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William B. Read
Husson University
1 College Circle
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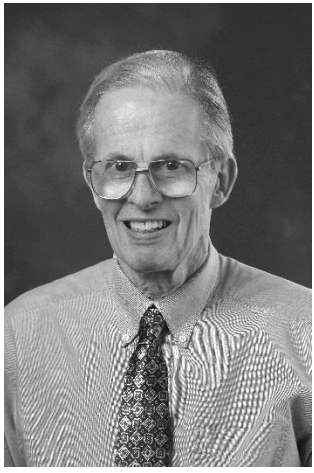
DEDICATION

In gratitude for his exemplary and longstanding service as Editor-in-Chief of the Business Law Review, the Board of Editors and the members of the North Atlantic Regional Business Law Association are so very pleased to dedicate this 50th Anniversary Edition of the journal to:

William B. Read, Husson University, Bangor, Maine.



HISTORY OF THE BUSINESS LAW REVIEW

In Fall 1968, the first edition of the Business Law Review was published by then Husson College. The dedication by President Chelsey H. Husson Sr. read as follows:

> *The law, written and unwritten, guides men in all pursuits and protects their efforts. Knotty problems can be solved only when knowledge of the law is comprehensive. To improve this comprehension, to expand man's knowledge of the statutes, to aid in this interpretation, are the purposes that caused this journal to be published. It is a contribution of merit to this discipline and possesses value not only to the*

student of law, but to the layman who will find much to interest him since it governs his every movement.

The Business Law Review continues to be published yearly by Husson University for the North Atlantic Regional Business Law Association (NARBLA). Its purpose is to encourage scholarly research in Business Law and the Legal Environment of Business. The Board of Editors for the journal includes professors and experienced legal practitioners from Arkansas, Connecticut, Florida, Rhode Island, Maine, and Massachusetts.

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A GLASS HALF FULL? ENDURING SMALL BUSINESS FRUSTRATIONS UNDER THE CONSUMER REVIEW FAIRNESS ACT OF 2016

by Lucille M. Ponte*

With the rise of social media, brand communications have become more interactive with an ever-growing number of crowdsourced review sites.[1] Businesses quickly learned that generating positive consumer ratings and reviews often translated into enhanced brand reputation and increased revenues.[2] In light of these incentives, some companies bought glowing reviews from pay-to-post blog farms or secretly compensated legitimate bloggers in hopes of receiving positive ratings.[3]

* Associate Professor of Law Florida Coastal School of Law.

[1] Approximately 89 percent of consumers believe that online reviews are trustworthy in evaluating products and services. *Game Changer: Cone Survey Finds 4-out-of-5 Consumers Reverse Purchase Decisions Based on Negative Online Reviews*, Cone Communications, Inc. (Aug. 30, 2011), http://www.conecomm.com/stuff/contentmgr/files/0/286c351989671ae74994fec139863bb2/files/2011_cone_online_influence_trend_tracker_release_and_fact_sheet.pdf, *archived at* http://perma.cc/VA8H-4GMM.

[2] Paresh Dave, *Small businesses struggle to manage online image*, L.A. Times, Aug. 9, 2013, http://www.latimes.com/business/la-fi-tech-savvy-online-reviews-20130810-story.html, *archived at* https://perma.cc/7SJQ-6WD7?type=source. Research, including Harvard Business School and University of California, Berkeley studies, indicate that ratings, positive and negative, can directly and substantially impact business revenues. Dave, *supra*. The Harvard study found that even a scant one-star rise in Yelp ratings corresponded to a five to nine percent increase in revenues for local restaurants. *Id*. Alternatively, a single negative online review may result in a twenty-five percent or more decline in revenues. *Id*.

[3] Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 833-34; Kendall L. Short, *Note: Buy My Vote:*

In 2009, the Federal Trade Commission's Revised Endorsement Guides set strict disclosure rules for those compensating reviewers and undertook some high-profile enforcement actions to try to prevent sponsored ads from masquerading as ordinary consumer opinions.[4]

Other businesses, from wedding photographers[5] to hotels[6] to e-commerce sites,[7] took aggressive steps to suppress negative customers through a range of adhesive speech suppression or "gag" contracts.[8] These speech suppression agreements relied upon inappropriate intellectual property claims, empty privacy promises, exorbitant monetary penalties, and other vague threats to silence online critiques.[9] Certain businesses defended these gag contracts as necessary to protect their brand in a social media environment filled with dishonest consumers, unprincipled competitors, and lackadaisical review sites.[10]

In 2014, California enacted the first, but flawed, "Yelp" Law aimed at protecting the ability of consumers to freely post their opinions about products, services, and merchant experiences.[11] On December 14, 2016, President Obama signed the Consumer Review Fairness Act of 2016 (CRFA or "Act") into law.[12] This first-of its kind federal law voids

Online Reviews for Sale, 15 VAND. J. ENT. & TECH. L. 441, 443, 437 (Winter 2013); Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 AM. BUS. L.J. 415, 420-24 (2010); *2011 Emerging Issues 592, Insurance Coverage Implications of Internet, Technology and Social Media*, 7, 9 (MB Sept. 29, 2011).

[4] Guides Concerning the Use of Endorsement and Testimonials in Advertising, 74 Fed. Reg. 53,124, 53,126 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255). *See* Jessica Godell, *Consumer-Generated Media and Advertising—Are They One and the Same? An Analysis of the Amended FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising,* 10 J. MARSHALL REV. INTELLECTUAL PROP. L. 205, 207–09 (2010); Lucille M. Ponte, *Protecting Brand Image or Gaming the System? Consumer 'Gag' Contracts in an Age of Crowdsourced Ratings and Reviews* 7 WM. & MARY BUS. L. REV. 59, 121 (2016).

[5] Ponte, *supra* note 4, at 78; Eric Goldman, *Fining Customers For Negative Online Reviews Isn't New... Or Smart*, Forbes.com Tech (Aug. 8, 2014, 10:47 AM), http://www.forbes.com/sites/ericgoldman/2014/08/07/fining-customers-for-negative-online-reviews-isnt-new-or-smart/, *archived at* http://perma.cc/C5MG-DZEL.

[6] Ponte, *supra* note 4, at 78; Christopher Elliott, *New confidentiality clauses can influence vacation rental reviews* (Apr. 14, 2012), http://elliott.org/blog/new-confidentiality-clauses-can-influence-vacation-rental-reviews/, *archived at* http://perma.cc/GNS9-HBCW.

[7] Ponte, *supra* note 4, at 78; Elliott, *supra* note 5.

[8] *See generally*, Ponte, *supra* note 4, at 71-88 (discussing wide range on speech suppression contracts).

[9] *Id*. at 68. *See infra* Part I.

[10] *Id*. *See infra* Part II.

[11] CAL. CIV. CODE §1670.8 (2014). *See generally* Ponte, *supra* note 4, at 115-18.

[12] Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 130 Stat. 1355 (2016), https://www.congress.gov/114/plaws/publ258/PLAW-114publ258.pdf. [hereinafter CRFA] *See also* Bryan Cave, *Congress Passes "Consumer Review Fairness Act of 2016" to Protect*

contract provisions that seek to prohibit, restrict or penalize online customer reviews.[13] While the CRFA provides valuable and needed protections for online consumer expression, small businesses were still left without new options, outside of costly litigation, to protect themselves from fake negative reviews.[14] Even in cases where businesses press legitimate legal claims, they can face a viral storm of online criticism that further worsens their reputation.[15]

This paper will consider the typical types of speech suppression clauses[16] that led to the passage of California's Yelp law.[17] The paper will also provide an overview of the key provisions of the CRFA, including, what communications are covered, what protections are in place for review sites seeking to effectively police third party postings, and the permissible public and private causes of actions under the new law.[18] This article will address how the Act does little to aid small businesses[19] and recommends self-help remedies, outside of litigation, that should be available to provide assistance to small businesses victimized by social media trolls and bogus negative reviews.[20]

I. THE NATURE OF GAG CLAUSES IN CONSUMER CONTRACTS

The increasing importance of social media and crowd-sourced review sites drastically changed the business marketing landscape, moving away from the one-way presentation of sponsored advertising to an interactive dialogue between merchants and consumers. Some businesses adapted quickly to this dramatic disruption by collecting and responding to consumer concerns as a direct method for improving customer satisfaction and building business goodwill. Other businesses, especially small businesses, seemed ill-prepared to deal

Online Reviews (Dec. 5, 2016) https://www.bryancave.com/en/thought-leadership/congress-passes-consumer-review-fairness-act-of-2016-to-protect.html; Ashlee Kieler, *Speak Freely America: New Federal Law Outlaws Gag Clauses That Punish You For Negative Reviews,* (Dec. 14, 2016, 9:30 am EDT) https://consumerist.com/2016/12/14/consumer-review-freedom-act/ (provides overview of legal issues and prior congressional proposals leading to final act). The law takes effect in March 2017 with enforcement actions permitted as of January 2018.

[13] CRFA, at §2(b). *See* H. Rep. No. 114-731 (2016). [hereinafter CRFA Report]

[14] CRFA, at §2(b)(2)(B).

[15] L. David Russell, Christopher C. Chiou & Zain A. Shirazi, *Fake It Until You Make it? Battling Fake Online Reviews,* LAW360 (June 9, 2014, 12:17 PM), http://www.law360.com/articles/545366/fake-it-until-you-make-it-battling-fake-online-reviews.

[16] *See infra* Part I.

[17] *See infra* Part II.

[18] *See infra* Part III.

[19] *See infra* Part IV.

[20] *See infra* Part V.

with the technological demands and real world impact of consumer concerns broadcast over the Internet. This loss of control led some businesses to use adhesive gag contracts to try to game the outcomes of online reviews by allowing only positive evaluations and prohibiting negative reviews from being posted online. Other businesses held legitimate grievances about faked negative reviews written by competitors and consumers trying to eke out unfair concessions and viewed form gag clauses as an inexpensive way to fend off unfair reviews.[21]

Regardless of the reasons for the use of gag contracts, these agreements were aimed at chilling all negative consumer speech online and punishing those who dared to complain online. A variety of methods were typically utilized in gag contracts. One approach involved consumer contracts that relied on intellectual property claims to forbid negative reviews and to goad crowd-source review sites to quickly remove offending content. In some cases, these contracts included copyright assignment clauses that stated that the consumer was transferring all of their copyright rights to the merchant in any online content about their experiences with that business. If a consumer tried to post negative feedback, the business would send a takedown notice to the website and threaten to sue the customer for copyright infringement.[22]

Similarly, these contract often asserted trademark rights in the company's name and logo and threatened to sue consumers who included them in negative online postings. While fair use would protect consumer postings of honestly-held beliefs, many consumers received cease and desist letters and removed any negative remarks out of fear of a trademark infringement lawsuit.[23] In addition, some crowd-sourced review sites immediately removed negative feedback once they received the copyright or trademark takedown notice to avoid a costly legal battle over the posted review.[24]

Another approach tried to ward off negative reviews through confidentiality provisions in consumer contracts. These confidentiality clauses typically require consumers to seek prior written approval of any posting exploring their customer experience. This type of clause

[21] Ponte, *supra* note 4, at 88-101.

[22] *Id*. at 88-101; Ann Marie Marciarille, *"How's My Doctoring?" Patient Feedback's Role in Assessing Physician Quality*, 14 DEPAUL J. HEALTH CARE L. 361, 395–97 (2012).

[23] *Id*. at 82; Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL'Y 37, 39 (2007).

[24] *Id*. at 123: Marciarille, *supra* note 22, at 395, 397; Center for Democracy & Technology Complaint & Request for Investigation, Injunction and Other Relief before the Federal Trade Commission, *In the Matter of Medical Justice Corp*. 1, 15 (Nov. 9, 2011) [hereinafter CDT Complaint].

allows the businesses to approve of glowing positive reviews while having veto power over any negative ones. In these cases, if a consumer posts an evaluation without prior consent, the merchant can bring suit for breach of contract.[25]

In addition, certain medical providers used "mutual privacy" contracts to impede critical patient reviews.[26] These privacy contracts supposedly offer added privacy safeguards to patients if the patient does not post negative feedback online.[27] Typically the claimed added protections for the patient involve the medical professional not disclosing or selling personal information to third parties for marketing purposes.[28] What some patients may not know is that medical professionals already have both legal and ethical obligations to protect patient confidentiality.[29] In essence, these agreements provide no added privacy benefits to patients and are only aimed at protecting the doctor or dentists from negative critiques.

These types of agreements may also contain a liquidated damages clause that allows the merchant to collect a specified dollar amount for each day the unapproved posting remains online.[30] The case of *Lee v. Makhnevich*[31] is an example of these various clauses at work along with financial penalties to suppress derogatory speech about a

[25] Ponte, *supra* note 4, at 78; CDT Complaint, *supra* note 24, at 6-7.

[26] Marciarille, *supra* note 22, at 362-63; Ponte, *supra* note 4, at 82-83; CDT Complaint, *supra* note 24, at 3-8.

[27] Marciarille, *supra* note 22, at 362-63; Ponte, *supra* note 4, at 80-86; CDT Complaint, *supra* note 24, at 3-8.

[28] *See supra* note 27.

[29] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE FOR CIVIL RIGHTS ANNUAL REPORT TO CONGRESS ON HIPAA PRIVACY RULE AND SECURITY RULE COMPLIANCE FOR CALENDAR YEARS 2009 AND 2010 15 (2010), http://www.hhs.gov/ocr/privacy/hipaa/enforcement/complianceрept.pdf. *See* 45 C.F.R. § 164.530(h) (individuals may not be required to waive their rights as a condition of treatment, payment, health plan enrollment or benefits eligibility). *See* Marciarille, *supra* note 22, at 391-92; Ponte, *supra* note 4, at 82-83; Sean D. Lee, "*I Hate My Doctor": Reputation, Defamation, and Physician-Review Websites,* 23 HEALTH MATRIX 574, 579-80 (2013); CDT Complaint, *supra* note 24, at 11-13, 17.

[30] Ponte, *supra* note 4, at 79. *See* Tim Cushing, *Online Retailer Says If You Give It A Negative Review It Can Fine You $3,500*, TECHDIRT (Nov. 14, 2013, 8:58 AM), http://www.techdirt.com/articles/20131113/06112425228/online-retailer-slaps-unhappy-customers-with-3500-fee-violating-non-disparagement-clause.shtml; *Can Nondisparagement Clauses Silence Negative Online Reviews?*, THE LEGAL INTELLIGENCER (June 26, 2014), http://www.blankrome.com/index.cfm?contentID=37&itemID=3352.

[31] 2013 U.S. Dist. LEXIS 43760 (S.D.N.Y. Mar. 27, 2013). *See* Complaint, Civil Action No. 11-civ-8665 (S.D. N.Y. Nov. 29, 2011), http://www.citizen.org/documents/Lee-v-Makhnevich-complaint.pdf [hereinafter Lee Complaint]. *See also* Gergana Koleva, *Dentist to the Stars Sued for Suppressing Bad Reviews Online*, FORBES (Dec. 8, 2011, 1:10 PM) http://www.forbes.com/sites/gerganakoleva/2011/12/08/dentist-to-the-stars-sued-for-suppressing-bad-reviews-online/; Ponte, *supra* note 4, at 84-86.

consumer's experience. In that case, Lee sought emergency dental care from Dr. Makhnevich,[32] who required patients to sign a contract with a copyright assignment clause, a mutual privacy clause,[33] and a liquidated damages clause to enforce the gag contract.[34] When Lee posted critical remarks about her services online, the dentist sent him a warning letter about breach of their contract[35] and started billing Lee one-hundred dollars per day for infringing her claimed copyright to his content.[36] The dentist also sent take down notices to various review sites demanding the removal of Lee's posts and disclosing personal information in violation of HIPAA.[37]

II. CALIFORNIA'S "YELP" LAW LEADS THE WAY

It is not surprising that the home of Silicon Valley and the headquarters of Yelp yielded the first state statute to prohibit gag clauses in consumer contracts, commonly nicknamed the "Yelp Law."[38] This California law makes it illegal to provide contracts of adhesion in which consumers must waive their rights to post an online review or rating.[39] This provision includes both non-disparagement and confidentiality clauses which would be voided as against public policy in California.[40]

Under this state law, businesses that offer or try to enforce such clauses are subject to civil fines,[41] starting at $2,500 for a first violation to $5,000 for each subsequent violation. These fines may be hiked up to a $10,000 fine for any willful, intentional, or reckless conduct[42] and are not the sole remedies for such aggressive contract behavior.[43] The primary enforcers are the state Attorney General, district attorneys or

[32] Lee Complaint, *supra* note 31, at 2.

[33] Marciarille, *supra* note 22, at 362-63; CDT Complaint, *supra* note 78, at 3-8.

[34] Lee Complaint, *supra* note 31, at 2, 8.

[35] *Id*. at 7-8.

[36] *Lee*, 2013 U.S. Dist. LEXIS at *5. *See* Lee Complaint, *supra* note 31, at 8; Koleva, *supra* note 112.

[37] *Lee*, 2013 U.S. Dist. LEXIS at *6. *See* Lee Complaint, *supra* note 31, at 8. Under the terms of the CRFA, such contracts would be void from the outset. CRFA, at §2(b)(2). *See supra* note 29 and accompanying text.

[38] CAL. CIV. CODE § 1670.8 (2014). *See* Songmee L. Connolly, *Don't Disregard Cal.'s Non-Disparagement Clause Ban*, LAW360 (OCT. 8, 2014, 10:44 AM), http://www.law360.com/articles/585252/don-t-disregard-calif-s-non-disparagement-clause-ban. *See generally* Ponte, *supra* note 4, at 115-18.

[39] CRFA, at §1670.8(a)(1), (2)(b) (West 2014).

[40] *Id*. at §1670.8(a), (2)(b).

[41] *Id*. at §1670.8 (2)(c).

[42] *Id*. at §1670.8 (2)(c–d).

[43] *Id*. at §1670.8 (e).

city attorneys.[44] However, the law also explicitly allows consumers to bring private causes of action.[45]

The California statute recognizes the right of crowd-sourced review sites to reject and delete postings that are not legally protected, such as obscene and defamatory content, or compensated reviews that do not comply with the requisite disclosure demands of the FTC's Endorsement Guidelines.[46] Under this statute, non-disparagement and confidentiality clauses in consumer agreements would be illegal and could be voided as against public policy in California.[47] In the wake of California's enactment of this law, numerous other states began to formulate state statutes to deal with these adhesive consumer gag contracts.[48]

Yet this hastily-drafted law is flawed in several ways. First, that statute broadly prohibits contracts that require consumers to contractually waive any online statement.[49] In some instances, consumers may not have a legal right to post anything they wish online, such as trade secrets, proprietary information, confidential records or fraudulent or defamatory content.[50] Secondly, this wide-ranging statutory language could also impact the ability of websites hosting third party reviews, like Yelp, to control otherwise lawful online speech that violates the site's terms of use,[51] such as abusive, lewd, pornographic, harassing or discriminatory speech.[52] This statute may, in part, be inconsistent with broad Section 230 immunity for websites under the federal Communications Decency Act.[53] Subsequent judicial review will likely need to narrow this statute's expansive scope in line with existing state-specific contract and tort law as well as federal laws and regulations.[54]

[44] *Id.* at §1670.8 (c).

[45] *Id.*

[46] *See supra* note 4.

[47] CAL. CIV. CODE §1670.8(a), (2)(b).

[48] *See* Connolly, *supra* note 38.

[49] *Id.;* Ponte, *supra* note 4, at 117.

[50] Connolly, *supra* note 38*;* Ponte, *supra* note 4, at 117.

[51] Ponte, *supra* note 4, at 117-18. *See Terms of Service* ¶4 (B), 5(A), 6(A), Yelp, (Nov. 27, 2012), http://www.yelp.com/static?p=tos, *archived at* http://perma.cc/39GM-9XPY.

[52] *Terms of Service*, *supra* note 51, at ¶ 6(A).

[53] 47 U.S.C. § 230(c)(1). The provision states that, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id*.

[54] Ponte, *supra* note 4, at 117.

III. KEY FEATURES OF THE CONSUMER REVIEW FAIRNESS ACT OF 2016 (CRFA/"ACT")

In the wake of California's statue, two California representatives proposed an initial federal version for safeguarding consumer free speech in online reviews in 2014.[55] Considering the typical glacial pace of federal legislation, Congress acted quickly to address growing concerns about efforts adhesive speech suppression contracts. The subsequent final version of the new Act tracks much of this earlier proposal and provides a national approach to these adhesive contractual concerns. The Act is relatively short, but strikes directly at the main questionable aspects of consumer gag contracts.

A. Covered and Exempted Communications

The Act voids any adhesive contract that restricts a contracting party from posting a "covered communication".[56] The term broadly protects a wide range of communications by a party who entered into a contract of adhesion for goods and/or service. The protected communications include any written, oral, pictorial, or other performance assessments of goods and/or services.[57] This broad definition captures traditional written reviews on discussion boards to growing number of audio podcasts and videos and pictorial reviews on such sites as YouTube and Instagram.

Despite this broad language, the Act does exempt various forms of communications. The CRFA affirms that the covered communications do not include speech suppression provisions in form contracts between employers and employees or contracts with independent contractors.[58] Clearly, Congress sought to protect the duty of confidentiality that an employer may require from employees under agency principles as well as from independent contractors.[59] This exception does not address other forms of protected employee speech that may be critical of an employer, such as concerted action under the National Labor Relations

[55] Consumer Review Freedom Act of 2014, H.R. 5499, 113th Cong. (Sept. 15, 2014), http://swalwell.house.gov/wp-content/uploads/SWALWE_046_xml1.pdf. [hereinafter CRFA 2014] California Democratic Representatives Eric Swalwell and Brad Sherman introduced the first version of the proposed CRFA 2014 in September of that year. *See also* Eric Goldman, *Congress May Crack Down On Businesses' Efforts To Ban Consumer Reviews*, Forbes.com (Sept. 24, 2014, 1:05 PM), http://www.forbes.com/sites/ericgoldman/2014/09/24/congress-may-crack-down-on-businesses-efforts-to-ban-consumer-reviews/.

[56] CRFA 2014, *supra* note 55.

[57] The final Act is an improvement over the covered communications definition in the initial 2014 proposal which only dealt primarily with online communications, and not offline reviews. *See* CRFA 2014, *supra* note 55.

[58] CRFA, at §2(a)(3)(B).

[59] *Id*. at §2(b)(2)(A).

Act, or whistle-blower protections that may contravene confidentiality duties.[60]

The law also excludes contract terms that forbid the disclosure of trade secrets, proprietary information, personnel, medical and law enforcement records that violate individual rights of privacy, or other unlawful content.[61] Unlike California's Yelp law, the new federal law explicitly prohibits abuses of copyright law to transfer intellectual property rights in consumer postings to the merchant or service provider.[62]

In addition, adhesive terms of use on review websites often reserve the right of the site to remove or refuse to post content under a broad category of illegal content as well as unacceptable content under the site's community standards.[63] The CRFA expressly upholds the right of review sites to monitor or control content on their sites that may be legally unprotected, such as libelous, false, deceptive, or obscene.[64] Further, the law permits adhesive terms that prohibit content that contains computer viruses, worms, and other damaging code.[65]

Furthermore, the law also upholds a site's right to delete or reject postings that are legally protected, but viewed as inappropriate or in violation of a site's community standards of conduct, such as vulgar, sexually explicit, harassing or inappropriate hate speech.[66] These CRFA terms mesh well with existing website immunity for user-generated content under Section 230 of the Communications Decency Act.[67]

While the congressional report emphasizes the importance of protecting truthful consumer reviews,[68] nothing in the covered communications language expressly indicates that the law only protects honestly held beliefs about products or services the reviewer actually used.[69] It is unclear whether or not a merchant can include a contract provision that prohibits a consumer's posting of false and/or defamatory content which are not protected forms of free speech.

[60] Ponte, *supra* note 4, at 133.
[61] *Id*. at §2(b)(3).
[62] *Id*. at §2(b)(1)(C).
[63] *Id*. at §2(b)(2)(C).
[64] *Id*. at §2(b)(2)(B),(C)(iii).
[65] *Id*. at §2(b)(3)(E).
[66] *Id*. at §2(b)(2)(C)(i).
[67] *See supra* note 53.
[68] CRFA Report, *supra* note 13, at 5, 7.
[69] *Id*. at §2(a)(2).

B. CFRA Prohibitions under Consumer Contracts of Adhesion

The CFRA indicates that adhesive contracts that seek to impede consumer reviews are void from the start in one of three ways. All three provisions seek to address aggressive business contracts and associated enforcement tactics that resulted in a host of consumer legal actions. First, a contract that either forbids or limits consumers from engaging in covered communications is not permitted under the CFRA.[70] Second, any form contract that imposes a penalty or fee against an individual for covered communications.[71] Lastly, efforts to suppress negative reviews through copyright assignment clauses on consumer reviews embedded in goods and services contracts is also prohibited under the CFRA.[72]

For example, the congressional report points to *Palmer v. KlearGear.com*,[73] as an example that will be rooted out under the CFRA. In that case, the plaintiff John Palmer ordered Christmas gifts from KlearGear.com.[74] When the items were not delivered and efforts to contact KlearGear.com went unanswered, his spouse posted a negative review on RipoffReport.com.[75] Subsequently, KlearGear.com billed Palmer $3,500 for breaching its nondisparagement clause.[76] Refusing to pay, KleraGear.com then reported Palmer's refusal as an

[70] *Id*. at §2(b)(1)(A).

[71] *Id*. at §2(b)(1)(B).

[72] *Id*. at §2(b)(1)(C).

[73] Case No. 1: 13-cv-00175 (N.D. Utah, filed Dec. 18, 2013). *See* Connolly, *supra* note 38; Cushing, *supra* note 30; LEGAL INTELLIGENCER, *supra* note 30.

[74] Connolly, *supra* note 38; Cushing, *supra* note 30; LEGAL INTELLIGENCER, *supra* note 30.

[75] *Id.*

[76] *Id.* The KlearGear.com provision stated as follows:

> Non-Disparagement Clause
>
> In an effort to ensure fair and honest public feedback, and to prevent the publishing of libelous content in any form, your acceptance of this sales contract prohibits you from taking any action that negatively impacts KlearGear.com, its reputation, products, services, management or employees.
>
> Should you violate this clause, as determined by KlearGear.com in its sole discretion, you will be provided a seventy-two (72) hour opportunity to retract the content in question. If the content remains, in whole or in part, you will immediately be billed $3,500.00 USD for legal fees and court costs until such complete costs are determined in litigation. Should these charges remain unpaid for 30 calendar days from the billing date, your unpaid invoice will be forwarded to our third party collection firm and will be reported to consumer credit reporting agencies until paid.

