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INTRODUCTION: MULTIPLE AND ALTERNATIVE FUTURES

This past year I was asked to contribute an essay covering the impact of technology, most notably the Internet ("the Net"), on legal education to a book that has since appeared in Austria—a reminder that the issues at the center of these reflections concern legal scholars everywhere. I entitled that piece "The Digital Futures of Legal Education," intending the use of the plural "futures" to express the view that the relationship of digital technology to the complex activities and actors involved in legal education was far from that of simple cause and effect - technological determinism, if you will. While technology propels change it also, in my view, puts challenging choices in front of key institutions and individuals through which they shape the future, whether consciously or by default. In any event, the book's editor, who also had the burden of translating my piece, reported back that he had serious difficulty aligning the title's notion of alternative or contingent futures with a single German word. It is a disquieting notion but one absolutely central to the ideas I want to share. To throw it in bolder relief, I shall not rely on such nuance, but will instead explicitly sketch multiple visions of the future.

One reason I am loath to predict a particular future for law and the legal profession is born of recent experience. In 1988, I set out to prepare a Social Security treatise that would take full advantage of, and be designed specifically for, electronic delivery. I told myself the work would be as different from a traditional law text as a movie is from a novel, though I had only the most general notions of what that meant. It seemed to me self evident that a complete and integrated specialty law library organized by and accessed through expert commentary, all

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1. Peter W. Martin is the Jane M. G. Foster Professor of Law at Cornell University Law School, where he and Thomas R. Bruce established the Legal Information Institute. This article is adapted from the Siebenthaler Lecture Professor Martin delivered at the Salmon P. Chase College of Law in April 1998.

contained on a single CD-ROM, held such powerful advantages over print that once I had solved the intellectual and technical problems, publication and distribution would be assured. That prediction hugely underestimated the resistance to change in the large commercial organizations that then comprised law publishing. While my CD-ROM was in time published and today enjoys substantial use in the field of Social Security law, it has experienced a turbulent and uncertain ride on the path to publication, due to dramatic changes in the commercial publishing sector about which I had no clue ten years ago.

A second experience leading me to be cautious about prediction began in 1992. At that time, pursuant to the belief that law schools were uniquely positioned to be centers of research on and experimentation in the use of technology to distribute law, my colleague Tom Bruce and I established the Legal Information Institute at Cornell University. Our strong suspicion was that digital technology would permit law schools to be serious publishing centers. However, we failed to anticipate the rapidity with which Internet would become a pervasive communication medium and also the range of users, content, and providers it would bring together in five short years. As a reminder, I recently thumbed through Ed Krol's The Whole Internet User's Guide and Catalog, published in September 1992. It describes the Cornell Law Gopher (our initial Internet experiment), introduces the World-Wide Web as a brand new information service while encouraging readers to "check it out," and purports to provide an exhaustive catalog of information sites of all types on the Net. Krol's understanding of the Net was, and is, keen. Still, his few lines in that 1992 book on "Where the Web is Going" bring a laugh today, for they undershoot the mark by miles.

6. Id. at 189-210.
7. Id. at 227 (describing World Wide Web (WWW) as a hypertext information service of the Internet).
8. Id. at 242.
9. Id. at 285-331.
10. Id. at 241-42.
These experiences prompt me to see the future as plural in its possibilities, heavily contingent on institutional factors, and devilishly hard to read. That leads me to attempt to ground these speculations about the future solidly in the present. I have a strong sense that the future is already here, at least as much of it as one can hope to foresee, and recognizable if we can but tease its strands out of their tangle with the far more familiar strands of the past. The following case study is instructive in aiding that disentangling process, and allows those of us in the law to approach it with some detachment because it lies outside that field.

A SUGGESTIVE CASE STUDY- THE ENCYCLOPEDIA BRITANNICA

A. The Case Study

This year the Encyclopedia Britannica celebrates its 230th anniversary.11 It was founded in Edinburgh in 1768, a full century before the former West Publishing Company and, indeed, before the birth of our nation. For most of this century, the Britannica has been privately owned and operated in the United States - held by a foundation with all revenues flowing to the University of Chicago. Secure in print, it was totally blind-sided by the information revolution.

Until the early 1990s, the Britannica prospered with an army of direct sales agents selling its bookcase load of print. A set of volumes cost $200 to produce and was sold on commission by agents for figures ranging up to $1500 per set.12 All of that crashed during the brief period in which the Internet exploded and CD-ROMs, including the Microsoft digital makeover of the Funk and Wagnall Encyclopedia re-christened Encarta, began to enter many American homes. Britannica sales plummeted. In five years the company lost twenty-five million dollars. It finally responded with a CD-ROM version of the encyclopedia in 1994, but because of concerns that it might step on sales of print sets, this CD was limited to identical content, given the same sticker price, and

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12. Davidson, supra note 11, at 17. The exact cost was dependent on factors such as binding and paper stock.
deprived of such critical functions as printing. A year later, in early 1995, the Britannica name, content, editorial staff and sales force was sold to a European investment group. The sales force and network of independent sales agents, including over four hundred representatives in the United States, was disbanded the following year. Today, those who choose to do so can still buy the thirty-two volume print edition for $1500, but anyone can acquire more content, including video and audio clips, for $125 on CD-ROM. The Britannica also offers this multimedia content via the Internet on a subscription basis, with both individual and educational site licenses, alongside substantial material that updates and extends the core collection and carries no charge. Whether or not this offering is "too little, too late" remains to be seen. The current CD is far more competitive than the original offering. But disc Britannica still has some distance to go, according to reviewers, in such critical areas as ease of installation, quality of presentation and user environment when compared to Encarta which now dominates the multimedia market. The new owner’s recent use of the Britannica brand name to enter the Internet search engine business reflects its ongoing search for a profitable place in this new information world.

If Britannica survives for another century it will be a very different enterprise selling information in a radically different way than it did but a few years ago. In a truly brief span of time its centuries old, high quality information product, sold essentially on capital investment terms, has been ripped apart by information being distributed in much greater volume through consumer channels on CD-ROM and offered via the Internet at zero or near zero prices.

B. Implications for the Law and the Legal Profession?

Does this tale have implications for law or the legal profession? There are, of course, evident parallels between Britannica’s fate and the sale and transformation of commercial law publishing in the United States. Ten years ago the West Publishing Company, Shepherd’s, LEXIS, and Lawyers Coop seemed strong, distinct, and enduring features of the law scene. Today, they are merely brand names that have been acquired and merged with their associated products into two

competing international conglomerates. Might such displacement and ignominy threaten law or the legal profession? Both public law-making bodies and the legal profession hold apparent monopolies. This would suggest that while they may be sluggish in adapting to a digitally networked world, their future is secure. Fundamentally, the respective monopolies and any consequent security are increasingly an illusion. Even if survival is not the issue, stature and effectiveness are unquestionably at stake. Immense social costs, including both unnecessary expenditures and opportunities lost, will be the consequence if law assumes the "Britannica" posture. For law firms and the profession as a whole, the Britannica experience poses the blunt question: "Are you selling services that are over priced and outmoded for a digital world?"

C. One of a Swarm of Piranhas - The LII

It is with true humility that I shift from the Encyclopedia Britannica to Cornell Law School's Legal Information Institute (LII) and our experience over the same period of time. I am startled to say it is not ridiculous today to discuss the Britannica and LII's activities in the same breath. It is fair to say, for example, that while our information services are far narrower, in 1997 Cornell's LII distributed information to more individuals and institutions than the Britannica. Each time the United States Supreme Court hands down a decision, the LII's e-mail bulletin goes out to over eighteen thousand individual and institutional


15. See Thomas R. Bruce & Peter W. Martin, The Legal Information Institute: A Key Law Location on the Global Internet, 24 CORNELL L.F. 3 (July, 1997). Cornell LII has a scant five year history as compared to that of Britannica's 230 years, and its brand name is still being established. However, the LII's servers responded to nearly one million data requests per week during 1997.
subscribers (more than subscribe to the Britannica on-line). On a day when a high profile, high impact decision is released, tens of thousands download the opinion from our Supreme Court web-server. In the course of a week, the servers and search engines of the Institute respond to roughly two million data requests.

More to the point, perhaps, the LII is but one of a swarm of piranhas that have ripped the Britannica apart and forced the reconfiguration of law publishing. For the price of the Britannica print set, a family or school library can today acquire a multimedia computer, Internet connection, plus a clutch of reference CD-ROMs. Cumulatively, this digital alternative furnishes access to far more information than that to which the most comprehensive encyclopedia could ever aspire. Equipped with such a system, the high school student studying the work of the Supreme Court or the impact of Brown v. Board of Education can access decisions of the Court in full text at the Web site of our Institute. The student will find the same material on the LII CD-ROM of other historic decisions in the school library in increasing numbers. By either route, Britannica cannot compete with the depth offered in this one field by our Institute and other law sources. Additionally, the story repeats field by field.

Analogously, cost underlies the tectonic shift that has occurred in commercial law publishing. New entrants, including the LII, which provide inexpensive or free legal have radically changed the market. Lawyers and other consumers of legal information will not continue to pay Britannica level prices for information that is available without charge on the Net or that can be purchased at consumer level prices on disc.

16. See Richard A. Melcher, Dusting Off the Britannica, Bus. Wk., Oct. 20, 1997, at 147 (explaining that Britannica Online was reported to have only 11,000 subscribers in 1997).
19. Bruce & Martin, supra note 4, at 4. Material related to the decision is also available at the site.
From earliest times, "communication" has been central to law. As the technology of communication has changed, the impact on law and the central actors in the legal process (law makers, law appliers, lawyers, and citizens) has been profound. The introduction of the technology of writing, then the printing press, followed by wide-spread literacy and the growth of organized libraries, have all transformed the law activity. Those seeking to improve the legal order, including its effectiveness, accountability, equity and transparency have often harnessed new technology to the cause of reform. Through the pre-digital history of law, there has been a recurring focus on the related themes of access and communication. 20

As Marc Galanter has observed, law "usually works not by the exercise of force but by information transfer, by communication of what is expected, forbidden, or allowable, as well as the consequences of acting in certain ways." 21 Galanter points out how such notions as "deterrence," "bargaining in the shadow of the law," and "legal socialization" assume an information flow. 22

Consider for a moment the implications for our legal system and the practice of law if legal materials were not as accessible as we take for granted. Suppose the decisions of the United States Supreme Court and the top appellate courts of Kentucky and Ohio were not widely available for years, and legislative acts could only be found in a chronologically stored and poorly indexed manner at a limited number of national centers or libraries. Imagine further that policies and individual determinations of public agencies were available only in the agency offices themselves with whatever degree of order or user assistance they managed to achieve. One need not travel back too many years in United States history nor journey far around the globe to find a situation bearing a strong resemblance to this picture. Indeed, there are currently countries where effective distribution of high court decisions are a decade or more in arrears. For example, in Zambia, where I spent time two years ago

22. Id.
helping develop a national law database, decisions of the Supreme Court and the country's intermediate appellate court had not been distributed in printed law reports since 1985. Additionally, key statutes were both out of print and unavailable in any public library.

Less obviously, in the United States today, the decisions of lower courts and many adjudicative bodies of special jurisdiction as well as the authoritative policies of many state and local governmental agencies cannot be found in collected or organized printed volumes at law firms, law schools, or public law libraries. Law that fails to reach the majority of the individuals it affects is, as a consequence, mostly dead letter. To the extent it is not, it operates inequitably, with the inequity arising directly from the competitive advantage enjoyed by those few who have access.

Since many legal norms do not operate through citizen self-application, the quality of communication within the structure of government is equally important to efficacy and equity in the law. In areas like tax and social security, law operates through large government agencies which intersect the lives and activities of large numbers of citizens. Qualities of performance such as accuracy, timeliness, consistency, and equity (like cases treated alike, different cases treated with appropriate difference) are strongly influenced by the manner in which communication of governing legal norms is accomplished within these agency structures. In areas of the law where judges and law enforcement officials are essential elements of the law application process, the concerns are quite similar even though the means of communication have traditionally been different.

Better access and improved communication have been consistent targets throughout the history of the law. Beginning with Sir Edward Coke's translation of the classic Littleton's Tenures from "Law French" into English so it might be understood that "ignorance of the law is no excuse," through the early nineteenth century statutes requiring judges to write out decisions so that accurate copies might be distributed in print, these goals were evident. In the late nineteenth century,

24. Id. at 451.
codification and restatement movements were premised significantly on
a view that law derived from the mosaic of judicial opinions was too
inaccessible. The evolution continued with the Administrative
Procedure Act and subsequent “plain English regulation” movements
of the twentieth century. The idea that concerned people be able to
know the grounds of their accountability, “ignorance of the law being no
close,” captures the rationale for these reforms; however, the aims are
understood affirmatively in many cases. That is to say, whatever aims
the law is seeking, through whatever intermediate means, the prime
instrument is communication. Efforts to make law more accessible,
understandable, and more clearly expressed are ultimately efforts to
make law not only more effective, but most importantly, more accessible
in a democracy.

IMPACTS OF PAST TECHNOLOGY: THE PROCESS AND
PROFESSION

A few years ago I attempted to survey the five century history of
printed legal information. In that study, I reached several core
conclusions about the relationship between information technology and
the activity or process we identify as “law.” Stripped of all supporting
detail, they include the following observations.

First, there is a powerful, but infrequently noticed, linkage
between the ways in which societies think about law and the technology
they use in its operation and distribution. “Legal information technology”
(or the field of “legal informatics,” as it is often called outside the United
States) has deep effects on the roles of and the domain in which lawyers
and legal academics work, as well as on those ultimately affected by law.
These effects are infrequently noticed because for most purposes legal

Connecticut passed legislation in 1785 requiring judges to “render written reasons for
their decisions,” followed by the publication of the first volume of Kirby’s reports in
1789). See also LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 282-84, 359
(1973); Leah F. Chanin, A Survey of the Writing and Publication of Opinions in Federal

27. See FRIEDMAN, supra note 26, at 548.
28. Administrative Procedure Act, 5 U.S.C. § 553 (1946). See also S. DOC. NO. 248,
L.J. 231, 259; see also George D. Gopen, The State of Legal Writing: Res Ipsa Loquitur,
information technology is as much in the background and as “transparent” as are language, gesture, and the stereotypes we deploy in understanding the world. This transparency is especially pronounced for those who work with law on a daily basis.

Earlier information revolutions illustrate the connection between law and technology. Prior to the application of the printing press to law in England, courts and those arguing law before them operated within an oral and handwritten tradition.\(^3\) Education required years spent with common lawyers whose memories held the law. Lawyers and judges of the time infrequently referred to cases, and then only as examples of important points of law, not as precedent. The only official records of decisions were the plea rolls, which contained only the pleadings and formal dispositions, omitting the detailed discussion of legal points.

As printed law books began to have an effect on the functioning of and the ideas about law, the citation of cases began.\(^3\) The reporting of cases in “Yearbook” form led to an increasingly popular view of the decisions as at least a useful means of communicating about law. Thus, the notion of precedent slowly evolved.

Changes in the technology of communication have also had a direct impact on the role of the legal professions. In the early days of printed law in England and later in this country, lawyers had a near monopoly on access to law. Since the communication of law was then limited to the printed form, and lawyers could read while most others could not, the professional role was quite different from the dominant pattern for lawyer-client relationships today. Many of the law reforms of the nineteenth and early twentieth centuries were driven in part by the growing literacy of the populace and the consequent potential for direct access to law.

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32. Ross, supra note 31, at 326 n.113.
The information revolution now underway is at least as destabilizing as the advent of printing and the spread of citizen literacy. Anytime changes occur at this rate, they generate complex transition issues. From our present perspective such issues loom large. They are important, challenging, and touch on powerful vested interests, including those of the legal profession, and on deeply seated work habits. However, these issues involve the past more than the future. A view into the next century assumes that:

- Distribution of legal information in digital form will continue its rapid substitution for the book/library system. Digital law is not only faster and much cheaper, it is more capable in important ways. Additionally, digital information is modular and recombinant, in that it can be assembled in new ways as well as in distant places.

- Law data, including judgments, statutes, ordinances, court rules, and agency regulations, will continue to be viewed as being in the "public domain." That is, the control of law data by commercial interests through copyright and contractual arrangements that create exclusive distribution channels will not be long tolerated.

- Compatible forms of digital communication will link all players, including public bodies lawyers, citizens, and business entities in the law process.

- Given this new environment, location and space will be far less important, rendering disturbing consequences for those favored by proximity under the preceding system as well as for those seeking to maintain control over physically or geographically defined norms, institutions, or professions.

Set against current practices, any one of these assumptions may seem problematic. However, to grasp possible longer term effects technology may have on law and its central institutions, one must brush
past such transition issues. That is not to belittle them. After all, a full
generation of transition followed Gutenberg’s printing of the first book
before a printer was able to throw off the idea that a printed book had to
look and work like a manuscript.33

A. First Order Changes

A variety of immediate gains flow directly from digital
distribution. These include not only that the available information is
current and concisely structured, but also that copyrighted material is
easily distinguished from public information. Further, accessibility is
improved and data is cheaper to the user.

A representative volume of New York State decisions (circa
1981) may help illuminate such benefits. The spine of the book declares
it to be volume 437 of the New York Supplement, Second Series (“437
N.Y.S.2d” for short).34 A penciled mark inside the cover reveals it
arrived in the Cornell Law Library roughly a year after the latest decision
it contains was rendered. Of course, because of the rush to print, the
volume holds information that is outdated, as several of the decisions it
reports were reversed on appeal within a year or two. While this series
purports to be comprehensive for the state, that is only true in
comparative terms, in that this volume and many of its companions fail
to carry all legal opinions of the New York courts. They do carry the full
opinion of all decisions handed down by the highest court of the state,
although coverage is sparser the further one moves down the judicial
ladder. It is clear that case reporters like this one are both static and
lumpy, posing some perplexing issues about how to treat obsolete law
data. The problem is dealt with in print by yet another set of companion
volumes called citators.35

Printed reports are lumpy in the sense that they package law data
in large mixed bundles. A researcher gathering relevant authority must
first identify and assemble the volumes containing the most pertinent
cases, where they are bundled together with hundreds, if not thousands,
of irrelevant ones. That quality also defines appropriate habitat for
information in this form. Volume 437 was not designed to roam; indeed,

33. See Katsh, supra note 20, at 472.
35. See Stephen E. Young, “Shepardizing®” English Law, 90 L. LIBR. J. 209, 211
its proper and useful place is close by its many kin and companion citators in a law library. Located there, it is physically and institutionally remote from many people who might otherwise refer to its contents. Finally, like the majority of United States case reports of this period, this volume was published by the West Publishing Company and commingles hard to separate copyrighted material with the public domain judicial opinions.

Contrast the digital information exemplified by the Web site of the North Dakota Supreme Court. Speed of distribution is the most obvious difference with this new technology. Decisions of the North Dakota Supreme Court are posted to this site on the day of decision. Additionally, they can be retrieved, viewed, and printed out from this site by legal researchers located miles or even continents away in a matter of seconds. It should be noted that these decisions are not posted as interim versions, pending the appearance of official printed volumes. Instead, they are final and official from the moment of release. From the start they carry all the citation information that those desiring to cite them in brief, memorandum, or opinion will ever require, for North Dakota is among the jurisdictions that have broken free from traditional citation norms that force dependence on print, or worse yet, some particular commercial publisher's print edition. Further, law data in this form is inexpensive to produce, transmit and store, omitting the need for users to be proximate to a dedicated "library" space. Because the cost threshold of digital publication is so low, public bodies such as courts, legislatures, and administrative agencies have discovered that they need no longer rely on commercial intermediaries for dissemination of their work product. Since digital information can so readily be moved, filtered, and incorporated in other writing, those gathering law pertinent to a particular problem or issue can separate, transport, file and work with the portions deemed to be most relevant.

For many reasons, the gains propelling the shift to digital distribution appear even more dramatic in the sphere of law overseen by the countless federal, state and local agencies that carry out the grunt work of government. The demand for high profile, high impact legal data

36. See <http://www.state.nd.us/lr> (visited Feb. 22, 1999) for the Web site of the North Dakota Supreme Court.
attracts a high quality of print services. This elevated quality, in turn, hides some of the disadvantages of print. In fact, when it comes to the distribution of agency codes, policies, and procedures, it is clear that print is not simply cumbersome, but in some legal settings has severely hobbled effective communication of pertinent law to those most directly affected. That is, while many states have produced compilations of agency rules and regulations, the cost, bulk, and upkeep of the printed form have severely limited the mobility, habitat, and consequent accessibility to those rules. However, CD-ROM technology and the Internet have reduced those limitations in less than a decade. Federal and state agencies have rushed their law to the Internet at a pace that puts the courts to shame. Whether those touched by the agency are a vast constituency (as with the Social Security Administration) or a small one, widely scattered, digital access to agency material has brought a quantum of improvement.\(^{38}\)

The shift from paper-based to digital information systems has moved at a similar pace on law's input side, for similar reasons. Government agencies that collect official data for public inspection, regulatory oversight, or taxation have begun to invite and in a few instances require electronic submission.

Those lawyers, law teachers and students who have ready access to comprehensive law libraries or costly commercial on-line systems may need to be reminded that most who work with law must operate under far less favorable terms and conditions. Some of the immediate gains for other types of users flowing directly from open electronic distribution of the law are perhaps best illustrated by actual communications from users of the Legal Information Institute’s Web-based law collection.

- Judges and their clerks as well as police officers, agency officials, and other public sector workers whose activities are surrounded and heavily impacted by law are now able to access professionally relevant legal information on the Internet in quantity and quality which were not provided in printed form due to public budgetary restrictions. A public sector user writes,

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38. Id. at 295 (describing the Internet as "the most powerful technological vehicle for disseminating government information & increasing public participation in government decisionmaking available today.").
"I am a law clerk to a judge in the Court of Appeals of Virginia. Because of [sic] the judges' offices are decentralized, our office is rather small as is our library. We do not have the space for the federal . . . materials that I sometimes need to do proper research. Consequently, your site is a resource of almost inestimable worth. I use it often . . . ."

- Small private firms also enjoy heightened benefits from accessibility improvements, as the print library system never worked well for lawyers in such firms, especially those serving smaller localities. An attorney at such a private firm acknowledges,

  "As an attorney at a small firm, I have to ply the Web for any free legal resources I can find . . . . Your coverage . . . has saved me many-a-trip to the law library . . . ."

- An additional advantage is the availability of the digital law library distributed on the Internet and CD-ROM based collections twenty-four hours a day, seven days a week, barring technical difficulties. This makes its use especially appealing to those working at non-conventional hours,

  "It's 1 A.M. and I needed a U.S.C. section right away. And there you were: easy to find, easy to use . . . ."

- The site is attractive, as well, as to those to whom medium location was formerly a determinant of access,

  "It's amazing. Here I am in Oklahoma, assisting an attorney in Los Angeles in looking up a point of New York Law!"

- Sites such as that of the Legal Information Institute likewise provide benefits to the lay user as evidenced by the following comments:
"I'm a lay person - employed by a bank - serve as compliance officer . . . . I found your site very helpful in my research and use."

"I feel more confident retaining an attorney and preparing information for my attorney. I also feel comfortable knowing what conduct and services I should expect from the attorney I retain."

B. Some Likely, Immediate Second Order Consequences

Once courts and other adjudicatory bodies understand that electronic delivery is the primary path for distributing their decisions, they will begin to write for the medium. This should mean greater clarity through labeling and structure and a tighter connection between related decisions.

Citizens should be able to establish a more direct relationship with law in this form. Homeowners, business people, government workers, and others who know they confront a legal issue, question or task and can name, frame or position it with rough accuracy, may now access the relevant primary law and expert commentary without the assistance of an attorney. Interactive, interview-like software environments should bring access to a far greater population and improve the accuracy of non-professional legal research and interpretation. Lawyers' clients will less often believe they need the lawyer to find the law. Citizens will be more knowledgeable and therefore more secure in dealing with a lawyer or government official. However, a client with more legal information may be a client with a very strong but mistaken view of the law. Consequently, the picture is not necessarily one of close and effective lawyer-client collaboration.

As already noted, putting law out in books is costly. Those costs have blocked effective distribution to individuals dealing with large quantities of important law data. Given the much lower costs associated with digital communication, material that didn't travel far or wide in print and other processes that were not very interactive can suddenly become

39. See Katsh, supra note 20, at 485.
40. Id. at 473-76.
41. See Eugene Volokh, Technology & The Future of Law, 47 STAN. L. REV. 1375, 1388 & n. 87 (1995) (reviewing ETHAN KATSH, LAW IN A DIGITAL WORLD (1995), and reporting the 1995 cost of West's F.2d series to be $9700 in print, but only $3500 on CD-ROM). See also supra notes 11-13 and accompanying text.
very different. Digital technology is therefore likely to work the most notable improvements in the functioning of the lower level courts, smaller states and agencies.

FURTHER SPECULATIONS

Just as has occurred during past information technology shifts, one can expect this transformation of the communicative output of promulgation, application and interpretation of agencies' decisions as well as their interaction with those they regulate or guide, to affect how we think about law and how the legal professions work with law. 42

A. Reading the Law in Outcomes (Dispositions, Awards, Sentences), Not Just in Precedent

An increasing fraction of the decisions of the United States Courts of Appeals and indeed many appellate courts throughout the United States, are denominated "unpublished" and "non-precedential" by the deciding court. 43 Throughout the past decade the proportion has exceeded fifty percent, and it continues to climb. 44 So long as the only effective distribution channel for the holdings of these courts was books published by the West Publishing Company, the determination not to publish effectively kept a decision of the court which was perceived as inconsequential from entering the legal information system. The commercial on-line systems changed all that. In fact, a very high percentage of the "unpublished" Courts of Appeals decisions are distributed in full text digitally along with warnings declaring them inappropriate for either publication or citation. 45 Why do LEXIS and WESTLAW distribute decisions even though courts declare them non-precedential and barred from citation? Simply, because those decisions

44. Id.
have predictive value to lawyers and their clients, albeit for a relatively short period of time.\textsuperscript{46} Lawyers are eager for not only the court's precedential opinions, but also for any information that will allow them to "read" a court.\textsuperscript{47}

\textbf{B. Greater Consistency Through Better Feedback}

Finding appropriate means to provide consistent but equitable outcomes in a voluminous judicial or administrative adjudication system is a challenge that neither the "top down rule"\textsuperscript{48} nor precedent guided approaches address satisfactorily. In the mid to late eighties, the United States was not alone in focusing on the serious discrepancies in sentences that became evident when one reviewed not individual sentencing decisions but judgments coming from all judges of a particular court over a period of time. Through a process mired in controversy, the United States dealt with this problem by establishing sentencing guidelines.

New South Wales, Scotland, and British Columbia have experimented with a quite different approach which relies on putting better information in the hands of those involved in sentencing decisions. New South Wales offers the world a working model of this approach in its Sentencing Information System, launched there in late 1990.\textsuperscript{49} The model provides several complementary databases to sentencing judges, among them a "Penalty Statistics Database."\textsuperscript{50} The system rests on an intriguing premise that a judge should have access to the hundreds of thousands of decisions made by other sentencing officers in the country in order to reach an appropriate judgment.\textsuperscript{51} Such information is supplemented with adequate data regarding the offense, as well as an

\begin{footnotes}
\footnote{46. \textit{Id.} at 568.}
\footnote{47. \textit{Id.}}
\footnote{49. Council of Europe, \textit{Consistency in Sentencing: Recommendation to Member States \& Explanatory Memorandum}, 4 CRIM. L.F. 355, 390 (1993) (describing that various states in Australia create such systems, which may include information about maximum penalties, judicial decisions and sentencing practices).}
\footnote{50. \textit{Id.} at 391.}
\footnote{51. \textit{Id.} at 389-92.}
\end{footnotes}
offender profile. Effective statistical analysis tools and graphic display enable the comparison.

The data on all federal civil dispositions placed on the Internet by Cornell furnishes another, though incomplete example. This database provides valuable statistical analysis opportunities, such as comparing jury trials and bench trials for duration or plaintiff success. However, it provides no way to review outcomes by judge.

For a brief time in the eighties, the Social Security Administration kept outcome data on all Administrative Law judges deciding disability, old-age, and survivors insurance cases. This data was accessible to the public, including lawyers, under the Freedom of Information Act. It is foreseeable that such an idea will reach widespread implementation in the future. That is, adjudicators can and should be known by the pattern of what they do, not simply by what they write. The importance of such information to litigants is revealed by the perceived advantages that follow from the knowledge of a decider's propensities available to repeat players and, less reliably through hearsay. Quite possibly, we will grow comfortable with the idea that an independent adjudicator can, consistent with that independence, be reviewed on the basis of a pattern of performance, not merely per evaluation of isolated individual instances on appeal. In all likelihood, the future of law will include distribution of much more outcome data on full populations of decisions of many different kinds, not just those decisions or portions of decisions selected by the decider "for publication."

C. Flatter, More Effective Administrative Bodies

Most institutions of the law, including significantly the judiciary, operate in a top-down or hierarchical manner. However, there is an incompleteness to the top-down approach because many issues that are resolved at the bottom never receive the attention judgment or authoritative law interpretation of those on "top". A non-litigated dispute

52. Id. at 376.
fails to register with the judicial system. Further, an issue that is not appealed due to discretionary deference or because the expense outweighs its stakes, may remain in confusion.

The work of Shoshana Zuboff and others strongly suggests that digital information technology has a corrosive effect on top down control within organizations because in that setting information can be, and therefore tends to be, more widely distributed. This invites non-managers to a broader view of the enterprise and a deepening understanding of their own tasks and roles. Zuboff speaks of financial institutions, paper mills, or auto companies. However, in analogizing this tendency to public bodies, one can see serious possibilities for "reinventing government." Top down, rule-based control is the model on which we have constructed both industrial enterprise and the administrative state, and is what the phrase "rule of law" means to many people. Digital technology permits, though it hardly assures, less rigid, compartmentalized, and hierarchical government measures that also facilitate more richly informed discretion. I would suggest that the layers, delays, departmental boundaries, and rigid rules which are synonymous with government to many people, are tightly associated with the use of print-based systems to communicate law.

D. Better Performance and Greater Accountability

Those governed by the law are "assumed" to know it. Perfect communication is hardly a reality, but "ignorance of the law is no excuse." With varying degrees of acknowledged discomfort, our legal system operates with fictions like assumed knowledge of the law and "legal notice." Both judges and administrators who apply the law are in one sense held to the same standard; for to the extent their work is subject to review by higher authority, their interpretation, application or knowledge about the law can be upset without pause or deference. These two propositions combined pose serious risks to even the most conscientious of citizens. Consider any one of several important legal regimes that have the following characteristics: (1) an intricate set of

56. See ZUBOFF, supra note 48, at 169-70.
57. Id. at 169.
58. Id. at 159-71.
59. Id. at 58-96.
60. Id. at 48.
rules that are changed from time to time, and (2) a large effected group with fair amounts at stake. These traits are shared by federal and state tax laws, farm subsidies, flood insurance guarantees, and the Social Security and Medicare systems. Such programs involve more than a targeted population, rule promulgators, and a cast of adjudicators; all are implemented through agencies. In pre-digital times, the spread of legal information within such a large and geographically distributed organization has required training programs, massive manuals, supervision, spot checks or quality control monitoring.

Most citizens have no alternative but to rely on a government agency or, more accurately, one of its employees to be both accurate and authoritative on questions involving "its" law. But, of course, systems fail and United States law today casts the risk of such failures on the citizen in most instances. Through better information, communication and better accountability it may be possible to both reduce the incidence of government error and increase the authority of front-line government workers to issue binding interpretations of the law.

E. Changes in How Law Functions Across Space and Time

Our current legal structures are built to paper scale. They carve larger units of space into compartments, minimizing the journey a citizen or his/her lawyer must make to file a document, review important public files, or testify. Our public land records are organized at the county level even as land boundaries are now surveyed using satellite data. Both the federal and state judicial systems divide jurisdiction in similar fashion. Digital communication permits a totally different scale, promising great leverage to institutions in competitive arenas which succeed in making the shift.

Whether accomplished by appellate courts overruling prior precedent, or administrative bodies or legislatures promulgating new rules, law changes. Such change is sharply discontinuous and awkwardly communicated by the essential static medium of print. That also is a dimension in which we may see major change.
F. Collapse of Some Multi-Layered Transactions into Simpler More Efficient Form

Many legal transactions or procedures are built around paper technology, and provide for separate stages to allow for the movement of paper from one party or agency to another. For example, real estate interests are transferred by deeds that are first executed, then delivered, and then recorded. Digital technology should make it possible to collapse many such procedures into simpler and more efficient forms.

G. Potential Benefits – A Summary

In sum, digital law may bring the following direct and more speculative consequential benefits:

- More direct and more effective communication of law to those directly affected. 61
- Greater potential for direct government/citizen interaction. 62
- More direct and more effective communication of essential data and options to official law implementers such as judges, police officers and environmental agency personnel. 63
- More effective internal communication, providing greater transparency and more equitable, efficient law application. 64

LESS POSITIVE FUTURES AND THEIR LIKELY CAUSES

Many of our legal institutions are inherently slow to act. 65 Most of them, law firms included, are not well suited to launching venturesome new initiatives nor to adapting current mission and practices to large-scale external changes. For institutions with these characteristics the immediate future is frighteningly full of hard choices.

61. See Henry H. Perrit, Jr., The Electronic Agency & The Traditional Paradigms of Administrative Law, 44 ADMIN. L. REV. 79, 95 (describing that electronic methods can provide a more complete & easily accessible record).
62. Id. at 80.
63. See Bruce & Martin, supra note 4, at 7.
64. See Perrit, Jr., supra note 61, at 104.
65. Conference, supra note 23, at 381-82 (relaying the comments of Thomas R. Bruce that the legal profession exhibits resistance to change by maintaining tight control over information it needs).
The most obvious ones have to do with institutional inputs such as information, staff and technology. Their effective resolution will require strategic decision-making, swift response and frequent revisiting, given so fluid an environment.

Still harder choices lie on the output side which entails selection of the optimal targets, scale and means for distributing legal information and legal services. Both public and private institutions are likely to find themselves in far more direct competition with other actors than ever before. Decisions such as how to focus limited human and information resources to maximum effect as well as which new opportunities to pursue will be difficult enough for those who fully recognize the challenge.

Threatened by change, public bodies or the organized bar may defensively array rules and standards, invoking concerns about quality and professionalism. Restrictions on where services are rendered may fend off virtual law firms for a time, even as citation standards may slow the use of virtual libraries. But they cannot, and therefore will not, prevent citizens and business entities from seeking legal information, counsel, and more active assistance via the same technology they use to access other information-based services. However, history suggests that whenever defensive measures like these are deployed for long, those surrounded by them prove the ultimate victims. History also suggests that such response is very common.

Many court systems and other public bodies have become quite dependent on revenue streams, and other significant but more diffuse returns, flowing from stable, longstanding relationships with commercial intermediaries. In such cases, direct and free distribution of decisions, regulations, or statutes will seem quite costly, as it will mean relinquishing tangible present benefits.

Most public bodies and non-profit institutions are resource-strapped and have viewed digital technology, and even the new


68. See Johnson, supra note 37, at 287 (describing the reduction in funding to agencies designed to ameliorate the federal deficit).
personnel it requires, as deferrable extra costs.\textsuperscript{69} Furthermore, to many of the key actors in the law process the current technology shift is experienced as a time and resource consuming distraction which threatens to draw attention and funds away from their main mission - whether that be adjudicating, legislating, regulating, counseling or litigating.\textsuperscript{70}

Slow, apathetic technology assimilation by public bodies invites the private sector in. Since the private sector has historically been a major presence in the legal information field in the United States, there is little doubt that the invitation will be heeded. No harm looms in this proposition so long as the process does not compromise the key values of public ownership of, and low threshold accessibility to, the law. Nevertheless, the past contractual relationships between many public bodies, especially court systems, and commercial publishers, as well as the sorry histories of the Department of Justice database contract with West\textsuperscript{71} and the Security Exchange Commission contract with LEXIS should alert us to the very real risk they may create.\textsuperscript{72}

In December of 1997, Microsoft announced a strategic alliance with several other vendors to "promote an electronic legal and justice system that will digitally link law firms to courts, as well as law firms to each other."\textsuperscript{73} The press release spoke of setting "up electronic filing systems in courts through the United States" and offering law firms of all sizes a document management system that "will integrate with the [court] systems" thereby realizing the full potential of "electronic filing."\textsuperscript{74} Nevertheless, it is current and past corporate practice, and not paranoia, that suggests a contrasting vision. The Internet browser competition and the constant addition of hitherto discrete applications to Windows "operating system" provide inescapable evidence of Microsoft's willingness to give away technology products and services in order to secure market dominance. With billions of dollars in reserve Microsoft should have no trouble dominating the market for electronic legal data.

\textsuperscript{69} Id. at 330.
\textsuperscript{70} Id.
\textsuperscript{71} See Lavenue, supra note 66, at 6.
\textsuperscript{72} See Allison, supra note 66, at 14 (reporting that during the period before the electronic filings with the SEC were opened to the Internet, any law firm desiring access to these "public disclosure" documents had to pay LEXIS a $60,000 subscription fee — its source of profitability in a contract that provided the SEC with very favorable terms).
\textsuperscript{73} Id. at 14.
\textsuperscript{74} Id.
interchange – that is, the means of communication between lawyers, courts and other public bodies, and ordinary citizens. 75

The scenario is straightforward. Imagine the Microsoft alliance offering a free or chillingly inexpensive, fully functional and secure “legal data interchange” and “electronic filing” system to courts and public agencies at all levels of government, few of whom are prepared to be technology leaders, yet all of whom feel resource constraints. Integrated smoothly with Microsoft Word, Internet Explorer, or the ubiquitous Windows operating system, and supported with ample training, this would be a package that courts and agencies moving into the digital environment might be hard pressed to refuse. However, if they accept such an offer without insisting that the resulting standard for data interchange be an open, non-proprietary one, they will have given the alliance control over the flow of law data both into and out of government. That decision would give Microsoft a monopoly position over tools of the communication that it could use to get both the public and lawyers to pay for again and again, either directly or indirectly.

CONCLUSION:
TAKING CHOICES SERIOUSLY AND ADDRESSING THEM COOPERATIVELY

Technology assures none of the positive outcomes or tendencies sketched herein, but it merely makes them possible in ways not before realized. It is likely, for the short term at least, that digital technology will be used essentially to rewire old architecture. Public bodies responsible for making law and structuring its application have been historically poor at technology take-up, perpetuating a tendency aided and abetted by many people both within and without government with a strong stake in the way things have been. Many public bodies will find it difficult to understand and respond to their responsibilities of version control, authentication, structuring (media-neutral citation), weeding (recompiling), and archiving in this new environment. More importantly, they will be subject to courtship by a new set of commercial partners offering to lighten the load of government with their technical expertise in return for gaining leverage or control over public data flows.

75. See Jerry Ackerman, Giant Technology Forges Alliances With Start-Ups, BOSTON GLOBE, Dec. 16, 1998, at C4 (reporting Microsoft to have seventeen billion dollars in "spare cash" at that time).
One hopes that public bodies will rise to the opportunity and challenge, shaking off cozy alliances with individual publishers on the one hand and the temptation to convert the strong demand for legal information into a revenue stream on the other, and view the release of basic law data as a core public function. One further hopes that they will insist on open rather than proprietary formats for electronic information flow in and out of the law making and law applying agencies. One hopes that they come to understand the importance of these systems and insist on remaining in control of them by knowing how they work. It is all too easy for a private vendor who maintains a single key element of a public data system to achieve major proprietary advantage, and indeed control, if its "know how" is not shared by its public client.

Can the organized bar, the courts, legislature, executive branch and technology vendors endeavor to work together on these matters? Such a commitment is necessary to prevent the current opportunity from slipping away due to insufficient resources and inattention to the matter. The stakeholders are numerous and the stakes very high. Fortunately, several initiatives now underway suggest it is not naïve to hope that this sort of cooperation is possible. Two such projects merit discussion here. Both deal with the complex legal obstacles faced by lawyers and firms. One example involves Cornell's Legal Information Institute. The other, the diverse legal institutions of the state of Utah.

A. The American Legal Ethics Library

Since there is no uniform national regulation of the legal profession in this country, lawyers who follow a client's business from state to state in the United States, or outside the United States into the global economy, must contend with significant jurisdictional differences. To tackle the information problems created for attorneys and firms by such differences, the Cornell Legal Information Institute has established a cooperative venture known as the "American Legal Ethics Library."76 It is distinctly a creature of the digital age and has several notable

characteristics. First, it is modular, with an open architecture which allows multiple points of entry and potential uses. Second, and more importantly, it has pulled together law firms, public bodies, academics, and a large malpractice insurer into a collaborative project, which operates within a non-profit structure. Patterned on the Internet, it is more a process than a product in that the content and shape of the resulting information resource is beyond the control of any of the participants in its creation.

B. The Utah Electronic Law Project

An even more ambitious cooperative venture has taken shape in Utah. The Utah Electronic Law Project began with preliminary meetings in 1996 followed by the creation of a formal organizational structure in early 1997. The Project’s bold aim is to “facilitate and enable the electronic processes and information interchange required to implement the Electronic Practice of Law and to establish the legal foundation for Electronic Commerce in the State of Utah.” Its mission evolved out of the realization of the Utah Bar Association that, for the most part, the state courts, various state agencies and local government entities interact and transact with legal professionals, businesses and the public using a paper-based metaphor. Even transactions between state and local government entities were seen as generally paper-based rather than electronic, as were interactions between private law firms, the Attorney General’s Office, local prosecutors and the state courts. It was felt that the primary reason these interactions had not migrated to more efficient and less costly electronic systems, was that all interested parties had

77. See Cramton & Martin, supra note 76, at 342-43.
78. Id. at 343.
79. Id. at 341-42.
80. Id. at 343 (explaining that the unique structure of the Project allows any user to add commentary and hypertext links to any portion of the collection).
82. See Toby Brown, Practicing Law on the Internet, 11 Utah B.J. 8, 11n.9 (May 1998) (explaining that the Utah Electronic Law Project is now known as the Utah Electronic Law and Commerce Partnership (UELCP). See also <http:www.uelp.org/front.htm>, the Web site of the UELCP, which stipulates the Project’s vision (visited Jan. 19, 1999).
83. See Brown, supra note 82, at 10.
84. Id.
failed to adopt uniform technical, policy and data exchange standards.\textsuperscript{85} While various initiatives were underway within the state courts, state agencies, local government entities, private law firms and law departments to automate portions of the various filing and information exchange systems, there was no comprehensive vision to shape the various initiatives into a coordinated system.\textsuperscript{86} Further, there was no effort among the various groups to establish the standards and procedures that are required to make a coordinated system function.\textsuperscript{87} The private law firms and corporate law departments that would ultimately interact with the various systems had not been made aware of or involved in the planning of those systems.\textsuperscript{88} Finally, the Utah State Bar had only limited involvement in the various projects, even though it should have been a leader in helping to shape the new guidelines and rules that will enable the electronic practice of law.\textsuperscript{89} Established to bring all stakeholders together and to specifically engage the organized bar in both addressing the necessary "cultural and rule changes" and encouraging support and participation in the project by members of the Bar, the Utah Electronic Law Project has made a promising start, as it has strong support from public and private sectors, and is committed to open standards.\textsuperscript{90} Still, the Project faces daunting responsibilities. Following the initial process of standards definition, the Project is scheduled for implementation in July, 1998. Its ambition is to provide an integrated and open system of electronic access to all state courts and agencies, as well as many local government entities, other government bodies, legal professionals, businesses, and the public.\textsuperscript{91} Both the process and the ambition need to be widely noted and emulated.

