagan, *supra* note 31, at 530.
[181] Barry, *supra* note 53, at 4.
[182] Parrotta v. PECO Energy Co., 363 F. Supp. 3d 577, 593 (E.D. Pa. 2019).
[183] Clark v. Boyd Tunica, Inc., No. 3:14-cv-00204-MPM-JMV, 2016 WL 853529, *5 (N.D. Miss. March 1, 2016).
[184] *See* notes 105-109 and accompanying text, *supra.*
[185] Crowell v. Denver Health and Hosp. Auth., 572 F. App'x 650, 658 (10th Cir. 2014).
[186] 42 U.S.C. § 12111(8) (2018).
[187] *Id.* 12112(b) (2018).
[188] Pub. L. No. 110-325, § 2 (a)(1).
[189] Befort, *supra* note 172, reported mixed outcomes of post ADAAA decisions when compared to decisions prior to the amendments.
[190] Porter, *supra* note 32, at 410.

pleadings,[191] additional remedies under the ADA,[192] bolstering the EEOC's enforcement role,[193] and initiatives at the state level.[194] As long as judges continue to construe the law narrowly, full parity in the workplace for Americans with disabilities will be difficult to attain.

[191] Barry, *supra* note 53, at 3.
[192] Andrew Hsieh, *The Catch-22 of ADA Title I Remedies for Psychiatric Disabilities*, 44 McGeorge L. Rev. 989, 1018 (2013).
[193] Kagan, *supra*, note 31 at 535.
[194] Sahana Pentyala, *Policy Proposal of the Americans with Disability Act (ADA) Amendments Act of 2008*, 9(11) Open J. of Soc. Sci. 213 (2021).

THE USE OF TRUSTS FOR MEDICAID PLANNING

by Winston Spencer Waters*

INTRODUCTION

Medicaid is an entitlement program providing (1) assistance for families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care.[1] Medicaid is the primary federal program for providing medical care to indigent people at public expense.[2] It is a cooperative federal aid program that helps the States provide medical assistance to the poor.[3] It was established by Congress in 1965 as part of the Social Security Act.[4] Congress added Title XIX to the Social Security Act[5] for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX. One such requirement is that a participating State agree to provide financial assistance to the "categorically needy" with respect to five general areas of medical treatment: (1) inpatient hospital services; (2) outpatient hospital services; (3) other laboratory and X-ray services; (4) skilled nursing facilities services, periodic screening and diagnosis of children, and family planning services, and (5) services of physicians.[6] Although a participating State need not "provide funding for all medical treatment falling within the five general categories, [Title XIX] does require that [a] state Medicaid [plan] establish 'reasonable

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42 U.S.C. § 1396-1.

[2] Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

[3] Lankford v. Sherman, 451 F.3d 496, 504 (8th Cir. 2006), citing Schweiker v. Hogan, 457 U.S. 569, 572 (1982).

[4] Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended at 42 U.S.C. § 1396 (1965)). Further, Medicaid was enacted under Congress' Spending Clause authority. Lewis v. Alexander, 685 F.3d 325, 331-32 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013).

[5] 79 Stat. 343, *as amended*, 42 U.S.C.§1396 *et seq*.

[6] 42 U.S.C. § 1396d (a)(1)-(5).

standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX].'"[7]

In 1993, Congress passed the Omnibus Budget Reconciliation Act.[8] This law was enacted in part to address widespread fraud by people abusing Medicaid eligibility rules by secreting their assets to leave an inheritance for their spouses or children. Various types of trusts were frequently used to accomplish this purpose. Seeking to stamp out abusive manipulation of trusts to hide assets and thereby manufacture Medicaid eligibility, Congress created a comprehensive system of rules mandating that trusts be counted as assets to ensure that these trusts were not abused.[9] But Congress also exempted from these rules certain trusts which are intended to provide disabled individuals with necessities and comforts not covered by Medicaid. The Omnibus Budget Reconciliation Act makes it mandatory for states to include trusts as available resources for Medicaid eligibility with three limited exceptions.[10]

This article will discuss the history of Medicaid. A brief history of the Patient Protection and Affordable Care Act will be examined. A discussion of Medicaid trusts will be provided with current uses. The fundamentals of Medicaid and basic forms of trusts which are used as a means to avoid Medicaid asset penalties. The article further examines these very exceptions which continue to circumvent the law and enable the avoidance of millions of dollars of available resources, which are capable of being used to pay medical and nursing home costs.

A Brief History of Medicaid

In 1965, Congress established Medicaid under Title XIX of the Social Security Act.[11] Enacted in response to national concerns over citizens' lack of affordable health care and rising medical costs, Medicaid was designed to help individuals without the financial resources obtain necessary medical care through medical assistance plans.[12] It quickly became the primary federal program for providing medical care to indigent people through public funding.[13] Medicaid grew out of the Johnson Administration's War on Poverty and reflects a fundamental concern about the health and wellbeing of the disadvantaged.[14] It is rooted in the Social Security Act and