Cushing, *supra* note 30.

unpaid debt to credit reporting agencies.[77] Palmer disputed the report, but were unable to have it removed from their credit report, hurting his ability to obtain credit.[78] In a default judgment, a Utah district court ultimately invalidated this clause[79] declaring that no debt was ever owed to KlearGear.com under the liquidated damages clause,[80] awarding the plaintiff over $300,000 in compensatory and punitive damages as well as costs and attorney fees.[81]

C. Public Enforcement Actions and Penalties

The CRFA states that any violations are considered unfair methods of competition or deceptive consumer practices under the Federal Trade Commission Act.[82] The FTC is provided with primary enforcement responsibilities for the CRFA.[83] Once the FTC institutes a civil or administrative action, state attorneys general are not permitted to bring actions while that FTC matter is pending.[84] The CRFA does not identify specific penalty amounts, but the FTC is permitted to determine appropriate civil penalties under its current statutory powers.[85] The Act also calls upon the FTC to undertake education and outreach programs on the new law within sixty (60) days of the law's enactment.[86]

However, the CRFA is not intended to limit the existing authority of state attorneys general to undertake investigations of potential CFRA violators.[87] Absent a pending FTC action, state attorneys general or authorized consumer protection official may bring CFRA actions in the relevant federal court with advance notice to the FTC.[88] The notice includes a copy of the complaint that the state representatives plan to file in federal court.[89] The FTC is then given the authority to intervene and participate in any CFRA civil action

[77] Connolly, *supra* note 38; Cushing, *supra* note 30; LEGAL INTELLIGENCER, *supra* note 30.

[78] Connolly, *supra* note 38; Cushing, *supra* note 30; LEGAL INTELLIGENCER, *supra* note 30.

[79] Case No. 1: 13-cv-00175 (N.D. Utah, filed May 5, 2014). *See* Connolly, *supra* note 38; Cushing, *supra* note 30; Legal Intelligencer, *supra* note 30.

[80] *Id.*

[81] Connolly, *supra* note 38; Cushing, *supra* note 30; Legal Intelligencer, *supra* note 30.

[82] *Id.* at §2(d)(1).

[83] *Id.* at §2(d)(2).

[84] *Id.* at §2(e)(4).

[85] *Id.* at §2(d)(2).

[86] *Id.* at §2(f).

[87] *Id.* at §2(e)(3).

[88] *Id.* at §2(e)(1), (6).

[89] *Id.* at §2(e)(2)(A).

brought by state officials.[90] In emergency cases, state official may act without prior notice to the FTC, but must promptly notify the FTC of the CFRA filing.[91] Furthermore, state officials are not prevented from bringing actions under existing state civil and criminal laws.[92] But considering the massive size and complexity of the consumer blogosphere, governmental enforcement is likely to remain focused on the most egregious examples of speech suppression in the online world.

D. Private Causes of Action

Private causes of actions under the CFRA are not allowed. Consumers must rely on vigilant federal or state officials to file CFRA cases on their behalf. However, individual consumers may still bring other non-CFRA actions under relevant laws.[93] Therefore, states could also determine whether or not to permit private actions for nondisparagement clauses under their state contract and consumer protection law. For example, California's Yelp statute allows individual consumers to bring legal actions regarding nondisparagement clauses along with state consumer protection officials.[94] These actions would not be disturbed under the CFRA.[95]

Although businesses are prohibited from suppressing consumer reviews, they may still bring breach of contract actions for employee and independent contractor violations of confidentiality and proprietary information under state laws. The CFRA does not disrupt the enforcement of other adhesive contract terms, only excluding the enforcement of gag provisions that contravene CFRA's protections.[96] For fake or fraudulent reviews by consumers or competitors, the CFRA only states that businesses retain their right to bring legal actions for defamation (libel or slander) and other similar causes of action.[97]

IV. CONTINUING CHALLENGES FOR SMALL BUSINESS

The underlying reasons for the development and use of these kinds of gag clauses may go beyond a mere superficial desire to tamp down negative posts. While the CFRA provides much needed protection to consumer free speech rights, it does little to aid merchants, particularly small business owners, from the damaging effects of

[90] *Id*. at §2(e)(2)(B).
[91] *Id*. at §2(e)(2)(A)(ii).
[92] *Id*. at §2(e)(6)(B).
[93] *Id*. at §2(g).
[94] *See supra* note 45.
[95] CFRA, at §2(g).
[96] *Id*.
[97] *Id*. at §2(b)(2)(B).

fraudulent or fake reviews.[98] Some businesses resorted to these aggressive tactics for a variety of reasons that remain unaddressed under the CFRA. There is a need to recognize a more complete picture of the driving forces behind these types of agreements in order to effectively deal with the unaddressed business concerns.

First, the CFRA seems to assume that all consumers wish only to post truthful reviews of their experiences. However, this approach fails to recognize that competitors may be masquerading as consumers or paying individuals to post negative reviews about their commercial rivals. In other instances, devious consumers may use the threat of bad online reviews to ring unfair concessions out of honest merchants.[99] With about one-third of all reviews being fake,[100] it is no wonder that small businesses consider themselves to be the victims of many consumers and competitors on crowdsourced rating sites.[101]

Second, the CFRA envisions that owners of crowd-sourced review sites will play an active role in monitoring their sites and removing fake or fraudulent reviews.[102] Yet it is often difficult or costly for a business to pursue the removal of a false review from a website.[103] Some businesses think that a site's ineffectual filtering efforts often delete hard-earned positive reviews while failing to remove inaccurate or defamatory postings.[104] Other merchants complain that these site operators have failed to properly police and verify consumer discussion postings, either through carelessness or deliberate intention.[105] While still others suspect that review sites actively highlight disapproving

[98] Ponte, *supra* note 4, at 89.

[99] *Id*.

[100] Kaitlin A. Dohse, Note, *Fabricating Feedback: Blurring The Line Between Brand Management and Bogus Reviews*, 13 U. ILL. J.L. TECH. & POL'Y 363, 385 (2013); David Streitfeld, *The Best Book Reviews Money Can Buy*, N.Y. TIMES, Aug. 26, 2012, at BU1.

[101] *See* Andrea Chang, *Tempers flare at Yelp's town hall for small business owners in L.A.*, L.A. TIMES (Aug. 21, 2013), http://articles.latimes.com/2013/aug/21/business/la-fi-tn-yelp-town-hall-reviews-20130820 http://articles.latimes.com/2013/aug/21/business/la-fi-tn-yelp-town-hall-reviews-20130820; Dave, *supra* note 2.

[102] *See supra* notes 63-67.

[103] Kathleen Richards, *Yelp and the Business of Extortion 2.0* (Feb. 18, 2009), http://www.eastbayexpress.com/oakland/yelp-and-the-business-of-extortion-20/Content?oid=1176635&showFullText=true; Tuttle, *supra* note 17.

[104] Ponte, *supra* note 4, at 95.

[105] *Id*. at 96. *See, e.g.,* Demetriades v. Yelp, 228 Cal. App. 4th 294 (2014) (unsuccessful challenge to Yelp's advertising claims about its filtering program under unfair competition and false advertising action); Reit v. Yelp, 907 N.Y.S.2d 411 (N.Y. Sup. Ct. 2010) (action alleging removal of positive reviews and highlighting negative ones to coerce businesses into advertising on Yelp).

reviews in order to leverage these bad postings to sell more remedial advertising to impacted businesses.[106]

Third, small businesses may lack the time, ability and resources to effectively monitor social media and to be responsive to truthful online reviews.[107] With the growing number of cellphone applications for review sites, consumers can instantly critique a merchant experience before a business even has a chance to become aware of or seek to handle a customer's concerns. The negative review is posted and efforts to address the matter or improve the outcome may go unnoticed by other consumers sifting through a mass of website postings. A small business can be rapidly overwhelmed by the unrelenting daily demands of social media and the need to comb through and address legitimate customer concerns.[108] Unlike major corporations, a local business or professional are unlikely to be able to afford marketing professionals or reputation management programs to aid them against the social media onslaught.[109]

Lastly, the CFRA does little to expand options for honest merchants trying to protect their business goodwill. The Act permits businesses to bring defamation actions to address false customer reviews and to protect their goodwill.[110] This perspective oversimplifies the complex challenges of suing for claims of libel and/or slander under the tort of defamation. Bringing a defamation action can be an expensive and arduous process. Initially, the merchant must wrangle with the website through the subpoena process to uncover the identity of the offending poster. For example, in *Yelp, Inc. v. Hadeed Carpet Cleaning*, a carpet cleaning service grew increasingly concerned about a series of anonymous negative reviews on Yelp.[111] The company was unable to match up existing customer information with the claimed service dates. The cleaning service had to first win a legal dispute with Yelp over subpoenaing reviewer identities which had promised anonymity to Yelp reviewers.[112] Only after spending time and money on unmasking its detractors was the company then able to bring a defamation lawsuit.

[106] *Id*. at 97-98. *See, e.g*., Levitt v. Yelp, 765 F.3d 1123 (9th Cir. 2014) (court rejected alleged extortion claim based on assertions of review manipulation and efforts to sell ameliorative advertising, but left open other possible causes of action).

[107] Dave, *supra* note 2.

[108] Dave, *supra* note 2; Dohse, *supra* note 3, at 372-73; Short, *supra* note 3, at 452.

[109] Ponte, *supra* note 4, at 88-89. *See* Chang, *supra* note 101; Dave, *supra* note 2.

[110] *See* Dohse, *supra* note 3, at 381-82; LEGAL INTELLIGENCER, *supra* note 30, at 10, 11.

[111] Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 752 S.E.2d 554, 557 (Va. Ct. App. 2014).

[112] *See e.g.,* Doe v. Individuals, 561 F. Supp. 2d 249, 253-56 (denies motion to quash subpoena to unmask anonymous posters as plaintiffs made our prima facie case of libel and First Amendment rights to anonymity not absolute).

But defamation is difficult to prove and collecting any damages awarded may be problematic, even if the merchant is successful.[113] Most small businesses do not have either the access or ability to pay for legal assistance to tread this likely long and costly path.[114] A good example of this legal quandary is *Dietz Dev., LLC v. Perez*.[115] In that case, Dietz, a residential contractor sued a customer, Jane Perez, for defamation claim regarding a scathing online review of the contractor's services and conduct.[116] Perez's review stated that she was billed for uncompleted services and that the contractor had trespassed on her property. She further insinuated that the contractor had stolen jewelry from her home.[117] Dietz responded online claiming that Perez had actually stolen from him by refusing to pay what she owed on the renovation project.[118] Subsequently, he filed a defamation action against Perez for $300,000 in business losses and $750,000 in damages.[119] After a costly and time-consuming legal battle, a jury determined that both plaintiff and defendant had defamed each other online. No damages were awarded to either Deitz or Perez.[120] Although defamation is an avenue for redress, its problematic outcome makes it difficult for merchants, especially small businesses, to see this approach as a viable option.

[113] Matt Kellogg & Simon Frankel, *Trends in Defamation Cases Involving Online Reviews*, LAW360 (Nov. 27, 2013, 5:55 PM), http://www.law360.com/articles/490334/trends-in-defamation-cases-involving-online-reviews; Lee, *supra* note 29, at 583; Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace,* 49 DUKE L.J. 855, 872-76 (2000); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 118 (2007); Joanna Schorr, *Note: Malicious Content On The Internet: Narrowing Immunity under the Communications Decency Act*, 87 ST. JOHN'S L. REV. 733, 737-38, 751-52 (2013).

[114] Ponte, *supra* note 4, at 77. See RESTATEMENT (SECOND) OF TORTS § 558.

[115] Case No. 2012-16249 (Fairfax Co., Va. Cir. Ct., filed Dec. 7, 2012).

[116] Justin Jouvenal, *Fairfax jury declares a draw in closely watched case over 'Yelp' reviews*, THE WASH. POST, Feb. 1, 2014, http://www.washingtonpost.com/local/in-closely-watched-yelp-case-jury-finds-dual-victory/2014/01/31/2d174580-8ae5-11e3-a5bd-844629433ba3_story.html; Justin Jouvenal, *In Yelp suit, free speech on Web vs. reputations*, THE WASH. POST, DEC. 4, 2012, http://www.washingtonpost.com/local/crime/2012/12/04/1cdfa582-3978-11e2-a263-f0ebffed2f15_story.html; Aditi Mukherji, *Yelp Defamation Lawsuit Ends in a Draw*, FINDLAW (Feb. 3, 2014 11:54 AM), http://blogs.findlaw.com/free_enterprise/2014/02/yelp-defamation-lawsuit-ends-in-a-draw.html.

[117] *See supra* note 116.

[118] *See supra* note 116.

[119] Jouvenal, *supra* note 116.

[120] *See supra* note 116.

V. PROPOSING A NEW WAY FORWARD FOR VICTIMIZED BUSINESSES

Under both the California law and the CFRA, the operators of crowd-sourced review sites are now the primary gatekeepers for what does and does not appear online. It makes sense to focus on self-regulatory measures to help balance the voices of consumers with the legitimate concerns of beleaguered businesses.[121] Mutual cooperation will be needed to decrease competitive tensions and simmering mistrust between businesses and crowd-sourced review websites.[122] These proposals are aimed at decreasing costly and time-consuming lawsuits over reviews while improving the online experience for consumers and businesses alike.[123]

A. Improve Enforcement of Site's Terms of Use

While the CFRA properly moves to protect online truthful consumer opinions, it is vital for crowd-sourced review sites to do a better job of policing and handling fake and false reviews by consumers and competitors.[124] Most review sites terms of use already prohibit users from posting bogus or defamatory reviews.[125] Based on anecdotal business stories and the language in business legal complaints, it appears that some sites are quite apathetic about enforcing their own terms of use.[126] Improved enforcement of these site's existing terms will help alleviate some of the business concerns about illegitimate reviews. In addition, websites can improve their own reputations with users by rooting out false or bogus reviews that detract from the site's overall benefits to consumers seeking helpful information about products and services.

There are a number of ways to approach this issue. First, a site can seek to verify actual consumer use of the product or service before

[121] Ponte, *supra* note 4, at 144-49. *See also*, Lucille M. Ponte, *Mad Men Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics in Decreasing Deceptive Online Consumer Ratings and Reviews*, Fourth Annual Intellectual Property Symposium, IP Rights, Ownership and Identity in Social Media, 12 J. MARSHALL REV. OF INTELL. PROP. L. 462, 503-04 (2013).

[122] Justin Malbon, *Taking Fake Online Consumers Seriously*, 36 J. CONSUM. POL'Y 139, 140, 151 (2013).

[123] Ponte, *supra* note 4, at 144-49; Ponte, *supra* note 121, at 505. *See* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 140-41 (2006).

[124] Dohse, *supra* note 3, at 389–390.

[125] Dohse, *supra* note 3, at 389.

[126] Short, *supra* note 3, at 452–53.

allowing the post to appear online.[127] Sites like Angie's List[128] and Expedia[129] tout the fact that there reviews have been verified before they are posted to provide consumers with real opinions about consumer experiences and preventing businesses from reviewing themselves or their competitors.[130] Alternatively, Amazon.com allows consumers to post, but clearly identifies verified purchaser reviews on its discussion boards for customer consideration.[131]

Secondly, sites could decide to ban users who have been found to consistently post false or defamatory materials about businesses.[132] This method is borrowed from the "three strikes" approach applied by some sites hosting user-generated content to persistent copyright infringers in order to avoid secondary copyright infringement liability under the safe harbor provisions of the Digital Millennium Copyright Act.[133] A review site could also tamp down bogus reviews through limits on the number of reviews a consumer may post about the same business[134] and adopt reasonable waiting periods between the initial review and any follow-up update.[135]

Lastly, review sites have the technological tools to crack down on individual users and reputation management companies that consistently post fake reviews either in favor of their clients or against competitors. To uphold their own terms of service, the use of filtering technologies can help sniff out these bad actors through various data points, text patterns and IP addresses.[136] It is estimated that well-designed filtering algorithms can effectively detect about ninety percent of fake reviews.[137] Once identified, these users and companies

[127] Dohse, *supra* note 3, at 389; Ponte, *supra* note 121, at 503-04; Short, *supra* note 3, at 467, 470–71.

[128] Angie's List, *How it works*, https://www.angieslist.com/how-it-works.htm.

[129] Press Release, Expedia.com, *Expedia Overhauls Hotel Reviews, Consumers Can Now Sort Verified Reviews by Shared Interest* (Mar. 8, 2012), https://viewfinder.expedia.com/ news/expedia-overhauls-hotel-reviews-consumers-can-now-sort-verified-reviews-by-shared-interest/.

[130] Dohse, *supra* note 3, at 389; Short, *supra* note 3, at 467, 470–71. *See supra* note 129.

[131] *Verified Purchase Reviews*, Amazon.com, http://www.amazon.com/gp/community-help/amazon-verified-purchase, *archived at* https://perma.cc/87WQ-PVU3?.

[132] Ponte, *supra* note 4, at 142.

[133] 17 U.S. CODE § 512 (d) (2017). *See id.* at 123.

[134] Dohse, *supra* note 3, at 389–90.

[135] Dohse, *supra* note 3, at 379.

[136] *See*, *e.g.*, TripAdvisor Content Integrity Policy, https://tripadvisor.mediaroom.com/us-content-integrity-policy; Angie's List, How it works, https://www.angieslist.com/how-it-works.htm. *See also*, CDT Complaint, supra note 53, at 8 (consistent use of same IP addresses often leads back to same sender of bogus reviews).

[137] Ott, et al, *supra* note 13, at 309, 316.

can have their access blocked and their postings removed. Yelp and Edmunds.com have brought legal actions against companies engaging in these deceptive and fraudulent activities.[138]

B. Provide Litigation Alternatives to Disputed Reviews

As previously noted, litigation seldom benefits any of the stakeholders in online review situations. This it seems logical for review sites to provide mechanisms that enhance the accuracy of their postings without simply giving in to business demands for removal of reviews. Sites should adopt easy ways for businesses to flag suspicious postings and provide appropriate staffing to review and make appropriate determinations about inaccurate or fake reviews.[139] If a review is inaccurate or fake, a site should not charge fees for prompt removal of the offending evaluation.[140] Currently, a number of review sites permit merchants to directly respond to consumer postings online which can facilitate dialogue between the consumer and the business, and those sites that do not offer this option should do so.[141]

In addition, review sites could offer online dispute resolution options for their users and businesses over the potential removal of negative feedback.[142] Review sites could create their own dispute resolution program or reach out to organizations, such as the Better Business Bureau,[143] to administer their programs. The sites could initially employ automated complaint programs that allow either party to initiate an online dialogue with the other party.[144] If the parties are unable to reach an agreement, then online mediators or arbitrators could try to facilitate a resolution of the matter between the consumer and the business through e-mail, teleconference, or in person if both parties are in the same community. These dispute resolution programs could be focused narrowly on resolving disputed reviews or branch out to deal more broadly with the consumer-merchant problem that led to the contested review.

[138] Dave, *supra* note 2.

[139] Russell, et al., *supra* note 15.

[140] *See* Dohse, *supra* note 3, at 374–75; Short, *supra* note 3, at 470.

[141] *See, e.g.,* Chang, *supra* note 153; Dohse, *supra* note 3, at 391.

[142] Ponte, *supra* note 121, at 505. *See* eBay, *Can I get Feedback changed or removed?,* http://pages.ebay.com/help/feedback/questions/remove.html.

[143] Better Business Bureau, *Dispute Resolution Processes and Guides*, http://www.bbb.org/bbb-dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/dispute-resolution-processes-and-guides/.

[144] *See* eBay Resolution Center, http://resolutioncenter.ebay.com/.

C. Establish Best Practices for Review Sites

Review sites have matured to a point where it may be time for the establishment of best practices to guide their conduct. These best practices could address accepted norms around broad-based content integrity standards that both protect truthful consumer expression as well as respect the concerns of honest merchants. These best practices could include the bases for review, rejection and removal of consumer evaluations, approaches to handling persistent offenders of site terms of use, appropriate uses of filtering systems, and effective options for business dialogue with unhappy consumers. It would also be important to address conflicts of interest issues for sites that write or promote influential reviewers as well as sell advertising or charge for review removal fees to those businesses being reviewed.[145]

The best practices could also address better education programs for both consumers and businesses about their content guidelines. Review sites or their industry organizations could develop FAQs pages and/or video tutorials about appropriate feedback rules, the bases for deleting or removing postings, and the importance of truthful opinion speech by both consumers and businesses participating on review sites.[146]

CONCLUSION

The CFRA has provided important protections to consumers offering their opinions about products and services online. The Act voids aggressive contracts of adhesion that seek to impinge upon consumer speech through improper intellectual property claims, excessive liquidated damages clauses, and other privacy and financial contractual risks meant to stifle negative reviews. However, aside from not blocking defamation actions, the Act did not help businesses bedeviled by unfair consumer and competitor reviews. The Act did not fully address the underlying concerns that led some businesses to take these drastic steps.

At this point in time, it makes sense that review sites step up and try to help support a more equitable balance between consumers and businesses. It benefits all of the stakeholders for review sites to improve the accuracy and integrity of their review content complaints and to reduce the number of bogus or false online reviews. Sites can ameliorate the impact on businesses from faked reviews by better enforcing their own terms of use, providing dispute resolution options for contested reviews, and establishing sensible best practices to guide their industry.

[145] Chang, *supra* note 153; Ponte, *supra* note 4, at 145-46. *See supra* notes 121-26.
[146] *See* Dohse, *supra* note 3, at 389–90.

PUBLIC TOES IN PRIVATE SAND: PUBLIC PRESCRIPTIVE EASEMENTS AND HOW THE PRESUMPTION OF PERMISSION SUPPORTS TOURISM AND RECREATION ON MAINE BEACHES

by Margaret T. Campbell*

> "A silent possession accompanied by no act which can amount to an ouster or give notice to the cotenant that his possession is adverse, ought not, we think to be construed into an adverse possession." Chief Justice John Marshall, *McClung v. Ross*, 18 U.S. 116, 5 L. Ed. 46 (1820).

I. INTRODUCTION

This article will explore the cases whereby the public has sought to establish prescriptive easements to coastal beaches in Maine, and the impact which the encouragement of tourism commerce has had on this issue. The first part will introduce the unique historical laws pertaining to tidal land in Maine, under which many landowners hold title to the "low tide mark." Thus, these landowners are in a position to block public access to many beaches. The second part of this article will examine the traditional presumption in Maine under which public use of private land is considered to be permissive, thus making it difficult for the public to establish prescriptive easements. It will then consider recent litigation in which various groups have attempted to obtain public prescriptive easements to beaches, concluding in 2016 with *Cedar Beach / Cedar Island Supporters, Inc. v. Gables Real Estate LLC*[1]

* Assistant Professor, School of Legal Studies, Husson University.

[1] Cedar Beach/Cedar Island Supporters, Inc. v. Gables Real Estate LLC (*Cedar Beach*), 2016 ME 114, 145 A.3d 1024.

decided by the Maine Supreme Judicial Court. There the court affirmed the efficacy of the traditional presumption of prescriptive use when the public accesses private land for recreational uses. The reasoning in that case recognizes the importance of access for the enjoyment of these lands by the general public, as well as those attracted by Maine's tourism industry.

II. HISTORICAL TITLE TO TIDAL LAND IN MAINE

A. Land Below the "High Tide Mark"

In many states, coastal parcels are described as being bounded by the "high tide mark"[2] and with respect to those states, the United States Supreme Court has "established thus far that the private title of littoral landowners remains subject to the public trust beneath the ordinary high water mark."[3] As a result of its unique history as part of the Massachusetts Colony, the coastal land in Maine has a different history.[4]

However, while Massachusetts was still a colony, littoral (or upland property owners) were granted title to the "low tide mark" pursuant to the Colonial Ordinance of 1641:

> Every Inhabitant that is an howse holder shall have free fishing and fowling in any great ponds and Bayes, Coves and Rivers, so farre as the sea ebbes and flowes within the presincts of the towne where they dwell, unlesse the free men of the same Towne or the Generall Court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others proprietie without there (sic) leave.[5]

The rationale for this ordinance was to provide "private ownership of intertidal lands to promote commerce by encouraging the construction of wharves at private expense."[6] This purpose was further described by the Massachusetts Supreme Judicial Court:

> When our ancestors emigrated to this country, their first settlements were on harbors or arms of the sea; and commerce was among the earliest objects of their attention. For the purposes of commerce, wharves erected below high water mark were necessary. But the

[2] "The soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original states possessed." (citations omitted). *Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 15, 56 S. Ct. 23, 26, 80 L. Ed. 9 (1935).

[3] Glass v. Goeckel, 703 N.W. 2d 58, 73 (Mich. 2005).

[4] Margaret T. Campbell, *The Business of Beaches: Public Access to Beaches on Private Coastal Property,* 48 *BUS. L. REV.* 11 (Spring 2015).

[5] Massachusetts Body of Liberties § 16 (December 10, 1641).

[6] McGarvey v. Whittredge, 2011 ME 97, ¶ 27, 28 A.3d 620, 629.

> colony was not able to build them at the public expense. To induce persons to erect them, the common law of *England* was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb more than one hundred rods, but not more where the tide ebbs to a greater distance.[7]

Massachusetts Courts have consistently upheld this grant, and have ruled that "The Massachusetts Colony Charter conveyed to the grantees all public and private rights in the seashore between high and low water mark."[8] After Maine became a separate state, its courts continued to recognize that "The colonial ordinance of 1641, extending the title of riparian proprietors to low-water mark, though originally limited to the Plymouth colony, is part of the common law of Maine; and is applicable wherever the tide ebbs and flows, though it be fresh water, thrown back by the influx of the sea."[9]

Recently, the Maine Supreme Judicial Court summarized the historical title to intertidal lands:

> The historical development of the fee simple private ownership of intertidal lands has been much discussed in our jurisprudence. Key to private ownership of intertidal lands in Maine and Massachusetts was the enactment of the Massachusetts Bay Colony's Colonial Ordinance of 1641–47. Specifically, the upland owner's property right in the intertidal zone was articulated in the Colonial Ordinance of 1647. *See The Book of the General Lauus and Libertyes Concerning the Inhabitants of the Massachusetts* (1648), *reprinted in The Laws and Liberties of Massachusetts* 35 (1929) ("[T]he Proprietor of the land adjoyning shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wheresoever it ebbs farther.").[10]

In Maine, the rights of the public are dependent upon "which of the three zones of property that lead into the ocean is being used—the submerged land below the mean low-water mark; the wet sand of the intertidal zone, which is the shore and flats between the mean high- and low-water marks, but not exceeding 100 rods; and the dry upland sand."[11] It has been well established that "The State of Maine owns the submerged land *below* the mean low-water mark and holds that land in trust for public uses"[12] and that "[o]n the dry upland side, the upland owner holds the fee title to the property *above* the mean high-water mark. When oceanfront property includes dry sand, the upland

[7] Storer v. Freeman, 6 Mass. 435, 438 (1810).
[8] Commonwealth v. City of Roxbury, 75 Mass. 451, 451 (1857).
[9] Lapish v. President, etc., of Bangor Bank, 8 Me. 85, 85 (1831).
[10] McGarvey v. Whittredge, 2011 ME 97, 28 A.3d 620. (citations omitted).
[11] *Id.* (citing Britton v. Donnell *(Britton II),* 2011 ME 16, ¶ 6, 12 A.3d 39, 42.).
[12] *Id.*

owner, in Maine, owns the dry sand portion of the beach in fee."[13] Most litigation has focused either upon the third "wet sand" zone (or intertidal zone) or upon dry land road access.[14]

Thus, the upland property owners have title to the intertidal land unless they have lost their title through one of the recognized methods of conveyance: eminent domain, adverse possession or prescriptive easement.[15] This grant of land in the intertidal zone was initially intended to aid in commerce, and such an inducement granted to a predecessor in title cannot be taken from a subsequent owner without just compensation.[16]

B. Property Rights as a "Bundle of Sticks"

Despite the fact that the conveyance of land was originally evidenced by a ceremony which included the symbolic act of placing a clump of dirt in the hand of the new owner,[17] property ownership is more akin to holding a bundle of sticks (or rights) than it is to holding a clump of dirt.[18] That bundle of "sticks" may include a great many rights including possession and the right to convey; however there will always be some rights which are held by others such as those held by the government which allow it to place zoning and land use restrictions on property.[19] Other limitations on property use include those "sticks, or rights, acquired by individuals either through purchase or adverse possession.[20]

As discussed previously, title to the intertidal zone was originally granted to the upland owners subject to the "sticks" which were retained by the public for fishing, fowling and navigation.[21] Recent

[13] *Id.*

[14] *Id.*

[15] "Under the common law, the land of the intertidal zone belongs to the owner of the adjacent upland property, subject to certain public rights. *Bell II,* 557 A.2d at 173; Matthews v. Treat*,* 75 Me. 594, 598 (1884); Duncan v. Sylvester*,* 24 Me. 482, 486 (1844). The ownership of the intertidal zone is "as land and not a mere easement." *Donnell,* 85 Me. at 119, 26 A. at 1018. Ownership of the intertidal zone may be separated by deed from ownership of the adjacent upland. Dunton v. Parker*,* 97 Me. 461, 467, 54 A. 1115, 1118 (1903). The submerged land below the low-water mark is owned by the State, which has the authority, pursuant to 12 M.R.S. § 1862(2)(A)(6), to lease it. *See Britton I,* 2009 ME 60, ¶¶ 2, 10 n. 5, 974 A.2d at 305, 307." Britton v. Donnell, 2011 ME 16, ¶ 7, 12 A.3d 39, 42.

