ATLANTIC LAW JOURNAL
VOLUME 16
2014

CONTENTS:

Each of the articles in the *Atlantic Law Journal* was recommended for publication by the staff editors and reviewers using a double blind review process.

The *Atlantic Law Journal* attracts large numbers of submissions from professors and scholars located across the United States and overseas. The current acceptance rate for the Journal is less than 25% and has remained below that level throughout all of our recent history. The Journal is listed in Cabell's Directory of Publishing Opportunities in Management and Marketing.

The review process and *Atlantic Law Journal* website at atlanticlawjournal.org were thoroughly revamped for 2014 in order to streamline processing of authors' submissions. Manuscripts received by October 15 will be reviewed by December 1 and the authors informed promptly thereafter. Manuscripts received by March 1, including those presented at the annual conference, will be reviewed by June 1 and the author(s) informed of the publication decision promptly thereafter.

The authors retain ownership of the copyright in the articles, and all rights not expressly granted to the *Atlantic Law Journal* in the *Atlantic Law Journal Publication and Copyright Agreement* authors must execute before publication. Copyright to the design, format, logo and other aspects of this publication is claimed by the Mid-Atlantic Academy for Legal Studies in Business, Inc. The authors have granted to the *Atlantic Law Journal* and its publisher a nonexclusive license throughout the world to publish, reproduce, distribute, and use their articles in all print or electronic formats and all languages, either separately or as part of a collective work, including but not limited to the nonexclusive right to publish the articles in an issue of the *Atlantic Law Journal*, copy and distribute individual reprints of the articles, authorize reproduction of the articles in another publication by the *Atlantic Law Journal*, and authorize the reproduction and distribution of the articles or an abstract thereof by means of computerized retrieval systems.

Please see the new *Atlantic Law Journal* website at atlanticlawjournal.org for submission guidelines effective January 9, 2014. Manuscripts submitted to the *Atlantic Law Journal* that scrupulously conform to the formatting and style rules in the submission guidelines will be strongly preferred.

Please send your submission to Professor Cynthia Gentile. Contact information is on the website. Please be sure that your submission meets the submission guidelines. For each submission, include a complete copy AND a blind copy with no author identification. Be sure to remove any identifying metadata. Name the files with the PRIMARY AUTHOR'S LAST NAME. For example, the primary author's last name is Jones, then the files should be named Jones.doc and Jones_blind.doc.

- *The Editors*

EDITORIAL BOARD ANNOUNCEMENTS

-CALL FOR STAFF EDITORS-

Staff Editors review Atlantic Law Journal submissions. We are currently soliciting new Staff Editors for Volume 17 and beyond. If you wish to review manuscripts for the Atlantic Law Journal, please contact the editors via the website with an email indicating your current position, your scholarly interests and/or your areas of expertise. A member of the Academy of Legal Studies in Business or any of the Academy's related regional associations are ideal staff editor candidates. Ideally staff editors attend the spring annual meeting of the Mid-Atlantic Academy for Legal Studies in Business, Inc., but attendance is not required.

-ADVERTISING-

The *Journal* accepts both paid advertisements and exchanges of advertising or display space. Full and half page formats are welcome.

-CONTENTS & OPINIONS-

The opinions expressed in the articles are solely those of their respective authors and do not reflect the opinions of the *Mid-Atlantic Academy for Legal Studies in Business*, the *Journal* itself, or the editors and reviewers. This publication is designed to give accurate and authoritative information with regard to the subject matter. It is distributed with the understanding that neither the publisher nor the editors are engaged in the rendering of legal advice, political opinion, or any other professional service. If legal advice or other expert assistance is required, please seek the services of a competent professional.

- ARTICLES -

THE NBA'S 2011 COLLECTIVELY BARGAINED AMNESTY CLAUSE – EXPLORING THE FUNDAMENTALS

ADAM EPSTEIN*
KATHRYN KISSKA-SCHULZE**

I. INTRODUCTION

The visibility of contractual issues within the sports genre continues to increase and inevitably plays a role in changing the landscape of amateur and professional sports. The appearance of novel clauses in professional sports employment contracts is not a new phenomenon, and numerous scholarly articles have scrutinized the employment clause variety within the sports arena, to include the hiring authority clause, morals clauses and termination clauses, to name a few.[1]

* J.D., M.B.A., Professor, Department of Finance and Law, Central Michigan University.
** J.D., LL.M (taxation), Assistant Professor, Department of Management, School of Business and Economics, North Carolina Agricultural & Technical State University.

[1] *See* Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5 (2011); *see also* Adam Epstein & Henry Lowenstein, *Promises to Keep? Coaches Tubby Smith, Jimmy Williams and Lessons Learned in 2012*, 24 S. L.J. 165 (2014) (discussing the lawsuit stemming from the 2012 legal decision that arose from an employment-related fiasco in 2007 when Coach Orlando Henry "Tubby" Smith asked coach Jimmy Williams from Oklahoma State University to join him as an assistant coach though Smith's offer proved not to be a legally binding offer as decided by the Supreme Court of Minnesota).

The purpose of this paper is to address the *amnesty clause* drafted into National Basketball Association's (NBA) 2011 collective bargaining agreement (CBA) which currently represents the relationship between NBA players and management.[2] The amnesty clause presents a unique way to manage a professional sports team from both a tax and team management and investment perspective.[3] This article discusses the development of the amnesty clause provision within NBA CBA, and analyzes the clause's applicability to the NBA's luxury tax.[4]

---

[2] *See* Larry Coon, *Breaking Down Changes in New CBA*, ESPN (Nov. 28, 2011), http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one (summarizing and comparing the acceptance by the NBA player's association of the take-it-or-leave-it offer from the league, the temporary dissolution of the players' union, the filing of a federal antitrust lawsuit, a 15-hour settlement negotiation, allowing teams to resume business on Dec. 9, 2011, and with opening day for the NBA on Christmas. Coon characterized the difference between the 2005 CBA and the 2011 CBA as "sweeping changes"); *see also* NBA, *CBA 101*, NBA.COM (Sept. 2012), *available at* http://www.nba.com/media/CBA101_9.12.pdf (last visited Apr. 2, 2014) (highlighting the 2011 NBA CBA).

[3] *See, e.g.,* Howard Beck, *Poof! Goes a Bad Contract, if Any N.B.A. Team Wishes*, N.Y. TIMES (Nov. 27, 2011), http://www.nytimes.com/2011/11/28/sports/basketball/each-nba-team-can-waive-one-bad-contract.html?_r=0 (offering humorously that in the NBA bad contracts are more common than lane violations. Beck also notes that the amnesty clause gives teams a "do-over" and a "get-out-of-jail-free card" under the terms of the 2011 amnesty provision in which each team can waive one player and remove him from the salary cap thereby saving millions of dollars in luxury tax penalties, even though the player's contract is still honored in the event another team claims his rights after a release. Beck also points out correctly that teams can only use the amnesty provision once in any off-season during the term of the 2011 CBA, the player also have been signed before July 1, 2011, and must be on the team's current roster at the time the CBA went into effect).

[4] The NBA's luxury tax is discussed further *infra*, and represents a financial penalty that teams have to pay under the CBA to the league for going over the maximum amount that the team can spend on its players in any given year. *See* Coon, *supra* note 2. *See infra* text accompanying notes 38-53 (pertaining to the luxury tax).

II. NBA'S AMNESTY CLAUSE PROVISION

The expression *amnesty clause*, used interchangeably in this paper as the *amnesty provision*, made a regular appearance in the NBA starting with the 2005 CBA, but was quite limited until the advent of the 2011 NBA CBA.[5] Very few academic research papers have mentioned the expression *amnesty clause*, per se.[6] In fact, a scholarly investigation of the term *amnesty clause* indicates that use of the expression, prior to its inclusion in the NBA's CBAs, had almost no place in sport but rather referenced international rights and justice as a result of a war.[7]

The amnesty clause is currently incorporated into the CBA between NBA players and team owners, and allows professional teams to release one player from their team's official roster without having it count against such team's salary cap[8] with certain

---

[5] *See* Coon, *supra* note 2 (offering that unlike the 2011 CBA, the 2005 CBA allowed only one player could be waived under the amnesty provision, but it had to be prior to the start of the 2005-06 season).

[6] Based upon our research via Lexis.com, only one law review had even mentioned the word *amnesty* in the context of the NBA, and it was only in a footnote. *See* Zachary A. Greenberg, *Tossing the Red Flag: Official (Judicial) Review and Shareholder-Fan Activism in the Context of Publicly Traded Sports Teams*, 90 WASH. U. L. REV. 1255 n. 206 (2013) (referencing the 2011 provision). We also conducted a search related to the "amnesty provision" and discovered mention of it in a 1987 law review article, but in an entirely different context. *See* Deanne L. Ayers, *Random Urinalysis: Violating The Athlete's Individual Rights?*, 30 HOW. L.J. 93, 101 (1987) (noting that amnesty would be given to players who submit to voluntary drug testing).

[7] Based upon our research via the Lexis.com database searching "amnesty clause" and "amnesty provision."

[8] *See* NBA Salary Cap History, REAL GM BASKETBALL, *available at* http://basketball.realgm.com/nba/info/salary_cap (last visited Apr. 2, 2014)(organizing a table which lists, *inter alia*, the history of the NBA salary cap, the luxury tax, and maximum and minimum individual player salaries); *see also* Amnesty Clause, SPORTING CHARTS, *available at* http://www.sportingcharts.com/dictionary/nba/amnesty-clause.aspx (last visited Apr. 2, 2014) (defining and concisely explaining the NBA's amnesty clause).

conditions. The amnesty clause affords NBA teams the opportunity to reduce their luxury tax by waiving one player.[9] Essentially, the clause is designed to protect an NBA team which, in hindsight, believes it made a poor investment in a professional basketball player who did not develop or succeed with that team, regardless of the reason.[10] During the term of the 2011 CBA, which is in place for ten years though either the players or the team owners can opt-out in 2017, a team choosing to exercise their amnesty clause rights must do so before the start of an NBA season.[11] Additionally, an NBA team may amnesty one-and only

---

[9] *See* Tom Ziller, *The NBA Amnesty Clause, Punitive Luxury Tax and the Playing Field*, SBNATION.COM (Jul. 23, 2013, 11:00AM), http://www.sbnation.com/nba/2013/7/23/4548534/luxury-tax-amnesty-clause-nba-lockout (offering that the fundamental purpose of the amnesty clause for most teams is not to reduce a high luxury tax bill but to free up cap space with which other players can be signed). *See infra* text accompanying notes 38-53 (pertaining to the luxury tax).

[10] Reasons might include continual injury, team playing style, poor performance, lack of motivation or team chemistry, and the like; *see* Charlie Zegers, *The NBA CBA, Amnesty Rule and the League's Worst Contracts*, ABOUT.COM (Aug. 2, 2011), http://basketball.about.com/od/nba-vs-nbapa/a/The-Nba-Cba-Amnesty-Rule-And-The-Leagues-Worst-Contracts.htm (providing team-by-team examples of bad player contracts and noting that under the 2005 CBA, NBA teams were given the chance to waive a single player contract and teams were still bound to pay the players' salary, the salaries continued to count against the cap, yet teams were freed from any obligation to pay luxury tax on those salaries. Zegers notes that the rule was termed the *Allan Houston Rule* and was based on the assumption that the New York Knicks would use the provision to waive Houston. Zegers also notes, however, that Houston was not waived under the provision); *see also* Associated Press, *Bucks Use Amnesty Clause to Waive Gooden*, NBA.COM (July 16, 2013), http://www.nba.com/2013/news/07/16/bucks-waive-gooden-by-amnesty.ap/ (noting that Drew Gooden had two years and about $13.4 million remaining on his contact. Though he still receives the money, it does not count against the team for salary cap purposes. Gooden signed with the Bucks in 2010, and he averaged 11.3 points and 5.9 rebounds in 107 games over 11 years).

[11] *See* Coon, *supra* note 2.

one-player during any season so long as the current CBA remains in place.[12]

III. FUNDAMENTALS OF THE AMNESTY PROVISION

Based on a summary of the 2011 CBA as prepared by the NBA itself, each team may waive one player and subsequently remove his contract value from the salary cap during a one-week window coinciding with the beginning of the NBA free agency period, provided that the player had signed with the amnestying team before July 1, 2011, as per the CBA.[13] Thus, such requirement includes those players who were signed to contracts prior the end of the 2005 CBA.[14] Other teams can then claim the

---

[12] *Id*.; *see also* Kelly Scaletta, *NBA Teams Who Still Have Their Amnesty Clause and How Each Should Use It*, BLEACHER REPORT (Apr. 25, 2013), http://bleacherreport.com/articles/1618167-nba-teams-that-still-have-their-amnesty-clause-and-how-they-should-use-it (noting that as of April 25, 2013, there were 15 teams which had their amnesty remaining; however, one team, the New Orleans Pelicans, had no amnesty eligible players. Scaletta notes that all players who were amnesty eligible will have their contracts run out by the end of the 2015-16 season, the player must have been on his current team and under his contract when the new CBA was signed, and contract extensions with the same team are not amnesty eligible). Teams are ranked here according to the likelihood of using their amnesty, not according to the quality of the players; *but see* Beck, *supra* note 3 (offering that the player also has to have been signed before July 1, 2011, and must be on the team's current roster at the time this CBA went into effect).

[13] *See* Ira Winderman, *Amnesty Week Approaches for Heat, Miller*, SUN SENTINEL (July 6, 2013), http://articles.sun-sentinel.com/2013-07-06/sports/sfl-ira-nba-column-s070713_1_amnesty-move-mike-miller-luxury-tax (offering that under the terms of the 2011 CBA, there is a one-week period in the offseason for teams to make amnesty moves. In 2013, this window ran from July 11 to July 17 and immediately followed the July 1 to July 10 free agency signing period); *see also* Coon, *supra*, note 2 (breaking down changes in the new CBA and noting that the 2005 NBA did have an amnesty provision as well, but teams had to use it prior to the 2005-06 season, and noting that that 2011 CBA allows a team to "kick one bad contract to the curb" throughout the term of the CBA).

[14] *See, e.g*., Darnell Mayberry, *Breaking Down the NBA's Amnesty Provision*, News OK (May 18, 2013), http://newsok.com/breaking-down-the-nbas-

rights to (and sign to a contract) a waived amnestied player, leaving the waiving team (i.e., the now former team) responsible for paying the balance of the player's contract in accordance with the contract's term.[15]

IV. WAIVED PLAYERS

Generally speaking, players whose rights have been waived outright by a team become free agents.[16] NBA players waived

---

amnesty-provision/article/3826854 (offering that the amnesty provision offers each of the 30 NBA teams a one-time opportunity to release a player via the league's waiver process without the player's salary counting toward the team's salary cap or potential luxury tax computations, and that this one-time provision is for use only once total, not once per season. Mayberry also offers that any player who was signed before the 2011-12 season can be waived via the amnesty provision, and NBA teams cannot designate any player traded after July 1, 2011 or any player whose contract has been extended, renegotiated or otherwise amended after July 1, 2011).

[15] *See* NBA, *CBA 101: Highlights of the 2011Collective Bargaining Agreement Between the National Basketball Association (NBA) and the National Basketball Players Association (NBPA)*, NBA.com (Sept. 2012), *available at* http://www.nba.com/media/CBA101_9.12.pdf (last visited Apr. 4, 2014) (Per the 2011 NBA CBA summary: "C. Amnesty. (1) Each team will be permitted to waive one "amnesty" player prior to any one of the first five seasons of the CBA (only for contracts in place at the inception of the CBA) and have 100% of the player's salary removed from Team Salary for Salary Cap and tax purposes. (Alternatively, a team that previously waived a player prior to the inception of the CBA whose guaranteed salary continues to be included in the team's payroll for future seasons is permitted to designate that player's salary for removal from its Team Salary for Salary Cap and tax purposes.)."

[16] *See* Larry Coon, *NBA Salary Cap FAQ*, CBAFAQ.COM (July 9, 2013), http://www.cbafaq.com/salarycap.htm (discussing the differences between the 2005 and 2011 NBA and CBA in great detail. Coon notes that there are two types of free agency: unrestricted and restricted. "An unrestricted free agent is free to sign with any other team, and there's nothing the player's original team can do to prevent it. Restricted free agency gives the player's original team the right to keep the player by matching a contract the player signs with another team.").

under the amnesty clause waiver process are not immediately considered unrestricted free agents; they must partake in a bidding process over a forty-eight hour period during which teams falling under the NBA's salary cap have the opportunity to bid on the player for his services.[17] Each bidding team has the ability to assume the player's full salary contract.[18] The team with the highest bid earns the rights to the player.[19] In the event of matching high bids, the team with the inferior winning record signs the amnestied player.[20]

Also, amnestied players are prohibited from re-signing with the team that originally amnestied him.[21] Teams which exceed their allowed salary cap may only acquire the rights to an amnestied player if that player is a free agent. If the player signs onto another team, the amount of his new contracted salary is deducted from what his original (amnesty) team owes under the terms of the contract. As of July 17, 2013, fifteen teams have utilized the amnesty clause provision.[22]

---

[17] *See* Chris Sheridan, *Amnesty Program Includes Secondary Waivers*, SHERIDAN HOOPS (Nov. 28, 2011), http://www.sheridanhoops.com/2011/11/28/amnesty-program-includes-secondary-waivers/ (discussing the bidding process).

[18] *See* Mayberry, *supra* note 14. Amnesty is different from the normal waiver process in that it allows teams to make either a *full* or *partial* waiver claim. When a team makes a full waiver claim it acquires the player, assumes his full contract, and pays all remaining salary obligations (and the waiving team has no further salary obligation to the player). Full waiver claims have precedence over partial waiver claims. If more than one team makes full waiver claims, the player is awarded to the team with the worst record.

[19] *Id*.

[20] *Id*.

[21] *See* Sean Deveney, *NBA Amnesty Clause Update: Rules, Players Let Go Thus Far*, SPORTING NEWS (July 10, 2013), http://www.sportingnews.com/nba/story/2013-07-10/nba-amnesty-clause-candidates-heat-lakers-thunder-bulls-mike-miller-world-peace (outlining the process and noting which teams are no longer eligible for the amnesty clause because they already exercised their rights).

[22] *See* Nancy Kercheval, *Metta World Peace Let Go by Lakers Under NBA Amnesty Clause*, BLOOMBERG NEWS (July 12, 2013),

As mentioned, the amnesty provision under the 2011 CBA provides a single, one-time opportunity for NBA teams to release one player from their team roster via the waiver process.[23] To be eligible for amnesty, the basketball player must have been on the team's roster continuously from July 1, 2011 until the amnesty date without any new contract, extension, renegotiation or amendment to his original contract.[24] NBA teams cannot amnesty any players which they sign, receive by trade, or contractually extend, renegotiate, or otherwise amend after July 1, 2011.[25] The following table lists those players who have been waived under the

---

http://www.bloomberg.com/news/2013-07-12/metta-world-peace-let-go-by-lakers-under-nba-amnesty-clause.html; *see also* Luke Adams, *Potential 2014 Amnesty Candidates*, HOOPS RUMORS (July 17, 2013), http://nba.si.com/2013/06/11/which-players-could-be-released-via-the-amnesty-clause-this-summer/.; *see also* Dave McMenamin, *Lakers Amnesty Metta World Peace*, ESPN LOS ANGELES.COM (July 11, 2013), http://espn.go.com/los-angeles/nba/story/_/id/9471444/; *but see* Marc Stein, *Last Two Players at Risk of Being Amnestied*, ESPN.COM (Dec. 10, 2013), http://espn.go.com/blog/marc-stein/tag/_/name/amnesty-clause (noting that Carlos Boozer and Kendrick Perkins are realistically the last two who might be amnestied until the next NBA collective bargaining agreement).

[23] *See* Coon, *supra* note 16 (discussing the amnesty provision in its entirety, in question #67). For the 2011-2012 NBA season, the provision was available from December 9-16, 2011. For the 2012-13 through 2015-16 seasons it is available for the first seven days that follow the July "moratorium." Coon states, "It is a period during the month of July in which teams may not sign most free agents or make trades. Free agents become free on July 1, but the salary cap is not set until the league's audit is completed later in the month. Teams and players must wait for the salary cap to be set before trades and most free agent signings can commence. Teams may negotiate with free agents beginning July 1, but they have to wait until the moratorium ends before signing a contract.").

[24] *Id*.

[25] *Id.* (noting that the 2011 season was blemished by a league lockout which began July 1, 2011. It lasted 161 days. For the 2012-2013 through 2015-2016 seasons it is available for the first seven days that follow the July moratorium).

2011 NBA CBA's amnesty provision, as of the time of our research.[26]

Amnestied NBA Players (2011 – 2014)

Season	*Team*	*`Player*	*Next team*	*Bid amount*
2011–12[27]				
Orlando Magic		*Gilbert Arenas*	*Memphis Grizzlies*	*N/A*
Golden State Warriors		*Charlie Bell Italy*	*Juvecaserta Basket*	*N/A*
New York Knicks		*Chauncey Billups*	*Los Angeles Clippers*	*$2,000,032*
Cleveland Cavaliers		*Baron Davis*	*New York Knicks*	*N/A*
New Jersey Nets		*Travis Outlaw*	*Sacramento Kings*	*$12,000,000*
Indiana Pacers		*James Posey*	*N/A*	*N/A*
Portland Trail Blazers		*Brandon Roy*	*Minnesota Timberwolves*	*N/A*
2012–13				
Philadelphia 76ers		*Elton Brand*	*Dallas Mavericks*	*$2,100,000*
Minnesota Timberwolves		*Darko Miličić*	*Boston Celtisc*	*N/A*
Dallas Mavericks		*Brendan Haywood*	*Charlotte Bobcats*	*$2,000,500*
Houston Rockets		*Luis Scola*	*Phoenix Suns**	*$13,500,000*
Phoenix Suns		*Josh Childress*	*Brooklyn Nets*	*N/A*
Washington Wizards		*Andray Blatche*	*Brooklyn Nets*	*N/A*

[26] *See generally* Wikipedia, NBA SALARY CAP (last visited Apr. 3, 2014), http://en.wikipedia.org/wiki/NBA_salary_cap (discussing the amnesty clause, luxury tax, and providing examples).
[27] *See* NBA News, *2011-12 Amnesty Tracker* (July 18, 2012), http://www.nba.com/news/amnesty-tracker/.

Denver Nuggets	*Chris Andersen*	*Miami Heat*	*N/A*
Los Angeles Clippers	*Ryan Gomes*	*Germany Artland Dragons*	*N/A*

2013–14[28]

Los Angeles Lakers	*Metta World Peace*	*New York Knicks*	*N/A*
Charlotte Bobcats	*Tyrus Thomas*	*N/A*	*N/A*
Milwaukee Bucks	*Drew Gooden*	*N/A*	*N/A*
Toronto Raptors	*Linas Kleiza*	*Turkey Fenerbahçe Ülker*	*N/A*
Miami Heat	*Mike Miller*	*Memphis Grizzlies*	*N/A*

To further understand the effects of the amnesty clause provision, consider Miami Heat player Mike Miller.[29] In July 2013, Mike Miller was designated as the team's amnesty player.[30] Such move saved the Heat almost seventeen million dollars in luxury taxes, and reduced its $33 million dollar tax bill by half.[31] Although the Heat is still required to pay Miller the remaining salary under his contract-$12 million-such salary amount will not

[28] *See* NBA News, *2013-14 Amnesty Tracker* (July 17, 2013), http://www.nba.com/news/2013-14-amnesty-tracker/; *see also* Marc Stein, *supra* note 22 (noting that Detroit, New Orleans, Sacramento and Utah are the four teams that did not use the amnesty clause, which could only be applied to players under their contracts at the time of the NBA's new CBA in December 2011).

[29] *See* Ethan Skolnick, *5 Hidden Risks of Miami Heat Using Amnesty Clause on Mike Miller*, BLEACHER REPORT (July 18, 2013), http://bleacherreport.com/articles/1708157-5-hidden-risks-of-miami-heat-using-amnesty-clause-on-mike-miller (discussing whether or not his replacement would work out well, and whether or not he could come back to haunt them with another team, inter alia).

[30] *Id*.

[31] *See* Brian Windhorst, *Heat Waive Veteran Mike Miller*, ESPN.COM (July 17, 2013), http://espn.go.com/nba/truehoop/miamiheat/story/_/id/9482980/miami-heat-waive-mike-miller-amnesty-clause.

count against the Miami Heat's salary cap space or add to future luxury tax bills.[32]

Under his original contract with the Heat, Miller would have earned $6.2 million during the 2013-14 season, and another $6.6 million during the 2014 season.[33] Miller is still entitled to this salary amount; however, this salary will not count against Miami Heat's team salary cap, nor will it count against a luxury-tax that could exceed $30 million during the 2013-14 season alone.[34]

A week after being waived, Miller signed with the Memphis Grizzlies as a free agent, a team which he played for from 2003-2008, having cleared the amnesty waiver period.[35] The Heat still owed Miller $12.8 million in salary over the next two seasons as part of the original contract he signed with the team in 2010.[36] For the 2012-13 NBA season, the Heat paid $13.3 million in luxury tax.[37]

---

[32] *Id*.; *see also* Roy Burton, *Pros and Cons of Miami Heat Using Amnesty Clause on Mike Miller*, BLEACHER REPORT (June 28, 2013), http://bleacherreport.com/articles/1682544-pros-and-cons-of-miami-heat-using-amnesty-clause-on-mike-miller.