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[7] 42 U.S.C. § 1396a (a)(17) 1993. *See* Beal v. Doe, 432 U.S. 438, 441.
[8] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 13226(a)(3), 107 Stat. 312 (1993).
[9] See, Lewis v. Alexander, 685 F.3d 325,331 (3rd Cir. 2012).
[10] *Id.*
[11] Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended at 42 U.S.C. § 1396 (1965)). Further, Medicaid was enacted under Congress' Spending Clause authority. Lewis v. Alexander, 685 F.3d 325, 331-32 (3d Cir. 2012), cert. denied, 133 S. Ct. 933 (2013).
[12] See Harris v. McRae, 448 U.S. 297, 301 (1980).
[13] Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 262 n.19 (1974).
[14] John D. Blum and Gayland O. Hethcoat II, *The 10th Annual Employee Benefits: Symposium: The Past, Present, And Future Of Supreme Court Jurisprudence On Erisa: Article: Medicaid Governance In The Wake Of National Federation Of Independent Business V. Sebelius: Finding Federalism's Middle Pathway, From Administrative Law To State Compacts,* 45 J. Marshall L. Rev. 601, 610 (2012), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=analytical-materials&id=urn:contentItem:56R6-XR00-00CV-W07D-00000-00&context=1516831.

designed to follow the format of other welfare programs. That is, it is voluntary, jointly administered by the states and federal government, financed out of matching general revenue funds, and based on an eligibility means test.[15] The core of Medicaid was to provide medical assistance to two primary populations: families enrolled in the Aid to Families with Dependent Children program, and individuals participating in the federally assisted cash welfare program for the blind, aged, and disabled. For State governments, the cooperative federalism approach underlying Medicaid has created a challenging balance of flexibility and control. On one hand, the Medicaid statute conditions the receipt of federal matching funds on federal approval of a state operating plan, as well as subsequent amendments to such a plan, which must meet requirements for program structure, operations, and benefits.[16] But, on the other hand, the statute grants States flexibility to individually tailor their Medicaid programs through the addition of optional benefits, resulting in significant variations in plans across the country, reflected in eligibility, the scope and nature of services, and provider reimbursement rates. Although the history of Medicaid does not parallel the constant reinvention of Medicare, it is nevertheless characterized by ongoing and regular changes in structure and benefits. Without accounting for the ACA expansion, Medicaid has expanded into the largest federal health insurance program, covering 75 million children and adults on average per month.[17]

Medicaid is voluntary. No State is obligated to join Medicaid, but if they do join, they are subject to federal regulations governing its administration.[18] Generally, Medicaid provides assistance for two types of individuals: the categorically needy and the medically needy. The categorically needy are those who qualify for public assistance under the Supplemental Security Income (SSI) program or other federal programs.[19] The medically needy are those who would qualify as categorically needy (because they are disabled, etc.) but whose income and/or assets are substantial enough to disqualify them.[20] Every State participating in Medicaid must provide assistance to the categorically needy. States need not provide assistance to the medically needy.[21] If States choose to make medical assistance available to the medically needy, they are subject to various statutory restrictions in determining to whom medical assistance should be extended.

Before granting approval, the agency reviews the State's plan and amendments to determine whether they comply with the statutory and regulatory requirements governing

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[15] *Id.*
[16] *Id.*
[17] Kristen Underhill, *ARTICLE: "Everybody Knows I'm Not Lazy": Medicaid Work Requirements and the Expressive Content of Law,* 20 Yale J. Health Pol'y L. & Ethics 225, 240 (2021), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=analytical-materials&id=urn:contentItem:64NT-4JY1-JYYX-6432-00000-00&context=1516831.
[18] See Roloff v. Sullivan, 975 F.2d 333, 335 (7th Cir.1992).
[19] See Roach v. Morse, 440 F.3d 53, 59 (2d Cir. 2006) (Sotomayor, J.); Roloff, 975 F.2d at 335.
[20] Roloff, 975 F.2d at 335.
[21] *Id.*

the Medicaid program.[22] The plan must provide coverage for the categorically needy" and, at the State's option, may also cover the "medically needy.[23] If a state participates, it must comply with the Medicaid Act and regulations.[24] Once the plan is approved, the federal government subsidizes the State's medical-assistance services.[25] The Medicaid Act authorizes the States to vest local agencies with responsibility for day-to-day administration of this benefit program.[26] Congress gives states "substantial discretion to choose the proper mix of amount, scope, and duration limitations" of their Medicaid programs.[27] However, failure to comply with federal requirements may jeopardize federal funds.[28]

Among these requirements, states must "comply with the provisions of section 1396p of this title with respect to . . . treatment of certain trusts."[29] To be eligible for Medicaid, a person must have income and resources less than the thresholds set by the Secretary.[30] In general, trust assets count as resources for determining Medicaid eligibility.[31] However, in 1993, Congress created an exception for special-needs trusts for disabled individuals as discussed herein.[32]

Federal legislation throughout the 1980s and 1990s expanded eligible populations and benefits, and the Affordable Care Act expansion was a transformative step nudging Medicaid toward a social insurance program — one of near universal applicability, although still under state control. Many scholars have considered the origins and impacts of local control over public benefits programs, including Medicaid, and although local control has created opportunities to identify the impact of policy features, decentralization has also contributed to access disparities on the basis of race and class.[33]

The Patient Protection and Affordable Care Act

The only other major health care initiative since Medicaid was established in 1965 occurred in 2010, when Congress enacted the Patient Protection and Affordable Care Act.[34] The goal of the Patient Protection and Affordable Care Act is to provide a larger