[16] *McGarvey*, 28 A.3rd at 638.

[17] 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW, 51 - 55 (2d ed. 1898).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Supra* note 5.

efforts to expand upon those rights have focused on attempts to establish public rights by adverse possession, claiming that years of public use of the intertidal zone have resulted in the acquisition of additional public rights.[22]

Although "the law disfavors the transfer of land by adverse possession,"[23] clear guidelines have been established for such claims and "[t]itle by adverse possession may be established either pursuant to the common law or statutory provisions."[24] While a claim of adverse possession attempts to obtain title to the land, a claim of a prescriptive easement is an attempt to establish an easement, or "right of use over the property of another."[25]

Similar to the analysis of a claim of adverse possession, a claim of a prescriptive easement requires that "the party seeking to establish the easement must prove "(1) continuous use; (2) by people who are not separable from the public generally; (3) for at least twenty years; (4) under a claim of right adverse to the owner"; and either "(5) with the owner's knowledge and acquiescence; or (6) a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed."[26] This recognizes that such claims by the public are inherently different from claims by individuals. The next section will discuss this distinction.

III. PRESUMPTION OF PERMISSION IN PUBLIC USE OF PRIVATE LAND

A. Maine as "Vacationland" Encouraging Tourism

The Maine tourism industry has set record numbers in recent years, with Portland, and the southern coastal areas and Bar Harbor leading this surge.[27] Coastal areas have always been coveted vacation destinations, and tourism became a significant economic factor when wealthy summer visitors began flocking to areas like Bar Harbor in the 1880s.[28] The value of coastal area resources in attracting tourists has long been recognized, and many efforts such as the Maine Coastal

[22] Bell v. Town of Wells (*Bell* I), 510 A.2d 509 (Me. 1986); Bell v. Town of Wells (*Bell II*) 557 A.2d 168 (Me. 1989).

[23] Striefel v. Charles-Keyt-Leaman P'ship, 1999 ME 111, ¶ 4, 733 A.2d 984, 988.

[24] *Id.*

[25] Stickney v. City of Saco, 2001 ME 69, ¶ 31, 770 A.2d 592.

[26] *Cedar Beach* 145 A.3d at 1027.

[27] J. Craig Anderson, *Maine Summer Tourism Revenue on Track to Break all Records*, PORT. PRESS HER., (Oct. 10, 2016), http://www.pressherald.com/2016/10/10/maine-summer-tourism-revenue-on-track-to-break-all-records/.

[28] THE BAR HARBOR HISTORICAL SOCIETY, https://www.barharborhistorical.org/new/wordpress/town-history/ (last visited March 25, 2017).

Program have been established to coordinate their management for the benefit of the public and encourage tourism.[29]

Beach access is essential to coastal tourism, and in an effort to ensure such access, the Public Trust in Intertidal Land Act was enacted in 1985.[30] This Act (parts of which were later found to be unconstitutional)[31] provided that "the intertidal lands of the State are impressed with a public trust and that the State is responsible for protection of the public's interest in this land."[32] It described uses of the land:

> which uses include but are not limited to, fishing, fowling, navigation, use as a footway between points along the shore and use for recreational purposes. These recreational uses are among the most important to the Maine people today who use intertidal land for relaxation from the pressures of modern society and for enjoyment of nature's beauty.[33]

While this language is similar to that found in the original Colonial Ordinance of 1641, it significantly adds "a footway between points along the shore and use for recreational purposes."[34] This legislation was part of efforts which began in the mid 1980s to establish a public right of access to Maine's beaches, and culminated in several contentious cases before the Maine Supreme Judicial Court. However, this "establishment of a public easement that exceeds uses within the scope of fishing, fowling, and navigation is an unconstitutional taking of private property without just compensation, whether the easement is created by the Legislature or the judiciary." [35]

In recognizing that the public has certain rights to "fishing, fowling and navigation"[36] in the intertidal lands, and that expansion of this easement to include recreation would constitute an unconstitutional taking, it would appear that the public may be blocked from private beaches. However, there is a tradition of presumed permission in public access to private land in Maine, which has provided a solution to the beach access dilemma.

[29] MAINE DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY, *About the Maine Coastal Program,* http://www.maine.gov/dacf/mcp/about/index.htm (last visited March 25, 2017).

[30] ME. REV. STAT. ANN. tit. 12 § 571-573.

[31] *Bell II*, 557 A.2d at 177-179.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Bell II*, 557 A.2d 177-79, 180, *See also Opinion of the Justices,* 313 N.E.2d 561, 569–71 (1974) (declaring that proposed legislation creating a footpath along privately-owned intertidal land would constitute an unconstitutional taking).

[36] *Id.*

B. Presumption of Permissive Use of Private Land

Maine has extensive undeveloped land and natural resources such as forests, mountains, lakes, rivers and beaches, including over 5,300 miles of shoreline.[37] The courts have long recognized that the public has certain rights to access and use of the ocean, and as the court recently stated "[a]s was written long ago, 'It will not be disputed that the sea, which has been called the 'Great highway of the world,' is common to all.'"[38] In support of these rights, as well as of various recreational uses of land, Maine has established a "presumption of permission" when the public is using "wild and uncultivated land" for recreational purposes.[39]

The rationale for this presumption is twofold. First, it fulfills the need for "public recreational use of private property" that is essential to Maine's tradition for its residents and tourism industry,[40] and, secondly, it "in no way diminishes, the rights of the owner in his land."[41] This presumption of permission "serves an important societal purpose in that it allows for greater access to Maine's renowned natural features by permitting landowners to rely on the presumption of permission to protect their ownership interests, rather than encouraging them to take steps to restrict recreational use of their lands."[42]

IV. RECENT LITIGATION IS COUNTERPRODUCTIVE

Tensions between beach owners and the public have always existed, however, the *Bell I* and *Bell II* cases from the 1980s are generally viewed as the starting salvo in the legal war pitting private beach front owners against a public seeking "all access" to what they view as public natural resources.[43] Although at first blush these litigation efforts appear to be laudable, they have actually caused an escalation in the animosity between beach owners and the public, with the owners viewing these efforts as a hostile taking of property rights for which they have paid dearly through high purchase prices and property taxes.[44]

[37] MAINE DEPARTMENT OF AGRICULTURE, *supra* note 19.

[38] McGarvey v. Whittredge, 2011 ME 97, ¶ 12, 28 A.3d 620, 625, (citing Blundell v. Catterall, 106 Eng. Rep. 1190, 1194 (1821) (Opinion of Best, J.)).

[39] Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, ¶ 36, 804 A.2d 364, 375.

[40] *Id.*

[41] *Id.*, citing Town of Manchester v. Augusta Country Club, 477 A.2d 1124 at 1130 (Me.1984).

[42] *Cedar Beach* 145 A.3d at 1028.

[43] *Bell I*, 510 A.2d 509; *Bell II* 557 A.2d 168.

[44] MAINE'S WATERFRONT REAL ESTATE NEWS, http://maineswaterfront.blogspot.com/

Recent litigation to establish public prescriptive easements over private land has become contentious, with many posturing it as being between wealthy people "from away" whose "acquisition of oceanfront land has eroded the access rights of working families."[45] Public reactions to the Maine courts blocking efforts to acquire public easements has been strong, with many expressing sadness and outrage.[46] Many groups have been formed to support ongoing efforts to establish public access, including "Preserve Goose Rocks Beach"[47]and "Save Cedar Beach" Facebook pages.[48]

Supporters of litigation to assert a public right of access over private land to beaches are convinced that if courts grant such access it will be beneficial to the public. It may be counterintuitive, but such efforts have resulted in a reduction in public access. Since the *Bell I* and *Bell II* litigation began in the 1980s, the public has argued that "the public has been walking in the intertidal zone in Maine as long as anybody can remember, and that they did so up until recently without objection."[49] However, it was not until this litigation started that the landowners had any need to object. Maine law has allowed landowners to feel secure in not objecting to public recreational use of land and "[t]o promote and continue Maine's tradition of presumptive landowner permission for public access for recreational uses of open fields and woodlands, the legislature has adopted limitations on landowner liability for injuries to the public that may occur in the course of such recreational uses."[50] Such long-standing legal support has encouraged private landowners to allow access to the public, and that "beachfront owners who objected in the past were seen as eccentrics."[51] Increased efforts by public groups to litigate prescriptive easements may well increase the number of landowners who feel the need to object, even though they may be viewed as "eccentrics." Thus, this litigation may have the opposite of the intended effect, with more landowners closing their property to the public.

(last visited March 25, 2017).

[45] *Maine Supreme Court overturns ruling that gave public access to Bailey Island beach*, PORT. PRESS HER., (Jul. 19, 20160, http://www.pressherald.com/2016/07/19/maine-supreme-judicial-court-vacates-ruling-on-bailey-island-beach-access/.

[46] *Id.*

[47] FACEBOOK, *Preserve Goose Rocks Beach,* https://www.facebook.com/groups/172580274889/ (last visited March 25, 2017).

[48] FACEBOOK, *Save Cedar Beach – Maine,* https://www.facebook.com/search/top/?q=Save%20Cedar%20Beach%20Maine (last visited March 25, 2017).

[49] *Id.*

[50] *Lyons* 804 A.2d at 372, citing 14 M.R.S.A. § 159–A.

[51] *See supra* note 19.

The effects of this reduction in public access to coastal land could have negative effects upon tourism as the "Maine Beaches region continues to be the State's main draw during the summer season, with 25% of overnight visitors and 39% of day visitors listing this region as their primary destination in Maine." [52] Tourism in Maine is a substantial aspect of its economy, and accounting for a record $5.65 billion in 2015. [53] It is well established that "[a]ccess to the shore is vital to all of Maine's coastal communities, whether for commercial fishing, water-dependent businesses or for tourism and recreation."[54]

Other recreation industries also recognize the impact of litigation that could encourage landowners to close their property to public recreation use. Coastal landowners have received support in their defense against public prescriptive easements from organizations representing users of the 14,500 miles of snowmobile trails and forests.[55] As Bob Meyers, Executive Director of the Maine Snowmobile Association, stated, "Landowners in Maine are incredibly generous, and we do have this great tradition of access to private land for recreation," [56]

A. Moody Beach Cases

In the 1980s two landmark cases, *Bell I* and *Bell II,* involving disputes to the intertidal zone at "Moody Beach" in Wells, Maine[57] were brought by landowners against the Town of Wells. In this litigation, the landowners sought an injunction limiting the use of the beach by the public.[58] The court recognized changes in the uses to which the modern public puts beaches,[59]but firmly reiterated that "[l]ong and firmly established rules of property law dictate that the plaintiff oceanfront owners at Moody Beach hold title in fee to the intertidal land subject to an easement, to be broadly construed, permitting public use only for fishing, fowling, and navigation

[52] MAINE OFFICE OF TOURISM, *Visitor Summer Tourism Tracking Summer 2016,* https://visitmaine.com/assets/downloads/2016_Summer_Topline_Report.pdf.

[53] *Maine tourism spending in 2015 topped $5.65 billion, a record*, PORT PRESS HER., (Mar. 22, 2016), http://www.pressherald.com/2016/03/22/tourism-spending-in-2015-topped-5-6-billion/.

[54] *See supra* note 19.

[55] Kevin Miller, *Maine high court ruling on land access sends out tremors,* PORT. PRESS HER., (Feb. 9, 2014), http://www.pressherald.com/2014/02/09/ruling_on_land_access_sends_out_tremors_/.

[56] *Id.*

[57] *Bell* I, 510 A.2d 509; *Bell II*, 557 A.2d 168.

[58] *Id.*

[59] *Id.*

(whether for recreation or business) and any other uses reasonably incidental or related thereto."[60]

In reaffirming that the public has only those limited rights to the intertidal land, the court firmly stated that "[e]ver since the 1810 decision in *Storer v. Freeman*, as well as long before, *the law on this point has been considered as perfectly at rest;* and we do not feel ourselves at liberty to discuss it as an open question."[61] Despite the fact that the court indicated that the law is "perfectly at rest,"[62] substantial litigation has ensued in efforts to expand upon public rights.

In addition to reaffirming the limited public rights to the intertidal land, the court clarified that establishing public rights by custom and prescription are also limited.[63] It stated that the statutory provision allowing for acquisition of rights-of-way and easements by adverse possession[64] also included "the acquisition of easements by 'custom, use or otherwise . . . merely [as] a legislative exercise in overabundant caution."[65] The court went on to state that "[t]here is a serious question whether application of the local custom doctrine to conditions prevailing in Maine near the end of the 20th century is necessarily consistent with the desired stability and certainty of real estate titles."[66] Thus, the court recognized the importance of "certainty" in real estate titles with respect to the marketability of such property.

It was allowances for language suggesting that the uses were to be "broadly construed"[67] which encouraged subsequent litigation, and attempted to establish some public uses beyond the historical "fishing, fowling and navigation."[68] The court recognized that extending the public uses of beaches to include modern recreational uses would "result in a much greater burden upon the fee owner."[69] The court was reluctant to establish a public recreational easement, and stated that:

> [w]e can find no principled basis for allowing bathing, sunbathing, and walking on privately owned intertidal land, and not allowing picnics and frisbee-throwing and the many other activities people regularly engage in on the beach. But there is no basis in law or history for declaring a public easement for general recreation. That would turn

[60] *Id.* at 169.
[61] *Id.* at 171 (emphasis in original).
[62] *Id.*
[63] *Id.*
[64] ME. REV. STAT. tit. 14, § 812.
[65] *Bell II,* 557 A.2d 168.
[66] *Id.*
[67] *Id.* at 169.
[68] *See supra* note 5.
[69] *Bell II*, 557 A.2d 168.

> the intertidal zone of Moody Beach into a public recreational area indistinguishable from the adjacent Ogunquit Beach, which the Village of Ogunquit acquired in its entirety by eminent domain.[70]

Many articles have championed the efforts of the groups in the *Bell I* and *Bell II* cases,[71] however, little consideration has been given to the potential fallout of a decision allowing the public to acquire a prescriptive easement over private property based on public usage over a term of years. Based on Maine's historical and statutory predilection to encourage private owners to allow the general public to access their property for a variety of recreational uses,[72] landowners were encouraged to allow free access, without concern about losing their property rights. Thus, large landowners, such as the owners of vast timberlands as well as lake and coastal landowners, were secure in not posting or closing their land to public use. Any eroding of this principle would, by necessity, require these landowners to close their land to public use, or risk losing their property rights. If a landowner has record title[73] and has purchased property rights for full market value, it is unconstitutional to take those property rights from them without compensation.[74]

While the Maine Supreme Judicial Court affirmed landowners' property rights, it also ignited a firestorm between the public and landowners, with many of the public calling for "coastal justice."[75] Relations between landowners and the public have changed since that decision for several reasons, including the public perception that they lost something to which they felt entitled,[76] rising property and taxation values,[77] as well as increases in the number of visitors to

[70] *Id.* at 176.

[71] *Bell* I, 510 A.2d 509; *Bell II*, 557 A.2d 168; *see also* Bill Trotter, *Judge to Rule on Dispute over Access to Gouldsboro Beach,* PORT. PRESS HER.,(Aug. 12, 2015), Seth Koenig, *Maine's High Court Revisits Nearly 370-year-old Question of Public Access to Private Beaches,* BANGOR DAILY NEWS (Apr. 9, 2014). *shttp://bangordailynews.com/2015/08/12/news/hancock/judge-to-rule-on-dispute-over-access-to-gouldsboro-beach/, http://bangordailynews.com/2014/04/09/news/portland/maines-high-court-revisits-nearly-370-year-old-question-of-public-access-to-private-beaches/*

[72] "We have long recognized the rebuttable presumption that public recreational uses are undertaken with the permission of the landowner." *Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶ 29, 106 A.3d 1099, 1111–12, as corrected (Apr. 16, 2015).

[73] Maine State Bar Association Standards of Title (2016), *See generally* Paul G. Creatu, MAINE SUPPLEMENT TO PRINCIPLES OF REAL ESTATE LAW 12–6 (1978).

[74] U.S. CONST. amend. V.

[75] Chris Chase*, Maine's high court hears arguments in beach access case in Harpswell*, PORT. PRESS HER.*,* (Apr. 11, 2015), http://www.pressherald.com/2015/11/04/maines-high-court-hears-arguments-in-beach-access-case-in-harpswell/.

[76] *Id.*

[77] MAINE'S WATERFRONT REAL ESTATE NEWS, *supra* note 44.

Maine beaches.[78] Beach owners have reported an increase in the disrespectful use of their properties such as loud parties and littering,[79] which may be the result of a combination of the public reaction to the court's blocking efforts to establish public access,[80] and the general increase of beach usage.[81] While much of the historic public usage described in litigation has been essentially by "locals,"[82] increasing numbers of those "from away"[83] are now seeking access to these private beaches. As a result, landowners are more inclined to block public access[84], and the public is more inclined to force public access.[85] The fact that rising property values have resulted in much coastal property being purchased by non-Maine residents, and thus many of these battles pit locals against people "from away."[86]

The court later expanded the permitted uses to include scuba divers,[87] but most other efforts to expand the public use have met with resistance.[88] Many of the subsequent cases have focused on efforts to establish prescriptive easements, as opposed to expanding on the definition of the established "fishing, fowling and navigation" rights.[89]

B. Eaton v. Wells

The next major case before the Maine courts was *Eaton v. Wells*[90] in which the court explored whether continuous maintenance by the town of a beach, contrary to the wishes of the landowners, was sufficient to establish a prescriptive easement by the town (and thus for use by the

[78] MAINE OFFICE OF TOURISM *supra* note 52.

[79] Brief of Appellants at 7, Cedar Beach/Cedar Island Supporters, Inc. et al. v. Gabels Real Estate LLC, et al., 2015 WL 12746156 (Me.).

[80] *See generally supra* notes 48, 49 and 55.

[81] *Id.*

[82] "'Just because a cat has her kittens in the oven don't make them biscuits'. This odd little analogy heard throughout Vermont and Maine emphasizes the value they place on native status. If you were born in New England, but your parents are originally from out-of-state, you can fuhggedabout claiming to be a true New Englander. Harsh. One might also say someone is 'from away,' indicating he isn't a native of Maine" Melia Robinson, *13 Sayings Only People From New England Can Understand*, http://finance.yahoo.com/news/13-sayings-only-people-england-150500033.html.

[83] "From Away adj., People who are not native Mainah's." THE WICKED GOOD GUIDE TO MAINAH ENGLISH, *http://webpages.charter.net/lorilady/glossary.html.*

[84] *Cedar Beach,* .185 A.3d 1024.

[85] *Id.*

[86] *See generally supra* notes 48, 49 and 55.

[87] *See supra* note 6.

[88] SURFRIDER FOUNDATION, *Maine High Court Ruling,*(Aug. 25, 2011), http://www.surfrider.org/coastal-blog/entry/maine-high-court-ruling-scuba-diving-6-exclusive-intertidal-zone-0

[89] *See generally supra* notes 48, 49 and 55.

[90] Eaton v. Town of Wells, 2000 ME 176, 760 A.2d 232.

public).[91] In that case, the court began with an extensive discussion of the historical title to the property and found that "the court did not err in its interpretation of the deeds and its conclusion that they conveyed the subject premises."[92] The court then stated that the elements of an adverse possession or a prescriptive easement as set forth by the court were that "[t]he party seeking title by adverse possession must prove by a preponderance of the evidence 'possession for a 20–year period that is actual, open, visible, notorious, hostile, under a claim of right, continuous, and exclusive.'"[93] In evaluating this claim, the court found that "[t]he claim of right must be an 'intent to claim the land as [its] own, and not in recognition of or subordination to [the] record title owner.' " [94] While adverse use through beach maintenance was established, the town had acknowledged the landowners' record interest so the town's claim of right to the fee was negated.[95] This reasoning follows that of most Maine cases, where it is required that the adverse possessor must prove "use and enjoyment of the property . . . in kind and degree as the use and enjoyment to be expected of the average owner of such property." [96] Thus, the adverse possessor must show that they used the land as an owner would use that type of property (such as the maintenance of a road), not just that they accessed the property.

C. Lyons v. Baptist School of Christian Training

The 2002 case of *Lyons v. Baptist Sch. of Christian Training*[97] further established the "adversity necessary to establish a public, prescriptive easement."[98] In that case, neighbors had attempted to establish a prescriptive easement based on use of a road across the landowners woodlot, but the court found that the evidence was insufficient to establish a prescriptive easement.[99] The court reasoned that the evidence established that those using the lot knew that they were using the property of another but did not feel that they were using it "against their wishes."[100] This was an important follow up to the

[91] *Id.*

[92] *Id.* at 242.

[93] *Id.* at 243.

[94] *Id.* citing Striefel v. Charles–Keyt–Leaman Partnership, 1999 ME 111, ¶ 14, 733 A.2d 984, 991 (quoting black's Law Dictionary 248 (6th ed.1990)).

[95] *Id.*

[96] Maine Gravel Servs., Inc. v. Haining, 1998 ME 18, ¶ 3, 704 A.2d 417, 418, citing Howe v. Natale, 451 A.2d 1198, 1200 (Me.1982).

[97] Lyons v. Baptist Sch. of Christian Training, 2002 ME 137, ¶ 1, 804 A.2d 364

[98] *Id.* at 366.

[99] *Id.*

[100] *Id.* at 368.

Eaton v. Town of Wells[101] case, in that it clarified that more than casual usage was needed to divest owners of rights, and that some action, such as that an owner would take, would be necessary to rebut the presumption of permission.[102]

D. Almeder v. Town of Kennebunkport

In the 2014 *Almeder v. Town of Kennebunkport*[103] case, also referred to as the "Goose Rocks Beach case,"[104] the court again examined the question of what actions by the town or the public were necessary to overcome the presumption of permissive use.[105] In that case, the public had been using the Goose Rocks Beach, both the dry sand and intertidal zone, for recreational purposes for the requisite prescriptive period.[106] However, one essential issue which the trial court had ignored was that the elements of prescriptive use must be determined on a parcel-by-parcel basis, evaluating the acts of the public on each parcel and the respective landowners' responses to those actions.[107]

The court acknowledged "the public's access to scarce resources such as sandy beaches in Maine is a matter of great importance and extraordinary public interest."[108] It also recognized that "the Beachfront Owners have already incurred considerable expense and expended significant effort in responding to the Town's arguments."[109] Thus the case was remanded for further findings, to "address one of the elements necessary for a successful prescriptive easement claim—adversity." [110] The court went on to explain that "[e]ssential to our consideration of adversity in cases involving public recreational easements is the presumption of permission. We have long recognized the rebuttable presumption that public recreational uses are undertaken with the permission of the landowner."[111]

Since the case was based on use of a long section of beach, which transected several different property owners, and since the different property owners dealt with the public's use in different ways,[112] it was

[101] *Eaton* 760 A.2d at 243.
[102] *Id.*
[103] Almeder v. Town of Kennebunkport, 2014 ME 139, ¶ 29, 106 A.3d 1099, as corrected (Apr. 16, 2015).
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 1111
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Almeder* 106 A.3d at 1115.

impossible for the court to issue a blanket ruling on all properties.[113] It therefore remanded the case for the trial court to make a determination on a parcel-by-parcel basis, taking into account the actions of each individual property owner with respect to the public use of their land.[114] While this ruling makes legal sense as to the elements required to establish an easement by prescription, it creates the practical problem of potentially establishing a public easement to only portions of the beach. Such a checkerboard beach is not what the public envisioned and would be difficult to enforce, thus putting an onus on both the public and the landowners.

This unsettled landscape has clearly had an effect upon both the public and landowners, with tensions escalating[115] and both land values and marketability of property being affected.[116] As land values in Maine are slowly recovering from the real estate crisis of 2008, [117]adding to those difficulties by making ownership rights to coastal land uncertain will only add to economic concerns. Also, because Maine is dependent to such a large extent on the tourism industry,[118] making beach access by tourists uncertain will challenge that industry and its growth. Thus, certainty is essential to the economic stability of the Maine economy.

E. Cedar Beach Case

The Maine courts made a move toward this needed certainty in the recent *Cedar Beach Case*.[119] This case saw all the elements of the earlier cases, with locals incensed at being blocked from beaches they had used for generations,[120] and landowners equally incensed by disrespectful use of their land,[121] litigation expenses,[122] and marketability issues as a result of these challenges.[123] Through the

[113] *Id.*

[114] *Id.*

[115] *See generally supra* notes 48, 49 and 55.

[116] MAINE OFFICE OF TOURISM, *supra* note 52.

[117] William Hall, *New index predicts 'slow, steady' recovery for Maine real estate*, BANGOR DAILY NEWS, (May 28, 2013), https://bangordailynews.com/2013/05/28/business/new-index-predicts-slow-steady-recovery-for-maine-real-estate/?ref=relatedBox.

[118] FUTUREMETRICS, *Maine and Tourism, Maine's Largest Industry*, (July, 2013), http://futuremetrics.info/wp-content/uploads/2013/07/Tourism-White-Paper.pdf.

[119] *Cedar Beach,* 145 A.3d 1025.

[120] *See generally supra* notes 48, 49 and 55.

[121] *Id.*

[122] Defendant in lawsuit over public access to private Harpswell beach makes deal to buy road 'to keep it private', BANGOR DAILY NEWS,(June 19, 2014), http://bangordailynews.com/2014/06/19/news/midcoast/defendant-in-lawsuit-over-public-access-to-private-harpswell-beach-makes-deal-to-buy-road-to-keep-it-private/.