[33] *See* Tom Haberstroh, *Heat in Free Agency: 3 Things to Know*, ESPN.COM (July 1, 2013), http://espn.go.com/blog/truehoop/miamiheat/post/_/id/18216/heat-in-free-agency-3-things-to-know.

[34] *See* Tim Reynolds, *Heat Designate Former Grizzly Mike Miller as Amnesty Player*, COMMERCIAL APPEAL (July 16, 2013), http://www.commercialappeal.com/news/2013/jul/16/heat-designate-former-grizzly-mike-miller-amnesty/?print=1.

[35] *See, e.g.,* Ira Winderman, *Grizzlies Sign Mike Miller after Release from Heat*, SUN SENTINEL (July 24, 2013), http://articles.sun-sentinel.com/2013-07-24/sports/sfl-miami-heat-mike-miller-s072413_1_amnesty-release-miami-heat-mike-miller.

[36] *Id*.

[37] *See* Windhorst, *supra* note 31.

V. 2011 CBA AND THE NBA'S LUXURY TAX

Academics and others have examined the manner in which professional sports leagues *tax* themselves by instituting caps on team spending, whether a *hard cap* or a *soft cap*.[38] The purpose of instituting these *luxury taxes* is to promote competitive balance among teams by penalizing high-spending teams and redistributing money to teams that managed to control their costs under the salary cap limits.[39] Caps set limits on what each team is allowed spend, and at certain predetermined levels above the cap requires teams to pay a luxury tax of one dollar for each dollar spent above the specified threshold.[40]

---

[38] *See* Kathryn Kisska-Schulze and Adam Epstein, 14 TEX. REV. ENT. & SPORTS L. 95, 97 (2013); *see also* Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1631-35(2004) (presenting the history of the NBA luxury tax).; *see also* Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5 (2011) (exploring clauses including the reserve clause, "best interests" of baseball clause, and others); *see also* Ronald Blum, *Yanks' Luxury Tax Increases $400k to $19.3 Million*, YAHOO! SPORTS (Dec. 18, 2012), http://sports.yahoo.com/news/yanks-luxury-tax-increases-400k-151952634--mlb.html (discussing Major League Baseball's luxury tax).

[39] Kaplan, *supra* note 38, at 1617 (stating, "Pioneered by Major League Baseball (MLB) in the mid-1990s and recently adopted by the National Basketball Association (NBA), the luxury tax as it currently exists is a penalty imposed on teams that spend above a collectively bargained level.").

[40] Simon Bernestein, *Salary Caps in Professional Sports: Closing the Kovalachuk Loophole in National Hockey League Player Contracts*, 29 CARDOZO ARTS & ENT. L. J 375, 379 (2011) (stating, "In the major North American sports leagues there are two types of salary caps: soft caps and hard caps. A soft cap, such as the one implemented by the National Basketball Association, sets the limit on what a club may spend, with a few exceptions, which permit a club to spend in excess of the cap. In addition, at a certain predetermined level above the cap, a club is required to pay a luxury tax of one dollar for each dollar spent above the predetermined level. This means that upon reaching the predetermined tax level, the cost of signing additional players doubles. The second type of salary cap is a hard cap, which is what the National Hockey League instituted in 2005. This system generally does not allow clubs to spend in excess of the cap ceiling, referred to as the upper limit.").

While the luxury tax model was built on the premise that its institution would help achieve a sense of balance among team spending, encouraging some teams to spend less, and offer players freedom from a salary cap while promising unlimited salary growth, it also penalizes teams which spend above the soft cap.[41] And like any other tax model where taxpayers seek avenues to minimize the impact of paying the tax, NBA teams have sought opportunities to reduce the penalty associated with the luxury tax: hence the amnesty clause.[42]

Under the 2005 CBA, which was originally for seven years but the NBA invoked a league op-out in 2011 under the terms of the agreement,[43] the luxury tax forced teams to pay a flat one dollar in tax for every dollar they spent over the luxury tax line.[44] Under the 2011 CBA, teams pay one dollar for every dollar their salary is above the luxury threshold for 2011-12 and 2012-13. [45] However, starting in 2012-13, teams then pay an incremental tax for every $5 million above the tax threshold.[46]

---

[41] *See* Kaplan, *supra* note 38, at 1617.

[42] *See* THE SPOKESMAN-REVIEW, *Heat Use Amnesty Clause On Miller To Save On Luxury Tax* (July 17, 2013), http://www.spokesman.com/stories/2013/jul/17/heat-use-amnesty-clause-on-miller-to-save-on/; *see also* Jeff Zillgitt & J. Michael Falgoust, *NBA Amnesty Provision Provides Teams With Flexibility*, USA TODAY (Dec. 14, 2011, 2:49AM), http://usatoday30.usatoday.com/sports/basketball/nba/story/2011-12-13/nba-amnesty-provision-provides-teams-with-flexibility/51892272/1; *see also* Rob Mahoney, *Which Players Could Be Released Via The Amnesty Clause This Summer?*, SPORTS ILLUSTRATED (July 17, 2013), http://nba.si.com/2013/06/11/which-players-could-be-released-via-the-amnesty-clause-this-summer/ (noting that teams can waive one player and remove the contract value from the salary cap during a one-week window that coincides with the beginning of free agency, provided that player signed with the team before July 1, 2011).

[43] *See* Coon, *supra* note 2.

[44] *Id*.

[45] *Id*. (noting that it is a ten year deal, but there is a mutual opt-out provision in which either side may opt out in 2017 (Coon, breaking down changes in the new CBA).

[46] *Id*.

For example, a team pays $1.50 in tax for every dollar spent over the line up to $5 million over, then $1.75 in tax for every dollar spent between $5 million and $10 million, then $2.50 in tax for every dollar spent between $10 million and $15 million, and $3.25- for every dollar spent from $15-$20 million.[47] The 2013-2014 luxury tax line was set at $71.7 million. Interestingly, the tax figure is not calculated until the date of the team's final regular season game.[48] These luxury tax revenues are normally redistributed evenly among non-tax-paying teams.[49] For comparative purposes, the following chart offers the luxury tax thresholds for the NBA seasons from 2008 to current.

[47] *See* Brian Kamenetzky, *How the New CBA Impacts the Lakers*, ESPN LA.COM (Nov. 28, 2011), http://espn.go.com/blog/los-angeles/lakers/post/_/id/23419/how-the-new-cba-impacts-the-lakers (discussing the luxury tax and amnesty provisions of the 2011 CBA and how it might affect the Los Angeles Lakers).
[48] *See* Coon, *supra* note 16.
[49] *Id.*

NBA Luxury Tax (2008-2014)[50]

NBA Season	Luxury Tax
2008 – 2009	$71.15
2009 – 2010	$69.92
2010 – 2011	$70.307
2011 – 2012	$70.307
2012 – 2013	$70.307
2013 – 2014	$71.748

Beginning with the 2013-2014 NBA season, however, the term *repeat offenders* refers to teams who have to pay an even higher penalty (i.e., tax) which have paid the luxury tax in previous seasons.[51] These teams paid luxury taxes in four out of the last five years.[52] The following chart represents the current tax rates for repeat offenders:[53]

[50] *Id*.; *see also* Wikipedia, *supra* note 26.
[51] *See* Coon, *supra* note 16; *see also* Eric Pincus, *Lakers Limited by Luxury Taxes*, LOS ANGELES TIMES (Aug. 8, 2013), http://articles.latimes.com/2013/aug/08/sports/la-sp-lakers-finances-20130809.
[52] *See* Coon, *supra* note 16; *see also* Ben Golliver, *NBA Sets 2013-14 Salary Cap, Luxury Tax Figures* (July 10, 2013), http://nba.si.com/2013/07/09/nba-salary-cap-luxury-tax-figures-2013-14/; (announcing that the NBA announced

Amount over Tax	Standard Tax Per Excess Dollar	Repeat Offender Tax Per Excess Dollar
$Less than $5M	$1.50	$2.50
$5M - $9,999,999M	$1.75	$2.75
$10M - $14,999,999M	$2.50	$3.50
$15M - $19,999,999M	$3.25	$4.25
Over $20M	$3.25+$0.50 per $50M	$4.25 + $0.50 per $5M

VII. CONCLUSION

The purpose of this article is to fundamentally introduce the *amnesty clause*, a relatively new provision in sports contract and labor and employment law discussions. The expression *amnesty clause* or *amnesty provision* is a new and unique clause found in the 2011 NBA CBA. To date, any academic reference to *amnesty clause* within the sport genre is virtually non-existent. The amnesty clause provides NBA teams a tool to release players from

---

Tuesday that the 2013-14 salary cap will be $58.7 million, the luxury tax line will be $71.7 million and the salary cap floor will be $52.8 million).

[53] *See* Coon, *supra* note 16; *see also* Wikipedia, *supra* note 26.

their contracts if they feel that the player turned out to be a bad investment, regardless of the reason.

Additionally, by releasing a player under an amnesty clause provision, the team exercising the clause may have the ability to reduce its luxury tax bill. Because NBA players continue to be paid under their originally-signed contracts by the team that waived them under the amnesty provision, such provision will likely carry on into the next CBA and could serve as a successful model for other leagues as well. In sum, the amnesty clause gives a team a free pass for a poor decision without any financial penalty to the player.

INTRODUCING RISK MANAGEMENT CONCEPTS TO BUSINESS LAW STUDENTS: IT'S MORE THAN CONTRACTS

SUSAN L. WILLEY[*]
HAROLD WESTON[**]

I. INTRODUCTION

Traditional business law and legal environment courses have focused on legal rules and strategies for avoiding litigation, the risk of adverse judgments, and potential liability for non-compliance with statutory and common law duties, breach of contract, and violations of the criminal law. Discussions of risk are generally limited to legal risks and the use of contractual provisions such as waivers, hold harmless provisions, and limitations of liability to reduce exposure to liability, and thereby more effectively manage identified legal risks.

This article argues that legal studies courses, particularly those taught in business colleges, should expand student understanding of risk beyond this traditional legal framework by incorporating broader risk management principles into our classes. We begin by discussing the rationale for including a risk management dimension in legal environment and business law courses. We then examine concepts of risk and risk management to familiarize legal studies faculty with an understanding of the basic vocabulary and the primary techniques for managing risk. We conclude by offering teaching strategies and specific exercises to enable

[*] J.D., Clinical Professor of Legal Studies, Georgia State University.
[**] J.D., Clinical Assistant Professor of Risk Management and Insurance, Georgia State University.

instructors to incorporate more risk principles into undergraduate and graduate legal environment and business law classes.

II. RATIONALE FOR INCORPORATING RISK MANAGEMENT PRINCIPLES

Historically, business management, risk management, and law developed as separate disciplines, each with its own understanding of risk. Management focused on risks to capital and the impact of those risks on corporate value and by extension to shareholders. Thus, management looked at risk when making simple decisions whether to proceed with a project or how much capital to put at risk. More complex decisions involved the use of insurance to transfer risk; derivatives contracts through options, futures and forward delivery contracts; and portfolio management with allocation, risk-adjusted returns, and risk-weighted capital measures.

In contrast, risk managers focused on harms to workers, corporate property, and consumers, as well as losses arising from general liability. As risk management became part of the business lexicon, risk managers expanded beyond concerns of general liability and began to proactively assess "the types and levels of risk appropriate for achieving the organization's strategic goals"[1] and avert harm to corporate value. Today's risk managers deal with far more than identifying and managing personal and property exposures due to perils and hazards; they also analyze risks facing any functional area within the firm to advise management on how to "finance" specific strategic, financial, and operational risks through retention, transfer and insurance.

Lawyers, however, because they are trained to look at risk as legal liability arising from activities causing compensable harm, or regulatory non-compliance, or errors in judgment, used the term

[1] Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 969 (2009).

"risk management" to mean reducing potential liability, primarily through effective use of contracts and insurance, while conducting lawful, profitable activities. Thus, lawyers helped the firm manage and allocate reasonable risk through hold harmless provisions, indemnity clauses, warranties and disclaimers, or they used warnings, disclaimers and comparative fault to prevent or reduce liability for defective products, personal injury, and other torts. Corporate counsel also saw compliance with regulatory requirements and internal and external standards of care as additional legal tools to avoid liability for economic losses resulting from breach of duty or professional malpractice. As lawyers today need to know more about risk management than the standard tools of disclaimers, hold harmless agreements and indemnity, risk management has become a frequent topic for the corporate lawyer in publications like the National Law Review,[2] while the American Bar Association's *Journal* has at least three websites on risk.[3] Similarly, the Association of Corporate Counsel (ACC) provides risk management materials for corporate counsel.[4]

---

[2] *See, e.g.*, Emily Holbrook, *Risk Management: Art or Science?* NAT'L L. REV. 2013 WLNR 14263703 (June 11, 2013); Emily Holbrook, *What Makes a Great Risk Manager: Q&A With Michael Lopez of Booz Allen Hamilton*, NAT'L L. REV. 2013 WLNR 11673038 (May 12, 2013); Jared Wade, *The Resurgence of Treasury Risk Management*, NAT'L L. REV., 2013 WLNR 11266510 (May 8, 2013);

[3]The *Financial Insurance Law Blog* available at http://www.abajournal.com/blawg/Financial_Insurance_Law_Blog/, *A Byte of Prevention: Risk Management Tips and Tidbits* available at http://www.abajournal.com/blawg/A_Byte_of_PreventionA_Risk_Management_Tips_and_Tidbits/ and *Risk Worldwide* available at http://www.abajournal.com/blawg/Risk_Worldwide/.

[4] *See, e.g.,* "General Counsel as Risk Manager – For This I Went to Law School?" on the program for the ACC's Second Institute for Corporate Counsel, May 10, 2013, available at http://www.acc.com/chapters/sfbay/iacc.cfm. The ACC has other materials on risk management for the corporate counsel, including *Enterprise Risk Management & the Law Department's Strategic Role*, ACC's CLO Thinktank Executive Report, ASSOCIATION OF CORPORATE COUNSEL, (May 2008),

"Risk is a concept underlying virtually every business discipline"[5] and determines whether a business makes or loses money. This has caused managers, risk managers and lawyers to draw closer together over the years, and broaden their understanding of risk to include some common frameworks for addressing risk in the real world. In the past twenty years, for example, business has added risk management to its vocabulary and practices. What was once called simply "business judgment" now embraces risk management, and risk management has become enterprise risk management with a C-suite title of Chief Risk Officer. Lawyers, particularly general counsel, now include evolving risk – and solutions -- within their legal advice and judgments.

As corporate counsel have expanded their understanding of risk beyond liability to include strategy and operations, business law classes can address this broader dimension of risk and help students understand that contractual provisions, standards of care, and compliance efforts are risk management tools that can be strategically used to add value to the firm. The next section introduces legal studies faculty to some of this basic vocabulary and fundamental principles of risk management, so that these

---

http://www.acc.com/community/clo/thinktanks/upload/Enterprise-Risk-Management-the-Law-Department-s-Role.pdf. The ACC's Mini-MBA Business Education program has a Risk Management Track. Recent courses include *Risk Management & In-House Counsel* (April and October 2013), program available at http://www.acc.com/education/businessedu/programs/riskmgmt.cfm; *Applying Risk Management Principles and Practices in Transactional Work* (October 2011), outline of session available at http://www.acc.com/legalresources/resource.cfm?show=1300993; *Enterprise Risk Management, Integrated Assurance and Role of In-House Counsel* (June 2010), program description at http://www.acc.com/legalresources/resource.cfm?show=965464; and *Risk Management: The Role of Corporate Counsel in a Changing World* (January 2010) at www.acc.com/chapters/Canada/upload/CanadaJan20program-2.pdf.

[5] James R. Garven, *Risk Management: The Unifying Framework for Business Scholarship and Pedagogy,* 10 RISK MGMT AND INS. REV 1, 4 (2007).

concepts can be incorporated into legal environment and business law classes at both the undergraduate and graduate levels. We also provide examples to illustrate these concepts so that instructors unfamiliar with risk management terminology can more easily introduce them to their classes.

III. DEFINITIONS AND BASIC PRINCIPLES OF RISK MANAGEMENT

Explaining the concepts of risk and liability is a good place to start. Although they are related concepts, business students should be aware that risk is business, while liability is law. The classical definition of risk is "uncertainty concerning the occurrence of a loss."[6] Pure risk is the possibility of loss or no loss. For example, if your house is destroyed, you have incurred a loss, while if it isn't destroyed, there is no loss. Risk also creates the opportunity for profit and businesses and investors seek profitable opportunities by assessing and taking measured risks.[7] This possibility of gain or

[6] GEORGE E. REJDA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE (12th ed., 2013) at 2 and 5. This textbook and other introductory risk management textbooks can provide the business law instructor with an excellent overview of basic risk management terminology and concepts. *See also,* GEORGE L. HEAD, RISK MANAGEMENT – WHY AND HOW: AN ILLUSTRATIVE INTRODUCTION TO RISK MANAGEMENT FOR BUSINESS EXECUTIVES (International Risk Management Institute, 2009), available at http://www.ktd-ins.com/assets/IRMI-Brochure.pdf and the articles identified at note 19 *infra.*

[7] E.g., FRANK K. REILLY AND EDGAR A. NORTON, INVESTMENTS, 4th ed. (Dryden Press, 1982) at 9; KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK-BEARING, (Markham Publishing Co, 1971) at 1-7.Robert H. Brockhaus, Sr., *Risk Taking Propensity of Entrepreneurs*, 23 ACAD. OF MGMT. J. 509 (1980) (finding entrepreneurs and managers had comparable levels of risk taking, contrary to previous studies). Laurent Josien, *Entrepreneurial Orientation: An Empirical Study of the Risk Propensity Dimension of Entrepreneurs*, 18 ACAD. OF ENTREPRENEURSHIP J. 21, 22 (2012), finds that risk-taking is a propensity of "macroentrepreneurs" "who see their involvement with their business as the primary vehicle for pursing self-actualization, … are innovative and creative and have a tremendous risk-taking propensity."

loss is called speculative risk. In recognition that uncertainty can produce either positive or negative outcomes,[8] the contemporary definition of risk embraces both.

Traditional risk management addresses the loss side only, using contracts to minimize loss exposure and insurance to transfer and finance losses that do occur to the firm's property or capital, particularly when the firm's acts cause a compensable harm. Thus, risk managers attempt to reduce loss exposure, perils and hazards. Loss exposure is simply the possibility of a loss. Any business asset may be exposed to a loss, from real or personal property to personnel to intangibles like the firm's reputation or intellectual property. The direct cause of the loss suffered is called a peril and includes weather, fire, collision, negligence, theft or other criminal behavior, as well as economic conditions or changes in consumer preferences that may cause a firm to lose value.

Hazards are conditions that increase the frequency or severity of a loss and are typically categorized as physical, moral, attitudinal and legal hazards. Physical hazards should be easy for students to understand. For example, defective wiring or a gas leak are hazards that increase the probability of a fire, while stored flammables and accumulated trash are hazards that can provide fuel for the fire, increasing its magnitude or severity. Similarly, icy road conditions are a physical hazard that increases the likelihood of collisions. Legal hazards are the conditions or legal "time bombs" that increase the risk of liability, e.g., unsafe work conditions that can lead to worker injuries and liability for workers' compensation, inadequate quality control that results in defective products that harm consumers, failure to adequately protect intellectual property, or careless drafting of contracts. Legal hazards also include characteristics of the legal system itself that may increase the frequency or severity of a loss, such as uncertainty of outcome or adverse jury verdicts with large awards

[8] MICHAEL W. ELLIOT, RISK MANAGEMENT PRINCIPLES AND PRACTICES, 1st ed. (American Institute for Chartered Property Casualty Underwriters, 2012) at 1.4.

to the injured plaintiff. Moral hazards refer to the possibility that someone will intentionally cause a loss. Thus, faking an accident, filing a false claim or inflating a claim, and arson are all examples of moral hazards. Finally, careless and indifference to the possibility of a loss that may be covered by insurance are called attitudinal or morale hazards. Leaving a house or office unlocked or leaving the car keys in the ignition, for example, are attitudinal hazards that increase the frequency and/or severity of theft, while obtaining insurance to cover speeding tickets increases the likelihood that the driver will speed and possibly cause an accident.

Traditional risk management uses a number of loss prevention and control strategies to reduce the possibility of loss exposure from various hazards by minimizing the frequency of the risk occurring or the adverse impact should it occur. In addressing liability exposures from physical hazards, for example, companies may tighten security, improve lighting and floor conditions, install sprinkler systems, implement stronger warnings, increase inspections for latent hazards, or restrict access to dangerous areas. Other risk management techniques attempt to prevent, reduce or mitigate loss. Companies may avoid a risk altogether by getting rid of the activity that exposes them to that risk. Pharmaceutical companies may cease manufacturing high risk vaccines, while sporting goods companies may choose not to manufacture or sell trampolines to avoid any liability risk from injured users. Another risk management technique is to make back-ups, which risk managers call duplication, so that if an item fails, a back-up is available to prevent the loss. For example, a winery may have two wine cellars or two wine tanks for storage so that if one fails or becomes contaminated, they still have a good batch to bottle and market. Diversification is another loss reduction technique that involves spreading the exposure so less is exposed at anyone one place. When companies divide inventory among several warehouses, for example, they are engaging in diversification.

It is not always advantageous to avoid or reduce risk altogether, and companies may retain some risks as a cost of doing business, transfer some risks by shifting them to an insurer or another party via contract, and also finance risk through insurance, reserves or credit. Where losses are anticipated to be relatively small, even if they occur fairly frequently, a company may actively or passively retain some of that risk, while implementing other loss control strategies to minimize the extent of the loss. For example, companies that deliver goods and products will finance some of the risk of accidents by insuring their fleet vehicles; if they assume a high deductible, they are actively retaining more of the risk than if they seek a lower deductible. In addition to insurance, risks can also be transferred through contractual provisions, such as hold harmless clauses and exclusions from liability or leases drafted that hold tenants liable for damage to the leased premises.

Table 1 provides a summary checklist of key concepts of risk management that faculty can introduce to their legal studies students.

TABLE 1

Basic Risk Management Concepts
Objectives of Risk Management ➢ Balance Risk and Reward (e.g., business continuity or growth) to reflect risk appetite[9]
Goals to Manage Risk ➢ Identify tolerable uncertainty, legal and regulatory compliance, survival business continuity, earnings stability, profitability and growth, as well as social responsibility and the economy of risk management operations[10]
Risk Terminology ➢ Loss exposure – thing exposed to loss, such as personnel, property, liability and income

[9] ELLIOT, *supra* note 8 at 1.15.
[10] *Id.* at 1.15 -- 1.19.

➢ Perils – the cause of the loss ➢ Hazards – Conditions that increase the frequency or severity of a loss are hazards, such as moral hazard (intentionally causing the loss), morale or attitudinal hazard (carelessness or indifference), physical hazard, and legal hazard.[11]
Techniques to Treat these Risks ➢ Avoidance (ceasing or never taking the risk) and separation (isolate one loss exposure from another) ➢ Duplication (use spares and backups) ➢ Diversification (spread the loss exposures) ➢ Prevention (reduce the frequency of loss) ➢ Reduction (reduce the severity of loss)[12] ➢ Retention (keep the risk within the firm) ➢ Transfer and Financing Risk (allocate the risk through contractual terms, insurance or other financial arrangements)[13]
Categories of risk ➢ Perils and hazards to property and people ➢ Operational, e.g., how the firm actually does its business, including people, process, systems and external events, sometimes defined as anything not market or financial ➢ Financial, e.g., interest rate, counterparty, price, credit and currency ➢ Strategic risks, e.g., acts and events of competitors and financial markets, political and legal changes, the economy and society[14]

Beyond these traditional risk management tools, today's risk managers use more tools, techniques, and risk models to categorize

[11] *Id.* at 3.3-3.4, 3-8-3.16. REJDA, *supra* note 6 at 4-11.
[12] ELLIOT, *supra* note 8 at 3.5
[13] *Id*. at 8.3-8.9.
[14] REJDA, *supra* note 6 at 63-65. HAROLD D. SKIPPER AND W. JEAN KWON, RISK MANAGEMENT AND INSURANCE, (Blackwell Publishing, 2007) at 21-22. ELLIOT, *supra* note 8 at 1.28, 4.3-4.8, 4.13-4.34.

and assess the urgency of risks facing the enterprise, including speculative financial risks, strategic risks, and newer operational risks like cyber-risks, privacy and terrorism that were rarely (if at all) contemplated even a generation ago. Reflecting this dual view of risk as gains or losses, Elliot offers a contemporary definition of risk management as "[t]he process of making and implementing decisions that enable an organization to optimize its level of risk" to manage risks, "both positive and negative, to meet its objectives."[15] Enterprise risk management takes risk analysis to a higher level and looks at the full spectrum of risks, including perils and operational, financial, and strategic hazards, and how these risks impact the firm's value.