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[22] *See* 79 Stat. 419, 344, as amended, 42 U. S. C. §§ 1316(a)(1), (b), 1396a(a), (b); 42 CFR §430.10 *et seq.* (2010); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 502 (1990).
[23] Pharma. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 651 n.4 (2003) (citing 42 U.S.C. § 1396a(a)(10)(A)(i)).
[24] *Id*., citing Schweiker v. Gray Panthers, 453 U.S. 34, 37 (1981); Bowlin v. Montanez, 446 F.3d 817, 818 (8th Cir. 2006).
[25] Lankford, 451 F.3d 496, 504 (8th Cir. 2006).
[26] Reynolds v. Giuliani, 506 F.3d 183, 188 (2d Cir. 2007).
[27] Alexander v. Choate, 469 U.S. 287, 303 (1985).
[28] *See* 42 U.S.C. §§ 1396a(a)(1)-(65), 1396c.
[29] 42 U.S.C. § 1396a(a)(18).
[30] 42 U.S.C. § 1396a(a)(17).
[31] *See* 42 U.S.C. § 1396p(d)(3).
[32] 42 U.S.C. § 1396p(d)(4); Norwest Bank of N.D. v. Doth, 159 F.3d 328, 330 (8th Cir. 1998).
[33] *Supra note* 17.
[34] 124 Stat. 119 (2010).

segment of the American population access to good health care. This is accomplished by expanding the number of persons with health insurance coverage.[35] The act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The ACA sought to expand Medicaid eligibility and coverage in all states to households with incomes up to 133 percent of the poverty level.[36] Its 10 titles stretch over 900 pages and contain hundreds of provisions.[37]

The Patient Protection and Affordable Care Act (also referred to herein as the Affordable Care Act) is a very complex piece of legislation.[38] Questions of policy design was left to the Congress. Congress enacted legislation that both expanded the Medicaid program and created a health insurance marketplace. Thus, expanding the Medicaid program which has traditionally provided low-income persons with health insurance and creating insurance marketplaces, known as "Exchanges" in the states for persons whose income preclude them from participating in the Medicaid program but opening the doors to private health insurance carriers. Interestingly, the Affordable Care Act in requiring states to pay for health care raised questions of federalism.[39]

One of the most important, yet controversial, provisions of the ACA was the individual mandate. The individual mandate required Americans to get health insurance coverage or pay a fine with their tax return.[40] The goal was to encourage persons that would otherwise go uninsured to gain coverage, thereby lowering adverse

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[35] Health policies typically are described as pursuing one of three goals: access, quality, or cost reduction. On the Affordable Care Act's prioritization of access, see, for example, Gluck & Huberfeld, ("The ACA responded to ... gaps in coverage with an overarching philosophy one of us has called "universality' - universal access to healthcare through universal access to insurance coverage... ."); President Barack Obama, Remarks by the President on the Affordable Care Act (Oct. 20, 2016), https://obamawhitehouse-archives-gov.libproxy.adelphi.edu/the-press-office/2016/10/20/remarks-president-affordable-care-act [https://perma .cc/SMK8-JXL5] ("We gave states funding to expand Medicaid to cover more people."); King v. Burwell, 576 U.S. 473, 478 (2015) (describing the ACA as "designed to expand coverage"). Despite its structural focus on increased access, the Act of course also included provisions aimed at the goals of quality improvement and cost reduction. See Patient Protection and Affordable Care Act §§3001-3602, 124 Stat. at 122-24.

[36] Michael Supanick, *Note: Private Insurance And Universal Healthcare: How Can Private Insurance Be Utilized Within A Universal Healthcare System In The United States?,* 30 S. Cal. Interdis. L.J. 551, 554 (Winter, 2021), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=analytical-materials&id=urn:contentItem:63P3-1BX1-F8KH-X180-00000-00&context=1516831.

[37] *See Nat'l Fed'n. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 539 (2012).

[38] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.). The reconciliation bill enacted as a companion to it was an additional 55 pages. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[39] See *Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012)* (holding that the mandatory nature of the Medicaid expansion program under the Affordable Care Act was unconstitutional because Congress was "not free to … penalize States that choose not to participate in that new program by taking away their existing Medicaid funding").

[40] *Supra note* 36.

selection in healthcare markets and leading to lower premium costs.[41] The constitutionality of the individual mandate was challenged in *Nat'l Fed'n of Indep. Bus. v. Sebelius.*[42] The Supreme Court held that the individual mandate could not be upheld by use of the Commerce Clause, because inactivity cannot be regulated. The individual mandate forced individuals to participate in the marketplace, which the Commerce Clause does not give Congress the power to do. However, the individual mandate could be characterized as a tax on those without proper health insurance coverage. Thus, the individual mandate was protected by Congress's taxing power.

In reviewing the constitutionality of the Patient Protection and Affordable Care Act, the United States Supreme Court held that the Act is constitutional in part and unconstitutional in part.[43] The Court held that the individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause.[44] That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it.[45] In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.[46]

As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding. Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.[47]

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[41] *Id.*

[42] See generally, *Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012).*

[43] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450, 2012 U.S. LEXIS 4876, 80 U.S.L.W. 4579, 2012-2 U.S. Tax Cas. (CCH) P50,423, 109 A.F.T.R.2d (RIA) 2012-2563, 80 A.L.R. Fed. 2d 501, 53 Employee Benefits Cas. (BNA) 1513, 23 Fla. L. Weekly Fed. S 480, 2012 WL 2427810 (Supreme Court of the United States June 28, 2012, Decided), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=cases&id=urn:contentItem:560C-KGV1-F04K-F2VJ-00000-00&context=1516831.