[123] *See supra* note 55.

long history of public use at Cedar Beach, landowners had welcomed public access, with one landowner even selling ice cream to children on the beach.[124]

Partly in response to the litigation which began with the *Bell I* and *Bell II* cases,[125] the public began to feel the need to establish a legal right to use the beach, beyond the historical permissive use.[126] Perhaps due to the notion of the necessity of adverse use,[127] and perhaps due to societal changes or the increased number of people using the beaches,[128] the public's use became more objectionable to the owners.[129] Loud parties, littering and destruction of fences and other property made owners reconsider allowing the public to use their land.[130] The *Cedar Beach* case[131] actually focused on an attempt to obtain a prescriptive easement over a private road to access a public beach.[132] Thus, the objectionable loud parties and littering on the beach were not considered by the court to be relevant adverse acts[133] to establish a prescriptive easement to the road, as those acts occurred on the beach.[134]

The record in the *Cedar Beach*[135] case is replete with evidence of a long history of permissive public use, interrupted by blockages resulting from concerns over the public acquiring prescriptive rights over the road leading to the beach.[136] Other than concerns over littering and vandalism, the owners of the road had no objection to the public using the road to access the beach. However, concerns that the public would assert rights by prescription over the road caused owners to post the property[137], and at various times put chains across the road and

[124] *Bell* I, 510 A.2d 509; *Bell II*, 557 A.2d 168.

[125] *Id.*

[126] *See generally supra* notes 48, 49 and 55.

[127] *Cedar Beach*, 145 A.2d 1025 at 1027.

[128] PUBLIC SHORELINE ACCESS IN MAINE, Maine Department of Agriculture, Conservation and Forestry, August, 2016, http://www.maine.gov/dacf/parks/docs/public-shoreline-access-in-maine.pdf.

[129] *Id.*

[130] MAINE OFFICE OF TOURISM *supra* note 52.

[131] *Cedar Beach,* 145 A.3d 1025.

[132] *Id.*

[133] "Similarly, although litter may be unpleasant to find on one's property, littering is not the type of hostile action that shows disregard of the owner's claims entirely and use of the land as though the claimant owned the property." *Cedar Beach,* 145 A.3d at 1029.

[134] *Id.*

[135] *Id.*

[136] *Id. at* 1026.

[137] In Maine, "posting" property refers to posting "no trespass" signs, as opposed to the historical "tradition of landowner acquiescence in public recreational uses of open, unposted fields and woodlands." *See Lyons,* 804 A.2d 372.

erect fences.[138] In response to these actions by the landowners, members of the public caused vandalism on the property, including one fence being "'mowed down by a pickup truck' driven by Scott Allen, a member of the public" and other such acts.[139] In that case, although the landowners originally welcomed the public, the dispute between the landowners and the public became so acrimonious that the public use turned destructive:

> Charlie Abrahamson, the owner of the Road from 1999 to 2014 welcomed pedestrian access over his land to the beaches, including the Small Beach which is located next to Cedar Beach and which he also owned. He even sold ice cream to children who used the beaches. However, public use began to become more and more objectionable. Mr. Abrahamson cleaned up more and more litter, including diapers, trash, and other items. He personally witnessed users urinating on his property and began to sense a change in people's attitude toward using the beach. After repeated warnings and confrontations, Mr. Abrahamson had had enough and blocked the path leading from the end of the Road to the Small Beach. People ignored that effort and Mr. Abrahamson received numerous threats to his family and property. As a result, Mr. Abrahamson closed the Road to public use. In return, Mr. Abrahamson received hate mail, threatening phone calls, and anti-Semitic slurs. In October 2012, Plaintiffs in this action filed suit against the Abrahamsons asserting a public prescriptive easement exists over the Road. Defendant Gables Real Estate LLC joined the action as a party defendant on April 8, 2013.[140]

Changes in the level of respect by the public in their use of private land has led to increased litigation over access to the shore. This litigation has drawn strong arguments from the opposing sides, both legal and emotional, and continuing what has been termed *The War for Maine's Shore*,[141] which does not serve either side.

The court also examined the essential requirement of adversity, and what constitutes the requisite adversity. While the court acknowledged that loud parties, littering and acts of vandalism are "adverse to the landowner,"[142] the actual requirement of adversity is looking for acts that show "use of the land as a landowner would use the land,"[143] as opposed to acts which have been defined as "criminal acts"[144] by State law. Since a landowner's use of his land does not

[138] *Id.*

[139] *Id.*

[140] *Supra* note 79 at 8-9 (references omitted).

[141] Colin Woodward, *War for Maine's shore,* PORT. PRESS HER. (Dec. 2, 2012), http://www.pressherald.com/2012/12/01/war-for-maine-shore_2012-12-02/.

[142] MAINE OFFICE OF TOURISM *supra* note 52.

[143] *Maine Gravel,* 704 A.2d at 418.

[144] *Cedar Beach,* 145 A.3d at 1029.

typically include destructive criminal acts, those actions should not constitute the requisite "treatment of land as their own"[145] to vest property rights in the adverse user (i.e. the public). In addition to this analysis following the purpose of the legal elements of adverse or prescriptive use, it serves a public purpose of not encouraging (or rewarding) criminal acts on land owned by others.

F. Alternatives for Resolving Public Access Disputes

In re-affirming the presumption of permissive use, and thus making it difficult for the public to obtain a prescriptive easement over private land, the court is encouraging private landowners to continue to allow public recreational use of the thousands of acres of Maine's natural resources, and encouraging towns and public groups to pursue other avenues to establish a public right to access. There are several other ways the public can acquire a "right" to access as opposed to simply "permission," which both recognize that property owners have record title to this land and that any taking of those property rights without due process and compensation are unconstitutional.[146]

Methods such as purchase of easements, negotiated licenses or a taking through eminent domain all respect the landowners' rights to due process and compensation. Many prescriptive easement cases may be resolved by these means, and such resolutions are not only more expeditious and less expensive than litigation, they also preserve the marketability of the properties and can encourage tourism.

Some may consider eminent domain as a viable method to establish a public recreational easement or title to a beach, however it is most likely the least attractive option. While the United States Supreme Court has affirmed that the scope of permitted public purposes for eminent domain may be extended to "economic purposes,"[147] it is widely expected that this standard may be reexamined by the Court in the future.[148] In addition, the eminent domain litigation process is expensive for both towns and property owners, due to the litigation costs, marketability issues and ultimate cost of compensation from the town (and corresponding loss of value to the landowner).[149]

[145] *Maine Gravel,* 704 A.2d at 418.

[146] *Bell* I, 510 A.2d 509; *Bell II*, 557 A.2d 168.

[147] The United States Supreme Court found that a taking of private residential property for private commercial development constituted "a "public use" within the meaning of the Fifth Amendment to the Federal Constitution." Kelo v. City of New London, Conn., 545 U.S. 469, 490, 125 S. Ct. 2655, 2668, 162 L. Ed. 2d 439 (2005).

[148] LINCOLN INSTITUTE OF LAND POLICY, *After "Kelo",* (April, 2010), http://www.lincolninst.edu/publications/articles/after-kelo.

[149] *Id.*

The most promising avenue for establishing public rights for access to beaches or other land will be by voluntary negotiation of easements or licenses. Many reasons could bring both landowners and the public to the negotiating table, including rising property values[150] and rising property tax burdens.[151]

For current landowners, annual property taxes can be crippling, especially if property values have risen significantly during the period of ownership.[152] This increased tax burden is particularly of concern for land which may have been in a family for generations, and burdensome property taxes may force owners to sell their property.[153] In such cases, negotiated public easements can reduce the assessed value of the property, and thus reduce the property tax burden,[154] allowing the family to retain their property while at the same time assuring the public a right of access.

In addition, when property values rise exponentially, frequently only a select number of wealthy individuals may be able to afford to purchase the property.[155] If property is encumbered with a public access easement, the market value of the land would be reduced thus opening more land to purchase by those of more modest means.[156]

The most recent development in the *Cedar Beach* case was just such a resolution. On March 11, 2017 at the Town of Harpswell Town Meeting, the town approved a negotiated license which allows access over the Cedar Beach Road to the beach.[157] This license was negotiated between the town and the landowners, and contains provisions benefitting both.[158] The license addresses the landowners' concerns regarding disrespectful public use, and use by non-residents, as well as providing for a monitoring system.[159] It addresses the concerns of the

[150] MAINE REAL ESTATE NETWORK, *Maine Oceanfront Real Estate, http://www.themainerealestatenetwork.com/popular-maine-real-estate-searches/maine-oceanfront-real-estate/(last visited March 25, 2017).*

[151] *Id.*

[152] MAINE COAST HERITAGE TRUST, *Property Taxes,* http://www.mcht.org/land_protection/options/property_taxes/, (last visited March 25, 2017).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] License Agreement approved at Town of Harpwell Town Meeting March 11, 2017 can be found at: http://www.harpswell.maine.gov/vertical/sites/%7B3F690C92-5208-4D62-BAFB-2559293F6CAE%7D/uploads/2017_03_02_Cedar_Bch_Rd_License_Agmt_(FINAL).pdf.

[158] *Id.*

[159] *Id.*

local residents by ensuring access by residents, including tourists at the local bed and breakfast inns, and other visitors and guests.[160]

V. CONCLUSION

While litigation efforts by public groups to establish prescriptive access rights are well-intentioned, they may end up being counter-productive and cause more landowners to block public use out of fear of the establishment of public rights. The recent *Cedar Beach* case[161] is a good example of these concerns, as well as of the best solution to this issue. While many groups supporting public prescriptive easements over private land feel that they are championing the best interests of the public, they may actually be setting in motion a movement which causes landowners to restrict public recreational use. This would have negative impacts on the enjoyment of natural resources by both Maine residents and tourists. Negotiated easements or licenses, such as in *Cedar Beach*,[162] will benefit landowners, locals, and visitors who wish to enjoy Maine's beautiful natural resources, as well as the Maine tourism industry. Hopefully, members of the public, local governments and landowners will see the value of resolving their disputes through negotiation, rather than litigation, and the *Cedar Beach* case[163] will serve as an example to all parties for the best course of action for moving forward.

[160] *Id.*
[161] *Cedar Beach* 145 A.3d at 1028.
[162] *Id.*
[163] *Id.*

TRAPS FOR THE UNWARY COMMERCIAL DRONE USER

by Chantalle R. Forgues*

I. INTRODUCTION

Recent changes to aviation regulations have made it realistic for any business to use small Unmanned Aircraft Systems (sUAS), colloquially referred to as "drones," to benefit their operations. The commercial use of sUAS was previously prohibited unless the user: (1) was a Federal Aviation Administration (FAA) certificated pilot; (2) obtained from the FAA a Certificate of Waiver or Authorization (COA) wherein the FAA enumerated specific use limits for low-risk operation; (3) obtained a "Section 333 determination and exemption" whereby the Secretary of Transportation made a determination on the airworthiness of the sUAS and granted appropriate exemptions to FAA operational or maintenance regulations; and, (4) registered the sUAS with the FAA.[1] In response to pressure from a diversity of business and other interests, the FAA eased its restrictions on commercial sUAS use as of August 29, 2016. Now a business that seeks to deploy an sUAS need only obtain a remote pilot certification with an sUAS rating, and register the sUAS.[2] The FAA certificated pilot, COA, and Section 333 determination and exemption are no longer necessary.

* Assistant Professor of Business Law, College of Business Administration, Plymouth State University.

[1] *See* 49 U.S.C. § 44711 (2012); 49 U.S.C. § 44101 (1994); FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (2012) (codified as amended in scattered sections of 49 U.S.C.).

[2] *See* FAA Air Traffic and General Operating Rules, 14 C.F.R. § 107 (2017) [hereinafter FAR].

Now that businesses have a real opportunity to use sUAS, it is important for them to understand the pertinent legal and aeronautical responsibilities associated with sUAS use. The laws related to privacy, nuisance, trespass, and other torts implicated with commercial sUAS use are complex. The newly promulgated aviation regulations governing sUAS also present complexities. Regrettably, the aeronautical knowledge test for sUAS user certification lacks rigor in certain areas, and may not adequately prepare an sUAS user for proper and compliant use of his sUAS. As such, sUAS users must exercise legal and aeronautical prudence.

Accordingly, this paper offers a survey of current laws, regulations, and aeronautical issues that pose potential hazards for commercial sUAS users. Specifically, this paper examines the laws and regulations of which commercial sUAS users are most likely to run afoul, as well as the potentially troubling areas of aeronautical knowledge that commercial sUAS users are likely to encounter, and offers guidance for avoiding the associated legal and aeronautical traps.

II. THE sUAS MARKET

Even with the previous regulatory barriers, the market for commercial sUAS in the United States has been impressive. Industry experts estimated that sales of commercial sUAS generated $200-$400 million in annual revenue in 2015.[3] The FAA predicted sales of commercial sUAS to reach 600,000 units by the end of 2016.[4] Furthermore, the United States market is expected to grow to over four billion dollars by the year 2020.[5] By that time, the FAA predicts that the national airspace system (NAS) will need to accommodate 2.7 million commercial sUAS.[6] In fact, just in the few months from the date the new FAA regulation took effect through November 3, 2016, the FAA has granted more than 18,000 sUAS remote pilot certificates, and about 23,000 airplane and helicopter pilots (hereinafter "private

[3] DELOITTE TOUCHE TOHMATSU LIMITED, DRONES: HIGH PROFILE AND NICHE, at 1 (2015), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Technology-Media-Telecommunications/gx-tmt-pred15-drones-high-profile.pdf (last visited Jan. 30, 2017).

[4] FAA, Aerospace Forecasts Fiscal Years 2016-2036 prepared by the Forecasts and Performance Analysis Division (APO-100), Office of Aviation Policy and Plans at 31 (2016), *available at* https://www.faa.gov/data_research/aviation/ [hereinafter FAA Forecast].

[5] BILL CANIS, CONG. RESEARCH SERV., R44192, UNMANNED AIRCRAFT SYSTEMS (sUAS): COMMERCIAL OUTLOOK FOR A NEW INDUSTRY, at 31 (2015).

[6] FAA Forecast, *supra* note 4, at 31.

pilots") have taken the FAA Safety Team online course to qualify to fly sUAS.[7]

If the data on the sUAS users who were granted a Section 333 determination and exemption prior to the change of law are predictive,[8] ninety percent of the 2.7 million commercial sUAS users expected to operate by 2020 will be small business owners. The vast majority of small business owners who are expected to use sUAS will report less than one million in annual revenue and have fewer than ten employees.[9] A significant number of these businesses will have just one employee.[10] Based on the early data, only around half of the remote sUAS pilots will have aviation experience.[11] As it becomes easier, cheaper, and more beneficial for novices to use sUAS, it is foreseeable that most commercial sUAS users will lack both the legal and aviation knowledge necessary to avoid the regulatory and aeronautical traps discussed herein.

Indeed, the cost of sUAS are now within the reach of small businesses. A basic, non-toy, sUAS costs approximately $300-$500 and includes a modest camera and a Global Positioning System (GPS).[12] The basic model can fly horizontally about fifteen kilometers per hour (km/h), or about nine miles per hour (mph), for approximately twenty minutes.[13] Users with a higher level of professional interest may pay $750-$2,000 for an sUAS that will fly at fifty km/h, or thirty-one mph, and remain airborne for up to twenty-five minutes.[14] Enterprise models cost $10,000 or more, and can carry a load of more than three kilograms (or about six and a half pounds) for up to an hour at even faster speeds.[15] Almost all sUAS models have enough thrust to fly up to several thousand feet above sea level.[16] It is reasonable to assume, moreover, that sUAS capabilities at every level will greatly improve in the future.

[7] Jim Moore, *Thousands of Drone Pilots Certified,* AIRCRAFT OWNERS AND PILOTS ASS'N (Nov. 3, 2016), https://www.aopa.org/news-and-media/all-news/2016/november/03/thousands-of-drone-pilots-certified?utm_source=ePilot&utm_medium=Content&utm_content=adv&utm_campaign=161103epilot

[8] *See* Geoffrey Smith, *Here Comes the Latest Drone Army,* FORTUNE, May 9, 2016 *available at* http://fortune.com/2016/05/09/here-comes-the-latest-drone-army/.

[9] *See id.*

[10] *See id.*

[11] *See supra* note 8.

[12] DELOITTE, *supra* note 3, at 1.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Henry H. Perritt, Jr. & Albert J. Plawinski, *One Centimeter Over Back Yard: Where Does Federal Preemption of State Drone Regulation Start?,* 17 N.C. J.L. & TECH. 307, 317 (2015).

The potential uses of commercial sUAS seem limitless. Some of the earliest adopters of sUAS technology were industries requiring inspection of large structures. Small UAS can easily inspect wind turbines, bridges, power lines, oil rigs, and other perilous settings. Smaller businesses are following their lead: landlords, building maintenance providers, pest services, and building contractors can also easily deploy sUAS to examine structures like roofs, chimneys, ducts, wires, attics, and trees in a safer and more efficient manner. The FAA estimates that approximately twenty-two percent of current commercial sUAS use is for aerial photography[17] furthering both the marketing and the operational efforts of many businesses, such as real estate, construction, surveying, engineering, outdoor recreation, professional sports, music, and journalism. Insurance, agriculture,[18] and even restaurants[19] have made creative and beneficial use of sUAS. Certainly many other businesses will use sUAS to benefit their operations in the future.

III. LEGAL TRAPS

With millions of new commercial sUAS users, lawsuits are inevitable. What are the likely sources of litigation? Commercial sUAS users are most likely to encounter tort and property claims. It is foreseeable that a commercial sUAS user may commit a trespass, nuisance, or privacy invasion, and potentially contravene other pertinent laws. Upon promulgating the new commercial sUAS regulations, the FAA specifically declined to address privacy and related tort issues, which it contends is beyond the scope of its authority.[20] Rather, the FAA "strongly encourages all sUAS pilots to

[17] FAA Forecast, *supra* note 4, at 33.

[18] Agricultural use of sUAS involves the gathering of "detailed data on soils, crops, nutrients, pests, moisture, and yield to increase farm productivity." AM. FARM BUREAU, FACT SHEET: QUANTIFYING THE BENEFITS OF DRONES IN PRECISION AGRICULTURE (July 2015) *available at* http://www.measure.aero/wp-content/uploads/2015/07/AFBF-Fact-Sheet.pdf (study done in coordination with Measure, an aerospace industry specialist and sUAS retailer). The American Farm Bureau predicts that farmers using sUAS technology could see a return on investment of $12 per acre for corn, $2.60 per acre for soybeans, and $2.30 per acre for wheat. *Id.* sUAS are also very effective at finding lost livestock and herding sheep. DELOITTE, *supra* note 3, at 1 (providing entertaining footage of drones herding cows here: https://www.youtube.com/watch?v=kK9gVzSYjJM#t=21).

[19] Corinne Dowling Burzichelli, Note & Comment, *Delivery Drones: Will Amazon Air See the National Airspace,* 42 RUTGERS COMPUTER & TECH. L.J. 162, 163 (2016) (citing Jeanette Settembre, *TGI Fridays Launches Flying Mistletoe Drones for the Holidays,* N.Y. DAILY NEWS (Nov. 19, 2014), http://m.nydailynews.com/life-style/eats/tgi-fridays-launches-mistletoe-drones-article-1.2016401.

[20] FAA, Fact Sheet – Small Unmanned Aircraft Regulations (Part 107), June 21, 2016, *available at* https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=20516. The

check local and state laws."[21] These existing laws are based in traditional common law and can be complicated, particularly as they apply to sUAS. It is important, then, for commercial sUAS users to develop a basic understanding of applicable tort, property, and other related laws, and to create conservative strategies to avoid legal transgressions.

A. Trespass

How can a commercial sUAS user avoid a trespass lawsuit? Trespass is most basically defined as the intrusion on the land of another without privilege.[22] The easiest way to avoid a trespass claim, therefore, is to refrain from flying over the land of another. Another easy way to avoid a trespass lawsuit is to obtain consent to overfly the land of another.[23] There are many occasions, however, when it is impossible or impractical to avoid flying over the land of another (including inadvertent overflight), or to obtain permission to do so. As such, sUAS users should be sensitive to the disposition of the law of trespass.

State laws on aerial trespass vary, but most are based on fundamental common law principles. Section 159 of the Restatement (Second) of Torts ("Restatement"), Intrusions Upon, Beneath and Above the Surface of the Earth, provides that: "Flight by aircraft[24] in the air space above the land of another is a trespass if, but only if, (a) It enters into the *immediate reaches* of the air space next to the land, and (b) It interferes substantially with the other's use and enjoyment of his land."[25] The Restatement does not define precisely what constitutes, "immediate reaches," but it does provide that, "In the ordinary case, flight at 500 feet or more above the surface is not within the 'immediate reaches,' while flight within 50 feet, which interferes

FAA, however, does recommend that sUAS pilots follow the National Telecommunications and Information Administration's "Best Practices" for privacy, which provides a few practical tips on how to be "neighborly," among other advice. *Id.* According to the FAA, these guidelines are not intended to set the legal standard. *Id.*

[21] *Id.*

[22] RESTATEMENT (SECOND) OF TORTS §§ 158, 163, 164 & 165 (1965).

[23] *Id.* at §167.

[24] In the FAA Modernization and Reform Act of 2012, Congress defined an sUAS as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft." Sec. 331(8), Pub. L. 112-95 (2012). In *Administrator v. Pirker*, the National Transportation Safety Board (NTSB) unanimously determined that sUAS are "aircraft," for the purpose of regulatory liability. NTSB Order No. EA-5730 (Nov. 17, 2014) *available at* http://www.ntsb.gov/legal/alj/Documents/5730.pdf. It follows that sUAS should also be considered "aircraft," for the purpose of tort liability.

[25] RESTATEMENT, *supra* note 22, at § 159 (emphasis added).

with actual use, clearly is, and flight within 150 feet, which also interferes, may present a question of fact."[26]

The concept of "immediate reaches" stems from the seminal case on aerial trespass by aviation, *United States v. Causby*.[27] In *Causby,* the Court explained that, "It is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."[28] According to the *Causby* Court, the landowner "owns at least as much of the space above the ground as he can occupy or use in connection with the land."[29] Conversely, it seems, the Court established that there are no private property rights to the land beyond the "immediate reaches." Upon remand, the Court of Claims awarded damages to the landowners for flights that occurred up to 365 feet, which was 300 feet above the tallest object on the property.[30] At that time, the Civil Aeronautics Authority[31] had set 300 feet as the minimum safe altitude at which an aircraft could fly over any sort of terrain.[32]

Courts have found trespass by aircraft flying anywhere between fifty feet[33] above ground level (AGL)[34] to 999 feet AGL over the property of another.[35] Aircraft flying less than 100 feet AGL are frequently held

[26] *Id.* at cmt. l.

[27] 328 U.S. 256 (1946). Prior to *Causby,* common law had long recognized the concept of aerial trespass through means other than aviation. *See, e.g., Whittaker* v. *Stangvick*, 100 Minn. 386 (1907) (shooting over another's land); *Butler* v. *Frontier Telephone Co.* 186 N.Y. 486 (1906) (wires strung over land twenty or thirty feet above surface); *Barnes* v. *Berendes*, 139 Cal. 32 (1903) (walls leaning over property); *Ellis* v. *Loftus Iron Co.* (1874) L.R. 10 C.P. 10 (U.K.) (horse kicking into another's space).

[28] *Causby,* 328 U.S. at 264.

[29] *Id.*

[30] *Causby v. U.S.,* 109 Ct. Cl. 768 (1948). The tallest object on the property was a sixty-five foot tree.

[31] The Civil Aeronautics Authority was the precursor agency to the FAA. FAA, A Brief History of the FAA, (page last modified on Feb. 19, 2015) *available at* https://www.faa.gov/about/history/brief_history/.

[32] *See Causby,* 109 Ct. Cl. at 770.

[33] *See, e.g., Brandes v. Mitterling,* 67 Ariz. 349 (1948).

[34] In aviation, AGL altitude is the absolute height measured against the underlying ground surface, and it distinguished from altitude above mean sea level (MSL), which is the measurement of the height of an aircraft above the average sea level. JEPPESEN, GUIDED FLIGHT DISCOVERY: PRIVATE PILOT 2-56 & 2-58 (2007).

[35] *See Brandes,* 67 Ariz. at 356-57 citing *Mohican & Reena, Inc., v. Tobiasz*, 1938 U.S.Av.Rep. 1 (master's report filed in Super.Ct. Hampden, Mass., 1938) (injunction granted for children's summer camp owner prohibiting flight below 1,000 feet within 500 feet of property). It should be noted that common law cases, including *Brandes,* often muddle the laws of trespass and nuisance. This is particularly true in aviation cases where courts have a history of labelling trespassory actions as nuisance claims. *See* Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 VA. L. REV. 965, 984 (2004).

liable pursuant to trespass law suits,[36] although many courts have decided that 500 feet AGL is the limit for aerial trespass.[37] The FAA's civil air regulations now provide that 500 feet AGL is the minimum safe flight altitude for aircraft over non-congested areas,[38] and 1000 feet AGL is the minimum safe flight altitude over congested areas.[39] Flight at or above these limits constitutes publically "navigable airspace"[40] and may constitute a reasonable marker for determination of liability.[41] Notwithstanding the FAA's declaration on minimum safe altitudes, some courts have determined that the altitude of overflight has no determinative impact on liability, finding that, "although the navigable airspace has been declared to be in the public domain, regardless of any congressional limitations, the land owner, as an incident to his ownership, has a claim to the superjacent airspace to the extent that a reasonable use of his land involves such space."[42]

A trespass claim, regardless of the altitude of the trespass, further requires a substantial interference with another's use and enjoyment of land.[43] There must be interference with actual, as distinguished from potential, use.[44] Notably, an otherwise nonharmful -even beneficial- intentional intrusion, will still subject an sUAS user to liability if the intrusion interferes with the use and enjoyment of land.[45] Courts have been more likely to find interference when the invasion occurs over "cultivated" land that is occupied and used, rather than land covered in dense brush or woods.[46] Most aircraft produce offensive noise, dust, light, vibration, and other air pollution. For these reasons, there appears to be little difficulty for a court to find that most low-flying

[36] *See, e.g., Vanderslice v. Shawn,* Del. Ch., 27 A.2d 87 (1942)*; Smith v. New England Aircraft,* 270 Mass. 511 (1930); Dlugos v. United Air Lines, 1944 U.S.Av.Rep. (Ct.Comm.Pl.Pa. Lehigh Co., May 27, 1944).

[37] *See, e.g.,* Burnham v. Beverly Airways, Inc., 311 Mass. 628 (1942); see also RESTATEMENT, *supra* note 22, at § 159 cmt. 2(l).

[38] FAR, *supra* note 2, at § 91.119(c).

[39] *Id.* at § 91.119(b) (such flight is unsafe within horizontal distance of 2,000 feet from congested area).

[40] FAR, *supra* note 2, at § 1.1.

[41] *See, e.g., Brenner v. New Richmond Regional Airport Com'n,* 816 N.W.2 291, 306 (2012). While helicopters, powered parachutes, and weight-shift control aircraft are permitted to operate at less than these minimum altitudes under certain circumstances, FAR §91.119(d), this does not mean that such operation is conducted within navigable airspace. *People v. Sabo*, 185 Cal. App. 3d 845, 852 (1986); nor is this always considered best practice.

[42] *Palisades Citizens Ass'n, Inc. v. C.A.B*, 420 F.2d 188, 192 (D.C. Cir. 1969) (internal quotations omitted) (citing *US v. 15,909 Acres,* 176 F.Supp. 447, 448 (1958)).

[43] RESTATEMENT, *supra* note 22, at § 159 (2)(b).

[44] *Id.* at cmt. k.

[45] *Accord id*. at § 163.

[46] *Smith,* 270 Mass. at 531.

aircraft substantially interfere with the use and enjoyment of occupied land. This is particularly true if the flights are frequent and occur at times unsuitable to the landowner.