IV. INCORPORATING RISK AND RISK MANAGEMENT IN THE LEGAL STUDIES CURRICULUM

Legal studies classrooms provide an excellent opportunity to introduce students to the terminology of risk and uncertainty. Law classes already devote considerable attention to uncertainty, encouraging students to apply the law to particular situations that may have uncertain facts and produce uncertain legal consequences. Students may also be asked to analyze and/or draft contractual provisions to reduce those uncertainties by transferring some of the risk to other parties to the transaction.

In this section, we offer teaching strategies and specific assignments that add risk as a dimension to legal analysis in undergraduate and graduate legal environment courses, as well as traditional business law electives. With the exception of a social media project created by two of our colleagues (discussed later), the authors designed each of these in-class exercises and assignments to enhance student understanding of the risk dimension of legal issues and the impact of legal decisions on the firm. These are not simply abstract assignments; each has been

[15] Id., *supra* note 8 at 1.5.

implemented and revised in the specified course over a series of semesters to produce the time-tested iterations that appear in the appendices.

A. THE INTRODUCTORY UNDERGRADUATE LEGAL ENVIRONMENT COURSE

Businesses are exposed to a variety of potential loss exposures. Many of these are legal liability risks and thus within the scope of legal studies course content. For example, companies can incur loss from the destruction or loss of property of others, injuries that occur on its own premises, liability caused by defective products, or liability resulting from environmental pollution. Employment issues such as sexual harassment, wrongful discharge and retaliation, or work-related injuries can also create loss exposures. Criminal acts ranging from shoplifting to employee theft to theft of intellectual property and trade secrets create losses. Depending on the nature, probability and magnitude of the loss exposure, companies develop risk management strategies to avoid, control, retain, transfer or insure against potential losses.

In the typical legal environment course, these topics are presented primarily in terms of legal issues and liability. These legal issues can also be examined from a risk perspective to add another dimension to the discussion. At Georgia State University, successful completion of the legal environment course is a prerequisite for admission to the college and upper-division business classes; accordingly, the course is primarily taken by freshman and sophomore level students who have not yet had business courses beyond introductory accounting and economics. Rather than formally introducing these students to risk terminology and basic risk management principles, we recommend more explicitly discussing existing content with the added dimension of risk to illustrate why and how law can be used to add value to the firm. In addition, existing assignments can be adapted to include a risk dimension as students focus on the legal issues.

Legal environment of business courses typically introduce students to features, advantages and disadvantages of non-corporate and corporate business entities. In teaching this content, we typically guide our students through the evolution of business entities from sole proprietorships and general partnerships, which expose their owners to unlimited personal liability, to the corporate form, which limits owner liability, to the modern adaptations of limited liability companies and limited liability partnerships. If instructors are not doing so already, we recommend that they explicitly articulate the differences in owner liability from the perspective of investor risk.[16] Similarly, discussion of intellectual property, tort and product liability law, contract law, and agency and employment law can be expanded to more intentionally remind students of the risks that gave rise to the legal question before them and how the law can be used to reduce, allocate, or transfer that risk, in addition to simply resolving the legal dispute.

Another strategy to increase student awareness of risk in the standard legal environment course is through experiential learning or what is sometimes called fieldwork. Such assignments will often be tied closely to liability issues, though instructions can be broadened to include business and financial risk and other risk concepts. For example, students in many legal studies classes are assigned to write a Court Observation paper that requires them to attend a court proceeding and then describe what they witnessed, the legal and procedural issues raised during their observation, and how what they observed relates to what they have learned in class. As part of the paper, students can be asked to explicitly identify and address concepts of risk, e.g. liability and financial risks, perils and hazards, and risk management strategies that might have averted the dispute underlying the legal proceeding.

Alternatively, students could take a walking tour of a retail or commercial complex or even their campus to identify property and

[16] This also ties the discussion of risk management back to corporate finance. See Garven, *supra* note 5 at 3.

liability exposures. Zoos and aquariums can also be excellent venues for students to assess risks; in addition to obvious liability sources that may cause personal injury, they also allow students to look at compliance with state and federal laws concerning animal welfare, providing a different dimension to examine liability. Students could be asked to submit digital photographs of potential premises liability risks and hazards, accompanied by a one or two paragraph essay in which they both describe the risk and explain what mitigation measures, if any, the owner should have taken to reduce risk exposure. Sample instructions for such a project appear in Appendix A.

Another project suitable for either an undergraduate or MBA legal environment class relates to social media, a topic very rich with potential risk and harm as companies (and their employees) embrace Facebook, twitter, blogs, intranets, Linked-In and similar sites. This topic resonates with students and they seem to find many of the legal and risk issues easy to grasp. In one social media project, for example, students were asked to choose a specific industry and then to draft a social media policy framed to match a company's culture within that industry.[17]

B. BUSINESS LAW COURSES

Because contracts have long been used to avoid certain risks or to allocate others between the parties, the traditional business law class with its emphasis on common law and UCC contracts is an appropriate course in which to incorporate risk management principles and strategies. At Georgia State, we have renamed the course "Legal Transactions and Risk" to reflect its expanded coverage of and emphasis on risk. This class is available as an upper-division business elective that is primarily taken by juniors

[17] Perry Binder and Nancy R. Mansfield, *Social Networks and Workplace Risk: Classroom Exercises from a U.S. and EU Perspective,* 30 J. LEGAL STUD. EDUC. 1 (March 2013).

and seniors, many of whom are accounting and finance majors. In addition, we are offering a new course, Contracts Risk, that can be used toward the RMI major.

Because students enrolled in both courses are business majors nearing the end of their undergraduate career who have taken at least one other legal studies class, the instructor can more fully integrate a risk management perspective into the legal content. This requires not only instructor familiarity with the definitions and basic principles, but also the use of assignments to reinforce this added dimension. The definitions of risk and risk management summarized earlier in this article should provide the needed preparation to introduce these concepts. Students can be assigned to read an introductory chapter from a risk management textbook;[18] there are also numerous articles and books available to deepen instructor and student understanding of risk and uncertainty beyond the overview of risk management terminology and basic principles provided earlier in this paper.[19]

---

[18] One such textbook is GEORGE E. REJDA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE, *supra* note 6.

[19] ROBERT I. MEHR AND BOB A. HEDGES, RISK MANAGEMENT IN THE BUSINESS ENTERPRISE, (Richard D. Irwin, Inc., 1963) at 15, ("Risk is defined as 'uncertainty regarding a loss."). JAMES L. ATHEARN, *RISK and Insurance* (2d ed, 1969) at 641 ("Risk may be defined as either (a) the possibility of loss or (b) the possibility of unfavorable deviation from expectations, because any unfavorable deviation from expectations is a loss."). Oliver G. Wood, Jr., *Evolution of the Concept of Risk*, 31 J. OF RISK AND INS. 83, 91 (March 1964). Athearn collects many definitions in his article. CHARLES 0. HARDY, RISK AND RISK BEARING (Chicago: The University of Chicago Press, 1923) at 1 ("Risk is uncertainty...."). There are many other definitions of risk used within the spheres of economics and risk and insurance, but this basic definition is sufficient for undergraduates. For other definitions, *see, e.g.,* Robert M. Crowe and Ronald C. Horn, *The Meaning of Risk*, 34 J. OF RISK AND INS., 459, 462 (Sept. 1967) ("In this paper, risk is defined as the possibility that a sentient entity will incur loss.") FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT (Boston: Houghton Mifflin Co., 1921) at 233 defined risk as measurable uncertainty ("The practical difference between the two categories, risk and uncertainty, is that in the former the distribution of the out- come in a group of instances in known (either through calculation a priori or from statistics of past experience), while in the case of

One of the authors teaches the course Legal Transactions and Risk annually. For the past several years, she has used two to four insurance cases on the first day of the semester to introduce students to risk and insurance concepts, as well as the importance of careful drafting of contracts to minimize risk exposure. Students are presented with the facts and pertinent insurance policy provisions for each case and then assigned the role of the judge and asked to decide the whether the insurance policy covers the claim being asserted. The cases were chosen to "hook" student interest, as well as to lay the groundwork for issues that will continue to surface throughout the semester. In one case, students are asked to decide whether an accidental death benefit clause applies to the insured's death from acute cocaine poisoning,[20] while in another, they have to decide whether the insured's mother, as beneficiary of his life insurance policy, was entitled to recover under the policy after he died of a gunshot wound to the head. The insurance company had denied her claim, after concluding that he had made false statements in bad faith about his drug use and prior hospitalization for a gunshot wound on his insurance application, thus voiding the policy.[21] The two other cases result from car accidents, but also pose compelling facts; in, one the insured claimed the insurance company acted in bad faith in delaying her

---

uncertainty this is not true, the reason being in general that it is impossible to form a group of instances, because the situation dealt with is in a high degree unique.") SKIPPER AND KWON, *supra* note 14 at 20 ("risk as the relative variation of actual from expected outcomes."). Douglas Hubbard gives two definitions, a long and a short: "The probability and magnitude of a loss, disaster or other undesirable event," and "Something bad could happen," DOUGLAS HUBBARD, THE FAILURE OF RISK MANAGEMENT: WHY IT'S BROKEN AND HOW TO FIX IT. (Wiley, 2009).

The authors' prefer the economic definition of risk which embraces the possibility of gain (recognized in finance, too) as well as loss, but this is not important for the pedagogical point made here.

[20] *Weil v. Federal Kemper Life Assurance Co*., 7 Cal.4th 125, 27 Cal.Rptr.2d 316, 866 P.2d 774 (Cal. 1994).

[21] *Cummings v American General Life Ins. Co*., 2008 U.S. Dist. LEXIS 37157 (E.D. Pa., 2008).

claim,[22] while in the second, the insured claimed the insurance company failed to negotiate a settlement in good faith.[23] The cases intrigue the students and keep their interest for two hours on the first day of class, and provide an excellent opportunity to introduce the importance of contracts – and carefully drafted contracts – as a strategy to manage potential liability risk.

After formally introducing risk terminology and basic principles in a subsequent class, the exercise in Appendix B helps students understand and apply that terminology to a variety of business risks. This in-class activity firsts asks students to identify five risks confronting a business. For each identified risk, students then suggest a business strategy to prevent, reduce or manage that risk. Finally, the activity asks them to classify the risk management strategy using appropriate terminology, e.g., risk control (avoidance, loss prevention) or loss control (separation, duplication, diversification[24]) or risk financing (e.g., retention, non-insurance transfer, or insurance).[25] In conjunction with this activity, students also read and analyze extensive excerpts from an automobile insurance policy in class, which further reinforces their understanding of both risk and insurance terminology. This exercise asks them to identify, explain and apply provisions in the policy related to perils, moral hazard, insurable interest, indemnification and subrogation clauses, exclusions, the good faith obligations of the parties, the insured's duties following an accident, and risks retained by the insured.

Hold harmless clauses and non-compete provisions in contracts illustrate two types of clauses that can be used to reduce the liability exposure of a business, although we contend students should realize that risk management is not limited to using

---

[22] *Goodson v American Standard Ins. Co. of Wisconsin*, 89 P.3d 409 (Colo., 2004).

[23] *Berglund v. State Farm Mutual Auto. Ins. Co*., 121 F.3d 1225 (8th Cir. 1997).

[24] Arthur L. Flitner (ed.) FOUNDATIONS OF RISK MANAGEMENT AND INSURANCE (The Institutes, 2010), at 3.3.

[25] REJDA, *supra* note 6.

contracts to avoid or shift liability. Consequently, Appendix C asks students to draft an exculpatory clause for a skydiving club and a non-compete clause for a bakery's employment contract. When students submit their completed assignment, there is considerable class discussion about what terms each clause should contain, as well as the difficulty of drafting language that will adequately protect the client's interests and avoid these particular risks.

Similarly, we require a semester-long contract-negotiation simulation in Legal Transactions and Risk. Students have negotiated and drafted contracts for the sale or lease of a home, home improvement contracts, sale of a business, commercial leases, employment contracts, and both domestic and international sales of goods contracts.[26] The project not only reinforces the importance of careful drafting to protect the client's interests, but also provides students with an opportunity to enhance their negotiation skills, oral and written communication skills, and critical thinking skills as they are subsequently asked to revise their draft contracts as "new" facts emerge that change their exposure to risk.

Essay questions on exams for both courses can require students to articulate and apply risk principles as part of their legal analysis. We have provided two sample questions in Appendix D. As part of the final exam for Legal Transactions and Risk, students also write a take-home essay in which they identify and briefly explain three legal doctrines studied in the course that they believe are of particular importance to managers. For each legal doctrine, they identify and explain a business risk that ignorance of the legal rule

[26] One of the authors has been using the contract simulation project in her business law classes for nearly 25 years. Although she has created most of the fact patterns students use in negotiating their contracts, she has also adapted and expanded the international sale of goods exercise created by Marisa Anne Pagnattaro and described in *From the Factory to the Playroom: Mattel, Inc. – Shenzhen Union King Sales Contract Exercise*, 28 J. LEGAL STUD. EDUC. 357-383 (Fall 2011).

could create, and then how managers could use their knowledge of that doctrine to reduce their company's exposure to litigation and liability that could be caused by that risk. Full instructions and a grading rubric for the take-home essay are also in Appendix D. Requiring students to integrate risk management strategies into their legal analysis, the essay question enables the instructor to quickly assess whether students are attaining this explicit course objective.

C. THE MBA LEGAL ENVIRONMENT COURSE

Attention to risk management has become a part of corporate governance in general.[27] Undergraduate legal environment students are introduced to corporate governance and the business judgment rule at a basic level. At the graduate level these doctrines can be developed in the context of risk.

---

[27] *See, e.g.,* The Corporate Laws Committee, ABA Section of Business Law, *Corporate Director's Guidebook-Sixth Edition*, 66 BUS. LAW. 975 (2011) ("Strategy and risk are interrelated, and directors cannot understand and guide strategy without also focusing on risk. Corporations must manage risks appropriately. Although not engaged in day-to-day risk management, directors are charged with its oversight" at 978; and "The board's oversight function involves monitoring the corporation's business and affairs including, for example, financial performance, management performance, compliance with legal obligations and corporate policies, and evaluating appropriate risk management structures" at 985). *See also,* Coral Ingley and Nick Vander Walt, *Risk Management and Board Effectiveness*, 38 INT'L STUDIES OF MGMT. & ORG. 43 (Fall, 2008); Martin Lipton, et al., *Risk Management and the Board of Directors*, 18 CORP. GOV. ADVISOR 1 (May/April 2010); E. William Bates II and Robert J. Leclere, *Boards of Directors and Risk Committees*, 17 CORP. GOV. ADVISOR 15 (Nov/Dec 2009); Cynthia M. Krus and Hannah L. Orowitz, *The Risk-Adjusted Board: How Should the Board Manage Risk*, 17 CORP. GOV. ADVISOR 1 (March 2009); Brenda Boultwood, *Risk in the Boardroom*, GLOBAL ASS'N OF RISK PROFESSIONALS, (Nov. 26, 2012) http://www.garp.org/risk-news-and-resources/2012/november/risk-in-the-boardroom.aspx.

The firm's management of risk is becoming one component of the business judgment rule, falling within the firm's duty of care.[28] The Delaware Chancery Courts have addressed this in at least three cases,[29] most explicitly in *In re Goldman Sachs*, where the court

[28] *See also* Bainbridge, *supra* note 1; Robert T. Miller, *Oversight Liability for Risk-Management Failures at Financial Firms*, 84 S. CAL. L. REV. 47 (2010); Michelle M. Harner, *Barriers to Effective Risk Management*, 40 SETON HALL L. REV. 1323, 1324 (2010) ("ERM is an integrated risk-management framework that seeks to improve knowledge of and communication about potential risks throughout the firm, starting with the board and senior management team. Indeed, the board and senior management team are vital to creating a risk culture. This Article considers the impact of boardroom dynamics and U.S. corporate culture on risk-management practices."); Wulf A. Kaal & Richard W. Painter, *Initial Reflections on an Evolving Standard: Constraints on Risk Taking by Directors and Officers in Germany and the United States,* 40 SETON HALL L. REV. 1433, 1442-43 (2010) ("Arguably, the business judgment rule finds a middle ground between excessive risk and excessive risk aversion while taking into account the interests of shareholders, corporate directors, and sometimes other constituencies."); and David Rosenberg, *Supplying the Adverb: The Future of Corporate Risk-Taking and the Business Judgment Rule,* 6 BERKELEY BUS. L.J. 216, 220 (2009) ("The widely accepted notion that the business judgment rule should protect virtually all risk-taking by corporate directors goes too far. Under Delaware law, a director should be liable for risky decisions that go wrong if the plaintiffs can show that the director knew that the decision was, to use Chancellor Allen's phrase, "too risky" [footnote omitted] or if the director did not even care to find out what the risks were.")
There are difficulties with using risk management a basis for finding liability under the business judgment rule, as noted in Robert T. Miller, *The Board's Duty to Monitor Risk After Citigroup*, 12 U. PA. J. BUS. L. 1153, 1164 (2010).

[29] *In re Caremark Int'l Inc. Derivative Litig*., 698 A.2d 959 (Del. Ch. 1996) ("it would, in my opinion, be a mistake to conclude that our Supreme Court's statement in *Graham* concerning 'espionage' means that corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance. [¶] Obviously the level of detail that is appropriate for such an information system is a question of business judgment.). *In re Walt Disney Co. Derivative Litig*.,

said, "The Director Defendants exercised their business judgment in choosing and implementing a risk management system that they presumably believed would keep them reasonably informed of the company's business risks."[30] As early as 1996, the Delaware court was noting the risk taking, and therefore the risk factors, that directors must consider under the business judgment rule. "Shareholders' investment interests, across the full range of their diversifiable equity investments, will be maximized if corporate directors and managers honestly assess risk and reward and accept for the corporation the highest risk adjusted returns available that are above the firm's cost of capital."[31] One of the first and foremost writers of risk, Charles O. Hardy, explained the connection best in his 1923 textbook, *Risk and Risk-Bearing*: "it is the persistent element of uncertainty which makes necessary the exercise of business judgment, and make possible the reaping of business profit."[32]

The Securities and Exchange Commission has added risk management to corporate management's responsibilities and disclosure requirements.[33] The *Proxy Disclosure Enhancements*

---

825 A.2d 275, 289 (Del. Ch. 2003) ("the facts alleged in the new complaint suggest that the defendant directors *consciously and intentionally disregarded their responsibilities,* adopting a "we don't care about the risks" attitude concerning a material corporate decision. Knowing or deliberate indifference by a director to his or her duty to act faithfully and with appropriate care is conduct, in my opinion, that may not have been taken honestly and in good faith to advance the best interests of the company.")

[30] *In re Goldman Sachs Group, Inc. Shareholder Litig.,* 2011 CIV.A. 5215 VCG, 2011 WL 4826104 (Del. Ch. Oct. 12, 2011), *aff'd by (sub nomine)* at *SEPTA v. Blankefein,* 44 A.3d 922 (Del. May 3, 2012), and cited without comment in *In re Goldman Sachs Mortgage Servicing Shareholder Derivative Litig.*, --- F.Supp.2d ---, 2012 WL 3293506 (S.D.N.Y. Aug. 14, 2012).

[31] *Gagliardi v. TriFoods Int'l, Inc.,* 683 A.2d 1049, 1052 (Del. Ch. 1996).

[32] CHARLES O. HARDY, RISK AND RISK-BEARING (1923) at xiii.

[33] Mary Ann Gadziala, *Speech by SEC Staff: SEC Risk Management and Compliance Examination*, 2003 Fiduciary and Investment Risk Management Association, Fiduciary and Risk Management Seminar (Feb. 26, 2003), SECURITIES AND EXCHANGE COMMISSION,

final rule requires listed companies to disclose in the management narrative "risks arising from the registrant's compensation policies and practices for its employees [that] are reasonably likely to have a material adverse effect on the registrant, discuss the registrant's policies and practices of compensating its employees, including non-executive officers, as they relate to risk management practices and risk-taking incentives."[34] The SEC's announcement of the Rule explained:

> The disclosure enhancements we are adopting respond to this focus [on informed voting and investment decisions], and will significantly improve the information companies provide to shareholders with regard to the following:
>
> > Risk: by requiring disclosure about the board's role in risk oversight and, to the extent that risks arising from a company's compensation policies and practices are reasonably likely to have a material adverse effect on the company, disclosure about such policies and practices as they relate to risk management…[35]

---

http://www.sec.gov/news/speech/spch022603mag.htm. Carlo V. Di Florio, *Speech by SEC Staff: The Role of Compliance and Ethics in Risk Management* NSCP Meeting, (Oct. 17, 2011), SECURITIES AND EXCHANGE COMMISSION, HTTP://WWW.SEC.GOV/NEWS/SPEECH/2011/SPCH101711CVD.HTM#P52_13272, ("The board of directors (if one exists in the organization) is responsible for setting the tone at the top, overseeing management and ensuring risk management, regulatory, compliance and ethics obligations are met.")

[34] 17 C.F.R. § 229.402.

[35] Final Rule, Proxy Disclosure Enhancements, 17 C.F.R. § 229.402 (effective Feb. 28, 2010) and available at http://www.sec.gov/rules/final/2009/33-9089.pdf. (last accessed 30 June 2013).

The SEC also requires boards to disclose cyber risks,[36] a topic previously left to the chief information officer. As a result of cases like *Caremark* and *Goldman Sachs*, SEC rules, and new obligations imposed by the Dodd-Frank Act that require financial services companies with at least $10,000,000,000 assets to have risk committees at the board level,[37] a new sub-discipline called "governance, risk and compliance" has come into being.[38]

To explore governance and risk issues, MBA students can be required to write a series of papers that evaluate corporate risk and governance information disclosed in the SEC filings of Fortune 500 companies. In a project developed by one of the authors for her graduate legal environment class, teams of MBA students are assigned Fortune 500 companies to research during the semester. One portion of the project requires them to carefully read their

---

[36] CF Disclosure Guidance: Topic No. 2, Cybersecurity, Division of Corporate Finance, *Securities and Exchange Commission* (Oct. 13, 2011), F http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm#_ednref3.

[37] Dodd-Frank Act, § 165(h). The Dodd-Frank Wall Street Reform and Consumer Protection Act requires financial market utilities (FMUs) to manage risk proactively. *See e.g.,* PriceWaterhouseCooper, *The Evolution of Model Risk Management* (May 2013) available at http://www.pwc.com/us/en/financial-services/regulatory-services/publications/dodd-frank-closer-look/model-risk-management.jhtml. This white paper takes a closer look at guidance by the Office of the Controller of the Currency and the Federal Reserve Board to oversee financial services companies' risk management. On January 10, 2014, the Federal Reserve Board proposed revisions to the risk management standards in Regulation HH for FMUs designated "systemically important" that were initially issued in July 2012. The proposed revisions would establish a new standard for general business risk, as well as separate standards to address credit and liquidity risks.
http://www.federalreserve.gov/newsevents/press/other/20140110b.htm

[38] *See e.g.,* Mark L. Frigo and Richard J. Anderson, *A Strategic Framework for Governance, Risk, and Compliance*, 90 STRATEGIC FIN. 20 (Feb. 2009); ROBERT R. MOELLER, COSO ENTERPRISE RISK MANAGEMENT: ESTABLISHING EFFECTIVE GOVERNANCE, RISK, AND COMPLIANCE PROCESSES (Wiley, 2011); Eric Krell, *All Hands on (the GRC) Deck!,* BUS. FIN. MAGAZINE (May/June 2009) at 24; and Gary Dickhart, *Risk: Key to Governance*, INTERNAL AUDITOR, (Dec., 2008) at 27.

assigned company's 10-K annual reports and 10-Q quarterly reports over a three-year period to identify any material litigation, contingent liabilities and risk, as well as other, non-legal risks disclosed in these SEC filings that might affect profitability and shareholder investment, such as cyber-risk, unforeseeable increases in raw materials costs (fuel costs for transportation companies), unanticipated work stoppages due to natural disasters or wars (if so identified in a company's reports), and other broadly defined risks. The students are required to write a Risk Assessment Paper that reports their findings and recommendations. In a second paper later in the semester, students research the company's governance structure and executive compensation metrics from its posted governance documents, proxy statements, and other SEC filings. The instructions and grading rubric for the Risk Assessment Paper are in Appendix E.[39]

Case studies are also an excellent tool for adding a risk dimension to an advanced legal environment of business course, typically at the graduate level. Depending on the maturity and capabilities of the particular students, seniors and honors students may also be able to discern distinctions, contexts, and abstraction of case studies in addressing risk, uncertainty and consequences.[40]

---

[39] For a discussion of the full project, as well as instructions for each of the component papers, see Susan Willey and Peggy Sherman, *Mining for Gold: Utilizing SEC Filings to Develop MBA Students' Understanding of Legal Concepts*, 27 J. LEGAL STUD. EDUC. 321-355 (Summer 2010).