[44] *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 588, 132 S. Ct. 2566, 2609, 183 L. Ed. 2d 450, 2012 U.S. LEXIS 4876, 80 U.S.L.W. 4579, 2012-2 U.S. Tax Cas. (CCH) P50,423, 109 A.F.T.R.2d (RIA) 2012-2563, 80 A.L.R. Fed. 2d 501, 53 Employee Benefits Cas. (BNA) 1513, 23 Fla. L. Weekly Fed. S 480, 2012 WL 2427810 (Supreme Court of the United States June 28, 2012, Decided), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=cases&id=urn:contentItem:560C-KGV1-F04K-F2VJ-00000-00&context=1516831.

[45] *Id.*

[46] *Id.*

[47] *Id.*

Nearly five years later, in December of 2017, Congress revisited the mandate penalty. After failing to repeal the ACA at least seventy times, Congress enacted the Tax Cuts and Jobs Act (also referred to herein as "TCJA), which reduced the mandate penalty to $0, but left the mandate — and the rest of the ACA — in place.[48] After the TCJA was passed, President Trump claimed in the State of the Union address that "the individual mandate is now gone."[49] Shortly thereafter, more than a dozen Republican-led states and several individuals filed suit in federal district court challenging the ACA.[50]

As a practical matter, there is no mandate; it has been a toothless requirement since Congress eliminated its penalty in 2017.[51] And, as it turns out, recent coverage data suggests the ACA operates just fine without the mandate.[52] In *Texas v. United States*, however, the mandate did serve an important purpose — it was the launchpad for the challengers' inseverability argument. In March, 2020, however, Congress passed the Families First Coronavirus Response Act and the CARES Act, which shredded the challengers' argument by overriding the severability ruling in *Texas v. United States*.[53]

The 2017 Tax Act reduced the shared responsibility tax to zero.[54] While it is commonly misreported that the 2017 Tax Act eliminated the individual mandate, it did not do so; it lowered the tax that enforces the individual mandate to zero.[55] In other words, after the 2017 Tax Act, an individual who fails to maintain adequate health coverage, as required by the individual mandate of the ACA, faces no penalty; there is no enforcement mechanism for the individual mandate after the 2017.[56] In *California v. Texas*, states and individuals are once again challenging the constitutionality of the ACA. The provision under direct attack in *California v. Texas* is the individual mandate.[57] The challengers in *California v. Texas* argue that because Congress reduced the tax to zero, the individual mandate can no longer be considered a constitutionally permissible exercise of taxing authority.[58] The District Court judge agreed with this argument, holding that the individual mandate is no longer constitutional.[59] The District Court referred to the Supreme Court's decision in *NFIB*, which found that the individual

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[48] TCJA, Pub. L. No. 115-97, § 11081(b), 131 Stat. 2054, 2092 (2017) (codified at 26 U.S.C. § 5000A(c)(3)).

[49] JOHN ALOYSIUS COGAN JR., * *ARTICLE: CONGRESS HAS ALREADY RULED IN CALIFORNIA v. TEXAS,* 62 B.C. L. Rev. E. Supp. 11, 13 (2021), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=analytical-materials&id=urn:contentItem:627Y-C001-F4NT-X31R-00000-00&context=1516831.

[50] *Id., at 14.*

[51] *Id., at 15.*

[52] *Id.*

[53] *Id.*

[54] Mary Leto Pareja, *ARTICLE: California v. Texas: The Role of Congressional Procedure in Severability Doctrine,* 45 Seton Hall Legis. J. 69, 91(2021), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=analytical-materials&id=urn:contentItem:626X-SY31-F06F-23W8-00000-00&context=1516831.

[55] *Id.*

[56] *Id.*

[57] *Id*, at 96.

[58] *Id.*

[59] *Id.*

mandate standing alone would be an unconstitutional overreach, exceeding Congressional authority, but that the inclusion of a penalty tax to enforce the individual mandate made the mandate constitutional under the taxing authority.[60] The District Court further found that a tax set at zero is the same as no tax at all.[61] Thus, without a tax, the individual mandate cannot be upheld under the taxing authority. The states and individual parties seeking to uphold the ACA appealed the decision to the Fifth Circuit, which issued a decision on December 18, 2019.[62] The Fifth Circuit agreed with the District Court that the individual mandate can no longer be considered a constitutional exercise of Congressional authority - without a tax, the individual mandate cannot be considered an exercise of Congress' tax and spending power.[63] Having found the individual mandate unconstitutional, the District Court judge next examined whether the now-unconstitutional individual mandate could be severed from the rest ACA and determined that it could not.[64] Therefore, the District Court's ruling strikes down the entire ACA as unconstitutional because it is not severable from the individual mandate.[65] On appeal, the Fifth Circuit remanded the severability question to the District Court, instructing it to provide additional analysis.[66] Before the District Court could revisit the case, the Supreme Court granted cert.[67]

MEDICAID TRUSTS

A trust is a legal instrument in which assets are held in the name of the trust and managed by a trustee for the benefit of a beneficiary.[68] The dominant theory underlying the concept of a trust is grounded in property law. Its defining feature is a bifurcated ownership structure in which property is transferred to a trustee who manages it for a beneficiary.[69] Historically, a trust is a contract. The contractarian claim or academic view is that the trust is a deal, a bargain about how the trust assets are to be managed and distributed.[70] To be sure, the trust originates exactly where convention says it does, with property.[71] The Restatement of Trusts says, "[a] trust cannot be created unless there is trust property.[72] The owner, called the settlor, transfers the trust property to an intermediary, the trustee, to hold it for the beneficiary.[73] We treat the trustee as the new owner for the purpose of managing the property.[74] In sum, a trust is generally a legal