This is one of those times when "how law works" should be a subject of interest and concern to non-insiders, non-professionals. It is quite possible that the more direct communication between citizens and

\textsuperscript{85} See the UELCP web site, supra note 82, containing the Mission Statement of the UELCP Technology & Standards Committee.
\textsuperscript{86} See id., containing the Mission Statement of the UELCP Legal & Policy Action Committee.
\textsuperscript{87} See id., containing the Mission Statement of the UELCP Managing Integration/Business Applications Action Committee.
\textsuperscript{88} Id.
\textsuperscript{89} See Toby Brown, Legal Economics: From Paper To Electronic, 10 Utah B.J. 18 (Apr. 1997).
\textsuperscript{90} Id.
\textsuperscript{91} Id.
government that digital communication has already opened and the widespread experience with the powerful liberating effects of a non-proprietary data standard (namely, the Web’s HTML) will generate just that pervasive interest and concern.

One thing is certain: if lawyers are unable to change old patterns and fail to organize their skills and resources for effective application in a networked world, that very connectivity will marginalize their professional role. The only sure way to avoid being blind-sided by the future, as the Britannica was, is to be involved in the shaping of it.
A PLACE FOR FAIR COMPETITION ACTS IN MOTOR FUEL MARKETING

by Samuel L. Perkins, Charles F. Phillips, Jr. and Geoffrey B. Schwartz

INTRODUCTION

In Section I of the article, the history of petroleum marketing and the environment in which fair competition laws and theories developed is reviewed. Also reviewed is the economic significance of increased barriers to entry in the retail motor fuel market and the resultant need for state legislation in this area.

Section II of the article addresses the statutory and regulatory scheme as it exists. Reviewed are the major federal statutes and the supporting case law. Also reviewed is the quilt of relevant state statutes that address the petroleum market structure and activities. This survey provides the background for the suggested structure of a fair marketing practices act.

The objective of Section III is to analyze the constitutionality of the existing state statutes and the theories that support each ruling. Some statutes have been ruled unconstitutional while others have been reviewed and allowed to stand. State legislatures enacted statutes to remedy holes that exist in the federal statutory scheme. No two statutes are exactly alike, but certain themes among these statutes arise from our analysis.

Section IV presents an analysis of our proposed structure for a fair marketing practices act. The objectives for such an act should be: 1) to level the playing field among refiners, jobbers, and dealers to remove unfair competitive advantages; 2) to promote competition on the merits at the retail level of motor fuel marketing; and 3) to protect a

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competitive environment which will not penalize efficiency in retail marketing but will enhance consumer choice. A properly drafted fair competition act can provide the environment for healthy competition to flourish which can be a win-win for retail marketers and consumers.

Whatever the reader’s purpose for reviewing this article, it is our hope that it will stimulate a thoughtful discussion of the competitive concepts that are the core of the American oil economy. Diverse approaches about how to allow competition to thrive exist in the law and economic thought. This article feasts on that diversity.

I. THE HISTORY OF PETROLEUM AND ITS ECONOMIC SIGNIFICANCE

It may help the reader to review the business environment in which the laws and theories discussed in this article developed. Rather than journey back to the time of “Rock Oil” or “Seneca Oil,” we will begin in 1900 with the dominance of the Rockefellers and the Standard Oil Trust. The Sherman Act was merely ten years old and had been infrequently tested and few state remedies had been enacted.

The mere mention of oil evokes a certain romance with success and wealth. Entering close on the heels of such a thought is the image of the man most closely associated with the United States oil industry, John D. Rockefeller. The person most responsible for our collective image of John D. Rockefeller is Ida M. Tarbell. That image is rarely

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4. “Rock Oil” was the name given to what we would call crude oil in an effort to distinguish it from vegetable or animal oils, like whale oil.
5. “Seneca Oil” refers to the Indians in the area where rock oil was found.
7. South Carolina was the first state to enact a statute prohibiting selling below cost in 1902, but the current trend of statutes dates from the depression years and the Robinson-Patman Act. See infra apps. A, B, and C for tables of these statutes.
8. Ida Tarbell wrote THE HISTORY OF STANDARD OIL COMPANY in 1904, just two years after she began publishing her serial work on the subject in McClure's. See Ida M. Tarbell, Miss Tarbell’s History of the Standard Oil Company: Editorial Announcement, McClures Magazine, October, 1902, at 588. The Tarbell-painted rapacious image of John D. Rockefeller dominates the public perception of oilmen and their companies. And yet, along with this Tarbell image, there co-exists in the public mind a seemingly irreconcilable fascination and romance with the swashbuckling oilman.
flattering, but always intriguing. The Rockefeller mystique remains entrenched more than sixty years after his death. For example, as Microsoft grows in importance and profitability, the popular press will probably compare Bill Gates with John D. Rockefeller. This comparison confirms the image Rockefeller evokes and with which the oil industry is saddled. While the image of oil companies and their marketing practices arise from Rockefeller in the first third of the twentieth century, those images grow out of an era that is commercially dissimilar to the final third.

At the dawn of the twentieth century, kerosene was the dominant refined product and gasoline considered a waste stream. Kerosene primarily served as illumination or cooking fuel in place of the more expensive alternative, whale oil. The electric light was invented in 1882 and in 1900 had not yet begun its encroachment on the kerosene illumination and cooking market. And, interestingly, as the oil industry launched into the new century, John D. Rockefeller had been retired for nearly five years with the automobile not yet beyond 2500 in number in the United States. It was in 1910 that the United States Supreme Court broke up the Standard Oil Trust. The first third of the twentieth century concluded with the “Great Depression” and with the automobile entrenched enough that 170,000 gasoline stations had sprung up in the United States. Gasoline had come of age.

While depression embraced the United States and the world in the 1930s, not long into the final third of the twentieth century inflation and stagflation, directly attributable to the oil shock of the late 1970s, would grip the United States. It was in this environment that branded franchisors and franchisees of petroleum products confronted the

9. “Mr. Rockefeller has systematically played with loaded dice, and it is doubtful if there has ever been a time since 1872 when he has run a race with a competitor and started fair.” IDA M. TARBELL, THE HISTORY OF STANDARD OIL COMPANY II 288 (1904).
10. See MICHAEL KARL WITZEL, THE AMERICAN GAS STATION 11 (1992). Early on gasoline was referred to as “stove naptha [sic].” Gasoline would not enter into the American conscience until the automobile became the dominant mode of transportation thirty years later.
11. Id. at 11.
12. Id. at 10.
13. Id. at 12.
15. See WITZEL, supra note 10, at 59.
Petroleum Marketing Practices Act. By the beginning of the final third of the century, various states had enacted statutes to supplement federal laws prohibiting certain business practices. The 1980s saw the return of oil company mergers and acquisitions. As the 1980s came to a close, the price of gasoline plummeted from a high of more than $2.10 per gallon to less than $1.20 (real U.S. gasoline prices). During the 1990s the United States oil industry witnessed further declines in gasoline prices and lost refining margins. The close of the final third of the twentieth century saw further consolidation of the downstream assets of the petroleum industry and the reuniting of portions of the original Standard Oil Trust.

17. See infra apps. A, B and C. In the early 1980s, President Reagan lifted the Department of Energy (DOE) controls on gasoline supply and pricing which created extensive upheaval in the motor fuel market. During DOE control, major oil companies were guaranteed product, price, and profit. The lifting of DOE control was the beginning of the demise of the dealer and the stimulus for model fair competition acts in the petroleum arena. Further discussion of DOE controls is beyond the scope of this article.
18. The main events of the 1980s included: DuPont’s acquisition of Conoco in 1981; acquisition of Marathon Oil Company by United States Steel Corporation, which has since become USX Corporation, in 1982; Chevron’s acquisition of Gulf Oil in 1984; Mobil’s acquisition of Superior Oil in 1984; Texaco’s acquisition of Getty in 1984; BP’s acquisition of SOHIO in 1987; and, acquisition of CITGO by Petroleos de Venezuela (PDVSA), the national oil company of Venezuela, in 1989.
21. The downstream end of the petroleum industry (frequently referred to as refining and marketing) encompasses those activities from the refining to the retailing of the refined products to the motoring public and other customers.
22. Ultramar and Diamond Shamrock merged in 1996, and in 1998 announced a joint venture in refining and marketing with Phillips 66. Tosco acquires the refining and marketing assets of Union Oil of California and with it the rights to the familiar orange ball and blue 76 in May 1997. Marathon and Ashland announced a merger of their refining and marketing assets in May 1997. Shell and Texaco entered into a joint venture for the combination of mid-western and western downstream properties and then announced the inclusion of the eastern Texaco properties with Saudi Refining, Inc. in July 1997. BP (including the old Standard Oil of Ohio) and Amoco (formerly Standard Oil of Indiana) announced a merger in August 1998. Mobil (formerly Standard Oil of
As the suppliers consolidated, so too the wholesale jobbers consolidated. Many commission agents\(^\text{23}\) of the integrated oil companies became independent wholesale jobbers. The jobbers acquired the integrated oil company-owned bulk plants and customer distribution assets. The integrated oil companies tended to hold on to the high volume distribution assets near their terminals.\(^\text{24}\) The jobbers began to acquire other jobbers in the wholesale sector.

The late 1990s witnessed a trend back to the petroleum marketing model of the 1930s as large grocery and mass retailers expanded their offerings by adding gasoline pumps. This trend frequently caused distortions in gasoline markets. "As petroleum marketers pursue additional revenue sources beyond gasoline, supermarket chains and mass retailers are seeking new profit opportunities as well--by adding gasoline pumps. Traditional petroleum marketers are concerned because several chains offer such low retail prices it's nearly impossible for the local marketer to compete."\(^\text{25}\) In the 1930s the "traditional petroleum marketer" was the lumberyard, hardware store, grocery store and other retail marketers. In the late 1990s, the traditional petroleum marketer has evolved into a convenience store and fast food franchisee, appended to retail petroleum operations.

There has been a steady decline in the number of gasoline stations in almost all markets.\(^\text{26}\) Much of the decline has been concentrated

\(^\text{23}\) A commission agent was an agent of an oil company who utilized an oil-company-owned storage and distribution center, within the industry called a bulk plant, and was paid a commission on the products sold through the bulk plant.

\(^\text{24}\) For example, the BP annual report from 1992 tells an interesting story of consolidation of retail throughput. In 1988 BP owned approximately 22,000 facilities worldwide, and in 1992 that had been pared to 18,000 facilities. In 1988 the average facility throughput was 1.7 million liters; by 1992 it rose to 2.4 million liters per year. In the period from 1988 through 1992, BP experienced an eighteen percent (18%) decrease in the number of retail facilities and experienced a forty-one percent (41%) gain in facility annual throughput. THE BRITISH PETROLEUM COMPANY, BP ANNUAL REPORT AND ACCOUNTS 1992.


\(^\text{26}\) In 1972 there were 226,459 retail gasoline stations in operation in the United States. As of 1998, that figure had dropped to 182,596. See Market Facts 1998, NATIONAL PETROLEUM NEWS, Mid-July 1998. The retail gasoline market consists of many small
among the full-service, lessee dealer stations selling branded gasoline. The decline primarily reflects the markets' adjustment to changing consumer demand in the post-OPEC (Organization of Petroleum Exporting Countries) period of higher retail prices. Self-service stations have become more attractive; an attraction reinforced by the do-it-yourself trend. Increasingly, consumers have shown a preference for purchasing gasoline from convenience stores and/or gasoline chain retailers. Further, there has been greater consumer emphasis upon price (rather than brand, service and convenience). This emphasis also accounts for the decline of full-service stations.

These changes, combined with environmental regulations, have increased barriers to entry into the retail motor fuel market. The proliferation of retail petroleum facilities occurred in an unregulated environment, or at least one with minimal regulations. The barriers to entry and exit were confined to the cost of equipment and the corresponding installation and removal costs. The development of environmental laws and regulations impacted entry and exit economics of the retail petroleum market. In particular, the environmental regulation of underground storage tanks (USTs) beginning in 1984 had the greatest impact on the entry and exit barriers at the retail level. Prior to the implementation of the technical regulations governing installation and operation of USTs, the primary regulatory concern was with safety (from explosion and fire) and aesthetic design. Prior to 1984, retail petroleum facilities were constructed with minimal cost. The post 1984 regulatory 

markets in central business districts, in or near shopping centers, on arterial highways, and in suburban and rural areas.

27. Further, the most recent environmental regulations with respect to underground storage tanks may cause a sharp decline in the total number of gasoline stations in the country. The Environmental Protection Agency estimates that about 25 percent of the nation's underground fuel tanks have not been upgraded to meet the new rules. Many of the affected stations are in rural communities. Gas Stations May Close in Face of EPA Deadline, USA TODAY, Dec. 10, 1998, at 1B.


29. See Finkler, History of Service Station and Gasoline Marketing, THE DESIGN, REGULATION AND LOCATION OF SERVICE STATIONS 5-6 (July-Aug. 1973).

30. The authors searched for readily accessible documents or a study that compared UST installation cost prior to and after RCRA. No such documents or study were uncovered. However, the common industry practices prior to RCRA and after may help the reader to comprehend the impact on entry and exit barriers at the retail level. The
environment impacts the cost of removal, installation, and operation of USTs and the corresponding entry and exit barriers in the retail petroleum market.

At the same time, the marketing strategy of mass retailers may have caused a change in motor fuel marketing power. Since they are not highly dependent upon gasoline sales for their annual revenues, relatively low gasoline prices may become a marketing tool to attract customers to their places of business. Thus, mass retailers are able to employ contemporaneous recoupment through other product offerings. Gasoline becomes a loss leader to maximize profits on these other product lines. The depression of the retail price of gasoline then becomes an entry barrier as the price is depressed below levels that allow for a reasonable rate of return. The only market entrants left are those who obtain a return from other products and gasoline is their leverage into those profits. In those markets in which the mass retailer maintains market dominance for retail goods, as in a rural setting, such gasoline pricing practices logically lead to market dominance in gasoline and ultimately the power to extract economic rents.

The ability to obtain contemporaneous recoupment is not limited to mass retailers. As more directly discussed in Section II, integrated oil companies were the focus of the early fair competition acts. Tennessee addresses this issue in the intent section of its statute. An integrated oil company can upstream profits to its refining as well as its exploration and production phases of its operations. The need to obtain a reasonable return at the retail level becomes less important if a greater return is possible at some other phase of production. The result once again is a depressed retail price

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common industry practices for installation and removal of USTs prior to RCRA followed existing fire and municipal codes. Fire codes permitted filling USTs with inert materials or proper cleaning and removal of USTs followed by backfilling the resulting pit. Owners usually installed inexpensive single walled steel USTs. Post 1988 removal costs increased, as did exposure to regulatory fines and penalties. See supra note 25. Post 1988 removal requires regulatory compliance with soil and groundwater cleanup standards. In addition to remediation and new equipment costs, there are the costs associated with regulatory compliance to avoid imposition of penalties. While identifying the actual costs is beyond the scope of this article, it is important to acknowledge the existence of these costs.

with contemporaneous recoupment. Again this type of activity becomes a barrier to entry into the retail market.

The significance of increased entry and exit barriers is the increased opportunity to recoup losses and ultimately control price once a competitor is eliminated as a result of predatory pricing. Unlike the situation with traditional predatory pricing (involving an intent to harm competitors), no such intent may be involved with the marketing strategy of mass retailers and, consequently, may not be illegal under federal laws. Yet, the strategy has an adverse impact on competition in the retail motor fuel market, an impact that state authorities should monitor carefully.

The issues presented by consolidation and the resulting concentration of market power are a concern for the consumer. Concentration of retail operations could threaten gasoline supply in many, especially rural, communities. The question to be addressed in this article is how the laws address this market evolution and ultimately how they should.

II. SURVEY OF EXISTING LAW

A. Federal Antitrust Legislation

1. Overview

Federal anti-competitive and antitrust legislation revolves around the Sherman Act, the Clayton Act, and the Robinson-Patman Act. These Acts proscribe anti-competitive restraints of trade,

33. See supra note 24.
36. The Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13-13b, 21a (1994)), was enacted in 1936 in response to concerns of small grocers that price discounts granted to larger chain food stores placed them at a competitive disadvantage. See Jonathan C. Rose, Acting Deputy Assistant Attorney General, Antitrust Division, Address to the Legal Committee of the Grocery Manufacturers of America (Oct. 29, 1975), in Leon R. Goodrich, Minnesota Price Discrimination and Sales Below-Cost Statutes: Should They be Repealed, Amended, or Left Alone?, 5 WM. MITCHELL L. REV. 1, 69 (1979). However, since its enactment, the Robinson-Patman Act has come under considerable scrutiny, and many commentators have been openly critical of its provisions. See generally WILLIAM C. HOLMES,
monopolies, and price discrimination where the effect of such discrimination is to substantially lessen competition or tend to create a monopoly. 37 All three prohibit the predatory practice of deliberately selling below cost to discipline a competitor, either to drive the competitor out of business or to raise prices to a level that will enable the predator to recover its losses and, in the long run, earn additional profits. 38 Each differs in the competitive consequences of the prohibited conduct. 39 However, as more fully discussed in this subpart, the burden of proving a case under either the Sherman Act or the Clayton Act, as amended by the Robinson-Patman Act, and the fact that section 3 of the Robinson-Patman act is a virtual nullity, leaves the real task of promotion of fair competition to the states. 40

An understanding of the federal statutory scheme intended to foster competition will provide a foundation for understanding the need for state fair competition legislation aimed at preventing certain anti-competitive conduct.


37. See discussion this section infra. The case law and materials which have evolved from these Acts are, not surprisingly, quite extensive. As the focus of this article is state fair competition legislation aimed at petroleum sales, this discussion of federal pricing legislation is intended as a brief summary only. For an in depth discussion of these Acts as well as other federal antitrust law, see HOLMES, supra note 36.


39. For example, "[s]ection 1 of the Sherman Act requires proof of a conspiracy." Brooke Group, 509 U.S. at 251. Section 2 of the Sherman Act applies to independent conduct and condemns predatory pricing when there is "a dangerous probability" of actual monopolization. Id. The Clayton Act, as amended by the Robinson-Patman Act, applies to price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." Id.

40. Fair competition legislation focuses on providing a level competitive playing field. The evaluation of this fairness necessitates an evaluation of the cost structures and the economic forces in the market place. This article will evaluate the effectiveness of federal legislation and the growth of state legislation to fill the voids left in the federal scheme. It will further explore some of the opportunities to level the playing field with state-based fair competition legislation.
2. **The Sherman Act**

Section 1 of the Sherman Act focuses on anti-competitive restraint of trade by prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, . . ."\(^{41}\) The language of the statute is directed at concerted action between two separate individuals or entities only. Unilateral actions are not encompassed within the statute. Prohibited practices include horizontal and vertical price fixing, horizontal allocation of territories among competitors, vertical nonprice restraints, boycotts, tying agreements, and exclusive dealing agreements.\(^{42}\) A violation of section 1 of the Sherman Act is considered a felony and is punishable by a fine of up to $350,000 for individuals and $10 million for corporations, or by imprisonment, or both.\(^{43}\) Civil remedies are also available for violations with the potential for treble damage awards.\(^{44}\)

Section 2 of the Sherman Act prohibits monopolies, attempts to monopolize, or combinations or conspiracies "with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, . . ."\(^{45}\) While the punishment and form of civil liability may be similar, Section 2 of the Sherman Act differs significantly from section 1 of the Sherman Act in that section 2 encompasses not only concerted action among several individuals or entities but extends to unilateral action as well. Section 2 of the Sherman Act "may be violated when there is a 'dangerous probability' that an attempt to achieve monopoly power will succeed."\(^{46}\) In the context of predatory pricing, while evidence of below cost prices is one element that may be used to establish the anticompetitive conduct

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42. See Holmes, *supra* note 36, at 218-19. Horizontal price fixing occurs when two or more competitors get together to set price. Vertical price fixing occurs when a distributor attempts to set price down the chain of distribution. See Albrecht v. Herald Co., 390 U.S. 145 (1968), *overruled by* State Oil Company v. Barkat U. Khan, 118 S.Ct. 275, 278 (1997). Of course, as discussed this section *infra*, evidence of below-cost pricing alone is not sufficient to make out a prima facie violation under the antitrust laws. Recoupment through market power must also be shown. See Brooke Group, 509 U.S. at 224-26.
46. Brooke Group, 509 U.S. at 251 (Stevens, J., dissenting).
prohibited by the statute, ultimately, a plaintiff must prove the defendant competitor had a dangerous probability of recouping its investment in below cost prices. 47


State Oil is a classic case of vertical price fixing under Section 1 of the Sherman Act. In State Oil, Barkat U. Khan and his corporation (Khan) entered into an agreement with State Oil Company (State Oil) to lease and operate a gas station and convenience store owned by State Oil. 49 The agreement required Khan to obtain gasoline from State Oil at a price equal to the suggested retail price set by State Oil, less a margin of 3.25 cents per gallon. 50 If Khan then charged its customers more than State Oil's suggested retail price, the excess had to be remitted to State Oil. 51 If Khan charged its customers less than State Oil's suggested retail price, the difference reduced the 3.25 cents per gallon margin allowed Khan. 52 Khan ultimately fell behind in its lease payments to State Oil and a receiver was appointed to operate the facility. 53 Kahn then filed suit against State Oil alleging price fixing prohibited by section 1 of the Sherman Act. 54 Relying in part on Continental T.V., Inc. v. GTE Sylvania Inc., 55 the Court in State Oil renounced the per se rule adopted in Albrecht v. Herald Co., 56 and

47. Brooke Group, 509 U.S. at 224. However, see supra discussion Section I. Based on general economic principles, if there are significant barriers to entry, once a competitor is eliminated, the opportunity to recoup losses increases. As discussed supra note 27 and accompanying text, the barriers to entry into the retail petroleum marketing business have become increasingly significant due to environmental regulations. The greater the barriers to entry, the more dangerous the probability of recoupment of losses.

49. State Oil, 118 S. Ct. at 278.
50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
56. 390 U.S. 145 (1968). In Albrecht, a case decided under section 1 of the Sherman Act, the United States Supreme Court held that vertical maximum price fixing was a per se violation of that statute. Id. Albrecht involved an independent newspaper carrier, who purchased newspapers for retail sale under an exclusive territory arrangement that was terminable if the carrier exceeded the maximum retail price advertised by the newspaper publisher. Upon ultimate termination for exceeding the maximum advertised price, the
returned to the "rule of reason" approach to vertical price restraints followed prior to Albrecht. Under a per se standard of proof, a plaintiff need only prove the prohibited practice occurred. Under the "rule of reason" standard in force as a result of State Oil, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." Not surprisingly, the economic investment required of a plaintiff to prove such factors is in most cases cost prohibitive.

3. The Clayton and Robinson-Patman Acts

a. Section 2(a)

The Robinson-Patman Act amendments to section 2(a) of the Clayton Act are aimed at price discrimination. Section 2(a) of the Clayton Act, as amended, prohibits:

carrier filed suit against the newspaper publisher demanding treble damages. Id. Under a per se standard, a plaintiff need only prove that the prohibited practice occurred and is not required to produce evidence of competitive unreasonableness. Id. The defending competitor is then precluded from introducing evidence of justification for its activities. Id. See also Holmes, supra note 36, at 249. In holding maximum price fixing as a per se violation of section 1 of the Sherman Act, the Court in Albrecht relied in part on U.S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), decided the prior term. The Court in Schwinn dealt with exclusive dealer territories and a supplier's imposition of territorial restrictions on a distributor. Schwinn held this practice to be "so obviously destructive of competition" as to constitute a per se violation of the Sherman Act. State Oil, 118 S. Ct. at 280 (citing and quoting Schwinn, 388 U.S. at 379). Ten years later in Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), the Court reconsidered its decision in Schwinn and reverted to the "rule of reason" standard followed prior to Schwinn with regard to vertical nonprice restrictions, thereby renouncing the per se standard of Schwinn. Id.

57. State Oil, 118 S. Ct. at 281-85.
58. Id., at 279.
59. The court in Sixty Enterprises Inc. v. Roman & Ciro Inc., 601 So. 2d 234, n.5 (Fla. Dist. Ct. App. 1992) recognizes that federal legislation exists to prohibit predatory pricing. However, the court, citing the state House of Representatives Committee on Commerce, notes that "for most persons harmed by anti-competitive practices in the oil industry, recourse through the federal acts might prove to be prohibitively costly and lengthy . . . ." Id.
any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . . .

Section 2(a) divides into six elements: 1) there must be a sale in interstate commerce of, 2) a good or commodity, of 3) a like grade or quality, at 4) a different price, 5) the sale must be an actual sale, not a transfer, lease or consignment, and 6) the sale must cause competitive injury. The statute specifically provides for two defenses including 1) cost justification where an allowance is made for differences in the cost of manufacture, sale, or delivery, and 2) meeting competition, which allows a seller to rebut a prima facie case by showing the lower price was offered to meet an equally low price of a competitor. Both criminal sanctions and civil liability, including treble damages and injunctive relief, are available. It is important to note that the Robinson-Patman Act condemns price discrimination "only to the extent that it threatens to injure competition." As with a case under the Sherman Act, evidence of below cost pricing is not alone sufficient to prove a violation. Rather, a plaintiff under the Robinson-Patman Act must show "a reasonable possibility" of substantial injury to competition through market power.

61. Id.
62. Id.
63. Id.
64. Id. at § 13(b). In Texaco, Inc. v Hasbrouck, 496 U.S. 543, 562 (1990), the Supreme Court stated that to qualify for protection under the cost justification defense, the discounts offered to a buyer must be related to a savings provided to the seller. Or more specifically, there must be a rational relationship between the services offered by the buyer and the discount offered by the seller. Id.
67. Brooke Group, 509 U.S. at 222-27 (quoting Falls City Industries, Inc. v. Vanco Beverages, Inc., 460 U.S. 428, 434 (1983)) (the Supreme Court failed to find case of predatory pricing where nature of market indicated that defendant could not expect to
b. Section 3

Additionally, an often forgotten statutory provision, for good reason, and one with very little judicial interpretation, is section 3 of the Robinson-Patman Act. This section specifically states that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." However, while this statute has been upheld as constitutional as applied to sales made below cost for the stated purpose, its provisions are not subject to the private remedies available under the Clayton Act. Section 3 of the Robinson-Patman Act "does not amend the Clayton Act, but stands on its own footing and carries its own sanctions." Moreover, section 3 of the Robinson-Patman Act has never been added to the list of laws designated as 'antitrust laws' in section 1 of the Clayton Act. Furthermore, Justice Douglas notes in his dissenting opinion in Nashville Milk Co. v. Carnation Co., that "the Department of Justice has never enforced the criminal provisions of Section 3 of the Robinson-Patman Act. Because of the Court's holding that Section 3 is not available in civil actions to private parties, the statute has in effect been repealed."

4. Burden of Proof

The difficulty, as a result of several recent cases including State Oil Company v. Barkat U. Khan, discussed above, and Brooke Group, recoup its losses). But see Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 703 (1967) (evidence of declining price structure sufficient to support jury's conclusion that effect of discrimination was to substantially lessen or injure competition).


71. Id. at 376.

72. Id. at 382 (quoting Hearings on H.R. 7905 Before a Subcommittee of the House Committee on the Judiciary, 81st Cong., Part 5, 48 (1950) (testimony of Representative Patman, co-author of the Robinson-Patman Act).


Motor Fuel Marketing Ltd. v. Brown & Williamson Tobacco Corp., is in the burden of proof necessary to sustain an antitrust violation. There are very few instances in which a plaintiff can meet this burden of proof.

In Brooke Group, the Court held the defendant's prices were not predatory despite the fact the defendant had lowered its prices on cigarettes below cost for an extended period during a price war with competing plaintiff. The Court held that to prove a case of anticompetitive predatory pricing, a plaintiff must show 1) that the prices complained of were below some appropriate measure of the defendant's cost; and 2) that the defendant had a reasonable prospect (under section 2(a) of the Clayton Act as amended by the Robinson-Patman Act) or a dangerous probability (under section 2 of the Sherman Act) of recouping its investments in setting its prices below cost. The Court specifically noted that evidence of a defendant setting its prices at a price below its cost would not alone be sufficient to infer recoupment and injury to competition. Rather,

[i]f market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed. In certain situations—for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create

76. Brooke Group, 509 U.S. at 243.
77. Id. at 222-24. The Court in Brooke Group notes the differences between section 2 of the Sherman Act and the Robinson-Patman Act.

There are, to be sure, differences between the two statutes. For example, we interpret § 2 of the Sherman Act to condemn predatory pricing when it poses 'a dangerous probability of actual monopolization,' (citation omitted) whereas the Robinson-Patman Act requires only that there be 'a reasonable possibility' of substantial injury to competition before its protections are triggered (citation omitted). But whatever additional flexibility the Robinson-Patman Act standard may imply, the essence of the claim under either statute is the same: a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.

Id. at 222.
or purchase new capacity--summary disposition of the case is appropriate.\textsuperscript{78}

Since \textit{Brooke Group}'s addition of a "recoupment element", predatory pricing cases are rarely tried and even more rarely are predatory pricing plaintiffs successful.\textsuperscript{79}

While the Sherman Act, Clayton Act, and Robinson-Patman Act govern anticompetitive pricing and monopolization, none effectively promotes fair competition. Section 1 of the Sherman Act requires concerted action which may not always exist and which, even if it does exist, is often difficult to prove. Section 2 of the Sherman Act and section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibit anticompetitive predatory pricing; however, dependent on market factors, such a case is difficult to prove under the "rule of reason" approach announced in \textit{State Oil} and after \textit{Brooke Group}. Further, while section 3 of the Robinson-Patman Act is specifically aimed at fair competition through prohibition of unreasonably low prices, lack of availability of a civil remedy and reluctance to impose criminal penalties has resulted in a virtual repeal of this section.

In summary, federal antitrust laws have the single goal of promoting efficiency and consumer welfare by encouraging practices that reduce prices, regardless of the effect on competitors or the competitive fabric of the local market. In \textit{Brooke Group}, the Supreme Court made it clear that the purpose of the federal antitrust laws was appropriately limited to addressing antitrust injury as that term has evolved through cited precedent.\textsuperscript{80} More generalized injurious conduct may not be addressed by the federal antitrust scheme:

\begin{quote}
[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford
\end{quote}

\begin{footnotesize}
\textsuperscript{78} \textit{Id}. at 226.


\textsuperscript{80} \textit{Brooke Group}, 509 U.S. at 224-25.
\end{footnotesize}
remedies for all torts committed by or against persons engaged in interstate commerce.\textsuperscript{81}

Thus, the real task of keeping the fabric of local markets competitive falls in the jurisdiction of state fair competition acts.

\textbf{B. State Petroleum Fair Competition Legislation\textsuperscript{82}}

The majority of states have enacted fair competition legislation,\textsuperscript{83} with at least seventeen enacting fair competition legislation specific to petroleum.\textsuperscript{84} While each state's statute is different, many contain similar provisions. A discussion of the major provisions follows.

\textsuperscript{81} Id. at 225.

\textsuperscript{82} The focus of this Article is on fair competition legislation aimed at petroleum marketing. Any in depth discussion of general state fair competition legislation is beyond the scope of this Article. However, for reference to other types of state fair competition legislation, see generally Goodrich, supra note 36; Francis M. Dougherty, Annotation, \textit{Validity, Construction, and Application of State Statute Forbidding Unfair Trade Practice or Competition by Discriminatory Allowance of Rebates, Commissions, Discounts, or the Like}, 41 A.L.R. 4th 675 (1985); Francis M. Dougherty, Annotation, \textit{Validity, Construction, and Application of State Statutory Provision Prohibiting Sales of Commodities Below Cost-Modern Cases}, 41 A.L.R. 4th 612 (1985); Erwin S. Barbre, Annotation, \textit{Validity and Construction of State Statutes Forbidding Area Price Discrimination}, 67 A.L.R. 3rd 26 (1975). Additionally, a table of citations to state general fair competition statutes and landmark cases is included at infra Appendices B and C.

\textsuperscript{83} See infra apps. B and C for a table of citations to these state laws.

\textsuperscript{84} These states include Alabama, Arkansas, Colorado, Florida, Georgia, Massachusetts, Minnesota, Missouri, Montana, New Jersey, North Carolina, South Carolina, South Dakota, Tennessee, Utah, Wisconsin, and Wyoming. See infra Appendix A. See also Geoffrey B. Schwartz, The Continued Viability of Fair Marketing Acts in a New Era of Retail Marketing, Address Before the American Bar Association Section of Natural Resources, Energy and Environmental Law 13th Annual Petroleum Refining and Marketing Law Conference (Nov. 20, 1998); Douglas E. Jones, State Regulation of Petroleum Pricing, Address Before the American Bar Association Section of Natural Resources, Energy, and Environmental Law, Committee on Oil Refining and Marketing Petroleum Refining and Marketing: Cutting Edge Developments (Nov. 5, 1993).
1. Legislative Intent: Marketing of Motor Fuel is Affected with a Public Interest

The marketing of motor fuel is affected with a public interest, and petroleum legislation aimed at fair competition is within the police power of the state. Several states include within their legislation statements of legislative intent as further confirmation that promoting fair competition in motor fuel marketing is within the public interest and is an important objective of state legislation. For example, the Alabama Motor Fuel Marketing Act provides in relevant part:

[It is hereby declared that marketing of motor fuel in Alabama is affected with the public interest. It is hereby declared to be the legislative intent to encourage fair and honest competition, and to safeguard the public against creation of monopolies or unfair methods of competition, in transactions involving the sale of, or offer to sell, or inducement to sell motor fuel in the wholesale and retail trades in this state. It is further declared that the advertising, offering for sale, or sale of motor fuel below cost or at a cost lower than charged other persons on the same marketing level with the intent of injuring competitors or destroying or

85. See ALA. CODE § 8-22-2(1) (Michie 1993 & Supp. 1998) ("Marketing of motor fuel is affected with the public interest.") But see Strickland v. Ports Petroleum Co. 353 S.E.2d 17, 18 (Ga. 1987) (regulation of gasoline prices under section 10-1-254 of state Below Cost Sales Act held unconstitutional because gasoline industry not affected with a public interest). However, given the inflation and stagflation directly attributable to the oil shock of the late 1970s, one wonders how the gasoline industry could not be affected with a public interest. One need only recall the price of oil in the late 1970s and the seemingly never ending lines at the gas pumps to confirm the effect of gasoline prices on the public. It is also ironic that while the public roads are considered a public interest, the gasoline that fuels the cars that drive on those roads could even be questioned as not being affected with a public interest.

86. See, e.g, Sixty Enterprises Inc., v. Roman & Ciro Inc., 601 So. 2d 234 (Fla. Dist. Ct. App. 1992) (Florida Motor Fuel Marketing Practices Act is rationally and reasonably related to furthering a legitimate state objective); Concrete, Inc. v. Arkhola Sand and Gravel Co., 322 S.W.2d 452 (Ark. 1959) (General Unfair Practices Act prohibiting locality discrimination is a proper exercise of state's police power); State ex rel. Young v. Standard Oil Co., 126 N.W. 527 (Minn. 1910) (upheld anti-discrimination statute against equal protection challenge, valid exercise of police power). See also 54A AM. JUR. 2d Monopolies and Restraints of Trade § 1078 (1996) and cases cited at note 42.
substantially lessening competition is an unfair and deceptive trade practice. The policy of the state is to promote the general welfare through the prohibition of such sales.\textsuperscript{87}

Similarly, the Florida Motor Fuel Marketing Practices Act provides:

[the Legislature finds that fair and healthy competition in the marketing of motor fuel provides maximum benefits to consumers in this state, and that certain marketing practices which impair such competition are contrary to the public interest. Predatory practices and, under certain conditions, discriminatory practices, are unfair trade practices and restraints which adversely affect motor fuel competition. It is the intent of the Legislature to encourage competition and promote the general welfare of citizens of this state by prohibiting such unfair practices.\textsuperscript{88}]

In analyzing the Florida Motor Fuel Marketing Practices Act in terms of the need for such legislation and its constitutionality, the Florida District Court of Appeals specifically notes that the legislative intent in enacting the Act was to protect consumers by protecting and promoting fair competition in motor fuel marketing. "It is beyond

\textsuperscript{87} \textit{ALA. CODE} § 8-22-3. \textit{See also ALA. CODE} § 8-22-2(4) ("Subsidized pricing is inherently predatory and is reducing competition in the petroleum industry, and if it continues unabated, will ultimately threaten the consuming public.").

\textsuperscript{88} \textit{FLA. STAT. ANN.} § 526.302 (West 1997). \textit{See also TENN. CODE ANN.} § 47-25-603(b) (1995 & Supp. 1998) ("Independent and small dealers and distributors of petroleum...are vital to a healthy, competitive marketplace, but are unable to survive subsidized below-cost pricing at the retail level by others who have other sources of income."). Below-cost selling laws have been effective...[against such] subsidized pricing"). The Tennessee Petroleum Trade Practices Act also recognizes the vertically integrated oil producer as the "perceived villain" in unfair competition.

The purpose of this part is to regulate vertical integration of the petroleum industry in Tennessee, it being the conclusion of the general assembly hereby expressed that vertical integration tends to operate in restraint of free trade and inhibits full and free competition and, therefore, tends to increase the price of petroleum and related products and services....

\textit{Id.} at 47-§ 25-603(a).
question that protecting competition is in the public interest and is an important objective of both state and federal legislative bodies. Healthy competition is valued because it increases the economic benefits to the public as a whole.\(^\text{89}\)

2. **Prohibited Activities**

   a. **Below Cost Pricing**

   A majority of states have enacted laws prohibiting below cost pricing.\(^\text{90}\) At least fourteen states have enacted legislation to regulate the below cost pricing of petroleum products. These states include Alabama, Arkansas, Colorado, Florida, Georgia, Massachusetts, Missouri, Montana, New Jersey, North Carolina, South Carolina, Tennessee, Utah, and Wisconsin.\(^\text{91}\) Simply put, the typical below cost provision prohibits the retail sale of motor fuel below cost.\(^\text{92}\) However, as more fully discussed in this section, whether the violating sale must be made with predatory intent, and how a statute defines "cost", enforcement, remedies, and other statutory components vary greatly from state to state. For example, the Alabama Motor Fuel Marketing Act provides in relevant part that:

   [i]t shall be unlawful for any person engaged in commerce in this state to sell or offer to sell motor fuel

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90. For a table of citations to general below cost statutes, *see infra* Appendix B.

91. For citations to these statutes, as well as references to landmark decisions, *see infra* Appendix A. Note that the below cost pricing statutes in Arkansas, Georgia, and New Jersey have been held unconstitutional or unenforceable. The Montana below cost statute was repealed by Initiative No. 134 in the state's November 3, 1998 general election.

92. The act of an individual or entity in setting its prices below some appropriate measure of cost constitutes predatory pricing. As stated by two well known experts in the field, "[t]he classically-feared case of predation has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975).
below cost or to sell or offer to sell it at a price lower than the seller charges other persons on the same day and on the same level of distribution, within the same market area, where the effect is to injure competition.\textsuperscript{93}

A Colorado statute provides:

[i]t is unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state to engage in a pattern of selling, offering for sale, or advertising for sale motor fuel for less than the cost thereof to such vendor, when such pattern has the effect of injuring one or more competitors or destroying competition.\textsuperscript{94}

A Massachusetts act states that "[n]o retail dealer shall, with intent to injure competitors or destroy substantially or lessen competition, advertise, offer to sell, or sell at retail motor fuel at less than cost to such retail dealer."\textsuperscript{95}

\textbf{b. Discriminatory Pricing}

A majority of states prohibit price discrimination, either as part of their fair competition legislation aimed at below cost pricing or as a separate legislative act.\textsuperscript{96} Of those states which have enacted petroleum fair competition legislation, a majority include within that legislation, provisions prohibiting price discrimination.\textsuperscript{97} "Price discrimination" generally means a price difference which may result when a seller charges different prices to different purchasers or which may result

\textsuperscript{93} \textsc{ala. code} § 8-22-6 (Michie 1993 & Supp. 1998).
\textsuperscript{94} \textsc{colo. rev. stat.} § 6-2-105(1)(b) (Bradford 1998).
\textsuperscript{95} \textsc{mass. ann. laws} ch. 94, § 295P (Law. Co-op 1985).
\textsuperscript{96} See \textit{infra} Appendix C for a table of citations to these state laws. See also Barbre, \textit{supra} note 82 and Goodrich, \textit{supra} note 36 for additional analysis of these laws.
\textsuperscript{97} See \textit{infra} Appendix C for a table of citations to these state laws. See also Barbre, \textit{supra} note 82 and Goodrich, \textit{supra} note 36 for additional analysis of these laws.
from different credit terms given different purchasers.\textsuperscript{98} For example, the Utah Motor Fuel Marketing Act states that:

[i]t is unlawful for any person engaged in commerce within this state to sell or offer to sell motor fuel at a price lower than the seller charges other persons at the same time and on the same level of distribution if the intent or effect of the sale or offer is to injure competition.\textsuperscript{99}

The Florida Motor Fuel Marketing Practices Act prohibits the resale of:

any grade of motor fuel at a price lower than the price at which the seller contemporaneously sells motor fuel of like grade and quality to another person on the same level of distribution, in the same class of trade, and within the same relevant geographic market as the purchaser . . . \textsuperscript{100}

One specific form of price discrimination is area price discrimination, which typically occurs when a manufacturer or distributor sells goods at a lower price in one area of the state to eliminate local competitors.\textsuperscript{101} The manufacturer or distributor then sells those same goods, in this case motor fuel, at a higher price in another area of the state to recoup any losses suffered by selling at the lower price in the first area.\textsuperscript{102} For example, Wyoming law prohibits any person from discriminating:

\textsuperscript{100} FLA. STAT. ANN. § 526.305(1)(a) (West 1997).
\textsuperscript{101} While some states prohibit price discrimination between different geographic localities, other states prohibit price discrimination among different purchasers at the same level of distribution. See \textit{infra} apps. A and C. The latter form of discrimination is consistent with the federal antitrust laws. See discussion of federal fair competition legislation \textit{supra} Section II.A..
\textsuperscript{102} Barbre, \textit{supra} note 82, at 30. Note that while some statutes may be aimed primarily at producers, manufacturers, and distributors, others may be aimed primarily at
between different sections, communities, localities, cities or towns in said state, by selling petroleum, or any products of petroleum, including gasoline, fuel oil, motor oil, and grease, of the same grade, test or quality, at a price or rate lower in one section, community, locality, city or town than in another section; community, locality, city or town, in this state, making due allowance for the difference, if any, in the actual cost of transportation, from the point or place of production, manufacture, sale, storage or distribution of such commodities...\textsuperscript{103}

Some other states, including Alabama, Missouri, and Montana, specifically prohibit price discrimination in intra-company transfers. For example, the Alabama Motor Fuel Marketing Act prohibits:

any person engaged in commerce in this state to sell or transfer motor fuel to itself or an affiliate for resale at another marketing level of distribution at a transfer price that is below cost or lower than the price it charges a person who purchases for resale on the same day and at the same distribution level, within the same market area, where the effect is to injure competition.\textsuperscript{104}

\textsuperscript{103}WYO. STAT. ANN. § 40-4-117 (Michie 1997). South Dakota has enacted a similar statute which prohibits area price discrimination with intent to create a monopoly or destroy the business of a regularly established competitor. S.D. CODIFIED LAWS § 37-2-1 (Michie 1994 & Supp. 1998). Although the South Dakota statute requires a showing of intent, section 37-2-3 of the act allows a prima facie case upon a showing of a price differential.

c. **Discriminatory Rebates**

Statutes in two of the states discussed above, Florida and New Jersey, also prohibit discriminatory rebates. Discriminatory rebates are concessions given with the sale of motor fuel where the seller does not provide the same concessions to others purchasing motor fuel for resale in the relevant geographic market. Under Florida law, the discriminatory rebate is illegal if the effect is to injure competition. Under New Jersey law, the discriminatory rebate must be given with the “intent to injure competitors or destroy or substantially lessen competition” to be unlawful.