It is important to note that intrusions over land by mistake will also subject an sUAS user to trespass liability.[47] An sUAS user who acts under a mistaken belief of law or fact, however reasonable his belief, will be liable to a landowner for an overflight.[48] Under the Restatement, an sUAS user would be liable for a mistaken intrusion over the land of another even if he acted pursuant to "the advice of the most eminent counsel," or pursuant to a lawful statute that was subsequently determined unconstitutional.[49] An sUAS user, therefore, would be liable for a good-faith but mistaken belief about a boundary line.[50] For several reasons, the "mistaken belief" provision is particularly perilous for sUAS users. As discussed more fully below in this section and in section IV.D, there are many ways an sUAS user could have a mistaken belief about his location, and therefore be liable in trespass.

Trespass offers strong remedies for plaintiffs. Courts award a full range of damages against trespassers, including nominal, compensatory, consequential, and even punitive damages for intentional conduct.[51] This can include the diminution of market value of the land at issue, the cost of restoration of the land, the loss of use of the land, and emotional distress damages, even when there is no physical injury to the person or land.[52] A court may also order injunctive relief against a trespasser for both current and future threatened harm.[53] Accordingly, a defendant in trespass may be liable for damages that are far beyond those normally imposed in a negligence action.[54]

Small UAS users, therefore, may be liable for flying too low and interfering with the use and enjoyment of another's land. Although sUAS may not produce as much dust or vibration as the aircraft involved in traditional aerial trespass cases, sUAS can be very intrusive at lower altitudes. Small UAS move slower, fly nearer to individuals, and typically remain over property for a longer period of time than most aircraft. They can follow people closely and look in their

[47] RESTATEMENT, *supra* note 22, at § 164.
[48] *Id.*
[49] *Id.* at cmt. a.
[50] *Id.* at cmt. c.(2).
[51] *See* 75 AM. JUR. 2D *Trespass* §§ 86-127 (2011).
[52] *See generally id.*
[53] *See id.* at §§ 86-90.
[54] *See id.* at §§ 100 & 130.

windows. Small UAS can even record, store, and broadcast an individual's activities (or lack thereof). Small UAS also tend to provoke the ire of dogs.[55] If a dog owner who permits excessive or untimely barking is liable for interfering with another's use and enjoyment of land,[56] it follows that anyone who causes such barking, including by means of sUAS, has also interfered with a landowner's use and enjoyment of land, and would be liable for trespass.

Overflying sUAS seem innately to incite fear and anger in many humans. As such, its very presence may automatically disturb the use and enjoyment of land. If flown at a low enough altitude, say, within gunshot range, overflying sUAS would necessarily interfere with the immediate reaches of land. Indeed, flying an sUAS at a low enough altitude may get one's sUAS shot down. For example, it appears that such physical force to prevent a trespass may be justified under Kentucky law,[57] notwithstanding the federal statute that could be construed to the contrary.[58] One Colorado town has even considered passing an ordinance to issue hunting licenses to shoot down sUAS and establish a bounty system rewarding the hunters.[59] It is clear then, that sUAS users may be readily subject to trespass liability, which can trigger either a costly damage award, or a costly abatement.

[55] *Accord* Perritt & Plawinski, *supra* note 16, at 310.

[56] *See, e.g., City of Belfield v. Kilkenny,* 729 N.W.2d 120, 128 (2007).

[57] Ky. Rev. Stat. Ann. § 503.080(1)(a) (2006) (physical force justified for protection of property from trespass). In one Kentucky case, a man shot down an sUAS that he claimed was observing his daughter who was sunbathing in his yard. There was disputed evidence concerning whether the sUAS was flying below tree level, but a trial court determined that shooting down the sUAS in response to the invasion did not constitute criminal mischief. Elisha Fieldstadt, *Case Dismissed against William H. Merideth, Kentucky Man Arrested for Shooting Down Drone,* NBC NEWS (Oct. 27, 2015, 1:28 PM), http://www.nbcnews.com/news/us-news/case-dismissed-against-william-h-merideth-kentucky-man-arrested-shooting-n452281. *Compare* Massachusetts law, *Commonwealth v. Haddock,* 46 Mass. App. Ct. 246, 248 n.2 & 249 (1999) (reasonable, nondeadly force permitted to defend property from trespass). *See also* Ashley Codiannia, CNN Exclusive: Snapchat Interview with Senator Rand Paul, CNN, http://www.cnn.com/2015/01/28/politics/rand-paul-snaphat-interview/ (last updated Jan. 28, 2015, 11:32 AM) (quoting Rand Paul: "drones should only be used according to the Constitution. But if they fly over my house, they better be aware because I've got a shotgun.")

[58] Anyone who shoots at an "aircraft," may be sentenced for up to twenty years in federal prison, 18 U.S.C. § 32(a) (2016), in addition to facing a fine of up to $250,000. *Id.* at 3571(b). Merely threatening to down an aircraft is punishable by up to five years in prison and the same steep fine. *Id.* at §32(c) & 3571(b).

[59] Ryan Grenoble, *Drone Hunting in Deer Trail, Colorado? Town Considers Bounty for Unmanned Aerial Vehicles*, HUFFINGTON POST (Jul. 17, 2013, 4:02 PM), http://www.huffingtonpost.com/2013/07/17/drone-hunting-deer-trailcolorado_n_3611806.html, *archived at* http://perma.cc/6ZE2-P4WP.

What guidance can be gleaned for sUAS users from the state of trespass law? First, common law suggests that when flying over the land of another, it would be prudent to fly at an altitude of at least 500 feet AGL over non-congested land and 1000 feet AGL over congested land, which is the FAA's minimum safe altitude for most aircraft. The new sUAS regulations, however, restrict sUAS flight to no more than 400 feet AGL.[60] Ideally, sUAS users should fly as close to 400 feet AGL as possible when flying over the land of another, particularly when that land is occupied and in use. One scholar suggests a "rule of thumb" that sUAS users fly at the treetop or powerline level,[61] but this is not ideal. The *Causby* court found tort liability for aircraft flying 300 feet above the tree level.[62] If it is necessary to fly an sUAS lower, and oftentimes it is,[63] an sUAS user should remain higher than 150 feet AGL because the Restatement comments that flying at 150 feet may present a "question of fact" for liability. Small UAS users should certainly refrain from overflying the land of another at less than 100 feet AGL, given the case law favoring landowners at that altitude. Retailers such as Google, who are testing delivery sUAS as low as 130 feet AGL, should probably adjust their operations accordingly.[64]

Second, sUAS users should fly in a way that avoids interfering with another's use and enjoyment of his land. While this seems like a common sense standard, current newsworthy use of sUAS suggests that common sense does not prevail.[65] It is advisable, therefore, for sUAS users to refrain from excessive noise-making, dust-causing, and light-generating activity, particularly over congested and cultivated land. Operators should also avoid hovering, repeated overflying, following, "peeping" on, and recording individuals. And, while some sUAS users innocently, or even beneficially, engage in some of these

[60] FAR, *supra* note 2, at §107.51(b).

[61] Perritt & Plawinski, *supra* note 16, at 347-348.

[62] *See Causby,* 109 Ct. Cl. at 770.

[63] For example, an sUAS user may have to fly lower to avoid clouds pursuant to FAR § 107.51(d).

[64] Alistair Barr & Greg Bensinger, *Google Is Testing Delivery Drone System: Amazon.com, Domino's Pizza Have also Tested Delivery Drones,* WALL ST. J. (Aug. 29, 2014, 4:04 AM), http://www.wsj.com/articles/google-reveals-delivery-drone-project-1409274480.

[65] *See, e.g.,* Fieldstadt, *supra* note 57 (observing sunbathing teenager); Aaron West, *Redmond Exploring whether Drone Spying Violates Nuisance Law,* WASH. TIMES (June 17, 2016), http://www.washingtontimes.com/news/2016/jun/17/redmond-exploring-whether-drone- spying-violates-nu/ (repeated overflying of home); Michael Rosenfield, *New Hampshire Residents Report Seeing Drones Hover Over their Skylights,* N. E. CABLE NEWS (Jan. 11, 2017), http://www.necn.com/news/new-england/New-Hampshire-Residents-Report-Seeing-Drones-Hovering-Over-Their-Skylights-410339885.html?_osource=taboola-recirc (hovering over skylights in house).

activities, these users should obtain permission from the pertinent landowner(s) to do so in order to avoid trespass and other liability.

It is also very important for sUAS users to take the time to develop and maintain proficiency in operating sUAS. Small UAS can be difficult to fly at first, and they do require self-training to operate. Surprisingly, the testing required to obtain an sUAS remote pilot certificate does not require practical training or aeronautical experience. Small UAS users, therefore, are responsible for their own flight proficiency. There is a similar learning curve with respect to understanding sUAS software applications,[66] and how to undertake contemporaneous physical and software operations in-flight. Lack of proficiency could cause a trespass, subjecting an sUAS user to tort liability.

It is equally important for sUAS users to study the operating limitations of their particular sUAS. Small UAS users must understand the performance capabilities of their particular sUAS, including specific speed and maneuverability limitations; function and capacity limitations with respect to weight, load, and balance issues; overall visual limitations; weather limitations, likely operational failures;[67] and performance limitations inherent to all possible weather scenarios. Failure to adjust to differing operating circumstances could cause the sUAS to intrude into the immediate reaches of another's air space and interfere with the use and enjoyment of land, thereby triggering trespass liability.

There are, moreover, many circumstances under which an sUAS user could misapprehend his location,[68] making it more likely he would cause a trespass. For example, a commercial sUAS user may not understand topography, navigation, weather conditions, mapping, location data, speed issues, load effects, balance calculations, maneuverability, and other operating issues associated with his sUAS. Given that trespassers are liable for unintentional intrusions, sUAS users should spend some time self-educating on these subjects and take plenty of practice before operating the sUAS near the land of another.

[66] This includes a duty to update sUAS software regularly as well as install anti-hacking and anti-hijacking software. *See, e.g.,* Bryant Jordan, Hacker Releases Software to Hijack Commercial Drones, DEFENSETECH (Dec. 9, 2013), http://defensetech.org/2013/12/09/hacker-releases-software-to-hijack-commercial-drones/.

[67] While most sUAS have autonomous safety features, it is not uncommon for an sUAS to fly away or ignore sUAS operator commands, including ascending or descending beyond desired heights or flying beyond commanded distances. Perritt & Plawinski, *supra* note 16 at 320. Indeed, whereas most aircraft have built in redundancies to reinforce safe flight, sUAS generally lack such safety redundancies.

[68] *See generally* section IV.D. *infra.*

B. Private Nuisance

Commercial sUAS users must also be wary of committing private nuisance. A private nuisance is the "nontrespassory invasion of another's interest in the private use and enjoyment of land" that causes "significant harm."[69] One is generally subject to liability if his invasion is "intentional and unreasonable," or if it is "unintentional or otherwise actionable under the rules controlling liability for negligent or reckless conduct . . . ."[70]

Like trespass, this tort claim protects an individual's free enjoyment of land, but unlike trespass, no physical intrusion is required. Nuisance also requires that the tortfeasor manifest tortious intent and cause significant harm, which are not requirements of trespass. The two claims often overlap, as the same action may constitute both a trespass and nuisance. As such, a plaintiff may sue in either tort or both.[71]

Specifically, nuisance requires significant current or potential harm "of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."[72] There must be a "real and appreciable" interference with a plaintiff's interest before he may recover for nuisance.[73] The duration and frequency of the harm is a significant factor for determining liability.[74]

Liability for nuisance also requires some level of tortious intent, such that the tortfeasor's action, or omission,[75] must be (1) intentional and unreasonable, or (2) otherwise negligent or reckless.[76] In determining liability under either standard of intent, a court will balance the gravity of the harm against the utility of the activity at issue.[77] The factors for balancing include, the malicious or indecent intent of the tortfeasor, the avoidability of the harm, the character of the harm, the nature of the locality in which the harm is caused, the social value of the conduct, and the financial burden on the tortfeasor in compensating for continuing harm.[78] For conduct that is negligent or reckless, courts balance an additional factor by considering the magnitude of the risk of harm caused by the conduct.[79] This test

[69] RESTATEMENT, *supra* note 22, at §§ 821D & F.
[70] *Id.* at § 822 (emphasis omitted).
[71] *Id.* at § 821D cmt. e.
[72] RESTATEMENT, *supra* note 22, at § 821F.
[73] *Id.*
[74] *Id.*
[75] *Id.* at § 824.
[76] *Id.* at § 822.
[77] *Id.* at cmt. k; *id.* at §§ 826-831.
[78] *Id.* at §§ 826-828.
[79] *Id.* at § 822 cmt. k.

provides courts with broad discretion in determining the liability of an sUAS user.

Remedies for nuisance include damages for a wide spectrum of losses, including compensation for physical injury, impairment of health, personal discomfort, annoyance and inconvenience, cost of repair of real or personal property, diminished market value of real or personal property, and lost productivity and rent.[80] Courts will also award punitive damages and injunctive relief as necessary.[81] This scheme presents a rich range of judicial choices in balancing outcomes and awarding relief.

A victim may also be entitled to abate the nuisance.[82] Abatement possibilities are limited, however, and must be reasonable.[83] Self-help remedies are permitted only when the nuisance is imminent.[84] A person must not take abatement actions that are unreasonably destructive or intrusive.[85] Any mistake about the facts giving rise to a nuisance, even if reasonable, will not protect a person who acts in abatement.[86] Small UAS users, therefore, may take some comfort in the fact that abatement by gunshot will probably not lie for their nontrespassory sUAS use, even if such use does constitute a nuisance.

Understanding legal precedent for aircraft-related nuisance may be helpful for sUAS users. Successful aircraft nuisance claims typically involve aircraft causing dust, noise, light, and vibration, all with frequency. An sUAS may present the same problems depending on its use. Small UAS also have distinct capabilities from aircraft and even remote-controlled airplanes, such as the ability to hover over, follow, peep on, and record individuals, which make sUAS uniquely intrusive. In weighing the harm of an sUAS use against its utility, a trier of fact may find that frequent or long-lasting overflights (or adjacent-flights) of quiet, residential land during the sleepy hours of the morning amounts to a nuisance. Small UAS use that periodically frightens children, startles chickens,[87] or provokes dog barking would likely subject the user to liability. A trier of fact may also find it particularly harmful if the sUAS is used to follow an individual, or record video, sound, or other data concerning a landowner without permission. Such conduct may be considered contrary to the common standards of

[80] *See* VINCENT R. JOHNSON, STUDIES IN AMERICAN TORT LAW 909 (5th ed. 2013).
[81] *See id.*
[82] *Id.* at 910.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Cf. Causby,* 328 U.S. 256 (aircraft bothering chickens interfered with use and enjoyment of land).

decency, an important factor in the harm-utility balance.[88] Small UAS users, therefore, should be cognizant of the amount of noise and light they generate, the type of land they fly over or around, the frequency with which they fly over or around a parcel of land, the duration of flight over or around a parcel of land, and in-flight conduct such as following an individual or data recording.

It is also important for a commercial sUAS user to remember that he may be liable for unintentional conduct. This means that he may be liable for failure to understand the operating limitations of his sUAS, failure to maintain the physical or software integrity of his sUAS, or for failure to develop and maintain flight knowledge and proficiency;[89] any of which could cause a harmful interference with another's use and enjoyment of land.

And, while a commercial sUAS user must cause significant harm to be liable for nuisance, any harm is unlikely to be outweighed by the social utility of commercial sUAS use under the pertinent legal balancing test. Courts have generally found little social utility in profit-making enterprises absent clear public benefit.[90] Small UAS may someday confer a clear benefit on the public, but until then, they are perhaps more like Supreme Court Justice Alexander George Sutherland's "pig in a parlor" nuisance,[91] for which the unwary user will be liable.

C. Invasion of Privacy

If anything, sUAS use challenges society's sense of privacy, and a commercial sUAS user may face liability for invading another's privacy. Causes of action for privacy invasion have "been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights."[92] Privacy invasion consists of four individual torts: (1) intrusion upon seclusion; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) false light publicity.[93] While one may easily use an sUAS to appropriate the name or likeness of another, to obtain and disclose private facts, or to place another in a false light, it seems that an sUAS user is most likely to commit the tort of intrusion upon seclusion.

[88] RESTATEMENT, *supra* note 22, at § 829.

[89] *See* section III.A., *supra.*

[90] *See, e.g., Esposito v. New Britain Baseball Club, Inc.,* 49 Conn.Sup. 509, 520 (2005) (fireworks from profit-making entertainment enterprise found less socially beneficial).

[91] *Vill. of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926).

[92] William L. Prosser, *Privacy,* 48 CAL. L. REV. 383, 392 (1960).

[93] RESTATEMENT, *supra* note 22, at § 652A.

The Restatement describes a cause of action for intrusion upon seclusion: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[94] The comments to the Restatement provide that for this tort, (a) there must be an intentional intrusion; (b) the intrusion may or may not be physical, may involve the use of senses, with or without mechanical aids, or may involve some other form of investigation into private concerns; (c) must involve something that is private; and (d) must be substantial.[95] This common law tort has been adopted in some form by most jurisdictions.[96]

Under this tort, there is generally no liability for observation while in public "since [one] is not then in seclusion, and his appearance is public and open to the public eye."[97] Certain instances of highly offensive surveillance in public, however, such as "upskirting" [98] or recording a victim of a motor vehicle accident,[99] are actionable. Additionally, close or continued following of an individual, even if that individual is in public, will subject an sUAS user to privacy liability.[100]

In general, intrusion upon seclusion is when someone "interrupts one's activities through unwanted [] presence or activities."[101] For example, the act of photographing a person at home without his permission, even when the victim invites the photographer to enter the home, is an intrusion upon seclusion.[102] In fact, the simple act of information gathering can constitute intrusion.[103] In some states, no

[94] *Id.* at § 652(B).

[95] *Id.* at cmt. a.-d.

[96] Eli A. Meltz, *No Harm, No Foul?: "Attempted" Invasion of Privacy and the Tort of Intrusion upon Seclusion,* 83 FORDHAM L. REV. 3431 (2015).

[97] RESTATEMENT, *supra* note 22, at § 652(B) cmt. c

[98] *See id.*

[99] *Shulman v. Group W Productions, Inc.,* 955 P.2d 469 (Cal. 1998) (television program on emergency response violated privacy rights of victims of motor vehicle accident for filming accident on scene and in rescue helicopter).

[100] *See* ALISSA M. DOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42949, INTEGRATION OF DRONES INTO DOMESTIC AIRSPACE: SELECTED LEGAL ISSUES, at 19-21 (2015) (citing *Galella v. Onassis,* 487 F.2d 986, 991-92 (2d Cir. 1973) and noting that First Amendment will not protect journalists from such invasion of privacy claims); *cf. United States v. Jones,* 132 S. Ct. 945, 963 (2012) (law enforcement placing GPS tracking device on vehicle to follow individual violated reasonable expectation of privacy under Fourth Amendment).

[101] *See id.*

[102] *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

[103] *See Alexander v. Fed. Bureau of Investigation,* 971 F. Supp. 603 (D.D.C. 1997) (*prima facie* case for intrusion made against First Lady Hillary Clinton and others based on gathering of personal information from Federal Bureau of Investigation files).

observation or actual recording of the information is even necessary for a cause of action.[104] Mere intent to intrude is sufficient to give rise to liability.[105]

Anyone who intrudes upon the seclusion of another will be liable for damages for the deprivation of the victim's seclusion, damages for the victim's related emotional distress, and any special damage the victim can prove.[106] A particularly intrusive sUAS user may be subject to additional punitive damages.[107] As with other torts, liability for invasion of privacy case be quite costly, and is something about which an sUAS user should be keenly aware.

Accordingly, an sUAS user who observes the person, affairs, concerns, or property of another inside a home or a place reasonably expected to be private, or just merely intends to do so, is subject to liability under privacy laws if the invasion is unreasonably offensive. Similarly, an sUAS user who records data concerning another that is reasonably expected to be private, or just merely intends to, is subject to privacy liability. This includes observing or gathering data on an individual's physical or virtual whereabouts. As such, it is not difficult to imagine how the Facebook sUAS,[108] for example, which records an individual's internet activity, including imagery, would be liable for a privacy invasion.

Furthermore, an sUAS user should be careful not to fly too close to an individual. Such activity, even if well-intentioned, could give rise to liability, as close flight is more likely to reveal something intimate about an individual, and the closeness itself may constitute an intrusion. A commercial sUAS user should also refrain from following individuals. This includes news media, surveyors, inspectors, and the like whose activities may inadvertently, or not-so-inadvertently, amount to nuisance.

Indeed, while liability for intrusion requires an intentional act, even an "innocent" act could subject the actor to liability. For example, a building owner may use an sUAS equipped with infrared technology to inspect a structure. This type of inspection would likely produce a picture of people inside the building, which may be intrusive.[109] An

[104] *See* Meltz, *supra* note 96, at 3454-64.

[105] *See id.*

[106] RESTATEMENT, *supra* note 22, at § 652(H).

[107] *See, e.g., Pulla v. Amoco Oil Co.*, 882 F. Supp. 836 (S.D. Iowa 1994); *see also* Prosser, *supra* note 92, at 409.

[108] *See* Cade Metz, *Facebook's Giant Internet-Beaming Drone Finally Takes Flight,* WIRED (July 21, 2016, 12:00 PM), https://www.wired.com/2016/07/facebooks-giant-internet-beaming-drone-finally-takes-flight/.

[109] *See Kyllo v. US,* 533 US 27, 38 (2001) (According to Supreme Court Justice Antonin Scalia, law enforcement's use of heat mapping camera is unconstitutional invasion of

sUAS user, moreover may be liable even if the intrusion is done with the intent to benefit the victim.[110] Accordingly, even a well-intentioned sUAS user should be wary of invading the privacy of another.

D. Other Legal Traps

There are countless other ways in which a commercial sUAS user could face legal liability. Considering human nature, it is inevitable that commercial sUAS users will act negligently and cause person injury or property damage.[111] Indeed, as discussed in sections III.A. and III.B. *supra,* a user's failure to develop and maintain flight knowledge and proficiency could constitute negligence. It is also foreseeable that a commercial sUAS user could commit a multitude of torts ranging from intentional infliction of emotional distress to theft of trade secrets. In fact, many states and municipalities have enacted their own specific tort laws addressing sUAS use, increasing an sUAS user's potential liability.[112] Some of these states criminalize pertinent torts. Additional public safety and criminal laws further apply to sUAS use. Stalking, harassment,[113] voyeurism, assault, battery, smuggling, computer intrusions, distracting motor vehicle drivers, and wiretapping are also all real, and likely, applications of an sUAS,[114] and commercial sUAS users should be apprised thereof as well.

Small UAS users should also be wary of "drone zoning," and other similar municipal regulations.[115] With the increased use of sUAS, local regulators may begin to control sUAS use in certain geographic areas. Localities may regulate the altitude, time, hovering duration, location,

reasonable expectation of privacy, because, among other things, it could reveal whether the "lady of the house [was taking] her daily . . . bath.").

[110] *See, e.g., Huskey v. Nat'l Broad. Co.,* 632 F. Supp. 1282 (N.D. Ill. 1986) (documentary crew filming prisoner with intent to improve prison conditions liable for invasion of prisoner's privacy.)

[111] *See, e.g.,* Kirk Enstrom, *Women Sue Groom over Drone Injuries at Wedding Reception,* WMUR (Dec. 8, 2016), http://www.wmur.com/article/women-sue-groom-over-drone-injuries-at-wedding-reception/8480649 (wedding guests sued photographer for negligence after being hit by sUAS); Reuters, *Drone Crashed into Famed Hot Spring at Yellowstone National Park* (Aug. 7, 2014), http://www.cnbc.com/2014/08/07/drone-crashes-into-famed-hot-spring-at-yellowstone-national-park.html (negligent sUAS user loses sUAS in Yellowstone hot spring).

[112] *See, e.g.,* Perritt & Plawinski, *supra* note 16 at 364-374; Meltz, *supra* note 96, at 3440-64; Burzichelli, *supra* note 19 at 182-87.

[113] *See* John Villasenor, *Observations from Above: Unmanned Aircraft Systems and Privacy,* 36 HARV. J.L. & PUB. POL'Y, 457, 505-06 (2013) (providing interesting discussion on sUAS stalking and harassment).

[114] DOLAN & THOMPSON, *supra* note 100, at 29.

[115] *See* Troy A. Rule, *Airspace in an Age of Drones,* 95. B.U.L REV. 155, 203-07 (2015); Michael N. Widener, *Local Regulating of Drone Activity in Lower Airspace,* 22 B.U. J. SCI. & TECH. L. 239, 252-60 (2016).

flight period, flight distance, recording usage, purpose,[116] and other circumstances of sUAS flight. Some local regulators may ban sUAS flight within city limits altogether.[117] The multitude of variables involved in the municipal regulation of sUAS use may present a complicated algorithm of rules to which an sUAS user must carefully attend.

IV. AERONAUTICAL TRAPS

Commercial sUAS users must also attend to the recently promulgated FAA regulations governing sUAS operations. The sUAS regulations consist of nearly one-hundred provisions, and present a rich regulatory scheme controlling sUAS use. It is foreseeable that commercial sUAS users, particularly those who have not undertaken FAA certificated private pilot training as required under prior law, will violate any number of regulations. Indeed, the test required obtain an sUAS remote pilot certificate is much less rigorous than the test required to obtain a private pilot certificate, and fails prepare commercial sUAS pilots for proper and compliant use of their aircraft. As such, unwary sUAS users may be susceptible to violating a handful of regulations, as highlighted below.

A. Small UAS Aircraft Specifications

Any business that wishes to use an sUAS to enhance its operations must first register its sUAS,[118] primarily to ensure owner accountability for legal and regulatory violations. The sUAS itself must weigh less than fifty-five pounds, including everything that is on board or attached to it,[119] and may not carry hazardous material.[120] Before every use, the user must undertake a preflight inspection of the sUAS, which includes requirements to assess weather conditions, local airspace, flight restrictions, and potential hazards associated with the flight.[121] Preflight inspection further requires the sUAS user to ensure that the sUAS is in proper working order.[122] Small UAS users must

[116] For example, a municipality may ban the use of sUAS for aerial advertising. *Cf. Skysign International, Inc. v. City and County of Honolulu,* 276 F.3d 1109 (9th Cir. 2002) (local regulation of signage could be applied to banner-towing aircraft).

[117] Evanston, Illinois has banned commercial sUAS use within city limits and St. Bonaficius, Minnesota has banned all types of sUAS use within city limits, including recreational use. Robert H. Gruber, *Commercial Drones and Privacy: Can We Trust States with "Drone Federalism"?,* 21 RICH. J.L. & TECH. 14, 21 (2015).

[118] FAR, *supra* note 2, at § 107.13.

[119] *Id.* at § 107.3.

[120] *Id.* at § 107.36.

[121] *Id.* at § 107.49(a).