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.,* at 97.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Black's Law Dictionary* 1546 (8th ed. 2004).
[69] F.W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW 23, 44 (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 1984).
[70] *See*, *e.g.*, John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995).
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

instrument where assets are held in the name of the trust and managed by a trustee for the benefit of a beneficiary.[75] Because the beneficiary does not own the assets in the trust, but has an equitable right to use them, he or she may use the trust to avoid certain legal requirements.[76] This structure means that the beneficiary does not actually own the assets of the trust, but instead has an equitable right to derive benefits from them (the benefits vary according to the terms of the trust).[77] The trust has long been a tool for evading the rigid strictures of the law, which has generally been a positive development.[78]

Supplemental needs trusts are a narrow category of trusts that help individuals with severe and chronic disabilities pay for items and services that Medicaid will not cover.[79] This includes additional health care services and equipment, specialized or unique therapy, private health insurance, educational and vocational training, computers and software, case management services, and recreational activities.[80] Supplemental Needs Trusts are commonly used where a person with a disability receives a "lump sum" of money from a lawsuit, inheritance, or other source.[81]

Again, to be eligible for Medicaid, a person must have income and resources less than thresholds set by the Secretary.[82] In general, trust assets count as resources for determining Medicaid eligibility.[83] Congress provided a limited exception to the general rule that a state must consider trust assets in making Medicaid eligibility determinations and exempted from these rules certain trusts intended to provide disabled individuals with necessities and comforts not covered by Medicaid.[84]

In 1993, Congress enacted several trust provisions within the Omnibus Budget Reconciliation Act of 1993 to prevent individuals from sheltering their assets in trusts

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[75] Lewis v. Alexander, 685 F.3d 325, 332 (3d Cir. 2012) (citing Black's Law Dictionary 1546 (8th ed. 2004)), cert. denied, 133 S. Ct. 933 (2013). Similarly, the Medicaid statute defines a trust as "any legal instrument or device that is similar to a trust but includes an annuity only to such extent and in such a manner as the Secretary [of the HHS] specifies." §1396p(d)(6).

[76] Lewis, 685 F.3d at 332.

[77] See, Lewis v. Alexander, 685 F.3d 325,331 (3rd Cir. 2012).

[78] *Id.*

[79] See Sullivan v. Cnty. of Suffolk, 174 F.3d 282, 284 (2d Cir. 1999). Note that third-party trusts, in contrast to Special Needs Trust, are established with a third party's assets and OBRA does not regulate them, so they are not the subject of this Note. See Bradley J. Frigon & W. Eric Kuhn, Which SNT, When & Why, 5 Nat'l. Acad. of Elder L. Att'ys J. 1, 7 (2009).

[80] See Joseph A. Rosenberg, Supplemental Needs Trusts for People with Disabilities: The Development of A Private Trust in the Public Interest, 10 B.U. Pub. Int. L.J. 91, 95-96 (2000). For a more comprehensive list of goods and services that beneficiaries may use SNTs to pay for, see Ruthann P. Lacey & Heather D. Nadler, Special Needs Trusts, 46 Fam. L. Q. 247, 260-61 (2012).

[81] See Joseph A. Rosenberg, Supplemental Needs Trusts for People with Disabilities: The Development of A Private Trust in the Public Interest, 10 B.U. Pub. Int. L.J. 91, 95-96 (2000). For a more comprehensive list of goods and services that beneficiaries may use SNTs to pay for, see Ruthann P. Lacey & Heather D. Nadler, Special Needs Trusts, 46 Fam. L. Q. 247, 260-61 (2012).

[82] 42 U.S.C. § 1396a(a)(17).

[83] *See id.* § 1396p(d)(3).

[84] *Id.* § 1396p(d)(3).

while receiving Medicaid.[85] Before Congress enacted Omnibus Budget Reconciliation Act of 1993 (also referred to herein as "OBRA"), no federal law existed monitoring trusts.[86] The states explicitly recognized special-needs trusts by statute or regulation.[87]

OBRA was enacted partly in response to the states' budgetary crises caused by individuals abusing Medicaid eligibility rules by hiding their assets in trusts to remain eligible for Medicaid or to provide an inheritance to their children and family.[88] This rule is unquestionably mandatory on the states based on the statute's text.[89] As with many government programs, eligibility for Medicaid is partially dependent on the claimant's income and assets. The Omnibus Budget and Reconciliation Act mandates that income and assets in almost all trusts be considered a resource in determining Medicaid eligibility.[90] There is an exception for supplemental needs trusts.[91] Supplemental Needs Trusts are designed to cover expenses for items not covered under Medicaid. As

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[85] Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified as amended at 42 U.S.C. § § 1396-1399 (2003)).

[86] *Hobbs v. Zenderman,* 542 F. Supp. 2d 1220, 1232, 2008 U.S. Dist. LEXIS 54389 (United States District Court for the District of New Mexico March 31, 2008, Filed), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=cases&id=urn:contentItem:4T0X-VX50-TXFR-G2YC-00000-00&context=1516831.