[40] Similarly, case studies can be used in undergraduate courses. In a freshman class that explored risk in society, students looked at the problem of piracy of ships off the Somalia coast as an exercise to understand risk and consequences. While the risk of capture and ransom was obvious, so was the anticipated student solution to shoot the pirates, until students began to consider other possible consequences. For example, when do the sailors shoot and what happens if the pirates shoot back or sink the ship? What response is likely to be safer to the crew and when does international maritime law apply? The current Somali piracy was compared to the Barbary Coast piracy. Extensive class discussion followed on risk management.

One of the authors has developed several case studies for his graduate legal environment of business classes – which could be adjusted for undergraduate students – on risk and liability arising from the manufacture and distribution of violent video games or alternatively from the sale of "junk" food that consumers claim have caused myriad health-related issues, including obesity and diabetes. Another case study requires students to examine the Atlanta Public Schools' cheating scandal to look at the risk of cheating on a variety of stakeholders, from the superintendent, to principals and teachers, to students and their families, and to the school system and the community as a whole.

Another teaching strategy to incorporate risk analysis into the graduate legal environment class is to weave one or more "risky" products throughout the course and encourage students to assess various legal risks associated with the products as different substantive legal topics are studied by the class. For example, one of the authors teaches the MBA legal environment course in an online format annually. For the first week's discussion boards, she posted an open-ended challenge asking students to identify legal risks associated with the development, production, marketing, sale and/or use of autonomous (driverless) cars, 3-D printing, and so-called "smart eyewear" devices, such as Google Glass, and then to suggest strategies to minimize and manage those risks. Most students commented on the risk of intellectual property infringement for all three products, suggesting patents and trademarks to protect the products from infringement by competitors, as well as requiring employees to sign confidentiality, non-disclosure, and non-competition agreements to reduce the likelihood that a disgruntled or greedy employee might attempt to sell that intellectual property to a competitor. In discussing autonomous cars, students also explored whether the driver or the manufacturer would be liable if the driverless car were in an accident and the driver, passengers, passengers in other vehicles, or bystanders were injured as a result of defective software controlling the vehicle. Similarly, students focusing on 3-D

printing considered who might be liable for potential legal risks if functional weapons are created by 3-D printing and used in the commission of criminal or terrorist asks. For all three products, students also identified numerous other risks, including regulatory and privacy risks. When they studied common law and UCC contracts two weeks later, students were asked to revisit their risk assessments and explore which (if any) of the identified risks could be avoided, reduced or transferred through warranties, limitations on remedies, hold harmless clauses, or other contractual provisions. Later in the semester as students study intellectual property, tort and product liability law, agency law, securities regulation and insider trading issues, they will be asked to either reassess their initial risk analysis in light of their deeper understanding of these substantive legal topics or to apply these legal rules to hypotheticals created to illustrate additional potential liability risks associated with autonomous cars, 3-D printing, and Google Glasses.

V. CONCLUSION

Businesses face a broad array of risks, not just legal risk and risk managers use more than legal tools to effectively manage those risks to produce gains, while limiting losses. The study of risk adds another dimension to business law courses beyond the legal concept of liability, which conveys only legal risk. A business law course can incorporate a broader concept of risk into its program through many ways, thereby bringing a more contemporary business understanding of risk to the legal studies curriculum.

APPENDIX A: PREMISES LIABILITY EXTRA-CREDIT ASSIGNMENT

After reading the material on negligence and premises liability in the textbook, find an item or property condition that might expose the landowner to a liability claim. Look in stores, parks and playgrounds, parking lots, apartment complexes, public buildings, or even the campus. Photograph the item or condition and then in a paragraph,

- identify where the picture was taken,
- explain what in the photo constitutes negligence and why, and
- make suggestions as to what the owner should do to mitigate potential liability.

Each submitted picture/explanation is worth up to 5 points. You may submit up to 5 photographs (with explanations), assuming that you are eligible for EC based on attendance. Note: You must take the picture and are not permitted to simply download pictures of dangerous conditions on premises from the internet to use for this assignment.

APPENDIX B: IDENTIFYING STRATEGIES TO REDUCE BUSINESS RISK

Directions: Working in groups of no more than 3, complete the following table.

- In the Column 1, identify 5 risks that a business may confront.
- In the Column 2, suggest at least 1 way the business might prevent, reduce or manage that risk.
- In the Column 3, categorize your recommendation in column 2. Are you suggesting a risk control method (e.g., avoidance, loss prevention, or loss control) or a risk financing method (e.g.,

retention, non-insurance transfer, or insurance) as the best way to prevent, reduce or otherwise manage the risk in column 1.

Risks Confronting Business	Strategies to Prevent or Reduce that Risk	Category of Risk Strategy

APPENDIX C: EXERCISE ON DRAFTING CONTRACT CLAUSES TO REDUCE RISK

EXCULPATORY CLAUSES

You are the president of the newly formed University's Skydiving Club. Provided that you can obtain financial sponsorship, you hope to sponsor 4-5 jumps yet this spring, culminating in an exhibition jump at the campus spring festival.

Although your current members are all experienced skydivers, you anticipate recruiting students who have never participated in the sport. To join, new members will have to take skydiving lessons at the airport before they can participate in any club-sponsored jumps.

You are concerned about the club's potential liability, should a member be injured or killed during a jump. To reduce the club's exposure to liability, draft an exculpatory clause (a waiver that holds the club harmless for injuries to jumpers) that each member would be required to sign before each club-sponsored skydiving event.

Note: Although you may look at exculpatory clauses that you find on the web for content ideas, write the Skydiving Club's clause in your own words. Provide a bibliography of all websites you consult that includes URLs.

Covenants Not to Compete

Assume that you are a partner in a bakery in St. Louis, Missouri, that specializes in exotic, expensive pastries. The business has grown quickly in its first four years, and now sells its products to stores and restaurants throughout Missouri, Illinois and Iowa. Sandra has applied for a management position and appears to be the perfect candidate. She has five years' experience as a food wholesaler and a reputation as a superb amateur chef. Sandra would analyze the market for new products, create new pastries and other foods, and assist in selling new and existing products. Sandra would work with company chefs, salespeople, and customers – just about everyone.

Draft a noncompete clause for Sandra's contract that would prohibit Sandra from working for a competitor or starting her own bakery. You may want to include protections for the bakery's trade secrets, customer lists, and confidential information.

Note: Although you may look at non-competition clauses in employment contracts that you find on the web for content ideas, write the bakery's clause in your own words. Provide a bibliography of all websites you consult that includes URLs.

EXHIBIT D: INCORPORATING RISK INTO EXAM QUESTIONS

Sample Essay Questions for Course on Contracts and Risk:

Essay 1: Atlanta wants to offer rental bicycles (bike share) like other cities, such as New York, Boston, Montreal and London. Bike share systems provide iconic, sturdy bikes at self-service docking stations and a new easy way to get around the city. People can use the bikes by becoming long- or short-term members. For 1-day ($10) or weekly memberships ($25), users can sign up at any station kiosk with a credit card. Annual memberships ($95) are with on-line enrollment; the member receives a key that is similar in shape and size to a flash drive. The key can be swiped at any dock in the system to unlock a bike. A person pays by credit card or swipes his or her key, takes a bicycle, and can return it to any docking station anywhere in the city. A small monitor on the bike displays nearby docks and open spaces. Sensors on the bikes and the docking stations provide for latching and unlatching, and determining if the bike has been returned, as well as when and where. Sometimes the technology can fail, so a returned bike is not registered as returned, and a full dock can report space available on the display when actually it is full. Atlanta will lease space to the bike share company (BSC) for the docks; BSC will own the docks and the bicycles. *Identify the majors risks Atlanta will be exposed to in creating this program, and therefore what needs to be in the contract between Atlanta and BSC. State the relevant risk provisions and your recommendations as to how those provisions should read. For example, in discussing technology risk, identify the specific risks to the city and specify how a contractual provision would address them.*

Essay 2: Evaluate the risks in this contract. You may assume it is in proper legal form and contains the usual legal requirements, and specifies things like Georgia law will apply, etc.

Georgia Power Co and Paul Bunyon Tree Cutting Co. make this contract effective February 24, 2014. Paul Bunyon undertakes to deploy 20 trucks with 4-person crews and equipment to trim tree branches that surround or interfere with power lines in Fulton and Dekalb Counties, Georgia. Power lines are those running from pole to pole on streets, not lines running to buildings. Branches are to be trimmed so that no branch is closer than 5 feet from a power line, except that dead branches will be trimmed to the trunk of the tree rather than merely 5 feet from the power line. Paul Bunyon will cart away tree trimmings and dispose trimmings as recyclable wood products or for composting.

Georgia Power will provide a list of high-risk areas for Paul Bunyon to begin work. This list to be provided by March 15, 2014. Paul Bunyon will work on these areas first. Paul Bunyon will do its own surveys, or obtain from Georgia Power its surveys, of secondary areas to be trimmed. Thereafter, Paul Bunyon will deploy its trucks in any manner designed to complete all tree trimming in the counties by November 1, 2014.

Paul Bunyon will provide reports to Georgia Power on the 10th of each month of its progress towards the scheduled November 1, 2014 completion. If by August 10, Paul Bunyon has not attained 65% completion, then the parties will discuss measures to get to 85% completion by October 1.

Paul Bunyon is the sole provider to Georgia Power for this work in these counties provided completion targets are met. Paul Bunyon may not delegate or assign any work. All crews must be employees of Paul Bunyon.

Take Home Essay and Scoring Rubric: (20 points):

Knowledgeable managers can use law strategically to defuse legal "time bombs" by anticipating and reducing the risk of litigation

and liability. This requires awareness that a legal problem exists, assessment of the potential risk, and formulation of strategies to avoid the legal problem, lessen its adverse impact and/or prevent its recurrence in the future.

In a thoughtful and well-written essay, discuss three specific legal doctrines/rules that managers could (should) use to more effectively manage risk within their companies. Each of the legal rules you select should be from a different chapter that we studied this semester. For each doctrine you select, explain:

- the potential business risk that ignorance of that legal doctrine could create (or that inappropriate use of the law could exacerbate),
- the legal rule and its application to business, and
- how managers could use their knowledge of this doctrine to reduce their company's exposure to litigation and liability.

The university honor code applies. Do not discuss the question (or your answers) with classmates, friends or family until after you turn in your essay when you come to take the in-class portion of the final. Good luck!

SCORING RUBRIC FOR GRADING THE RISK TAKE-HOME-ESSAY

Name				Points
Legal "time bomb" selected to discuss				
Potential business risk (1 pt x 3)				
Legal rule and application (2 pts x 3)				
Risk Management Use (2 pts x 3)				
Essay Format (3)				
Mechanics of Writing (2)				
Total (out of 20 pts)				

APPENDIX E: MBA RISK ASSESSMENT PAPER

The SEC requires companies to report material litigation, contingent liabilities and risk in their annual and quarterly reports. Research the annual and quarterly SEC filings (including footnotes) of your assigned Georgia Fortune 500 company for the past three years and then write a paper addressing the topics below.

- Since this is your first team paper on your assigned company, please provide an introductory paragraph or two about the company and its primary product or service, as that may help put its identified risks in a more understandable context (e.g., uncertain fuel costs would be more important to Delta or Home Depot than to Aflac).
- Describe any *material litigation* identified in the company's annual reports. How were the cases resolved or are they still pending? [You may need to check quarterly reports for updates on pending litigation or announced resolutions.]
- What *liability risk* and *contingent liabilities* does the company identify in its filings? The SEC requires companies to report risk in Item 1A and Legal Proceedings in Item 3. More detailed information is usually included in Items 7 and 7A as well as in the Notes to the Consolidated Financial Statements.
- What other, *non-legal risks* does the company identify in its SEC filings that might affect profitability and shareholder investment, e.g., unforeseeable increases in raw materials costs (fuel costs for transportation companies), unanticipated work stoppages due to natural disasters or wars (if so identified in a company's reports), etc.
- Do the identified risks and liabilities fall into certain categories (e.g., employment or intellectual property issues)? How does the company portray these risks? Does the company use any *cautionary language* in describing these risks? If so, provide examples.

- If you were a shareholder, would these risks concern you? Why or why not? What additional information would you like included in the Risk sections? Why?

Points	Grading Criteria
45-50	Exceptional paper that shows original thought, analysis and creativity. Research shows considerable depth and there are more links to specific references or identification of page numbers within PDF documents. Written as a cohesive narrative, the paper goes beyond a mere summary (or answers to specific questions) and provides examples to support its analysis and conclusions.
40-44	Research shows more depth and originality than an adequate paper, but links are still broad and general and/or writing has awkward wording or too many grammatical/typographical errors.
35-39	Research and writing are adequate. Paper summarizes content, but with little analysis or conclusions. Links to information and data are fairly broad and not very helpful to readers interested in looking at the actual provision.
0-35	Research is incomplete and/or writing is not up to the standard expected of MBA students.

INTELLECTUAL PROPERTY ISSUES ASSOCIATED WITH BIOREPOSITORIES: CURRENT PRACTICES

NANCI K. CARR·

I. INTRODUCTION

As technological innovation over the last 20 years has offered ever more opportunity for the development of diagnostic and therapeutic inventions at the genomic and proteomic level, the leading edge of medical research today is increasingly found slicing through large collections of biospecimens held in government, university and private repositories. Specimens are collected from a variety of human sources for a particular purpose and then stored for future research and study. Beyond the ethical and regulatory considerations that are rich with conflicting public interests, the determination of who owns the potentially valuable intellectual property rights must be weighed against the unfettered need to promote further research and innovation that follows from data sharing and timely disclosure of results and inventions. With that in mind, what are the current practices regarding the disposition of intellectual property rights, or economic interests therein, that arise out of the study of human tissue specimens held in biorepositories and the use of the biologic information each of those specimens contains?

·J.D., Lecturer, California State University, Northridge.

II. BIOREPOSITORIES

It is conservatively estimated that, in the U.S. alone, there are over 300 million human tissue specimens stored in a large number of facilities ranging from formal repositories holding as many as 92 million specimens to the informal storage of blood or tissue in a researcher's freezer holding as few as 200 specimens.[1] The volume of biological materials in storage is increasing by 20 million units a year.[2] While such facilities are often also denominated as "tissue repositories", "biobanks", "registries", "libraries," and "genetic databases", the distinctions[3] are subtle, and here they will be collectively referred to as "biorepositories."

Biorepositories are maintained by institutions of government, academia and private industry. They include military facilities, sponsored facilities of the National Institutes of Health (the "NIH"), other federal agencies, state agencies such as forensic DNA banks and newborn screening laboratories, diagnostic pathology laboratories, university and research hospitals, commercial entities and non-profit organizations. The largest biorepository is the Armed Forces Institute of Pathology and Joint Pathology Center with specimens that have been collected for over 150 years.[4] The pathology departments at academic medical centers and community hospitals collectively constitute the largest and some of the oldest stores of biospecimens in the United State, some of which are over 100 years old.[5] Private sector collections

---

[1] Eiseman et al. *Human Tissue Repositories "Best Practices" for a Biospecimen Resource for the Genomic and Proteomic Era*, RAND SCIENCE AND TECHNOLOGY, 2003, *available at* http://www.rand.org/pubs/monograph_reports/MR954.html.

[2] Eiseman & Haga, *Handbook of Human Tissue Sources,* RAND SCIENCE AND TECHNOLOGY, 1999, *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA373679.

[3] *See, e.g.*, A. Cambon-Thomsen et al., *Trends In Ethical and Legal Frameworks For The Use of Human Biobanks,* EUROPEAN RESPIRATORY JOURNAL, 2007, *available at* http://www.ersj.org.uk/content/30/2/373.full.pdf+html.

[4] Eiseman et al., s*upra* note 1.

[5] Eiseman et al., s*upra* note 1.

are maintained for proprietary use as well as for distribution. Virtually every university medical center has created and maintains one or more biorepositories for research purposes under the supervision of the Institutional Review Board of that institution.[6]

III. SPECIMENS

Generally, the human tissue specimens[7] held in a biorepository are available for research purposes both within the institution maintaining the biorepository and for distribution to other researchers pursuant to a material transfer agreement ("MTA"). With advances in molecular biology, genetics, and informatics, there is less reliance on snap-frozen tissue, paraffin blocks or formalin-fixed tissue in preference for electronic databases of analyses of the tissues that is sufficient for the study of protein, gene expression and genetic somatic mutations. As a result, data regarding the actual physical tissue samples are increasingly transferred to researchers rather than the specimens from which the relevant data have been extracted and reduced to electronic storage media held and maintained by the

---

[6] Eiseman & Haga, *supra* note 2.

[7] A human tissue specimen is broadly defined as:

> A quantity of tissue, blood, urine, or other biologically derived material used for diagnosis and analysis. A single biopsy may generate several specimens, including multiple paraffin blocks or frozen specimens. A specimen can include everything from subcellular structures (DNA) to cells, tissue (bone, muscle, connective tissue, and skin), organs (e.g., liver, bladder, heart, kidney), blood, gametes (sperm and ova), embryos, fetal tissue, and waste (urine, feces, sweat, hair and nail clippings, shed epithelial cells, and placenta).

National Cancer Institute, *Glossary*, http://biospecimens.cancer.gov/aaBackup/cahub/news/index4837.html (last updated July 11, 2013).

biorepository.[8] For purposes of this discussion, any reference to human tissue specimens necessarily includes any data about such specimens retained by the biorepository.

Sources of such specimens are volunteers, clinical research protocols, autopsies, biopsies, blood, organ, sperm and embryo banks, pathology laboratories, and forensic laboratories. The most common source of tissue is from patients following diagnostic or therapeutic procedures.[9] The tissue specimens are stored by the biorepository for a variety of purposes, based upon its founding requirements, to fulfill a specific set of objectives including establishing correlations with respect to changes of structure and appearance of a tissue with a diagnosis of a disease and in longitudinal studies. Invariably, tissue specimens are maintained for uses that are unrelated to any original therapeutic or diagnostic purpose. For example, in describing the purpose of maintaining its biorepositories, the NCI[10] states that "commonly, human biospecimens are used to identify and validate ways to deliver drugs or agents to specific cells, identify how diseases progress and vary, group patients as more or less likely to respond to specific drugs, group patients to determine which treatment is

[8] Most repositories collect pathology data about each specimen including demographic and diagnostic information. Some also try to collect medical history and clinical outcomes data. Eiseman et al., s*upra* note 1, at 48.

[9] Eiseman and Haga, *supra* note 2, at xviii. *See also* Childress et al. *Future Uses of the Department of Defense Joint Pathology Center Biorepository,* THE NATIONAL ACADEMIES PRESS 2010*,* at 37-64, *available at* http://www.nap.edu/openbook.php?record_id=13443&page=37.

[10] The National Cancer Institute ("NCI"), part of the NIH, which, in turn, is one of eleven agencies of the U.S. Department of Health and Human Services, supports several major tissue resources that provide support for research in early detection, breast and ovarian cancer, colorectal cancer, prostate cancer, pediatric oncology and many other disease-specific collections such as HIV/AIDS. The NCI is the largest of the NIH's biomedical research institutes. Other agencies within the NIH support a multitude of biorepositories in areas related to aging, allergies, heart and lung diseases, diabetes, brain studies, deafness and other communication disorders, and environmental-related studies.

appropriate and develop screening tests to detect biomarkers that are associated with certain stages or sub-types of a disease."[11]

IV. ETHICS AND INTERNATIONAL DIFFERENCES

Apart from a multitude of vexing and contentious ethical and regulatory issues that date back to the notorious U.S. Public Health Service syphilis study at Tuskegee, the Jewish Chronic Disease Hospital case, the Willowbrook hepatitis study and other such events in the US,[12] the issues of informed consent and confidentiality are a trenchant part of the historical development regarding the use of biological materials in research. Not surprisingly, these issues are international in scope and affect the grant of patent rights to discoveries in widely differing ways around the world.[13]

For example, under the European Union Biotechnology Directive and the European Patent Convention, there are exclusions for the awarding of patent rights to inventions that are contrary to "ordre public" or morality,[14] and, as a result, moral

---

[11] National Cancer Institute, *Frequently Asked Questions,* http://biospecimens.cancer.gov/patientcorner/faq.asp#q3 (last visited February 13, 2014).

[12] *See* J. Katz, *Experimentation With Human Beings*, RUSSELL SAGE FOUNDATION, 1972.

[13] *See* Astrid Burhöi, *Moral Exclusions in European Biotechnology Patent Law*, LUND UNIVERSITY, 2006, http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1337961&fileOId=1646263 (last visited February 13, 2014) and Thambisetty, *Ethics and Law of Intellectual Property*, ASHGATE PUBLISHING, 2007, *available at* http://tinyurl.com/njc7fj9.

[14] European Patent Convention, 14th Ed. 2010, art. 53(a) *available at* http://tinyurl.com/c6bmeth.

> European patents shall not be granted in respect of:
>
> (a) inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States

issues are to be considered in the biotechnology patent field. Since, in the EU system, case law is suggestive, but not determinative, each patent application must be determined on its own merits. To complicate matters further, the ability to obtain IP protection outside the US requires filing a patent application prior to public disclosure of research results through publication.[15] In the US, researchers have a period of one year to file a patent application from the point their data and results are disclosed.[16] Since the NIH 2003 data sharing policy regarding the use of biospecimens requires that "research and resources should be made

---

Council Directive 98/44, art. 6, 1998, O.J.(L 213)

> 1. Inventions shall be considered unpatentable where their commercial exploitation would be contrary to ordre public or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation.
>
> 2. On the basis of paragraph 1, the following, in particular, shall be considered unpatentable:
>
> (a) processes for cloning human beings;
>
> (b) processes for modifying the germ line genetic identity of human beings;
>
> (c) uses of human embryos for industrial or commercial purposes;
>
> (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

[15] European Patent Convention 1973, *Id.* at art 54(1) and 54(2).

> (1) An invention shall be considered to be new if it does not form part of the state of the art.
>
> (2) The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application.

[16] 35 U.S.C. § 102.

available no later than acceptance for publication,"[17] these international differences intersect and collide with the intellectual property interests of those putative claimants otherwise entitled to exploit the rights.

V. POTENTIAL CLAIMANTS TO SPECIMEN OWNERSHIP AND INTELLECTUAL PROPERTY RIGHTS

Among those who have an arguable potential claim to property rights associated with tissue specimens in biorepositories are the biorepositories themselves, individual contributing researchers, academic and medical research institutions, industry sponsors of research, the United States government and the individual contributors of the specimens. These issues have been fiercely contested among several of these potential claimants, both in court and in contract negotiations.

One well-known such contest was *Moore v. Regents of University of California*[18] in which a patient who was treated for leukemia at a university medical center asserted that the cells of his removed spleen were economically valuable to his physician in the physician's research activities apart from the patient's leukemia treatment. The patient alleged conversion of those valuable cells, and the California Supreme Court determined that the tort of conversion could not apply to excised cells, and that the patient did not own a proprietary interest in the potentially lucrative cell line generated from his cells.[19]

---

[17] http://grants.nih.gov/grants/policy/data_sharing/data_sharing_guidance.htm#time (last updated February 9, 2012).

[18] Moore v. Regents of University of California, 51 Cal. 3d 120 (1990), *cert. denied*, 499 U.S. 936 (1991).

[19] *Id.* at 137.

> Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such

Building upon the logic in *Moore*, the court in *Greenberg v. Miami Children's Hosp. Research Inst.*[20] held that organizers, financial supporters and contributors to a tissue repository, the purpose of which was to find a treatment for a rare genetic disorder, owned no economic interest in the researcher's and the research institution's commercialization of the invention arising from their research on the tissue samples that they used to isolate the gene causing the genetic disease. The plaintiffs alleged that they had a property interest in their body tissue and genetic information. The court disagreed and declined to "find a property interest for the body tissue and genetic information voluntarily given to Defendants. These were donations to research without any contemporaneous expectations of return of the body tissue and genetic samples, and thus conversion does not lie as a cause of action."[21] The court found that the plaintiff donors had no cognizable property interest in body tissue and genetic matter donated for medical research.[22]

The most well-known of the legal contests between potential claimants to proprietary rights in biorepository tissue samples is *Washington University v. Catalona*[23] which resolved the matter, as between the researcher and the university medical center, which party owns the biorepository inventory of specimens. Dr. Catalona, a researcher and urologist at Washington University

---

> interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent -- the patented cell line and the products derived from it -- cannot be Moore's property.

[20] Greenberg v.Miami Children's Hosp. Research Inst., 264 F. Supp. 2d 1064 (S.D. FL 2003)

[21] *Id.* at 1074.