**d. Discriminatory Allocations**

Arkansas and Florida also prohibit discriminatory allocations to resellers purchasing under contract. Under the Arkansas Petroleum Trade Practices Act, a discriminatory allocation occurs when a refiner limits or allocates:

- the quantity of motor fuel available to a dealer, distributor or other reseller purchasing under contract from such refiner unless the limitations or allocations are applied in a reasonable and nondiscriminatory manner among all resellers supplied by such refiner under contract in a general trade area and the refiner's own affiliate retail outlets.

The Florida statute is similar except that it limits the discriminatory allocation to one made "because [the] reseller was prevented by [the] supplier from purchasing the minimum quantities [the] reseller was obligated to purchase from [the] supplier in the immediately preceding

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107. Id.
The Florida Motor Fuel Marketing Practices Act also prohibits generally the limitation or allocation of the quantity of motor fuel available to a reseller purchasing under contract from a supplier for more than five days.

3. Defining Cost

Each statute necessarily contains a definitions section. Definitions within these sections include competition, cost, dealer, motor fuel, purchase, retailer, sale or sell, transfer price, and wholesale distributor. Of these definitions, the definition of "cost" is likely the most varied and the most disputed. Statutory definitions of cost typically include cost of the product, plus freight charges, plus some cost of doing business. The cost definitions can be classified in two

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111. FLA. STAT. ANN. § 526.306(1).
112. Id. at § 526.306(2).
113. See Neeld v. Automotive Prods. Credit Ass'n, 90 A.2d 558 (Union County Dist. Ct. N.J. 1952) (statute prohibiting retail dealers from selling motor fuel below net cost plus all selling expenses, but which did not define net cost, held unenforceable for uncertainty).
114. See infra Appendix A for a list of petroleum fair marketing legislation statutory cites. See also Schwartz supra note 84, at Appendix A.
115. What the appropriate measure of "cost" is differs. For a leading article on the subject, see Areeda and Turner, supra note 92, at 700. Courts have moved away from a strict following of the Areeda-Turner formula and have also considered other factors such as entry barriers and the ability of other competitors to respond with their own matching price reductions. See Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). For a general discussion of competing economic theories, see Joseph F. Brodley & George A. Hay, Predatory Pricing: Competing Economic Theories and The Evolution of Legal Standards, 66 CORNELL L. REV. 738 (1981). See also 54A AM. JUR. 2D Monopolies and Restraints of Trade § 1090-97 (1996); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 285-89 (3rd ed. 1986).
116. Section 365.030 of the Kentucky Unfair Trade Practices Act, which prohibited any person from selling, offering or sale, or advertising for sale, any article or product at less than cost, was held unconstitutional in Remote Services, Inc. v. FDR Corp., 764 S.W.2d 80 (Ky. 1989). The Kentucky Supreme Court noted that the General Assembly had defined "cost" as "the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by the distributor or vendor." Further the statute defines "cost of doing business" as expenses incurred for labor (including executive salaries), rent, interest, depreciation, selling cost, maintenance of equipment, delivery cost, etc. In a word, cost means all those items
general categories: 1) total cost of doing business, and 2) direct cost of retail motor fuel sales.\footnote{117}

The Alabama Motor Fuel Marketing Act can be classified in the first category as its definition of cost includes all costs of the retail facility, including administrative and overhead expenses.\footnote{118} This statute defines the "basic cost of motor fuel" as the lesser of the invoice cost or the replacement cost within five days prior to the date of sale in the quantity last purchased, less trade discounts, plus freight costs and taxes, and including the cost of doing business.\footnote{119} The Alabama statute goes on to define "cost of doing business or overhead expenses" to include all costs incurred in the conduct of business including:

- labor (including salaries of executives and officers), rent (which rent must be no less than fair market value based on current use), interest on borrowed capital, depreciation, selling cost, maintenance of equipment, transportation or freight cost, losses due to breakage or of actual expense which must be recovered before a profit can be realized.

\textit{Remote Services,} 764 S.W.2d at 82. Because the definition of "cost" was not confined to the cost of the product, the court held the statute unconstitutional. \textit{Id.} at 83. See also Donald K. Kazee, \textit{The Sherman Act and the Arbitrary Power Section of the Kentucky Constitution as Applied to Kentucky Fair Trade Laws,} 20 N. Ky. L. Rev. 297 (1993). Kazee criticizes the court's decision in \textit{Remote Services} and another fair competition case, \textit{Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Co.,} 691 S.W.2d 893 (Ky. 1985), in failing to observe the reasonable relation between the statute and both the predatory pricing aspect of the Sherman Act and section 198 of the Kentucky Constitution. Section 198 of the Kentucky Constitution states:

It shall be the duty of the General Assembly from time to time, as necessity may require, to enact such laws as may be necessary to prevent all trusts, pools, combinations or other organizations, from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value.

Text as ratified on August 3, 1891, rev. September 28, 1891.

\footnote{117} Schwartz, \textit{supra} note 84, at 10. For a table of statutory cites with references to types of costs definitions, see \textit{id.} at Appendix A.


damage; credit card fees, or other charges; credit losses, all types of licenses, taxes, insurance, and advertising.\textsuperscript{120}

The Alabama statute also defines "cost to the wholesaler" and "cost to the retailer".\textsuperscript{121}

The Florida Motor Fuel Marketing Practices Act is an example of a "category (2)" statute as its definition of cost includes only those costs most directly related to the retail sale of motor fuel. This statute defines "nonrefiner cost" as invoice cost, less credit card allowances, trade discounts, and rebates, plus taxes and fees applicable to motor fuel, freight charges, direct labor costs, and reasonable rental value of the facility attributable to the sale of motor fuel.\textsuperscript{122} The statute further defines "direct labor cost" to include only those personnel costs relating to the "purchase, storage, inventory, and sale of motor fuel, the maintenance of equipment, and environmental reporting and compliance, . . ."\textsuperscript{123} Executive and managerial salaries are not included, and, the costs of environmental cleanup and remediation are specifically excluded from the definition of "direct labor cost."\textsuperscript{124}

4. Sales Covered and Prohibited

While some state statutes apply to both the wholesale and retail sale of petroleum, others apply only to retail sales.\textsuperscript{125} Those that regulate both the wholesale and retail sale of motor fuel include Alabama, Georgia, Missouri, Montana, Utah, and Wisconsin. Those states that regulate only retail sales of motor fuel include Arkansas, Florida, Massachusetts, New Jersey, North Carolina, and Tennessee.\textsuperscript{126}

\textsuperscript{120} ALA. CODE § 8-22-4(17).
\textsuperscript{121} Id. at § 8-22-4(15), (16).
\textsuperscript{122} FLA. STAT. ANN. § 526.303(7) (West 1997). Subsection (11) contains a similar definition of "refiner cost". \textit{Id.}
\textsuperscript{123} Id. at § 526.303(4);.
\textsuperscript{124} Id. \textit{See also} UTAH CODE ANN. § 13-16-2 (Michie 1996) (reasonable cost of doing business presumed to be a margin of 6% of the posted retail price in absence of proof of a lower cost); State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1348-1349 (Utah 1990) (definition of "cost" and "cost of doing business" not unconstitutionally vague).
\textsuperscript{125} For a detailed listing of motor fuel marketing acts identified by level of distribution regulated, see Schwartz, supra note 84, at appendix A.
\textsuperscript{126} The Arkansas Petroleum Trade Practices Act was held unconstitutional as violative of due process as the statute did not require intent as an element of proof of a violation.
Another significant difference among fair marketing statutes, and one that is a hot topic of constitutionality analysis, is whether the statute prohibits only acts with intent to injure competition or acts with the effect of injuring competition.\(^{127}\) Massachusetts, Missouri, and North Carolina all require "intent to injure competition" as an element of a fair competition violation.\(^{128}\) Alabama, Arkansas, Florida, Georgia, Montana, and Tennessee do not contain an intent element and prohibit sales or offers to sell motor fuel below cost "where the effect is to injure competition."\(^{129}\) Utah and Wisconsin prohibit such sales with the intent

See Ports Petroleum Co. v. Tucker, 916 S.W.2d 749 (Ark. 1996). The Georgia Below Cost Sales Act was held unconstitutional in Strickland v. Ports Petroleum Co., 353 S.E.2d 17 (Ga. 1987) (petroleum industry not affected with a public interest). Additionally, the Montana Retail Motor Fuel Marketing Act was repealed during the state's November 1998 general election as a result of the adoption of Initiative 134.

127. See infra Section III Analysis of Constitutionality for analysis of case law holding statutes as constitutional or unconstitutional depending upon the inclusion of an intent element. Also, a topic of several petroleum fair competition legislation cases is the definition and interpretation of "injury to competition." In both Florida and Alabama, injury to a single competitor is sufficient to establish a fair competition violation. See Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376 (Fla. Dist. Ct. App. 1998) (Florida Motor Fuel Marketing Practices Act § 526.303(2) defines "competition" as "the vying for motor fuel sales between any two sellers in the same relevant geographic market."); McGuire Oil Co. v. Mapco, Inc., 612 So. 2d 417, 422 (Ala. 1992). However, in Tennessee, a plaintiff must show injury to competitors in the aggregate and not just to a specified competitor. See Ghem, Inc. v. Mapco Petroleum, Inc., 850 S.W.2d 447, 453 (Tenn. 1993). See also Cain v. Chevron U.S.A., Inc., 757 F. Supp. 1120, 1122 (D. Or. 1991) (under Oregon anti-price discrimination law, plaintiff must show competitive injury).

128. MASS. ANN. LAWS ch. 94, § 295P (Law. Co-op. 1985 & Supp. 1998); MO. ANN. STAT. § 416.615 (West 1990 & Supp. 1998); N.C. GEN. STAT. §75-82(a) (Michie 1997 & Supp. 1997) (In addition to intent to injure competition, this statute also requires sales with such frequency as to indicate a general business practice of selling at less than cost.). With regard to general price discrimination statutes, see also Des Moines, Etc. v. Wapello Dairies, Inc., 226 N.W.2d 9 (Iowa 1975) (party must allege facts showing discriminatory purpose); Belfry Coal Corp. v. East Kentucky Beverage Co., 294 S.W.2d 539 (Ky. 1956) (party must show intent); Miller's Groceteria Co. v. Food Distributors Ass'n, 109 P.2d 637 (Colo. 1941) (discriminatory act must be intentional).

129. ALA. CODE § 8-22-6 (1993 & Supp. 1998); 1993 Ark. Acts 380, § 4; FLA. STAT. ANN. § 526.304 (West 1997); GA. CODE ANN. § 10-1-254 (Michie 1994); MONT. CODE ANN. § 30-14-804 (1997) (This statutory section also procribes a violation where the effect is to injure or destroy competitors.); TENN. CODE ANN. § 47-25-611 (1995 & Supp. 1998). Both the Arkansas Petroleum Trade Practices Act and the Georgia Below Cost Sales Act have been held unconstitutional. Ports Petroleum, 916 S.W.2d 749 (lack of intent element violates due process); Strickland, 353 S.E.2d 1 (petroleum industry not affected with a public interest). Additionally, the Montana Retail Motor Fuel Marketing
or effect of injuring competition or diverting trade from a competitor.\textsuperscript{130} The New Jersey statute does not specify whether or not an element of intent is required to establish a prima facie case of a fair competition violation and has been held unenforceable, although on different grounds.\textsuperscript{131}

5. \textit{Burden Shifting Provisions}

The elements of intent and effect of injuring competition can be very difficult elements to prove without a smoking gun. Thus, several states, including Alabama, Arkansas, Georgia, Montana, North Carolina, Utah, and Wisconsin, shift the burden of proof to the defendant once the plaintiff has shown proof of a sale or offer to sell below cost.\textsuperscript{132} The defendant must then prove that any such sale or offer was not a violation by providing proof of cost or by showing justification or qualification for an exception under the particular Act was repealed during the state's November 1998 general election as a result of adoption of Initiative 134. \textit{See also} McGuire Oil, 612 So. 2d at 417 (lack of intent to injure competition is an affirmative defense to a fair competition violation under the Alabama Motor Fuel Marketing Act); Money Back, Inc. v. Gray, 569 So. 2d 325 (Ala. 1990) (under Alabama Motor Fuel Marketing Act, competitor need only establish sale below cost and injurious effect on competition, after which seller has burden of showing lack of injurious intent).

\textsuperscript{130} UTAH CODE ANN. §13-16-4 (Michie, 1996); WIS. STAT. ANN. §100.30(3) (West 1997).

\textsuperscript{131} N.J. STAT. ANN. §56:6-2 (West 1989 & Supp. 1998). \textit{See} Neeld v. Automotive Prosds. Credit Ass'n, 90 A.2d 558 (Union County Dist. Ct. N.J. 1952) (statute held unenforceable for uncertainty where there was no definition of "net cost").

statute. 33 For example, the Utah Motor Fuel Marketing Act states that in any civil action, including an action by the attorney general or a county attorney, "the burden of proof, upon a prima facie showing of a violation, shall shift to the defendant to show justification. Unless justification is shown, the court shall award judgment for the plaintiff." 134

6. Exceptions from Violations

Most states include statutory provisions which exempt certain acts from a fair competition violation. The most common of these exceptions is the "meeting competition" defense. This defense allows a marketer to lower his prices to meet an equally low price of a competitor without violating below cost prohibitions. 135 For example, the Alabama Motor Fuel Marketing Act provides in relevant part that "[i]t is not a violation of this chapter if any price is established in good faith to meet an equally low price of a competitor in the same market area on the same level of distribution selling the same or a similar product of like grade and quality ...." 136 The Tennessee Petroleum Trade Practices Act similarly provides that "[n]othing in this section shall prohibit a dealer from making, or offering or advertising to make, sales at retail which are made in good faith to compete with the equally low or lower retail price of a competitor." 137 Other states also exempt clearance sales, final business liquidation sales, sales under judicial order or direction, and "[s]ales made during a grand opening

133. See infra Section II.6., "Exceptions from Violations" for analysis of exceptions to fair competition violations.
134. UTAH CODE ANN. § 13-16-8.
135. See generally 54A AM. JUR. 2D Monopolies and Restraints of Trade § 1087 (1996).
136. ALA. CODE § 8-22-8(b). See McGuire Oil Co., 612 So. 2d at 423 (meeting competition defense does not allow competitor to undercut another competitor's prices then rely on meeting competition defense).
to introduce a new or remodeled business. However, such sales may not be used as the basis of a defense to price below a competitor. Alabama, Florida, and Montana also specifically exempt isolated or inadvertent sales not in the usual course of business.

7. Enforcement and Remedies

Most states provide for state enforcement of fair competition violations. Typically, such state enforcement includes both civil penalties and injunctive relief. Penalties in a successful state enforcement action may range from $1000 to $10,000 per violation per day. Of those petroleum fair marketing statutes discussed in this article, Georgia appears to be the only state which does not provide for state enforcement. At the opposite end of the spectrum are Colorado, for which violation of the state's below cost statute can result in a misdemeanor conviction, and Wyoming, for which violation...


141. Alabama, Arkansas, Colorado, Florida, Montana, North Carolina, Tennessee, Utah, and Wisconsin all allow for state enforced civil penalties and injunctive relief. For citation to these state laws, see appendix A infra. See also Schwartz, supra note 84, at appendix A.


However, the real thrust of these statutes lies in the civil remedy provisions. State Attorneys General are more apt to place fair competition violation cases at the "bottom of the pile" in favor of higher profile cases. It thus follows that a state fair competition statute without civil and injunctive remedy provisions would be without "teeth" and of little value. Nearly all the petroleum fair marketing statutes discussed in this section provide for both civil damages and injunctive relief.\footnote{145. Alabama, Arkansas, Florida, Georgia, Missouri, Montana, New Jersey, North Carolina, Tennessee, Utah, and Wisconsin. For citation to these state laws, see infra Appendix A. See also Schwartz, supra note 84, at Appendix A. The Massachusetts, Minnesota, South Dakota, and Wyoming statutes, and \S 47-25-623 of the Tennessee statute, do not specify what civil remedies, if any, are available. See, e.g., Kerr v. Hackney Petroleum Tennessee, Inc., 775 S.W.2d 600, 602-03 (Tenn. Ct. App. 1988) (court implied a private right of action).}
The majority of states with petroleum fair competition legislation also provide for treble damage and attorneys' fees awards to successful plaintiffs in civil actions.\footnote{146. See ALA. CODE \S 8-22-17 (1993 & Supp. 1998); 1993 Ark. Acts 380, \S 8; FLA. STAT. ANN. \S 526.312 (West 1997); MO. REV. STAT. \S 416.635 (West 1999); TENN. CODE ANN. \S 47-25-611 (1995 & Supp. 1998); UTAH CODE ANN. \S 13-16-7 (Michie 1996). Although the Georgia Below Cost Sales Act was ultimately ruled unconstitutional, Strickland v. Ports Petroleum Co., 353 S.E.2d 17 (Ga. 1987) (petroleum industry not affected with a public interest), section 10-1-255(b) of the Act allows a punitive damages award to a successful plaintiff of $1000 per day of the violation with a maximum award of $200,000. See also Gjem, Inc. v. Mapco Petroleum, Inc., 850 S.W.2d 447, 457-458 (Tenn. 1993) (Elements for a cause of action for damages and injunctive relief under the Tennessee Petroleum Trade Practices Act based on a dealer's below cost pricing are: (1) accused party is a "dealer"; (2) sale at retail or offer or advertisement to make such sale; (3) sale at retail below cost to retailer; (4) below cost retail sale has effect to injure or destroy competition or substantially lessen competition; (5) sale is not exempt under the Act; (6) plaintiff has an interest which is or may be adversely affected by violation or threatened violation.)}
III. ANALYSIS OF CONSTITUTIONALITY

A. Police Power

Regulating petroleum sales is rationally related to furthering the legitimate state objective of protecting and promoting fair competition and is thus within the police power of the state.\textsuperscript{147} Fair competition legislation is typically enacted for the protection of the public health, safety, and welfare and as such must only be rationally or reasonably related to a legitimate state interest.\textsuperscript{148} In upholding the Florida Motor Fuel Marketing Practices Act against constitutional challenge, the court in \textit{Sixty Enterprises Inc. v. Roman & Ciro}, stated that "[i]t is beyond question that protecting competition is in the public interest and is an important objective of both state and federal legislative bodies."\textsuperscript{149} Healthy competition is valued because it increases the economic benefits to the public as a whole."\textsuperscript{150} The Court noted that "[b]y eliminating the predatory practices of selling motor fuel at below cost, the legislature is furthering a legitimate interest in protecting healthy competition in the marketing of motor fuel, thus increasing economic benefit to the public."\textsuperscript{151} Several states have upheld fair competition legislation concerning petroleum and general commodities, in the face of constitutional challenges.\textsuperscript{152} Those

\begin{itemize}
\item \textsuperscript{147} See \textit{Sixty Enterprises Inc. v. Roman & Ciro Inc.}, 601 So. 2d 234 (Fla. Dist. Ct. App. 3 Dist. 1992); \textit{State v. Ross}, 48 N.W.2d 460 (Wis. 1951).
\item \textsuperscript{148} \textit{Sixty Enterprises}, 601 So. 2d at 236.
\item \textsuperscript{149} Id. at 234.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id. at 236-37.
\end{itemize}
statutes which have been shot down as unconstitutional have typically been recognized as price fixing statutes rather than statutes which promote fair competition through prohibition of below cost sales, or as arbitrary or unreasonable for some other reason.\textsuperscript{153} The court in \textit{Sixty Enterprises} distinguished the Florida Motor Fuel Marketing Practices Act from typical price fixing statutes on the basis that "the legislation only restricted those sales where the effect of below cost selling was to injure competition and where the legislation did not impermissibly penalize for ordinary injury to competitors resulting from accepted marketing practices."\textsuperscript{154} The Florida Act is limited to those predatory sales where the effect is to injure competition and specifically exempts legitimate sales such as those made in good faith to meet the equally low price of a competitor.\textsuperscript{155}

\subsection*{B. Cost Definition}

The statutory definition of "cost" included in fair competition legislation must be sufficiently clear so that anyone using reasonable accounting methods can comply with the statute.\textsuperscript{156} Further, it is clear

\begin{itemize}
\item \textsuperscript{153} See, e.g., Strickland v. Ports Petroleum Co., 353 S.E.2d 17 (Ga. 1987) (goal of statute was regulation of petroleum prices). See \textit{supra} III. "Analysis of Constitutionality" for discussion of statutes held unconstitutional based on lack of a predatory intent element.
\item \textsuperscript{154} \textit{Sixty Enterprises}, 601 So. 2d at 238. \textit{See also} Remote Services., Inc. v. FDR Corp., 764 S.W.2d 80 (Ky. 1989) (Section 365.030 of Kentucky Unfair Trade Practices Act held unconstitutional as a minimum mark-up law. Statute was not confined to cost of product but included other "legitimate competitive advantage").
\item \textsuperscript{156} See State v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990) (court upheld Utah Motor Fuel Marketing Act as constitutional despite challenge to cost definition). See also Avella v. Almac's Inc., 211 A.2d 665 (R.I. 1965) and cases cited \textit{infra} at 673 (cost provision invalid as vague and uncertain); Flank Oil Co. v. Tennessee Gas Transmission Co., 349 P.2d 1005 (Colo. 1960) (Colorado Unfair Practices Act upheld despite attack on indefiniteness of cost provision); Neeld v. Automotive Prods. Credit Ass'n, 90 A.2d 558 (Union County Dist. Ct. N.J. 1952) (New Jersey legislation prohibiting sale of motor fuel below cost held unenforceable where net cost not defined); People v. Kahn, 60 P.2d 596
\end{itemize}
that courts disfavor so-called minimum mark-up laws.\textsuperscript{157} Although there is no case law directly on point, arguably, those statutes which


\textsuperscript{157} Although other states have upheld legislation invoking "total cost of doing business" cost definitions, the Kentucky Supreme Court has, in its most recent decisions, disposed of such legislation as unconstitutional. State v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990) (definition of cost not unconstitutionally vague). See, e.g., ALA. CODE ANN. §§ 8-22-1 to 8-22-18 and Section II.B.3, Defining Cost infra. In Remote Services, Inc. v. FDR Corp., 764 S.W.2d 80 (Ky. 1989), the court struck down section 365.030 of the Kentucky Unfair Trade Practices Act, which prohibited sales at less than cost for the purpose of injuring competition or destroying competition, as an unconstitutional minimum mark-up law. The court based its decision on the definition of "cost" which was not confined to cost of the product, but included other legitimate competitive advantage . . . . Remote Services at 82. Section 365.030 included in its definition of "cost of doing business" "all costs of doing business incurred in the conduct of the business [including] without limitation the following . . . expense[s]: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance and advertising." KY. REV. STAT. ANN. § 365.030(3) (Banks-Baldwin 1999). The court in Remote Services also relied on its prior decision in Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Co., 691 S.W.2d 893 (Ky. 1985). In Kentucky Milk Marketing, the court struck down as violative of section 2 of the Kentucky Constitution the Kentucky Milk Marketing Law which was designed to prevent monopolies and unfair practices in the sale of milk and prohibited sales of milk at less than cost for the purpose or with the effect of injuring or destroying competition. Kentucky Milk Marketing, 691 S.W.2d at 899. The definition of cost in section 260.680 of the Kentucky Milk Marketing Law was almost identical to the definition in section 365.030 of the Kentucky Trade Practices Act and included "total cost" of doing business. KY. REV. STAT. ANN. §§ 260.680(12), (17).

However, at least one commentator has been critical of the decisions in Remote Services and Kentucky Milk Marketing. See Donald K. Kazee, The Sherman Act and the Arbitrary Power Section of the Kentucky Constitution as Applied to Kentucky Fair Trade Laws, 20 N. KY. L. REV. 297 (1993). As noted by this commentator, both Remote Services and Kentucky Milk Marketing were departures from prior court decisions, including Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc., 635 S.W.2d 319 (Ky. 1982) which considered the validity of the alcoholic beverage minimum mark-up statute and declared it consistent with section 2 of the Kentucky Constitution.

The Kentucky Supreme Court had but four years earlier in Taylor Drug gone out if its way to declare a genuine minimum markup statute consistent with § 2 of the Kentucky Constitution even though it was found to violate the Sherman Act. In Kentucky Milk Marketing, a statute mandating merely that all costs be reflected in the price was forced into the minimum markup mold and, as such, found per se arbitrary and violative of § 2 of the Kentucky Constitution. Such a
define "cost" in terms of the direct cost of retail motor fuel sales are the statutes most likely to survive judicial scrutiny. A "direct cost" definition is sufficiently clear so that any person using reasonable accounting methods may comply with the statute. Further, such a statute prohibits any calculation that could be imposed as a minimum mark-up.

C. Element of Intent

Although the case law is split, a line of cases in Alabama construing the Alabama Motor Fuel Marketing Act has held that proof result is without evident precedent or reason in the Kentucky Milk Marketing opinion other than as a policy preference. Kazee, supra at 318. It is also worth noting that in 1990, the Kentucky General Assembly revised both the Kentucky Milk Marketing Law and a similar statute related to below cost cigarette sales, the Kentucky Unfair Cigarette Sales Law. See KY. REV. STAT. ANN. §§ 260.675-760; 365.260-395 (Banks-Baldwin 1999). The courts have as yet scrutinized neither of these statutes. But see Ky. OAG 93-74 (1993) (Kentucky Unfair Cigarette Sales Law unconstitutional under Remote Services and Kentucky Milk Marketing).

158. Although the constitutionality of Florida's "direct cost" provision has not been specifically analyzed by the courts, the overall Motor Fuel Marketing Practices Act has been upheld as constitutional. See Sixty Enterprises, Inc. v. Roman & Ciro, Inc. 601 So.2d 234 (Fla. Dist. Ct. App. Dist. 1992).

159. See, e.g., McElhone v. Geror, 292 N.W. 414 (Minn. 1940) (Minnesota act against unfair discrimination and competition upheld as constitutional regardless of lack of requirement of intent). There is a long line of cases originating in Minnesota that analyze various fair competition statutes with regard to the element of intent. In Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927), the United States Supreme Court struck down a Minnesota milk marketing law that did not require intent as an element. Fairmont Creamery was impliedly overruled by a subsequent Court decision in Nebbia v. New York, 291 U.S. 502 (1934). The Court in Nebbia upheld a New York statute fixing minimum prices for milk stating price control was unconstitutional only if arbitrary or discriminatory. Several years later in Great Atlantic & Pacific Tea Co. v. Ervin, 23 F. Supp. 70 (D. Minn. 1938), the District Court of Minnesota failed to uphold a portion of Minnesota's Unfair Trade Practices Act which did not require intent. The anti-discrimination portion of the act which did require intent was upheld as constitutional.

McElhone followed Great Atlantic & Pacific Tea Co. as did the court in State v. Lanesboro Produce & Hatchery Co., 21 N.W.2d 792 (Minn. 1946). The court in Lanesboro upheld a statute prohibiting discrimination in the purchase of farm products despite the omission of an intent element. Subsequently, a decision rendered by the Minnesota Supreme Court regarding the state's Unfair Cigarette Sales Act, Twin City Candy & Tobacco Co. v. A. Weisman Co., 149 N.W.2d 698 (Minn. 1967), held the act
of intent is not required to establish a prima facie case under the Act. Rather, lack of intent is an affirmative defense once the plaintiff has proven a sale below cost with an injurious effect on competition. Section 8-22-6 of the Alabama Motor Fuel Marketing Act prohibits below cost sales "where the effect is to injure competition." Section 8-22-3 of the Act contains a declaration of legislative intent to govern those below cost sales made with "the intent of injuring competitors or destroying or substantially lessening competition ... " The Alabama Supreme Court read these two provisions together to save the constitutionality of the Act. The court noted in State ex rel. Galanos v. Mapco Petroleum, that the purpose of the Act was to prevent monopolization, that the motor fuel marketing business had the potential for monopolization, and that the means employed were rationally related to such purpose.

On the other hand, the Supreme Court of Arkansas, in Ports Petroleum Co., Inc. of Ohio v. Tucker, shot down the Arkansas Petroleum Trade Practices Act as "constitutionally infirm because of its failure to include an element of predatory intent for a violation. As a consequence, the Act is overbroad in its effect and impermissibly unconstitutional. The Unfair Cigarette Sales Act did not require intent as an element. For an in-depth discussion of these cases, see Goodrich, supra note 36. But see Ports Petroleum Co. v. Tucker, 916 S.W.2d 749 (Ark. 1996) (Arkansas Petroleum Trade Practices Act); Commonwealth v. Zasloff, 13 A.2d 67 (Pa. 1940) (Pennsylvania Fair Sales Act); State v. Packard-Bamberger & Co., 8 A.2d 291 (N.J. 1939) (New Jersey statute governing fair trade practices). See also 54A AM. JUR. 2D Monopolies and Restraints of Trade §§ 1081-83 (1996); Dougherty, 41 A.L.R. 4th 612 (1985), supra note 79 for a general discussion of statutes requiring or not requiring anticompetitive intent or effect. With regard to anti-discrimination statutes, see Des Moines, Etc. v. Wapello Dairies, Inc., 226 N.W.2d 9 (Iowa 1975) (party must allege facts showing discriminatory purpose); Belfry Coal Corp. v. East Kentucky Beverage Co., 294 S.W.2d 539 (Ky. 1956) (party must show intent); Miller's Groceteria Co. v. Food Distributors Ass'n, 109 P.2d 637 (Colo. 1941) (discriminatory act must be intentional).

161. See McGuire Oil Co. v. Mapco, Inc., 612 So. 2d 417 (Ala. 1992); Galanos, 519 So. 2d at 1286.
163. Id. at § 8-22-3 (emphasis added).
164. See Galanos, 519 So. 2d at 1286.
165. 519 So. 2d 1275 (Ala. 1987).
166. Id. at 1284-85.
167. 916 S.W.2d 749 (Ark. 1996).
impinges on the due process rights of [the defendant]."\textsuperscript{168} Section 4 of the Arkansas Petroleum Trade Practices Act provides in relevant part that "[n]o dealer shall make, or offer or advertise to make, sales at retail at below cost to the retailer of motor fuel where the effect may injure competition, . . . ."\textsuperscript{169} The court expressed concern that the statute was not reasonably designed to accomplish its purpose of preventing predatory pricing. To the contrary, an overbroad prohibition on below cost sales, without an element of predatory intent, would, according to the court, prevent small retail facilities from using below cost-pricing as a means of attracting customers.\textsuperscript{170}

In summarizing several cases relating to statutory elements of intent, one writer notes:

that the likelihood that a given act will be held constitutional has a direct relation to the extent of restriction in this portion of the penalizing statute. It may be admitted that due process probably does not impose upon state legislatures the necessity of including conscious intent to do wrong as an element of statutory offenses. However, due process does require that all crimes be designated in language sufficiently definite and certain to inform a person of ordinary understanding what course of conduct he may lawfully pursue.\textsuperscript{171}

It is important to note that the majority of the petroleum fair competition statutes do not consider violation of their provisions a "crime." Rather, civil damages or monetary penalties are the typical remedies.\textsuperscript{172} Thus, the extent of penal restriction in these statutes arguably does not warrant conscious intent to do wrong as an element of statutory offense.

\textsuperscript{168} Id. at 750.
\textsuperscript{170} See Ports Petroleum, 916 S.W.2d at 755. See also Wal-Mart Stores, Inc. v. American Drugs, Inc., 891 S.W.2d 30 (Ark. 1995) (violation of Arkansas Unfair Practices Act for below-cost selling required showing of intent to destroy competition).
\textsuperscript{171} Thatcher, supra note 147, at 567.
\textsuperscript{172} See supra Section II.B.7. "Enforcement and Remedies".
D. Burden Shifting and Evidentiary Presumptions

Several states, including Alabama, Arizona, Arkansas, California, Georgia, Montana, North Carolina, Utah, and Wisconsin, have enacted fair competition legislation with provisions that shift the burden of proof to the defendant once the plaintiff has shown proof of a sale or offer to sell below cost.\textsuperscript{173} Court decisions are mixed as to whether such burden shifting provisions are constitutional. The Supreme Court of California, in \textit{People v. Pay Less Drug Store},\textsuperscript{174} upheld a provision of the California Unfair Practices Act which "provides that in all actions brought under the provisions of the statute the proof of one or more acts of selling below cost, together with proof of the injurious effect of such acts, 'shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition.'"\textsuperscript{175} A violation of the California Unfair Practices Act occurs when a competitor 1) makes a sale at less than cost with 2) the purpose of injuring competitors or destroying competition.\textsuperscript{176} What the California statute does is allow a plaintiff to show proof of a sale below cost plus injury to meet its burden of a prima facie case. The burden then shifts to the defendant to show lack of intent or that its acts are covered by a statutory exception. The California Supreme Court stated that "[a] statutory requirement that the defendant go forward with evidence to rebut a prima facie showing of guilty intent from proof of specified facts is permissible when the result has some rational relation to those facts and the defendant is given a fair opportunity to meet it by evidence."\textsuperscript{177} The court further acknowledged the "manifest disparity in convenience of proof and opportunity for knowledge as between the plaintiff and the [defendant]."\textsuperscript{178} Typically, the defendant in a fair competition case is in a better position to know the intent or purpose of

\textsuperscript{173} See supra Section II.B.5. "Burden Shifting Provision". See also 54A AM. JUR. 2D Monopolies and Restraints of Trade §1102 (1996) and cases cited therein.
\textsuperscript{174} 153 P.2d 9 (Cal. 1944).
\textsuperscript{175} Id. at 12. See also, Dooley's Hardware Mart v. Food Giant Markets, Inc., 1 Cal. App. 3d 105 (Cal. Ct. App. 1969) (statutory presumption valid); State v. Eau Claire Oil Co., 151 N.W.2d 634 (Wis. 1967) (proof of sale at less than cost as prima facie evidence of intent upheld as constitutional).
\textsuperscript{176} See CAL. BUS. \\& PROF. CODE § 17043 (West 1997).
\textsuperscript{177} Pay Less Drug Store, 153 P.2d at 13.
\textsuperscript{178} Id.
its conduct. Without the "smoking gun", it is often difficult for the plaintiff to prove such intent.179

The Supreme Court of Alabama in Money Back, Inc. v. Gray,180 held that under the Alabama Motor Fuel Marketing Act, a competitor is only required to show a sale below cost plus an injurious effect on competition to prove a prima facie case under the Act.181 The defendant then has the burden to show lack of intent.182 This ruling followed an earlier decision in State ex rel. Galanos v. Mapco Petroleum,183 where the court severed the burden shifting provisions of the Alabama Motor Fuel Marketing Act as not rationally related to the goal of safeguarding against monopolies and, thus, unconstitutional.184 Section 8-22-18 of the Alabama Motor Fuel Marketing Act shifts the burden of rebutting a

179. In Baseline Liquors v. Circle K Corp., 630 P.2d 38 (Ariz. App. 1981), the Court of Appeals of Arizona upheld a provision in the Arizona Unfair Sales Act which allowed "[p]roof of any advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of [the Act as] prima facie evidence of a violation of [the Act]." Id. at 44. The court stated that the evidentiary presumption was permissible and was similar to other evidentiary presumptions "such as the presumption of intoxication from proof of the presence of 0.15 percent or more by weight of alcohol in a person's blood, the presumption of sanity in criminal prosecutions, or the presumption that driving in excess of the posted speed limit is unreasonable and unlawful." Id. at 44-45 (citations omitted). A person who violates the Arizona Unfair Sales Act may be found guilty of a petty offense. ARIZ. REV. STAT. § 44-1466 (West 1994) (repealed 1982). The Arizona Unfair Sales Act requires intent as an essential element of a violation. Baseline Liquors, 630 P.2d at 44. As discussed in Section III.C. Element of Intent, infra, the fact that the Arizona statute imposes a criminal penalty arguably provides some justification for the inclusion of an intent element.

180. 569 So. 2d 325 (Ala. 1990).

181. Id. at 327.

182. See also McGuire Oil Co. v. Mapco, Inc., 612 So. 2d 417 (Ala. 1992) (lack of intent is an affirmative defense under the Alabama Motor Fuel Marketing Act).

183. 519 So. 2d 1275 (Ala. 1987).

184. See also Great Atlantic & Pacific Tea Co. v. Ervin, 23 F.Supp. 70 (D. Minn. 1938) (Minnesota Unfair Trade Practices Act provision making sale at less than 10 per cent above cost prima facie evidence of violation of Act is unconstitutional); Mott's Super Markets, Inc. v. Frassinelli, 199 A.2d 16 (Conn. Super. Ct. 1964) (provision stating that proof of sales below cost would be prima facie evidence of statutory violation denied due process); Wiley v. Sampson-Ripley Co., 120 A.2d 289 (Me. 1956) (prima facie showing upon proof of sale below cost unconstitutional); Perkins v. King Soopers Inc., 221 P.2d 343 (Colo. 1950) (Colorado Unfair Practices Act unconstitutional to the extent it limits right of defendant to prove actual intent; prima facie showing by proof of below cost sale violates due process); Blum v. Engelman, 57 A.2d 421 (Md. 1948) (court upheld constitutionality of Maryland Unfair Sales Act but declined to determine whether prima facie provisions conformed with due process).
prima facie showing upon proof by the plaintiff of a sale below cost. However, even though these burden shifting provisions are no longer a viable part of the Alabama Motor Fuel Marketing Act, a plaintiff in Alabama is not required to prove intent as part of its prima facie case.

IV. A RATIONAL APPROACH TO FAIR COMPETITION

In the eyes of some, the statement above begs the question. It presumes there can exist a rational basis for any legislation that restrains pricing decisions. Fair competition acts are not without their detractors. Those who criticize the state-adopted acts claim that they stifle competition and result in higher prices to consumers. (Proof of this claim has yet to be presented). These critics point to low prices as badges of "economic efficiency." All too often, however, this economic efficiency is achieved through the leverage of economic power from other areas to the retail level or to particular retail markets. Whether this is done through direct dealer networks and company operated retail outlets, or indirectly through net back arrangements and sweetheart strategic alliances between refiners and large marketers, the unfair use of this power to drive out competitors is a very real fear for many.

The espoused purpose of fair competition acts is to level the playing field so that competition can be vigorous yet fair. Can this be accomplished without over-regulating the market? Many believe it can. Proponents of this view claim that a properly drafted fair competition

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185. See ALA. CODE § 8-22-18 (1993 & Supp. 1998) for the actual language of the statute which provides three formulas for determining a prima facie showing of a sale below cost.

186. See cases cited supra note 184.


188. Huey, supra note 89, at 948-55, 960-61. See also Sixty Enterprises, Inc. v. Roman & Ciro, Inc. 601 So. 2d 234, 237 n.7 (Fla. Dist. Ct. App. 1992) (important purpose of state sales below cost statutes is to save the independent retailer who cannot afford to sell below cost or compete with those retailers who do); ALA. CODE § 8-22-2 (1993 & Supp. 1998) (legislative findings regarding unfair competition); FLA. STAT. ANN. § 526.302 (West 1997) (intent of legislature to encourage fair competition); TENN. CODE ANN. § 47-25-603 (1995) (subsidized pricing is inherently unfair and reduces competition).
act can provide the environment for healthy competition to flourish. This, they say, can be a win-win for retail marketers and consumers. Proponents embrace certain tenets upon which a model act should be premised. The following is intended to be an illustrative, but not exhaustive list, of these tenets:

1. Refiners, jobbers and dealers must have the opportunity to make a reasonable profit on retail sales.

2. Refiners have profit opportunities up the chain of distribution which are not available to jobbers and dealers.

3. Large jobbers and multi-state chain marketers have profit opportunities up and across the chain which are not available to smaller jobbers and dealers.

4. Because of these other profit opportunities, refiners, large jobbers and multi-state chain marketers may be able to maximize total profits by maximizing retail volume through subsidizing retail or wholesale prices on one or more grades of motor fuel.

5. The marketing strategy described in #4 is intended to and does increase market share for some, but at the expense of profit margins and market shares of others.

6. The natural consequence of #4 and #5 increases the risk that entire segments of competitors will be eliminated, thereby

189. Dougherty, 41 A.L.R. 4th 612 (1985), at 617, supra note 82. See also Sixty Enterprises, 601 So. 2d at 236-37; State ex rel. Galanos v. Mapco Petroleum Inc., 519 So. 2d 1275, 1285-87 (Ala. 1987); Huey, supra note 89, at 960-64.
increasing market concentration, reducing consumer choices, and creating the ability to increase and maintain a higher price level over time.

For purposes of the following discussion, let us assume that the proposition advanced by the proponents of fair competition acts is true, or at least reasonably likely to be true. Let us further assume that a fair competition act could be cut out of whole cloth devoid of the give and take compromises attendant to the legislative process. What specific goals or objectives would a model act advance? What shape would such a model act take to achieve these goals or objectives? The answer to these questions should be the starting point for crafting a model fair competition act.