[87] See, Hobbs v. Zenderman, 542 F. Supp. 2d at 1232, stating, [f]or example, in an article for a Massachusetts Continuing Legal Education publication, *Drafting Irrevocable Trusts in Massachusetts*, the authors discuss the benefits of a Special Needs Trust pursuant to § 1396p(d)(4)(A), but note: "[t]he only drawback to this trust is that upon the beneficiary's death the state must be reimbursed for any funds it had expended on his or her behalf. In addition, the states have the right to monitor trust distributions to be sure the funds are used for the benefit of the disabled beneficiary. For example, with respect to applications for MassHealth, the Office of Medicaid requires that the trust permit it to demand an annual account of the trust's expenditures. Typically, these accounts are not requested every year, but in any given year the trustee must be prepared to submit one." Alyssa Adams and Harry S. Margolis, *Irrevocable [**33] Supplemental Needs Trusts*, DITM MA-CLE 7-1, § 7.4hh.2 (2005). The Court has already pointed out New York's statute explicitly requiring protection of the state's remainder interest in a Special Needs Trust, *see* n. 11, *supra*, and notes there are other state statutes recognizing states' authority to monitor special-needs-trust expenditures. *See, e.g.*, C.R.S.A. § 25.5-6-103(1)(b) (Colorado statute requiring state agency to promulgate rules concerning reimbursement of departments of social services for efforts undertaken "for the recovery of trust property that has been improperly distributed or otherwise expended."). While the states' practice is not controlling, it comports with the common-sense interpretation of § 1396p(d)(4)(A) that the Court adopts today and is therefore supportive of that interpretation.

[88] Jeffrey R. Grimyser*, *STUDENT NOTE: MISSING THE FOREST FOR THE TREES: WHY SUPPLEMENTAL NEEDS TRUSTS SHOULD BE EXEMPT FROM MEDICAID DETERMINATIONS,* 89 Chi.-Kent L. Rev. 439, 444 (2014), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=analytical-materials&id=urn:contentItem:5B8S-JDP0-00CT-S0NW-00000-00&context=1516831.

[89] See, e.g., Keith v. Rizzuto, 212 F.3d 1190, 1193 (10th Cir. 2000) ("Section 1396p(d)(3) does not merely "allow' states to count trusts in determining Medicaid eligibility; it requires them to do so.") (emphasis in original).

[90] See 42 U.S.C. § 1396p(d)(3) (2006). Note, however, that use of the phrase "default rule" in this Note is merely referring to a descriptive term to show that § 1396p(d)(3) applies to nearly all trusts, rather than referring to the contract law term of art. See, e.g., Lewis, 685 F.3d at 333 (stating that in § 1396p(d)(3) "Congress established a general rule that trusts would be counted as assets for the purpose of determining Medicaid eligibility.").

[91] See § 1396p(d)(4).

discussed, Medicaid is a federal assistance program, administered by the states, that helps individuals with below a certain level of assets pay for medical expenses. Higher income and resourced individuals are expected to exhaust their own resources before turning to the public for assistance. But trusts can enable these same individuals to technically "own" nothing at all, even though they may have access to substantial wealth. Such claimants may then qualify for Medicaid. However, because Medicaid is available only to the needy, lawyers have devised various ways to "shield" wealthier claimants' assets in determining Medicaid eligibility.[92] The trust provisions have confused federal courts, causing a recent circuit split about whether assets contained within SNTs can be counted by state Medicaid agencies when they determine the trust beneficiaries' Medicaid eligibility and benefits.[93] On one hand, one can read §1396p(d)(4) as being mandatory, which would require all states to exempt assets in SNTs when determining Medicaid eligibility. This would allow the beneficiaries to continue using SNTs and remain eligible for Medicaid, but would force the states, as payors, to cover more citizens under Medicaid. On the other hand, one can interpret § 1396p(d)(4) as being optional, which would permit each state to enact laws that disqualify beneficiaries of SNTs from receiving Medicaid. This would enable states to save some of their limited resources, but would cause the beneficiaries to lose their Medicaid benefits if they use SNTs.[94]

Thus, within the Omnibus Budget Reconciliation Act, there is an explicit exception for Special Needs Trusts for disabled individuals.[95] Section 1396p(d)(1) instructs that the "rules specified in paragraph (3) shall apply to a trust established by" an individual seeking Medicaid assistance, but "subject to paragraph (4)."[96] Paragraph (4), in turn, instructs that "[t]his subsection shall not apply to any of" the trusts defined in §1396p(d)(4)(A), (B), and (C).[97]

Section 1396p(d)(4) lists three types of SNTs: individual, income, and pooled.[98] The three types of Special Needs Trusts that are permissible under current guidelines are:

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[92] Johnson v. Guhl, 357 F.3d 403, 440 (3rd Cir. 2004).

[93] Jeffrey R. Grimyser, *Student Note: Missing The Forest For The Trees: Why Supplemental Needs Trusts Should Be Exempt From Medicaid Determinations,* 89 Chi.-Kent L. Rev. 439, (2014), *available at* https://advance-lexis-com.libproxy.adelphi.edu/api/document?collection=analytical-materials&id=urn:contentItem:5B8S-JDP0-00CT-S0NW-00000-00&context=1516831.

[94] *Id.*

[95] *Id.* § 1396p(d)(4); Norwest Bank of N.D. v. Doth, 159 F.3d 328, 330 (8th Cir. 1998).

[96] 42 U.S.C. § 1396p(d)(1).

[97] *Id*. § 1396p(d).

[98] See § 1396p(d)(4)(A)-(C).

(4) This subsection shall not apply to any of the following trusts:

(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3) [42 USCS § 1382c(a)(3)]) and which is established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [42 USCS §§ 1396 et seq.].