[22] "[T]he property right in blood and tissue samples also evaporates once the sample is voluntarily given to a third party." *Id.* at 1075.

[23] Washington University v. Catalona, 437 F. Supp. 2d. 985 (2006), 490 F.3d 667, 673-77 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 1122 (2008).

for over 25 years had been instrumental in establishing a biorepository for the collection and storage of biological specimens of prostate tissue, blood and DNA samples. More than 30,000 research participants were enrolled in prostate cancer research studies, in many of which Dr. Catalona was named as the principal investigator,[24] and about 3,000 of the participants had been patients of Dr. Catalona. The biorepository contained over 100,000 serum samples. Dr. Catalona left Washington University for a post at Northwestern University. He asserted the right to take the biorepository with him and demanded its transfer to Chicago. He also recruited a number of tissue donors to write letters to Washington University demanding the release of their tissue samples to Dr. Catalona. The court held that neither Dr. Catalona nor any of the tissue donors retained any property interest in the specimens in the biorepository and that Washington University retained all rights thereto.[25] In light of these case, as to tissue donors and the individual researchers and physicians who were instrumental in collecting the specimens, it is currently reasonably well-established that under common law property theories and state jurisprudence regarding gifts, they hold no proprietary interest in any inventions or discoveries that may be derived from a study of those specimens in a biorepository and the institution holding the repository owns the specimens.

What would be the claim of the United States Government? Since a very significant number of biorepositories are either supported by agencies of the US or owned by agencies of the US, the intellectual property rights that are derived from research using those resources are governed by technology transfer legislation.[26] The Bayh-Dole Act typically governs any demands for proprietary

---

[24] See 21 C.F.R. § 312.3(b) (2013).

[25] "The Court finds that the RPs [research participants] had the present intent to donate their biological materials to WU to be maintained in the GU Repository. The informed consent forms repeatedly asserted WU's ownership of the donated materials and only listed Dr. Catalona as the Principal Investigator." *Id.* at 999.

[26] *See* 5 U.S.C. § 3710a and 35 U.S.C. § 200 *et seq.* Title II, Chapter 18, *Patent Rights in Inventions Made With Federal Assistance,* ("Bayh-Dole Act").

rights that would be asserted by the US. At most, the US retains a nonexclusive, nontransferrable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any subject invention throughout the world.[27] In 1995, the NIH published the Uniform Biological Material Transfer Agreement[28] ("UBMTA") as a model agreement for general use in the exchange of biological materials between organizations involving biorepositories supported by NIH agencies. The disposition of intellectual property rights is covered in Section 8 of the UBMTA.[29] One treatment of intellectual property issues in an MTA with respect to a transfer of biological materials to a for-profit institution is reflected in the policies at the University of California Berkeley in which it is expected that any commercial use of research findings will require some sort of "consideration", presumably, a royalty payment, to the university.[30] Another approach to new inventions can be found in agreements such as with Vanderbilt University in which the university only requires a "non-exclusive license to use the same for non-commercial research, educational and patient care purposes."[31]

A more detailed discussion of the disposition of intellectual property rights in an MTA can be found in Section 8 of the Esophageal Adenocarcinoma and Barrett's Esophagus Consortium

---

[27] 35 U.S.C. § 202(c)(4).

[28] 50 Fed. Reg. 45, 12771.

[29] *Id.* at 12774.

> The RECIPIENT is free to file patent application(s) claiming inventions made by the RECIPIENT through the use of the MATERIAL but agrees to notify the PROVIDE R upon filing a patent application claiming MODIFICATIONS or method(s) of manufacture or use(s) of the MATERIAL

[30] http://www.spo.berkeley.edu/guide/mtaquick.html (last visited February 13, 2014).

[31] *See* Level 5 MTA-Research Collaboration Agreement, http://www.vanderbilt.edu/cttc/mta (last visited February 13, 2014).

Agreement.[32] In general, intellectual property that is derived from a research project arising out of the use of the biorepository materials is to be owned by the participating member of the consortium except as otherwise provided in any agreement with a third party.[33] The result of this approach leaves the status of any intellectual property to be resolved in the same manner as such issues are typically resolved in clinical trial agreements between a sponsor and a research institution.[34]

VI. CLINICAL TRIAL AGREEMENTS

Classic tensions exist in the conduct of clinical human drug and device trials between the private pharmaceutical company or

---

[32] *Esophageal Adenocarcinoma and Barrett's Esophagus Consortium Agreement*, 2005, http://www.docstoc.com/docs/26453617/ESOPHAGEAL-ADENOCARCINOMA-AND-BARRETTS-ESOPHAGUS-RESEARCH-CONSORTIUM (last visited February 13, 2014). The Esophageal Adenocarcinoma And Barrett's Esophagus Research Consortium is comprised of nine university medical centers including three Mayo Clinics. The Mayo Clinic Rochester is designated in the consortium agreement as the Host Institution. The consortium is supported by the NIH and its access policy with respect to the biological samples is regarded as a model by many. The consortium agreement has extensive detail regarding the disposition of intellectual property rights and licenses among its members.

[33] *Id.* at Section 8.3.1, page 12.

> *Research Project IP*. Subject to the provisions herein and to the terms and conditions of any applicable sponsored Research Project agreement, title to any Intellectual Property created during performance of the research Project shall remain with the inventing or creating Member Institution(s)

[34] *See also* International Cancer Genome Consortium Intellectual Property Policy, *available at* http://www.icgc.org/icgc/goals-structure-policies-guidelines/e4-intellectual-property-policy.

> All ICGC members agree not to make claims to possible IP derived from primary data (including somatic mutations) and to not pursue IP protections that would prevent or block access to or use of any element of ICGC data or conclusions drawn directly from those data.

device manufacturer, the investigational site, such as a university hospital, and the principal investigator at the site with respect to intellectual property issues. These conflicting interests are typically hammered out in the clinical trial agreement ("CTA") among the parties. In most situations, the principal investigator is not a party to the CTA, but, in a separate document, acknowledges his or her responsibilities and obligations as well as the disposition of the intellectual property rights.

From the perspective of the drug company or device manufacturer, the fully capitalized cost of a new drug or biopharmaceutical from preclinical research and development to market approval is $1.3 billion and $1.2 billion (in 2005 dollars) respectively, expended over a mean of five years.[35] Given that only one in five compounds makes it through to market approval from the filing with the United States Food and Drug Administration of an investigational new drug application,[36] industry sponsors of clinical trials have a very substantial interest in owning any rights to commercialize their inventions.

Similarly, research hospitals and their research staffs supply considerable expertise and investigative resources in identifying study subjects, and those institutions incur unreimbursed costs executing the clinical trial protocols and advancing and improving upon therapeutic modalities. In addition, the institution conducting the trial undertakes very substantial tort

---

[35] DiMasi & Grabowski, *The Cost of Biopharmaceutical R&D: Is Biotech Different?,* MANAGERIAL & DECISION ECONOMICS (2007), 28:469-479 *available at* http://emoglen.law.columbia.edu/twiki/pub/LawNetSoc/BahradSokhansanjFirstPaper/28ManageDecisEcon469_cost_of_biopharma_rd_2007.pdf. *Cf.* Sherer, *R&D Costs and Productivity in Pharmaceuticals,* HKS FACULTY RESEARCH WORKING PAPER SERIES, Harvard Kenned School of Government, 2011, *available at* https://research.hks.harvard.edu/publications/getFile.aspx?Id=745.

[36] DiMasi, *Risks in new drug development: approval success rates for investigational drugs*. CLINICAL PHARMACOLOGY & THERAPEUTICS, 2001;69:297-307 *available at* http://213.190.70.6/gmp.asso/Documents/Biblio/Risks%20in%20new%20drug%20development.pdf.

and contractual risks in deviating from generally recognized good clinical practices and standards of care[37] to follow the protocol in the study. If, in the course of a trial, the scientists at a research institution conceive or reduce to practice an invention that arises from their work in the trial or is developed by further research that has been suggested by study results, the study site has a legitimate interest in any commercialization of that invention. The industry sponsors, not unsurprisingly, take a different view.

These issues are heavily negotiated between the parties, and the outcome of those negotiations vary widely, but, presumably, a balanced resting place for the distribution of intellectual property rights arising from the study starts with the proposition that the separate ownership of any pre-existing intellectual property rights or other such rights developed independently of the study remain with respective parties. With respect to the study itself, there is usually significant conflict between the negotiating parties over the definition of any invention that arises, in some fashion, out of the study.

Typically, if the invention is conceived and reduced to practice by the researchers representing the institution, in direct performance of the study in accordance with the protocol, and that invention incorporates any confidential information or other proprietary information of the sponsor, the sponsor will be assigned that intellectual property. Often, such an assignment permits the research institution to retain a free nonsublicensable, nonexclusive license to practice that invention for internal noncommercial research and educational purposes.

If the invention is conceived or reduced to practice by the institution researchers independently of the confidential information or other proprietary information of the sponsor, the research institution would normally expect to retain any such intellectual property, often subject to the sponsor's option to

[37] U.S. Department of Health and Human Services, *National Guideline Clearinghouse, http://www.guideline.gov/browse/by-topic.aspx (last visited February 13, 2014).*

negotiate a separate agreement to acquire those rights or to receive a royalty. If the invention is jointly conceived by the parties during the study, then they would expect joint ownership on the same terms, generally.

VII. CONCLUSION

As current medical research continues to evolve relying increasingly upon sophisticated studies using human tissue specimens held in biorepositories, apart from the complexities in determining precisely what is a patentable invention[38] in this type of study, as between the potential claimants (the donors of specimens, the biorepositories, the researchers who collected the specimens, the research institutions, private sponsors and agencies of the United States government), the intellectual property (or economic interests in such intellectual property) derived from these studies is ultimately distributed among the downstream researchers pursuant to the vigorously negotiated terms of clinical trial agreements and material transfer agreements.

[38] *See* In re Bilski, 545 F.3d 943 (2008) (for purposes of biological research, implied a limitation on the availability for patents involving correlations between genetic or phenotypic attributes and treatment) *But cf.* Bilski v. Kappos, 130 S. Ct. 3218 (U.S. 2010) (the Court affirmed the decision of the Circuit Court in *In re Bilski* but held that the "machine-or-transformation" test is not the sole test for determining patent eligibility of a process). Correlation claims are a type of process claim. *Supra,* In re Bilski, at 1014.

SHOULD A LEGAL ANALYSIS OF THE ADEQUACY OF WARNING LABELS CONSIDER ISSUES RELATING TO USE OF PRODUCTS BY NON-ENGLISH SPEAKERS?

KELLY DALLAVALLE*
RICHARD J. HUNTER, JR.**
And
HECTOR R. LOZADA***

I. INTRODUCTION TO PRODUCT WARNINGS

It might be said that the moral basis of modern product liability law can be summarized as a compact between manufacturers and consumers that products available for purchase will perform to reasonable standards of quality and safety. An important part of this tacit agreement requires that a manufacturer inform the buyer of any potential dangers that may be inherent to the product, and then instruct the buyer how to use the product safely so as to avoid such dangers as far as possible. This is commonly referred to as the legal "duty to warn," defining the scope of a manufacturer's responsibility when "he has knowledge, or by application of reasonable, developed human skill and foresight should have knowledge" of possible harm through the use of a product.[1] Generally, the manufacturer has a duty to warn

*MBA in Finance;
**Professor of Legal Studies, Stillman School of Business, Seton Hall University;
***Professor of Marketing, Stillman School of Business, Seton Hall University

[1] RESTATEMENT (SECOND) OF TORTS § 492A cmt. j (1965).

consumers or potential users when the product is dangerous, when the manufacturer is aware of a potential danger, if the danger is present when the product is being used in its intended manner, and if the danger is not obvious or known to the user.[2] The duty to *warn and instruct* is a significant one under product liability law in the United States.

Florida law provides an important insight into the standards related to the required conduct of a manufacturer: "A manufacturer and distributor of a product have a duty to warn of the inherent dangers associated with a product when the product has dangerous propensities."[3] According to the Restatement (Third) of the Law of Torts, Products Liability, by placing this duty on the manufacturer, society is providing an incentive to "achieve optimal levels of safety in designing and marketing products."[4]

Once it has been established that a warning is legally mandated, the manufacturer is required to assure that the warning is "adequate" in order to avoid potential liability.[5] The purpose of the warning requirement is to assure that the user, "by the exercise of reasonable care, will have fair and adequate notice of the possible consequences of the product's use or misuse."[6] The adequacy of any warning must take into account both the intended and any foreseeable *uses* of a product, as well as the intended and foreseeable *users* of a product. There are three main criteria for judging the adequacy—or inadequacy—of any warning:

---

[2] Kenneth Ross and Matthew W. Adams, *Legally Adequate Warning Labels: A Conundrum for Every Manufacturer*, FOR THE DEFENSE, Oct. 2008, *available at* http://www.productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf.

[3] Advance Chem. Co. v. Harter, 478 So. 2d 444 (Fla. 1st Dist. Ct. App. 1985).

[4] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. a (1998).

[5] DAVID. T OWEN, PRODUCTS LIABILITY LAW 594-95 (2d ed. 2008).

[6] Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242, 248-49 (Fla. 1st Dist. Ct. App. 1984).

(1) The warning must be displayed so as to reasonably catch the attention of the user;
(2) The warning must fairly apprise a reasonable user of the nature and extent of the danger and not minimize any danger associated with the use of a product; and
(3) The warning must instruct the user as how to use the product so as to avoid the potential danger.[7]

The scope of the duty of a manufacturer, seller, or distributor's is not invariable. As the marketplace changes, so does the definition and scope of the adequacy of any warning or instruction. The adequacy of a warning may also be dependent on the nature of the foreseeable *environment of use of a product*.[8] As the structure and components of this environment change, the requirements for adequacy can often be challenged to meet new demands and expectations.

II. THE AMERICAN ENVIRONMENT

The *2011 American Community Survey* estimates that there are nearly 330 million people in the United States.[9] Nearly 61 million, over the age of five, speak a language other than English at home, and over 25 million Americans speak English "less than very well." Of the 37.6 million respondents who speak Spanish, the Census Bureau estimated that 56.3% spoke English "very well," 16.9% "not well," and 9% "not at all." Over the past thirty years, the U.S. saw an 147% increase in the number of people that spoke a language other than English at home. It is projected that

[7] RICHARD J. HUNTER, JR., JOHN H. SHANNON & HENRY J. AMOROSO, PRODUCTS LIABILITY: A MANAGERIAL PERSPECTIVE 19 (2012).
[8] *E.g.,* Lawrence v. Raymond Corp., No. 3:09 CV 1067, 2011 US Dist. LEXIS 85798 (N.D. Ohio Aug. 4, 2011); Tober v. Graco Childrens' Prods., Inc., No. 1:02-cv-1682-LJM-WTL, 2004 U.S. Dist. LEXIS 9010 (S.D. Ind. Mar. 4, 2004).
[9] U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2011 AMERICAN COMMUNITY SURVEY REPORTS (2011), *available at* https://www.census.gov/prod/2013pubs/acs-22.pdf.

by 2020, as many as 71.8 million people will speak a language other than English at home.[10]

Obviously, the millions of Americans who are not fluent in English purchase and use products just like the majority of English-speakers. Undeniably, most of these products contain warnings and instructions written only in English. However, at the same time, savvy marketers have taken account of their non-English speaking customers by advertising in their native languages and using clever, eye-catching graphics to secure their market positions and sales. As the size of the non-English-speaking market increases, manufacturers must recognize that it is clearly foreseeable that their products will be used by consumers who may not be able to read their "English-only" warnings, labels, and instructions. Yet, there is very little definitive legal guidance for the appropriate incorporation of pictorial or foreign-language materials in product warnings in light of the reality of the consumer-mix. But, this begs the question: Should there be?

III. GOVERNMENT LABELING STANDARDS

In 1991, the American National Standards Institute published non-mandatory consensus standards concerning product labeling, referred to as *ANSI Z535*.[11] It outlines recommendations for developing safety labels, including acceptable formats for multilingual labels. However, ANSI Z535 does not specify *when* a manufacturer must include a label in a foreign language. With reference to this issue, ANSI Z535 notes:

---

[10] *Id.*

[11] AMERICAN NATIONAL STANDARDS INSTITUTE, INC., PRODUCT SAFETY SIGNS AND LABELS, ANSI Z535.4-2011 (2011), *available at* www.nema.org/Standards/ComplimentaryDocuments/Z535-4-Contents-and-Scope.pdf; *see generally* Gil Fried & Robin Ammon, Jr., *What is Appropriate Signage for the Sport Industries?*, 11 J. LEGAL ASPECTS SPORT 181 (2001).

> The selection of additional languages for product safety signs is an extremely complex issue. Experts suggest that nearly 150 languages are spoken in the United States and millions of Americans speak a language other than English in their homes. If it is determined that additional languages are desired on a safety sign, the following formats should be considered. In all examples, the use of symbols is strongly encouraged in order to better communicate the sign's hazard information across language barriers.[12]

The Restatement (Third) of Torts, Products Liability also provided guidance to companies creating product labels.[13] The Restatement says that a warning is inadequate if "the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings."[14] However, there is no further definition of the qualifier "*reasonable*" in this context. The comments to section 2 of the Restatement recognize the ambiguity of these labeling guidelines. They state: "No easy guideline exists for courts to adopt in assessing the adequacy of product warnings and instructions. In making their assessments, courts must focus on various factors,

---

[12] Kenneth Ross, *Multilingual Warnings and Instructions: An Update*, DRITODAY, Oct. 25, 2012, *available at* http://dritoday.org/feature.aspx?id=449 (quoting AMERICAN NATIONAL STANDARDS INSTITUTE, INC., PRODUCT SAFETY SIGNS AND LABELS, ANSI Z535.4-2011 (2011), *available at* www.nema.org/Standards/ComplimentaryDocuments/Z535-4-Contents-and-Scope.pdf).

[13] Spencer H. Silverglate, *The Restatement (Third) of Torts: Products Liability- The Tension Between Product Design and Product Warnings*, 75 FLA. B.J. 11 (2001), *available at* www.floridabar.org.

[14] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (1998).

such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups."[15]

As difficult as these "factors" are to define, they are even more difficult to apply for a court. Given the increasing number of languages spoken and read in the United States and the significant number of people who are illiterate in English or in all languages, developing an effective method to communicate warnings and instructions to consumers poses an important marketing and legal challenge. However, as was determined in *Spruill v. Boyle-Midway, Inc*., one thing *is* certain: *"an insufficient warning is in legal effect no warning."*[16] Therefore, even adequate safety instructions that are not communicated effectively to the end-user might not meet the requirement of *reasonability* or *adequacy*.

Many consumers who have purchased and used products without being able to read or understand their dangers and who then suffer some injury have attempted to hold manufacturers liable for failing to warn or for issuing inadequate warnings. Without any formal legislation, statutory language, or an administrative rule guiding manufacturers in the creation of multi-lingual or pictorial product labeling, consumers can only rely on case law to support their claims. The most commonly cited case is *Stanley Industries, Inc., v. W. M. Barr & Co., Inc*.[17]

In *Stanley*, the District Court in Florida made some general comments as to the issue of the adequacy of warnings: "Preliminarily this court observes that a warning is adequate if it is communicated by means of positioning, lettering, coloring, and language that will convey to the typical user of average intelligence the information necessary to permit the user to avoid

---

[15] *Id.* at § 2 cmt. i.
[16] 308 F.2d 79, 87 (4th Cir. 1962).
[17] Stanley Indus., Inc. v. W.M. Barr & Co., Inc., 784 F. Supp. 1570 (S.D. Fla. 1992).

the risk and to use the product safely."[18] In evaluating the adequacy of any warning, the court is required to weigh the following five factors:

1. The dangerousness of the product;
2. The form in which the product is used;
3. The intensity and form of the warning given;
4. The burdens to be imposed by requiring the warnings; and
5. The likelihood that the particular warning will be adequately communicated to those who will foreseeably use the product.[19]

Does the communication of information extend to the actual language of any warning?

IV. A DISCUSSION OF THE RELEVANT CASE LAW: A CHECKERED HISTORY OF CONFLICTING PRECEDENTS

We begin with a detailed discussion of *Stanley Industries*. On August 30, 1988, there was a fire at a Gallery Industries plant in Southern Florida. The fire was attributed to the spontaneous combustion of rags soaked in Kleanstrip Boiled Linseed Oil, which were used by the plaintiff's employees to oil a cutting table earlier that day. W.M. Barr manufactured, packaged, and distributed the linseed oil products. Management-level employees from Gallery purchased the linseed oil from Home Depot.[20]

The two employees of Stanley Industries who used the oil were brothers from Nicaragua whose primary language was Spanish. The product warning label on the oil was in English, and there were no graphics, symbols, or pictographs on the label to

[18] *Id.* at 1575 (quoting M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 234 (1987)).
[19] *Id.* (quoting Dougherty v. Hooker Chem. Corp., 540 F.2d 174, 179 (3d Cir. 1976)).
[20] *Id.*

serve as pictorial warnings. Stanley Industries argued that the defendants had a duty to fairly and adequately warn Spanish-speaking product users in Spanish because they had jointly advertised and promoted products in various Hispanic media in the Miami area.[21]

In denying a motion for a summary judgment (Glossary, Entry I) filed by the defendant, the U.S. District Court for the Southern District of Florida issued a decision that turned out to be quite prescient to the future of product warning litigation. A key factor in the decision revolved around the Hispanic advertising and marketing practices of the defendants. Home Depot regularly advertised in Spanish on Hispanic television and radio and in Hispanic newspapers. Home Depot had also marketed a number of its products with bilingual instructions. "The labels contained no graphics, symbols or pictographs on either side of the label alerting users to the product's dangerous propensities."[22] The court in *Stanley* framed the threshold issue in terms of a *duty* to these non-English speaking users.

Having denied the defendant's motion for a summary judgment, the District Court held that it was for the *jury* to decide whether the defendants could have reasonably foreseen that the product would be used by non-English speakers. The court also held that the *jury* must decide whether a warning should at least contain pictorials for non-English speaking purchasers or users under these specific facts and circumstances. In citing *Hubbard-Hall Chemical Co. v. Silverman*, the District Court in Florida stated that the jury would be required to determine "… that the warning… would not, because of its lack of a skull and crossbones or other comparable symbols or hieroglyphics, be inadequate…"[23] Furthermore, the court found that it was for the jury to decide

---

[21] *Id.*
[22] *Id.* at 1572.
[23] *Id.* at 1576 (citing Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965)).

whether the warning must contain words in a language other than English or must contain pictorials.[24]

After the trial which took place in November 1993, the jury nevertheless returned a verdict in favor of the defendant, Home Depot. The jury in this case essentially decided that it was unnecessary for the defendants to warn the plaintiff's employees in Spanish or by use of pictorials even if the defendant-retailer had advertised their products in Spanish.[25] However, the floodgates were beginning to open—at least as far as considering the threshold questions of whether a duty existed and who would make the determination as to the adequacy of any warnings given.

Despite the verdict in its favor, Home Depot subsequently encouraged many of its suppliers to include Spanish on all warning labels and instructions. This appears to be more of a preventive measure, but it is still a public recognition of the need to address the ever-expanding Hispanic market in a manner that would be conducive to their safety, as well as meeting their needs as consumers.[26]

In contrast to *Stanley Industries,* in *Hubbard-Hall Chemical Company v. Silverman*, the U.S. Court of Appeals for the 1st Circuit in Boston, Massachusetts sustained a jury finding that the seller's warning was inadequate.[27] The defendant, Hubbard-Hall, was the manufacturer and seller of 1.5% Parathion dust, which is used as an insecticide. The defendant sold bags of this dust to Mr. Vivieros, who operated a farm in Taunton, Massachusetts. The farm employed Manuel Velez-Velez and Jaime Ramos-Sanches, who were both natives of Puerto Rico. One

---

[24] *Id.*

[25] Kenneth Ross, *The Duty to Warn Illiterate or Non-English Reading Product Users*, IN-HOUSE DEFENSE QUARTERLY, Winter 2008, at 29-33, *available at* http://www.productliabilityprevention.com/images/2-DutytoWarnIlliterateandNonEnglishReadingProductUsers.pdf.

[26] *Id.*

[27] Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965).

of the employees could read some English and the other could not read any.[28]

In August of 1959, Velez-Velez and Ramos-Sanches dusted the farm with Parathion dust several times during the week. Mr. Vivieros stated that he told the employees that the chemicals were dangerous and if they did not follow directions, they might die. On August 14, 1959, Vivieros observed the plaintiffs working without protective masks or coats. That afternoon, they were brought to the hospital in semi-comatose states and died almost immediately.[29]

The legal issue in *Hubbard-Hall* was whether there was sufficient evidence of negligence on the part of Hubbard-Hall to permit a jury to hold it liable for these two deaths. The Parathion dust had been labeled according to the standards of the U.S. Department of Agriculture. The trial court decided that the manufacturer should have *foreseen* that "its admittedly dangerous product would be used by, among others, persons like the deceased, who were farm laborers, of limited education and reading ability, and that a warning [even if it complied with federal statutory requirements] would not… be adequate."[30] The defendant had also raised the issue whether the lawsuit should have been dismissed on federal preemption grounds because the defendants had complied with applicable federal law.