Based upon the tenets listed above, we can define at least these objectives to be accomplished by a model act:

1. Level the playing field to remove unfair competitive advantages.

2. Promote competition on the merits at the retail level of motor fuel marketing.

3. Protect a competitive environment which will not penalize efficiency in retail marketing but will enhance consumer choice.
The following rules of market behavior are consistent with our three objectives:

1. NO ONE should sell motor fuel at retail prices lower than the delivered posted terminal price of their refiner/supplier ("rack") price per grade, plus certain other costs attributable to the sale of motor fuel, such as a portion of the occupancy and operational costs for the retail outlet and the personnel expense relating to the sale of motor fuel at the outlet.

2. Rule #1 should apply to jobbers or multi-state marketers who operate their own retail outlets.

3. If a refiner/supplier does not have a posted terminal price, then the imputed price for that refiner/supplier will be the lowest posted terminal price for like grade or quality (branded or unbranded) of motor fuel in the general trade area.

4. Everyone should be able to meet the retail price of a bona fide competitor, even if that means selling below cost. But a refiner or jobber selling below cost at a company operated retail outlet must offer the same low price (as adjusted for certain cost components) to reseller customers supplied under contract in the same relevant geographic market.

5. Rebates and other financial incentives offered by a refiner should be made available to all resellers supplied by the
refiner in the relevant geographic market.

6. A refiner should not sell to direct dealers or company operated retail outlets at net prices lower than the prices charged to the refiner's contract wholesalers. A "sale" should include an inter-company transfer.

7. Suppliers should make motor fuel products available to company operated retail outlets, direct service dealers and all contract resellers on proportionately equal terms.

8. Cross selling discounts (hyper-market discount coupons) must be considered in reducing the retail selling price of the fuel to determine whether the "net" retail price is below cost. Even if the operator of the retail outlet receives 100% redemption payment from the issuer of the coupon, the credit or allowance should not be able to reduce the statutory fuel cost below the minimum level set forth in #1 above.

Market behavior contrary to the above rules and resulting in actual harm to a competitor should be prohibited.

A. Below Cost Sales at Retail

The centerpiece of our model fair competition act is the prohibition of selling any grade of motor fuel at retail below cost. This, in the authors' opinion, has been and continues to be the single most unfair and anti-competitive practice complained of by retail marketers. Although some fair competition statutes extend this prohibition to the wholesale level as well, this may be overly restrictive and more difficult
Additionally, a different set of market forces are at play at the wholesale level of product supply. Finally, it is believed that protection against price and supply discrimination are sufficient to curb unfair and anti-competitive conduct at the wholesale level.

The below cost selling ban must apply to anyone who sells at retail, including refiners, jobbers and retail dealers. Historically, vertically integrated refiners have caused most of the problems with below cost selling. To regulate one group of participants to the exclusion of the others is unworkable. Moreover, in this new age of motor fuel marketing, certain large non-refiners, such as large multi-state chain marketers and hyper-markets, have shown the ability to leverage economic power to subsidize below cost retail prices of motor fuel, thereby driving out competitors.

Moreover, the below cost selling statute must be applied on a grade-by-grade basis. (Each of the existing state acts has this feature in common). The category “motor fuel” is comprised of three grades of unleaded gasoline - regular (87 octane), mid-grade (89 octane) and premium (91 to 93 octane) - and diesel fuel. Each type of fuel is a separate product. The retail price and cost analysis must be done on a grade-by-grade basis to avoid subsidizing below cost prices on one grade of fuel (usually the regular) with the profits made from the other grades.

The sticking point in any below cost selling ban is the statutory formulation of “cost.” Common sense and basic economics (not always mutually exclusive concepts) recognize that a business cannot survive by selling products at the raw cost of those products. The retail selling of motor fuel is no exception; more than product cost must be included in any statutory definition of “cost.” In addition to the per grade cost of motor fuel, our model act should include the cost of delivery, all taxes

190. States that regulate the wholesale level of petroleum marketing include Alabama, Georgia, Missouri, Montana, Utah, and Wisconsin. See infra Section II.B.4. “Sales Covered and Prohibited”. See also Schwartz, supra note 89, at Appendix A.

191. Florida’s experience is a case in point. In the initial version of Florida’s Motor Fuel Marketing Practices Act adopted in 1985, only refiners were prohibited from selling at retail below cost. Refiners selling at retail could, however, meet competition, even if the competition was selling below cost. This proved to be a significant weakness, which was corrected when the Act was amended in 1987 to include all persons engaged in the retail sale of motor fuel. See Fla. Stat. Ann. § 526.304 (West 1997).

192. For a table of citations to the existing petroleum fair marketing statutes, see infra Appendix A.
and user fees, and the costs associated with the facilities and personnel necessary to store and sell the fuel. In addition to these costs, some state fair competition acts include general overhead and administrative expenses. Our model act takes a narrow view of cost. The preferred formulation of statutory cost is limited to those costs more directly related to the sale of motor fuel. This allows prices to be set at lower cost levels without violating the law.

The starting point for formulating cost is how to determine product cost. This is one instance where refiners and non-refiners should be treated differently. For refiners, the product cost per grade should be the refiner's posted price at the terminal servicing the geographical area in which the refiner's retail outlet is located. Although a refiner's true product cost is lower than terminal price, to allow the refiner to use its actual product cost at the refinery gate gives the refiner an unfair competitive advantage. Further, it makes compliance and enforcement an almost impossible task as legends of cost accountants will be pitted against one another to determine the refiner's actual product cost. To keep the playing field level, when refiners supply their company operated retail outlets, they must use as a transfer cost the posted terminal price per grade for the motor fuel supplied. Using posted terminal prices facilitates compliance and enforcement because posted terminal prices are readily available to those in the industry through industry publication services and other readily available sources. In some circumstances, a refiner may not have a posted terminal price. In such event, the refiner’s product cost will be the lowest posted terminal price in the area in which the refiner’s retail outlet is located.

Non-refiners selling at retail do not have terminal prices. A straightforward manner of determining a non-refiner’s product cost is to use the invoice price of the motor fuel, by grade, charged to the non-refiner. For the non-refiner seeking to comply with the law, this requires no guesswork.

Oftentimes, a supplier gives discounts or trade allowances in connection with purchases of motor fuel. Should these be taken into account in calculating a non-refiner’s product cost? Yes, but only to the

193. See supra Section II.B.3. “Defining Cost”.
194. In motor fuel marketing, terminal price is the price refiners charge to wholesale customers, including jobbers and large commercial customers. See Fla. Stat. Ann. § 526.303(8).
extent that an amount certain is actually received or unconditionally payable to the non-refiner at the time the motor fuel is purchased. The "actually received" requirement can be satisfied by showing the discount or allowance as a deduction off the invoice price. Alternatively, an amount certain can be earned and unconditionally payable to the non-refiner at the time the motor fuel is purchased even though the discount or allowance does not appear on the face of the invoice. The "actually received" requirement avoids the guesswork of factoring in discounts or allowances that may be earned and paid in the future. Some volume incentive discount programs require non-refiners to reach certain levels of purchases before discounts or rebates are earned. Even after they are earned, oftentimes these rebates are not received by the non-refiner until weeks and even months after the motor fuel is purchased and sold. A significant matching problem exists and can overly complicate the calculation of cost.

To keep the playing field level, a non-refiner's statutory product cost must never be below posted terminal price. As discussed above, terminal price must be the benchmark or starting point from which the statutory motor fuel cost is calculated to avoid the leveraging and subsidization problems. By making terminal price the floor for calculating non-refiner product cost, refiners will be prohibited from doing indirectly what the law prohibits them from doing directly. This does not prevent refiners from providing their directly supplied retail dealer special competitive allowances or other forms of financial assistance to reduce the dealer's actual cost of motor fuel purchased. Rather, it merely prevents directly served dealers from using as product cost subsidized product prices below terminal prices. Simply put, the product cost for a non-refiner will be the invoice cost of the motor fuel by grade to the non-refiner, less all allowances and trade discounts actually received; provided, however, that the net invoice cost cannot be lower than the non-refiner's supplier's posted terminal price for the like grade and quality of motor fuel purchased.

In addition to product cost, motor fuel cost should include a portion of the occupancy cost and operational expenses attributable to the retail sale of motor fuel at the retail outlet. Regarding occupancy cost, the reasonable rental value of the retail outlet ought to be determined under an objective standard as the fair market rental value of the land, improvements and equipment at the retail outlet. The purpose for using a fair market rental value standard instead of using
the actual amount of rent paid is twofold. First, an owner of a retail outlet should recognize occupancy cost as the opportunity cost of not leasing out the facility. Hence, for an owner, the fair market rental value would be the lease income the owner would receive if the facility were leased to a third party in an arms-length transaction. The second purpose for an objective standard is to avoid the practice of some refiners of using rent subsidies or "free" rent to subsidize retail sales. In addition to the occupancy cost, certain operational expenses should be recognized, the major ones being 1) real and personal property taxes; 2) utilities; and 3) insurance. These are direct costs necessary for the operation of a motor fuel retail outlet.

The second category of non-product cost to be included in the statutory cost of motor fuel is personnel expense attributable to the sale of motor fuel at the retail outlet. This category of cost includes the personnel expenses of storing, inventorying, ordering and selling the motor fuel. Personnel costs include hourly wage personnel, such as store clerks, and salaries of managers or supervisors. Additionally, worker's compensation insurance premiums, unemployment compensation taxes, payroll taxes and the like are to be included in personnel costs. If the company offers employee benefits, the costs of these benefits should be included as well.

Almost every motor fuel retail outlet sells other products or services in conjunction with motor fuel. Accordingly, occupancy and personnel costs must be allocated to motor fuel and non-motor fuel sales. Several methods exist for allocating these costs. The most straightforward method is to allocate occupancy and personnel costs attributable to motor fuel sales as a percentage of gross sales revenue. For example, if the dollar value of motor fuel sales at a retail outlet is 85% of total sales revenue, the occupancy and personnel costs attributable to the retail sale of motor fuel would be 85% of the total costs in each of these categories. The amount of these costs would then be divided by the total gallons sold during the period under observation to determine the per-gallon occupancy and personnel costs.

**B. Competitive Harm**

The "no harm, no foul" rule must be incorporated into a model fair competition act. Even if motor fuel is being sold at retail below statutory cost, in order for there to be a violation, the below cost selling
must cause legally cognizable harm. Most state acts phrase this harm as either an "adverse effect on competition" or "an injury to competition" in the relevant geographic market.\footnote{195} Defining the injury element should be one of legislative policy. As discussed in Section II.B.4. above, two schools of thought exist on what constitutes "injury to competition."\footnote{196} One school of thought may argue that the "injury to competition" element found in the state fair competition acts is the counterpart of the federal antitrust law concept of market-wide injury or injury to the competitive process itself. The other school of thought might argue that injury to a single competitor is sufficient to show injury to competition under state acts. Absent express legislative guidance, this issue is fairly debatable with persuasive arguments on both sides of the issue.

A model fair competition act should expressly provide that injury to a single competitor, which injury is proximately caused by the below cost selling, constitutes an adverse effect on competition or is deemed to be injury to competition in the relevant geographic market. Although not without its critics, this approach to cognizable injury is consistent with the perceived purpose for state fair marketing acts. As mentioned above, large segments of the motor fuel marketing industry believe that federal antitrust laws have proved largely inadequate to deal with many of the unfair and predatory practices complained of in motor fuel marketing. State fair competition acts are not intended to incorporate federal antitrust principles and economic theory. Rather, one of the purposes of these acts is to afford smaller, less powerful competitors an effective remedy for below cost selling and other unfair acts.

Moreover, in retail motor fuel marketing, proof of injury to a single competitor proximately caused by below cost selling is a strong indication of injury to competition in a larger sense. The relevant geographic market for a retail motor fuel outlet is relatively small (between one to three miles in most areas); and it is relatively simple to identify each retail competitor in the relevant geographic market. Additionally, retail prices are extremely visible, both to motorists and competitors. Price competition is fierce and competitive reaction to price movements rapid. Hence, if one competitor among several in a relevant geographic market suffers demonstrable financial injury as a

\footnote{195. See infra Section II.B.4 Sales Covered and Prohibited.\footnote{196. See Id. at note 119.}}
result of the below cost selling of another competitor, it is more probable than not that other competitors in the area are also suffering financial harm. As a practical matter, the single competitor plaintiff will offer testimony of other competitors about the harm caused by the below cost seller. The single competitor plaintiff, however, should not have to satisfy the rigorous economic proof (i.e., market shares, etc.) by proving injury to competition in the aggregate. If only the single competitor plaintiff has suffered financial harm during the period of below cost selling and other competitors have not, this supports the inference that the below cost selling is not the legal cause of the plaintiff's losses.

C. The Role of Predatory Intent

Another vigorously debated issue is whether a showing of predatory intent is required to establish a below cost selling violation. For reasons similar to the ones stated above, a model below cost selling statute should not have a predatory intent requirement. The concept of "predatory intent" is another creature of predatory pricing cases under the evolving federal antitrust laws. To overlay this rigorous requirement on a state below cost selling statute would render such a statute meaningless. A properly drafted below cost selling statute is intended to promote healthy competition, benefit consumers, and protect smaller competitors from the unfair use of economic power enjoyed by larger competitors. As such, it is remedial and not criminal legislation. Even though public enforcement remedies include civil penalties, many regulatory statutes have this feature without being deemed "criminal." Proof of specific intent has no place in a remedial civil statute.

It is settled that the law implies that people intend the natural and direct consequences of their actions. Mistakes or isolated instances of below cost selling, however, should not trigger liability. Not only do such isolated or inadvertent acts fail to satisfy a general intent requirement, they also will fail to be the "proximate cause" of any demonstrable injury. A person selling below cost for a time sufficient to cause financial harm to a competitor understands that the natural--and

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197. See supra Sections II.B.4 “Sales Covered and Prohibited,” and III.C. “Element of Intent.”
198. See supra Section II.B.7. “Enforcement and Remedies.”
even intended—consequence of his action was to take business away from his competitors.

D. Meeting Competition

A good faith meeting competition defense is an essential component to a model below cost selling statute. The statutory provision setting forth this defense should expressly state that a person can sell below that person’s statutory cost in a good faith attempt to meet the price of a competitor, even if the competitor is selling below cost. A properly drafted “meeting competition” defense allows competitors the flexibility needed to meet lower retail prices set by others without fear of liability. Additionally, this defense allows the marketplace to provide consumers both with an array of choices and low prices.

E. Price Discrimination

Next to below cost selling, the authors have found that the two most complained of unfair practices in motor fuel marketing are: 1) refiners selling to direct served retail dealers at net prices lower than the prices charged to jobbers in the same relevant geographic area; and 2) refiners transferring motor fuel to company operated retail outlets at prices below those charged to jobbers and retail dealers. A model fair competition law should include a provision making each of these practices unlawful where the effect is to injure a competitor or competition generally. The provision should emphasize that it is a difference in “net” prices, including any discounts, allowances, rent subsidies or the like. Additionally, this provision must treat intracompany transfers as a “sale.” Under the Robinson-Patman Act, intracompany transfers are not treated as a sale; therefore, refiners can transfer motor fuel to a company operated retail outlet without the fear of liability under federal law. By making an intracompany transfer a “sale,” refiners will be required to offer their jobbers or independent dealers the same price as the price charged to their directly-operated retail outlets in the same market area.

199. See O'Byrne v. Cheker Oil Co., 727 F.2d 159, 164 (7th Cir. 1984).
F. Discriminatory Allocation of Fuel

From time to time, market conditions, including shortages and market opportunities, provide the incentive for a refiner to discriminate against jobbers and dealers by limiting the availability of motor fuel to them while fully supplying the refiner's own directly-operated outlets. This type of discrimination can be more ruinous than price discrimination or below cost selling since it curtails or removes the jobber's or independent dealer's source of supply from their sole supplier. Strategically, some refiners may intend to expand their directly-operated locations in an area. To facilitate this strategy, these refiners reduce the ability of their jobbers or dealers to expand in the same area. An effective way to accomplish this is to either reduce or limit motor fuel supply.

A provision outlawing the discriminatory allocation of fuel should apply to both refiners and jobbers. As with refiners, many jobbers operate retail outlets and supply independent dealers. Hence, the same rule should apply to refiners and jobbers—-one can compete against one's own customers, but the competition must be fair and nondiscriminatory.

G. Discriminatory Rebates

As with price discrimination, refiners have used rebate programs to favor their direct-supplied dealers and to discriminate against their jobbers and the dealers of the jobbers. The most typical rebates have been volume rebates and rent rebates, whereby refiners have allowed their direct-supplied dealer substantial discounts which have resulted in these dealers selling motor fuel at a lower price than their competitors. In geographic areas where refiners competed against jobbers, the jobbers and the dealers supplied by jobbers were placed at a significant competitive disadvantage. Rebates and other competitive allowances in motor fuel marketing are not adequately covered under federal law. Experience has shown that rebates have been used to avoid federal price discrimination laws. A prohibition against discriminatory use of rebates is an effective way to close this loophole. As with the discriminatory allocation prohibition, both refiners and jobbers should be subject to the rule against using discriminatory rebates. If the single most important objective of fair competition acts is to level the playing
field for all who compete at the retail level, then rebates must be available to all competitors. Precise equality should not be required so long as the rebates are made available on proportionately equal terms.

H. Enforcement and Remedies

Most state fair competition acts provide for public and private enforcement. Likewise, model acts should incorporate a dual enforcement scheme. Although public enforcement should be provided, it is unrealistic to believe that public enforcement will be the primary remedy. Rather, the concept of “Private Attorneys General” should be embodied in a private enforcement scheme. Any person who is injured as a result of a violation should have a cause of action for actual damages and injunctive relief. To increase the deterrent effect, a provision should give a court discretion to treble any actual damages proved. In addition to damages, the prevailing plaintiff should be awarded reasonable attorneys’ fees as a matter of right. A prevailing defendant should be allowed to recover attorneys’ fees only upon a showing of bad faith by the plaintiff in bringing the litigation.

Injunctive relief, both preliminary and permanent, is an important remedy. One of the purposes underlying fair competition acts should be to afford an efficient remedy to stop the unfair or predatory conduct in its incipiency. Anti-competitive conduct, such as below cost selling, can destroy the profitability of a geographic market in a few short weeks. Once competitors react to a below cost seller, prices and profit margins can plummet, thereby weakening the competitive fabric of the market. The primary thrust of such state acts is to deter such conduct from occurring; however, if it does occur, it should be eliminated quickly. One cannot overestimate the value of the preliminary injunction remedy to do this.

CONCLUSION

Changes in the retail marketing of petroleum, combined with environmental regulations, have increased barriers to entry into the retail motor fuel market. The significance of increased entry and exit barriers is the increased opportunity to recoup losses and ultimately control

200. See infra Section II.B.7. “Enforcement and Remedies.”
price once a competitor is eliminated as a result of predatory pricing. However, unlike the situation with traditional predatory pricing, no intent to harm may be involved with the marketing strategy of convenience and chain stores and, consequently, such conduct may not be illegal under federal laws. Yet, the strategy may have an adverse impact on competition in the retail motor fuel market; an impact that state authorities should monitor carefully. The majority of states have enacted fair competition legislation, with at least sixteen enacting fair competition legislation specific to petroleum.

The authors do not have all the answers when it comes to drafting a model fair competition act. Policy considerations and practical politics will vary from state to state. Generally speaking, a model fair competition act must be delicately and artfully balanced to both protect all participants in retail motor fuel marketing and provide the benefits of healthy competition to consumers. The purpose of a model act is not to foster litigation or massive public enforcement efforts. Rather, such an act should clearly state the rules of fair competition in motor fuel marketing and provide for effective remedies for violations of these rules. The purpose is to deter the most flagrant and harmful abuses by those in a position to leverage economic power at the retail level.
APPENDIX A

PETROLEUM FAIR COMPETITION LEGISLATION

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE CITE</th>
<th>KEY PROVISIONS</th>
<th>DISCRIMINATORY PROVISIONS</th>
<th>KEY CASES AND RULINGS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Ala. Code §§ 8-22-1 to 8-22-18 (1993 &amp; Supp. 1998)</td>
<td>Price discrimination prohibited on the same level of distribution, within the same market area, where effect is to injure competition. Prices and distribution prohibited by intercompany transfers and rebates where effect is to injure competition.</td>
<td>Price discrimination within the same market area, where effect is to injure competition. Includes intra-company transfers and rebates where effect is to injure competition.</td>
<td>McGuire Oil Co. v. Mapco, Inc., 612 So.2d 1417 (Ala. 1992) (Act only requires injury to a competitor not required for prima facie case); State Ex Rel. Calhoun v. Mapco Petroleum, 519 So.2d 1275 (Ala. 1987); (prima facie provisions severable to save constitutionality); Mapco v. Pac-Can (Ala. 1990) (proof of intent not injury to competition); Money Back, Inc. v. Gray, 569 So.2d 325 (Ala. 1990) (proof of intent not injury to competition).</td>
</tr>
</tbody>
</table>

The tables set forth in Appendices A, B, and C are offered as a summary of fair marketing legislation only and do not reflect every statutory provision or interpretive case. The reader should refer to the particular statute referenced for the actual language of that statute and to any additional case law which may exist in the particular jurisdiction.
<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Statute Title</th>
<th>Key Provisions</th>
<th>Discriminatory Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado (1998)</td>
<td>1993 Ark. Acts § 1-18</td>
<td>1993 Ark. Acts § 6-2-105(1)(b)</td>
<td>Requires ten day notice of knowledge of regulated and cost defined by relation to retail location; prima facie presumption may be drawn; retail distribution prohibited below cost sales where effect on competitive area as the retail outlet of the competitive area by dealers within the same process</td>
<td>All state fuel marketing rules are consistent with Section 4 of the Act (failure to include element of predation)</td>
</tr>
<tr>
<td>STATE</td>
<td>STATUTE CITE</td>
<td>KEY PROVISIONS</td>
<td>DISCRIMINATORY PROVISIONS</td>
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</tr>
<tr>
<td>Florida</td>
<td>F.L.A. STAT. ANN. §§ 526.301 - 526.3125 (West 1997)</td>
<td>Prohibits below cost sale where effect is to injure competition; regulates retail sales; definition of cost limited to costs attributable to motor fuel sales; no burden shifting</td>
<td>Prohibits price discrimination on the same level of distribution, in the same class of trade, and within the same relevant geographic market where effect is to injure competition; discriminatory rebates and allocations also prohibited</td>
<td></td>
</tr>
</tbody>
</table>

**KEY CASES AND RULINGS**

Raceetrac Petroleum, Inc. v. Delco Oil, Inc., 1998 WL 769799 (Fla. App. 5 Dist.)

(proof of injury to single competitor qualifies as element of violation under Act) 

Star Enterprises, Inc. v. Roman & Circo, Inc., 601 So. 2d 234 (Fla. App. 3 Dist.)

(constitutionality of Act upheld)
<table>
<thead>
<tr>
<th>Massachusetts</th>
<th>Georgia</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulated retail sales; cost defined in reasonable cost of doing business (in terms of invoice cost plus levels of distribution regulation)</td>
<td>Reprisal sale below cost where effect is made upon proof of below cost sale; all terms of cost attributable to sale of motor fuel; intent required as element</td>
<td>KEY PROVISIONS</td>
</tr>
<tr>
<td>None</td>
<td>to lessen or injure competition; inherent commerce and where effect is in grade and quality where purchase is in different purchasers of product of like</td>
<td>DISCRIMINATORY PROVISIONS</td>
</tr>
<tr>
<td>None</td>
<td>not affected with a public interest</td>
<td>RULES</td>
</tr>
<tr>
<td></td>
<td>Unconstitutional; regulation of petroleum</td>
<td>KEY CASES AND</td>
</tr>
<tr>
<td>Provision</td>
<td>State of Minnesota</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>None</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Key Provisions</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Discriminatory Provisions**
- Criminal penalties may be imposed for refusing to create or maintain a monopoly.
- Inhibits the business of a manufacturer and distributor.
- Prohibits price discrimination on the same market.

**Rulings and Key Cases**
- Rule of 126 N. W. 227 (Minn. 1900) v. Standard Oil
- None
<table>
<thead>
<tr>
<th>New Jersey</th>
<th>Montana</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not contain a meeting competition defense</td>
<td>Intent cost sale prima facie evidence of competition; evidence of below wholesale sales below cost sales prohibited</td>
<td></td>
</tr>
<tr>
<td>Not cost not defined; statute does not contain a meeting competition defense</td>
<td>Where effect is to injure competition</td>
<td></td>
</tr>
<tr>
<td>Motor fuel below net cost plus all selling expenses; retail sales prohibited</td>
<td>Regulates wholesale and retail</td>
<td></td>
</tr>
<tr>
<td>Substantially less competition at § 9.6-22 Substantially less competition at § 9.6-22</td>
<td>Where effect is to injure competition</td>
<td></td>
</tr>
<tr>
<td>Wholesalers prohibited discrimination or price discrimination between different retail dealers except to meet competitive conditions</td>
<td>Probabilistic price discrimination by wholesale to injure competition</td>
<td></td>
</tr>
<tr>
<td>General election to the date of November 3, 1998</td>
<td>Repealed by Initiative No. 134 in 1997</td>
<td></td>
</tr>
</tbody>
</table>

Key: 1999

Motor Fuel Marketing

Key Provisions

Discriminatory Provisions

Rulings and Key Cases
<table>
<thead>
<tr>
<th>South Carolina</th>
<th>North Carolina</th>
<th>STATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>5C. CODE ANN. § 39-5-325 (Law. Co-op.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>defense</td>
<td>provisions</td>
<td>STATUTE CITE</td>
</tr>
<tr>
<td>substantially lessens competition or injures competition</td>
<td>prohibit sales below cost of acquiring</td>
<td></td>
</tr>
<tr>
<td>prohibits sales below cost of acquiring product plus taxes and transportation</td>
<td>below cost with intent to injure</td>
<td></td>
</tr>
<tr>
<td>prohibited sales; prohibits sales</td>
<td>below cost with intent to injure</td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Key Provisions</td>
<td>Provisions</td>
<td>Discriminatory</td>
</tr>
<tr>
<td>Key Cases and Rulings</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>STATUTE</td>
<td>STATE</td>
<td></td>
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<tr>
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</tr>
</tbody>
</table>

**KEY PROVISIONS**

- No specific below cost provisions permitted.
- Different sections or communities of the state: price differential to meet competition.
- Applies to portion of statute aimed at price discrimination: requires intent to create or destroy monopoly or destroy the business of a regularly established competitor.

**DISCRIMINATORY RULES AND CASES**

- None
<table>
<thead>
<tr>
<th>Tennessee</th>
<th>State</th>
</tr>
</thead>
</table>

Regulations Retail Sales: Prohibits below cost sales where effect is to injure

Prevent or destroy competition

Effect is to substantially lessen competition, tend to create a monopoly or injure, 47-25-623 Prohibits price discrimination by a retailer, distributor or producer, where outlet at a lesser price than other outlet dealers within the same competitive area, § 1

Prohibits vertically integrated producer from selling or transporting to its own retail

Discriminatory

Injury (implied a private right of action: party alleging discrimination must show actual

Huckaby Petroleum Tennesse, Inc. v. Murphy Petroleum Corp. 548 S.W.2d 600 (Tenn. App. 1977) (court is in competition in the aggregate, not on specific individual competition) | Key Rulings

Chernic, Inc. v. Murphy Petroleum Corp., 850 S.W. 2d 47 (Tenn. 1993) (focus of act
<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE CITE</th>
<th>KEY PROVISIONS</th>
<th>DISCRIMINATORY PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utah</td>
<td>UTAH CODE ANN. §§ 13-16-1 to 13-16-12 (1996)</td>
<td>Regulates all levels of distribution; cost of doing business is presumed to be a margin of 6% of posted retail price; prohibits below cost sales with intent or effect to injure competition; burden shifting provisions</td>
<td>Prohibits price discrimination where intent or effect is to injure competition; also prohibits price discrimination in intra-company transfers</td>
</tr>
</tbody>
</table>

KEY CASES AND RULINGS: State v. Rio Visa Oil, Ltd., 786 P.2d 1343 (Utah 1990) (constitutionality upheld)
<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>WI</td>
<td>WIS. STAT. ANN. § 100.30 (WEST 1997)</td>
</tr>
</tbody>
</table>

Primarily evidence of such inherent or effect of inferior quality arising from a competitor's evidence of a sale at less than cost is business requires inherent or effect of inducing the purchase of other merchantable or regular sales of distribution: 6% markup presumed for cost of doing

Key Provisions

None

Discriminatory Provisions

Consitutionality of statute

Provisions as constitutionall; State v. Koos, 48 N.W.2d 460 (Wis. 1951) (upheld)

State v. Eau Claire Oil Co., 131 N.W.2d 634 (Wis. 1967) (upheld prima face

Key Cases and Rulings
<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE CITE</th>
<th>KEY PROVISIONS</th>
<th>DISCRIMINATORY PROVISIONS</th>
<th>KEY CASES AND RULINGS</th>
</tr>
</thead>
</table>
### APPENDIX B

**GENERAL FAIR COMPETITION LEGISLATION**

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE CITE</th>
<th>KEY PROVISIONS</th>
<th>KEY CASES AND RULINGS</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARKANSAS</td>
<td>STATE</td>
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<table>
<thead>
<tr>
<th>STATE CITATE</th>
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<tbody>
<tr>
<td>ARK. CODE ANN. §§ 4-75-201 to 4-75-211, Michie 1996 &amp; Supp. 1997</td>
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</table>

<table>
<thead>
<tr>
<th>PROVISIONS</th>
<th>KEY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibits sales below cost with purpose of injuring competitors and destroying competition; civil liability with treble damages available; cost of doing business defined to include all costs incurred in the conduct of the business; required for violation: mere proof of below cost sale not sufficient to infer intent. WAL-MART STORES v. AMERICAN DRUGS, INC., 891 S.W.2d 30 (ARK. 1995).</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RULES AND CASES</th>
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<tbody>
<tr>
<td></td>
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<tr>
<td>California</td>
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<tr>
<td>State</td>
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<td>STATE</td>
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<tr>
<td>COLORADO</td>
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<tr>
<td>COLORADO</td>
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</tbody>
</table>

Available:
- Civil liability with treble damages
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon
- Corporate injunction proceeding upon

Prohibits sales below cost with intent to

Key:

Prohibits sales for less than cost for the

Key:

Rulings:

(1993)

(1998)

Flank Oil Co. v. Tennessee Gas Transmission

Island Tobacco Co. v. R.L. Reynolds

HAW. REV. STAT. §§ 6-2-106-2-117

Cooper v. 221 P.D. 343 (Colo. 1950) (suit against

Sooper's, 221 P.D. 343 (Colo. 1950), suit against

costs not victory or uncertain, Perkins & King

Co. 349 P.D. 105 (Colo. 1960) (definition of

Sooper's, 221 P.D. 343 (Colo. 1950) (suit against

costs not victory or uncertain, Perkins & King

expenses)

Co. 349 P.D. 105 (Colo. 1960) (definition of

Sooper's, 221 P.D. 343 (Colo. 1950) (suit against

costs not victory or uncertain, Perkins & King

expenses)
<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho</td>
<td>Idaho Code § 48-104 (1997)</td>
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</table>

<table>
<thead>
<tr>
<th>KEY PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Product (less than cost) (988 Idaho 1992) (fair market value may be less than cost) 988 v. Immou:mmation Gas, Co, 646 P.2d, Remo: Services, Inc v. FDR Corp, 764</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>KEY CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pope, v. Immou:mmation Gas, Co, 646 P.2d</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>KEY</th>
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</thead>
<tbody>
<tr>
<td>Prohibits sales at less than fair market value, also available with potential for treble damages.</td>
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</tbody>
</table>

**Kentucky**

(Wishie 1996)


<table>
<thead>
<tr>
<th>DAMAGES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retaliatory, available with potential for treble damages. Injunctive and civil penalties also available. Injunctive relief may be sought.</td>
</tr>
</tbody>
</table>

**KEY**

Product (definition of cost not confined to cost of trade practices act unconstitutional because S. W. 2d 80 (KY. 1989) 836 S.030 of United Remote Services, Inc. v. FDR Corp, 764
<table>
<thead>
<tr>
<th>Louisiana</th>
<th>State Code</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; $5120.00</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Provision</th>
<th>Key</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Applies to both wholesale and retail.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| B. Cost prohibitive of the process (or price-fixing statute and does not violate sales act of 1940, as amended, if not invalid). | | }

<table>
<thead>
<tr>
<th>Key Cases</th>
<th>Rulings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Massachusetts</strong></td>
<td><strong>Maryland</strong></td>
</tr>
<tr>
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</tr>
</tbody>
</table>

### **Regulates Wholesalers and Retailers:**

1. Influential relief available upon proof of sale at less than cost; competition; prima facie evidence of intent with intent to influence competitors or destroy business; prohibits sales at less than cost
2. 2% to the wholesaler to cover cost of doing business; presented markup of 6% to the retailer and presented 5% of the remaining markup to wholesalers;

### **Key Provisions**

- Co-op 1994

---

<table>
<thead>
<tr>
<th><strong>Key Cases</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>N.E.2d 167 (Mass. 1967) (constitutional flaw of statute; dependent upon show and specific methodology and proof a violation introduced evidence of defendant's subsequent sales)</td>
</tr>
<tr>
<td>N.E.2d 195 (Mass. 1966) (plaintiff need not prove a cost)</td>
</tr>
<tr>
<td>Cozen v. Frye &amp; Son, 80 A.2d 267 (Md.)</td>
</tr>
<tr>
<td>Maryland v. Engelmann, 57 A.2d 421 (Md.)</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE</th>
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</thead>
</table>

<table>
<thead>
<tr>
<th>KEY PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibits agreements that limit or fix market share or allocate sales or territories.</td>
</tr>
<tr>
<td>Prohibits agreements that limit market share or allocate sales or territories.</td>
</tr>
<tr>
<td>Prohibits agreements that limit market share or allocate sales or territories.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>KEY CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
</tr>
<tr>
<td>None</td>
</tr>
<tr>
<td>Mechanic v. Gerber, 292 N.W. 414 (Minn. 1940) (constitutional challenge)</td>
</tr>
<tr>
<td>Pacific Tel. Co. v. Brimson, 23 Pac. 2d 487 (Minn. 1941) (constitutional challenge)</td>
</tr>
<tr>
<td>Standard Oil v. Montana, 281 U.S. 111 (1930) (constitutional challenge)</td>
</tr>
<tr>
<td>OKLAHOMA</td>
</tr>
<tr>
<td>----------</td>
</tr>
</tbody>
</table>
| 288 P.2D 716 (OKLA. 1951) (upheld)
Adron v. OKLAHOMA RETAIL GROCERS ASS'N, statute as applied to retail sales of gasoline;
(OKLA. 1951) (upheld, constitutionality of
N.D. CENT. CODE §§ 51-10-10 to 51-10-15 | CITE |
| association on behalf of members
remedies available, allows action by trade
sale at less than cost; civil and criminal
price fixing evidence of intent upon proof of
competitor's of otherwise innocent a competitor,
and purpose of unfairly diverting trade from a
prohibits sales at less than cost with intent
| North Dakota Trade Commission
Injunctive and other equitable relief,
compete.
Requisites retail and wholesalers;
<p>| PROVISIONS |
| KEY CASES |
| RULES AND CASES |</p>
<table>
<thead>
<tr>
<th>Rhode Island</th>
<th>Pennsylvania</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Penalties available</strong>&lt;br&gt;When cost, inventory, or transactional evidence does not support or destroy competition, prima facie evidence of internal organization of sales at less than cost, or otherwise injuring a competitor or with intent of injuring the consumer trade, is presumed and a court may award:</td>
<td><strong>Sale in conversion of service</strong>&lt;br&gt;When cost, inventory, or transactional evidence does not support or destroy competition, prima facie evidence of internal organization of sales at less than cost, or otherwise injuring a competitor or with intent of injuring the consumer trade, is presumed and a court may award:</td>
<td><strong>Provisions</strong></td>
</tr>
<tr>
<td><strong>Cost includes presumed markup of 6% to 10%</strong></td>
<td><strong>Cost includes presumed 4% markup for each</strong></td>
<td><strong>Key</strong></td>
</tr>
<tr>
<td><strong>(R.I.) provisions in context</strong> of an equitable court decision to determine primafacie issue of 1946 (Commonwealth of Rhode Island); Avella v. Alamia's Inc., 211 A.2d 665 (R.I.)</td>
<td><strong>Violation</strong>&lt;br&gt;Process as intent or resultant element of 1940 (prompt sale held violative of the 13 A.2d 67 (Pa.)</td>
<td><strong>Rulings</strong> and <strong>Key cases</strong></td>
</tr>
<tr>
<td>State</td>
<td>Statute</td>
<td>Key Provisions</td>
</tr>
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</tr>
<tr>
<td>Tennessee</td>
<td>TN Code Ann. § 42-25-201 to 42-2-25.</td>
<td>Regulates retailers and wholesalers; cost available; criminal penalties and injunctive relief; sale is prima facie evidence of a violation; infringing a competitor's product of below cost diversion trade from a competitor or otherwise contravention of legislative policy to prohibit prohibitive sales at less than cost in includes resounding 6% markup on retailer;</td>
</tr>
<tr>
<td>South Carolina</td>
<td>SC Code Ann. § 39-3-150 (Law. Co-op.)</td>
<td>The purpose of financially influencing purpose of driving off competition or for prohibitive sales below cost with intent of prohibitive sales below cost with intent of regulating all levels of distribution;</td>
</tr>
</tbody>
</table>

**Rulings and Key Cases**

None
<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE</th>
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<tbody>
<tr>
<td>UTAH CODE ANN. §§ 13-5-1 to 13-5-18</td>
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<tr>
<th>STATE</th>
<th>STATUTE</th>
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<tbody>
<tr>
<td>West Virginia</td>
<td>(1998)</td>
</tr>
<tr>
<td>W.VA. CODE §§ 47-11A-1 to 47-11A-14</td>
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<table>
<thead>
<tr>
<th>KEY PROVISIONS</th>
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</thead>
<tbody>
<tr>
<td>Relevant retailers and wholesalers' prohibitions</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>KEY CASES</th>
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</thead>
<tbody>
<tr>
<td>Upheld constitutionality of statute</td>
</tr>
<tr>
<td>Harless v.讲解, Candy R. Whealing</td>
</tr>
<tr>
<td>Upheld constitutionality of statute</td>
</tr>
<tr>
<td>Council v. Shafer's Drug</td>
</tr>
<tr>
<td>Upheld constitutionality of statute</td>
</tr>
<tr>
<td>Trade Commission v. Shafer's Drug</td>
</tr>
<tr>
<td>WYOMING</td>
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<tr>
<td>Government enforcement effect: criminal penalties available along with civil and criminal remedies available. Total cost of doing business: civil and criminal penalties. Proof of a sale at less than cost or inducing the purchase of other merchandise. Prohibits sales at less than cost for the purpose of injuring competitors and destroying competition.</td>
</tr>
<tr>
<td>State v. Lambey, 84 P. 2d 77 (Wyo. 1938) (upheld constitutionality of statute)</td>
</tr>
<tr>
<td>(WIS. 1951) (upheld constitutionality of statute)</td>
</tr>
<tr>
<td>State v. Ena Claire Oil Co., 151 N.W.2d 654</td>
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</tbody>
</table>
## APPENDIX C

### GENERAL PRICE DISCRIMINATION LEGISLATION

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE</th>
<th>KEY PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>Ark. Code Ann. § 4-75-207 (Michie 1996 &amp; Supp. 1997)</td>
<td>Part of the Arkansas Unfair Practices Act prohibits locality discrimination with intent to destroy competition of regularly established dealer or prevent competition of any regularly established dealer; discrimination includes special rebates; allows for meeting competition defense; allows for differences in grade, quality, transportation and cost.</td>
</tr>
<tr>
<td>California</td>
<td>Cal. Bus. &amp; Prof. Code §§ 17040-17041 (West 1997)</td>
<td>Prohibits locality discrimination with intent to destroy competition of regularly established dealer or prevent competition of any regularly established dealer; also allows meeting competition defense; allows for differences in grade, quality, transportation and cost.</td>
</tr>
</tbody>
</table>

### KEY CASES

- Concrete, Inc. v. Arkola Sand and Gravel Co., 322 S.W.2d 452 (Ark. 1959) (valid exercise of police power)
<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Key Cases and Rulings</th>
</tr>
</thead>
</table>

Key Provisions:
- Colorado's statute includes prohibition of transportation, including prohibition of differential in price for good faith prevention of competition; also allows for certain public utilities; allows for meeting certain public utilities; excludes prohibited localities, discrimination with respect to discrimination where.
- Connecticut's case made upon proof or discrimination meaning competition defense; prima facie discrimination; also allows for good faith prevention of competition; allows for cost differential, in good faith.

Special Rules:
- Act must be intentional.
<table>
<thead>
<tr>
<th>State</th>
<th>Key</th>
<th>Key Provisions and Rulings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>(1993) HAW. REV. STAT. § 481.1</td>
<td>Prohibits local price differentials; prevents destruction of or prevention of price discrimination with intent to</td>
</tr>
<tr>
<td>Florida</td>
<td>540.01 (West 1997) FLA. STAT. ANN. §</td>
<td>Competition; allows for cost differentials and good faith meeting of price discrimination with intent to</td>
</tr>
<tr>
<td>Delaware</td>
<td>2504 (1993) DEL. CODE ANN. tit. 6, §</td>
<td>Penalties; competition; criminal</td>
</tr>
</tbody>
</table>

Key: None

Prohibits local price discrimination with intent to prevent competition.
<table>
<thead>
<tr>
<th><strong>STATE</strong></th>
<th>CITY</th>
<th>KEY PROVISIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho</td>
<td></td>
<td>Price discrimination; prima facie case made for cost differentials; good faith competitive distinction, where discrimination for the purpose of depressing a competitive advantage is justified.</td>
</tr>
<tr>
<td>Iowa</td>
<td></td>
<td>Defense plaintiff, defense competition cost differential; monopoly; due allowance for purpose of destroying a competitive advantage for the purpose of depressing a competitive advantage.</td>
</tr>
<tr>
<td>Kansas</td>
<td></td>
<td>Price discrimination prohibited locally and statewide.</td>
</tr>
</tbody>
</table>

**Specified Provisions**

- Specified private cause of action.
- Penalizes available; no equalization: criminal.
- Allows transportation cost to destroy competition with inherent price discrimination locally.