[122] *Id.* at § 107.15 & § 107.49(c)-(e).

also advise anyone participating in the operation of the operating conditions, emergency procedures, roles and responsibilities, and potential hazards related thereto prior to flight.[123]

Failure to comply with any of these specifications would subject an sUAS user to regulatory liability. The required assessment of weather, airspace, flight restrictions, and hazards is particularly complicated and time-consuming, and is an area where a commercial sUAS user would be highly vulnerable to liability. Weather is a sophisticated science, and a proper assessment of weather conditions will require the user to identify and interpret specially published aviation weather charts and data. Similarly, the NAS is complex, and an sUAS user must decode current aeronautical charts, airport facility directories, and other supplements and apply them to his planned flight. An sUAS user must also obtain recent Notices to Airmen, which include time-critical aeronautical information concerning potential airspace hazards and restrictions, including Temporary Flight Restrictions (TFRs),[124] that may be relevant to their flight path. Flight planning takes time, and it is easy to see how a commercial sUAS user, whose time is quantifiable in money, may be tempted to check weather.com and Google Maps to prepare for flight, and neglect the other, more onerous, requirements. An sUAS user must not succumb to such temptation, however, as it would subject him to both regulatory and tort liability.[125]

B. Small UAS User Specifications

To operate an sUAS, a user must be at least sixteen years of age,[126] and pass an aeronautical knowledge test to obtain a remote pilot certificate with an sUAS rating.[127] The user must also pass recurrent knowledge tests every twenty-four months.[128] The regulations further provide that no person may operate an sUAS if he has a physical or

[123] *Id.* at § 107.49(b).

[124] A TFR defines a certain area of airspace where air travel is limited because of temporary hazardous conditions, such as a wildfire or rescue operation; a security-related event, like air travel by the US President; or other special situation, like a Super Bowl. JEPPESEN, *supra* note 34, at 4-77. TFRs are updated perpetually throughout a day, and a pilot must always check them immediately prior to flight. *See generally id.* at 7-45.

[125] For example, failure to understand airspace could easily cause a trespass. Failure to consult appropriate weather sources would constitute negligence. Both situations could also present a nuisance.

[126] FAR, *supra* note 2, at §107.61.

[127] *Id.*

[128] *Id.* at §107.65.

mental condition that would interfere with its safe operation.[129] And, an sUAS user may be surprised to learn that he may not fly an sUAS within eight hours of having even a taste of alcohol.[130]

Other than an occasional, but predictable, user neglecting his recurrent testing requirement, the primary concern with respect to the sUAS user specifications is the requirement that the user not have a compromising medical condition. This regulation is unlike the medical requirements for a private pilot, which provide a list of medical conditions that would disqualify a candidate for a licensing certificate.[131] For sUAS operation, a user would have to self-validate his safe medical condition, which, if done imprudently, would subject him to regulatory liability. An imprudent self-evaluation of an sUAS user would further subject him to tort and other liability if his medical condition led him to trespass, cause nuisance, invade privacy, operate his sUAS negligently, or commit some other legal transgression.

C. Small UAS Timing Specifications

FAA regulations specify that a user must not operate an sUAS at night, and require special anti-collision lighting during civil twilight.[132] In addition, an sUAS user may only fly when there is minimum flight visibility of no less than three statute miles as observed from the location of his control station.[133] Visibility is measured by the average slant distance from the control station at which prominent objects may be identified.[134]

While these specifications present easy compliance, it may be challenging for an sUAS user to measure visibility. Aviation weather sources provide data with respect to horizontal visibility, which may differ from the slant visibility that sUAS users must assess. While private pilots are specifically trained to measure visibility, as well as to identify when visibility becomes diminished, sUAS users lack this training and could easily miscalculate visibility. Flying under conditions with compromised visibility is not only a regulatory violation, but, for all the reasons stated herein, could also effect a trespass, nuisance, negligence, or other tort violation.

[129] *Id.* at § 107.17.

[130] *Id.* at § 91.17. An sUAS user must also not have a concentration of 0.04 or greater grams of alcohol per deciliter of blood or per 210 liters of breath. *Id.*

[131] *Id.* at §§ 67.1 – 67.415.

[132] *Id.* § 107.29. Except for in Alaska, civil twilight is a period of time that begins thirty minutes before official sunrise and ends at official sunrise, and a period of time that begins at official sunset and ends thirty minutes after official sunset. *Id.* at § 107.29(c).

[133] *Id.* at § 107.51.

[134] *Id.* at § 107.51(c).

D. Small UAS Location Specifications

An sUAS user must operate his aircraft within his visual line-of-sight.[135] This means that an sUAS must always remain within sight of the remote pilot or designated visual observer. Small UAS users must refrain from flying over any person not participating in the operation.[136] In addition, an sUAS may not be flown higher than 400 feet AGL or the highest point of a structure,[137] and must remain 500 feet below clouds and 2,000 feet horizontally from clouds.[138] A remote sUAS pilot must also not enter "controlled,"[139] prohibited or restricted[140] airspace without permission from Air Traffic Control, and must not operate in the vicinity of an airport in manner that interferes with its operations.[141] An sUAS flight carrying property for compensation must remain intrastate.[142]

Of all sUAS regulations, it seems that for a variety of reasons, sUAS users are most likely to violate location specifications. First, the test for sUAS pilot certification does not require practical training or aeronautical experience. It is easy to see how an inexperienced remote pilot could violate any one of the location specifications without training or experience on how to aviate.

Second, it may be impossible for an sUAS user to refrain from flying over any people. This is particularly true if an sUAS operation is being conducted in a congested or urban area. An sUAS user may obtain from the FAA a waiver of this requirement, but must follow a specified procedure including providing a complete description of the proposed operation, and establishing that the operation can safely be conducted in the event of a waiver.[143] Given the difficulties of avoiding flight over any people at all times, sUAS users may have to request multiple waivers to avoid violating this regulation. Multiple requests may become overly burdensome, and lead to risky noncompliance.

Third, the knowledge test for the remote pilot certificate with an sUAS rating fails to prepare a user to assess sufficiently his location. The knowledge test does not test pilotage or "dead reckoning" skills.

[135] *Id.* at § 107.31.

[136] *Id.* at § 107.39.

[137] *Id.* at § 107.51(b).

[138] *Id.* at § 107.51(d).

[139] *Id.* at § 107.41. This means that an sUAS may not operate in Class B, C, or D airspace, or within the lateral boundaries of the surface area of Class E airspace designated for an airport.

[140] *Id.* at § 107.45.

[141] *Id.* at § 107.43.

[142] *See* 49 U.S.C. 40102(a)(2) (defining "air carrier") and (a)(5) (defining "air transportation").

[143] *Id.* at § 107.200.

Pilotage is the skill of understanding aircraft location by reading an aeronautical chart or supplement and comparing it with the surrounding terrain.[144] Dead reckoning is the process by which pilots determine their location and effect navigation using time, speed, distance, and direction without the aid of advanced technology, such as a GPS or other computer-assisted information system.[145] While most popular commercial sUAS have GPS and other systems to inform the user of its location, it is not uncommon for such systems to fail. In such a case, an sUAS user without pilotage and dead reckoning skills would likely be unable to determine accurately his location, and make him vulnerable to violating several of the aforementioned FAA regulations.

Furthermore, the sUAS test fails to prepare users to assess their altitude independent of a GPS or other similar system. While most commercial sUAS provide the user with altitude data, and some even verbally alert the user when nearing a maximum specified altitude, not all sUAS have altitude-encoding equipment. Without training, an sUAS user must estimate his altitude, which is a challenging assignment with a device at hundreds of feet in the air. Private pilots also learn that there are also many atmospheric, weather, topographic, lighting, and other conditions that can lead one to misgauge the altitude of an object in the air. Without training or experience, sUAS pilots are not likely to be able to determine the precise altitude of their sUAS without a GPS. Further, the sUAS altitude requirement is given in AGL, whereas aeronautical charts and aids provide many altitudes in MSL. While the sUAS knowledge test does briefly discuss the difference in altitude measurements, this disparity can still pose problems for a novice pilot.

The sUAS knowledge test, moreover, fails to prime a user on in-flight weather observation and data-gathering. Private pilots are trained on how to identify and obtain flight-altering weather conditions during the course of flight. Weather conditions can change abruptly, and ultimately force an aircraft to run outside of its operating limitations. Private pilots are therefore trained on how to interpret in-flight weather data and observations to avoid potentially dangerous conditions. Remote sUAS pilots, however, are not required to develop these skills, even though they may also encounter adverse weather conditions. Adverse weather can cause a pilot to misunderstand his location (e.g., upon entering fast-advancing clouds), or worse, be unable to operate his sUAS safely, thereby posing a danger to people and property on the ground.

[144] JEPPESEN, *supra* note 34, at 9-7.
[145] *Id.* at 9-7, – 9-8.

For the same reasons, sUAS users will initially lack the ability to gauge their distance from the clouds. This may cause the sUAS to enter the clouds errantly, which is an instant violation of several FAA regulations.[146] Once in the clouds, the sUAS user may easily lose his understanding of his location. More significantly, however, an sUAS user that misgauges his distance from the clouds presents a serious collision danger to other aircraft that may be flying in the clouds or exiting from the clouds at high rates of speed. Other aircraft may be unable to see an sUAS that is operating in the clouds, and vice versa, and neither may have time to avoid the other.

The sUAS knowledge test also fails to prepare an sUAS user on many other aspects of flight that would enhance his understanding of his location and remote piloting in general. For example, an sUAS user is not tested on subjects like obstacle clearance requirements, principles of flight, aerodynamics, and electrical theory. Private pilots are tested on all of these subjects, the knowledge of which aid in their regulatory and legal compliance.

Thus, for a variety of reasons, an sUAS user could misapprehend his location, and violate any number of FAA regulations. Misgauging location could cause an sUAS user to wander over people, above a permitted altitude, too close to clouds, into busy controlled airspace, in prohibited or restricted airspace, in the vicinity of an airport interfering with its operations, and across state lines. A lost sUAS user could also errantly wander into warning areas, military operation areas, alert areas, controlled firing areas, low altitude Military Training Routes, areas subject to special TFRs, Parachute Jump Operations, National Security Areas, Visual Flight Rule Routes, and Instrument Flight Rule Routes. Such wandering also presents a risk of tort liability, which includes not just the obvious exposure to trespass and nuisance claims, but also the serious danger of collision with other aircraft that could cause significant personal injury and property damage.

E. Small UAS Operational Specifications

The FAA also provides a list of operational prohibitions about which sUAS users should be informed. In particular, a user should not operate an sUAS in a careless or reckless manner,[147] including operating over eighty-seven knots, or one-hundred miles-per hour.[148] A user may not operate more than one sUAS at a time,[149] and may

[146] *See, e.g., id.* at §§ 107.51(d); 107.31.
[147] *Id.* at § 107.23(a).
[148] *Id.* at § 107.51(a).
[149] *Id.* at § 107.35.

generally not operate an sUAS from a moving vehicle or aircraft.[150] If the sUAS is involved in an accident, a user must report it to the FAA within ten days if the accident resulted in serious personal injury or property damage over $500.[151]

A commercial sUAS user should be able to comply easily with most operational specifications, although the "careless or reckless" operation standard is ostensibly vague. Failure to undertake a thorough preflight examination, failure to ascertain weather conditions, failure to become proficient in flight skills and knowledge or maintain proficiency thereof, failure to maintain the sUAS, as well as failure to update, and understand updates of, sUAS software might all constitute careless or reckless operation. It may also be difficult for an untrained sUAS user to comply with groundspeed restrictions, particularly if his sUAS does not provide groundspeed data, or its groundspeed systems become dysfunctional. Absent practical training, it is difficult to determine the groundspeed of an object in the air, and one can imagine a situation in which a novice commercial sUAS user would miscalculate his speed and violate this and other related regulations, as well as face potential tort liability therefrom.

F. Penalties for Regulatory Violations

Violation of any of the aforementioned sUAS regulations could subject an sUAS user to significant sanctions. It should be noted that the FAA has indicated its intention to promulgate addition regulations governing sUAS, which would further expose sUAS users to potential sanctions.[152] Small UAS users are also subject to numerous other FAA regulations by virtue of being an "aircraft," which may subject them to additional sanctions.[153]

In determining sanctions for any regulatory violation, the FAA weighs several factors, including, but not limited to, the severity of the safety risk involved, the number of pre- and co-existing regulatory and legal violations, whether the violation involved careless or reckless conduct, aggravating and mitigating circumstances, the ability of the violator to absorb the sanction, and the consistency of the sanction.[154] Sanctions include administrative actions such as a "Warning Notice"

[150] *Id.* at § 107.25.

[151] *Id.* at § 107.9.

[152] Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg.42063 at 27-28 & 37 (2016) (to be codified at 14 C.F.R. pts. 21, 43, 61, 91, 101, 107, 119, 133, & 183) [hereinafter Part 107 Preamble].

[153] *Id.* at 39-42.

[154] *See* FAA, Compliance and Enforcement Program, F.A.A. Order No. 2150.3B, at ch. 7 & app. B. (2015) [hereinafter Enforcement Handbook].

or a "Letter of Correction,"[155] certificate suspensions or revocations, and civil penalties that range from $100 to $500,000 per violation.[156]

Commercial sUAS users should be wary of violating FAA regulations, particularly given the FAA's recent aggressive enforcement action against SkyPan International, Inc. ("SkyPan"). SkyPan is an aerial photographer who apparently flew an sUAS above private property, mostly consisting of dirt, grass, or paved lots, to assist land developers with design plans for new buildings.[157] The FAA accused SkyPan of flying without a Section 333 exemption (under previous law), and violating Class B airspace, among other things, and proposed a civil penalty against SkyPan of $11,000 per violation for a total of $1.9 million.[158]

A regulatory violation may not only demand prohibitive fines; it may also constitute negligence *per se,* subjecting an sUAS user to automatic tort liability in addition to administrative liability. Even if a violation is not negligence *per se,* it is likely that activities that violate FAA regulations would also amount to the commission of any number of torts for which an sUAS user would be additionally liable. And, while a sUAS user may successfully defeat FAA enforcement and coincident tort liability, the user will likely have to spend tens of thousands of dollars, or more, in defense costs. It is best, therefore for sUAS users to be mindful of FAA regulations.

V. CONCLUSION

The market for commercial sUAS use is exploding, and there are likely to be millions of commercial sUAS flying around by the year 2020. Commercial sUAS are becoming more affordable and more useful, and the recent changes to the law make it easier to obtain a remote pilot license for sUAS operation. Most commercial sUAS users, however, will lack understanding of both law and aviation, and many unwary users will face the legal and aeronautical traps discussed herein. Tort and property lawsuits are inevitable, as are regulatory violations.

[155] FAR § 13.11. A "Letter of Correction" states the necessary corrective action the alleged violator agrees to take. If the agreed corrective action is not fully completed, legal enforcement action may be taken.

[156] *See* Enforcement Handbook, *supra* note 154.

[157] *See* SkyPan International Inc., Docket No. FAA–2014–1102 at 1 (FAA Apr. 17, 2015), *available at* https://www.faa.gov/uas/beyond_the_basics/section_333/333_authorizations/media/skypan_international_11352.pdf.

[158] Press Release, FAA, FAA Proposes $1.9 Million Civil Penalty Against SkyPan International for Allegedly Unauthorized Unmanned Aircraft Operations (Oct. 6, 2015), *available at* https://www.faa.gov/news/press_releases/news_story.cfm?newsId=19555.

Liability risks for sUAS users, moreover, are likely to grow in the future. There will be more state and local laws governing sUAS, and the FAA intends to promulgate additional regulations relative to sUAS. Significantly, businesses should not assume that insurance will cover any liability associated with their sUAS use.[159]

It is important, therefore, for a commercial sUAS user to understand the applicable legal and regulatory hazards. To avoid liability, commercial sUAS users should spend time with competent legal counsel to discuss the legal and regulatory issues discussed above. And, in addition to the FAA recommended twenty hours of self-study,[160] sUAS users should spend some time with a Certified Flight Instructor to review the NAS, weather, pilotage and dead reckoning, performance issues, airport operations, aeronautical decision-making, common safety practices, and the culture of aviation. Responsible attention to, and careful study of, all the aforementioned issues should mitigate the risk of the potentially costly tort and regulatory liability associated with commercial sUAS use.

[159] *Cf.* Tom Schrimpf & Russ Klingaman, *Recreational Drones: Do Homeowners' Insurance Policies Provide Coverage?,* CLAIMS J. (Aug. 4, 2015) http://www.claimsjournal.com/news/national/2015/08/04/264918.htm (noting policies exclude coverage for damage associated with "aircraft" use).

[160] Part 107 Preamble, *supra* note 152, at 551.

STICK 'EM UP THIS IS A BREACH: A CASE FOR PUNITIVE DAMAGES FOR CONTRACT HOLDUPS

by Scott Thomas,* David Missirian** and Mystica Alexander***

I. INTRODUCTION

Consider the following fact pattern. After lengthy negotiations, the parties finally arrive at terms to a contract. Before the parties complete their obligations under the contract, one party makes a midterm demand to renegotiate the contract using the threat of a breach of contract to increase her bargaining power in negotiating a new contract or modifications to an existing contract. We see these scenarios repeatedly. Superstar athletes hold out in a demand for contract renegotiation, a consumer of services withholds payment after services have been provided in the hope of getting a price reduction, or a vendor decides to sell promised goods to a third party unless the customer pays a higher price. Corbin has used the phrase "holdup" to refer to these types of situations.[1] Holdup is a fitting term for this behavior, since the behavior, in its own right, justifies the term and the victims are often limited to recovery of foreseeable compensatory damages.

Traditionally, courts have held the purpose of contract damages is to compensate the victim of a breach for injury. These damages often address three different interests held by the nonbreaching party: expectation interest, reliance interest, and restitution interest.

* Lecturer, Bentley University
** Assistant Professor, Bentley University
*** Assistant Professor, Bentley University

[1] IA A. CORBIN, CORBIN ON CONTRACTS § 171, at 105 (1963).

Protecting the plaintiff's restitution interest means the defendant should return any benefit the plaintiff conferred. Protecting the plaintiff's reliance interest requires the reimbursement of the plaintiff for losses sustained in reliance on the contract, returning the plaintiff to her position prior to the contract. This paper focuses on the awarding of expectation damages to put the nonbreaching party where she would have been if the contract had been performed and concludes these damages are insufficient.[2] In the awarding of damages, expectation damages usually exceed reliance damages, which often exceed damages awarded for restitution. Courts have generally been reluctant to provide a plaintiff with an award beyond these three measures of damages. More specifically, punitive damages have generally not been available in contract actions. As stated in Section 355 of the Restatement (Second) of Contracts: "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."[3]

However, in cases of a willful breach of contract, in which the breaching party seeks to better her position through the breach, the traditional measure of damages seems to fall short, and punitive damages could serve as a well-needed deterrent to such behavior. Unfortunately, dismissing or ignoring ethical reasons for deterring holdups, the courts and commentators have often justified limiting recovery to expectation damages using economic theory, social policy, and existing commercial law doctrine.

This paper explores these economic, social, and ethical theories. Part II provides a more detailed look at typical holdup scenarios. Part III discusses the economic theories and social theories used by courts when limiting damage awards. Part IV explores the ethical dimensions of contractual agreements and the ethical implications of "bad behavior." Ultimately, this paper concludes that justice is best served by the awarding of punitive damages to victims of a holdup.

II. UNDERSTANDING HOLDUPS IN THE COMMERCIAL SETTING

A holdup can occur in many forms and ultimately leads to the encouragement of breaches when courts limit their awards to expectation damages. Consider more closely the impact of the superstar athlete and the service recipient engaging in a willful breach.

A superstar athlete is in his third year of a four-year contract. Hoping for a contract extension, the superstar refuses to attend

[2] Robert Cooter and Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432 (1985), http://scholarship.law.berkeley.edu/facpubs/1449 .

[3] RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

practices and to play in exhibition games until his contract is renegotiated. Faced with this predicament, ownership stands in the shoes of the holdup victim and often finds little relief from the courts. One commentator has explained the mechanics and bargaining power of a holdout as follows:

> Owners will sign a marquee player to a long-term deal to please fans and promote team stability. However, certain players elect to try to coerce ownership into renegotiating existing contracts before the contractual term has expired. These players, usually perennial all-stars at the prime of their careers, will announce, likely during the off-season, that they will "hold out" from training camp and the upcoming season unless their contract is modified to reflect their "true value." When negotiations reach a stalemate, the player will follow through on his threat and refuse to participate with the team.[4]

One of the reasons a player's threat to hold out is so powerful is that the legal remedies available to a team against a superstar are sorely lacking.[5] At best, a team can secure a "negative injunction" to prevent a player from playing professionally for another sports franchise. It is "exceedingly burdensome to establish what the loss of one player, even a superstar player, will have on the club's performance and its financial condition."[6] As a result of these limitations, owners have not successfully litigated a claim for damages against an athlete.[7] The difficulty of reaching a suitable calculation of damages also undercuts the likely effectiveness of some of the more creative solutions to the holdout problems proposed by commentators, such as the use of tortious breach of contract litigation.[8] The punitive damages proposed have often relied on the establishment of an independent tort.[9] As a result, these superstars better their positions for the remaining years on their contracts with no adequate damages left for the nonbreaching owners. Left with the burden of proving damages and disappointed fans, the owner becomes a victim of the holdup. The player's opportunistic behavior increases his slice of the pie, and the owner receives no compensation. Punitive damages for breach of contract

[4] Basil M. Loeb, Comment, *Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to be Done*, 11 MARQ. SPORTS L. REV. 275, 275 (2001).

[5] See generally Alex M. Johnson, Jr., *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61 (1989).

[6] *Id.* at 78.

[7] *Id.* at 81.

[8] Kevin Yeam, *New Remedial Developments in the Enforcement of Personal Services Contracts for the Entertainment and Sports Industries: The Rise of Tortious Bad Faith of Contract and the Fall of the Speculative Damages Defense*, 7 LOY. L.A. ENT. L.J. 27 (1987).

[9] *Id.*

could level the playing field and discourage this type of opportunistic breach.

Another frustrating opportunistic breach is a bad faith refusal to pay. A service provider spends months learning the business of a client, presents the client with a contract that is negotiated by the attorneys for several weeks, the services occur over a year, and the client accepts the services as fully in compliance with the contract. However, the client, fully aware of its negotiating leverage, refuses to pay. This could occur when the client has other contracts with the organization, leaving the service provider fearful those contracts could suffer. This could also occur in situations where suing clients in a small professional community could damage the service provider's reputation, despite the strong validity of the claim. When considering these types of breaches, one court has expressly held that an "obstinate and willful refusal to pay . . . is a ground upon which punitive damages may legitimately be granted."[10] But this is highly unusual, and even some states that generally allow punitive damages for breach of contract deny such damages for willful refusal to pay a debt.[11]

III. CHARACTERIZING THE BREACH AND RATIONALIZING THE LIMITATION OF DAMAGES

Analyzing the appropriate damage award for a willful breach requires consideration of the economic and social implications of such a breach. After describing the types of willful breaches of contracts and the legal history, this part explores each of these areas and the unique considerations applicable to each type of willful breach.

A. Types of Willful Breach

Commentators have divided willful breaches into two categories: opportunistic and efficient. "A breach is opportunistic if the breaching party attempts to get more than he bargained for at the expense of the nonbreaching party."[12] An opportunistic breach would include the holdup described above where a party refuses to pay for properly performed services merely to obtain a price reduction. The breaching party improves her position at the expense of the nonbreaching party. An efficient breach improves the position of the breaching party but gives the benefit of the contract to the nonbreaching party through the payment of expectation damages. An efficient breach example would

[10] DynaSteel Corp. v. Aztec Indus., 611 So. 2d 977, 984 (Miss. 1992).

[11] See, e.g., Vann v. Nationwide Ins. Co., 185 S.E.2d 363, 364 (S.C. 1971) ("Punitive damages are not recoverable for the mere failure or refusal to pay a debt.").

[12] See William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L. J. 629, 652 (1999).

include finding another customer willing to pay more for your product and breaching your contract for the sale of those goods to the nonbreaching party, but paying expectation damages to the nonbreaching party. Therefore, proponents of efficient breaches would argue that it creates a "Pareto improvement" whereby the breaching party is better off and neither party suffers from the breach.[13] In other words, an opportunistic breach slices the pie into different size portions, while an efficient breach increases the overall size of the pie. Despite placing these two breaching parties in different camps, where one is being labelled as an opportunistic breacher, the presumably bad seed, and the other as merely being an efficient breacher, the presumably good seed, let it not be lost that both of these parties broke their promise to perform.

B. Damages for a Willful Breach

Although punitive damages have traditionally been awarded in tort actions, the long-standing presumption of lawyers and scholars alike is that punitive damages should not be awarded for a breach of contract.[14] What are the origins of this presumption and is this presumption, in fact, accurate? To understand the law's approach to punitive damages, it is necessary to view this in the context of the origin of contracts, the origin of punitive damages, and the objectives served by the award of such damages.

1. Historical Background:

Our modern understanding of contracts has its origins in the nineteenth century.[15] While the medieval understanding of contractual relationships was rooted in the idea of "inherent injustice" or "fairness of an exchange" that prevailed through the eighteenth century, the nineteenth century witnessed a departure from this approach as courts and jurists both in England and the United States established that "the source of obligation of contract is the convergence of the wills of the contracting parties."[16] Traditionally, contract remedies seek to compensate a non-breaching party for harm suffered, and do not seek to compel the breaching party to perform.[17]

[13] E. FARNSWORTH, CONTRACTS §1.2 at 7, note 1 (1982).

[14] Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977).

[15] Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARVARD L. REV. 917 (1974).

[16] *Id*.

[17] Dodge, *supra* note 12, at 630.

A look at the system of justice in Medieval England indicates that by the end of the reign of King Henry III in 1272, the King's Court had not yet developed a doctrine of contract law. [18] A loose notion of contract law indicated that it was limited to cases in which a defendant had received either something tangible or services from a plaintiff for which he failed to pay.[19] In this early time period we see the court either imposing punishment for crimes committed, or providing specific relief to a plaintiff for harm suffered.[20] "The plaintiff's objective was not to receive a judgment for some pecuniary sum but rather to obtain a judicial declaration establishing his entitlement to the return of some species of property of which he had been deprived."[21] It was only gradually during the thirteenth century that there arose a suggestion that it may be possible to recover a "double remedy."[22] "This can be attributed to the rise of trespass actions which would set the law on a path to making "the award of pecuniary compensation commonplace in Anglo-American law."[23]

Interestingly, punitive damages trace their origins in English law to juror sentiment rather than to any specific legislative or judicial actions. Although there was precedent for setting the amount of damages based on some fixed schedule,[24] the King's Court rejected this approach in the assessment of damages, choosing instead to vest responsibility for this in the jury.[25] For example, punitive damages were awarded in 1769 to an individual whose unmarried daughter was impregnated by the defendant. The court made note that the jury was right to award liberal damages, and that the court would have approved of an even greater amount because the plaintiff received this insult from the defendant "in his own house."[26]

English law did not prescribe rules for juries on how a damage award can/should be assessed, and so jury assessments were sometimes excessive and sometimes inadequate.[27] In the absence of substantive law, the courts found procedural means to control damage

[18] F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 194 (2d. ed. 1898). http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/maitland/HistoryEnglishLaw2.pdf (Cambridge University Press, Cambridge).

[19] Pollock, *supra* note 18, at 222.

[20] *Id.* at 523.

[21] Sullivan, *supra* note 14, at 208.

[22] Pollock, *supra* note 18, at 524.

[23] Sullivan, *supra* note 14, at 208-209.

[24] Pollock, *supra* note 18, at 457-458.

[25] Sullivan, *supra* note 14, at 209.

[26] Tullidge v. Wade, 95 Eng. Rep. 909 (K.B. 1769).