Concerning the issue of federal preemption (Glossary Entry II), the Court of Appeals stated that Department of Agriculture approval of the label is considered more of a satisfaction of conditions for regulating the product in interstate commerce, rather than for the purposes of establishing product liability standards relating to the adequacy of a product warning. As to the issue of preemption, the court noted: "Nor is it argued that the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA], Congress had occupied the whole field of civil liability between private

[28] *Id.*
[29] *Id.*
[30] *Id.* at 405.

parties in tort actions founded on negligence…."[31] Therefore, the Court of Appeals upheld the decision for the plaintiffs.[32]

In 1993, in *Ramirez v. Plough, Inc.*, the Supreme Court of California considered a case involving warning labels on non-prescription medication.[33] The plaintiff, Jorge Ramirez, was a minor whose mother gave him SJAC (St. Joseph Aspirin for Children), a product manufactured and distributed by the defendant. He contracted Reye's syndrome as a result of ingesting this nonprescription drug. The aspirin was purchased and then administered by the plaintiff's mother, who could not read English, but was literate in Spanish. The key factor in this case was that the aspirin was advertised to and used by non-English-speaking literate Hispanics.[34]

The California Court of Appeals, in reviewing the motion for a summary judgment granted to the defendant at trial, held that the adequacy of warnings was normally one of fact and an issue for the jury, as had been decided in *Stanley*. The California Supreme Court, in the review of the judgment of the Court of Appeals, later affirmed the summary judgment for the defendant that had been granted by the trial court, finding that the manufacturer did *not* have to add Spanish language warnings and instructions on its packaging as a matter of law. The court stated that the burden would be too onerous to require the inclusion of languages for all foreseeable users of the aspirin. The court held that the plaintiff's claim of inadequate warnings was in fact precluded (preempted) by federal and state regulations and that the legislature had "deliberately chosen not to require that manufacturers also include warnings in foreign languages."[35] Therefore, the California Supreme Court asserted that requiring a language other than

---

[31] *Id.* at 405; Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (2000).
[32] *Hubbard-Hall*, 340 F.2d at 402.
[33] 25 Cal. Rptr. 2d 97 (1993).
[34] *Id.*
[35] Ross, *supra* note 25, at 29-33.

English "…is a matter of public policy for consideration by the appropriate legislative bodies and not by the Courts."[36] Interestingly, the court also noted that it had not decided whether a manufacturer would be liable to a consumer who had relied upon foreign-language advertising that was *materially misleading* (essentially a fraud standard) as to product risks and who was unable to read English language package warnings.[37] That was a separate issue to be litigated in another forum and in another case.

In *Medina v. Louisville Ladder, Inc.*, plaintiffs, Arnaldo Medina and his wife, Luz Lopez, had asserted that the ladder they had purchased from a Home Depot in Osceola County, Florida was defective because it lacked warnings and instructions in Spanish.[38] Medina has a very limited ability to read English, so he hired a local handyman to help install the ladder. However, his handyman could not read English either. The ladder was installed improperly, with gaps existing at the joints. On January 2, 2006, while Medina was on the ladder, it collapsed, severely injuring his elbow. The plaintiffs relied on *Stanley* to support their claims. The defendants filed a motion for summary judgment.[39]

The court considered the *Stanley* opinion, noting that in the years since the opinion, no Florida case, state or federal, has determined that bilingual warnings and instructions were required under existing law. The court found as a matter of law that there was no legal duty to provide bilingual labels and thus granted defendant's motion for summary judgment.[40]

---

[36] *Id.* (citing Ramirez v. Plough, Inc., 25 Cal. Rptr. 2d 97, 108 (1993)).
[37] *Ramirez*, 25 Cal. Rptr. 2d at 108-09.
[38] Medina v. Louisville Ladder, Inc., 496 F. Supp. 2d 1324 (M.D. Fla. 2007).
[39] *Id.*
[40] *Id.*

V. A RECENT VIEW

Farias v. Mr. Heater, Inc., is a recent case regarding a foreign-language requirement on consumer product warning labels.[41] The case reached the Eleventh Circuit Court of Appeals in 2012. The plaintiff, Lilybet Farias, was a Spanish-speaking resident of Miami, Florida. She purchased two portable outdoor propane-fired heaters from Home Depot, which had been manufactured and distributed by Enerco and Mr. Heater, located in Cleveland, Ohio for national sales and distribution. The warnings on these heaters appeared only in English. "In direct contravention of the warnings included with the product," Farias used the heaters inside her home, placing one of the two heaters she had purchased within two or three feet of her living room sofa.[42] Contrary to the instructions and warnings, she also used the heater indoors for several hours. When she later turned off the heater, she did not close the valve on one of the gas tanks before going to sleep. Her home caught on fire, causing approximately $300,000.00 in damages.[43]

Farias claimed that the defendants failed to adequately warn her of the risk of using the gas tanks indoors. Specifically, the plaintiff argued that the warnings were inadequate because the written warnings were in English and the pictorials were at best ambiguous. The defendants brought a motion for summary judgment.[44]

The trial court ruled that marketing practices do not create a duty to provide bilingual warning labels or instructions, as a

---

[41] Farias v. Mr. Heater, Inc., 684 F.3d 1231 (11th Cir. 2012).
[42] Gregory M. Cesarano, Douglas J. Chumbley and David L. Luck, *Does Florida Recognize a Duty to Warn in Spanish or Additional Languages Other Than English?*, JDSUPRA, July 2, 2012, *available at* http://www.jdsupra.com/legalnews/does-florida-recognize-a-duty-to-warn-in-50123.
[43] *Id.*
[44] Farias v. Mr. Heater, Inc., 684 F.3d 1231 (11th Cir. 2012).

matter of law. They found the English-only warnings to be accurate, clear, and unambiguous. Applying Florida law, which is consistent with the Restatement (Third) of Torts, Products Liability, the court reasoned that a warning must be adequate in the eyes of a reasonable person, rather than on a more individualized, specific plaintiff basis.[45]

On appeal, the plaintiff argued that the adequacy of the warnings accompanying the product was a question of fact to be determined by a jury, as had been decided in *Stanley*. Farias claimed the pictures on the heater packaging were ambiguous and confusing, and that because the defendants actively marketed the product to Miami's Hispanic community, the case should go before a jury. The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's finding that the existing warnings, instructions and pictures were adequate. They also held that *Stanley* case did not apply here because there was insufficient evidence that Enerco or Home Depot had targeted advertising or marketing efforts specifically toward the Hispanic community through Hispanic media outlets.[46] It is worth noting that the District Court had found:

> Unlike Stanley Industries, Inc. in which Judge Moreno decided that the defendant had advertised in Miami's Hispanic media and purposefully directed its sales pitch towards Spanish speakers, there is no evidence here that Home Depot, Mr. Heater, or Enerco took such steps. Instead, all parties admit quite the opposite as it pertains to Home Depot. Moreover, since Home Depot was the party responsible for advertising its products, it stands to reason that neither Mr. Heater nor Enerco directed

[45] *Id.*
[46] *Id.*

> their sales towards the Hispanic community. As such, Plaintiff's reliance on Stanley Industries, Inc. is misplaced.[47]

VI. AN ANALOGY TO THE DOCTRINE OF UNCONSCIONABILITY: IS IT APPROPORIATE?

One important insight to seeking a possible resolution of the issues surrounding the adequacy of English-only instructions or warnings given to non-English consumers or users of products may be found through an analogy to the development of the doctrine of unconscionability. At its origin, the doctrine was most often associated with a variant of proving contract fraud.[48] In order to raise the defense of unconscionability, a party is not required to argue that the defendant actually committed fraud—only that the defendant misled the plaintiff either by the nature of the contract or by taking advantage of the plaintiff's ignorance or other special circumstances such as race, language, literacy, education, national origin, etc.[49]

Unconscionability was raised as a defense in a contract enforcement action (or perhaps in a related action to reform or rewrite a contract) in the era when courts were committed to the enforcement of the time-honored doctrines of "freedom of contract" and *caveat emptor* ("let the buyer beware"). Spurred on by the writing of Professor Corbin (who commented about the issue in the context where the terms of the contract are "so extreme as to appear unconscionable according to the mores and business practices of the time and place"), found in the jurisprudence of

---

[47] *Id.*at 1291.

[48] Bill Long, *Unconscionability: Understanding 2-302* (Feb. 8, 2005), http://www.drbilllong.com/Sales/U.html.

[49] RICHARD. J. HUNTER, JR., JOHN H. SHANNON, HENRY J. AMOROSO & SUSAN O'SULLIVAN-GAVIN, THE LEGAL ENVIRONMENT OF BUSINESS: A MANAGERIAL AND REGULATORY PERSPECTIVE 92-98 (Richard J. Hunter, Jr., ed. 2005).

Chief Justice Stone as early as 1912 ("who described the concept of unconscionability as underlying "practically the whole content of the law of equity"), and the inclusion of Section 2-302 into the Uniform Commercial Code, courts increasingly moved to develop a doctrine that aided the innocent and ingenuous purchaser, often the victim of "exploitive and callous practices which shocked the conscience of both legislative bodies and the courts."[50] Unconscionability was known by many other names—including what one author has termed as "fraud light."[51] At its essence, unconscionability was seen as a tool to fight ("fight back") against the power of the potentially oppressive seller in a commercial transaction.[52]

Unconscionability became the vehicle by which courts would reflect the "moral sense of the community" in commercial transactions. Cases such a *Williams v. Walker-Thomas Furniture Store* (Judge J. Skelly Wright) and *Jones v. Star Credit Corporation* (Judge Sol Wachtler) became the watchwords of the application of this new theory.[53] In *Jones,* for example, Judge Wachtler (ironically who would later resign in disgrace amidst a sex scandal) decided that a contract under which the defendant had sold a home freezer unit, which had a retail value of $300, for $900, plus credit charges, credit life insurance, credit property insurance, etc., where the final total reached nearly $1,450, was an "unconscionable as a matter of law."

It is most interesting however, that just as courts and judges have struggled with creating a hard and fast rule in the area of the efficacy of product warnings where the purchasers or users have been non-native speakers, Judge Wachtler candidly wrote:

---

[50] Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 265 (N.Y. Sup. Ct. 1969).

[51] Bill Long, *Unconscionability: Understanding 2-302* (Feb. 8, 2005), http://www.drbilllong.com/Sales/U.html.

[52] *Jones*, 298 N.Y.S.2d at 266.

[53] Williams v. Walker Thomas Furniture Store, 198 A.2d 914 (D.C. App. 1964); Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969).

"Concededly, deciding the issue is substantially easier than explaining it."[54] Thus, Judge Wachtler decided that the context of the contract was equally as important as were the words of the economic bargain because the seller (and the credit corporation to which the contract had been assigned) had preyed on the "poor and illiterate without risk of either exposure or interference."[55] As Judge Wachtler concluded, the plaintiff's, having paid more than $600, had furnished consideration more than sufficient to acquire the freezer. The court permitted the contract to be *reformed* or rewritten to terminate any further obligation on the part of Mr. and Mrs. Jones.

As noted by the court in *Wille v. Southwestern Bell*,[56] a major breakthrough in the development of the doctrine of unconscionability took place in the codification of the concept into Section 2-302. Note the language:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may limit the application of any unconscionable clause as to avoid any unconscionable result.
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.[57]

---

[54] *Jones*, 298 N.Y.S.2d at 266.
[55] *Id.*
[56] Wille v. Sw. Bell Tel. Corp., 219 Kan. 755 (1976).
[57] U.C.C. § 2-302 (2012).

Yet, the Code provided no definition of the "parameters or limits" of unconscionability. Was a definition required or were the code writers trying to make a more subtle point in much the same vein as when Justice Potter Stewart's defined pornography with the famous words: "I know it when I see it"?[58] The court in *Wille* offered an insight when it stated: "Perhaps that was the real intent of the drafters of the code. To define is to limit its application and to limit its application is to defeat its purpose."[59]

What the court was doing was turning the previously sacrosanct doctrine of *caveat emptor* into a not so subtle warning to potentially unscrupulous businessmen: *If you cross the line—and we are not going to tell you precisely where this line has been drawn—you run the risk of a court declaring that what you did was unconscionable.* Enter the concept of *caveat* v*enditur*—or let the seller be wary!

While the UCC provision was touted merely as codifying the common law, Comment 1 indicates that unconscionability was a doctrine whose precise contours were in fact not well defined. Indeed, an early definition of unconscionability had been provided by Lord Chancellor Hardwicke in the case of *Chesterfield v. Jensen*, when he characterized an unconscionable contract as "A contract that such as no man in his senses and not under delusion would make on one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the Common Law has taken notice."[60]

Professor Gordon Leff referred to the putative doctrine with "no reality referent" that was really only "an emotionally satisfying incantation."[61] However, Professor Leff noted the distinction between *procedural* and s*ubstantive unconscionability* that most

---

[58] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
[59] *Wille*, 219 Kan. at 757.
[60] *Id.* (quoting Chesterfield v. Janssen, 28 Eng. Rep. 82 (1750); Hume v. U.S., 132 U.S. 406, 411-13 (1889)).
[61] Bill Long, *Unconscionability: Understanding 2-302* (Feb. 8, 2005), http://www.drbilllong.com/Sales/U.html.

courts would apply. In essence, procedural unconscionability would lie in three kinds of circumstances: (1) where the seller took advantage of a buyer's *limited understanding of English*; (2) where the contract was so confusing and filled with opaque phrases that no one, really, could be charged with knowing what it meant; or (3) when the seller used "high pressure" tactics, removing the reality of "meaningful choice" to close the deal. Substantive unconscionability, in contrast, would focus on the *ends* of the bargaining process and would evaluate the actual terms of the contract. For example, how "one-sided" and fundamentally unfair are the actual terms of the contract?

Comment 1 to Section 2-302 relates: "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[62]

By the time Judge Harman had handed down his decision in *Wille*, courts had developed factors relating to the issue of oppression and analyzing the relative bargaining positions of the parties.[63] These include:

1. the use of the use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry-wide standards offered on a take-it-or-leave-it basis to the party in a weaker economic position;
2. a significant cost-price disparity or excessive price;
3. a denial of basic rights and remedies to a buyer of consumer goods;
4. the inclusion of penalty clauses'

[62] U.C.C. § 2-302 cmt. 1 (2013).
[63] Wille v. Sw. Bell Tel. Corp., 219 Kan. 755 (1976).

5. the circumstances surrounding the execution of the contract, including its commercial setting, its purposes and actual effect;
6. the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract;
7. phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them;
8. an overall imbalance in the obligations and rights imposed by the bargain;
9. *exploitation of the underprivileged, unsophisticated, uneducated and the illiterate;* and
10. inequality of bargaining or economic power.[64]

UCC 2-302 also provides a method for resolving a claim of unconscionability that has seemed rather vexatious not only in this area but also in issues surrounding the nature of rules in product advertising to non-English speakers. According to the statutory provision, it is the judge, rather than the jury, that decides if a term is unconscionable. Having made such a finding, the judge enjoys wide latitude to deal with the situation and may strike the unconscionable clause, void the entire contract, or rewrite the contract so as to avoid any unconscionable result. In order to assure a fair determination of the issue, a hearing is almost always required before passing judgment on the unconscionability of a provision—a hearing at which the parties may offer evidence as to the unconscionable nature (or lack thereof) of an alleged unconscionable provision. It is apparent, however, that it be a rare occasion where procedural unconscionability *alone* will be enough

[64] *Id.* at 757-759.

to void a contract. In most all cases, *both* procedural and substantive unconscionability will be present. Rarely can a corporation or an experienced businessman (as was Mr. Wille with at least thirteen years of experience dealing with business and pre-printed contracts) argue the doctrine should be applied.[65] Might the doctrine of unconscionability provide a suitable bridge to the analysis of the adequacy of product warnings in relation to non-English speakers?

VI. CONCLUSIONS, OR RATHER, SOME POSSIBLE ALTERNATIVES

As the American business environment continues to expand and diversify on ethnic and demographic grounds, the legal and technical requirements for providing adequate safety communications to those who do not read or speak English will likewise evolve. Manufacturers who are responsible for creating warning labels and instructions for their products must consider the unique characteristics of their customers and must apply the necessary safeguards to ensure their safety. From a purely marketing standpoint, the manufacturer's goal should be to adequately communicate safety information to all foreseeable users so as to attract these consumers into buying their products. However, for many manufacturers, this is a near impossible feat as America broadens into many cultures, languages, or ethnic groupings.

The attention brought to this issue by cases like the ones described above have encouraged many manufacturers, sellers, and distributers to re-think their existing strategies and to try, when appropriate, to issue multilingual safety communications. Some manufacturers are including bilingual or even trilingual (English, Spanish and French) labels and instructions with their products.

[65] RICHARD J. HUNTER, JR., JOHN H. SHANNON & HENRY J. AMOROSO, PRODUCTS LIABILITY: A MANAGERIAL PERSPECTIVE 150 (2012).

There are also several government agencies that have required manufacturers who fall under their jurisdiction to attach bilingual or pictorial labels to some of their products.[66]

To decrease the burden on the manufacturer, another potential solution would be to translate only the most important signal words (i.e., WARNING, CAUTION or DANGER) into multiple languages and add a pictorial on the label to clearly illustrate the hazard. The remainder of the label would continue to be found in English. The manufacturer might also choose to include a multilingual direction to consult a supervisor or a product website to retrieve safety information in alternate languages.

Many products now utilize *Quick Response* or QR codes to provide their users with additional company or product information. This might be a helpful way to incorporate technology into the spread of safety information while also limiting the cost to the manufacturer in a specific, targeted environment.

Based on the legal precedents, are we to conclude that English-only warning labels are always legally adequate, even when a large portion of the expected users speak very little English? Are manufacturers and sellers only able to be found liable if there is evidence of active marketing campaigns toward non-English speaking populations? In finding that the defendants' warnings were adequate, the Eleventh Circuit distinguished the facts in *Farias* from those of the *Stanley* case, in which the Southern District of Florida denied summary judgment to the manufacturer on the plaintiff's failure to warn claim because "given the advertising of defendants' product in the Hispanic media and the pervasive presence of foreign-tongued individuals in the Miami

---

[66] Kenneth Ross and Matthew W. Adams, *Legally Adequate Warning Labels: A Conundrum for Every Manufacturer*, FOR THE DEFENSE, Oct. 2008, *available at* http://www.productliabilityprevention.com/images/6-LegallyAdequateWarningLabelsAConundrumforEveryManufacturer.pdf.

workforce, it is for the jury to decide whether a warning, to be adequate, must contain language other than English or pictorial warning symbols."[67]

It appears as though courts are hesitant to impose often burdensome requirements on manufacturers due to fears of setting an unrealistic precedent or because mandating non-English warning labels is a matter for legislative action and not for the resolution by a court.

There is also a practical consideration. If society (either through *stare decisis,* or statute, or administrative fiat, or perhaps by extending the concept of unconscionability to such situations) were to impose a requirement to include warning labels for all foreseeable users of a product, how many languages will need to appear? There are over 150 languages spoken in this country. Furthermore, the inclusion of additional languages on a warning may serve to "clutter" the label and result in what marketers call "habituation," thereby diminishing the effectiveness of the entire message.

Unlike a larger issue such as the imposition of strict liability in tort for most product cases, largely accomplished through the efforts of judges like Roger Traynor, it would most likely take a legislative action to institute a multilingual warning label standard. Based on the ambiguity and generality of the terms in the Restatement and in the ANSI Z535, this is highly unlikely to occur in the near future, although the lessons of the development of the concept of unconscionability may provide a useful insight into the future resolution of the issue. One clear path may be to focus on the *marketing aspects* of the controversy; that is, requiring product warnings in a language other than English where the manufacturer has chosen to enter and then to advertise in a non-English speaking market in a language other than English.

---

[67] Stanley Indus., Inc. v. W.M. Barr & Co., Inc., 784 F. Supp. 1570, 1576 (S.D. Fla. 1992).

GLOSSARY

I. Summary judgment: A judgment in a summary proceeding, as one rendered pursuant to statute against the sureties on a bond furnished in an action.[68] A judgment in certain actions specified in the statute providing the remedy, rendered upon plaintiff's motion, usually with supporting affidavits, upon the failure of the defendant to controvert the motion by filing an affidavit of defense or his failure to file an affidavit of defense or affidavit of merits sufficient to show the existence of a genuine issue of fact.

A motion for summary judgment is not a trial; on the contrary it assumes that scrutiny of the facts will disclose that the issues presented by the pleadings need not be tried because they are so patently insubstantial as not to be genuine issues at all. Consequently, as soon as it appears upon such a motion that there is really something to "try," the judge must at once deny it and let the cause take its course in the usual way.[69]

II. Preemption: Congress may intend to "occupy the field" in a given area where: federal regulations may be so pervasive or the federal interest so dominant as in federal labor legislation or in nuclear waste disposal; where a state law or statute conflicts with a federal rule; where a state law or statute stands as an "obstacle" to the accomplishment and execution of the purposes of Congress; or where it would be a physical impossibility to comply with both federal and state law.[70]

---

[68] 50 Am. J1st. Sur. § 209.
[69] BALLENTINE'S LAW DICTIONARY (Lexis 2010).
[70] RICHARD J. HUNTER, JR., JOHN H. SHANNON & HENRY J. AMOROSO, PRODUCTS LIABILITY: A MANAGERIAL PERSPECTIVE 78 (2012).

UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER v. NASSAR: WILL PLAINTIFFS' CLAIMS OF RETALIATION BE MORE DIFFICULT TO PROVE?

ALIX VALENTI*

I. INTRODUCTION

Claims of unlawful discrimination in the workplace are typically accompanied by allegations of retaliation. Statutes prohibiting employment discrimination also contain provisions barring retaliation against employees for making a complaint alleging discrimination. In order to present a prima facie case of retaliation plaintiffs must prove (1) that they engaged in protected activity under Title VII or another statute; (2) that the employer was aware of this activity; (3) that the employer took adverse action against the plaintiff; and (4) that a causal connection existed between the protected activity and the adverse action. Initially, most practitioners believed that as long as a retaliatory motive played a part in the adverse employment action, causality could be established.[1] Recently, however, the U.S. Supreme Court ruled that the employer's actions must have been motivated solely by the desire to retaliate.[2] This holding represents a departure from the Court's previous decisions that seemed to favor plaintiffs in

* Ph.D., J.D., LL.M., Associate Professor of Legal Studies and Management, University of Houston-Clear Lake.

[1] Michael C. Harper, *The Causation Standard in Federal Employment Law*: Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 81 (2010).

[2] Univ. of Tex. Sw. Medical Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

retaliation actions.[3] This paper will examine the history of the Courts' treatment of retaliation claims under Title VII of the Civil Rights Act followed by a discussion of its most recent decision. The paper will also examine the potential impact of the decision on plaintiffs' ability to successfully raise the pretext issue.

II. SUPREME COURT'S TREATMENT OF RETALIATION CLAIMS UNDER TITLE VII

Retaliation is defined by the EEOC as any adverse action taken by an employer against an employee because the employee exercised his or her rights under the law.[4] While retaliation can occur in a number of different contexts,[5] a claim by an employee based on retaliation is typically based on discrimination under Title VII. The anti-retaliation provision under Title VII states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in

[3] At least one author has commented that the decision will result in fewer claims of retaliation. Natalie C. Rougeux, *Oh, What a Tangled Web We Weave When We Decipher Employee Leave*, 61 FED. LAW 38, 43 (2014).

[4] EEOC. *Facts about Retaliation*, http://www.eeoc.gov/laws/types/facts-retal.cfm (last visited, Aug. 18, 2014).

[5] Over 40 federal statutes contain provisions banning retaliation, from the whistle-blowing protection under Sarbanes-Oxley, 18 U.S.C. § 1514A(a) (2012), to employee protection under OSHA, 29 U.S.C. § 660(c)(1) (2012). For an excellent summary of federal laws containing anti-discrimination provisions, *see* John O. Shimabukuro, L. Paige Whitaker & Emily E. Roberts, *Survey of Federal Whistleblower and Anti-Retaliation Laws,* CONG. RES. SERV., Washington, D.C. (2013).

> an investigation, proceeding, or hearing under this subchapter.[6]

In determining whether the plaintiff suffered an adverse employment action, several circuit courts of appeals looked to whether the plaintiff had suffered "a materially adverse change in h[is] employment status" or in the terms and conditions of his employment.[7] Employment actions that had been deemed sufficiently disadvantageous to constitute an adverse employment action included termination of employment, a demotion, decrease in wage or salary, a material loss of benefits, or significantly diminished material responsibilities.[8]

---

[6] 42 U.S.C. § 2000e-3(a) (2012).