**Key Cases**

- Case: *Des Moines, Des Moines v. Safelite Glass*.
- *Case*: *N.W. 329 Iowa 1975*.
- *Case*: *Wagner v. Des Moines, Inc.*
- *Case*: *Des Moines, Inc. v. Wagner*.
- *Case*: *262 Iowa Code Ann. § 551.1*.
- *Case*: *N. 311 F. Supp. 477 (W.D. Iowa 1975)*.
- *Case*: *Des Moines, Inc. v. Wagner*.
- *Case*: *N. 311 F. Supp. 477 (W.D. Iowa 1975)*.
<table>
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<tr>
<th>Louisiana</th>
<th>Kentucky</th>
<th>State Code</th>
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<tr>
<td>1999</td>
<td>1996</td>
<td>KY. REV. STAT. ANN. § 365.320 (Michie)</td>
</tr>
</tbody>
</table>

**KEY PROVISIONS**

- Lower cost sale; criminal penalties available.
- Rebates differentials; prohibition includes special competition; due allowance for cost; intent to injure or destroy the business of a competitor; locale price discrimination with intent to injure or prevent.

**CASES AND RULINGS**

- None

**KEY**

- 1941 (Uniform Trade Practices Act)
- 1949 (Ky. Dep. of Consumer Protection)
<table>
<thead>
<tr>
<th>MINNESOTA</th>
<th>MARYLAND</th>
<th>STATE</th>
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</thead>
</table>


**Statute**

- **Criminal remedies available for cost differentials; good faith, defense, adverse possession, anti-monopoly, unfair competition; reduction of lessened monopoly to create a competitive market**

**Provisions**

- Prohibits price discrimination where the effect is to substantially lessen competition.
- Prohibits price discrimination with intent to destroy competition, or price discrimination that is predatory, with intent to destroy or substantially lessen competition.

**Key Cases and Rulings**

- None

**Key**

- "Efficient" seller; § 325D.01 only requires that industry is directed at retailers, wholesalers, and manufacturers and distributors while § 325D.04 is directed at producers.
- Available §§ 325D.03 is directed at producers.
- Good faith, defense, competition defense, defense competition, defense competition.
- Prohibits local price discrimination with intent to destroy competition or substantially lessen competition.
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<tbody>
<tr>
<td>Key</td>
<td>Montana Code Ann. §§ 39-1.4-207, 30-1.4-901</td>
<td>Miss. Code Ann. § 75-21-3 (1991 A)</td>
</tr>
</tbody>
</table>
| Key   | Differentials due to monopoly, injure or destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially lessen competition or create a monopoly, or injure, destroy, or prevent competition; substantially less
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<tr>
<th>New Mexico</th>
<th>Nebraska</th>
<th>State</th>
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a defense; civil remedies available against differentials; criminal penalties. Prima facie case upon proof of price discrimination with intent to destroy competition or substantially lessen competition, create a monopoly, or injure, eliminate a competitor; prohibits local price. Prohibits price discrimination between different

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<tr>
<th>State Cite</th>
<th>State Statute</th>
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The business of a competitor; due allowance for cost differentials; the effect is to substantially less competition or substantially injure, eliminate a competitor; prohibits local price. Prohibits price discrimination between different.

<table>
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<tr>
<th>Key Provisions</th>
<th>Key Cases</th>
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question of fact. plan was adopted with requisite intent is Jay Walton Enterprises v. Rio Grande Oil, 738

None

AND RULES
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<thead>
<tr>
<th>North Dakota</th>
<th>North Carolina</th>
<th>State</th>
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Civil remedies not specified
differentials, criminal penalties available;
a competitor's allowance for cost
the purpose of destroying the business of
prohibits locally price discrimination for
prohibits locally price discrimination with

A view to injuring the business of another

None

<table>
<thead>
<tr>
<th>Key</th>
<th>Key Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provision</td>
<td>Rose v. Vulcan Materials Co., 194 S.E.2d</td>
</tr>
<tr>
<td>Key Cases</td>
<td>221 N.C. 1973</td>
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<tr>
<td>STATE</td>
<td>STATUTE</td>
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<tr>
<td>Oklahoma</td>
<td>OKLA. STAT. ANN. tit. 79 § 81 (West 1995)</td>
</tr>
<tr>
<td>Oregon</td>
<td>OR. REV. STAT. § 646.040 (1997)</td>
</tr>
<tr>
<td>Utah Code Annotated</td>
<td>State</td>
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<tr>
<td>03-5-3 (1996)</td>
<td>S.D. Codified Laws § 37-1-4 (Michie)</td>
</tr>
</tbody>
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<tr>
<th><strong>Wisconsin</strong></th>
<th><strong>Virginia</strong></th>
<th><strong>State</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>WIS. STAT. ANN. § 133.04(West) (1997)</td>
<td>VA. CODE ANN. § 59.1-9.7 (Michie 1998)</td>
<td><strong>STATE</strong></td>
</tr>
<tr>
<td>Remedies available for claims of competition, secret rebates prohibited. The remedies must include injunctive relief to prevent injury or destroy unfair competition and to restore the relationship of the parties to the condition which existed prior to the violation.</td>
<td>Remedies available for claims of competition, secret rebates prohibited. The remedies must include injunctive relief to prevent injury or destroy unfair competition and to restore the relationship of the parties to the condition which existed prior to the violation.</td>
<td><strong>PROVISIONS</strong></td>
</tr>
<tr>
<td><strong>KEY</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prohibits price discrimination among different purchasers where effect is to substantially lessen competition.</td>
<td>Prohibits price discrimination among different purchasers where effect is to substantially lessen competition.</td>
<td><strong>KEY CASES</strong></td>
</tr>
<tr>
<td><strong>State</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State enforcement of competition law in accordance with state and federal law.</td>
<td>State enforcement of competition law in accordance with state and federal law.</td>
<td><strong>KEY CASES</strong></td>
</tr>
<tr>
<td>JV. v. Landis, 384 N.W.2d 719 (Wis.)</td>
<td>JV. v. Landis, 384 N.W.2d 719 (Wis.)</td>
<td><strong>Key Cases</strong></td>
</tr>
<tr>
<td>STATE</td>
<td>STATUTE CITE</td>
<td>KEY PROVISIONS</td>
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<td>-------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Wyoming</td>
<td>WYO. STAT. ANN. § 40-4-101, 40-4-106 (Michie 1997)</td>
<td>Prohibits locality price discrimination with intent to destroy competition or gain unjust and unreasonable profits; prohibition includes special rebates</td>
</tr>
</tbody>
</table>
A SEAMLESS WEB OF CONFUSION:  
THE SIXTH CIRCUIT OBFUSCATES THE LAW IN APPLYING  
TRADEMARK PRINCIPLES TO INTERNET DOMAIN NAME  
CONFLICTS IN THE OPINION OF DATA CONCEPTS INC. V.  
DIGITAL CONSULTING INC.  

by Robin W. Foster  

INTRODUCTION  

Not so long ago marketing a product for public consumption in the free market economy of the United States meant creating effective advertising for print media, radio and television promotional spots; and then selling the product through traditional channels of distribution.\(^1\) In an ever diligent battle to garner market share, sellers of new and innovative products relied on these traditional channels to market their products to the consuming public. Within the context of these traditional marketing techniques, a body of law has evolved for sellers to protect their valuable intellectual property assets: patent, copyright and trademark infringement actions have been developed to protect a party's often intangible, yet very real and valuable inventions, artistic works, and identification marks.\(^2\)  

Near the end of the twentieth century, however, the dawn of the Internet dramatically changed the landscape upon which marketers of consumable goods and services promote their products.\(^3\) While the technological innovations of the Internet have expanded the resources available for marketing and selling goods and services, they also have brought a concomitant infusion of legal disputes for which traditional

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1. See generally Special Issue: Welcome to Cyberspace, TIME MAGAZINE, Spring 1995.  
2. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 3:1 (4th ed. 1998). The Patent Act, The Copyright Act and The Lanham Act (also referred to as The Trademark Act) were enacted by Congress pursuant to its constitutional power to regulate interstate commerce. A similar cause of action is available in most states for trademarks used in intrastate commerce; these state law claims derive from either the common law or a state statute similar to the federal models. Id. § 5:3, at 5-6.  
3. See Welcome to Cyberspace, supra note 1.
protection remedies are inadequate.\(^4\)

In an important recent decision, \textit{Data Concepts, Inc. v. Digital Consulting, Inc.},\(^5\) the Sixth Circuit employed traditional trademark “tacking”\(^6\) and “likelihood of confusion”\(^7\) analysis to attempt a reconciliation of two areas of law in serious conflict. This decision is particularly significant because to date the Supreme Court has not yet addressed the problematic area of legal conflict between priority registration of an Internet address on the one hand, and traditional trademark jurisprudence on the other; and the federal district courts and circuit courts of appeal have failed to establish a uniform rule of law.\(^8\)

The purpose of this note is to explore the Sixth Circuit’s analysis of the conflicting legal interests arising between the “first in time, first in right” registration policy of Network Solutions, Inc. (NSI), which is the organization in charge of registering Internet addresses in the United States,\(^9\) and the “priority of use” policy upon which traditional trademark protections\(^10\) are founded.

\(^5\) 150 F.3d 620 (6th Cir. 1998) (applying Tennessee law).
\(^6\) Id. at 623-24.
\(^7\) Id. at 624.
\(^8\) See \textit{Reno v. ACLU}, 521 U.S. 844 (1997). This opinion represents the most comprehensive treatment of Internet regulation to date by the Supreme Court. \textit{Reno} involved a charge of constitutional overbreadth by recent enactment of the Communications Decency Act (CDA). The CDA was a governmental attempt to regulate obscene or indecent communications on the Internet. In striking down the CDA, the Court commented on the troublesome nature of Internet regulation. However it failed to address specifically the constitutionality of NSI regulation of domain names, or the superiority of trademark infringement claims arising thereunder. \textit{Id}.
\(^9\) In 1993 the National Science Foundation (NSF) created the Network Information Center (InterNIC) to provide oversight of the developing Internet technology. The NSF then contracted with NSI Inc., a private corporation, to run InterNIC Registration Services, to provide registration services for all commercial Internet addresses in the United States. See Glenn R. Simpson and John Simons, \textit{Little Internet Firm Stirs Big Debate in Washington}, \textit{WALL ST. J.}, Oct. 8, 1998, at A6. For a historical account, see Kenneth Sutherlin Dueker, \textit{Trademark Law Lost In Cyberspace: Trademark Protection For Internet Addresses}, HARV. J.L. & TECH. 483, 492 (1996).
\(^10\) In 1996 Congress adopted an amendment to The Lanham Act which provides a federal claim for dilution of a “famous” mark. \textit{See} 15 U.S.C. § 1117 (1996). Unlike in a traditional trademark infringement claim, a dilution claimant is not required to prove a “likelihood of confusion.” Since the Court in \textit{Data Concepts} was not concerned with a “famous mark,” this Casenote does not treat the topic of dilution claims in any significant depth. For a more thorough analysis of dilution claims, see Michael B. Landau, \textit{Problems Arising Out of the Use of “WWW.Trademark.com”: The Application of
Section II of this note outlines the historical backdrop of domain name disputes giving rise to the Data Concepts decision, and explains the particular facts before the court in that case. Section III outlines the court’s holding in Data Concepts. Section IV analyzes the court’s reasoning in the case, and points out some serious shortcomings in the tests set forth in the court’s opinion. Section V concludes with the observation that the present tests used by courts in most jurisdictions, including the Sixth Circuit’s holding in the Data Concepts opinion, are inadequate in providing practitioners and Internet marketers with a clearly discernible standard of permissible conduct.

BACKGROUND

A. A Brief History Of The Conflict Between Traditional Trademark Remedies And NSI’s “First-Come/First-Served” Policy For Registration Of Domain Names

1. The Legal Landscape

The Lanham Act was adopted by Congress to create a federal cause of action for infringement on trademarks, defined as any “word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”11 A protectable trademark can arise either from registration with the federal Patent and Trademark Office (USPTO),12 or from a history of use.13 The policy underlying the creation of trademark infringement claims was that senior users of marks used in association with the sale of their products should be able to

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13. See 15 U.S.C. § 1125 (1996). A “history of use” mark may require an additional showing that the mark is “inherently distinctive” (also known as a “technical trademark” at common law) or that it has “acquired secondary meaning.” See McCARTHY, supra note 2, § 4:4. See also Accuride Int’l, Inc. v. Accuride Corp., 871 F.2d 341 (9th Cir. 1989).
exercise a property right in those marks, such that others may not exploit
the marks in a manner that confuses the consumer to the detriment of the
public or the trademark owner. Thus, a trademark owner has come to
be understood as owning a legally cognizable property right to exclude
others from use of certain protected marks.

However, these protection remedies are limited to those
circumstances where the alleged improper use of a trademark either:
confuses the consuming public and results in a detriment to the
trademark owner; creates unfair competition for the senior user; or
results in a dilution or diminution in the value or quality of a famous
mark.

With the advent of the Internet and the World Wide Web,
traditional modes of marketing goods and services changed
dramatically. Created in 1969, the Internet evolved from a U.S.
Department of Defense organization, the Advanced Research Project
Agency, which developed a project called ARPANET to facilitate shared
research and communications across a diversified, decentralized network
of computers, so that an attack on strategic military communication
centers would not cripple the military's strategic capabilities. Since its
militaristic inception, the Internet has grown into a vast and largely
unregulated network of millions of interconnected computers worldwide,
used as a resource for the marketing, research, and communication needs
of individuals in every nation across the globe. The evolution of such a
powerful tool necessarily created a whole new consumer marketplace:
today the Internet has become the fastest growing, and often the least
expensive, method for companies to market their products.

Along with the unabated success of the Internet, however, has
come a whole new range of legal issues. Whereas trademark
infringement, trademark dilution and unfair competition claims were

14. See McCarthy, supra note 2, § 2:8, at 2-15 to 2-16.
15. Id. § 2:14, at 2-29.
17. See generally Welcome to Cyberspace, supra note 1.
19. See Barbara Kantrowitz & Adam Rogers, The Birth of the Internet, Newsweek,
    Aug. 8, 1994, at 56.
20. See generally Welcome to Cyberspace, supra note 1.
23. Id. See also McCarthy, supra note 2, § 3.01. A claim for "unfair competition"
sufficient to protect intellectual property assets in a more traditional forum, on the Internet commerce flows electronically at previously incomprehensible speeds, through web addresses, homepages and Internet sites. The Internet’s inherent propensity to resist regulation, and the speed with which parties can enter and exit markets that were traditionally characterized by high entrance barriers, has created significant challenges to the existing system of legal remedies for owners of intellectual property assets.

When the U.S. government began to realize the significance of the rapid growth of the Internet, a decision was made to implement some regulatory devices to facilitate a smooth and fair system of use. As a result, the U.S. National Science Foundation ultimately contracted with three companies to oversee the development and expansion of Internet technologies. One of these companies, NSI, was given the sole authority and responsibility for registering Internet addresses, also called “domain names,” in the United States.

2. The “How To” Of Creating A Domain Name

An Internet Web site is created by the use of a numeric code, called an “Internet Protocol” address (IP), which is assigned to a given computer user, and used to identify and direct the electronic program commands through which a computer accesses information on the Internet. In the United States users may register “domain names,” an alphanumeric code chosen by the user and assigned to their IP address.

often is framed as a state statutory or common law claim added onto a related federal Lanham Act claim. Id.


25. Id.

26. Id.

27. AT&T was responsible for directory services, General Atomics was responsible for information services, and Network Solutions Inc. was responsible for registration of domain names. Id. See also Simpson and Simons, supra note 9, at A6.


30. Id. Registering a domain name with NSI is a simple process: the registrant must fill out a form (which can be found online at the Internet address <www.networksolutions.com>), specify a previously unregistered name of not more than twenty alphanumeric characters, and pay a fee of $70. A registrant can confirm the
In its raw, numeric state an IP address is comprised of "a sequence of thirty-two bit numbers broken into four groups" separated by periods or "dots." A typical address in its numeric form might look like this: 131.96.1.18. Since the use of randomly assigned numbers was not deemed user friendly, NSI developed a system allowing alphanumeric domain names to be assigned to the corresponding thirty two bit IP address. Because the use of an alphanumeric domain name allows the user to choose a name that suits its needs, this method of registration is ideal for companies who wish to use the Internet to market their products.

Thus, for example, a domain name might be the name of a company, a significant term or product name, or even a proper name or title. All that is required to create a domain name is a search of the NSI database to insure that the name is not already in use by a prior registrant, and assuming it is not, a proper registration of the chosen domain name with NSI.

To facilitate registration by type of registrant, NSI was given sole authority to register all domain names ending in the suffix ".com", ".edu", ".org", ".gov", and ".net" (indicating, respectively, a commercial user; an educational institution; an organization, usually non-profit; a governmental entity or agency; or a network or provider). This portion of the domain name is referred to as the first level domain. A second level domain is the information immediately preceding the "dot" to the left: for example, in the address "espn.com", the domain name for a well known sports news television network, "espn" is the second level.

availability of a desired name by checking NSI’s database found at <www.networksolutions.com/cgi-bin/whois/whois>. Conversely, to check if a domain name has been registered as a trademark with the USPTO, a registrant can contact: <www.uspto.gov/web/uspto/info/domain.html>. Id.

32. See Landau, supra note 10, at 461.
33. Id.
34. Id.
35. A common technique is for a company to use its name plus the suffix identifying its nature or primary purpose (e.g., " .com" = a commercial entity) as its Internet address. Thus, for example, IBM Corporation uses the domain name "ibm.com." See Cardservice International, Inc. v. McGee, 950 F. Supp. 737, 741 (E.D. Va. 1997).
36. See supra note 30 and accompanying text.
37. See Landau, supra note 10, at 462. See also Simpson and Simons, supra note 9, at A6.
domain, while "com" is the first level domain. A similar analysis applies for third, fourth, or higher domain levels.\(^{38}\)

3. The Conflict Between Traditional Trademark Protections and the NSI Policy

Domain names have been compared to the use of a street address by the United States Postal Service.\(^{39}\) However, a difficulty sometimes arises because, unlike a street address which might serve as the home of more than one business or individual, no specific domain name, once registered, can serve more than its single registered owner.\(^{40}\)

Thus, for example, the name "Eagle" has been registered as a trademark to identify products as diverse as condensed milk and pencils as well as three hundred other uses.\(^{41}\) Because this use of the identical term "Eagle" in multiple capacities does not generate a "likelihood of confusion" in the mind of the buying public, the USPTO properly allows the term to be used as a trademark for both the condensed milk and the pencil manufacturer.\(^{42}\) Hence, the hallmark of trademark analysis is the likelihood of confusion: two or more federally registered marks can exist concurrently and peaceably without trademark infringement so long as there is no "likelihood of confusion" of the products by the public.\(^{43}\)

In contrast, under the technological restrictions inherent in assigning domain names, only one party can select the Internet address "eagle.com."\(^{44}\) Under the NSI Domain Name Policy the general rule is "first-come/first-served."\(^{45}\) Within this framework, the first to register

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38. Id.
40. Compare this to the Lanham Act, which specifies that more than one trademark owner can concurrently own an identical trademark or name so long as each mark pertains to a different product or service that will not confuse the consumer. Likewise, similar marks are permissible if used in distinct geographic markets. See 15 U.S.C. § 1052(d) (1996).
42. Id.
43. See McCARTHY, supra note 2, § 7:17.1, at 23-6 to 23-8.
44. See Hale, supra note 41, at 416.
45. A copy of this policy is available on the Internet at the following address: <ftp://rs.internic.net/policy/internic.domain.policy>. 
“eagle.com” as an Internet address with NSI46 is entitled to use of the name, to the exclusion of all other potential users, without regard to any equitable claims that an aggrieved party might assert.47

Intuitively, this inherent restriction in assignability of domain names necessarily results in some interesting and problematic disputes.48 These controversies range from humorous squabbles49 to highly contentious, heated exchanges.50

Because most companies that choose to conduct marketing or sales activity over the Internet prefer to use their corporate name or an identifiable trademark as the second level of a domain name, inevitable disputes arise regarding who is entitled to the address: does it belong to a prior registrant with NSI, or to a party holding a validly registered trademark? The Supreme Court has not yet addressed the issue specifically,51 and the various federal district courts and circuit courts of appeal have handed down disparate and sometimes irreconcilable holdings.52

46. See Hale, supra note 41, at 416. Where domain name disputes arise between two parties that have both registered the infringing mark with the USPTO for dissimilar uses, the first to register the domain name with NSI prevails. Id.

47. Id. A similar analysis applies to many other commonly used terms. For example, the term “United” has been used to refer to a national moving company (United Van Lines), and also has been used to identify a national airline (United Airlines). Id.

48. Id. One interesting development has been the evolution of “cybersquatters,” parties who register as a domain name the name of a famous company or product with the hope of selling the domain to the company at a later time for a large profit. See also Panavision International, L.P. v. Toeppen, 945 F. Supp. 1296 (C.D. Cal. 1996).

49. Many humorous anecdotes are set forth in Friedman & Siebert, supra note 29, at 645-7. In one instance Stanley Kaplan Co., the large test preparation firm, fell victim to the prank of its much smaller rival, Princeton Review, when Princeton Review registered the domain name “kaplan.com.” Princeton created a web site at the address, which immediately notified browsers that they had in fact reached a Princeton Review site and invited browsers to compare the services offered by the two companies and register complaints about Kaplan. When Kaplan learned of the site and threatened suit, Princeton offered to sell the “kaplan.com” address for a case of beer! A similar incident occurred when a writer for Wired magazine registered the address “mcdonalds.com” and demanded a $3,600 donation to a New York City high school to purchase computer equipment and an Internet connection in exchange for surrender of the address. Id. Even software giant Microsoft Corporation has not been not immune to pranksters: one clever user registered the name “microsoft.com” (substituting a zero for the “o” in “soft”); while a Utah graduate student obtained the name “windows95.com.” Id.

50. For a highly contentious example, see MTV Networks, Inc. v. Curry, 867 F. Supp. 202, 204 (S.D.N.Y. 1994).

51. See supra note 8 and accompanying text.

52. For a comparison of the disparate holdings of the various district courts and circuit

Data Concepts Inc. (Data) is a Tennessee corporation that provides performance software for data management and process control.\(^54\) In 1982 Data began using the stylized mark comprised of the letters “d” “c” and “i” in lower case (dci).\(^55\) The “dci” mark was used on corporate stationary, sales brochures and other corporate literature.\(^56\) In 1993 Data began to transact business over the Internet, and at that time it registered the Internet address “DCI.COM” with NSI.\(^57\)

Digital Consulting Inc. (Digital) is a Massachusetts corporation that provides consulting and training related to database management, software development, computer networks, mobile computing, and Internet technologies.\(^58\) In 1987 Digital obtained a federal trademark registration for the mark “DCI” in capital letters. Digital also conducts business on the Internet: it uses the address “DCIEXPO.COM.”\(^59\) Prior to the dispute over the DCI.COM Internet address, neither Digital nor Data had any interaction with each other.\(^60\)

In April, 1996, Data received a letter from NSI stating that Digital had complained about Data’s use of the Internet address DCI.COM because Data’s use of this address allegedly infringed on Digital’s registered federal trademark “DCI.”\(^61\) The NSI letter outlined

\(^{53}\) 150 F.3d 620 (6th Cir. 1998).
\(^{54}\) Id. at 622.
\(^{55}\) Id.
\(^{56}\) Id.
\(^{57}\) Id. It is unclear from the court’s holding whether the Internet address was registered using uppercase or lowercase letters. The significance of this distinction is discussed in greater detail under A.1. of the Analysis section of this note.
\(^{58}\) Id. at 623.
\(^{59}\) Id.
\(^{60}\) Id.
\(^{61}\) Id.
the NSI Domain Name Dispute Policy and offered Data three options: 1) it could retain the DCI.COM address if it could provide to NSI a copy of a valid federally registered trademark that was the same as the domain name; 2) it could relinquish the DCI.COM address to Digital and get a new one; or 3) the address DCI.COM could be placed on hold so that no one could use it until the dispute was resolved.

Data instead filed suit to enjoin NSI from reassigning to Digital the DCI.COM address; and it sought a declaratory judgment that its Internet address was its unregistered trademark. Data also argued that use of this unregistered mark was not trademark infringement on the “DCI” mark owned by Digital. Digital counterclaimed, and sought an injunction to prevent Data from using the DCI.COM address, arguing that Data’s use of the Internet address was infringement within the contemplation §32 and §43(a) of The Lanham Act, and §47-25-512 of the Tenn. Code Ann. Both parties moved for summary judgment on their respective claims.

The District Court for the Middle District of Tennessee denied Data’s summary judgment motion, ruling that Data’s prior use of the stylized mark consisting of the letters “dci” allegedly in lower case was not an unregistered trademark equivalent to the “DCI.COM” Internet address. The district court also granted the summary judgment motion for Digital Consulting, holding that there was infringement. The Sixth Circuit affirmed the denial of Data’s summary judgment motion, but reversed the grant of Digital Consulting’s summary judgment motion, holding that material issues of fact exist regarding Digital’s counterclaim for trademark infringement.

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62. The present version of this policy, as amended, was adopted by NSI effective February 25, 1998. The full text of the policy is available on the Internet at: <ftp://rs.internic.net/policy/internic.domain.policy>.

63. See Data Concepts, 150 F.3d at 623. The domain name “dci.com” is presently in use by Digital Consulting Inc., but the administrator of the site reports that ownership is still in dispute.

64. Id. at 622.

65. Id.


67. Id.

68. Id. at 623.

69. Id.

70. Id. at 627.
THE HOLDING OF DATA CONCEPTS, INC. V. DIGITAL CONSULTING, INC.\textsuperscript{71}

The Sixth Circuit attempted to resolve the dispute by engaging in a two part analysis: first, the court determined that Data was not a "senior user" of the DCI mark relative to Digital;\textsuperscript{72} and second, upon a finding of clear error, the court remanded to the district court after clarifying and enumerating the "likelihood of confusion" test, a mixed question of law and fact to be determined through consideration of eight factors.\textsuperscript{73} In so ruling, the court held that granting Digital's summary judgment motion based on a finding that "a likelihood of confusion exists as a matter of law" was error: rather, the court held, "a triable issue of fact exists on the issue."\textsuperscript{74}

A. Data's Senior User Claim: May Unregistered Prior Use Be "Tacked"?

Data claimed to be entitled to continue its use of the DCI.COM address because its use of the lower case stylized letters "d" "c" and "i" (dci) beginning in 1982 was a "legal equivalent" of its 1993 registration of the Internet address DCI.COM.\textsuperscript{75} The court rejected this argument, noting that Data is entitled to "tack" its use of the stylized mark "dci" only if that mark is "the legal equivalent of the mark in question (DCI.COM) or is indistinguishable therefrom."\textsuperscript{76}

In holding that the two marks are distinguishable, and thus not legal equivalents, the court cited two examples of similar names for which legal equivalence was held not to exist.\textsuperscript{77} The first involved the slogans "CLOTHES THAT WORK" and "CLOTHES THAT WORK FOR THE WORK YOU DO."\textsuperscript{78} The second involved the marks "Pro-

\textsuperscript{71} 150 F.3d 620.
\textsuperscript{72} Id. at 623-4.
\textsuperscript{73} Id. at 624 (citing Frisch's Restaurants, Inc. v. Elby's Big Boy, 670 F.2d 642, 648 (6th Cir. 1982)).
\textsuperscript{74} Id. at 627.
\textsuperscript{75} Id. at 623. The issue of whether capitalization affects a finding of legal equivalence is discussed in greater depth under A.1. of the Analysis section of this note.
\textsuperscript{76} Id. (citing Van Dyne-Crotty, Inc. v. Wear-Guard Corp., 926 F.2d 1156, 1159 (Fed. Cir. 1991)).
\textsuperscript{77} Id. at 624.
\textsuperscript{78} Id. at 624 (citing Van Dyne-Crotty, Inc. v. Wear-Guard Corp., 926 F.2d 1156, 1159 (Fed. Cir. 1991)).
Cuts” and “Pro-Kut.” 79

The court explained that the question of whether two marks are legal equivalents is a question of law. 80 In construing the legal equivalence of similar marks strictly, the court explained that “the marks sought to be tacked ‘must create the same continuing commercial impression,’” and that “tacking should be permitted ‘only in rare circumstances.’” 81 Concluding that the marks “dci” and DCI.COM were not indicative of such a rare case, the court held that they were not legal equivalents. 82 As such, Data could not “tack” its use of the mark “dci” from 1982 to 1993 to its use of DCI.COM beginning in 1993. Since Digital registered the mark “DCI” in 1987, the court held that Data was not a senior user.

B. Whether A “Likelihood Of Confusion” Exists -- The Eight Factors To Be Weighed

In the second part of its opinion, the court analyzed in detail eight factors to be considered in determining whether a “likelihood of confusion” exists. These eight factors are as follows: 1) the strength of the plaintiff’s mark; 2) the relatedness of the goods or services; 3) the similarity of the marks; 4) evidence of actual confusion; 5) the marketing channels used; 6) the likely degree of purchaser care; 7) the defendant’s intent in selecting the mark; and 8) the likelihood of expansion of the product lines. 83

The majority then explained that the determination of whether a “likelihood of confusion” exists, viewed in relation to these eight factors, is a mixed question of law and fact. 84 The court wrote: “If the facts relevant to the applicable factors are contested, factual findings must be made with respect to each of these factors and these findings are [then] subject to review for clear error.” 85 The opinion then reviewed the

79. Id. (citing Pro-Cuts v. Schilz-Price Enters., Inc., 27 U.S.P.Q.2d 1224 (T.T.A.B. 1993)).
80. Id. at 623.
81. Id. (citing Van Dyne-Crotty, Inc. v. Wear-Guard Corp., 926 F.2d 1156, 1160 (Fed. Cir. 1991)).
82. Id.
83. Id. at 624 (citing Frisch’s Restaurants, Inc. v. Elby’s Big Boy, 670 F.2d 642, 648 (6th Cir. 1982)).
84. Id. (citing Little Caesar Enters., Inc. v. Pizza Caesar, Inc., 834 F.2d 568, 570 (6th Cir. 1987)).
85. Id.
findings of the district court, as adopted from the magistrate judge in his report and recommendation (R & R) to the district court, for clear error.

First, the Sixth Circuit held that the district court committed clear error in holding that the "strength of the mark" factor weighed in favor of a finding of a likelihood of confusion.\textsuperscript{86} The court explained, "a mark that has been registered and uncontested for five years, as Digital's was, is entitled to a presumption that it is a strong mark."\textsuperscript{87} But, if a third party (i.e., Data, or any other company) has also used the mark, such a mark becomes weakened if that use is outside of the context in which the registered mark is normally used.\textsuperscript{88} Upon this rule of law, the court held that the district court erroneously failed to consider "numerous other instances of third-party use of the DCI mark . . . [including] an affidavit from the president of Data that he found over ninety web sites incorporating DCI into their domain names."\textsuperscript{89}

Second, the court found that the district court committed clear error in its factual determination that the services of Data and Digital were "related."\textsuperscript{90} Although both companies are involved in the profession of computer services, Data argued that Digital, unlike Data, is not "involved in the development of software."\textsuperscript{91} In remanding the record for reevaluation, the court drew a distinction on the basis of "evidence in the record indicating that Digital is not involved in software development and that Data is not involved in database systems beyond providing software for them."\textsuperscript{92}

Third, the court ruled that the district court committed clear error by doing nothing more than a side-by-side comparison to evaluate the similarity of the two marks.\textsuperscript{93} In stating its opinion the court held that "a side-by-side comparison 'is not the test' for similarity of marks. Rather . . . the marks 'must be viewed in their entirety and in context . . . a court must determine, in light of what occurs in the marketplace, whether the

\begin{itemize}
\item \textsuperscript{86} Id. at 625.
\item \textsuperscript{87} Id. (citing Wynn Oil Co. v. American Way Serv. Corp., 943 F.2d 595, 600 (6th Cir. 1991)).
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Data Concepts, 150 F.3d at 625 n.2 (listing many examples of third party use of the DCI mark in an Internet address).
\item \textsuperscript{90} Id. The term "related" used in this context is a term of art. Its meaning extends beyond an ordinary definition of "interdependence or connectedness." See WEBSTER'S DICTIONARY 816 (1992).
\item \textsuperscript{91} Data Concepts, 150 F.3d at 625.
\item \textsuperscript{92} Id. at 625-26.
\item \textsuperscript{93} Id. at 626.
\end{itemize}
mark will be confusing to the public when singly presented.\footnote{94} The court then remanded this issue for a more in depth analysis by the lower court.

Fourth, while noting that the lower court had not drawn a conclusion on the evidence of actual confusion factor, and that the record was devoid of evidence on the issue, the court dismissed as meritless Data's contention that a lack of evidence of actual confusion by consumers in the past implied that there was no likelihood of future confusion.\footnote{95} The court explained:

\begin{quote}
[L]ittle time elapsed from the date Data started using the DCI mark as part of its web address and the instigation of this litigation. Thus, there was only a brief period of time during which consumers had the opportunity to be confused by Data's use of this Internet address before the court considered this issue.\footnote{96}
\end{quote}

Fifth, the court rejected the analysis of the degree of purchaser care by the magistrate judge, who found that there was no likelihood of confusion by purchasers of Data's products who may have mistakenly believed that they were buying Digital products and services.\footnote{97} Characterizing this analysis as incomplete, the court explained that the reviewing judge "must inquire into both whether buyers would accidentally purchase [an]other company's product and whether [a] sophisticated purchaser might be confused as to affiliation."\footnote{98}

Thus, in expanding the scope of analysis required for this element, the court held that a reviewing court must consider not only whether a potential buyer visiting the "DCI.COM" web address would mistakenly believe that the site was operated by Digital, and not Data; but it also must consider whether a buyer who properly understood the site to be operated by Data would mistakenly believe that the products advertised there were affiliated with Digital (e.g., a browser might mistakenly believe that Data was a licensed distributor of Digital's

\begin{footnotes}
\footnote{94. \textit{Id.} (citing Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 931 F.2d 1100, 1109 (1991)).}
\footnote{95. \textit{Id.} (citing Wynn Oil Company v. American Way Service Corp., 943 F.2d 595, 601-02 (1991)).}
\footnote{96. \textit{Id.}}
\footnote{97. \textit{See Data Concepts,} 150 F.3d at 626.}
\footnote{98. \textit{Id.} (emphasis added).}
\end{footnotes}
Sixth, the court also rejected the inference of the magistrate judge that Data's failure to investigate whether there were any registered marks using DCI was circumstantial evidence of Data's intent to appropriate Digital's mark for its own advantage. While conceding that intent can be established by circumstantial evidence, the court distinguished between actual notice and constructive, or record, notice. The opinion explains: "[T]he record indicates that Data really was unaware of Digital at the time it decided to use DCI as part of its Internet address. Such evidence usually militates in favor of finding no intent, which weighs against a finding of a likelihood of confusion." On this basis the court found clear error in the findings of the magistrate judge.

Seventh, the court indicated agreement with the magistrate judge that because both Data and Digital were using the Internet for marketing purposes, the marketing channels used factor weighed in favor of a finding of a likelihood of confusion. However, the court gave little or no further analysis to this factor.

Finally, the court indicated agreement with the magistrate judge that on the record presented the likelihood of expansion factor was not of any great relevance. Again, the court gave little further analysis.

ANALYSIS OF THE SIXTH CIRCUIT'S OPINION

A. Legal Equivalence And Tacking

The first part of the court's opinion addressed the issue of whether Data's use of the lowercase stylized letters "dci" and its registered Internet address "DCI.COM" are legal equivalents. A finding that the two marks are legal equivalents would allow Data to "tack" its use of "dci" beginning in 1982 to its registration and use of "DCI.COM" beginning in 1993; and since this antedates Digital's registration of the trademark "DCI" with the USPTO in 1987, Data would be deemed a
senior user of the DCI mark entitled to protection under §43(a) of The Lanham Act.  

Regrettably, the court's analysis of whether the marks "dci" and "DCI.COM" are legal equivalents rests on some questionable reasoning. Specifically, the court failed to establish a clear and discernible rule of law on three specific issues. First, the court did not address the significance of the capitalization form of the two marks in construing legal equivalence. Second, the court cited as controlling precedent two decisions on the issue of legal equivalence, which upon closer analysis are either inapposite, or imply a holding contrary to the one reached by the court. Third, the court failed to address the threshold issue of whether an Internet address, comprised of an otherwise valid trademark plus a domain extension (e.g., "com" or "net"), is itself a proper subject for trademark protection: may domain names also be valid trademarks?

1. Capitalization Form

Conspicuously absent in the court's analysis is any specific language regarding the significance of the capitalization form used by the two marks. If capitalization form is deemed relevant to an inquiry into legal equivalence, a comparison of two marks using differing capitalization forms would provide a dispositive legal rule. Unfortunately, disparate inferences result from the majority's failure to address explicitly the significance of capitalization.

On one hand, in its recitation of the facts the court describes Data's use of the stylized mark, beginning in 1982, as a use of the letters "in lower case." Moreover, in referring to Data's later registration of the Internet address, the reported opinion for the court uses the uppercase form: "DCI.COM." This distinction seems to imply that capitalization

105. See 15 U.S.C. § 1125 (1996). This statute provides protection to unregistered marks in prior use. Id.
106. See Data Concepts, 150 F.3d at 627 (Merritt, J., concurring) (citing McCarthy, supra note 2, §7:17.1).
108. See Data Concepts, 150 F.3d at 622.
109. Id.
110. Id.
may have been a factor in the court’s ultimate finding that the two marks were not legal equivalents.\textsuperscript{111} For example, the court held that a “determination of legal equivalence may be based on ‘the visual or aural appearance of the marks,’” and “tacking should be permitted ‘only in rare circumstances.’”\textsuperscript{112} If the court felt that DCI.COM (uppercase) and dci (lowercase) were not visual equivalents, this alone might be sufficient to support a finding that the two marks were not within scope of the “rare circumstances” necessary to find legal equivalence.\textsuperscript{113}

On the other hand, it is difficult to infer with any certainty an explicit intention by the court to address the capitalization issue. Specifically, two facts weigh in favor of a contrary inference. First, the concurring opinion of Judge Merritt refers to the Internet address in the lower case form: “dci.com.”\textsuperscript{114} Because there is a contradiction between the uppercase form used by the majority opinion, and the lowercase form used in the concurrence, absent an explicit reference to this distinction by the court it seems more likely that this contraindication was merely an oversight.\textsuperscript{115} Additionally, although the majority did use the uppercase form in referring to the Internet address, as a practical matter Internet addresses are rarely capitalization sensitive.\textsuperscript{116}

In summary, while it is difficult to construe the court’s intention since it did not specifically address the significance of the capitalization form used, an inference that the court did not consider capitalization relevant to a finding of legal equivalence is certainly as plausible as a contrary inference. Unfortunately for the practitioner, this shortcoming in the court’s analysis fails to provide a discernible legal standard for future reference and guidance.

\begin{itemize}
  \item 111. \textit{Id.} at 623.
  \item 112. \textit{Id.} (citing Van Dyne-Crotty, Inc. v. Wear-Guard Corp., 926 F.2d 1156, 1160 (Fed. Cir. 1991)).
  \item 113. \textit{Id.}
  \item 114. See \textit{Data Concepts}, 150 F.3d at 627.
  \item 115. See generally McCarthy, supra note 2, § 7:17.1 (explaining, absent an explicit indication otherwise, punctuation in a trademark is given its ordinary contextual meaning). In the context of the Internet, capitalization is not ordinarily a distinguishing feature. See discussion infra note 116.
  \item 116. For example, the author of this note can be reached at the Internet address <Fostermail@aol.com>, or at <FOSTERMAIL@AOL.COM>, or even <fostermail@aol.com>. Any combination of these characters will function correctly without regard to capitalization.
\end{itemize}
2. Precedents Cited By The Court For Construing Legal Equivalence

Another troubling component of the court’s reasoning in holding that the marks “dci” and “DCI.COM” (or “dci.com”) are not legal equivalents as a matter of law is its reliance on the holdings of Van Dyne-Crotty and Pro-Cuts. These two cases, as construed by the majority, stand for the propositions that the issue of legal equivalence is a question of law; that “tacking” on the basis of the legal equivalence of two marks should be granted only in rare circumstances; and that even “confusingly similar marks” are not necessarily legal equivalents -- the test is whether the marks “create the same continuing commercial impression.”\footnote{117. See Van Dyne-Crotty, 926 F.2d at 1159; Pro-Cuts, 27 U.S.P.Q.2d at 1226-27.}

In Van Dyne-Crotty the United States Court of Appeals, Federal Circuit was reviewing a decision handed down by the Trademark Trial and Appeal Board (TTAB).\footnote{118. See Van Dyne-Crotty, 926 F.2d at 1159.} Van Dyne-Crotty, Inc. (hereinafter “VDC”) registered the trademark “CLOTHES THAT WORK” in June of 1986.\footnote{119. Id.} In April of 1987 a competitor in the retail uniform and work clothes market, Wear Guard Corporation (hereinafter “WG”), petitioned for cancellation of VDC’s registration on the theory that the mark was facially similar to a series of its own registered marks (“CLOTHING THAT WORKS,” “CLOTHES THAT WORK HARD” and “CLOTHES THAT WORK OVERTIME”); and these marks antedated VDC’s registration and use of “CLOTHES THAT WORK.”\footnote{120. Id.} In September of 1988 VDC acquired the mark “CLOTHES THAT WORK. FOR THE WORK YOU DO” from another manufacturer in the uniform and work clothes market for consideration of $25,000.00.\footnote{121. Id.} The history of use for this newly acquired mark antedated the use of both VDC’s and WG’s other marks.\footnote{122. Id.}

The Van Dyne-Crotty majority ultimately rejected VDC’s claim that it should be allowed to “tack” its use of “CLOTHES THAT WORK” to its newly acquired “CLOTHES THAT WORK. FOR THE WORK YOU DO” on the grounds that the two were legal equivalents. In so holding, the majority explained that, to allow tacking, the two marks

\footnote{117. See Van Dyne-Crotty, 926 F.2d at 1159; Pro-Cuts, 27 U.S.P.Q.2d at 1226-27.}
\footnote{118. See Van Dyne-Crotty, 926 F.2d at 1159.}
\footnote{119. Id.}
\footnote{120. Id.}
\footnote{121. Id.}
\footnote{122. Id.}
must be "indistinguishable;" and "the consumer should consider both as the same mark." The majority explained that "purchasers would clearly differentiate" the two marks, since the earlier mark was used to identify the products of an entirely distinct manufacturer, with no historical affiliation with VDC.

Citing this holding, the Sixth Circuit in Data Concepts analogized that "dci" and "dci.com" were also not legal equivalents. This reasoning seems suspect. Significantly, the court failed to address the distinguishing factor that unlike in the VDC scenario, Data was the sole user of both marks at all times: the mark to be tacked was not acquired from a separate legal entity. Given this oversight, the precedential value of the Van Dyne-Crotty opinion for the Data Concepts case seems greatly diminished, if indeed the opinion is not entirely inapposite.