(B) A trust established in a State for the benefit of an individual if—

(i) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),

(1) an individual trust; (2) an income trust and (3) a pooled trust. All three trusts are often collectively referred to as Supplemental Needs Trusts despite having certain key differences.

Individual Special Needs Trusts:

Special Needs Trusts allow recipients of means-tested government benefit programs such as Supplemental Security Income[99] and Medicaid from being denied benefits until such time that they have depleted cash and other assets to qualifying levels. Supplemental Security Income is a replacement program eliminating various grant-in-aid federal and state joint programs support for elderly, blind and disabled persons who do not qualify for Social Security Retirement or Disability Insurance Benefits. A Special Needs Trust is a "discretionary trust established for the benefit of a person with severe and chronic or persistent disability and is intended to provide for expenses that assistance programs such as Medicaid do not cover."[100] Historically, the Special Needs Trust evolved from the irrevocable discretionary trust.[101]

It is a grantor trust, but it is a type of irrevocable discretionary trust restricting the control of trust assets that assist in Medicaid planning. It enables disabled individuals under age 65 to contribute "assets" to a Special Needs Trust for their benefit without having such assets treated as countable assets for Medicaid purposes.[102] The beneficiary

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(ii) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title [42 USCS §§ 1396 et seq.], and
(iii) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V) [42 USCS § 1396a(a)(10)(A)(ii)(V)], but does not make such assistance available to individuals for nursing facility services under section 1902(a)(10)(C) [42 USCS § 1396a(a)(10)(C)].

(C) A trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] that meets the following conditions:

(i) The trust is established and managed by a non-profit association.
(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title [42 USCS §§ 1396 et seq.].

[99] 42 U.S.C.§ 1381. ("Statement of purpose; authorization of appropriations). For the purpose of establishing a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled, there are authorized to be appropriated sums sufficient to carry out this title [42 USCS §§1381 et seq.]").

[100] Sullivan v. County of Suffolk, 174 F.3d 282, 284 (2d Cir. 1999).

[101] A. Frank Johns, *Perspectives on Elder Law: Legal Ethics Applied to Client-Lawyer Engagements in Which Lawyers Develop Special Needs Pooled Trusts*, 29 WM. MITCHELL L. REV. 47, 50 (2002).

[102] Reames v. Okla. ex rel. Okla. Health Care Auth., 411 F.3d 1164, 1166 (10th Cir. 2005).

must be under sixty- five years of age,[103] disabled as defined in section 1614(a)(3) and which is established for the benefit of such individual by the individual, parent, guardian, grandparent, legal guardian, or court. The elements of an individual supplemental needs trust include: (1) the beneficiary is under 65 years of age; (2) the person is disabled pursuant to 42 U.S.C. § 1382c(a)(3); (3) the trust is for the benefit of the beneficiary; (4) the trust is established by the individual, a parent, grandparent, legal guardian of the individual, or a court and (5) the trust provides for the State to be repaid upon the death of the beneficiary.

Such an instrument must provide that the State will receive all amounts remaining in the Trust at the death of the beneficiary up to the amount equal to the total Medicaid paid.[104] The part of the statute requiring the Medicaid advance amount to be paid back is commonly known as the Medicaid payback provision. Should there be a remainder, it passes to the beneficiary's estate. Courts in different jurisdictions impose the prerequisite that either a part, or all, of the outstanding Medicaid lien be paid prior to the approval of the creation of a supplemental needs trust. Self-settled trusts are prohibited. Moreover, Special Needs Trust distributions must be put toward expenses that are not covered by government benefits.[105] Another restriction of this type of supplemental needs trust is that the trustee cannot provide funds directly to the beneficiary but must instead pay the vendor directly.[106]

A Special Needs Trust generally authorizes protection of assets, including income, from Medicaid determinations, whereas state and federal Medicaid regulations mandate that states take income into account in determining co-pay. Section 1396p(e)(1) defines "assets" as all income and resources of the individual.[107] 42 U.S.C. § 1382(a) defines income to include benefits. Therefore, it follows that 42 U.S.C. § 1396p(d)(4)(A) authorizes the benefits or income of an individual to be contributed to a Special Needs Trust. These trusts provide for a higher quality of life for the incapacitated person. This is accomplished by permitting funds to be withdrawn from the trust with court approval to purchase: (1) real estate; (2) personal items; (3) vacations; (4) educational support items; (5) recreational items; (6) vocational items (7) health care services and (8) goods or services that would not ordinarily be possible but for the Supplemental Needs Trust income or corpus.

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[103] 42 U.S.C. § 1396p(d)(4)(A) (2021).
[104] *Id.* § 1396p(d)(4)(A) (2021).
[105] Lawrence Frolik & Melissa Brown, P 17.03[1] *Special Needs Trusts and Personal Injury Settlements, in Advising the Elderly & Disabled Client* 4 (2015).
[106] *Id.*
[107] Reames v. Okla. ex rel. Okla. Health Care Auth., 411 F.3d 1164, 1166 (10th Cir. 2005).

Income Supplemental Need Trusts:

Income trusts are established for persons living in a Nursing facility.[108] This type of trust is also referred to as a "Miller" trust.[109] These trusts allow persons residing in Nursing Homes to qualify for Medicaid in States that have income caps for Medicaid.[110] The requirements are that (1) the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust); (2) the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual; (3) the State makes medical assistance available to individuals described in section 1902(a)(10)(A)(ii)(V) 42 USCS § 1396a(a)(10)(A)(ii)(V)], but does not make such assistance available to individuals for nursing facility services under section 1902(a)(10)(C) [42 USCS § 1396a(a)(10)(C)].