[7] *E.g.*, Williams v. R.H. Donnelley, Corp., 368 F.3d 123 (2d Cir. 2004); Burlington N. & Santa Fe Ry. Co., v. White, 364 F.2d 789, 795 (6th Cir. 2004) (en banc); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). The Fifth and Eighth Circuits interpreted the statue to require an ultimate employment decision, such as hiring, firing, promotion, demotion, or compensation. Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Manning v. Metro. Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997). Similarly, a district court in the Fourth Circuit also applied the "ultimate employment standard". Raley v. Bd. of St. Mary's Cnty. Comm'rs, 752 F. Supp. 1272 (D. Md. 1990) (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (a Title VII discrimination case)). The Tenth Circuit stated that the conduct must constitute "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Aquilino v. Univ. of Kansas, 268 F.3d 930, 934 (10th Cir. 2001) (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998)). Both the Seventh and DC Circuits had applied a standard that was similar to the one ultimately adopted by the *Burlington* Court. Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C.Cir. 2006); Washington v. Illinois Dep't of Revenue, 420 F.3d 658, 662 (7th Cir. 2005).The Ninth Circuit adopted a broader standard based on EEOC guidelines. Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000).

[8] Galabya v. N.Y.C. Bd. of Educ., 202 F.3d 636 (2d Cir. 2000). The court stated that a materially adverse change must be "more disruptive than mere inconvenience or an alteration of job responsibilities," and can include, for example, "termination of employment, a demotion accompanied by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly

In *Burlington Northern & Santa Fe Railway Co. v White*[9], the Supreme Court announced a different standard. The *Burlington* Court ruled that "the anti-retaliation provision [of Title VII], unlike [Title VII's] substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment."[10] Rather, to prevail on a claim for retaliation under Title VII, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means that it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.[11] The Court noted the differences between the language of Title VII's substantive prohibition, which refers expressly to an employee's "compensation, terms, conditions, or privileges of employment," and the language of its retaliation prohibition, which contains no such reference.[12] Observing that Title VII's primary goal is to promote "a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," the Court pointed out that "[t]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."[13] In addition, the Court adopted a broad stance in its interpretation of the anti-retaliation statute, holding that it provides a remedy for an

---

diminished material responsibilities, or other indices . . . unique to a particular situation." *Id.* at 640.

[9] 548 U.S. 53 (2006). In *Burlington*, the plaintiff had been hired as a railroad "track laborer," which included both the operation of a forklift as well as less desirable track laborer chores. After she filed a sexual harassment complaint against her male supervisor, White was taken off forklift duty and assigned only other track laborer tasks. White sued, asserting the change of duties was retaliation. The Supreme Court held that reassignment of duties, together with a temporary suspension, was an adverse employment action.

[10] *Id*. at 68.

[11] *Id*. at 64.

[12] *Id*. at 62.

[13] *Id.* at 63.

expansive range of retaliation, including actions that may well occur outside the work environment.[14]

After the Court's decision in *Burlington*, several commentators noted that an increase in employee claims involving retaliation could be expected given this pro-plaintiff decision, because the Court's standard was more favorable to plaintiffs than that previously adopted by many of the federal courts of appeals.[15] It was suggested that the position adopted by the Supreme Court would call into question a broader range of employer conduct that does not directly affect key employment decisions or conditions, and would make it more difficult for employers to defend against a claim of retaliation at the summary judgment stage of a case.[16]

Although the Supreme Court's appeared to loosen the standard that plaintiffs must prove in retaliation cases, many courts continue to require employees to show that they suffered some economic loss due to the retaliation.[17] In *Fuentes v. Postmaster General of United States Postal Service*,[18] the appellate court stated that the term "adverse employment action" includes only "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." In cases where the

---

[14] *Id.* Previous cases held that the anti-retaliation statute could extend beyond the work environment when the adverse employment action was against a former employee. Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996); Beckham v, Grand Affair, Inc., 671 F. Supp. 415, 419 (W.D.N.C. 1987). In *McKenzie v. Atl. Richfield Co*., 906 F. Supp. 572 (D. Colo. 1995), the court held that an employee who is discriminated against because of his spouse's protected activity may claim retaliation. *Id*. at 575.

[15] Erwin Chemerinsky, *Workers Win in Retaliation Case*, 43 TRIAL 58 (January, 2007); Eileen Kaufman, *Other Civil Rights Decisions in the October 2005 Term: Title VII, IDEA, and Section 1981*, 22 TOURO L. REV. 1059 (2007); Ramona L. Paetzold, *Supreme Court's 2005-2006 Term Employment Law Cases: Do New Justices Imply New Directions*? 10 EMP. RTS. & EMP. POL'Y J. 303 (2006).

[16] Emily White, Burlington Northern & Santa Fe Railway Co., v. White: *The Supreme Court Bolsters Worker Protections by Setting Broad Retaliation Test*, 27 BERKELEY J. EMP. & LAB. L. 530 (2006).

[17] Sykes v. Pennsylvania State Police, 311 F. App'x 526, 529 (3rd Cir. 2008).

[18] 282 F. App'x 296, 301 (5th Cir. 2008).

adverse employment action takes the form of rude conduct and an otherwise hostile work environment, the circuits are generally in agreement that such behavior falls into the definition of "normal petty slights, minor annoyances, [and] simple lack of good manners" that the *Burlington* Court expressly characterized as non-actionable.[19] Thus, claims of retaliation continue to require a showing of some tangible harm, such as loss of employment, reduction in pay, or a significant change in employment circumstances.[20]

A few years later, in *Thompson v. North American Stainless, LP*,[21] the Supreme Court again appeared to favor the plaintiff in a retaliation case by recognizing a cause of action for third-party retaliation. In *Thompson*, the plaintiff claimed that he was the subject of retaliation when his fiancé, who worked for the same employer, filed a sex discrimination charge with the EEOC. The Court agreed, stating that an "aggrieved person" includes any person whose interests fall within the zone of interests covered under the statute.[22] Citing *Burlington*, the Court held that Title VII's antiretaliation provision must be construed to cover a broad range of employer conduct.[23] Clearly, noted the Court, a reasonable worker might be dissuaded from filing a charge with the EEOC if she knew that her fiancé would be fired because of her actions.[24] Comments on the case, similar to those made after the *Burlington* decision, suggested that the decision was a

[19] 548 U.S. at 68. *E.g*., Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 619(8th Cir. 2007); Pittman v. General Nutrition Corp., 515 F. Supp. 2d 721, 743 (S.D. Tex. 2007).
[20] Alix Valenti, Burlington Northern & Santa Fe Railway Co. v. White: *Are Plaintiffs More Successful in Litigating Retaliation Claims?* 11(2) ALSB J. EMP. & LAB. L.146, 175 (2009).
[21] 131 S. Ct. 863 (2011).
[22] *Id.* at 870.
[23] *Id.* at 868.
[24] *Id*.

significant expansion of Title VII's retaliation protection[25] and signaled the Court's inclination to broadly construe anti-discrimination laws.[26]

III. THE CAUSATION ISSUE AND THE SUPREME COURT'S RECENT INTERPRETATION

In addition to proving that the actions taken were sufficiently adverse, the plaintiff must also establish causality between the making of a complaint and the adverse employment action. The third prong of the statute requires evidence that the employer took the adverse action because the employee engaged in protected activity. Causality can be established if there exists direct or other non-circumstantial evidence.[27] For example in *Patane v. Clark*,[28] the plaintiff testified that she had overheard her supervisor conspiring to drive her out of her job and that another professor, to whom she reported, issued a negative performance review, constantly monitored her actions, and picked up her telephone. Thus, the court found sufficient direct evidence of causation between the time of the complaint and the adverse action even though a one-year gap existed between the complaint and the retaliation.

Absent direct evidence, however, causation is inferred by the temporal proximity between the protected activity and the employer's action. When the adverse employment action takes place immediately after the protected activity, courts generally find sufficient evidence of causation.[29] In most cases, however, the

---

[25] Brandon Underwood, *Tread Lightly: Third-Party Retaliation Claims after* Thompson v. North American Stainless, 38 IOWA J. CORP. L. 463 (2013).
[26] Frank J. Cavico & Bahaudin G. Mujtaba, *Managers Be Warned! Third-Party Retaliation Lawsuits and the United States Supreme Court*, 2 INT'L J. BUS. & SOC. SCIENCES 8, 16 (2011).
[27] Vance v. Chao, 496 F. Supp. 2d 182, 186 (D.D.C. 2007).
[28] 508 F.3d 106 (2d Cir. 2007).
[29] Troy B. Daniels & Richard A. Bales, *Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII*

employment action does not occur immediately after the protected activity. Where the only evidence of a connection between the protected activity and the adverse action is "temporal proximity," courts have held that the proximity must be "very close".[30] Very close has been defined as 21 days,[31] two weeks,[32] three weeks,[33] and, in one case, over two months.[34]

Retaliation Claims, 44 GONZ. L. REV. 493, 494 (2009). Circumstantial evidence will support a claim for retaliation where the plaintiff is fired one day after the company learned about his filing an EEOC complaint; a reasonable finder of fact could infer the requisite causation. Pantoja v. Am. NTN Bearing Mfg. Corp., 495 F.3d 840 (7th Cir. 2007). Similarly, an employee established causal connection between his EEOC charge and his termination, as required for prima facie case of retaliation under ADEA, where he was terminated on day that employer learned of charge. Mickey v. Zeidler Tool and Die Co., 516 **F**.3d 516 (6th Cir. 2008). Where plaintiff made a request for information to support his discrimination claim and was transferred to a new, less responsible job a week later, the court found that there was sufficient causation – the retaliatory action "followed closely on the heels" of the protective activity. Kessler v. Westchester Cnty. Dep't of Social Servs., 461 F.3d 199, 210 (2d Cir. 2006). A five-day span between the plaintiff's engagement in protected activity and employer's alleged retaliation was sufficient to establish "causal link" element of retaliation. Evans v. City of Houston, 246 F.3d 344, 354 (5th Cir. 2001).

[30] Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001); Summers v. Winter**,** No. 08-2039, 2008 WL 5227192 at *4 (11th Cir. Dec. 16, 2008); Pittman v. Gen'l Nutrition Corp., 515 F. Supp. 721, 737 (S.D. Tex. 2007).

[31] DiCarlo v. Potter, 358 F.3d 408, 422 (6th Cir. 2004). Where plaintiff's employment was terminated about a month after her first written complaint, the court nevertheless found that any temporal proximity between her complaint and the termination of her employment was weak, especially in light of the other strong evidence that her termination was for a reason other than her complaints. Banta v. OS Restaurant Servs, Inc., No. C07-4041-PAZ, 2008 U.S. Dist. LEXIS 97279 at *50 (N.D. Iowa, Dec. 1, 2008).

[32] Feingold v. New York, 366 F.3d 138, 156-57 (2d Cir. 2001).

[33] Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1091 (10th Cir. 2001).

[34] King v. Rumsfield, 328 F.3d 145, 151 (4th Cir. 2003). The DC Circuit applies a 3-month rule of thumb to establish causality on the basis of temporal proximity alone. Rattigan v. Gonzales, No. 04-2009, 2007 WL 1577855 (D.C.C. May 31, 2007). However, the Tenth Circuit held that a lapse of three months was insufficient to establish a causal connection. Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997).

Generally courts will not find evidence of temporal proximity if the time difference is three to four months or more.[35] The Tenth Circuit held that three and one half months between the EEOC charge and denial of tenure was too much time to establish causation by temporal proximity alone.[36] Similarly, a gap of six months from the filing of the lawsuit and eleven months from filing of the EEOC charge is also "too great to establish retaliation based merely on temporal proximity."[37] The Fifth Circuit held that an employee who was fired seven months after she filed an EEOC charge could not prevail on a claim of retaliation based solely on temporal proximity.[38]

Third Circuit applies an "unusually suggestive" test in examining the causality between the protected act and the adverse act. When plaintiff had received prior warnings for absences and had received a written reprimand, the court held that the discipline was for a highly plausible, legitimate, non-retaliatory reason.[39] The timing of the incidents must be sufficiently close to be "unduly suggestive," and there must be other evidence to suggest a causal connection.[40]

---

[35] *E.g.*, Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2005); Nguyen v. City of Cleveland, 229 F.3d 559, 566 (6th Cir. 2000).
[36] Meiners v. Univ. of Kansas, 359 F.3d 1222, 1231 (10th Cir. 2004).
[37] Foster v. Solvay Pharmaceuticals, Inc., 160 F. App'x. 385, 389 (5th Cir. 2005). *But see* Garvin v. Potter, 367 F. Supp. 2d 548, 571 (S.D.N.Y. 2005) (an eleven-month time period between the EEOC complaint and the beginning of the pattern of disciplinary actions supported a finding that there was a genuine issue of material fact as to whether the actions were taken in retaliation for the plaintiff's protected conduct).
[38] Bell v. Bank of Am., 171 F. App'x 442, 444 (5th Cir. 2006).
[39] Link v. Trinity Glass Int'l, No. 05-6342, 2007 WL 2407101, *7 (E.D. Pa. Aug. 22, 2007).
[40] Morrison v. Carpenter Technology Corp., 193 F. App'x 148, 155 (3d Cir. 2006) (citing Thomas v. Town of Hammonton, 351 F.3d 108, 114 (3d Cir. 2003)).

The Fifth Circuit noted that "temporal proximity alone will be insufficient to prove proximity; it is just one of the elements".[41] Thus, other facts such as poor performance, improper conduct, prior disciplinary record, and reports of disruptiveness will undermine a claim for retaliation based on temporal proximity even if only 3 and 1/2 months.[42] Similarly, the Seventh Circuit holds that a short period of time between the filing of a charge of discrimination and the adverse employment action is "rarely enough by itself" to create a prima facie case of retaliation.[43] Nevertheless, the court of appeals found the timing of the plaintiff's discipline as "extremely suspicious" and reversed the district court's summary judgment motion for the employer.[44]

As noted above, however, when there is additional evidence to support retaliation, for example, evidence of disparate treatment, the court will find sufficient evidence to permit the inference that retaliatory conduct was motivated by a previous lawsuit.[45] Timing is not important when the facts clearly indicate an unbroken chain of action from the time an employer first learns of a claim to the adverse action.[46] Time is also not necessary to establish causation when there is other non-circumstantial or direct

---

[41] Strong v. Univ. Healthcare Sys. L.L.C., 482 F.3d 802, 807-808 (5th Cir. 2007). *But see* Weeks v. NationsBank, N. A., No. CIV.A. 3:98–CV–1352M, 2000 WL 341257 (N.D. Tex. Mar.30, 2000), where a district court held that three months was close enough to establish a prima facie case. The court noted that the causation prong of the *prima facie* test is less stringent than is the "but-for" test applicable to the ultimate question of whether the defendant unlawfully retaliated against the plaintiff. *Id*. at *3. The plaintiff failed to establish but-for caution when the bank was able to show legitimate business reasons for the termination. *Id*. at *4.

[42] Strong, 482 F.3d at 808.

[43] Lang v. Dep't of Children & Fam. Servs. 361 F.3d 416, 419 (7th Cir. 2004).

[44] *Id*. at 420.

[45] Campbell v. Univ. of Akron, 211 F. App'x 333, 351 (6th Cir. 2006).

[46] Richard v. Bd. of Supervisors of La. State Univ., 960 So. 2d 953, 971 (La. Ct. App. 2007).

evidence.[47] For example, if the employee can prove an intent to retaliate the courts will find in favor of the plaintiff.[48]

If the employer can show that disciplinary actions or reprimands occurred *before* the protected activity took place, it will likely prevail on the temporal proximity issue. Reassignment and denial of training opportunities before the complaint negates the causal link.[49] Causation was negated when plaintiff was told two months before her participation in an EEOC investigation that would not receive a pay raise. In *Dehart v. Baker Hughes Oilfield Operations., Inc*.,[50] the court found no causation based on the employee's prior disciplinary record and the fact that the employer followed its policy and procedures. The employee had been previously reprimanded for taking leave without authorization and for poor attendance and insubordination. Similarly, the decision not to promote the plaintiff before the complaint was filed, plus previous disciplinary problems, defeats the causal connection between the complaint and the employment decision.[51] In one case, however, the Court of Appeals for the Tenth Circuit held that an action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.[52]

Further, subjective belief that incidents were retaliatory is not sufficient to establish the causal link between the incidents and the EEOC complaint,[53] or beliefs that incidents were motivated by personal dislike, not retaliation,[54] are not sufficient. An

---

[47] Vance v. Chao, 496 F. Supp. 2d 182, 186 (D.D.C. 2007).
[48] Terry v. Ashcroft, 336 F.3d 128, 141 (2nd Cir. 2003).
[49] Grother v. Union Pac. RR Co., No. 04-3279, 2006 WL 3030769, *4 (S.D. Tex, 2006).
[50] 214 F. App'x 437, 443 (5th Cir. 2007).
[51] Bryan v. Chertoff, 217 F. App'x 289, 293 (5th Cir. 2007).
[52] Sauers v. Salt Lake Cnty., 1 F.3d 1122, 1128 (10th Cir. 1993). Direct evidence existed in the form of a tape recorded conversation that the employee's supervisor feared that she would file a sexual harassment complaint against him.
[53] Peace v. Harvey, 207 F. App'x 366, 369 (5th Cir. 2006).
[54] Allen v. Nat'l RR Passenger Corp., 228 F. App'x 144, 148 (3rd Cir. 2007).

employee's speculation that she did not receive a "Far Exceeds" rating in her performance review was found to be insufficient to establish a retaliation claim.[55]

IV. THE SUPREME COURT'S DECISION IN *NASSAR*

The Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*[56] makes it more difficult for plaintiffs to establish causation because it eliminates the mixed-motive approach in retaliation cases. The Court held that as long as an employer's explanation of its actions against the plaintiff does not evince a discriminatory motive, the employer will prevail in the retaliation action, even if there exists other evidence of a retaliatory motive. Under the Court's ruling, an employee claiming retaliation must prove that the protected activity was the "but-for cause" of the alleged adverse action. This is a more demanding criterion than the motivating-factor standard which had been adopted by the court of appeals.[57]

The petitioner, who was of Egyptian descent, was a physician and a member of the faculty at University of Texas Southwestern Medical School (UTSW). As part of an agreement with Parkland Hospital (Parkland), the petitioner provided patient care at an outpatient care clinic at Parkland, which, starting in 2004, was headed by Dr. Beth Levine. The petitioner claimed that Dr. Levine demanded that the petitioner begin billing patients for his services, even though his salary for clinical services was covered under a federal grant, that she unduly questioned his productivity, and that she made comments such as "Middle Easterners are lazy," and that such behavior was evidence of discrimination based on his religion and ethnic heritage.[58] Because of this perceived bias, the petitioner applied for employment

[55] Hare v. Potter, 220 F. App'x 120, 131 (3rd Cir. 2007).
[56] 133 S. Ct. 2517 (2013).
[57] *Id*. at 2534.
[58] *Id*. at 2523.

directly at Parkland without also being on UTSW's faculty. On June 3, 2006 Parkland offered the petitioner a job to work directly in the clinic on Parkland's payroll, effective July 10, 2010, but only if he resigned from UTSW. The petitioner resigned his job at UTSW that same day by sending a letter to the department chair, Dr. Fitz, and other faculty members in which he claimed that he was leaving because of the harassment by Dr. Levine. In the letter, the petitioner wrote: "The primary reason of my resignation is the continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine .... I have been threatened with denial of promotion, loss of salary support and potentially loss of my job . . . . [This treatment] stems from [Levine's] religious, racial and cultural bias against Arabs and Muslims that has resulted in a hostile work environment."[59] After reading the letter, Dr. Fitz was concerned over the petitioner's accusations, saying that Dr. Levine had been "publicly humiliated by th[e] letter" and that it was "very important that she be publicly exonerated."[60] Dr. Fitz then opposed Parkland's hiring of the petitioner, on the grounds that the offer violated the affiliation agreement's requirement that all Parkland staff physicians be members of UTSW's faculty.[61] Parkland revoked the offer, and the petitioner moved to California where he accepted a position at a smaller clinic.

The petitioner sued on two grounds: that UTSW's blocking his appointment to Parkland was a constructive discharge of employment and that Dr. Fitz's actions were retaliation for the petitioner's claim of discrimination. Following receipt of a mixed-motive instruction, the jury found for the petitioner on both issues, but the court of appeals reversed on the constructive discharge issue.[62] On the issue of retaliation, the court of appeals held that the evidence supported a finding that Dr. Fitz was motivated, at

[59] Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 471 (5th Cir. 2012).
[60] 133 S. Ct. at 2524.
[61] *Id.*
[62] Nassar, 674 F.3d at 453.

least in part, to retaliate against the petitioner for his disparaging remarks about Dr. Levine.[63]

The Supreme Court reversed, holding that the mixed motive approach taken by the court of appeals was incorrect.[64] The Court applied the same reasoning that it took with respect to its interpretation of the Age Discrimination in Employment Act of 1967 (ADEA)[65] in *Gross v. FBL Financial Services, Inc*.[66] The language in both the ADEA and anti-retaliation statute under Title VII makes it unlawful for an employer to take adverse employment action against an employee "because" of certain criteria.[67] The Court stated: "Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross,* the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[68] This standard makes plaintiffs' burden of proving retaliation more difficult because they must show that, but for their protected activity, they would not have

---

[63] *Id.* at 454.

[64] 133 S. Ct. at 2534. The Court also rejected the more employee-friendly standard adopted by the EEOC. EEOC, *Compliance Manual*, Section 8: Retaliation n.45 (May 20, 1998), *available at* http:// www.eeoc.gov/policy/docs/retal.html.

[65] 29 U.S.C. § 623 (2012).

[66] 557 U.S. 167 (2009).

[67] 42 U.S.C. § 2000e-3(a) (2012). Congress passed the Civil Rights Act of 1991 which clarified the standard for status-based discrimination. 42 U.S.C. § 2000e-2(m) (2012) provides that an "unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Under the revised statutory language, a plaintiff can obtain declaratory relief, attorney's fees and costs, and injunctive relief based on a showing that race, color, religion, sex, or nationality was a motivating factor in an adverse employment action, but is not entitled to reinstatement or monetary damages. However, the Court noted, these amendments to Title VII do not apply to claims of retaliation. 133 S. Ct. at 2328.

[68] *Id*. at 2533.

suffered the adverse employment action.[69] Thus, the burden of proof shifts to the plaintiff who must prove that a retaliatory motive was the *sole* reason for the decision; if the illegitimate factor was merely a determinative factor in the adverse employment decision, the employer will most likely prevail.

The decision of the Supreme Court in *Nassar* was not unexpected. After its decision in *Gross*, most circuits applied the but-for standard in non-Title VII discrimination claims, including claims of retaliation.[70] As stated by the Seventh Circuit, "unless a statute ... provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."[71] The Fifth Circuit, which is normally more employer-friendly, was one

---

[69] The Court's decision appeared to be motivated at least in part by its concern for reducing frivolous claims and the increase in litigation under anti-retaliation statutes. *Id*. at 2531. One author lamented that the Court's interpretation of the law was merely to arrive at the end result it sought. In *Gross*, the Court distinguished Title VII from ADEA, yet it used the same "because of" language from *Gross* to apply a but-for approach for Title VII retaliation claims. Kendall. D. Isaac, *Is It "A" or Is It "The"? Deciphering the Motivating-Factor Standard in Employment Discrimination and Retaliation Cases*, 1 TEX. A&M L. REV. 55, 71 (2013).

[70] Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either Price Waterhouse's or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in a Post-*Gross *World (But Should)*, 64 ALA. L. REV. 1067 (2013). Before the Supreme Court's decision in *Gross*, the courts were generally split regarding which approach to follow in retaliation claims. In circuits which continued to follow the Civil Rights Act as it existed prior to the 1991 amendments (i.e., applied the *Price Waterhouse* standard), if a plaintiff demonstrates that a protected trait played a motivating factor in an adverse employment action, a defendant can avoid Title VII liability as long as it could prove that it would have made the same decision regardless of the retaliatory motive. Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1471 (10th Cir. 1992) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). Other courts held that the 1991 amendments were intended to overturn *Price Waterhouse* in all Title VII actions and thus although plaintiffs were entitled to damages, such damages were limited. deLlano v. North Dakota State University, 951 F. Supp. 168 (D.N.D. 1997).

[71] Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010).

of the few circuits that continued to apply the motivating factor approach in retaliation cases.[72] In addition, the Fifth Circuit also applied the rule articulated in *Price Waterhouse v. Hopkins*[73] which held that when the plaintiff establishes that at least one motivating factor was unlawful retaliation, then it is incumbent upon the employer to prove that it would have made the same decision absent the retaliatory motive, thus passing the burden of proof to the employer.