[27] Sullivan, *supra* note 14, at 210.

awards.[28] For example, in the thirteenth century the "writ of attaint" was developed. This could be used to either set aside an erroneous verdict but also punish any jury that rendered a false verdict. This short-lived approach gradually gave way to other methods of controlling a jury verdict, so that in 1655, in the case of *Wood v. Gunston,*[29] the court ruled a new trial could be awarded to a defendant solely as a result of an excessive damage award.[30] Although in this case the King's Court established the authority of the court to grant a new trial on the ground of excessive damages, it is important to note this rule was not applied equally to tort and contract cases. Judges were less likely to interfere with damage awards for tortious conduct than for contract damages.[31] So here we see the beginning of a distinction for damages in contracts actions as opposed to those involving tortious behavior.

By the early nineteenth century, punitive damages, especially in tort actions, were an accepted part of English law. This sentiment carried over to the American legal system. By the mid-nineteenth century punitive damages in tort were well-settled law, although not without some controversy and disparity as to the limitations of such awards.[32] Much like their English predecessors, early American jurists generally did not provide jury instructions on damages awards, nor did they ordinarily take action to adjust a damage award they found disagreeable. [33] Such action confirmed the early view of contracts cases as equitable in nature, ruled by the prevailing standard of the "community's sense of fairness."[34] Early court decisions in colonial Virginia and South Carolina illustrate the jurist's deference to the jury's award of damages.[35] As time progressed, a different approach to contract law began to be adopted, the effects of which we see in The Restatement (First) of Contracts description of the purposes of contracts damages: "Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and gains prevented by the defendant's breach."[36] There is a

[28] *Id.*

[29] 82 Eng. Rep. 867 (K.B. 1655).

[30] Sullivan, *supra* note14, at 212.

[31] *Id.* at 212-213.

[32] *Id.* at 215.

[33] Horwitz, *supra* note 15, at 925.

[34] *Id.*

[35] *Id.*, citing Pledger v. Wade, 1 Bay 35, 37 (S.C. 1786) (South Carolina Supreme Court will not award a new trial even though the jury verdict was for a lesser amount that the contract price), and Waugh v. Bagg, 1 Virginia Colonial Decisions 77, 78 (Va., 1731) (excess damages awarded by a jury was not grounds for a new trial).

[36] RESTATEMENT OF CONTRACTS §329 (1932).

movement away from the notion of fairness and justice to one of putting a party back to where one started absent the breach. The simplistic notion of putting a party back to its position before the breach has inherent appeal, but can an action ever truly be undone or reversed as to all of its consequences and ramifications?

2. Contemporary Understanding of Contract Damages:

The Restatement (Second) of Contracts makes clear the prevailing approach with regard to availability of punitive damages: "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."[37] There are a few exceptions to the rule barring punitive damages for breach of contract: breach of a contract by a public service company,[38] breach of a contract that is also a breach of a fiduciary duty,[39] breach of a contract to marry,[40] and bad faith breach of an insurance contract.[41]

For a brief period of time, in the 1970s and 1980s, the U.S. witnessed a more liberal approach to punitive damages awards with various jurisdictions "allowing plaintiffs to recover punitive damages directly in contract actions and others achieving the same result by characterizing some contractual breaches as torts."[42] However, since the end of the 1980s courts have generally retreated from this expansion of punitive damage awards to once again focus on the compensatory nature of contract damages.[43]

Although rarely allowed in contract cases, the U.S. Supreme Court has defined the contemporary function of punitive damages as punishment and deterrence.[44]

[37] RESTATEMENT (SECOND) OF CONTRACTS §355 (1981).

[38] See, e.g., Stevenson v. John J. Grier Hotel Co., 251 S.W. 355, 355 (Ark. 1923); Milner Hotels v. Brent, 43 So. 2d 654, 656 (Miss. 1949).

[39] See, e.g., Brown v. Coates, 253 F.2d 36, 40 (D.C. Cir. 1958); Newton v. Hornblower, Inc., 582 P.2d 1136, 1149 (Kan. 1978); Balsemides v. Perle, 712 A.2d 673, 685 (N.J. Super. Ct. App. Div. 1998).

[40] Coryell v. Colbaugh, 1 N.J.L. 90, 91 (N.J. 1791).

[41] At least 45 states recognize bad faith breach of an insurance contract as a tort in third-party cases. See Douglas R. Richmond, An Overview of Insurance Bad Faith Law and Litigation, 25 SETON HALL L. REV. 74, 80 n.33 (1994) (listing cases).

[42] Dodge, *supra* note 12, at 638. See, for example Barry Perlstein, *Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract*, 58 BROOKLYN L. REV. 877 (1992) (discussing a line of California cases that have concluded that acting in bad faith is a breach of the implied covenant of fair dealing in a contract).

[43] Dodge, *supra* note 12, at 642.

[44] Smith v. Wade, 461 U.S. 30 (1983).

> Punitive damages are awarded in the jury's discretion "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts Sec. 908(1) (1979). The focus is on the character of the tortfeasor's conduct – whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages … To put it differently, society has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault.[45]

C. Economic Rationale for Limiting Damages:

We find little discussion regarding the reluctance of our courts to award damages that go beyond expectation damages. Instead, the courts appear to have avoided any discussion of the benefits that punitive damages could bring in maintaining the sanctity of contracts.

> [O]ne of the principal impediments to analysis of contract cases treating the question of punitive damages is the consistent absence, particularly in the early cases, of any meaningful judicial discussion of the philosophy of damage law.... Whatever the explanation, we must begin without any firm idea of *why,* beyond adherence to traditional English standards, American courts have held, as a general rule, that punitive damages should not be awarded for breach of contract.[46]

In *Iron Mountain Security Storage v. American Specialty Foods, Inc.,*[47] a federal district court provided insight with respect to damage limitations involving contracts. Although this case involved a tort lawsuit for a violation of the implied covenant of good faith and fair dealing, it gave us a sense of the thinking of the courts at that time. The court refused to extend tort liability beyond insurance contracts, concluding that most contract violators would be subject to tort liability since "the violation of most contracts involves a breach of faith."[48] In other words, the court seemed to believe that because contract violations are common, they should not be subject to tort liability and potential punitive damages. But the court did not explain why bad faith breaches do not justify tort liability and the imposition of punitive damages.

In the absence of meaningful discussions of punitive damages, judges have relied, in part, on economic theories to support the denial of punitive damages in a holdup. As explained in part IIIA,

[45] *Id.* at 54-55.
[46] Sullivan, *supra* note 14, at 221.
[47] 457 F. Supp. 1158 (E.D. Pa. 1978).
[48] *Id.* at 1165 n.7.

opportunistic behavior does not create wealth or enlarge the size of the economic pie, but simply redistributes wealth from the nonbreaching party to the breaching party.[49] Opportunistic breaches may go further and actually reduce the size of the pie because "potential opportunists and victims expend resources perpetrating and protecting against opportunism."[50] The opportunist may spend time and money looking for loopholes in a contract and the victim may spend its own time and money protecting itself from the opportunist's behavior.[51]

Thus, as Judge Posner recognizes, the law should discourage opportunistic breaches of contract:

> If a promisor breaks his promise merely to take advantage of the vulnerability of the promisee in a setting (the normal contract setting) where performance is sequential rather than simultaneous, we might as well throw the book at the promisor. An example would be where A pays B in advance for goods and instead of delivering them B uses the money in another venture. Such conduct has no economic justification and ought simply to be deterred.[52]

As Judge Posner's quote illustrates, no economic efficiency results and the breaching party is rewarded for the holdup. If courts restrict their awards to expectation damages in holdups, the stickup man will ultimately learn that breaching contracts is a profitable venture. Judge Posner stated the argument for damages beyond expectation damages when a promisor breaches opportunistically, "we might as well throw the book at the promisor. . . . Such conduct has no economic justification and ought simply to be deterred."[53] Punitive damages would provide the appropriate deterrence.

A "holdup" that could be characterized as an efficient breach finds only flawed support in the theory of creating a Pareto improvement through an efficient breach. Support for the encouragement of an efficient breach seems to find its roots in Justice Holmes' *The Common Law*:

> The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference

[49] George M. Cohen, *The Negligence Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 973 (1992).

[50] Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 524 (1981).

[51] *Id.*

[52] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 131 (5th ed. 1998).

[53] *Id.* at 130.

> until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.[54]

Judge Posner, in favor of punitive damages for opportunistic breaches does not find the same need for punitive damages with an efficient breach:

Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result.[55]

Judge Posner has also commented that "Holmes's dictum . . . contains an important economic insight. In many cases it is uneconomical to induce completion of performance of a contract."[56] Continuing on this point, "The modern theory of efficient breach is an extension of Holmes' outlook on contractual remedy."[57] In other words, the rationale underlying the encouragement of efficient breach is that expectation damages due to the promise will ensure the promisor will breach only when the gains from breach exceed the legal damages. Conversely, the promisor will be discouraged from breaching when gains from the breach do not exceed the legal damages.[58]

There are a number of problems with this analysis. The efficient breach argument assumes that the breaching party willingly agrees to compensate for the nonbreaching party's actual losses and does not try to take advantage of the costs of litigation to avoid paying damages or settle for a lesser amount. The efficient breach argument also assumes that expectation damages do, in fact, put the nonbreaching party in as good a position as performance. However, this argument ignores the fact that nonbreaching parties may not recover for emotional distress, negative public speculation regarding the reason the breaching party backed out, potential secondary business clients who are now leery of contracting with the non-breaching party, attorneys' fees, or

[54] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 301 (1881).

[55] Patton v. Mid-Continent Sys., 841 F.2d 742, 750 (7th Cir. 1988).

[56] POSNER, *supra* note 53.

[57] Daniel Friedmann, *The Efficient Breach Fallacy*, The Journal of Legal Studies, Vol. 18, No. 1. (Jan. 1989), pp. 1-24, 2.

[58] Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977).

prejudgment interest leaving the nonbreaching party in a hole dug by someone else and as a result without adequate expectation damages.[59]

The promisor often finds breach attractive not because anticipated gains from the breach exceed anticipated losses, but because she never intends to pay damages.[60] For example, one who contracts to sell goods at a specified price has no incentive to breach a contract when market price rises, since the gains derived by selling to an alternative purchaser at the higher rate will be offset by the promisee's legal damages. But if the seller never intends to compensate the promisee for her legal damages, there is nothing to discourage a breach. In a system in which a breach, coupled with a refusal to pay resulting damages, is often its own reward, it is not surprising that intentional breach often occurs.

Ultimately, if the breaching party is not responsible for the nonbreaching party's full losses or has no intention of compensating the nonbreaching party for losses, then there is an incentive to breach even when the breach would not be efficient.[61] In addition, the doctrine suffers from its own logic in that the breach allocates the benefit of the breach to the breaching party. Klass illustrates the improper distribution of gains under our current legal system using the following fact pattern.

> The original contract promised $4 per unit in net gains from performance, $2 profit to Seller and $2 profit to Buyer. Third Party's offer to pay $13 for the goods created the opportunity for the parties to realize between them a $5 per unit gain ($13 price - $8 Seller costs = $5). If, as the efficient breach theory recommends, Seller breaches, pays expectation damages, and sells the goods to Third Party, Seller pockets the $1 difference ($3 profit vs. $2 profit) and buyer comes out even ($2 expectation damages). If, on the contrary, Seller delivers the goods, Buyer might sell them to Third Party. Now, as compared to the first transaction, Seller comes out even ($2 profit), whereas Buyer receives the extra $1 from the sale to Third Party ($13 resale price - $10 contract price = $3). The theory of efficient breach is morally problematic not only because it encourages a moral wrong, but also

[59] See, e.g., C. Delos Putz, Jr. & Nona Klippen, *Commercial Bad Faith: Attorney Fees—Not Tort Liability—Is the Remedy for "Stonewalling"*, 21 U.S.F. L. REV. 419, 452-60 (1987); (arguing that awarding attorneys' fees is preferable to awarding punitive damages).

[60] Thomas A. Diamond, The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions? 64 MARQ. L. REV. 425 (1981). Available at: http://scholarship.law.marquette.edu/mulr/vol64/iss3/1 .

[61] See, e.g., John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation*, 33 U.C.L.A. L. REV. 1565, 1573. (1986). ("By systematically undercompensating plaintiffs, we risk encouraging too much breach rather than too little.").

> because it would allocate all the gains from that wrong to the wrongdoer.[62]

Dual performance hypothesis attempts to support our current legal system and the concept of an efficient breach. In short, the hypothesis postulates that no breach has occurred if the breaching party pays expectation damages because those damages fulfill the obligation to the nonbreaching party. To reach this result, the dual performance hypothesis holds that the typical promisor makes a promise to deliver goods or services in return for consideration *or* to pay damages when the promisee chooses not to deliver or perform. Therefore, the promisor "breaches" only when she fails to deliver and refuses to pay.[63] This theory assumes that the promisee receives "the equivalent of the promised performance" when the promisor merely pays expectation damages. This transfer is "the exact scope of what was promised in the event" that the promisor does not tender.[64]

The logic of the dual performance hypothesis requires us to assume that parties enter into contracts with this theory in mind. In other words, the parties interpret their contract as including a promise to either perform or pay expectation damages.[65] Supporters would argue that the pricing of the contract relies on this assumption. In other words, the promisor charges less for the goods or services assuming that a breach would require only the payment of expectation damages.[66] Therefore, permitting punitive damages, specific performance, disgorgement or other remedies would require a corresponding increase in the price. Because of the price advantage received by the promisee, the promisee will often be the beneficiary of contract gains resulting from the logic of the dual performance hypothesis.

A normative analysis of dual performance has found few supporters. Frederick Pollock, critical of this logic, wrote the following in 1891:

> A man who bespeaks a coat of his tailor will scarcely be persuaded that he is only betting with the tailor that such a coat will not be made

[62] Gregory Klass, *Efficient Breach, in the Philosophical Foundations of Contract Law* (G. Klass, G. Letsas & P. Saprai, eds., Oxford University Press, forthcoming). http://scholarship.law.georgetown.edu/facpub/1185/.

[63] Note that dual performance assumes an efficient breach and does not address inefficient breaches.

[64] Alan Schwartz and Daniel Markovits, *The Myth of Efficient Breach* (2010). Faculty Scholarship Series. Paper 93. http://digitalcommons.law.yale.edu/fss_papers/93 .

[65] *Id*.

[66] *Id.*

> and delivered to him within a certain time. What he wants and means to have is the coat, not an insurance against not having the coat.[67]

More recently, Stephen Smith wrote "[i]t just seems implausible, as a matter of fact, to regard contracting parties as having agreed, in the typical case, to disjunctive obligations to perform or compensate."[68] Others have more generally dismissed the theory. Andrew Gold wrote that "as a general description of what parties intend, or even as an interpretation of the public meaning of contract language, [the dual performance hypothesis] seems inadequate."[69] Indeed, the Uniform Commercial Code notes that "the essential purpose of a contract between commercial [parties] is actual performance and they do not bargain merely for a promise, or for a promise plus the right to win a lawsuit."[70] The dual performance hypothesis fails to adequately support limiting damages for an efficient breach. Rather, it seems to constitute a contrived attempt to support existing law by proposing a change to the interpretation of the bargain by the parties to the contract.

The social argument for encouraging efficient breaches of contract begins with a recognition that if breaches are too harshly sanctioned, there will be deterrence not only of breach but of the execution of contracts.[71] "[I]f damages are awarded to secure expectation interest in order to encourage the making of contract promises, to introduce damage measuring law which goes beyond the value of expectations may introduce a deterrent to the very contract making behavior to be encouraged." Therefore, damages must not be so oppressive as to discourage the formation of binding commercial agreements."[72]

Our current legal system in which a breach, often coupled with a refusal to pay resulting damages, seems to encourage willful breaches or holdups. Without an effective deterrent to holdups, the system encourages service hold outs, and bad faith refusals to pay. When balanced against these defects, damages going beyond expectation damages are warranted and far outweigh the need to encourage the execution of contracts.

[67] FREDERICK POLLOCK, PRINCIPLES OF CONTRACT XIX (London, Stevens & Sons rev. 3d ed. 1881).

[68] STEPHEN A. SMITH, CONTRACT THEORY 402 (2004).

[69] Andrew S. Gold, *A Property Theory of Contra*ct, 103 NORTHWESTERN UNIV. L. REV. 1, 54 (2009).

[70] 8UCC § 2-609 cmt. 1 (2003).

[71] Hartzler, *The Business and Economic Functions of the Law of Contract Damages,* 6 AMER. BUS. L.J. 387, 392 (1968).

[72] Gardner, *An Inquiry Into the Principles of the Law of Contracts,* 46 HARV. L. REV. 1, 29 (1932).

III. CAN EXISTING ECONOMIC THEORY WITHSTAND ETHICAL SCRUTINY

As explained in Part II, there is little to no support to be found in either legal or economic theories for opportunistic breaches of contract. Efficient breaches, however, have found some support in economic theories. This Part III explores willful breaches, and more specifically, efficient breaches, from an ethical perspective.

A. Introduction to Ethical Behavior

The theory of "efficient breach" has by its very name curb appeal. Its name states categorically that it is efficient, a presumably good outcome.[73] It is an economic theory and given the contractual backdrop of the discussion, has certain legitimacy. After all economics is: "a social science concerned chiefly with description and analysis of the production, distribution, and consumption of goods and services."[74] These are areas in which contracts abound: Article 2 of the Uniform Commercial Code deals with the sale of goods[75] and common law contracts deals with the sale of services. Therefore isn't economics the proper point of our analysis? What could be better than efficiency?

Yet the definitions of efficiency seem to vary depending on the discipline. In economics it means: "an economic state in which every resource is optimally allocated to serve each individual or entity in the best way while minimizing waste and inefficiency."[76] In investments, efficiency means: "a level of performance that describes a process that uses the lowest amount of inputs to create the greatest amount of outputs."[77] If we view contracts as an integral part of our society one need ask what we are attempting to achieve through the use of contracts in our society. Are we attempting to create the greatest amount of outputs? Are we attempting to minimize waste? Or are we attempting to increase social welfare?

So, if we presume that the purpose of contracts is to improve society, then it follows that we should mold our contract law to maximize this benefit or good to society. But what do we mean by something which is good for society or a benefit to society? To evaluate the overall value

[73] 2017 Daniel Seth Lewis, *Is Efficiency a Good Thing*, (March 23, 2017) http://www.danielsethlewis.com/2013/09/is-efficiency-good-thing.html.

[74] Merriam-Webster, *Definition of Economics,* (March 23, 2017) https://www.merriam-webster.com/dictionary/economics.

[75] *Article 2 of the UCC: Definition & Terms*, Study.com (March 23, 2017) http://study.com/academy/lesson/article-2-of-the-ucc-definition-terms.html.

[76] *Economic Efficiency*, Investopedia, http://www.investopedia.com/terms/e/economic_efficiency.asp, (March 23, 2017).

[77] *Id.*

to society of efficient breach as a concept we must first understand the notion of what it means to act in a good or beneficial way. To do this we need to look at the ethics of our society. Ethics can be thought of as, "a set of moral principles, or an area of study that deals with ideas about what is good and bad behavior."[78] Morality (as differentiated from morals) can be looked at as "conformity to ideals of right human conduct."[79] In everyday life most people would agree that acting ethically is a benefit to society. In the business setting many people also espouse acting ethically for various reasons. Amy Rees Anderson, founder and managing partner of ReesCapital and prior CEO of MediConnect Global, Inc., offers the following advice on achieving success: "Do the right thing and let the consequences follow."[80] Others believe that, "a business must keep in tune with the wishes of the societies it serves or it runs the risk of alienating its shareholders, stakeholders and customers. This would be bad for business, reducing growth and potentially affecting profit."[81] Ms. Anderson's comments tend more towards the inspirational while the latter comment tends more towards a nod to ethical conduct being necessary to garner more profits.

Regardless of which of these justifications for ethical behavior is correct, the question still remains what is the right thing to do? Is the right thing or the ethical thing or the good thing always the same in all circumstances? Is the proper behavior the same regardless of position, station, and circumstance? Am I always my brother's keeper?

B. Common Ethical Theories Outlining Good Behavior

Philosophers have grappled with the concepts of good and evil, right and wrong, for centuries. Despite the vastness of ethical theories on the subject, a review of some of the more prevalent ones will be helpful in answering some of the questions posed. As a very general premise, most ethical theories can be divided into either duty based systems (deontology) or consequence based systems (teleology).[82] A duty based system chooses conduct based on what ought to be done regardless of

[78] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, Eleventh Edition, *available at* http://www.merriam-webster.com/dictionary/.

[79] *Id.*

[80] Amy Rees Anderson, *Do the Right Thing*, Amy Rees Anderson Blog (March, 23, 2017), http://www.amyreesanderson.com/blog/do-the-right-thing/.

[81] *Business Ethics and Corporate Social Responsibility, and Anglo American Case Study* (March 23, 2017) http://businesscasestudies.co.uk/anglo-american/business-ethics-and-corporate-social-responsibility/why-should-a-business-act-ethically.html.

[82] GERALD R. FERRARA, MYSTICA M. ALEXANDER, WILLIAM P. WIGGINS, CHERYL KIRSCHNER AND JONATHAN DARROW, THE LEGAL AND ETHICAL ENVIRONMENT OF BUSINESS, (2014) p. 47.

the consequences of that conduct whereas a consequence based system demands conduct based on the outcome of the conduct.[83] Some ethical theories contain elements of both duty based systems and consequence based systems.[84] Saint Thomas Aquinas can be viewed as one of those philosophers whose theory may delve into both camps.[85]

St. Thomas Aquinas viewed law or rules designed to circumscribe our conduct as "a rule or measure of human acts, whereby a person is induced to act or is restrained from acting"[86] It is a boundary for our conduct which was related to and rooted in reason.[87] Where might this reason begin? Aquinas would say in being or in the beginning of life.[88] Aquinas felt that all reason was directed towards achieving good. "Good is to be done and evil is to be avoided."[89] For Aquinas this "good" or natural state is one which originates from the eternal law and is endowed within us from the very beginning of life, giving us an innate internal sense of good.[90] Yet if we have this internal sense of the good why do we as a people deviate from that direction. For Aquinas the answer is clear: our skewed behavior has its roots in original sin.[91] Despite the significant influence of original sin on human behavior, St Thomas Aquinas does believe that our actions are driven for the most part by the influence of God.[92] His approach highlights the conflict of desires which individuals sometimes feel within. For Aquinas, the actions of the opportunist[93] are incongruous with the nature of the good: "Whoever walks in integrity walks securely, but whoever takes crooked paths will be found out."[94]

Another approach which attempts to clarify right and wrong which has endured the test of time is Utilitarianism. Utilitarianism is an outcome based system.[95] Originated by Jeremy Bentham and further refined by John Stuart Mill, Utilitarianism according to Jeremy

[83] *Religious Studies Online, Natural Law Theory* (March 23, 2017) http://www.rsrevision.com/Alevel/ethics/natural_law/.

[84] *Id.*

[85] *Id.*

[86] *ST* Ia IIae 90.1, *cited in Thomas Aquinas: Moral Philosophy*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (March 23, 2017) http://www.iep.utm.edu/aq-moral/#H4.

[87] *Thomas Aquinas: Moral Philosophy*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, http://www.iep.utm.edu/aq-moral/#H4, (March 23, 2017).

[88] William S. Brewbaker III, *Thomas Aquinas and the Metaphysics of Law*, 58 ALABAMA L. REV. 575, 585 (2007).

[89] *Id.* at 602.

[90] *Id.* at 595.

[91] *Id.* at 610.

[92] *Id.* at 586.

[93] The opportunist here is equivalent to our stickup man in the holdup.

[94] Proverbs 10 NIV.

[95] FERRARA, et. al., *supra* note 88, at 52.

Bentham looked at whether the act produces pleasure or happiness and prevented pain and suffering.[96] John Stuart Mill in refining Bentham's ideas stated: "actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure."[97] Additionally, Mills believed that our actions should strive to be those which benefited society as a whole in addition to benefiting ourselves.[98] Mill's felt that it was in our nature to be nurturing to society as a whole, and that by seeking happiness for our fellow man we too would thus be benefited.[99] One can see how Mills links positive outcomes for society with positive actions for self. Also, the instinctive nature of man's desire to act in furtherance of society seems to resonate with concepts espoused by St Thomas Aquinas above of having some pre-ordained notion of acting towards the good of society.

Yet when we are looking towards choosing our actions in a way which maximizes the good or the beneficial outcome to society, how far does that obligation extend? The answer to this depends on how one defines society. Webster defines it as: "the people of a particular country, area, time, etc., thought of especially as an organized community."[100] So if we pick our community as society, what if our actions are viewed by some in our society as producing happiness while others do not? The difficulty faced by Bentham and Mills' theory is that it presupposes an understanding of what is beneficial and good. This lack of clarity can make its application in practice very difficult. Thus in an effort to add clarity to these theories some proponents of Utilitarianism looked to Christian religious ideals as a way of harmonizing the interests of the individual, who are motivated by their own happiness with the interests of society as a whole.[101] Consider the holdup of the star athlete in the light of Utilitarianism. One wonders if the Star Player thinks that he is acting with integrity when he holds his team up for more money by breaking his word to play. Utilitarians would look at his actions and say the greatest good can be achieved only by following the moral path, rather than worldly desires (such as economic efficiency).

[96] *Id.*

[97] *John Stuart Mill (1806-1873)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (MARCH 23, 2017) http://www.iep.utm.edu/milljs/#SH2d.

[98] *Id.*

[99] *Id.*

[100] Merriam-Webster, (March 23, 2017) https://www.merriam-webster.com/dictionary/society.

[101] *John Stuart Mill (1806-1873)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (March 23, 2017) http://www.iep.utm.edu/milljs/#SH2d.

The final theory we will examine is that stated by Emmanuel Kant in his categorical imperative. "Act only on that maxim whereby thou canst at the same time will that it [your action] should become a universal law."[102] The categorical imperative can be stated simply by using the following approach. Take whatever action you are contemplating and then universalize it. Or to put it differently, would you consider your action to have a good result if everyone were to follow the same conduct. The method advanced by Kant is a duty based system where doing the correct thing is the best choice regardless of the outcome. So for Kant we should consider doing the right thing regardless of its consequences.[103] The right course of conduct being determined by having everyone act in the same way and presumably multiplying any negative effect of the conduct. Thus if after universalizing the action it is still viewed as good then it must be so. Looking at Kantian philosophy, there is a sort of symmetry between parts of his philosophy and the proverb, "do unto others as you would have them do unto you."[104]

For Kant acting in a moral way was paramount regardless of the outcome. For example, Kant felt that, lying is something which is to be avoided, "as it was contrary to our moral dignity."[105] Both the opportunist and the efficient breacher are telling a lie if they entered the contract knowing that they would consider breaching the contract in the event something better comes along.

While no one philosophical method has the perfect solution to what is a good or beneficial result, each put acting in a way which is good ahead of acting in a self-centered way. There seem to be no ethical theorists who espouse a theory of good centering itself on economic efficiency or on economics at all. Some theories attempt to make morality a simple matter by reducing good conduct to imperatives without considering consequences. Others give us vague generalities to maximize the good without telling us what specifically is the good. And others tell us to do that which is innately within us. Nonetheless, all theories seem to search for something more. They center the good or acting in a good way around an idea which is beyond that for which men, who lack integrity, strive. They all see one's word as a priceless thing, rather than something which can be dismissed and compensated with the latest coin of the realm. "When a man makes a vow…or takes an oath to obligate himself by a pledge, he must not break his word but

[102] FERRARA, *supra* note 88, at 50.

[103] *Id.*

[104] *Luke* 6:31(New International Version).