In addition, the Data majority failed to distinguish or limit the statement of the Van Dyne-Crotty majority that tacking is permitted "where the two marks, though differing slightly in their literal meaning or grammatical presentation, nevertheless possess the same connotation in context." This statement seems to offer support to a finding of legal equivalence, a result in stark contradiction to the result reached by the Sixth Circuit. Unlike in Van Dyne-Crotty the two marks claimed by Data did not derive from separate businesses; rather, they were always used solely as a marketing and brand identity mark of Data Concepts, Inc. Therefore, Data's use of "dci" as an identification mark on its literature and business stationary, on the one hand, and its use of "dci.com" to identify its Internet address for the same purpose, on the other hand, certainly seems to create the "same continuing commercial impression."

The other case cited as precedent by the Sixth Circuit is Pro-Cuts v. Schilz-Price Enterprises Inc. Upon closer inspection, however, this case seems similarly inapposite. In Pro-Cuts, just as in Van Dyne-

123. Id.
124. Id.
125. See Data Concepts, 150 F.3d at 623.
126. Van Dyne-Crotty, 926 F.2d at 1160 (emphasis added). The Van Dyne-Crotty court offered an illustration of this distinction: the Court allowed tacking of the marks "BLUE BIRD" and "BLUE ROBIN," because they "create substantially the same general impression;" i.e., they both evoke the image of a blue colored bird. Id.
127. See Data Concepts, 150 F.3d at 623.
Crotty, the second mark claimed as a legal equivalent was not one in use by the same party at an earlier time; rather, it was assigned following the acquisition of assets from a competitor. Moreover, each of the two marks, "Pro-Cuts" and "PRO-KUT," was part of a logo design imparting a dramatically different visual image. (In the former mark, a simple shadow-block lettering font, surrounded by an oval outline, was used; while in the latter mark, a "tropical" font, with two illustrated palm trees surrounding the letters, was used.) Because these marks were clearly not intended to "create the same continuing commercial impression," Pro-Cuts, like Van Dyne-Crotty, is not on point; and thus it is similarly unavailing in construing the legal equivalence of the "dci" and "dci.com" marks.

Upon a closer analysis of these two cases cited as precedent, it is difficult to discern a clear legal standard by which the Data Concepts majority arrived at its conclusion that the two marks were, as a matter of law, not legal equivalents. Indeed, when contrast with the factual history of Van Dyne-Crotty and Pro-Cuts, the reasoning of the the Data Concepts majority suggests an undue extension of the more narrow general rule enunciated therein: a finding of legal equivalence is prohibited where the two marks to be tacked do not create the same continuing commercial impression, in part because they derive from separate legal entities. The extension is unjustified, because, unlike in Van Dyne-Crotty and Pro-Cuts, the two Data marks did not derive from distinct predecessors. Given this important distinction, the reasoning of the majority opinion in Data Concepts in relying on these two cases for precedential value is less convincing.

3. A Threshold Question: Can Domain Names Serve As Trademarks?

A third deficiency in the reasoning of the majority opinion is its failure to address the threshold question: Is an Internet address itself a trademark? The import of this preliminary question is readily
manifest, for if an Internet address is not itself a trademark, then there is nothing to “tack” to the mark claimed as a result of prior use.\textsuperscript{135} Hence, legal equivalence cannot save Data’s use of the “dci.com” domain name unless the “dci.com” mark is first found to be a trademark in and of itself.\textsuperscript{136}

In framing this threshold question for the majority, the concurring opinion of Judge Merritt astutely observes: "The question is sometimes asked: ‘Is a domain name a trademark?’ The correct answer is: ‘A domain name can become a trademark if it is used as a trademark.’"\textsuperscript{137} Within this framework, the rule is clear and unequivocal: if the purpose for which a domain name is used indicates that it is intended merely as an address on the Internet, and not as a means of identifying the source of goods and services (i.e., in a marketing capacity), it is not functioning as a trademark.\textsuperscript{138}

While the “purpose of use” analysis implicit in this threshold question is self-evident, the question of who evaluates the purpose of the domain name, and what factors or tests are used to guide this decision, are issues left unaddressed by the majority opinion.\textsuperscript{139} For example, is the purpose for which the domain name is used a fact question, or a question of law? In considering the purpose served by the domain name, what factors should be used to guide this evaluation?

By focusing its analysis solely on the question of legal equivalency to the exclusion of a “purpose of use” analysis, the majority missed an opportunity to address the more fundamental question: Is a domain name capable of use as a trademark; and, if so, under what circumstances does it do so?\textsuperscript{140}

Again, the concurrence of Judge Merritt offers some guidance. Noting that the record in the Data Concepts case was insufficiently developed to support a legal conclusion as a matter of appellate review, Judge Merritt explained: “domain names, like telephone numbers, street

\begin{itemize}
\item of legal equivalence is of no consequence if the later asserted mark, the “dci.com” Internet address, is not properly characterized independently as a trademark. \textit{id.}
\item \textsuperscript{135} \textit{id.}
\item \textsuperscript{136} \textit{id.}
\item \textsuperscript{137} \textit{id.} (citing \textit{McCarthy}, supra note 2, § 7:17.1).
\item \textsuperscript{138} \textit{id.}
\item \textsuperscript{139} \textit{id.} at 623. Because the majority felt that the earlier “dci” mark was not a legal equivalent of the “dci.com” domain name, it did not address the issue of whether the domain name is itself a proper trademark.
\item \textsuperscript{140} \textit{id.} at 627-8.
\end{itemize}
addresses, and radio station call letters, which permit one to locate and communicate with a place or a person, do not, without more, function as trademarks.\footnote{141} Under such a functionalistic approach, the burden on the domain name owner is a high one: a party seeking to claim that its Internet address is also a trademark must show use in a capacity beyond mere use as a tool for communication.\footnote{142} Thus, for example, a domain name used solely to receive and transmit e-mail would likely fail under this heavy burden.\footnote{143}

In contrast to Judge Merritt's suggested approach, other courts have observed that a domain name almost always implies use in a capacity beyond mere use as a communication tool.\footnote{144} Thus, one court observed:

A customer who is unsure about a company's domain name will often guess that the domain name is also the company's name. For this reason, "a domain name mirroring a corporate name may be a valuable corporate asset... [A] domain name is more than a mere Internet address. It also identifies the Internet site to those who reach it, much like a person's name identifies a particular person, or, more relevant to trademark disputes, a company's name identifies a specific company.\footnote{145}

Under this more permissive understanding of the purpose of use of a domain name, the burden of proof for a party claiming that its Internet address is also a trademark is much lower.\footnote{146}

Although the concurring opinion in \textit{Data Concepts} appropriately brought the important "purpose of use" consideration to the attention of the court,\footnote{147} the majority failed to enunciate any legal rule responsive to the issue. Given the confusion surrounding this more fundamental (and often dispositive) issue of whether a domain name also meets the

\footnotesize{\begin{itemize}
\item \footnote{141}{Id. (citing \textit{McCARTHY, supra note 2, § 7:17.1}).}
\item \footnote{142}{See \textit{McCARTHY, supra note 2, § 7:17.1}.}
\item \footnote{143}{Id.}
\item \footnote{144}{See \textit{MTV Networks, Inc. v. Curry}, 867 F. Supp. 202, 204 (S.D.N.Y. 1994).}
\item \footnote{146}{Id.}
\item \footnote{147}{See \textit{Data Concepts}, 150 F.3d 620, 627 (6th Cir. 1998).}
\end{itemize}}
requirements of trademark use, it is disheartening that the Sixth Circuit failed to elucidate a clearly discernible legal standard by which practitioners might be guided in advising their clients. On this point, *Data Concepts* sadly represents a forgone opportunity.

B. *The Eight “Likelihood Of Confusion” Factors*

The second stage of analysis employed by the *Data Concepts* Court involved weighing a series of eight factors used to determine whether there is a likelihood of confusion among consumers who are potential customers of Data Concepts Inc. and Digital Consulting Inc.\(^{148}\)

Proof of a likelihood of confusion is a necessary element of a trademark infringement claim.\(^{149}\) Under this test, if the court finds that a browser who visits the “dci.com” web site is inclined mistakenly to believe that she is visiting a Digital Consulting Inc. site, or if she mistakenly believes that Data is affiliated with Digital for the purpose of marketing Digital’s goods and services, then a likelihood of confusion exists.\(^{150}\)

A similar concern arises in regard to the likelihood of confusion factors\(^{151}\) as was present in the legal equivalence/tacking analysis: the courts have grafted onto the domain name dispute scenario a legal standard which in at least some respects fails to provide the practitioner with a much needed discernible legal standard from which to advise a client. However, unlike in the context of the legal equivalency analysis, where the issue was considered a pure question of law,\(^{152}\) the likelihood of confusion test is a mixed question of law and fact.\(^{153}\) The initial step requires a factual finding on each of the eight factors.\(^{154}\) Once a factual determination has been reached indicating whether each of the factors weighs in favor of or against a likelihood of confusion, the ultimate

\(^{148}\) Id. at 624.

\(^{149}\) See generally McCarthy, supra note 2, § 2:8, at 2-15.

\(^{150}\) See *Data Concepts*, 150 F.3d at 624.

\(^{151}\) The Sixth Circuit has adopted eight factors to be weighed in evaluating the likelihood of confusion. See Frisch’s Restaurants, Inc. v. Elby’s Big Boy, 670 F.2d 642, 648 (6th Cir. 1982). Other circuits have adopted similar tests. See Dr. Seuss Enterprises, LP v. Penguin Books USA, Inc., 109 F.3d 1394, 1404 (9th Cir. 1997); Estee Lauder Inc. v. The Gap, Inc., 108 F.3d 1503, 1510-12 (2d Cir. 1997).

\(^{152}\) See *Data Concepts*, 150 F.3d at 623.


\(^{154}\) Id.
balancing of these fact findings is a question of law. This section will briefly consider some of the issues raised by each of the factors; and will conclude by pointing out some of the unique problems that arise within the context of a domain name dispute, for which this traditional factor-balancing method is ill-suited.

In the *Data Concepts* case, Digital's registered mark “DCI” is entitled to a presumption that it is a strong mark, because it was not contested for the five year period after it was registered with the USPTO. However, where a mark is used beyond the normal scope of use of the mark by third parties, the presumption is weakened. In the Data opinion, the majority correctly points out that the magistrate judge failed to consider evidence offered in the affidavit of Data’s president showing use of the DCI mark by over ninety third parties.

Traditionally, the basis for holding that third party use tends to weaken a mark arose from classification of trademarks into four basic classes: 1) arbitrary and fanciful, 2) suggestive, 3) descriptive, or 4) generic. A mark’s strength decreases in ascending order: arbitrary and fanciful marks are considered very strong and are fully protected; suggestive marks are also very distinctive and therefore are considered strong marks; descriptive marks are weaker and receive protection only under certain conditions; while generic marks are not protected at all.

Since evidence was introduced that over ninety other third parties used the “DCI” mark in their domain names, it can not be considered arbitrary or fanciful (the strongest type of mark). Likewise, it is not a suggestive mark, as the initials DCI do not indicate any characteristic about the products sold by Data and Digital from which a consumer might infer the nature of the business. A reasonable interpretation of the DCI mark is that it is merely generic, and not entitled to trademark protection; however, since the DCI mark also

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155. Id.
156. See *Data Concepts*, 150 F.3d at 625 n.1. See also Wynn Oil Co. v. American Way Serv. Corp., 943 F.2d 595, 600 (6th Cir. 1991).
157. Id.
158. Id.
159. See *Green Products Co. v. Independence Corn By-Products Co.*, 992 F. Supp. 1070, 1075 (N.D. Iowa 1997).
160. Id.
161. See *Data Concepts*, 150 F.3d at 625 n.2.
163. Id.
describes the initials of the two companies, it is arguably a descriptive mark.\textsuperscript{164} For a descriptive mark to receive protection, traditional trademark jurisprudence requires that the mark must have acquired a "secondary meaning."\textsuperscript{165} Although the Data Concepts majority opinion pointed out the necessity of considering evidence of third party use,\textsuperscript{166} it did not indicate whether it felt that "DCI" was a descriptive mark, and if so whether a requirement obtains that the descriptive mark also must have acquired a secondary meaning. This omission by the majority creates an ambiguity concerning whether such a showing is still required in the Sixth Circuit. The Data majority provides no clear answer.

The second factor, relatedness of services, seems from a common sense perspective to favor a finding of a likelihood of confusion. This is true because both companies are in the business of providing consulting and other services related to computer software and databases.\textsuperscript{167} Nonetheless, the majority apparently requires a much more narrow reading of "relatedness."\textsuperscript{168} While this approach is certainly a legitimate one, and within the sound discretion of the court, a practitioner must wonder, is the rule that relatedness should always be construed in a narrow fashion? Or, in the context of a domain name dispute, is this narrow "relatedness" standard limited to companies involved in providing Internet services? Are there guidelines a reviewing court or practitioner should follow in construing "relatedness"? Regrettably, the majority opinion is unresponsive to these lingering questions.

The third factor requires a comparison for similarity of the DCI mark and the dci.com mark. On this count, the court clearly indicates that a side-by-side comparison is instructive, but not sufficient: "A court must determine, in light of what occurs in the marketplace, whether the mark will be confusing to the public when singly presented."\textsuperscript{169} As was true in the tacking context, the issue of capitalization potentially arises: does the uppercase or lowercase form of the mark render it more or less confusing? Sadly, this issue is not addressed by the court.

The fourth factor is fairly straightforward: evidence of past confusion of the two marks tends to favor a finding of a likelihood of

\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} See Data Concepts, 150 F.3d at 625 n.2.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 626.
confusion of the marks. 170 Curiously, the majority opinion, in rebutting Data's claim that a lack of evidence of past confusion implies that there will not be a likelihood of future confusion, states dryly that there was "only a brief time during which consumers had the opportunity to be confused by Data's use of this Internet address before the court considered this issue." 171 This comment seems odd, because in fact Data registered the address in 1993, and the litigation was not initiated until at least April 1996; this leaves a period of roughly three years. Thus, the court's assertion begs the question: if three years is not enough time to expect to find some evidence of confusion by browsers visiting the Data site, mistakenly assuming it to belong to Digital, what period of time is legally adequate?

Alternatively, if the court is using only the time period between Digital's registration of the Internet address "dciexpo.com" and the onset of litigation (a much shorter period), then the analysis is misplaced. Under this assumption, the theory is that a browser would not attempt to visit Digital online until they had knowledge (actual or constructive) that Digital had established an online web site. Yet, consideration of both forms of notice is unavailing.

The opinion in Cardservice International points out the fallacy of the constructive notice argument. 172 [See footnote #35, explaining that many browsers simply assume that a company's Internet address is also its name or initials.] This form of constructive notice (i.e., a browser assuming the Internet address is the same as the company's initials) argues for measuring the time period from the date the address "dci.com" was registered, not the "dciexpo.com" address. This is logically true: the initials of Digital Consulting, Inc. are DCI, not DCIEXPO. As such, it is irrelevant when the dciexpo.com address was registered. A party imputed with constructive notice that Digital Consulting operated a website (i.e., by assuming the website address was also the company's name or initials) would be confused, if at all, at the time she attempted to visit the dci.com address, not the dciexpo.com address.

Moreover, if a browser had actual notice that Digital Consulting, Inc. was operating an online website, the source of this notice (often a sales brochure, company letterhead, or a similar business document)

170. Id.
171. Id.
would identify the address for online browsing as "dciexpo.com.,” not "dci.com.” Again, this form of actual notice rebuts the presumption of a likelihood of confusion. Since both actual and constructive notice interpretations favor measuring the time period during which a likelihood of confusion might occur, if at all, from the registration of the dci.com address, and not the dciexpo.com address, the court’s characterization of this period (roughly three years) as “only a brief time during which consumers had the opportunity to be confused” is troubling.

Regrettably, the court fails to enunciate a more clear standard for what time period would be regarded as legally sufficient to expect to find a likelihood of confusion, or even what criteria to follow in measuring this chronology. This omission is particularly disappointing, because these standards are precisely the kind of bright-line rules that practitioners desperately need.

The fifth factor, degree of purchaser care, elucidates the principal that a court must consider not only whether a visitor to the "dci.com" site might mistakenly believe that it was Digital’s site (and not Data’s site); but also whether a visitor who was aware that the site belonged to Data might nonetheless mistakenly presume that Data was affiliated with Digital. The court’s analysis of this factor is well reasoned and particularly instructive in explaining the full scope of possible confusion among the marks: a reviewing court must look not only at the likelihood of confusion in identifying the owner of a web site, but also at the likelihood of confusion as a result of a mistaken assumption of affiliation. This exacting and thorough level of analysis by the court creates a very clear and helpful standard for practitioners.

The sixth factor, intent in selecting the mark, properly explains that failure of the party registering the domain name to check with the USPTO for possible trademark infringement claims may result in a finding of constructive or record notice; and this notice may become circumstantial evidence of a wrongful intent to appropriate the mark of a registered trademark owner. However, the majority also points out that such circumstantial evidence of a wrongful intent is overcome where there is no showing of bad faith. The ability of a domain name

173. Data Concepts, 150 F.3d at 626.
174. Id.
175. Id. (emphasis added).
176. Id.
177. Id.
registrant to demonstrate that it acted in good faith and without awareness of a possible infringement favors a finding that there was not a likelihood of confusion. The majority, in adopting this analysis, not only provides a bright line rule by which practitioners may be guided, but also favors an equitable outcome. This approach seems both sensible and fair.

The final two factors, marketing channels used and likelihood of expansion, are not significant factors in the context of the Data Concepts litigation. [The court explained that because both Digital and Data use the Internet to market their services, the former factor tends to favor a finding of confusion; however, neither party indicates a relevant concern with expansion, so the latter rates as a neutral factor. Of note, however, the court explained that neither of these factors are substantial enough to affect significantly the likelihood of confusion balancing test.]

When considered in total, these eight factors allow a reviewing court to assess in a thorough and organized fashion the extent to which it is likely that consumers will be confused by the two marks. Of course, if the reviewing court determines that confusion is indeed likely, the normal remedy is to grant the owner of the registered trademark infringement protection, and enjoin the owner of the infringing domain name from using the mark. Regrettably, as the above analysis demonstrates, it is often difficult for a practitioner to predict accurately how a court will resolve the balancing of these factors. This is a disheartening result which, rather than helping to settle an important area of legal conflict, instead actually fosters a greater onslaught of litigation.

CONCLUSION:
THE FUTURE OF TRADEMARK LAW IN DOMAIN NAME DISPUTES

One troubling aspect of the attempt to resolve domain name disputes by reference to the substantive law of trademark infringement and unfair competition is that the test for whether legal equivalence exists and “tacking” of a prior mark is permitted is a subjective one; and the courts have failed to enunciate a clear, discernible standard of review in evaluating the appropriateness of tacking. As a result, practitioners are often guided by little more than an educated guess as to what result the

178. Id.
179. Id.
courts might reach in a particular case. Hence, the intersection between trademark law and domain name registrations that incorporate a trademark remains murky.\textsuperscript{180}

Another troubling aspect of this area of legal conflict is that, because so many variables are in play when the "likelihood of confusion" balancing test is used, and the reviewing court has discretion to assign weight to the factors as it sees fit, even a practitioner who feels confident in predicting the court's outcome on each of a majority of the factors cannot feel a similar confidence in forecasting an ultimate result. As one commentator summarized: "[V]arious attempts at crafting a policy for domain name disputes in a fair and equitable manner have left only a trail of litigation and no solutions."\textsuperscript{181}

Indeed, there are countless decisions on both sides of the ledger to bear witness to the unpredictable state of the current law in the domain name context.\textsuperscript{182} This frustrating circumstance is particularly true in the Sixth Circuit, where factual findings for each "likelihood of confusion" factor are subject to review only for clear error; but the weighing of the factors implies "no mathematical precision," and a judge can assign inordinate weight to any one factor in a given case.\textsuperscript{183}

In summary, it is frustrating from the perspective of practitioners and Internet users that the current approach to resolving domain name disputes is premised on substantive rules of law (i.e., the "tacking" test, and the "likelihood of confusion" test) that were designed to allow for the peaceful coexistence of concurrent users of a trademark, so long as the two users either operate in different geographic markets, or market products or services unlikely to cause confusion.\textsuperscript{184}

In the domain name context, however, sharing a common name

\textsuperscript{180} See Friedman & Siebert, supra note 29, at 661.

\textsuperscript{181} Id.


is a technological impossibility, even if application of trademark legal principles would otherwise permit a shared use. One of the proposed solutions to this inherent tension is embodied in the U.S. Government's Statement of Policy (also called the "White Paper"), which calls for increasing the registrar accreditation process so that NSI, Inc. is forced to compete among other domain name registrars. This view advances the argument that by increasing competition prices will drop while services will be enhanced, thereby relieving some of the strain on the popular " .com" domain extension. Yet, while the benefits of increased competition are clearly not merely illusory, neither are they a cure-all. The availability of more domain registrars certainly has the potential to relieve some of the strain created when two owners of an identical trademark seek to claim the "trademark.com" address for their website; yet, paradoxically, the availability of five or more new domain extensions also gives rise to a potential fivefold increase in trademark infringement litigation. The unenviable conclusion is that the substantive rules of trademark law currently in use in the domain name context fail adequately to protect many parties that they are designed to protect, and the currently proposed solutions fail to resolve this issue.

To solve this larger problem, the law governing domain name disputes must be able to evolve beyond the narrow paradigm of traditional trademark protections. However, no clear replacement standard has yet emerged to offer more predictable and satisfying results. Regrettably, for now, trademark laws are likely to continue in

185. Id.
186. For a summary of the "White Paper" proposal, which became effective 4/25/99, visit <www.intemic.net> online.
187. For a discussion of various proposed solutions, see generally Friedman & Siebert, supra note 29, at 656-61. This article advocates adoption of the recommendation of the IAHC, an international ad-hoc committee of technical and legal experts in the area of Internet technologies. The proposal suggests creation of as many as 150 new first level domains, to be administered by as many as 50 registries. For example, the group CORE (Internet Council Of Registrars) advocates ending NSI's monopoly over internet registrations by instead creating competition, and allowing new registrars to add new suffixes such as " .shop" as alternatives to the traditional " .com" suffix controlled by NSI. See generally Simpson & Simons, supra note 9, at A6.

While this proposal would relieve some of the pressure caused by the limited availability of trademarks used in conjunction with the most popular first level domain, " .com", it fails to address the more fundamental problem: still only one party can own any given domain name. Thus, while a jointly held trademark such as the terms "United" and "Eagle," see supra notes 41-47 and accompanying text, may be available as a domain name to a greater number of potential registrants under the proposed solution
their fractured and unpredictable application to this rapidly evolving and important area of law.

(e.g., "united.com" might be augmented with "united.shop," "united.mall," etc.), the crown jewel is still the most popular and widely used "com" suffix; and creating multiple suffixes cannot resolve the dispute over which user gets this more elite and desirable address.

Moreover, the creation of 150 new first level domains raises the specter of creation of many more infringement claims, rather than reducing the number of claims. A simple example illustrates the point: under the IAHC and CORE proposals there might be as many as 150 domain names registered incorporating the trademark "united" (such as "united.mall", "united.store", "united.shop", etc.). In this scenario, each user is a potential infringer on the others, a prospect that gives rise to potential litigation by multiple users over a single trademark.
"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."  

INTRODUCTION

In 1989, two exceedingly controversial "art" exhibits prompted such a huge public outcry that Congress put limits on the types of art projects funded through the National Endowment for the Arts (NEA).

2. The first exhibit was that of Robert Maplethorpe. The exhibit was called "The Perfect Moment" and included homoerotic photographs. The second exhibit belonged to Andres Serrano and included a photograph of a crucifix immersed in the artist's urine. See National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2172 (1998).
3. NEA funding has remained between $98 million and $99.5 million per year since the 1996 fiscal year. See Peggy McGlone, Arts Backed in Budgets, The Star-Ledger, Feb. 7, 1999, available in 1999 WL 2953390. President Clinton has proposed a significant increase for the NEA to $150 million. Id. However, "[l]obbyists still anticipate future attempts by House conservatives to whittle away at the NEA [funding]." Mary Jo Palumbo, Clinton Challenges America by Proposing 53 Percent Hike for NEA Funds, Boston Herald, Feb. 2, 1999, available in 1999 WL 3389139.
4. Title 20 U.S.C. § 954(d) provides in full that:

   No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that:

   (1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; and

   (2) applications are consistent with the purposes of this section. Such regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded.

In addition to artistic excellence and artistic merit, the NEA must now ensure that grant “applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” The additional “decency and respect” criteria has become a hotly-debated First Amendment issue relating to both the statute’s vagueness and the high potential for viewpoint discrimination. In a 1998 decision, National Endowment for the Arts v. Finley, the United States Supreme Court decided that even with the provision requiring the NEA to screen art, based on “undeniably opaque” standards, so long as the government is “acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe,” thus condoning a vague statute and a form of viewpoint discrimination under the guise of an art patron. Although there were two major issues in Finley implicating First and Fifth Amendment rights, the analysis of this article will focus only on the First Amendment viewpoint discrimination factor.

LEGISLATIVE BACKGROUND

Congress established the NEA in 1965 as part of the National Foundation on the Arts and Humanities “to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent.” The NEA issues grants through its Chairperson and a twenty-six member panel, all appointed by the President of the United

6. Id.
9. Id. at 2179.
10. Id.
11. Id. at 2185 (Souter, J., dissenting).
13. The two constitutional rights implicated in Finley involve vagueness of the statute and viewpoint discrimination. See Finley, 118 S. Ct. 2168, 2171-172.
States with the advice and consent of the United States Senate. Initially, Congress intended to keep artistic interpretation away from the political arena and the influence of government officials and leave the decisions regarding artistic criteria for supportive grants in the hands of the artists and their representative organizations. The Senate report went so far as to include a section called “Freedom of Expression” which stated:

It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression. One of the artist’s and humanist’s great values to society is the mirror of self-examination which they raise so that society can become aware of its shortcomings as well as its strengths . . . . Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age. Therefore, the committee affirms that the intent of this act should be the encouragement of free inquiry and expression . . . . [C]onformity for its own sake is not be encouraged, and . . . no undue preference should be given to any particular style or school of thought or expression.

However, by 1990, after the funding of the two controversial art exhibits, Congress substantially amended the NEA statute by requiring the NEA to consider the “general standards of decency and respect for the diverse beliefs and values of the American public” when granting

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19. NEA funds for the Maplethorpe exhibit were $30,000 while Serrano’s exhibit received $15,000 in NEA funding. See Finley, 118 S. Ct. at 2172.
artistic subsidies. This statutory amendment came after a torturous debate in and among both houses of Congress. Initially, three proposals were considered to address what many were calling “tax-paid obscenity.” The House rejected the Crane Amendment which would have entirely eliminated government funding for the NEA. The second alternative, the Rohrabacher Amendment, prevented grants that “promote, distribute, disseminate, or produce matter that has the purpose or effect of denigrating the beliefs, tenet, or objects of a particular religion.” The Rohrabacher Amendment was rejected in favor of the Williams/Coleman Amendment, which ultimately became the statutory provision at issue, 20 U.S.C. § 954(d)(1).

PROCEDURAL POSTURE

This case began when four performance artists challenged the NEA’s veto of their art projects after the projects had originally received

22. See Finley, 118 S. Ct. at 2173.
25. Id. at 28657-8664.
26. See Finley, 118 S. Ct. at 2173.
27. The full text of 20 U.S.C. § 954(d) is provided in note 4.
28. The four artists were Karen Finley, John Fleck, Holly Hughes, and Tim Miller. Karen Finley sought funding for the show “We Keep Our Victims Ready” which contains three segments. In the second segment of the show, Finley visually recounts a sexual assault by stripping to the waist and smearing chocolate on her breasts and by using profanity to describe the assault. Holly Hughes’ monologue ‘World Without End’ is a somewhat graphic recollection of the artist’s realization of her lesbianism and reminiscence of her mother’s sexuality. John Fleck, in his stage performance ‘Blessed Are All the Little Fishes,’ confronts alcoholism and Catholicism. During the course of the performance, Fleck appears dressed as a mermaid, urinates on the stage and creates an altar out of a toilet bowl by putting a photograph of Jesus Christ on the lid. Tim Miller derives his performance ‘Some Golden States’ from childhood experiences, from his life as a homosexual, and from the constant threat of AIDS. Miller uses vegetables in his performances to represent sexual symbols.
advisory committee approval. These grant applications were based upon controversial political issues including homosexuality, AIDS, and violence against women. Approximately four months after their applications were denied, the “decency and respect” clause was added as a requisite consideration for NEA grants. The lawsuit was amended to challenge the new clause as chilling freedom of speech. The district court rejected the government’s motion to dismiss, discovery was completed, and then pursuant to a settlement agreement, the NEA paid the plaintiffs for their vetoed grants, attorneys fees, and damages. The challenge to the “decency and respect” criteria continued to move through the court system. The district court found that denying an artist’s grant funding based upon past performance and artistic contribution was content discrimination in violation of the First Amendment. In addition, section 954(d)(1) of Title 20 was held to be unconstitutional because the statute was too vague and overbroad and the district court granted summary judgment in favor of the artists. The NEA appealed and at the appellate level, the district court’s decision was affirmed. Although the Ninth Circuit had a split decision, the court concluded that the “decency and respect” clause was void for vagueness and impermissibly restricted the plaintiffs’ First Amendment

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29. *See Finley v. National Endowment for the Arts, 100 F.3d 671, 674 (9th Cir. 1996).*


33. *Id. at *10.*

34. *See Finley, 118 S. Ct. at 2174.*

35. *See Finley, 795 F. Supp. at 1464.*

36. *Id. at 1476.*

37. *See Finley, 118 S. Ct. at 2174.*

38. *See Finley, 100 F.3d at 671.*

39. There was a three judge panel. Judge Browning wrote the opinion of the court and was joined by Judge Ferguson. The strong dissent was written by Judge Kleinfeld. *Id.*
The government had “made no attempt to articulate a compelling interest served by the provision” and thus, section 954(d)(1) could not survive strict scrutiny. In making this decision, the Ninth Circuit relied on two cases for the proposition that the government may not invoke viewpoint discrimination between speakers even if the government is funding the speech. The court firmly rejected an economic scarcity argument as a valid means of viewpoint discrimination. The dissent posed an interesting alternative to ensure that artistic freedom is protected. “The only practical guarantee of artistic freedom is private money . . . . With diverse sources of private money, majority preferences need not affect an artist’s freedom or fortune, because only one or a few patrons or purchases may suffice.” A majority of the Ninth Circuit panel voted to deny the petition for a rehearing and rejected a hearing en banc. The Supreme Court granted certiori.

THE SUPREME COURT’S REASONING

Justice O’Connor wrote the opinion of the Court. The Supreme Court reversed the Ninth Circuit and district court and held that section 954(d)(1) “is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles.” The premise of the Court was that the “decency and respect” provision must be taken into consideration with the aim of “reforming procedures

40. See Finley, 100 F.3d at 683-84.
41. Id. at 683.
42. The two cases relied upon were Regan v. Taxation with Representation, 461 U.S. 540, 545-48 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959); and Hannegan v. Esquire, Inc., 327 U.S. 146, 158-59 (1946)).
43. See Finley, 100 F.3d at 682.
44. The economic scarcity argument is that when there are limited resources available, viewpoint discrimination is an inevitable and expected part of the process of awarding grants and thus, there is no constitutional violation. Id. at 683.
45. Finley, 100 F.3d at 691 (Kleinfeld, dissenting).
46. See Finley, 112 F.3d at 1015.
47. See Finley, 118 S. Ct. at 554.
48. Justice O’Connor was joined by Chief Justice Rehnquist and Justices Stevens, Kennedy and Breyer with Justice Ginsburg joining, except for part II-B of the opinion. See Finley, 118 S. Ct. at 2171.
49. Id. at 2172.
rather than precluding speech." Further, because art and NEA funding has a role in educational programs, factors such as decency can be considered without violating the Constitution.

The Court found solace for suppression of First Amendment rights when the government provides subsidies in a competitive grant allocation process. However the Court magnanimously agreed that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case." The Court concluded that until the criteria is applied in a manner that suppresses disfavored viewpoints, the provision is constitutional.

"The First Amendment certainly has application in the subsidy context . . . the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities."  

The Court decided that choosing to fund a program to encourage certain activities that the government deems to be in the public interest but refusing to fund an alternative program is not a form of viewpoint discrimination. The Court found that section 954(d)(1) "merely adds some imprecise considerations to an already subjective selection process." The Court then proposed that suppression of speech is likely to occur in the grantmaking process. "We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decision-making criteria in order to acquire funding. . . . But when

50. Id. at 2176.
51. Id. at 2177.
52. Id. at 2178.
53. Id.
54. Id. at 2179.
55. Id.
56. Id.
57. Id. at 2180.
58. Id.
the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." The key for the Court was to establish a First Amendment exemption from viewpoint discrimination when the government is acting as an art patron.

According to Justice Scalia, who wrote a concurring opinion, the Court sustained the constitutionality of section 954(d)(1) "by gutting it." Scalia stated that the statute by its very terms "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated" because "the decisionmaker, all else being equal, will favor applications that display decency and respect, and disfavor applications that do not. This unquestionably constitutes viewpoint discrimination." In spite of the viewpoint discrimination, Scalia found the process to be "perfectly constitutional." Scalia posits that this viewpoint discrimination is constitutional because "the government . . . may allocate both competitive and noncompetitive funding ad libitum, insofar as the First Amendment is concerned." Scalia's position, according to Justice Souter's dissent, is that government subsidization of the arts falls within a "zone of activity free from First Amendment restraints."

Justice Souter was the lone dissent. Souter stated that the restrictions turn on the term "decency" and this makes the statute "quintessentially viewpoint based" because "they require discrimination on the basis of conformity with mainstream mores." Souter also found that the government acting as an art patron is a new, third type of government category exempt from First Amendment constraints. Souter claims that this new category "falls embarrassingly on the wrong side of

59. Id. at 2179.
60. Justice Thomas also concurred in the judgment. See Finley, 118 S. Ct. at 2180 (Scalia, J., concurring).
61. Id.
62. Id.
63. Id. at 2181.
64. Id. at 2180.
65. Id. at 2184.
66. Id. at 2190 (Souter, J., dissenting).
67. See Finley, 118 S. Ct. at 2185 (Scalia, J., concurring).
68. See Finley, 118 S. Ct. at 2187 (Souter, J., dissenting).
69. The other two categories are government-as-buyer and government-as-speaker. Id. at 2190.
the line between government-as-buyer or -speaker and government-as-regulator-of-private-speech.”

ANALYSIS

A. The Constitutional Right to Freedom of Speech

1. Historical Analysis

The first ten amendments to the Constitution were added because of fear that the Constitution gave the government too much power at the expense of individual rights. These amendments were sent to the states for adoption in October 1789 and by December of 1791, three-fourths of the states had approved the Bill of Rights which then became a part of the Constitution. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The freedom of speech guaranteed by the Constitution is not an absolute right or freedom. There are three broad categories of speech that receive varying degrees of protection under the Constitution. A few limited categories of speech, such as obscenity, defamation, and fighting words may be

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70. Id.
72. Id. at 24.
73. U.S. CONST. amend I.
74. See, e.g., New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography is a constitutionally proscribable form of speech); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity is not a constitutionally protected form of speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (fighting words are unprotected forms of speech under the First Amendment).
75. These three categories are pure speech (including verbal or written communications), visual speech, and physical conduct. Pure speech has traditionally received the most protection under the First Amendment. Visual speech has been subjected to greater restriction and physical conduct has received the least amount of protection under the First Amendment. See 1 RALPH E. LERNER & JUDITH BRESLER, ART LAW 668 (2d ed. 1998).
regulated consistent with the First Amendment because "of their constitutionally proscriptible content." 76

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem . . . . It has been well observed that such utterances . . . are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 77

The issue then becomes whether art is protected under the First Amendment or whether, like fighting words, defamation and obscenity, art may be circumscribed.

2. Artistic Expression Under the First Amendment

"It goes without saying that artistic expression lies within . . . First Amendment Protection." 78 Throughout history, art has served as "powerful purveyors of political and religious ideas and as portrayers of social commentary and satire." 79 Courts have found that artwork is entitled to the same First Amendment protection as is given to the written word, 80 "works which, taken as a whole, have serious literary, artistic, political, or scientific value." 81 However, the framers did not intend for the arts to be funded by the government.

78. Finley, 118 S. Ct. at 2186 (Souter, J., dissenting).
79. LERNER & BRESLER, supra note 75, at 676.
80. See Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996). New York City had enacted a General Vendors Law, an ordinance barring street artists from selling their art on the streets without a permit. The permit did not apply to vendors of written materials, such as books or magazines. Even though there was a long waiting list for the permits, sometimes taking years for one to be granted, the district court found the statute to be content-neutral and thus, constitutional. The Second Circuit reversed the New York federal district court for abuse of discretion and stated that artwork is entitled to First Amendment protection to the same extent as the written word. id.
During the Constitutional Convention in Philadelphia, as a matter of fact, in 1787, Delegate Charles Pinckney introduced a motion calling for the Federal Government to subsidize the arts in the United States. Although the Founding Fathers were cultured individuals who knew firsthand of various European systems for public arts patronage, they overwhelmingly rejected Pinckney's suggestion because of their belief in limited constitutional government.  

3. The Chilling Effect of Viewpoint Discrimination

The Supreme Court has often linked content and viewpoint discrimination together. "The Court has recognized, for example, that government discrimination against broad categories of expression such as 'political,' 'controversial,' or 'offensive' speech, is often a guise for disagreement with the ideas expressed, or is so close in spirit to viewpoint discrimination that the same strict First Amendment review should apply." This strict First Amendment review is required because viewpoint discrimination has an ominous and chilling effect on freedom of speech. Even though it may be offensive, non-obscene speech is protected by the First Amendment. An attempt to curb an artist's creativity and limit the areas of funded art to those meeting the requisite "decency and respect" criteria in an attempt to limit even offensive speech profoundly and unequivocally implicates First Amendment rights.

One need do nothing more than read the text of the statute to conclude that Congress's purpose in imposing the decency and respect criteria was to prevent the funding of art that conveys an offensive message; the

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84. Id. at 102.
decency and respect provision on its face is quintessentially viewpoint based, and quotations from the Congressional Record merely confirm the obvious legislative purpose.  

Viewpoint discrimination "is an egregious form of content discrimination, and therefore the government must abstain from regulating speech when a specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction."  

In R.A.V. v. City of St. Paul, the Supreme Court struck down an ordinance that stated:

> Whoever places on public or private property a symbol, object appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of misdemeanor.

The Minnesota Supreme Court found the ordinance to be narrowly tailored to meet the compelling government interest of "protecting the community against bias-motivated threats to public safety and order." The United States Supreme Court reversed and remanded the case because the ordinance censored expressive conduct in violation of the First Amendment. The Court found that the only interest served by the ordinance was that of "displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.

89. Id. at 380.
92. Id.
The NEA scenario has amazing similarities to those found in *R.A.V.* The NEA amendment was made with hostility towards anti-religious viewpoints and eliminated expressive conduct supporting these viewpoints from NEA funded grants.

In *R.A.V.*, the Court said that "burning a Cross in someone's frontyard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." Likewise, Andres Serrano's decision to photograph and exhibit an immersed crucifix of Jesus Christ in the artist's own urine was reprehensible and condemned as blasphemous by Christians. But discrimination against anti-religious expression, such as occurred as a result of Serrano's work, is also viewpoint based.

The *Finley* Court attempted to distinguish *R.A.V.* by stating the "decency and respect" criteria did not "silence speakers by expressly 'threaten[ing] censorship of ideas.'" The attempt to distinguish *R.A.V.* on these grounds fails because later this same Court admits that content-based considerations will be taken into account in the grantmaking process and that this is a "consequence of the nature of arts funding." This consequence does silence speakers by threatening censorship of anti-religious views.

In *Finley*, the district court and the Ninth Circuit correctly relied on a key case, *Rosenberger v. Rector and Visitors of the University of Virginia*, when analyzing the statute and its effect on freedom of speech. In *Rosenberger*, the court held that the University of Virginia engaged in viewpoint discrimination when it denied student newspapers with religious perspectives equal access to funding.

Protecting the right to religious expression necessarily invokes protection for ideas that may not be popular among the majority of the population. Requiring the NEA to consider "general standards of decency and respect for the diverse beliefs and values of the American

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93. *Id.*
94. *Id.*
96. *Finley*, 118 S. Ct. at 2176.
97. *Id.* at 2177.
100. See *Rosenberger*, 115 S. Ct. at 2510.
public amended the statute to prevent the NEA from funding works, like Serrano's, that were offensive to Judeo-Christian beliefs. Even though this most important symbol of the Savior was desecrated in the most vile manner, called “art,” and funded with tax dollars to the utter dismay of members of Congress and their constituents, the only way that Christians can retain their free speech rights is to ensure that the courts do not dilute the freedoms given under the U.S. Constitution. Everytime an exemption to freedom of speech is carved out, a little more of everyone’s protection slips away.

In an amicus brief filed in the NEA case, a distinguishing point was made between the government funding private citizens to convey a government message and the government funding private speech where the speaker is not a surrogate for the government but rather is expressing independent ideology. The brief correctly concluded that in the case of government speech, there is no constitutional requirement for the government to be viewpoint neutral but with government funded private speech, there are constitutional protections against viewpoint discrimination.

Considering the content of art involves analyzing “the viewpoint expressed if it’s a kind of art that is expressing a viewpoint, or could be interpreted as expressing a viewpoint.” The author of section 954(d)(1), Representative Paul Henry, stated that the addition added “to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must constantly be taken into account.” Representative Kasich said, “[w]e intend to remain vigilant and ensure that such scurrilous attacks on religious beliefs with Government support do not happen again.” This desire to screen a specific viewpoint violates the

103. Id.
105. Id. at *10-16.
106. Id.
Constitution. The Supreme Court’s decision to ignore this Constitutional violation because the government is acting in the role of art patron carves a new niche of First Amendment exemption and is an offense to the very concept of free speech.