Using this standard in what had been treated by the Fifth Circuit as a mixed motive case, the jury in the *Nassar* case found that UTSW retaliated against the petitioner by blocking his employment by Parkland because he engaged in a protected activity and awarded him $438,167.66 in back pay and benefits and $3,187,500.00 in compensatory damages.[74] Evidently, the jury rejected UTSW's argument that its decision to prevent the petitioner from working at Parkland was a routine application of Parkland's agreement to use only UTSW doctors. On appeal, the Fifth Circuit noted in a footnote that its decision in *Smith v. Xerox Corp*.[75] required it to apply a mixed motive approach;[76] further,

---

[72] Smith v. Xerox Corp, 602 F.3d 320 (5th Cir. 2010). The court distinguished the two issues, noting: "To state the obvious, *Gross* is an ADEA case, not a Title VII case." *Id*. at 329. Further, the court applied the *Price Waterhouse* test (decided before the 1991 amendments) which provided that the "because of" language in the context of Title VII authorized a mixed-motive framework. *Id*. The court stated that, "as an inferior court," it could not ignore the application of the *Price Waterhouse* standard absent that case being overruled by the Supreme Court. *Id*. In a dissenting opinion, Judge Jolly called the decision "lame," arguing that the majority mischaracterized the case as a mixed motive case when the issue should have been analyzed as a pretext case. *Id*. at 336. *See* notes 76 and 95 through 98 and accompanying text *infra*.

[73] 490 U.S. 228 (1989).

[74] Nassar v. Univ. of Tex. Sw. Med. Ctr., No. 3:08-CV-1337-B, 2010 WL 3000877 (N.D. Tex. July 27, 2010).

[75] 602 F.3d at 330.

[76] 674 F.3d 448, 454 n.16. On a motion for a rehearing which was denied, Judge Smith dissented from that denial and in a dissenting opinion suggested that the

since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," the court could find no basis to upset the jury's verdict that UTSW retaliated against Nassar because of his complaints of racial discrimination.[77]

V. IMPLICATIONS OF *NASSAR*

The Supreme Court has clarified that in all but Title VII discrimination cases the employee must prove, under a "but-for" standard, that the adverse employment action would not have occurred absent a discriminatory animus. Under the more lenient mixed motive standard as long as the plaintiff can present some evidence of a discriminatory intent, the burden shifted to the employer to prove by a preponderance of the evidence that the employment action would have taken place even absent that prohibited motive. Under *Nassar*, the employer no longer has the burden of proving that a discriminatory animus was not the motivating factor for the employment decision. Scholars have suggested that this ruling simplifies jury instructions at trial as the burden of proof is placed solely on the plaintiff,[78] although the net impact may be fewer verdicts for employees[79] and fewer reversals on appeal.

At the summary judgment stage, it has been suggested that the Court's decision will not have a substantial impact. Arguably, when an employee presents evidence of both a discriminatory motive and a legitimate non-discriminatory motive, a genuine issue

---

Smith v. Xerox Corp. case was erroneously decided and should be overturned. 688 F.3d 211, 213-214.

[77] 674 F.3d 448, 454.

[78] Alan Rupe, Jason Stitt & Mark Kanaga, *U.S. Supreme Court Clarifies the Plaintiff's Burden pf Proof in Title VII Retaliation Actions*, 83 J. KAN. B. ASSN. 24, 29 (2014).

[79] Richard L. Wiener & Katlyn S. Farnum, *The Psychology of Jury Decision Making in Age Discrimination Claims,* 19 PSYCHOL., PUB. POL'Y, & L. 395 (2013).

of material fact arises, thus precluding a motion for summary judgment. However, although courts may have stated that a mixed motive standard was being applied, in fact they may have been filtering out cases as long as employers were able to show a plausible reason for their actions.[80] Thus, this paper examines whether, after the Supreme Court's decision in *Nassar,* plaintiffs' claims of pretext will be affected.

In the typical retaliation claim, plaintiffs must first state a prima facie case that (1) that they engaged in protected activity under Title VII or another statute; (2) that the employer was aware of this activity; (3) that the employer took adverse action against the plaintiff; and (4) that a causal connection existed between the protected activity and the adverse action. Defendants then file a motion for summary judgment alleging that the plaintiff did not meet his or her burden in alleging one or more of the required conditions[81] and/or that there exists a legitimate, nondiscriminatory

---

[80] Jeffery M. Hirsch, *The Supreme Court's 2012-2013 Labor and Employment Law Decisions: The Song Remains the Same*, 17, EMPL. RTS. & EMPL. POL'Y J.157, 167 (2013).

[81] According to the district court opinion in *Nassar*, the jury found that UT Southwestern retaliated against Dr. Nassar by blocking or objecting to his employment by Parkland because he engaged in protected activity. 2010 WL 3000877, at *1. According to the facts in the opinion, the petitioner's protected activities were (1) that on several occasions, he met with Dr. Fitz, the department chair, to complain that his billings were being overly scrutinized and (2) his letter of resignation in which he cited as his reason to resign, the "continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine . . . ." 674 F.3d at 451. A "protected activity," for purpose of showing Title VII retaliation claim, is defined as opposition to any practice rendered unlawful by Title VII, including making a charge, testifying, assisting, or participating in any investigation, proceeding, or hearing under Title VII. Ackel v. Nat'l Commcns., Inc**.**, 339 F.3d 376, 386 (5th Cir. 2003). Protected activity does not require a formal complaint to an administrative or regulatory authority. Internal complaints to a human resources representative or contact with an attorney have been found to be "protected activity" for purposes of the statute. However, informal discussions with a supervisor where there are no allegations of discriminatory conduct will not be treated as protected activity. **Drake v. Magnolia Management Corp.**, 115 F.

reason for the action. Once a defendant has presented its reason for taking the adverse employment action complained of, the plaintiff can present evidence to rebut the defendant's testimony by establishing that the defendant's proffered explanation is merely a pretext for the alleged retaliatory action.[82] A plaintiff may be successful in successful in establishing pretext if the plaintiff can show that the employer's explanation for its action was untrue. In *Mickelson v. New York Life Insurance Company*,[83] the plaintiff filed a complaint with the EEOC was later denied permission to work part-time. The court noted that while the timing between these events, alone, would not support an inference of causation, if the employee could show that the employer's proffered reason for taking adverse action was false, a jury could infer that the employer was lying to conceal its retaliatory motive.[84] The defendant's proffered reason for denying the plaintiff's request was that the plaintiff's position must be filled by a regular, full-time employee. But this argument was contradicted by evidence that three months later, the defendant permitted another employee to return to work on a part-time basis following a back injury. Thus, the court found that the defendant's justification of its denial of her request was pretextual.[85]

Supp. 2d 712, 723 (E.D. La. 2000), aff'd, 265 F.3d 1059 (5th Cir. 2001). Thus, Dr. Nassar had to rely solely on his letter of resignation as the basis for his claim. Under the EEOC Compliance Manual, it would appear that Dr. Nassar's protest of Dr. Levine's conduct contained in his letter of resignation was sufficient to be considered as an opposition to a practice believed to be unlawful discrimination and thus a protected activity. EEOC, *Compliance Manual*, Section 8: Retaliation, B. Protected Activity: Opposition (May 20, 1998), *available at* http:// www.eeoc.gov/policy/docs/retal.html.

[82] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[83] 460 F.3d 1304 (6th Cir. 2006).

[84] *Id.* at 1317.

[85] *Id.*

There is no "mechanical formula" for finding pretext.[86] Pretext can be established through "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions."[87] For example, when presented with inconsistent and contrary explanations for the employer's opposition to the plaintiff's unemployment benefits claim, the court concluded that a jury could reasonably find that the stated reasons were false to cover up a discriminatory purpose.[88] On the other hand, in conducting a pretext analysis it is not the court's job to engage in second guessing of an employer's business decisions.[89] The law does not require that the employer make proper decisions, only non-retaliatory decisions. Even a decision based on incorrect information can be a legitimate reason.[90] The Third Circuit noted that to discredit the defendant, "the plaintiff cannot simply show that the defendant's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."[91] In addition, the plaintiff's perception of the decision is irrelevant – the courts will determine the legitimacy of the employer's action through the perception of the employer.[92]

A close proximity in time between the plaintiff's claim and the adverse employment action is one factor that the courts will examine in determining the issue of pretext.[93] Pretext can also be established based on a disparate treatment argument. For example, if the employer offers a nondiscriminatory explanation of why an employee was terminated, the employee may be able to establish

---

[86] Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 6 (1st Cir. 2000).
[87] Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).
[88] Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1093 (10th Cir. 2007).
[89] Bryant v. Compass Gp. USA, Inc., 413 F.3d 471, 478 (5th Cir. 2005).
[90] Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991).
[91] Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).
[92] Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980).
[93] Lin v. Rohm and Hass Co., 293 F. Supp. 2d 505, 514-15 (E.D. Pa. 2003).

pretext if he or she can show that other similarly situated employees not in a protected class were not terminated.[94]

In analyzing whether *Nassar* changes the plaintiff's burden in establishing pretext, it is useful to review the distinction between the motivating factor approach from a claim of pretext. Both the majority and dissenting opinions in *Smith v. Xerox Corp*.[95] provided explanations. The majority noted that pretext cases involve an investigation of the true reason for an employer's action, which is either legal or illegal, while motivating factor cases involve employment decisions based on multiple factors, or mixed motives, at least one of which is determined to be illegal and prohibited by statute and one of which may have been legitimate.[96]

The dissenting opinion in *Smith* disagreed with this analysis, noting that under these definitions, any pretext argument is a mixed motive argument. Instead Judge Jolly defined a pretext case as one in which the employee prevails because the reason or reasons given by the employer were spurious. No specific showing of illegal animus toward the employee is required; the employee must prove only that the employer's reasons are false or otherwise unsupportable. Because the employer is in the best position to explain its justification for its actions, the jury may infer discrimination if it concludes that the explanation is false.[97] Conversely, in a mixed-motive case, there are both valid, non-pretextual reasons for an adverse employment action as well as other invalid, discriminatory factors contributing to the employment decision. As long as the employee can show that,

---

[94] Floyd v. Amite Cnty. Sch. Dist., No. 3:04CV78TSL-JCS, 2008 WL 2954972, *8 (S.D. Miss. July 29, 2008). In *Floyd*, although there were other teachers involved in grade inaccuracies and other infractions, the plaintiff, as principal, was unable to identify a single similarly situated employee who was treated more favorably than he under "nearly identical circumstances." *Id*.

[95] 602 F.3d 320 (5th Cir. 2010).

[96] *Id.* at 326.

[97] *Id*. at 339.

notwithstanding the validity of the employer's stated motives for its actions, another factor was the motive to illegally discriminate, he or she will prevail. This argument requires a showing of a specific illegal animus toward the employee that factored into the adverse employment action, said Judge Jolly.[98]

Whether a case is characterized as a mixed motive case or a pretext case is sometimes difficult. In *Terry v. Ashcroft*[99] the plaintiff raised several actions taken by the employer after he filed and EEOC claim which arguably were adverse employment actions. The employer argued that the plaintiff was not promoted because other employees were more qualified. However, the fact that a less qualified employee was promoted plus notations in the plaintiff's file that an action was "pending" were evidence of a motivating factor as well as sufficient to establish that the employer's action as pretextual.[100] Similarly, the court found that the plaintiff's transfer to another unit, which the plaintiff argued was designed to induce him to quit, was motivated by retaliation based on evidence presented at trial of comments made by his supervisors.[101] Further, the employer's proffered reason for the transfer was deemed pretextual because the plaintiff countered the explanation with a comment made by the personnel supervisor, "you mean to say he really showed up."[102]

In retaliation cases, the Fifth Circuit appeared to apply both mixed motive and but-for standards in analyzing the pretext argument. In a case involving a retaliatory FMLA discharge case, the court of appeals for the Fifth Circuit applied a mixed-motive framework, stating that even though the plaintiff conceded that discrimination was not the sole reason for her dismissal, she could nevertheless argue that discrimination was a motivating factor in

---

[98] *Id*. at 340.
[99] 336 F.3d 128 (2nd Cir. 2003).
[100] *Id*. at 142.
[101] *Id.* at 144.
[102] *Id.* at 147.

the decision.[103] As long as she could prove that discrimination was a motivating factor in the employment decision, the burden shifts to the employer to prove that it would have taken the same action despite the discriminatory animus.[104] Under this standard, evidence of hostile remarks and the close proximity in time were sufficient to raise the issue that retaliation contributed to the decision to fire the employee.[105] Following the Fifth Circuit decision, the district court for the Northern District in Mississippi applied a mixed-motive approach where the plaintiff alleged that the employer's explanation for a one-month suspension was retaliatory for her having filed a sexual harassment claim.[106]

In another case involving pretext, however, the district court for the Southern District of Texas followed a but-for standard in which the burden of proof shifts to the employee to prove pretext. In *Guerra v. North East Independent School District,*[107] the court stated: "In a pretext case, the causation standard is whether the employer would have taken the action 'but for' the improper characteristic -- a more stringent standard than 'motivating factor."[108] Similarly, in *Pittman v. General Nutrition Corp*.[109] the court first noted that if the employee can prove a retaliatory motive, the burden then shifts to the employer to establish that it would have reached the same result regardless of the discriminatory motive. Once the employer proffered a

---

[103] Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 333 (5th Cir. 2005).
[104] *Id*.
[105] *Id*. at 335. Even under the mixed motive standard, the court held that the employer met its burden of proof that it would have fired he plaintiff despite any retaliatory motive. *Id*. at 336.
[106] Brockington v. Circus Circus Mississippi, Inc., No. 2:07cv1, 2008 WL 2079130 *5 (N.D. Miss. May 15, 2008). Here, the court noted that where the plaintiff, a bartender, was suspended one week after making the claim and other employees were not disciplined for the same actions, giving free drinks to customers, the plaintiff could establish pretext even under a but-for standard.
[107] 496 F.3d 415 (5th Cir. 2007).
[108] *Id*. at 418.
[109] 515 F. Supp. 2d 721, 735 (S.D. Tex. 2007).

nondiscriminatory purpose for the adverse employment action, the employee had the burden of proving that but for the discriminatory purpose he would not have been terminated.[110] Summary judgment was awarded to the employer because the employee could not show that employer's explanation for terminating employee, falsification of expense reports, was a pretext for discharge after the employee exercised his protected rights.[111] The issue, said the court, is what the employer believed when it made the termination decision.[112]

An employer's explanation for its actions will not be deemed a pretext if the employee cannot show that the employer's explanation is false or unworthy of credence.[113] Further, the employer is not required to prove the absence of a retaliatory motive, but only that there is a legitimate nondiscriminatory reason for its action. To establish pretext the plaintiff must show that the action would not have occurred but for the protected activity.[114]

---

[110] *Id*. at 738-39 (citing Septimus v. Univ. of Houston, 399 F.3d 601, 607 (5th Cir. 2005)). In *Pittman* the plaintiff claimed that he was terminated because he opposed an allegedly racially discriminatory policy which prevented Black employees from being promoted above a certain level and because he filed an EEOC claim. The court found that his subsequent termination was sufficiently close in time to raise an inference of causation. Thus, the employer was obliged to provide a nondiscriminatory explanation of the termination, in this case, falsification of expense reports.

[111] 515 F. Supp. 2d at 739. Because the plaintiff was not able to refute the employer's honest belief that he had lied and that according to policy, he should be terminated, the court held that his burden of establishing pretext was not fulfilled. *Id.* at 741.

[112] *Id.* at 740.

[113] Floyd v. Amite Cnty. Sch. Dist., No. 3:04CV78TSL-JCS, 2008 WL 2954972 *3 (S.D. Miss. July 29, 2008).

[114] Rivers v. Baltimore Dep't of Recreation and Parks, No. R-87-3315, 1990 WL 112429 at *11 (D. Md. Jan 9, 1990). In *Rivers*, the plaintiff, a Black man, complained that his failure to be promoted was discriminatory, and that after making this complaint, he received a reprimand. The court held that such "evidence alone does not demonstrate that but for his complaints, he would not have been reprimanded for committing [certain] infractions." *Id*.

Given the facts of *Nassar*, the question arises whether the court of appeals decision would have been different under a but-for standard. The court of appeals in affirming the district court on the retaliation issue apparently treated the issue as one of pretext stating: our review is limited to determining "only whether the record contains sufficient evidence for a reasonable jury to have made its ultimate finding that [the employer's] stated reason for [taking adverse employment action against the employee] was pretext or that, while true, was only one reason for their being fired, and race was another motivating factor."[115] Applying a mixed motive approach to the pretext issue, the court of appeals determined that the defendant had not met its burden of proof that its policy requiring that Parkland employ only UTSW doctors was the reason for blocking Dr. Nassar's appointment.

Following the Supreme Court's ruling, in any retaliation action where the employer offers a nondiscriminatory explanation for its action, the plaintiff must prove that the explanation is pretext or that but for the discriminatory animus, the adverse action would not have taken place. In essence all cases that might have been considered under the mixed motive standard are now treated as pretext cases where the burden of persuasion had always remained with the plaintiff to prove that the employer's reason was a pretext once the employer proffers of a legitimate, non-retaliatory reason for an adverse employment action.[116] If the plaintiff is successful in convincing the court that the employer's explanation was false or implausible, the issue of mixed motive becomes irrelevant as there remains only one motive, presumably discriminatory, that can explain the adverse employment action. Thus, the sole question remaining with respect to the causality issue is whether there existed temporal proximity between the protected activity and the employer's action, a question that was not addressed by the *Nassar* Court since it appeared that the action

[115] 674 F.3d at 454 (quoting DeCorte v. Jordan, 497 F.3d 433, 437-48 (5th Cir. 2007)).
[116] Womack v. Munson*,* 619 F.2d 1292, 1296 (8th Cir.1980).

blocking the petitioner's appointment to Parkland took place immediately after the letter was delivered.

Applying this reasoning to the facts of *Nassar*, strong evidence existed against UTSW that its preventing the petitioner from working at Parkland was motivated solely by its anger at the petitioner for disparaging Dr. Levine's reputation; thus, it can be speculated that a court would have denied UTSW's motion for summary judgment because the evidence suggested the existence of animosity. Even though under a but-for approach the burden shifts to the plaintiff to show that the only reason for the adverse employment action was a retaliatory motive, Dr. Nassar, nevertheless, may have been successful in proving that UTSW's reliance on the agreement with Parkland was merely a pretext for its true motive of retaliation. Moreover, if the case as remanded, goes to a second trial, it is likely that a jury might find for the petitioner even under a more stringent "but-for" jury instruction.

VI. CONCLUSION

The Supreme Court's decision in *Nassar* signals a change in its previous employee-friendly approach to claims of retaliation. If the employee is not able to demonstrate that the employer's explanation for the adverse employment action was in fact a pretext, the employee must be able to prove that the action was motivated solely by a discriminatory animus. This presents a difficult but not insurmountable challenge, and the question will ultimately turn on the specific facts of the case.

- END ARTICLES -

Manuscripts submitted to the *Atlantic Law Journal* that scrupulously conform to the following formatting and style rules, including the quick tips below, will be strongly preferred. These revisions are effective for Volume 16 of the *Atlantic Law Journal* and subsequent volumes. In order to simplify the submissions process for authors we have conformed the *Atlantic Law Journal* style sheet to the standards of the *Southern Law Journal* with the permission of its editors. We extend our thanks to the *Southern Law Journal* for their gracious permissions.

MARGINS, INDENTS, & TABS:

- Top and bottom margins - one inch (all pages).
- Right and left margins – one inch (all pages).
- Set all "indents" to zero. In WORD 2007, use Paragraph drop box from Home tab. Use a zero indent throughout the manuscript (this is very important!). The only time you should use the indent feature is to set off long quotes (1/2 inch each side).
- Set tab to 1/2 inch. In WORD 2007, use the ruler, or use the Paragraph drop box from Home tab to set "tab stop position" at .5 inch. (1/2 inch is probably your tab set already!).

TITLE PAGE:

- Begin title on the fourth line after three skipped lines (press enter key four times).
- Title is centered, in ALL CAPITAL, using Bold letters and 12 point Times Roman font.
- Following the title of the paper, skip a line (press enter key twice).
- Author(s) names are centered in UPPER AND LOWER CASE CAPITAL letters and 12 point Times Roman font. Do not skip a line between author names.
- Identify author's (or authors') graduate degrees, academic rank, and institution name in non-numbered footnotes, denoted by the symbol * Use the corresponding number of symbols for the corresponding number of authors.

TEXT:

- Begin text three hard returns (two skipped lines) after the last author.
- Body of the paper is 12 point Times Roman font, single spaced with full justification.
- Begin each paragraph with a tab set at 1/2 inch (see above).
- Do NOT skip a line between paragraphs.
- If you wish to emphasize something in the text, do NOT underline or put in quotation marks, use italics or a dash.
- Do NOT number the pages. Numbers will be inserted when the manuscript is prepared for publication.
- Insert two spaces (not one) following the period of each sentence, both in the text and in the footnotes.

HEADINGS:

- First Level Headings (I.): Preceded and followed by one skipped line, Centered, UPPER/LOWER CASE CAPITALS, and Bold in 12 point Times Roman font.
- Second Level Headings (A.): Preceded and followed by one skipped line; Centered, Italics in 12 point Times Roman font.
- Third Level Headings (1.): Preceded and followed by one skipped line, Centered, using Underlining in 12 point Times Roman font.
- Fourth Level Headings (a.): Preceded and followed by one skipped line, Centered and in 12 point Times Roman font.

FOOTNOTES:

- All footnotes must conform to the Harvard Blue Book Uniform System of Citation (currently in the 19th Edition).
- Footnotes must use auto numbering format of the word processing system. (Do not manually number footnotes)
- Footnotes are to be placed at the bottom of each page in 10 point Times Roman font.
- Do not skip lines between footnotes.
- Footnote numbers in text and within the footnote should be superscript.
- Footnotes are Single Spaced with Left Justification.

A DOZEN QUICK TIPS for successful publication in the ATLANTIC LAW JOURNAL:

1. Use Microsoft WORD only (Word 2007 or later strongly preferred).

2. Use the BLUEBOOK! The QUICK REFERENCE: LAW REVIEW FOOTNOTES on the flip-side of the Bluebook Front Cover and the INDEX are much easier to use than the Table of Contents. Use both the QUICK REFERENCE and the INDEX! (The Index is particularly well done). If you don't have the latest version of the Bluebook, buy one!

3. Case Names. Abbreviate case names in footnote citations in accordance with Table 6 (and Table 10) in the BLUEBOOK. Abbreviate case names in textual sentences in accordance with BB Rule 10.2. Note that there are only eight words abbreviated in case names in textual sentences (10.2.1(c)), but more than two hundred words in abbreviated in case names is citations (Table 6 & Table 10). Please pay close attention to case name abbreviations.

4. Statutes: 22 U.S.C. § 2541 (1972). See QUICK REFERENCE (and BB Rule 12) for examples.

5. Constitutions: N.M. CONST. art. IV, § 7. See QUICK REFERENCE (and BB Rule 11) for examples.

6. Books: See QUICK REFERENCE (and BB Rule 15) for examples. Pay particular attention to how to cite works in collection. (UPPER AND LOWER CASE CAPITALS can be accomplished in WORD 2007 with a "control/shift K" keystroke.).

7. Journals (e.g. law reviews). See QUICK REFERENCE (and BB Rule 16.3) for examples. Abbreviate Journal names using Table 13.

8. Newspapers: See QUICK REFERENCE (and BB Rule 16.5) for examples.

9. Internet Citations: Use BB Rule 18.2. An internet citation has five subparts: (a) full name of author or if no author is given the full name of the sponsor of the website; (b) the name of the article or title of the page (in italics); (c) name of traditional printed source if there is one (typically in UPPER/LOWER CASE CAPS); (d) the date of the traditional source or of the internet source if one is given … if and only if there is no date in the cited source, then list the date "last visited" in parenthesis following the URL; (e) the URL … if and only if there is a traditional source, as well as an electronic source, then use the phrase "available at" in italics preceding the URL, otherwise precede the URL only with a comma.

Example: Kristen Hays & Tom Fowler, Some Shocked at Sentence, HOUSTON CHRON., Sept. 28, 2006, available at http://www.chron.com/enron/4220305.html.

Example: American Civil Liberties Union, Hate in America, http://www.aclu.org/hate.thml (last visited Aug. 10, 2010).

10. Please remove the "link" formatting from the URL (the URL should not be underlined or blue).

11. Using symbols (e.g. % or § or $), numbers (325 or three hundred and twenty five), abbreviating United States (U.S.), etc. can be tricky. Use the Bluebook INDEX to quickly find the BB Rule!

12. Recurring Rules: BB Rule 1.2 on Introductory Signals, BB Rule 3.5 on Internal Cross- References, and BB Rule 4.2 on the use of supra come up a lot. Become familiar with these three rules.

The editors of the ATLANTIC LAW JOURNAL will help put citations in proper BLUEBOOK form; however, the responsibility

begins with the author. Conformance with BLUEBOOK rules is one of the factors that the reviewers considered when selecting manuscripts for publication. Time spent with the BLUEBOOK is time well spent!

- END -