Pooled Special Needs Trusts:

A Pooled Special Needs Trust is identical to Individual Special Needs Trust with certain exceptions. First, the Pooled Special Needs Trust is a part of a larger and broader trust which is created and managed by a not-for-profit association.[111] The non-profit organization as trustee manages the pooled assets of many disabled individuals (with separate accounts for each beneficiary). Each individual's assets are held in a single trust with separate accounts for each beneficiary. Pooled trusts are referred to as "type C" trusts that may be established by the beneficiary or a third party, thus, an individual can create a Pooled trust for his/her benefit.[112] The beneficiary must be disabled and under 65 years of age. However, contributions to the Trust after age 65 could be subject to the Medicaid Transfer Penalty for Nursing Home Care. The exception is if the income is used to pay for rent, utilities, etc. A Pooled Special-Needs Trust usually pays for a

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[108] 42 U.S.C. § 1396p(d)(4)(B) (2021).

[109] Income trusts are also known as "Miller trusts" after a decision in a federal district court case. See Miller v. Ibarra, 746 F. Supp. 19 (D. Colo. 1990).

[110] See J.P. v. Div. of Med. Assistance & Health Servs., 920 A.2d 707 (N.J. Super. Ct. 2007). Due to a severe physical disability, the recipient lived in a nursing home and received Medicaid benefits. Under the "medically needy" Medicaid nursing home program, she was required to use her income, consisting of social security benefits, to pay for her nursing home care, and Medicaid paid for the amount not covered by her income. After her divorce, pursuant to court order, her ex-husband paid his alimony obligation to her into a Special Needs Trust that the divorce court ordered to be established to protect her eligibility for Medicaid. Petitioner Medicaid recipient sued the New Jersey Division of Medical Assistance and Health Services (DMAHS) and a county board of social services, challenging DMAHS's ruling that alimony her ex-husband paid into a Special Needs Trust was considered to be her income, pursuant to N.J.A.C. 10:71-5.4(a), and had to paid to the nursing home where she resided. The appellate court construed federal and New Jersey Medicaid statutes and regulations concerning Special Needs Trusts, including N.J.S.A. § 3B:11-37 and N.J.A.C. 10:71-4.11(g)1. It held that alimony did not constitute income received by a Medicaid recipient where the alimony was paid to a Special Needs Trust created under 42 U.S.C.S. § 1396p(d)(4)(A) pursuant to a family part order as part of divorce proceedings. Therefore, the New Jersey Medicaid program could not reduce its contribution to the recipient's nursing home costs by the amount of alimony her ex-husband paid to the Special Needs Trust.

[111] 42 U.S.C. § 1396p(d)(4)(C)(i) (2021).

[112] 42 U.S.C. § 1396p(d)(4)(C)(iii) (2021).

disabled person's Medicaid-ineligible expenses, such as clothing, phone service, vehicle maintenance, and taxes.[113]

Unlike the other two Special Needs Trusts, upon the death of the beneficiary, the remainder passes from the subaccount (individual pooled trust) to the main trust for the benefit of other persons with disabilities if an election is made in the Trust.[114] Residual amounts in the pooled trust after the beneficiary's death do not have to be paid back to the state, and may be kept by the non-profit for the benefit of other pooled-trust beneficiaries. Some States demand a portion of the remainder revert to Medicaid.[115]

The elements of a pooled trust are as follows: (1) the trust must contain the assets of the beneficiary; (2) the beneficiary is disabled pursuant to (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)]; (3) the trust is established and managed by a non-profit association; (4) a separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts; (5) accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] and (6) the trust was created by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.[116]

CONCLUSION

This article has reviewed the basic types of trusts legally permissible pursuant to the Omnibus Budget Reconciliation Act. The three Special Needs Trusts discussed are extensively used by practitioners to accomplish Medicaid and estate planning objectives. Accountants are in a unique position to advise their clients about the best time to begin thinking about planning for retirement with the possibility of creating a Medicaid trust. Inclusive in such planning are ways to shield assets from devastating medical and Nursing Home costs. It is important for business and accounting students to learn about the fundamentals of trusts as they advance their careers and counsel future clients notwithstanding their own familial and personal needs. It is particularly important for accounting students to comprehend these types of trusts used in Medicaid and Estate planning to properly counsel for both estate and tax purposes.

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[113] 42 U.S.C. § 1396p(d)(4)(C) (2021).

[114] Jennifer Field, *Special Needs Trusts: Providing for Disabled Children Without Sacrificing Public Benefits*, 24 J. JUV. L. 79, 87 (2004).

[115] *See*, EDWIN KASSOFF, ELDER LAW AND GUARDIANSHIP IN NEW YORK § 8:131 (2014) (providing that New York allows the beneficiary and the trust management company to negotiate at the time of trust preparation as to the percentage of funds retained). In fact, Pennsylvania used to cap this retention amount at fifty percent, but this provision was later ruled to be pre-empted. Lewis v. Alexander, 276 F.R.D. 421, 444 (E.D. Pa. 2011), *aff'd*, 685 F.3d 325 (3d Cir. 2012).

[116] 42 U.S.C. § 1396p(d)(4)(C)(i) (2021).