4. The Impact - Cases After Finley

Three cases have cited Finley as support for various propositions. Unfortunately, these three cases do not shed any additional light on or provide an additional interpretation of Finley. Commodity Trend Services, Inc., v. Commodity Futures Trading Commission, cited Finley for the proposition that invalidating statutes on the basis of facial overbreadth is used very rarely and “only as a last resort.”\(^{110}\) Guzman v. Local 32B-32J, Service Employees Int’l Union, cited Finley for the proposition that the statute at issue in Guzman is “‘void for vagueness’ in the absence of a bright-line test describing its scope.”\(^{111}\) The third case, Capital Leasing of Ohio, Inc. v. Columbus Municipal Airport Authority, cited Finley regarding “government restrictions of First Amendment rights in a government-subsidized program.”\(^{112}\) In Capital Leasing, the Port Authority for the airport placed limits on the car rental companies’ description of access fees charged by the Port Authority to the car rental companies that were ultimately passed through to consumers.\(^{113}\) Some of the fees were off-site expenses and were incorporated under a heading implicating that all costs were from the Port Authority and were pass through charges.\(^{114}\) The court held that the “defendant cannot prohibit the use of words which could be incorporated in a description of the surcharge in a truthful and non-misleading

110. Commodity Trend Serv., Inc., v. Commodity Futures Trading Comm’n, 149 F.3d 679, 689 n. 5 (7th Cir. 1998) (citing National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998)).
111. Guzman v. Local 32B-32J, Serv. Employees Int'l Union, 151 F.3d 86, 92-93 (2d Cir. 1998) (citing National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2179 (1998)).
113. Id. at 644-45.
114. Id at 665.
manner" but the defendant could require the car rental company to inform customers of the surcharge by the car company that is not from the Port Authority or government entity. One case has already distinguished Finley. In Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Authority, a government-owned naval pier used for commercial and recreational purposes had been rented for a nominal amount to the Democratic National Convention and then the government entity refused to rent the facilities for a comparable amount to a group wishing to advocate for an increase in the minimum wage. The Seventh Circuit distinguished this case from Finley by holding that Navy Pier was not a "producer of speech" but was merely a "renter of premises to speakers." By focusing on renting space, editorial judgments about the content of speech did not have to be made. But the court would not allow the government to pick and choose the users of the facilities based upon political grounds.

B. The Government’s Role in the Arts

1. Protect Free Speech

The Legislature’s attempt to control the types of art produced and funded with tax dollars has not protected free speech rights. Prior to Finley, the Supreme Court made it clear that a viewpoint neutrality principle applied “regardless of whether a government action is direct suppression, ‘forced speech,’ . . . or manipulation of benefit and subsidy programs.” This policy needs to be reestablished and enforced to ensure protection of free speech.

115. Id. at 665.
116. Id.
117. Chicago Acorn, SEIU Local No. 880 v. Metropolitan Pier & Exposition Auth., 150 F.3d 695 (7th Cir. 1998).
118. Id.
119. Id.
120. Id. at 701.
121. Id. at 704.
122. Id.
123. See Heins, supra note 83, at 109.
2. Eliminate Government Funding

The NEA was funded with 98.5 million tax dollars for next year. At a time of tight fiscal management and concern for other programs, such as renovation and preservation of national parks, continuing to fund the NEA at almost 100 million dollars per year is ludicrous. Some members of Congress support the federal governments' exodus from the arts business. Representative, Robert L. Livingston, a Louisiana Republican, said that after the Supreme Court's Finley ruling, he will "wait and see what happens as to what the NEA leadership does to conform with the Supreme Court ruling. If they continue to fund [indecent material] they are sounding the death knell for the NEA." Perhaps the death knell needs to toll for an organization that, in addition to funding Serrano and Maplethorpe's controversial works, also funded artist Ron Athey's performance of piercing his body with needles, cutting designs on the back of another man, blotting the blood with paper towels and then sending the paper towels over the audience on a clothesline.

The controversy behind the NEA and its funding decisions is not likely to end in the near future. Recent grants given to the Manhattan Theatre Club are garnering more controversy for the beleaguered NEA. The Government purchase of art is corrupt and stifles creativity.

125. On September 15, 1998, Senator Ashcroft proposed amendment 3593 which would have eliminated funding for the NEA and transferred these available funds to the operation of the National Park. 144 CONG. REC. Section 10354, 10371 (daily ed. Sept. 15, 1998) (statement of Sen. Ashcroft). This amendment was defeated by a vote of 76 to 22. Id. at 10378.
126. One such Congressman is House Majority Whip Tom DeLay, a Republican from Texas. Id.
128. See, e.g., supra text accompanying note 2.
129. See Dunn, supra note 127, at A1.
130. The NEA approved a $31,000 grant for a play called Corpus Christi which was described in the grant application as "an examination of good and evil. He [Terrence McNally, the author] will use certain miracles in the life of Christ as the inspiration for the story which will have a contemporary setting." CONG. REC. S10354, 10371 (1998). The grant application was approved on June 14, 1996. The grant money was switched to
because work supported with government grants generally garners art on politically correct and "safe" topics. The government needs to get out of the "art business" and allow private patrons and corporations to subsidize the arts.

CONCLUSION

Since 1965, the NEA has given over three billion dollars in grants to individuals and organizations in support of the arts. This money has been spent on some very controversial projects. The government attempts to justify this expenditure by saying in Finley that there was no viewpoint discrimination in the grantmaking process, but even if there was, it doesn't matter because the government was acting in the role of art patron. The Court's reasoning leads to the only logical conclusion, the government has no business funding the arts. In the role of art patron, the government is promoting a form of viewpoint discrimination and violating the First Amendment rights of the various artists applying for NEA subsidies. "Government subsides, even with the best of intentions, are dangerous because they skew the market toward whatever the Government grantmakers prefer." A better idea is to stop funding the NEA and allow private sources and donors to fulfill this function. Dilution of First Amendment protection is a slippery slope to begin sliding down, and the more the courts allow the government to claim any type of First Amendment viewpoint exception or exemption, the more

another play at the same theater at the request of the theater. Id. Afterwards, information came out in newspapers, such as the New York Times, about the real story in Corpus Christ as retelling "the Biblical story of a Jesus-like figure from his birth in a Texas fleabag hotel ... to his crucifixion as 'king of the queers' in a manner with the potential to offend many people. Joshua has a long-running affair with Judas and sexual relations with the other apostles. The draft ends with the frank admission: 'If we have offended, so be it. He belongs to us as well as you.'" Id. at 10372. Once the subject of the play became public, the NEA disavowed any involvement with the play that it had originally funded even though the project had only been "de-funded" because of a request from the Manhattan theater group. Id. at 10372. The money still remained and subsidized the Manhattan theater group, although for an alternative play. Id.

132. See Finley, 118 S. Ct. at 2172.
134. See Finley, 118 S. Ct. at 2179.
there is a detrimental and chilling effect on everyone's right to free speech. There is no constitutional right to artistic funding of projects.\textsuperscript{136} In \textit{Finley}, the Supreme Court has shown its willingness to fashion another exemption from First Amendment protection for artists who received federal subsidies.

When the Government funds art, it will always have to make value judgments on what is art and what is not, which is not an appropriate function of Government. . . . If the Government says that some speech is better than other speech and prefers it by providing a subsidy, the Government is impairing the right of every citizen to speak and to express himself freely.\textsuperscript{137}

Controversy is a common reaction to artistic themes involving sexuality,\textsuperscript{138} politics,\textsuperscript{139} or religion,\textsuperscript{140} but tying an artist's creativity to government approved "safe" topics is a form a viewpoint discrimination. "[T]he Government should not pick and choose among different points of view and value systems and continue politicizing the arts. Garth Brooks fans pay their own way, while the NEA canvases the Nation for politically correct art that needs a transfusion from the Treasury."\textsuperscript{141} Government subsidization of art is bad public policy.\textsuperscript{142} Some have argued that during the last thirty years, the NEA has failed in its mission for cultural enhancement and continues to fund "patently offensive projects."\textsuperscript{143} The government needs to get out and stay out of the business of funding and politicizing the arts because this funding leads to viewpoint discrimination in violation of the First Amendment. Because art is "related to values and because it is speech, it is inappropriate for the Government to say that some art is to be funded,

\begin{footnotes}
\footnote{136. See \textit{Finley}, 118 S. Ct. at 2173.}
\footnote{137. 144 \textit{Cong. Rec.} S10354, S10372-0373 (1998).}
\footnote{138. See \textit{Lerner \& Bresler}, \textit{supra} note 75, at 681.}
\footnote{139. Id.}
\footnote{142. Id.}
\end{footnotes}
some art is to be subsidized, and other art is to be disregarded, that other art is somehow unworthy and not to be provided merit."144 The role of art patron is for private citizens and corporations, not the United States government. A proponent of the NEA has stated that:

Society, since the beginning of time, has left behind a chronicle of the past through its art. We will be remembered and understood by the architecture, monuments, arts and writing we pass on to the next generation. What we do today will have an enormous impact in the future and how we as a nation are perceived in the future. We must not be shortsighted and we should recognize that nurturing and preserving the heart and soul of our country today will preserve the greatness of the nation for all time.145

Will this great county want to be remembered for financially supporting an artist whose prior works include photographs of a flower vase made from the hollowed-out head of a cadaver or who used excised body parts to create "morbid and grotesquely perverted photographs?"146

By refusing to follow constitutional mandates the Finley Court has created an abyss of confusion. The Court should have found that there was viewpoint discrimination and affirmed the Ninth Circuit and district court’s findings. This would force the Congress to decide whether to implement a constitutional limit on the NEA or to reconsider the Crane Amendment147 and simply provide no funding to the NEA. Since there is no constitutional right to this funding, the latter alternative is most feasible in this time of heightened fiscal concern. Private patrons and corporations could continue to subsidize the arts promoting freedom of speech by allowing individuals and corporations to put financial support towards the type of art they prefer. Controversial works would no longer be influenced by government opinion.

144. Id. at 10378 (statement of Sen. Ashcroft).
146. See Helms, supra note 23, at 100.
ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.: JUDICIAL RECOGNITION OF SAME-SEX SEXUAL HARASSMENT

by Christina S. Yager

INTRODUCTION

On December 5, 1991, Joseph Oncale filed a complaint for sexual harassment with the Equal Employment Opportunity Commission (EEOC). Oncale claimed he was sexually attacked by a co-worker who grabbed him, pulled him down and held him immobile in a squatting position, while a supervisor unzipped his pants, pulled out his penis and stuck it onto the back of Oncale's head. The next day, the same two attempted to rape Oncale as he was taking a shower when his co-worker grabbed him and the supervisor grabbed the bar of soap and "rubbed it between his cheeks . . ." The Fifth Circuit Court of Appeals held that same-sex sexual harassment claims are not viable under Title VII of the Civil Rights Act of 1964.

On June 30, 1992, Freddy Garcia filed an action alleging that he had been sexually harassed in violation of Title VII. Garcia alleged that on several occasions a supervisor had approached him from behind and "reach[ed] around and grab[bed] [Garcia's] crotch and ma[de] sexual motions from behind [Garcia]". The Fifth Circuit again held that harassment by a male supervisor against a male subordinate was not cognizable under Title VII, even if harassment had sexual overtones. The Fifth Circuit's complete bar to same-sex sexual harassment claims was reversed by the U.S. Supreme Court's decision in Oncale v. Sundowner Offshore Services, Inc.; the Court declared that claims of same-sex sexual harassment are cognizable under Title VII of the Civil

2. Id. at 2 (citing Dep. at 49-52).
3. Id. at 3 (citing Dep. at 58).
5. See Garcia v. Elf Atocam North America, 28 F.3d 446, 449 (5th Cir. 1994).
6. Id. at 448.
7. Id. at 449.
Rights Act of 1964.  

Title VII of the Civil Rights Act of 1964 prohibits discrimination by employers "against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual’s . . . sex." The current statute, as amended by the Civil Rights Act of 1991, provides for a cause of action for victims of such sex discrimination to obtain equitable relief, compensatory, or punitive damages. The statute also grants the right of a jury trial to either party to a dispute.

Sex discrimination is discrimination based on an individual’s sex, and arises, for example when an employer establishes unalike policies for men with young children than for women with children of the same age. Sexual harassment, a form of sex discrimination, involves "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" which are unsolicited and either unappealing or offensive to the employee.

Historically, sexual harassment has been viewed as a feminist issue. In fact, women were protesting about sexual harassment in the workplace before "sexual harassment" became a term of art. Today, most sexual harassment actions involve women who are sexually

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10. Id.
11. Id. See also 42 U.S.C. §§ 1981(a)(1), (b)(1).
12. Id. See also 42 U.S.C. § 1981(c)(1).
14. Id.
15. Id. (citing Meritor, 477 U.S. at 65 (quoting 29 C.F.R. § 1604, 11(a) (1985)).
16. Id. (citing Jones v. Flagship Int’l, 793 F.2d 714, 719 (5th Cir. 1986), cert. denied, 479 U.S. 1065 (1987)).
17. Id. at 292 (citing Rachael A. Hetherington & Barbara C. Wallace, Recent Developments in Sexual Harassment Law, 13 Miss. C. L. REV. 37, 38 (1992)).
harassed by a male supervisor. While the law is settled regarding male-to-female and female-to male sexual harassment, courts have struggled with the issue of whether to recognize same-sex sexual harassment.

Courts’ prior disagreement concerning the cognizability of same-sex sexual harassment has now been resolved by the Supreme Court’s decision in Oncale v. Sundowner Offshore Services, Inc. While Oncale establishes a cause of action for same-sex sexual harassment, it leaves the “work of defining standards to the lower courts.” Oncale offers “little practical guidance” to courts attempting to determine the actionability of allegations of sexual harassment outside the admonition to pay “careful attention to the requirements of the statute” and to use

19. Id. (citing Hetherington & Wallace, supra note 17, at 38 n.2). In 1976, Redbook, a women’s magazine, conducted an informal survey on sexual harassment and found that over 8,100 women in the United States reported that they were victims of sexual harassment. Id. (citing Claire Safran, What Men do to Women on the Job: A Shocking Look at Sexual Harrassment, REDBOOK, Nov. 1976, at 149).


22. Storrow, supra note 9, at 694 (citing Marcia Coyle, Justices Tackle Sex Harrassment; Four Cases Offer Chances to Rewrite this Area of Law, NAT’L L.J. (1995)).

23. Id. (citing Dominic Bencivenga, Same-Sex Harassment; Ruling Puts Work Environment Under Scrutiny, N.Y. L.J., Mar. 12, 1998, at 5 (“While the Court made clear that discrimination because of sex can be shown in a variety of ways, it gave little guidance for determining when untoward conduct crosses the line to sex-based discrimination.”); John Cloud, Harassed or Hazed? Why the Supreme Court Ruled That Men Can Sue Men for Sexual Harrassment, TIME, Mar. 16, 1998, at 55 (“Having said what it doesn’t mean, however, the high court left wide open what it does mean to discriminate ‘because of’ gender.”); Jan Crawford Greenburg, Liability at Crux of Sex Harrassment Case; Suit May Settle When Employers Must Pay, CHI. TRIB., Mar. 24, 1998, at n1 (stating that Oncale “offered lower courts little practical guidance in determining whether a person makes a valid claim of same-sex harassment); Randy McClain, The Same-Sex Harrassment Issue; Louisiana Same-Sex Case Stirs Nation-Wide Interest, BATON ROUGE SUN. ADVOCATE, Mar. 22, 1998, at n1 (noting Supreme Court’s failure precisely to define when sexual remarks or suggestive behavior “crosses the line between horse play and harassment”). But see Jeffrey M. Schlossberg, The Pendulum Swings Back in Sexual Harrassment Cases, N.Y. L.J., Mar. 17, 1998, at 1 (stating that Oncale Court’s articulation of parameters of permissible behavior helps define and reduce spectrum of actionable conduct).

24. Storrow, supra note 9, at 695 (citing Oncale, 118 S. Ct. at 1002).
"common sense." Nonetheless, the Supreme Court has taken the right step in recognizing same-sex sexual harassment claims and will render new anti-discrimination legislation unnecessary.

Part I of this Note will review the historical background of Title VII, theories of Title VII discrimination, theories of sexual harassment, and the variety of stances courts have taken in cases of same-sex sexual harassment. In Part II, this Note will discuss the Supreme Court's holding in Oncale; and Part III will analyze the decision in reference to judicial authority in support of the decision along with judicial impact as a result of the decision. Part IV will conclude this Note by exploring the effects of Oncale.

HISTORICAL BACKGROUND

A. Equality in the Workplace

As enacted, Title VII of the Civil Rights Act of 1964 was a tool to bring equality to the workplace and to narrow the breadth of the employment-at-will doctrine. That is, since the Civil War, there has been a struggle for equality in many areas of life, including the workplace. Enactment of the Civil Rights Act of 1866 was a congressional attempt to equalize the power between black citizens and their former masters, evidenced by its provision that all citizens the same right to contract and to the equal benefit of all laws. Because the Act was nearly invalidated by the U.S. Supreme Court, efforts to end employment discrimination by federal statute were "half-hearted" in the first half of the nineteenth century.

The employment at will doctrine unfolded toward the end of the

25. Id.
26. Id. at 681.
27. Id. at 293.
28. See Blasi, supra note 13, at 295.
29. Id. at 294.
30. Id. (citing Hodges v. United States, 203 U.S. 1 (1906) (holding that a violation of the Civil Rights Act of 1866 was not within the jurisdiction of the United States federal courts where the black plaintiffs were seeking to protect their employment rights), overruled by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)).
nineteenth century. This doctrine permits both employers and employees to terminate the employment relationship without any justification, cause, or notice. In theory, these rights are sufficient to govern the conduct of both employees and employers. However, employers could terminate employment for any reason; therefore, employees were vulnerable to employers' "whims" or "mood." Because employers fired employees for rejecting sexual favors or because of personal animosity toward the employee, enactment of federal laws was necessary to abate employers' freedom with respect to employment decisions. In 1961, President Kennedy issued an Executive Order that formulated the Equal Employment Opportunity Commission (EEOC). The EEOC, in turn, drafted legislation that Congress ultimately enacted as the Civil Rights Act of 1964. Title VII of the Act makes it unlawful for an employer to discriminate against any individual with respect to hiring and discharging practices, compensation, terms, condition, or privileges of employment, because of such individual's sex. In effect, Title VII of the Civil Rights Act of 1964 narrowed the breadth of the employment-at-will doctrine.

The Civil Rights Act of 1991 modified employment law; it amended Title VII to provide a significant increase in important

33. Id. at 295.
34. Id.
35. Id. (citing David E. Morrison, Note, You've Built the Bridge, Why Don't You Cross It? A Call for State Labor Laws Prohibiting Private Employment Discrimination on the Basis of Sexual Orientation, 26 U. MICH. J.L. REV. 245, 246 (1991)). The basic principle of employment-at-will was set forth as early as 1884 in Payne v. Western & Atl. R.R., 81 Tenn. 507, 518-19 (1884), overruled on other grounds by Hutton v. Watters, 179 S.W. 134, 138 (1915). In Payne, the court summarized the employment-at-will doctrine in stating that: men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer. 81 Tenn. at 518-19.
36. See Blasi, supra note 13, at 295.
38. Id.
40. Id.
41. Id. at 296.
remedies for victims of discrimination. That is, victims of intentional sexual harassment and hostile environment sexual harassment can now recover compensatory and punitive damages pursuant to Title VII, as amended by the Civil Rights Act of 1991, where prevailing plaintiffs under the prior law of Title VII could only be awarded equitable relief.

B. Theories of Title VII Discrimination

There are two theories for discrimination pursuant to Title VII: 1) the disparate impact theory; and 2) the disparate treatment theory. Application of the disparate impact theory comes about in situations where an employer's facially neutral policy or practice adversely impacts a protected class and the employer cannot justify the policy or practice as a business necessity. Under this theory a plaintiff must show that the employment policy or practice has a disproportionate adverse impact on a protected class.

The disparate treatment theory is applicable in situations where the employer's treatment of an employee is different than the employer's treatment of other similarly situated employees who are outside of the plaintiff's protected class. The plaintiff must prove a prima facie case

42. Id.
44. Id.
45. Id. (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971). As a condition of employment, Duke Power required its applicants to either have a high school education or have passed a standardized intelligence test. Id. These standards, however, were not significantly related to job performance. Id. In addition, both requirements tended to disqualify black applicants. Id. While there was no evidence that Duke Power intended to discriminate against blacks, Duke Power was ordered to abandon its testing practices. Id. The Court stated that any policy favoring a particular group was valid only if it services a business necessity. Id. at 432. According to the Court, Duke Power’s policy did not serve a business necessity. Id.).
46. Id. (citing Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). See also Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 657 (1989) (a plaintiff must demonstrate that it is the application of a specific or a particular employment practice that has created the disparate impact . . . Such a showing is an integral part of the plaintiff’s prima facie case in a disparate impact suit under Title VII). But see 42 U.S.C. § 2000e(k)(1)(B)(I) (1994) (excepting plaintiff from pleading a specific employment practice in situations where the specific policy causing the impact cannot be separated from the process itself)).
47. Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). McDonnell Douglas laid off Green, a black male, in the course of reducing its workforce. Green
of discrimination. Sexual harassment cases under Title VII apply one of these two theories.

C. The Development of Sexual Harassment as a Form of Sex Discrimination Under Title VII

Sex was not embodied as one of the protected classes under Title VII until just before the bill was passed. In fact, Congressman Smith, a long-time chairman of the House committee on Rules, proposed to incorporate the category of sex in an effort to demonstrate the absurdity of Title VII as a whole. Obviously, Smith’s strategy failed, but his actions illustrate why there is no history to guide the courts and the

protested his discharge in a manner that was disruptive and illegal. Id. at 794-95. Subsequently, McDonnell Douglas advertised job openings for qualified employees, and it rejected Green’s re-employment application on the basis of Green’s illegal activity. Id. at 796. Green alleged that McDonnell Douglas’s refusal to rehire was racially motivated, and he filed a race discrimination action under Title VII. Id. The Supreme Court remanded the case after proscribing the analysis for disparate treatment cases. Id. at 802-07).

49. Id. (citing McDonnell Douglas, 411 U.S. at 802. In McDonnell Douglas, the court held that a plaintiff may establish his prima facie case “by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons with complainant’s qualifications.” Id.).

50. Id.

51. Id. (citing 110 CONG. REc. 2, 577-84 (1964)).

52. Id. at 298 (citing Susan Estrich, Sex at Work, 43 STAN. L. REV. 813, 816 (1991)). Mr. Smith, who was not a civil rights enthusiast and who offered his amendment “in the spirit of satire and ironic cajolery,” supported his amendment by quoting a letter he had just received from one of his female constituents. Francis J. Vaas, Title VII: Legislative History, 7 B.C. INT’L & COMP. L. REV. 431, 441 (1966). Mr. Smith quoted:
The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an “imbalance” of 2,661,000 females[.] Just why the Creator would set up such an imbalance of spinsters, shutting off the “right of every female to have a husband of her own,” is, of course, known only to nature[.] But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct, especially in this election year[.] Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their “right” to a nice husband and family?
Id. at 441-42 (citing 110 CONG. REc. 2,577 (1964)) (statement of Rep. Smith)).
EEOC in interpreting the sex discrimination section of Title VII.\textsuperscript{53}

Because there is no legislative history on the meaning of "sex discrimination" under Title VII, courts were hesitant to find that sexual harassment fell within the purview of Title VII's prohibition of sex discrimination,\textsuperscript{54} and battled with the issue from the 1970's through the 1980's.\textsuperscript{55} In fact, as cases demonstrate, whether a plaintiff could sustain a claim of sexual harassment in the 1970's and 1980's greatly depended upon the court in which the complaint was filed, and not the underlying merits of the claim.\textsuperscript{56}

In 1980, the EEOC proposed guidelines identifying harassment on the basis of sex a violation of Title VII.\textsuperscript{57} The EEOC defined sexual harassment as "unwelcome sexual advances" where such behavior occurs in any of the following situations:

(1) [Where] submission to such conduct is made either explicitly or implicitly a term or condition of an individuals employment, (2) [where] submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) [where] such conduct has a purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.\textsuperscript{58}

Needless to say, advocates of the movement to include sexual harassment under the prohibition of sex discrimination encountered numerous arguments by opponents.\textsuperscript{59} Typical arguments included (1) Congress did not intend sexual harassment to be a cause of action under

\textsuperscript{53} Id.
\textsuperscript{54} Id. (citing Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975) (holding that sexual harassment by a superior was not a violation of Title VII), rev'd on other grounds, 562 F.2d 55 (9th Cir. 1977); Tompkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976) (holding that sexual harassment that was not conducted by the corporation was not protected by Title VII), rev'd, 568 F.2d (3rd Cir. 1977)).
\textsuperscript{55} Id. at 300. See, e.g., Barnes v. Castle, 561 F.2d 983 (D.C. Cir. 1977); Tompkins v. Public Service Electric & Gas Co. 422 F. Supp. 553 (D.N.J. 1976).
\textsuperscript{56} See Blasi, supra note 13, at 300 (citing 29 C.F.R. § 1604.11(a) (1985)).
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
Title VII, all victims of sexual harassment should be denied Title VII protection because there may be situations where claims of sexual harassment would not be valid, (3) sexual harassment claims under Title VII are absurd when the harassing supervisor is bisexual, (4) concerns that there would be a potential lawsuit every time an employee made amorous or sexually oriented advances toward another, and (5) tort law already provides a remedy for sexual harassment. The issue of whether sexual harassment was embodied in the sex discrimination provision of Title VII was ultimately decided in 1986 with the Meritor Savings Bank v. Vinson decision. In Meritor, the U.S. Supreme Court held that sexual harassment is actionable under Title VII's sex discrimination provision.

1. Theories of Sexual Harassment

The EEOC Guidelines identify two different types of sexual harassment: (1) quid pro quo harassment; and (2) hostile environment harassment. Quid pro quo means "something for something," and is easily recognized. For example, when an employee is denied a tangible job benefit because she rejects her employer's sexual advances or sexual requests, the harassment is quid pro quo. Quid pro quo cases are typically litigated under a disparate treatment theory; therefore, a successful quid pro quo harassment claim can come apart from one incident of discrimination.

60. Id. See also Meritor, 477 U.S. at 63-64 (referring to the last minute addition of sex discrimination as a prohibition of Title VII).
61. Blasi, supra note 13, at 300.
62. Id. at 301.
63. Id. at 302.
64. Id.
65. Id. at 304; see 477 U.S. at 66 (1986).
66. See Blasi, supra note 13, at 304. In Meritor, plaintiff was harassed by the vice president of Meritor Savings Bank, and she agreed to have sexual intercourse with him out of fear of losing her job. The Court held that plaintiff could establish a violation of Title VII by showing that the discrimination was based on sex and that it created a hostile or abusive work environment. Id.
67. Id. (citing 29 C.F.R. § 1604, 11(a)(1985)).
68. Id. (citing BLACKS LAW DICTIONARY 1248 (6th ed. 1990)).
69. Id.
70. Id. at 305. Employer liability standards vary depending on the status of the harasser. First, by agency principles, the employer is strictly liable for the conduct of supervisory employees who have authority over hiring, advancement, discipline, and firing. See
Unlike quid pro quo claims, a hostile environment claim requires a pattern of offensive conduct. An actionable hostile environment claim exists whenever an employer designs or condones a discriminatory work environment that unreasonably hinders an employee’s work performance. Four of the five elements for proving hostile environment sexual harassment are the same as the elements for proving quid pro quo harassment. However, rather than showing that sexual harassment altered a term, condition or privilege of the individual’s employment, hostile environment sexual harassment claimants must show an offensive or abusive working environment. Hostile environment actions are also analyzed under a disparate treatment theory.

Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989); Highlander v. KFC Nat’l Mgt. Co., 805 F.2d 644, 648 (6th Cir. 1986); see also Meritor, 477 U.S. at 72 (declining to state a rule for employee liability but stating that the courts should look at agency principles for guidance). For co-workers, the standard is negligence. See Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990) (citing Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421-22 (7th Cir. 1986)). Sexual harassment by a co-employee is not a violation of Title VII unless the employer knew or should have known about the harassment and “unreasonably fail[ed] to take appropriate corrective action.” Id. See also Barrett v. Omaha Nat’l Bank, 726 F.2d 424, 427 (8th Cir. 1984). An employer acts unreasonably if “it delays unduly or is the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring.” Guess, 913 F.2d at 465. In addition, employers can be liable for co-employees actions were the employees did not have a reasonable means of informing the manager of the harassment. See Meritor, 477 U.S. at 62 (citing 29 C.F.R. § 1604.11(c) (1985)). In the Guess decision, Judge Posner notes that the standard has been mislabeled by many courts as respondeat superior. Guess, 913 F.2d at 465; see, e.g., Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 905(11th Cir. 1982).

To prove a case of hostile environment sexual harassment, the plaintiff must show: (1) that she belongs to a protected group; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; and (4) that the liability exists between the harasser and the employer; and (5) that the [plaintiff’s] submission to the unwelcome advance was on express or implied condition for receiving job benefits or that the [plaintiff’s] refusal to submit to a supervisor’s sexual demands resulted in a tangible, job detriment. Henson, 682 F.2d at 903.

See Blasi, supra note 13, at 304. See Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986).

Id. See Highlander, 805 F.2d at 649.

To prove a case of hostile environment sexual harassment, the plaintiff must show: (1) that she belongs to a protected group; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment complained of was based on sex; and (4) that the liability exists between the harasser and the employer; and (5) that the [plaintiff’s] submission to the unwelcome advance was on express or implied condition for receiving job benefits or that the [plaintiff’s] refusal to submit to a supervisor’s sexual demands resulted in a tangible, job detriment. Henson, 682 F.2d at 903.
2. Judicial Recognition of the Hostile Environment Theory

Courts moved slowly in recognizing the hostile environment theory of sexual harassment. Such unwillingness by the courts presumably bore upon the fact that Title VII's anti-discrimination prohibitions applied not only to actions of an economic nature such as hiring, firing, or promotions, but also to the non-economic terms, conditions or privileges of employment. Early "terms and condition cases" prohibit a range of practices that granted women lesser workplace privileges than men. In effect, these practices were found violative of Title VII because Congress intended that the law attack the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Once established that Title VII did not require a showing of wage-based injury, courts started to recognize that harassing behavior could alter the work environment in a discriminatory way. Courts first acknowledged that harassment could constitute a discriminatory term or condition of employment in national origin and race cases.

77. Id.
79. Id.
80. Id. at 9.
81. See Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971). The plaintiff challenged the offensive work environment created by her employer, an optometrist who operated his
The hostile environment theory under Title VII began with *Bundy v. Jackson* in 1981 and was culminated in the Supreme Court's decision in *Meritor Saving Bank v. Vinson*. In effect, the discriminatory employment practices could now reach not only a "tangible loss" of an "economic character" because of a person's sex, but a plaintiff could also establish a violation of Title VII by proving that discrimination fashioned on sex has created a hostile or abusive environment.

D. Same-Sex Sexual Harassment Law

Two types of same-sex sexual harassment actions typically exist; the first type is in fact sexual orientation discrimination where the plaintiff is attempting to bootstrap sexual orientation protection under the sex discrimination protection of Title VII; the second type entails valid actions of sexual harassment where the victim and harasser are of the same sex. Plaintiffs have filed same-sex sexual harassment claims where the facts show the plight to be harassment on the basis of sexual orientation. Title VII does not make discrimination on the basis of sexual orientation illegal; plaintiffs who bring such actions have tried to bootstrap discrimination on the basis of sexual orientation into the practice in a discriminatory manner by "segregating" his Hispanic and Anglo patients. The Fifth Circuit held that the phrase "terms, conditions or privileges of employment in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination ... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers ...." *Id.* at 238.

84. *Id.*
85. See *Blasi*, supra note 13, at 308.
86. *Id.*
87. *Id.* (citing *Desantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 237 (9th Cir. 1979)). In a consolidated appeal to the Ninth Circuit, the plaintiffs in DeSantis contended that they were not hired, continually harassed, and/or forced to quit because they were homosexuals. *Id.* at 238. The court held that Title VII does not prohibit discrimination on the basis of sexual orientation, and therefore, the plaintiffs did not have a claim under Title VII. *Id.* at 239-40. The DeSantis court stated that "Title VII's prohibition of sex discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality." *Id.*
protection against sex discrimination provided by Title VII. While courts have properly denied relief pursuant to federal anti-discrimination law in such cases, other courts have misapplied their holdings to state that same sex sexual harassment is not actionable.

Prior to the Garcia decision, only one same-sex sexual harassment claim was denied adjudication. Typically, the rationale is that sexual harassment inherently implicates one's sex, notwithstanding the sexual orientation of the harasser and/or the victim. Garcia stood alone as the only definitive appellate decision regarding same-sex sexual harassment claims where the court held that same-sex sexual harassment claims are not actionable under Title VII. The court in Garcia did not discuss the issue, but merely cited two cases as support. A handful of cases have followed the Garcia holding: Oncale v. Sundowner Offshore Services, Inc. being one of those cases. Like Oncale, such cases do not discuss the Garcia decision, they simply apply the Garcia holding to their fact situations.

On March 4, 1998, the U.S. Supreme Court in Oncale reversed and remanded the Fifth Circuit's decision to invoke a categorical rule excluding same-sex harassment claims from the coverage of Title VII. Writing for a unanimous Court, Justice Scalia held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.

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88. Id.
89. Id. at 309.
90. Garcia v. Elf Atocam North America, 28 F.3d 446 (5th Cir. 1994).
92. See Blasi, supra note 13, at 310.
93. Id. at 311. See Garcia, 28 F.3d at 451.
94. See Blasi, supra note 13, at 311; Garcia, 28 F.3d at 451-452.
96. See Blasi, supra note 13, at 313.
97. See Oncale, 118 S. Ct. at 1003.
98. Id.
ONCALE V. SUNDOWNER OFFSHORE SERVICES, INC.

A. Facts and Procedure Below

In late October 1991, Joseph Oncale (petitioner) was working for Sundowner Offshore Services (respondent) on an oil platform in the Gulf of Mexico. Oncale was employed as a roustabout on an eight-man (all male) crew which included respondents John Lyons, Danny Pippen, and Brandon Johnson. On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by Lyons, Pippen and Johnson in the presence of the rest of the crew. Oncale's complaints to supervisory personnel produced no remedial action and consequently he "voluntarily left due to sexual harassment and verbal abuse." Oncale filed a complaint against Sundowner in the United States District Court for the Eastern District of Louisiana, alleging that he was discriminated against in his employment with Sundowner because of his sex. The district court, relying on the Fifth Circuit's decision in Garcia v. Elf Atocam North America, granted summary judgment for defendants and held that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." The Fifth Circuit held that Garcia was binding Circuit precedent, and affirmed. The Supreme Court granted certiorari and held that sex discrimination in the form of same-sex sexual harassment is actionable under Title VII, and thus, reversed and remanded.

B. Majority Opinion

Justice Scalia, for a unanimous court, addressed the question of whether workplace harassment can violate Title VII's prohibition against

99. Id. at 1000.
100. Id. at 1000-01. A roustabout is a dock or wharf laborer employed for transient or unskilled jobs. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1131 (2d ed. 1969).
101. See Oncale, 118 S.Ct. at 1001.
102. Id.
103. Id.
104. 28 F.3d at 451-452.
106. Id.
107. See Oncale, 118 S. Ct. at 1001, 1003.
"discrimination . . . because of sex," when the harasser and the harassed employee are of the same sex. Because the facts and details alleged by Oncale were irrelevant to the legal point to be decided, the Court assumed the facts to be as alleged by Oncale and provided a brief outline of them. \textsuperscript{110}

The Court first considered the extent of coverage of Title VII and reiterated a conclusion reached by the Court in \textit{Meritor} that Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." \textsuperscript{111} The Court also noted its previous decision in \textit{Newport News Shipping and Dry Dock Co. v. EEOC},\textsuperscript{112} that Title VII protects men as well as women and emphasized its rejection of any conclusive presumption that persons of one definable group will not discriminate against other members of that group.\textsuperscript{113}

The Court noted the difficulty of same-sex sexual harassment when it arises in the context of a "hostile environment" claim and acknowledged that male-on-male harassment in the workplace was not the principal evil Congress was concerned with when it enacted Title VII.\textsuperscript{114} The Court analyzed that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed:"\textsuperscript{115} and concluded that sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.\textsuperscript{116}

In response to the respondent's argument that recognition of liability for same-sex harassment will transform Title VII into a general civility code for the American workplace, the Court stated the risk is no

\textsuperscript{108.} \textit{Id.} at 1000 (citing 42 U.S.C. § 2003-2(a)(1)).

\textsuperscript{109.} \textit{Id.} Justice Scalia delivered the opinion for a unanimous court, in which opinion Justice Thomas concurred. Justice Thomas's concurring opinion simply stressed the need for plaintiffs to prove Title VII "because of sex" statutory requirement. \textit{Id.}

\textsuperscript{110.} \textit{Id.}

\textsuperscript{111.} \textit{Meritor,} 477 U.S. at 64.

\textsuperscript{112.} 462 U.S. 669, 682 (1983).

\textsuperscript{113.} \textit{Id.} See \textit{Castaneda v. Partida}, 430 U.S. 482, 499 (1977). "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group.” \textit{Id.}

\textsuperscript{114.} See \textit{Oncale}, 118 S. Ct. at 1002.

\textsuperscript{115.} \textit{Id.}

\textsuperscript{116.} \textit{Id.}
greater for same-sex than for opposite-sex harassment if adequately met by careful attention to the statutory requirements.117 Accordingly, the Court explained that “whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination . . . because of . . . sex.”118

In addition, the Court noted the requirement of a reasonable person standard to find a hostile or abusive environment as sufficient to ensure the courts and juries do not mistake ordinary socializing in the workplace, such as male-on-male horseplay, for discriminatory conditions of employment and such standard would serve as another way to prevent Title VII from expanding into a general civility code.119 The Court concluded “common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.”120

ANALYSIS

Same-sex sexual harassment can be equally as frequent, pervasive, severe, threatening, humiliating and disruptive to a work environment as opposite-sex harassment.121 While the Court’s holding in Oncale concluded one long lasting debate by deciding the narrow issue that same-sex sexual harassment is a viable claim under federal civil rights law, it unfolded into a larger debate about who will benefit most from the ruling.122 Civil rights experts believe that Joseph Oncale, the victor in the high court, and others like him face formidable obstacles at trial.123

117. Id.
118. Id.
119. Id. at 1003. See Meritor, 477 U.S. at 67. “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII’s purview.” Id.
120. Oncale, 118 S. Ct. at 1003.
122. See Bencivenga, supra note 23, at 5.
123. See Marcia Coyle, Victor In Court’s Same-sex Ruling Faces Tough Trial, NAT’L
That is, when critics construed this decision to open the gate to the slippery slope of sexual harassment lawsuits, the Court emphasized what it considered a critical element of Title VII. This indispensable prerequisite mandates that the conduct must be accordingly offensive that it either: (1) alters the conditions of the victim’s employment; or (2) is sufficiently severe or pervasive to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive. The court went on to say that normal social behavior in the workplace is not enough to meet this standard, and cautioned that fact finders must look to the context of the behavior and use common sense in their determination of what constitutes actionable sexual harassment under Title VII.

Despite the lingering questions about same-sex sexual harassment claims under Title VII, the determination of whether Mr. Oncale, and other plaintiffs like him, experienced discriminatory treatment because of their sex is not a legal question, but one of fact, to be decided by the fact finder. The Court’s decision in Oncale is a judicially correct decision; a decision supported by: (1) the plain language of Title VII, (2) deference to the EEOC as an administrative agency, (3) equal protection jurisprudence and (4) public policy.

A. Judicially Correct Decision

I. Plain Language of Title VII

All evidence suggests that Congress did not take into account claims for same-sex sexual harassment when it enacted Title VII. In fact, it is well known that “sex” was added to the enumerated categories in Title VII in order to cause it to be unattractive to legislators so that the

125. Id. (citing Oncale, 1998 WL 88039, at *4).
126. Id.
127. Id.
128. Id. at 583.
129. Id.
proposed bill would not be enacted.  

Because the bill was quickly passed as amended, we are left with obscure legislative history as a guide in interpreting the Act’s prohibition against discrimination based on “sex.”

Although the legislative history is sketchy, the brief House debate contemplates that Congress included the prohibition against sex discrimination as a means to prevent discrimination against women and to protect the employment rights of women. In fact, Issachoroff, in his brief for the respondents, argued that such debate alludes that the provisions in Title VII relating to sex discrimination were intended to provide redress for inequities faced by women in the workforce, and other laws passed by Congress near the enactment of Title VII further impart this as the congressional intent of Title VII. He further argued that Congress has not hesitated to amend Title VII when it has disagreed with judicial interpretation, or when courts have faced matters not contemplated by the drafters, concluding the failure of Congress to legislate in this area is not an oversight because Congress has repeatedly refused to legislate a remedy for sexual orientation discrimination.

In contrast, Laplace, in her brief for Oncale, emphasized that interpretation of a statute requires the court to first discern the plain

131. Id.
132. Id. (citing Meritor, 477 U.S. at 63-64).
meaning of the statute's text rather than seek direction from an extratextual source as an interpretive aid.\textsuperscript{136} Congress elected to use the unmodified word "sex" when referring to the prohibited discrimination. Had Congress intended to prevent only different-sex discrimination, it could have used the term "member of the opposite sex."\textsuperscript{137} On its face, Title VII's sex-neutral prohibition against sex discrimination is simply not limited to discrimination by the opposite sex.\textsuperscript{138}

Therefore, the plain language of Title VII invalidates Issachoroff's suggestion that Title VII does not apply to same-sex discrimination because members of the same sex cannot discriminate against each other because of sex.\textsuperscript{139} In fact, the Court long ago declared invalid the behavioral presumption that human beings would not discriminate against their own kind.\textsuperscript{140}

While the legislative history neither compels nor supports the Fifth Circuit's summary refusal to recognize same-sex sexual harassment claims,\textsuperscript{141} it is evident from Title VII that Congress intended to eliminate arbitrary and discriminatory barriers to employment.\textsuperscript{142} The mere fact that Congress did not address the instant issue does not create a negative inference limiting the scope of Title VII to the specific problem that prompted its enactment.\textsuperscript{143} Thus, because of the unambiguous language


\textsuperscript{137} See Petitioner's Brief at 10, Oncale (No. 96-568).

\textsuperscript{138} See Brief for the United States and Equal Employment Opportunity Commission at 7, Oncale v. Sundowner Offshore Servs., 118 S. Ct. 998 (1998) (No. 96-568). See., e.g., 29 U.S.C. § 206(d)(1) (Equal Pay Act generally prohibits employer from paying wages to employees at rate less than rate employer pays to "employees of the opposite sex" for equal work); 38 U.S.C. § 101(3) and (31) (defining surviving spouse and spouse as a member of the opposite sex).

\textsuperscript{139} Brief for the United States and Equal Employment Opportunity Commission at 8, Oncale (No. 96-568).

\textsuperscript{140} Id. (citing Castaneda v. Partida, 430 U.S. 499 (1977)).

\textsuperscript{141} See Petitioner's Brief at 11, Oncale (No. 96-568).

\textsuperscript{142} See Brief for the Association of Trial Lawyers of America at 7, Oncale (No. 96-568).