[105] Tim C. Mazur, *Lying*, ISSUES IN ETHICS, (v.6, n.1, Fall 1993), https://www.scu.edu/ethics/publications/iie/v6n1/lying.html.

must do everything he said."[106] Let us be a society of people whose laws help us along the straight and narrow moral path rather than one which dispenses morality for economic efficiency.

IV. CONCLUSION

It seems the faster we move, and the more sophisticated we believe our society to be, the more we lose track of our origins. We want to prove we know best and that morality, contracts, and law need to be kept distinct. Yet there was a time in our history when a sense of fairness was part of the law.[107] What happened to the time when we listened to our conscience, and economics and morality did not sleep in the same bed? As the Blue Fairy in Pinocchio said, "a conscience ought to be Lord High Keeper of the knowledge of right and wrong, counselor in moments of temptation, and a guide along the straight and narrow path."[108] The straight and narrow has no room for the holdup artist, the Star Athlete who can sink a basket at will but who has no integrity, or the supplier who can be economically efficient but who has no morality.

Rather than deter holdups, our current legal system actually encourages such breaches. These holdups serve no societal function, find no support in economic theory, and violate the sanctity of our promises and our moral concepts of justice. Damages going beyond expectation damages are warranted. Punitive damages seem to be a fitting consequence of a holdup in that they were designed with exactly such a deterrent effect in mind. In the words of Posner, "[i]f a promisor breaks his promise merely to take advantage of the vulnerability of the promisee . . . we might as well throw the book at [him]."[109] Let punitive damages be that book.

[106] Numbers 30:2 NIV.

[107] Morton J. Horwitz, *supra* note 15, at 925 (citing Pledger v. Wade, 1 Bay 35, 37 (S.C. 1786)).

[108] https://ohmy.disney.com/movies/2013/04/05/we-wish-jiminy-cricket-was-our-conscience/.

[109] POSNER, *supra* note 48, at 105.

THE DEVELOPING LAW OF EMPLOYEE NON-COMPETITION AGREEMENTS: CORRECTING ABUSES; MAKING ADJUSTMENTS TO ENHANCE ECONOMIC GROWTH

by David P. Twomey

I. INTRODUCTION:

Non-compete employment contracts prohibit employees from working for a competing employer for a set period of time after leaving their employment.[1] Today, non-compete agreements not only affect chief executive officers, managers, engineers, scientists and information technology specialists,[2] but also lower wage earners such as fast food employees and hair stylists. [3] The U.S. Department of the Treasury recently issued a report raising concerns about the misuse of non-competes across education, occupation and income groups and the resulting adverse implications for worker bargaining power, job

[1] Note. This paper deals with non-compete employment contracts. Restrictions in a contract of sale of a business prohibiting the seller from going into the same or similar business again within a certain geographic area, for a certain period of time are enforced in all states. Even California, which prohibits all employee non-compete agreements in section 16600 of its Business Professional Code has statutory exceptions that cover and protect sales of a business whether effected through the sale of the business's assets, the sale of shares in a corporation, or the sale of a partnership interest. *See* Cal. Bus. & Prof. Code § 16601 (2016) (sale of goodwill or corporation shares; agreement not to compete); id. §16602 (partners; dissolution, dissociation, or sale; agreement not to compete).

[2] *See* EMC Corporation v. Clesle, 2016 Mass. Super. LEXIS 124 (May 13, 2016).

[3] *See* Hair Club for Men, LLC v. Ehson, 2016 U.S. Dist. LEXIS 118069 (E.D. Va. May 6, 2016).

mobility and economic growth. [4] Developing law through court decisions and state legislative activity continues to weigh, balance and adjust protections for legitimate employer interests while not unduly burdening employees and the economic growth of regional economies.

II. LEGAL TRENDS IN SELECTED STATES

The Restatement (Second) of Contracts sets forth the general principles for states to enforce non-compete agreements considering: (1) whether "the restraint is greater than needed to protect the [employer's] legitimate interests; (2) the hardship to the [employee]; and (3) the likely injury to the public.[5] The employer's legitimate business interests may include confidential information, trade secrets and customer good will.[6] Overly broad geographic and time restrictions are unenforceable.[7] While the majority of states reflect the Restatement's principles, they do so guided by the rule of reason, resulting however in somewhat different, evolving formulations in different states.

A. Massachusetts Case Law: Blue Penciling Overbroad Restrictions: Banning Restrictions on Ordinary Competition for Conventionally Skilled Service Providers

When an employer discovers that a former employee is working for a competitor in violation of a non-compete agreement, through counsel it may notify the new employer and threaten litigation; [8] and, if not successful, the former employee may seek a preliminary injunction in state or federal court prohibiting the violation of the non-compete agreement.[9] Motions for preliminary injunctions are heard expeditiously by the courts and are ordinarily used to preserve the status quo pending trial on the merits. However, in non-compete cases the validity of the time limitation in the non-compete agreement is

[4] Office of Economic Policy, U.S. Department of the Treasury, "*Non-Compete Contracts: Economic Effects and Policy Implications*" www.treasury.gov, p.6 (March 2016).

[5] Restatement (Second) of Contracts § 188 (1981).

[6] DAVID TWOMEY, MARIANNE JENNINGS & STEPHANIE GREENE, BUSINESS LAW, PRINCIPLES FOR TODAY'S COMMERCIAL ENVIRONMENT. pp. 277, 278 (5th ed. 2017).

[7] *Id.*

[8] In Socko v. Mid-Atlantic Systems of CPA, Inc. 126 A. 3d 1266 (Pa. 2015) the employer notified the new employer and threatened litigation resulting in Socko's termination. Socko successfully challenged this action, with the court deciding that the agreement was unenforceable for lack of consideration because it was entered into after the commencement of Socko's employment with his former employer, Mid-Atlantic.

[9] *See* EMC Corporation v. Clesle, 2016 Mass. Super. LEXIS 124 at *7 (May 13, 2016).

clothed with immediacy. Decisions at the preliminary injunction stage become, in effect, a determination on the merits.[10]

In order to obtain a preliminary injunction a plaintiff must show: (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.[11] Regarding Massachusetts technology industries, state and federal courts enforce non-compete and non-disclosure agreements to protect against inevitable or even inadvertent disclosure.[12] In *SimpliVity Corp. v. Moran,* the court allowed a preliminary injunction against Keith Moran, enjoining him from working for a competing start up, Nutanix, or any other firm in the data storage industry for a year even though he promised not to solicit the customers of his former employer, SimpliVity.[13] The court determined that he would inevitably use the SimpliVity confidential information in his brain memory in selling Nutanix's products and competing against SimpliVity. [14]

In Massachusetts, rather than declining entirely to give effect to an unreasonable non-competitive clause, a court may modify its terms so as to make it reasonable.[15] Partial enforcement is sometimes called "blue penciling" – a throwback to the days when lawyers edited written work with a blue pencil.[16] In *Perficient, Inc. v. Priore,* the court found that the two year restriction in the non-compete clause was longer than reasonably necessary to protect the employer, Perficient, from a 23 year old college graduate who had only worked for the client at issue for nine months. [17] The court revised the restrictions to a one year period.[18]

Enforcement of non-competition clauses in Massachusetts is limited to the extent they serve a legitimate business interest of the employer such as protection of trade secrets, confidential business information

[10] Horner International Co. v. McCoy, 754 S.E. 2d 852 (2014).

[11] SimpliVity Corp. v. Moran, 2016 Mass Super. LEXIS 297 at *21 (Aug. 14, 2016).

[12] *Id. See also* SimpliVity Corp. v. Bondranko, 2016 U.S. Dist. LEXIS 117448 at *10 (D. Mass. Aug. 31, 2016).

[13] *Moran*, 2016 Mass. Super. LEXIS 297 at *33.

[14] *Id.*

[15] Kroeger v. Stop & Shop Companies Inc., 13 Mass. App. Ct. 310, 312 (1982).

[16] *See* Turnell v. Centimark Corp., 796 F.3d 656, 662 (7th Cir. 2015) for a discussion of the origin of the term "blue penciling."

[17] Perficient, Inc. v. Priore, 2016 U.S. Dist. LEXIS 56704, at *20 (D. Mass April 26, 2016).

[18] *Id.* at *19.

and customer good will.[19] An employer is not entitled to a preliminary injunction to enforce a non-compete agreement against former employees who possess no more than the conventional job knowledge and skill readily obtainable from publicly available sources.[20] In *Elizabeth Grady Face First, Inc. v. Garabedian*, the employer was not entitled to a preliminary injunction on a non-compete agreement against two former employees who operated a day spa nine miles from the plaintiff's shop.[21] The court found that there was no evidence that the defendants were possessed of or exploiting bona fide trade secrets, confidential information, or customer good will belonging to the Company, rather the court stated it was evident that Elizabeth Grady's true motivation was to thwart ordinary competition from conventionally skilled service providers. The court determined that this was not permissible under Massachusetts law.[22]

B. Virginia Case Law: No Reforming Overbroad Non-Compete Agreements

Covenants that restrain trade are disfavored by Virginia courts.[23] The employer must show that the restraint in a non-compete clause is necessary to protect a legitimate business interest, is not unduly harsh in curtailing an employer's ability to earn a livelihood and is reasonable in light of sound public policy.[24] The courts analyze the restrictions in terms of function, geographic scope and duration.[25]

Unlike Massachusetts courts, Virginia courts have no authority to "blue pencil" or otherwise reform or rewrite overly broad restrictions in a non-compete contract.[26] In *Home Paramount Pest Control v. Shaffer* the non-compete provision prohibited Shaffer from "engag[ing] indirectly or concern[ing] himself… in any manner whatsoever" in pest control "as an owner, agent, servant, representative, or employee and/or as a member of a partnership and/or as an officer, director or stockholder of any corporation, or in any manner whatsoever."…[27] Because the non-compete provision did not confine the "function' element to those activities Shaffer actually engaged in for the

[19] *See* Elizabeth Grady Face First, Inc. v. Garabedian et al, 2016 Mass. Super. LEXIS 34 at *5 (Mar. 25, 2016).

[20] *See id*. at *7.

[21] *See id*. at *13.

[22] *Id.* at *11.

[23] Hair Club for Men, LLC v. Ehson, 2016 U.S. Dist. LEXIS 118069 at *7 (E.D. Va. Aug. 31, 2016). *See also* Modern Environments, Inc. v. Stinnett, 263 Va 491 (2002).

[24] *Id.*

[25] Simmons v. Miller, 261 Va. 561,581 (2001).

[26] Landmark Tech, Inc. v. Canales, 454 F. Supp. 2d 529 (E.D. Va. 2006).

[27] Home Paramount Pest Control v. Shaffer, 282 Va. 412, 416 (2011).

employer, the court found the non-compete provision was overbroad and unenforceable.[28]

In *NVR Inc. v. Nelson* the court determined that the geographic scope of the non-compete provision was indefinite and could possibly extend to at least fourteen states.[29] Accordingly, the court found the geographic scope of the non-compete provision overbroad and thus not valid.[30]

C. Washington State Case Law Protecting Low Wage Workers

Like most other states, Washington law disfavors restraints on trade regarding covenants not to compete and other restrictive covenants such as non-solicitation clauses.[31] This is especially true when low wage, at-will employees are involved. In *Genex Cooperative, Inc. v. Contreras*, the court refused to enforce a non-compete clause against a low-level agricultural worker with an employment-at-will relationship with the employer. [32] It determined that the restrictive covenant was unreasonable because the at-will employee may be terminated without any cause and then be prohibited from seeking new employment in his line of work.[33] Regarding another former Genex bovine inseminator, the court stated that it appeared to the court that the employer actually used restrictive covenants to eliminate competition or to strong-arm employees to accept ever-dwindling wages and restrict their freedom to work.[34] The court determined that the non-competition agreement was unenforceable as a matter of law and would not be reformed.[35]

D. Illinois Law: Protecting Low Wage Workers

Illinois follows the general rule that covenants not to compete are valid if they are reasonable in purpose and scope and are supported by adequate consideration.[36] In 2016 the state took action against a fast

[28] *Id*. at 418.

[29] NVR Inc. v. Nelson, 2017 U.S. Dist. LEXIS 21829 at *21 (Feb. 14, 2017).

[30] *Id*.

[31] *See* Knight, Vale & Gregory v. McDaniel, 37 Wash. App. 366, 370 (1984).

[32] Genex Cooperative, Inc. v. Conteras, 2014 U.S. Dist. LEXIS 141417 at *21 (E.D. Wash. Oct. 3, 2014).

[33] *Id* at *18.

[34] *Id*.

[35] *Id.*

[36] For a discussion of Illinois law on adequate consideration *see* McInnis v. OAG Motorcycle Ventures, LLC, 35 N.E.3d 1076, 1083 (Ill. App. 2015) (employment alone of an at-will employee is not considered adequate consideration to support enforcement of a non-compete clause; an employer's promise of continued employment may be an illusory benefit where the employment is at-will; the court determined that continued employment for super motorcycle salesman Chris McInnis of eighteen months was

food franchise for requiring low wage workers to sign non-compete agreements. Illinois Attorney General Lisa Madigan filed a lawsuit on June 8, 2016 against Jimmy John's Sandwich Shops seeking injunctive and other equitable relief contending:

> … that Jimmy John's use of non-compete agreements for at-will, low wage workers limits the ability of employees to find new employment, … hinders upward mobility of workers looking for higher wages or advancement with new employment using skills obtained in their current employment, and suppresses wages for employees who have limited negotiating power with both current and potential new employers when they are limited by a non-competition agreement. …[37]

All store employees are employees at-will, and all store employees in Illinois were required to sign a non-competition covenant, [38] which stated in part:

> **Non-Competition Covenant.** Employee covenants and agrees that, during his or her employment with Employer and for a period of two (2) years after… he or she will not have any direct or indirect interest in or perform services for (whether as an owner, partner, investor, director, officer, representative, manager, employee, principal, agent, advisor, or consultant) any business which derives more than ten percent (10%) of its revenue from selling submarine, hero type, deli-style, pita and/or wrapped or rolled sandwiches and which is located within three (3) miles of either (1) _____ [Insert address of employment], or (2) any such other JIMMY JOHN'S Sandwich Shop operated by JJF, one of its authorized franchisees, or any of JJF's affiliates....
>
> **Costs and Attorney's Fees.** Employee agrees to reimburse Employer and JJF for all costs and expenses, including attorney's fees, that Employer or JJF incur to enforce this Agreement against Employee.[39]

On December 7, 2016 the parties announced a settlement with Jimmy John's, in which the company, among other things, is required to notify all current and former employees that their non-compete agreements are unenforceable and that Jimmy John's does not intend to enforce them. [40]

insufficient consideration).

[37] Complaint, Illinois v. Jimmy John's Enterprise, LLC., 2016 CCH 07746 at 17.

[38] *Id*. at 5.

[39] *Id*. at Exhibit A.

[40] "*Illinois Attorney General Madigan Announces Settlement With Jimmy John's For Imposing Unlawful Non-Compete Agreements*," http://www.illinoisattorneygeneral.gov/pressroom/2016_ 12/20161207.

Effective January 1, 2017 the Illinois Freedom to Work Act bans the use of non-compete agreements for those earning less than $13.50 per hour.[41]

E. California: Continuing Its Ban on Non-Competes

California does not follow the general rule that covenants not to compete are valid if they are reasonable in purpose and scope. California Business and Professions Code section 16600 states, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.[42] The policy behind California's rule as expressed by the California Supreme Court states:

> Every individual possesses as a form of property the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer provided such competition is fairly and legally conducted.[43]

However, agreements not to disclose an employer's trade secrets during or after the term of employment are fully enforceable.[44]

Even though non-compete agreements are not enforced in California, still California employers often require that workers sign non-compete agreements there, with some 19 percent of workers currently working under unenforceable non-compete agreements. [45]

Applying to contracts entered into after January 1, 2017, California law now prohibits the litigation outside of California of most employment-related issues including non-compete and trade secret matters affecting California based employees. [46]

[41] Illinois Freedom to Work Act, Public Act 099- 0860, Effective, January 1, 2017.

[42] CAL. BUS. & PROF. CODE §16600 (2017).

[43] Cont'l Car-Na-Var Corp. v. Mosely, 24 Cal.2d 104, 110 (Cal. 1944).

[44] *See, e.g.* Muggill v. Reuben H. Donnelly Corp. 62 Cal.2d 239 (Cal. 1965).

[45] Office of Economic Policy, U.S. Department of the Treasury "Non-compete Contracts Economic Effects and Policy Implementations" (March 2016) p. 12.

[46] CAL. LAB. CODE § 925 (2016) states:

(a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

(1) Require the employee to adjudicate outside of California a claim arising in California.

(2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

III. ADJUSTING NON-COMPETE LAW TO ATTRACT NEW HIGH TECH VENTURES: MASSACHUSETTS AND CALIFORNIA APPROACHES

Derived from the U.S. Department of the Treasury's recent report on "*Non-Compete Contracts: Economic Effects and Policy Implications*,"[47] a recent White House paper summarized the position that non-compete agreements can affect the mobility of workers, clearly affecting a region's growth as follows:

> When firms in a given industry are clustered, it makes it easier for their workers to share expertise and discoveries, some of which may not be protected by trade secret or intellectual property legal provisions. Economists refer to geographic clustering effects of factors like a large, deep pool of skilled workers, a more competitive market of suppliers, and information spillovers across workers and firms as "agglomeration effects."
>
> While not necessarily in the interest of an individual firm, more rapid dissemination of ideas and technology improvements can have significant positive impacts for the larger regional economy in terms of innovation, entrepreneurship, and attracting more businesses and jobs to a region. Non-competes that stifle mobility of workers who can disseminate knowledge and ideas to new startups or companies moving to a region can limit the process that leads to agglomeration economies. Overly broad non-compete provisions could prevent potential entrepreneurs from starting new businesses in similar sectors to their current employer, even if they relocate.[48]

The research history for the positions set forth in the White House paper on information spillovers across workers and firms as "agglomeration effects" goes back to Professor Ronald Gilson's 1999 article comparing the growth of California's Silicon Valley and the Route 128 corridor outside of Boston.[49] The post-employment non-compete agreements applicable to Massachusetts employees presented a barrier to the second-stage agglomeration economy that sustains a high technology district by allowing it to reset its product life cycle, an economy that did not develop on Route 128 but did in Silicon Valley.[50]

With the idea of becoming more competitive with California in terms of venture capital investments in new high tech enterprises and to continue to invigorate its start-up community, Massachusetts legislators recently set out to enact comprehensive legislation relating

[47] *Supra* note 45, p. 22.

[48] "*Non-compete Agreements: Analysis of the Usage, Political Issues and State Responses*" The White House, May 5, 2016. p. 22.

[49] Ronald J. Gilson, "*The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*", 74 N.Y.U.L. REV. 575 (1999).

[50] *Id*. at 607.

to non-compete agreements. In the summer of 2016 it proposed passage of the Massachusetts Non Competition Agreement Act,[51]containing the following major revisions:

- The non competition agreement must be provided to the employee by the earliest of a final offer of employment or 10 business day before starting work.[52]
- If signed after employment it must be supported by fair and reasonable consideration in addition to continued employment.[53]
- It must be tailored to protect legitimate business interests such as, trade secrets, confidential business information and good will.[54]
- It must not exceed one year in duration.[55]
- It must be reasonable in geographic territory, limited to areas where the employee provided services in the last 2 years of employment.[56]
- It must be reasonable in scope of prescribed activities, relating to work activities the affected employee has performed over the last 2 years of employment.[57]
- It may be judicially reformed.[58]
- It will not apply to employees who have been terminated without cause or laid off, or to student interns. [59]

The proposed legislation contained a "garden leave" provision which would require an employer to pay a worker a half year's salary if the worker could not take a new job due to the one year non-compete provision.[60]

Interest groups and legislators ran out of time with the ending of the legislation session on July 31, 2016 without the necessary

[51] H.B. 4434, § 24 L. (June 27, 2016) https://masslegislature.gov/bills/189/H.B.4434.html.

[52] § 24L (b)(i).

[53] § 24L (b)(ii).

[54] § 24L (b)(iii).

[55] § 24L(b)(iv).

[56] § 24L(b)(v).

[57] § 24L(b)(vi).

[58] § 24L(d). A May 19, 2016 version of the proposed legislation, H.B.4323, had stated in subsection (d) that a non-compete agreement may not be judicially reformed.

[59] §24L(c).

[60] § 24L(b)(vii). The subsection also contained the option of "other mutually-agreed upon considerations between the employer and the employee" but this option did not soften the opposition to the bill. *Id*. The chief executive of the Greater Boston Chamber of Commerce, Jim Rooney commented, "It creates a dynamic in which one employer would have to basically pay someone for not working… this does not feel right." See Jon Chesto, "Bill to Limit Non-compete deals includes a surprise catch". https://www.bostonglobe.com/business/2016/05/16/bill-limiting-noncompete-agreements-advances-with-contentious-provision/bfGSYp0oCW6UVSQH4LMaBM/story.html

compromises needed for the Massachusetts House and Senate to pass new legislation. The "garden leave" provision was difficult for employers and some legislators to accept.[61] Proponents are now waiting to go forward in next year's legislative session.

The vibrancy of California's Silicon Valley innovation economy due in part to information sharing facilitated by worker mobility unfettered by non-compete agreements is well established.[62] It has been encumbered somewhat however, by practices where major employers including Google and Apple allegedly agreed with each other not to hire away each other's employees, a factor contradicting the mobility of employees in high tech firms in Silicon Valley.[63]

Metropolitan Boston has enormous core strengths in technology derived from MIT, Harvard, its other major universities and its world class research based hospitals. Boston leads the world in start-up activity in biotech, and there is solid growth in tech industries as well.[64] Moreover, there is a surge in innovation in Intelligence Systems, where start-ups are building out infrastructure for practical applications of Intelligence Systems.[65] Appropriate adjustments to its non-compete legal infrastructure will enhance Boston's future growth.

IV SUGGESTED GUIDANCE AND CONCLUSIONS

A case can be made to ban employee non-compete agreements like California, North Dakota and Oklahoma,[66] however all other states provide some measure of enforcements of non-compete agreements to protect legitimate business interests of employers.[67] Recent court decisions previously presented have exposed the misuse of non-competes and their adverse impact on employees ability to bargain for better pay and find new better paying jobs. Aware of the abuses and accepting in part the California experience that banning non-competes

[61] *See* Jon Chesto, "Bill Limiting Non-compete Agreements Advances With Contentious Provisions" https://www.bostonglobe.com/business/2016/05/16.

[62] *See supra* note 45, p. 22.

[63] *See* U.S. v. Adobe Systems, Inc.; Apple Inc.; Google Inc.; Intel Corp.; Intuit Inc. and Pixar, 2011 U.S. Dist. LEXIS 83756 at *5 (D. D.C. Mar. 17, 2011) where defendants agreed that they participated in at least one agreement in violation of the Sherman Act and each defendant was enjoined from attempting to enter into, any agreement with any other person to in any way refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person. *See also* Steve Musil "Apple/Google offer $415 million to Settle Anti-pouching Suit – SNET", Jan. 15, 2015, www.CNET.com.

[64] Todd Hickson "The Boston Tech Startup Ecosystem Is Making a Strong Comeback", April 8, 2016, www.forbes.com.

[65] *Id.*

[66] RUSSELL BECK, EMPLOYMENT NONCOMPETES A STATE BY STATE SURVEY (July 31, 2016).

[67] *Id.*

advances the innovation economy of a region, many states are looking to update their non-compete laws. Some trends may be found in the cases previously set forth in this paper.

A. Misuse of Non-compete By Employers

The Jimmy Johns Sandwich Shops non-competes are a clear abuse of a legal framework meant to protect employers legitimate business interests, by limiting the mobility of its at-will low wage workers and locking them into their current employment.[68] While Jimmy Johns asserts that it does not enforce these agreements, the clear agreement language calling for the employer to assess all costs and attorney fees on employees to enforce the agreement, has a chilling and restrictive effect on employees and is a misuse of the non-compete framework.[69]

The *Genex Cooperative*, *Inc.* enforcement cases from Washington state identified the misuse of restrictive covenants by an employer to eliminate competition and to strong arm at-will, low wage agriculture employees to accept ever-dwindling wages and restrict their freedom to work.[70]

In the *Elizabeth Grady* Massachusetts case the court refused to grant a preliminary injunction because the employer's true motivation was to thwart ordinary competition from conventionally skilled service providers.[71] The trouble and expense of the litigation itself was an abuse suffered by low wage workers and should be corrected by legislation.

B. Strict Applications of the Non-compete Agreements Regarding Functions, Geographic Scope and Duration.

Avoiding competition is not a legitimate business interest, while protecting business plans and methods and other confidential information can properly support a non-compete agreement. Reasonable restrictions on occupational functions (job duties) and geographic and duration restrictions vary depending on each individual businesses circumstances and the employees in question. Unreasonable restrictions will not be well received by a court at the preliminary injunction stage as seen in the two Virginia cases previously presented, one involving an overbroad "function" and the other overbroad in geographic scope.[72] Virginia courts have declined

[68] Madigan, *supra* note 40.
[69] *Id.*
[70] *Genex*, 2014 U.S. Dist. LEXIS at *18.
[71] *Elizabeth Grady*, 2016 Mass. Super LEXIS 34 at *11.
[72] NVR Inc. 2017 U.S. Dist. LEXIS 21829 at * 21.

to "blue pencil" overbroad non-compete agreements.[73] In the *Genex* case the court stated it had the equitable power to modify an unreasonable covenant to enforce its basic purpose but refused to do so based on the facts of record in the case before it.[74]

Employers should not risk relying on the courts to blue pencil overbroad non-compete agreements and should customize non-competes for the various categories of high level employees in its workforce as to functions, geography and duration.[75]

C. Garden Leave

"Garden leave" should not have been an obstruction to reaching legislative accord on a non-compete bill as happened in Massachusetts. Such unusual contractual arrangements are best left to the contracting parties to work out.

In a "garden leave clause" in an employment contract, the employee must give a certain amount of notice to the employer in advance of the employee's resignation from employment. In exchange, the employer does not require the employee to come into work during the period of the leave, and the employee will receive full wages and benefits, and can spend his or her time "in the garden".[76] During the leave the employee cannot work for a competitor. However, on leave the employee also cannot access confidential records and will be unable to directly solicit clients or co-workers.[77] Given the costs to the employer of paying salary and benefits during the period of garden leave, the employer must carefully identify the type of employee that warrants a garden leave, such as senior executives, key technical employees and employees who have access to confidential information. Enforceability of garden leaves are also in doubt.[78]

[73] *See* Lanmark Tech. Inc., v. Canales, 454 F.Supp 2d 524, 529 (E.D. Va. 2006). Better Living Components, Inc. v. Coleman, 62005 WL 771592 at *5 (Va. Cir. Ct. Apr.6, 2005).

[74] *Genex*, 2014 U.S. Dist. LEXIS at *17.

[75] *See* Wis. Stat. § 103465, where the state of Wisconsin applies an "all or nothing" reading of noncompete agreements.

[76] *See* Jeffrey S. Klein and Nicholas Pappas, "*Garden Leave" Clauses in Lieu of Non-competes*, www.NYLJ.com, vol. 241 No. 24 (Feb 5, 2009).

[77] *Id*.

[78] *See* Bear, Stearns v. Sharon, 550 F.Supp. 2d 174 (D. Mass. 2008) where such a clause was denied enforcement because the balance of hardship weighed to the individual employee and his clients.