\textsuperscript{143} Id. at 7-8. See Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S.
of Title VII, the Court properly reversed the Fifth Circuit's categorical ban on same-sex sexual harassment claims. 144

2. EEOC -- Deference to Administrative Agencies

The "lacking congressional intent" argument can also be addressed by according proper deference to the EEOC as an administrative agency. 145 Throughout history the United States Supreme Court has recognized that courts should accord significant deference to the agency entrusted with administering the statute at issue. 146 The Supreme Court's decision in Chevron, U.S.A. v. Natural Resources Defense Council, Inc. governs the extent to which courts must defer to interpretations of statutes by the administrative agencies charged with implementing them. 147 The Chevron court held that, when Congress has not addressed directly the precise issue in question, a court cannot levy its own statutory construction when the appointed administrative agency has resolved the questions by articulating a reasonable interpretation of the statutory provision at issue. 148

In applying the Chevron progeny to the issue of same-sex sexual harassment, Congress explicitly delegated authority to the EEOC and did not speak to the issue of whether Title VII should prohibit same-sex sexual harassment. 149 However, because the EEOC construed Title VII

144. See Petitioner's Brief at 10-11, Oncale (No. 96-568).
147. 467 U.S. 837, at 842-843.
148. Id. The Supreme Court explained:
If ... the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute.
Id. at 843 (citations omitted). The Supreme Court clarified that a permissible construction of the statute is a reasonable construction. Id. at 844.
149. See Feldmeier, supra note 145. In 1980, the EEOC issued Guidelines on Discrimination Because of Sex. 29 C.F.R. §§ 1604.1-1604.11 (1994). Although the
as establishing a cause of action for same-sex sexual harassment, *Chevron* commands courts to trust the EEOC’s expertise instead of applying their own opinion when there is such a conflict. Thus, while courts disagree on the plain meaning of the term “sex” in Title VII, they should defer to the EEOC’s construction of Title VII that forbids sexual harassment regardless of the identity of the harasser and the victim.

3. **Equal Protection Jurisprudence**

The Constitution “neither knows nor tolerates classes among citizens.” A dual system of rights founded on an arbitrary ground violates every equal protection standard recognized. Surely, courts cannot legally ignore men’s complaints of sexual harassment while taking women’s without gravely violating the sex equality component of the Equal Protection Clause, and of Title VII and of Title IX. The guarantee of equal protection cannot denote one thing when attached to one individual and something else when attached to another.

Furthermore, official classifications founded on sex are subject to heightened scrutiny under the Supreme Court’s equal protection

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150. See Feldmeier, *supra* note 145.

151. Id.

152. *See Brief for the National Organization on Male Sexual Victimization, Inc.* at 28, *Oncale* (No. 96-568); *see also* *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).


154. Id. (citing *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996) (school must “give male and female students equivalent levels of protection”); *Madon v. Laconia School District*, 952 F. Supp. 44, 47-48 (D.N.H. 1996) (school ignoring complaint of anal groping of teacher by principal is sex-based); *Yusef v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994) (judicially interpreting Title VII to ignore men’s complaints of sexual abuse by men, while allowing women’s complaints of sexual abuse by men as a violation as well)).

The burden of justification is demanding upon the state; it must show minimally that the challenged classification serves important governmental objectives and that the discriminatory methods employed are substantially related to the achievement of these objectives. It is also well settled that this heightened standard of equal protection review applies not only to classifications that disadvantage women, but also to classifications that effectively benefit women or handicap men. To dismiss Oncale's claim because he is a man rather than a woman is to hold that Title VII claimants should be treated differently founded solely on their sex without any support for that in the statutory language. Thus, it is no justification to contend that the excluded same-sex harassment would not create a sex-based classification because it exempts members of each sex, equally, from establishing liability for sexual harassment by a perpetrator of the same sex. That type of analytic canard was renounced in Loving v. Virginia and such is contrary to the spirit of Title VII and equal protection principles.

4. Public Policy

"Public policy demands that same-sex sexual harassment claims be adjudicated under Title VII." Analyzing the effects of harassment on one particular person is the current focus of anti-discrimination laws; a shift from its former examination of institutional discrimination and power over the victim. Recognizing "reverse" discrimination cases

157. Id. (citing U.S. v. Virginia, 116 S. Ct. 2264, 2275 (1996)).
159. Brief of LAMBDA Legal Defense and Education Fund at 27, Oncale (No. 96-568).
160. Id.
162. Brief of LAMBDA Legal Defense and Education Fund, at 28, Oncale (No. 96-568).
163. Blasi, supra note 13, at 318.
164. Id.
supports the focus on the individual. The Supreme Court held "that Title VII prohibits racial discrimination against white petitioner and invokes the same standards as would be applicable were they negroes." This same analysis has been applied to sex discrimination cases, therefore, because sexual harassment is a form of sex discrimination, the same analysis has been applied in cases of sexual harassment in non-traditional situations.

In contrast, the amicus brief of the Texas Association of Business and Chambers of Commerce argued that public policy considerations support the bar to same-sex sexual harassment claims. A principal premise for their argument is that an expansion of Title VII to reach same-sex sexual harassment would result in litigants and the courts attempting to ascertain a person's sexual orientation.

"Sexual harassment knows no sex or sexual orientation." Title VII aims to protect men and women: both heterosexuals and homosexuals. The rationale for allowing sexual harassment claims applies equally to everyone. Thus, public policy demands that any person who is sexually harassed in the workplace can seek redress through an action for sex discrimination under Title VII.

165. Id. at 318-319.
167. See Blasi, supra note 13, at 319 (citing e.g., Adams v. Philip Morris, Inc., 67 F.3d 580, 583 (6th Cir. 1995) (discussing a release of Title VII claims in the context of reverse discrimination); Maitland v. Univ. of Minn., 43 F.3d 357 (8th Cir. 1994) (discussing a sex discrimination claim brought by a male)).
168. Id. (citing Jasany v. United States Postal Serv., 755 F.2d 1244, 1252 (6th Cir. 1985) (permitting sex discrimination case where victim is male); Drinkwater, 904 F.2d at 861 n.15 (recognizing that Title VII quid pro quo sexual harassment claims are available for men as well as women)).
170. Id.
171. Blasi, supra note 13, at 319.
172. Id.
173. Id. at 320.
B. Sexual Harassment Claims Post Oncale

1. Increase or Decrease In Sexual Harassment Litigation

Ann Elizabeth Reesman, EEOC general counsel, predicts an increase in sexual harassment claims given the Oncale decision. In fact, a large increase in sexual harassment claims filed with the EEOC more than doubled from 6,883 claims in 1991 to 15,889 in 1997. Claims filed by men have grown even faster; they jumped nearly four-fold -- from 550 to 1,853 -- and accounted for 11.6% of all claims in 1997 compared with 8% in 1991.

With regard to the naysayers' prediction that permitting same-sex sexual harassment cases will barrage the judicial system with a flood of action involving instances of workplace horseplay and crude discourse, the Court devoted a relevant portion of its opinion to clarifying the parameters of sexual harassment generally. The fact that it did so is significant because while rendering a decision that on its face opens the door to a greater number of potential plaintiffs, the Court also appears to have sent a message that reveals its dissatisfaction with the plethora of sexual harassment suits today.

175. Id.
176. Id.
179. Id. Schlossberg explains:

[The Court rejected the argument that permitting same-sex sexual harassment claims would turn “Title VII into a general civility code for the American workplace.” It emphasized that Title VII would not be a “civility code” because only certain types of conduct are prohibited by Title VII and unlawful discrimination is not found simply because “the words used have sexual content or connotation.”

Restating principles established over a decade ago in Meritor and reconfirmed more recently in Harris, the Court stressed that actionable conduct is only that which is so severe or pervasive and objectively offensive as to alter the conditions of the victim's employment. Thus, it declared that lower courts should not examine the routine interactions among men and women in the workplace.
The Court's opinion can somewhat be interpreted as paving the way for an abridgement in sexual harassment litigation.\textsuperscript{180} The various examples of permissible conduct noted by the Court could serve as an aid

Indeed, it is "crucial" that the conduct be severe or pervasive enough to create an objectively hostile environment, the Court said. This will "ensure that courts and juries do not mistake ordinary socializing in the workplace -- such as male-on-male horseplay or intersexual flirtation -- for discriminatory conditions of employment."

Further, the Court explained that Title VII was not intended to address "genuine but innocuous differences in the way men and women routinely interact with members of the same sex and of the opposite sex." It said:

Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "discrimin[ation] . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the works used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

The Court went so far as to state that Title VII's prohibition on harassment "requires neither asexuality nor androgeyny in the workplace." It concluded by expressly recognizing that a claim of hostile environment sexual harassment must be measured by the realities of the workplace environment:

The real social impact of workplace behavior often depends on a constellation or surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the works used or the physical acts performed. Common sense and appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

\textit{Id.}\textsuperscript{180} \textit{Id.}
in subsequent cases for courts to conclude that the Supreme Court is willing to contemplate a wider latitude of behavior in the workplace than previously permitted.\textsuperscript{181}

This conclusion is based in large part on the fact that the Court seems to have gone to unnecessary measures to articulate permissible behavior, especially in an opinion that in theory should be limited to the issue of same-sex sexual harassment.\textsuperscript{182} The Court’s express approval of “intersexual flirtation” and “teasing or roughhousing” might be interpreted as a signal that a certain level of sexual fraternization in the workplace is permissible and consequently, the spectrum of actionable conduct is correspondingly reduced.\textsuperscript{183} Notwithstanding the likelihood that more cases may be subject to dismissal because of \textit{Oncale}, it would be prudent to await lower courts’ guidance on the boundaries of permissible of prohibited conduct such as “sexual flirtation” and “teasing or roughhousing.”\textsuperscript{184}

2. \textit{The Requirement “Because of Sex”}

\textbf{a. \textit{Proof Problem}}

Discrimination “because of sex” is a threshold requirement to show sexual harassment in violation of Title VII.\textsuperscript{185} Proving that a victim was harassed because of his or her sex when the harasser and victim are of the same sex purports to be the main obstacle to establish a Title VII hostile environment cause of action in same-sex claims.\textsuperscript{186} Courts have taken three approaches to determine whether a victim of same-sex sexual harassment was harassed because of the victims gender: (1) courts may focus on the sexual preference of the harasser and look for sexual attraction to the victim; (2) courts may look to see if the harasser treats the opposite gender differently than the victims gender; and (3) courts may look at the work environment as a whole to see if

\begin{itemize}
  \item \textsuperscript{181} \textit{Id.}
  \item \textsuperscript{182} \textit{Id.}
  \item \textsuperscript{183} \textit{Id.}
  \item \textsuperscript{184} \textit{Id.}
  \item \textsuperscript{185} \textit{See Brief Amicus Curiae for the Equal Employment Advisory Council at 10, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (No. 96-568).}
  \item \textsuperscript{186} \textit{See Corey Taylor, Same-sex Sexual Harassment in the Workplace Under Title VII: The Legal Dilemma and the Tenth Circuit Solution, 46 U. KAN. L. REV. 305, 319 (1998).}
\end{itemize}
there is hostility directed toward one gender over another.\textsuperscript{187}

During oral arguments, Chief Justice Rehnquist addressed this "proof problem" issue when questioning attorney Cannady.\textsuperscript{188} For example, his questions "But how would you show that for an all-male workforce? But how would you prove anything at all about it, because what evidence would you have about how women would have been treated had they been in the workplace?"\textsuperscript{189} demonstrate query into that issue.

While the Court made clear that discrimination "because of sex" can be shown in a number of ways, it gave very little guidance for determining when untoward conduct crosses the line to sex-based discrimination.\textsuperscript{190} The broad, conduct-based analysis could establish class distinctions for Title VII plaintiffs because it could be interpreted to allow different standards for different work environments.\textsuperscript{191} In fact, Pearly Zuchlewski, a partner at Goodman & Zuchlewski LLP, believes that courts already struggle with defining and identifying sexual harassment, and adding another requirement, that courts may consider social context is problematic.\textsuperscript{192} Zuchlewski asks "does that mean employees in blue collar situations have less expectation of protection than someone in a white-collar professional environment?"\textsuperscript{193}

Even though it is difficult when you cannot explain why someone behaves in an inappropriate and bizarre way, to make an evidentiary case in a particular instance, that it was done because of an individual’s sex,\textsuperscript{194} same-sex sexual harassment is an assertion of power in which the harasser subjects a subordinate to adverse working conditions based on gender-related traits.\textsuperscript{195} This harassment is based on sex even in the narrowest anatomical sense of the word.\textsuperscript{196} Any person who suffers from the conduct of a supervisor or a co-worker that pertains to occasions of sexual activity, sexual identity, or gender-stereotyped

\textsuperscript{187} Id. at 320.
\textsuperscript{189} Id.
\textsuperscript{190} See Bencivenga, supra note 23.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} See Zalesne, supra note 121, at 415.
\textsuperscript{196} Id. at 415-16.
traits should have a cause of action for sexual harassment under Title VII.\footnote{Id. at 416.}

\subsection*{b. Overcoming the Proof Problem}

Despite the causation obstacle inherent to same-sex sexual harassment cases, the plaintiff must ultimately prove the causation element as part of his Title VII prima facie case.\footnote{See Willis v. Wal-Mart Stores, Inc., 504 S.E.2d 648 (W. Va. 1998).} If the plaintiff cannot offer evidence to prove that he was harassed because of his sex, as opposed to some other reason, the claim fails.\footnote{Id.} When proof of a sexual harasser’s homosexuality is available and credible, such evidence is relevant to the issue of a same-sex sexual harassment claim.\footnote{Id. (citing \textit{Oncale}, 118 S. Ct. at 1002).} “Lack of such evidence, however, does not render a plaintiff unable to prove a prima facie case of sexual harassment. It just makes his/her case more difficult to prove.”\footnote{Id. at 653.}

Both litigants and courts are accustomed to sifting through facts and considering only viable cases under Title VII.\footnote{See Brief Amicus Curiae for the National Employment Lawyers Ass’n at 15, \textit{Oncale} v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (No. 96-568).} Courts can be trusted to recognize a colorable Title VII claim.\footnote{Id. See \textit{McWilliams} v. Fairfax County Bd. Of Supervisors, 72 F.3d 1191 (4th Cir.), \textit{cert. denied}, 117 S. Ct. 72 (1996). But the fact that sexual harassment may be accompanied by personal enmity or hooliganism does not detract from its character as sexual harassment. \textit{See} \textit{Quick} v. Donaldson Co., 90 F.3d 1373 (8th Cir. 1996); \textit{Burns} v. McGregor Elec. Indus., 989 F.2d 959, 964-65 (8th Cir. 1993) (\textit{Burns II}). “So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.” \textit{Harris} v. \textit{Forklift Systems}, 510 U.S. 17, 22 (1993).

The ultimate question in all harassment cases is whether the actions were sufficiently “severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” \textit{Harris}, 510 U.S. at 21 (quoting \textit{Meritor}, 477 U.S. at 67). Not every offensive action will rise -- or sink -- to this level. In some cases, the offensive work-related nature of the actions will be clear; in others, it will be less clear, and in some, the acts either will not be sufficiently severe or pervasive or will not alter the victim’s working conditions.

Each of these situations will require the parties and the courts to review the facts to see whether the protections of Title VII are truly involved. Such a review must focus upon the background and purposes of Title VII (i.e., to prevent discrimination from
underlying argument that male-on-male or female-on-female abuse and hostility can never be illegal, there is an implied conjecture that workplace harassment among persons of the same gender is inherently different from either types of abuse because “boys will be boys.”

While drawing the line is not always easy and Title VII is not intended to purge the workplace of vulgarity, employers in single-sex environments are not immunized from liability. Sundowner advances the implausible suggestion that because there were no women on Oncale’s job site, Oncale cannot establish the elements of a sex-discrimination claim. That argument rests on the flawed notion that Oncale needs to show that women were in fact, or would have been treated differently by the employer to prove that he suffered discrimination because of sex.

Comparative evidence is an evidentiary tool that individual plaintiffs may use in Title VII cases to show that the adverse action suffered was because of sex; however, it is not the only way to do so. In fact, Cannady addressed that very issue in his oral argument and suggested the possibility of a confession from one of the defendants that had Oncale not been a man he never would have done that. It is clear that sexual harassment cases are fact-bound, and therefore, each sexual骚扰 claim will require the parties and courts to review the facts to determine whether the protections of Title VII are truly involved. The jury’s function is to determine whether the conduct constitutes “because of” the victim’s sex.

infecteding a person’s work environment). The defining assessment must be based upon whether there is sufficient evidence of the elements of a Title VII harassment case to permit a jury to find that discrimination based on sex created a work environment that a reasonable person would find abusive or hostile, and that the victim specifically perceived it to be so. Harris, 510 U.S. at 21-22.

204. Brief Amicus Curiae for the National Employment Lawyers Ass’n at 14-15, Oncale (No. 96-568).
205. Id. at 17. See Bakersville v. Culligan Int’l. Co., 50 F.3d 428, 430 (7th Cir. 1995) (citations omitted).
206. See Brief of LAMDBA Legal and Education Fund, et. al. at 20, Oncale (No. 96-568).
207. Id.
208. Id.
209. Id. (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1998)).
210. Oral Argument of Nicholas Cannady at 17, Oncale (No. 96-568).
211. See Brief Amicus Curiae of the National Employment Lawyers Ass’n at 16, Oncale (No. 96-568).
212. Id. at 17.
c. Actionable Hostile Environment

The Supreme Court has consistently opined that the test for determining whether an environment is hostile or abusive is not a mathematically precise one.\(^{213}\) A sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim, in fact, did perceive to be so.\(^{214}\)

The Court in *Oncale* concluded with an appeal to "social context" and "common sense" and reasoned that, by bearing these factors in mind, courts and juries can distinguish between simple teasing and roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.\(^{215}\) Certainly, focusing on "discrimination" and "terms and conditions of employment" answers many questions and draws helpful lines between permitted and prohibited conduct.\(^{216}\) Similarly, appeals to "context" and "common sense" resonate reassuringly.\(^{217}\) Nevertheless, sometimes context is marked not by what people infer from it, but by what they take from it; and sometimes what people view as common sense is neither common nor sensible.\(^{218}\)

Accordingly, several management attorneys are imploring caution before applying *Oncale* too broadly.\(^{219}\) Marc Silverman, a partner at Brown & Wood, believes that using a common sense test will be a burden for employers that could make it more difficult to have cases dismissed early.\(^{220}\) Silverman says, "Particularly on motions for summary judgment . . . a standard of common sense is going to leave the door wide open for a judge to determine the jury should decide what is common sense. The common sense of juries can span a whole range of behaviors."\(^{221}\)


\(^{214}\) Id.


\(^{216}\) Id.

\(^{217}\) Id.

\(^{218}\) Bencivenga, *supra* note 23.

\(^{219}\) Id.

\(^{220}\) Id.

\(^{221}\) Id.
1. Employer Liability

Most employers are still struggling to deal with opposite-sex sexual harassment matters. Nonetheless, by now most employers have taken steps to curtail sexual harassment in the workplace. These efforts, however, may be too narrowly focused if they are aimed at preventing only the traditional type of sexual harassment claims. Because about one in ten cases of workplace harassment involves harassment between members of the same sex, it is imperative that companies take the necessary steps to prevent sexual harassment and protect themselves.

The employers should have a strong, well-articulated policy regarding sexually offensive activity. Companies should take specific measures to guard against same-sex sexual harassment or to protect the business if a same-sex sexual harassment complaint does arise.

223. See Linda Burnell, Same-sex Harassment Now a Lawsuit Waiting to Happen, RAINS DET. BUS., April 13, 1998. Burnell emphasizes the importance of this decision to employers by providing a sample of verdicts or judgements entered against three companies for same-sex harassment in the past two years (1) $4.2 million to a mechanic who claimed his boss made sexual remarks that belittled him; the boss also slapped and grabbed the employee from behind; (2) $145,000 to three employees in a lumberyard whose supervisor grabbed them by their genitals, fondled them and told other employees that he engaged in sex with these employees; and (3) $1.7 million to a cook who claimed he was denied promotions after his boss launched into a sexually explicit tirade against him. Id.
224. Id.
225. Id.
226. See Whitehead, supra note 222.
227. See Thomas M. Simpkins, Same-sex Harassers Get Equal Time, NAT'L L.J., June 8, 1998. Specific measures suggested by Simpkins are as follows: 1) updating sexual harassment policies to communicate that same-gender sexual harassment will not be tolerated. Companies should later rewrite their policies to reflect future changes in the law; 2) communicating this policy to employees. Employers should be sure to include a definition of same-gender sexual harassment in the policy, as well as examples of prohibited conduct that is considered same-gender sexual harassment; 3) developing procedures for receiving and responding to sexual harassment complaints, including complaints of same-gender sexual harassment. Companies should ensure that all employees are aware of this policy and assure all employees that any complaint of sexual harassment will be fully investigated; 4) acting quickly when a sexual-harassment complaint is made. Companies may take appropriate action up to, and including discharge, depending on the severity of the conduct and the need for progressive discipline; 5) scheduling sensitivity training for all employees and supervising personnel
The Supreme Court’s *Burlington*\(^{228}\) and *Faragher*\(^{229}\) decisions break new ground in cases of supervisory sexual harassment by establishing vicarious liability for employers.\(^{230}\) Because the primary objective of Title VII is not to provide redress for harassed employees, but to avoid the harm in the first place,\(^{231}\) the lessons of *Oncale* require a corporate culture that refuses to allow same-sex sexual harassment.\(^{232}\)

**CONCLUSION**

The evolution of sexual harassment law now encompasses claims of sexual harassment where the offender and victim are of the same sex.\(^{233}\) The Supreme Court has adopted the judicially correct measure in recognizing same-sex sexual harassment claims.\(^{234}\) Courts’ prior disputes concerning the cognizability of same-sex sexual harassment has now been resolved.\(^{235}\) While *Oncale* expands Title VII coverage to same-sex harassment, it also narrows the scope of conduct that can rise to the level of sexual harassment and encourages judges to carefully consider the context in which alleged offensive behavior occurs.\(^{236}\) Consequently, it may be easier for employers to obtain summary judgement in certain cases.\(^{237}\)

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231. *Id.* (citing Albemarle Paper Co. v. Moody, 95 S. Ct. 2362, 2371 (1975)).
234. *See Storrow, supra* note 9, at 681.
235. *Id.* at 693.
237. *Id.* Saban states:

> Less than one month after the Supreme Court decided
The Court’s decision in *Oncale* contains remarkable parallels to *Meritor*\(^{238}\) in that it establishes a cause of action for sexual harassment, this time by plaintiffs of the same sex, but leaves “work of defining standards to the lower courts.”\(^{239}\) While the courts have been plagued

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*Oncale*, a district court judge in Arkansas dismissed Paula Jones’ sexual harassment case against President Clinton, finding the alleged conduct, if true, was “certainly boorish and offensive,” but did not rise to the level of sexual harassment. Jones had alleged, of course, that then-Governor Clinton invited her to his hotel room, exposed himself to her and requested oral sex. He also allegedly mentioned that Jones’ ultimate superior was his “good friend”.

Judge Susan Webber Wright rejected Jones’ quid pro quo claim because she failed to show that she had suffered any tangible job detriment as the result of turning down the Governor’s advances, a requirement for making a case of quid pro quo sexual harassment according to Judge Wright. In support of this conclusion, she observed that Jones received every merit and cost-of-living increase for which she was eligible, her job was reclassified upward and she consistently received satisfactory job reviews.

Judge Wright further held that even if a tangible job detriment was not required, the case could not go to the jury because Governor Clinton’s alleged “good friend” statement “do[es] not in any way constitute a clear threat that clearly conditions concrete job benefits or detriments on compliance with sexual demands.”

Judge Wright also refused to send Jones’ hostile environment claim to the jury, finding there was no evidence that she had been harmed by the incident. She concluded that the alleged “incident was brief and isolated [and] did not result in any physical harm.” Jones continued to work for 1-1/2 years without missing work, never complained and never consulted a therapist. A single proposition, in Judge Wright’s opinion, was not sufficiently “frequent, severe or pervasive” to create a hostile environment in the absence of something akin to a sexual assault.

The Jones v. Clinton decision, like *Oncale*, reflects the general trend in sexual harassment law that not all sexual conduct in the workplace is actionable. This highly publicized decision, however, may leave employers with a false sense of security. It is not clear whether an ordinary supervisor off the street would win summary judgement in New York under the same circumstances (or even in Arkansas if he were not the President).

239. *Oncale*, 118 S. Ct. at 1002.
with the causation phase in same-sex sexual harassment litigation, this
problem can be eluded by modifying the but-for analytical paradigm to
reflect the nature of same-sex sexual harassment. A manifest and
unavoidable task is to fathom the correct scope of "sex"; courts could
aggressively define sex and thereby risk protecting some harassment
based on sexual orientation or they could narrowly define "sex" and risk
tolerating some otherwise unlawful sex-based sexual harassment.

In forging an encompassing jurisprudence more reflective of the
goals of Title VII, the courts must view same-sex sexual harassment
claims in the same way they do opposite sex claims. "Such an
approach requires the courts to harmonize the analysis in sexual
harassment cases generally by discarding reliance on presumptions of
heterosexuality or homosexuality and focusing squarely on the conduct
in such cases and whether such conduct can reasonably be characterized
as sexual." 

Sober judicial and commentorial scrutiny of same-sex sexual
harassment issues can illuminate, define, and ultimately discard much of
the doctrinal and semantic litter that presently obfuscates intelligible
analysis in both traditional and same-sex sexual harassment disputes.
Same-sex sexual harassment disputes offer courts an opportunity to
magnify Title VII coverage and equality in the workplace. In
addressing such disputes, the courts can apply either anti-discriminatory
policy or ideology as a guiding light in advancing and interpreting Title
VII's jurisprudence. The choice is obvious -- either bring some
analytical illumination to expose these issues or further immerse them in
ideological heat causing Title VII and a growing number of victims to
sink into doctrinal abyss.

240. See Robert Brookins, A Rose By Any Other Name... The Gender Bases of Same-
241. Id.
242. See Storrow, supra note 9, at 745.
243. Id.
244. See Brookins, supra note 240, at 536.
245. Id.
246. Id. at 538.
247. Id.
INTRODUCTION

Title II of the Americans with Disabilities Act of 1990 (ADA) was a watershed law by any measure. The Rehabilitation Act of 1973 sought to eliminate discrimination against disabled persons in programs receiving federal assistance, and Title II extended this protection to state and local governments as well. When President Bush signed the Americans With Disabilities Act into law on July 26, 1990, he stated that “[t]his legislation is comprehensive because the barriers faced by individuals with disabilities are wide-ranging.” A looming and particularly troubling question is just how far Title II of the ADA extends in requiring state and local governments to remove barriers that discriminate against the disabled. The answer, of course, is largely a matter of statutory interpretation.

The clear statement doctrine provides an ostensibly intelligible rule to guide courts in correctly interpreting federal statutes. This rule states that when Congress seeks to regulate a core or fundamental state function, and thereby change the balance of power between the federal government and the states, this intention must be clearly stated in the language of the applicable statute. Title II of the ADA unequivocally extends to state and local governments, but the very terse and

4. A&P 101-336 Mat’l 62 (Statement on Signing the Americans with Disabilities Act of 1990, July 26, 1990). The first purpose stated in the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1) (West 1998). At the time it drafted the statute, Congress found that approximately 43 million people had disabilities and that the number was growing due to the aging population. Id. at § 12101(a)(1). Moreover, the findings indicate that discrimination against the disabled has been pervasive and has reared its head in multifarious ways. Id. at § 12101(a)(5).
overarching language used in the statute leaves room for disagreement over whether Title II applies to particular state functions.\(^6\) The extent to which Title II applies to state prison inmates has become a point of major contention.

This note examines the United States Supreme Court's 1998 decision in *Pennsylvania Department of Corrections v. Yeskey*,\(^7\) which extended the protections afforded the disabled under Title II of the Americans With Disabilities Act\(^8\) to inmates in state prisons. Part II of this note reviews the statutory language and implementing regulations associated with Title II, and it explores the divisions percolating in the federal courts of appeals prior to the *Yeskey* decision. Part III sets forth the facts and reasoning in the unanimous *Yeskey* opinion, and Part IV analyzes the clear statement rule in light of current commentary and likely future developments. Some concluding thoughts are provided in Part V.

**BACKGROUND**

**A. Statutory and Administrative History**

The Rehabilitation Act of 1973 was an ambitious effort to bring disabled persons into the mainstream of American society. Congress stated its desire "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society . . ."\(^9\) The statute designates the federal government to champion this new effort,\(^10\) and section 504 prohibits discrimination against the disabled in all programs or activities receiving federal largesse:


\(^7\) 118 S. Ct. 1952 (1998).

\(^8\) The statute defines a “qualified individual with a disability” as follows:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.


\(^10\) Id. at § 701(b)(2).
No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...\textsuperscript{11}

The definition of a "program or activity" includes the federally-funded operations of state and local governments,\textsuperscript{12} and the implementing regulations make it amply clear that section 504 extends to state prisons.\textsuperscript{13} Importantly, the only real remedy disabled state prisoners had prior to the enactment of section 504 was a section 1983\textsuperscript{14} claim of "deliberate indifference" by prison officials in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.\textsuperscript{15}

Recognizing that the nation had a long way to go in alleviating discrimination against the disabled, Congress passed the Americans With Disabilities Act of 1990.\textsuperscript{16} Under Title II of the ADA, Congress extended the protections of section 504 to prohibit discrimination against disabled persons by all public entities.\textsuperscript{17} The definition of a public entity under Title II includes "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."\textsuperscript{18} In sweeping yet familiar language, the statute declares that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."\textsuperscript{19} The Department of Justice (DOJ) is given authority to

\begin{itemize}
  \item \textsuperscript{11} 29 U.S.C. § 794(a) (West 1998).
  \item \textsuperscript{12} Id. at § 794(b) (West 1998).
  \item \textsuperscript{13} See 28 C.F.R. § 42.540(h) (1998).
  \item \textsuperscript{15} See Estelle v. Gamble, 429 U.S. 97, 104 (1976) (The "deliberate indifference" standard is fairly high and has been difficult for many prisoners to overcome); See, e.g., Ira P. Robbins, \textit{George Bush's America Meets Dante's Inferno: The American's with Disabilities Act in Prison}, 15 YALE L. \\& POL.'Y REV. 49, 67-68 (1996).
  \item \textsuperscript{16} See 42 U.S.C. § 12101 (West 1998).
  \item \textsuperscript{17} Id. at § 12132.
  \item \textsuperscript{18} Id. at § 12131(1)(A), (B).
  \item \textsuperscript{19} Id. at § 12132.
promulgate regulations to implement Title II, and those regulations leave no doubt that Title II applies to public entities that receive no federal financial assistance. The statute and the DOJ regulations define the phrase “qualified individual with a disability” in precisely the same way:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Title II additionally states that the “remedies, procedures, and rights” under the ADA are the same as those under section 504, and courts usually discuss the two statutes in tandem. The DOJ regulations put a significant amount of meat on the statutory bones of Title II; this is accomplished through expansive definitions, and through abundant requirements for both existing facilities and new construction.

**B. Tempest in a Teapot — The Conflict Among the Circuits**

Not long after passage of the ADA, the federal courts of appeals started receiving cases brought by disabled state prisoners seeking shelter under Title II. These courts were faced with the unenviable task of deciding whether Title II applies to state prisoners, and some courts

20. Id. at § 12134 (1).
25. See 38 C.F.R. § 35.104 (1998). For example, the definition of “physical or mental impairment” in section 35.104 excludes homosexuality or bisexuality, and the definition of disability leaves outside its orbit transvestitism and voyeurism. Id.
26. Id. at §§ 35.150-35.151. The statute requires the regulations to include standards for facilities and vehicles, and those standards have to “be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.” 42 U.S.C. § 12134 (c) (West 1998).
changed their view on this contentious issue. Even before the ADA became law, the Ninth Circuit held in *Bonner v. Lewis* that section 504 of the Rehabilitation Act of 1973 applied to a deaf inmate in a state prison who was denied access to a sign language interpreter knowledgeable in the American Sign Language. After passage of the ADA, the Ninth Circuit in *Gates v. Rowland* employed the ADA implementing regulations to find that HIV-infected prisoners are "disabled" under section 504, but the court then used a four-part reasonableness test in concluding that section 504 was not violated by a prison policy excluding HIV positive inmates from food service assignments. The *Rowland* court reasoned that "[t]here is no indication that Congress intended the Act [section 504] to apply to prison facilities irrespective of the considerations of the reasonable requirements of effective prison administration." Thus, as the Fourth Circuit would later note, the Ninth Circuit appeared to pull back from its original position that section 504 protects state prisoners. Yet, in 1996, just two years after *Rowland*, the Ninth Circuit in *Duffy v. Riveland* held that a state prisoner alleging that

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27. See *Bonner v. Lewis*, 857 F.2d 559, 564 (9th Cir. 1988).

28. See *Gates v. Rowland*, 39 F.3d 1439, 1446-48 (9th Cir. 1994). The four-part test was taken from *Turner v. Safely*, 482 U.S. 78 (1987), but the Ninth Circuit broke new ground by applying the test to determine the statutory, as opposed to constitutional, rights of prisoners. The following quote lays out the test:

Turner identifies four factors relevant in determining the reasonableness of prison policies: (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) the impact that accommodation of the constitutional right will have on guards, on other inmates, or on the allocation of prison resources; and (4) whether the regulation or policy is an "exaggerated response" to prison concerns. The burden is on the inmates to show that the challenged regulation is reasonable under Turner.

*Gates*, 39 F.3d at 1447 (quoting *Casey v. Lewis*, 4 F.3d 1516, 1520 (9th Cir. 1993)). When the *Yeskey* case reached the U.S. Supreme Court, the petitioner, the state of Pennsylvania, relied on *Turner* in making the constitutional argument that state prison regulation falls outside Congress' power under the Fourteenth Amendment. See Petitioner's Brief at 28, *Yeskey* (No. 97-634). The respondent replied that *Turner* was a judicially-created test and that the Fourteenth Amendment was not violated by the enactment of a contrary remedy in the ADA. See Respondent's Brief at 38-41, *Yeskey* (No. 97-634).


he was not provided with a qualified sign language interpreter could
pursue his claims for violations of section 504 and Title II. Relying on
Bonner, the Duffy court also ruled that disciplinary and classification
hearings for prisoners are “programs” under Title II.

The Seventh Circuit likewise experienced a transformation in
positions. In Bryant v. Madigan, the Seventh Circuit held that a prisoner
who was denied pain medication for an injury he sustained in falling out
of his bed failed to state a claim under the ADA. Speaking for the
court, Chief Judge Posner expressed serious doubts that the ADA applied
to state prisoners, stating “[i]t is very far from clear that prisoners should
be considered ‘qualified individual[s]’ within the meaning of the Act.
Could Congress really have intended disabled prisoners to be
mainstreamed into an already highly restricted prison society? He
stated that prisoners have fewer rights than free citizens, and he
commented on the practical problems associated with applying the Act to
prisoners. However, only one year later, in Crawford v. Indiana
Department of Corrections, Judge Posner and the Seventh Circuit held
that the ADA applies to state prisoners and reinstated a blind prisoner’s
suit for denial of access to certain prison programs and activities.
Crawford is significant for its discussion of the clear statement rule.
Having found no statutory exception for state prisoners, the court turned
to the state’s argument that Title II does not apply to state prisoners
because there is an absence of clear statutory language showing a
congressional intent to regulate the core state function of prison
administration. Posner admitted that prison administration is a core
state function, but he concluded that the term “public entity” was a clear
expression of Congress’ intent that Title II apply to all state and local
governmental entities. He also surmised that state prisons, like public schools, were not part of any "inner core" of state functions.

*Gregory v. Ashcroft*, a non-ADA case, is usually cited as authority for the clear statement rule. In *Gregory*, the U.S. Supreme Court was faced with the issue of whether a Missouri constitutional provision requiring mandatory retirement for aging judges violated the federal Age Discrimination in Employment Act of 1967 (ADEA). Following a lengthy discussion of federalism, the Court articulated the clear statement rule. In short, certain functions of a state are so fundamental that Congress cannot encroach upon them without clearly expressing its intent to do so in the language of the specific federal statute at issue. The Court then set forth a lengthy quotation, some of which is worth repeating here:

[I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute . . . ." Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States . . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislation has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

After finding that the setting of qualifications for state judges "is a decision of the most fundamental sort for a sovereign entity," the

38. *Id.* Posner stated that "[r]ealistically, the state is asking us to amend the two statutes," referring to section 504 and Title II. *Id.* at 484. Posner felt that the better argument for a judge-made exception for prisons is that it is "necessary to save the statute from generating absurd consequences," although he rejected this view right along with the "clear statement" argument. *Id.* at 485-487.

39. *Id.* at 485.


41. *Id.* at 455.

42. *Id.* at 460-61.

43. *Id.*

Gregory Court held that, because the ADEA’s exclusion for appointed state officers “at the policymaking level” is ambiguous, the Missouri constitutional provision mandating retirement for judges did not violate the Act.\(^{45}\) That is, the ADEA does not “plainly” apply to state judges, so state judges are not protected by the ADEA.\(^{46}\) Similarly, the Crawford court held that because Title II of the ADA does not clearly exclude state prisoners from its protections, Title II applies to state prisoners.\(^{47}\) If there is a difference between Gregory and Crawford for our purposes, it is that adjusting the qualifications for state judges touches state sovereignty in a way that prison administration does not.

The focal point for the view that Title II of the ADA does not apply to state prisoners has been the Fourth Circuit. In Torcasio v. Murray, the Fourth Circuit held that the failure of prison officials to fully accommodate the needs of a 460-pound prisoner did not provide grounds for relief under Title II of the ADA, or the Rehabilitation Act of 1973, because it was not clear that either act applied to state prisoners.\(^{48}\) While admitting that some of the language in the two statutes looks “all-encompassing,” the court concluded that the statutory language does not clearly express a congressional intent to apply either of the two acts to state prisoners.\(^{49}\) The court regarded prison management as a core state function,\(^{50}\) and both statutes failed to satisfy the clear statement rule.\(^{51}\)

A lengthier exposition of the Fourth Circuit’s position showed up a short time later in Amos v. Maryland Dept. of Public Safety and Correctional Services.\(^{52}\) The Amos court forthrightly stated that “[a]fter painstakingly reexamining our decision in Torcasio, we are convinced that Torcasio’s analysis of the issue is, indeed, compelling, and that the Rehabilitation Act and the ADA do not apply in the state prison context.”\(^{53}\) Amos involved claims by thirteen prisoners with a wide range of ailments.\(^{54}\) The Amos court addressed four major “clear

\(^{45}\) See Gregory, 501 U.S. at 467.
\(^{46}\) Id.
\(^{47}\) See Crawford, 115 F.3d at 487.
\(^{48}\) See Torcasio v. Murray, 57 F.3d 1340, 1342 (4th Cir. 1995).
\(^{49}\) Id. at 1346-52.
\(^{50}\) Id. at 1345.
\(^{51}\) Id. at 1352.
\(^{52}\) 126 F.3d 589 (4th Cir. 1997).
\(^{53}\) Id. at 591.
\(^{54}\) Id. at 591-93. Importantly, two of the thirteen prisoners were suffering from the same condition as Yeskey, hypertension. Id. at 592.
statement” arguments proffered by the appellants, the DOJ and the prisoners. First, the appellants argued that the clear statement rule only applies where a statute is ambiguous, and the ADA is not ambiguous. Reiterating much of the Torcasio decision, the Amos court contended that terms like “public entity,” “services, programs, or activities,” and “public services” do not really apply in the prison context and belie the notion that Congress intended to apply the ADA to state prisons. Similarly, the words “eligible” and “participate” connote voluntariness, something obviously lacking in a correctional setting. The language of the statute, therefore, does not contain a clear statement of Congress’ intent to apply the ADA to state prisoners. There is also no sign of such congressional intent in the legislative history. A second argument by the appellants was that the clear statement rule only applies to core state functions that deal with representation and the democratic process. The court, however, concluded that the rule is much broader and forbids congressional intrusion into areas that change the federal-state balance in the absence of a clear statement of congressional intent. Prison management, argued the court, is just such an area.

The appellants additionally argued that it was unnecessary to apply the clear statement rule in Torcasio because in no uncertain terms section 504 and the ADA abrogate the states’ immunity from suit under the Eleventh Amendment. The court responded with a quote from Gregory: “a clear statement is required not simply in determining whether a statute applies to the states, but also in determining whether the statute applies in the particular manner claimed.” Thus, although the states can be sued for violating the ADA, the threshold question is whether or not the particular state function falls within the confines of the ADA. The court concluded that prisons do not. The appellants’ final argument was that even in the face of an ambiguous statute, the

55. Id. at 593.
56. Id. at 594-96, 601.
57. Id. at 601.
58. Id. at 602.
59. See Amos, 126 F.3d at 604.
60. Id. at 605.
61. Id.
62. Id. The specific statutory section is 42 U.S.C. § 12202.
63. Id. at 604 (quoting Virginia Dep’t of Educ. v. Riley, 106 F.3d 559, 568 (4th Cir. 1997)) (citing Gregory, 501 U.S. at 460-70).
64. See Amos, 126 F.3d at 607.
65. Id.
doctrine of deference to administrative agencies, set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, requires the court to give great deference to the DOJ regulations implementing and interpreting the ADA. Those regulations show that the ADA applies to state prisons. The court responded that the clear statement rule, and not the *Chevron* doctrine, applies when the ambiguous statute may alter the distribution of power between the federal government and the states.

While the Fourth Circuit has perhaps been the most prolific in explaining why the ADA should not apply to state prisoners, the Tenth Circuit has likewise refused to apply the ADA to state prison inmates. In *White v. Colorado*, a state prisoner was denied evaluation, treatment, or surgery for a leg injury sustained prior to his incarceration, and he was allegedly denied prison employment because of his disabling injury. The *White* court, in an exceptionally terse opinion, held that the plaintiff failed to state a claim for relief of any kind under either the Rehabilitation Act of 1973 or Title II of the ADA.

This, then, was the state of the law when the *Yeskey* case arose in the Third Circuit in 1997. The Seventh and Ninth Circuits had changed their positions at least once, although both tended to favor ADA protections for state prisoners. On the other hand, the Fourth and Tenth Circuits squarely rejected application of the ADA to state prison inmates. In applying the clear statement rule, different circuits were coming up with different results. The Seventh Circuit, viewing the rule as one part of an argument for a judicially-created exception to the statute, found that the ADA covers state inmates, but the Fourth Circuit applied the rule and came to the opposite conclusion. It would be the job of the U.S. Supreme Court to resolve this conflict.

67. See *Amos*, 126 F.3d at 605-07.
68. Id.
69. Id. at 606-07.
70. See *White v. Colorado*, 82 F.3d 364, 366 (10th Cir. 1996).
71. Id. at 367.
72. See, e.g., *Yeskey*, 118 F.3d at 170.
73. See *Bonner*, 857 F.2d at 559; *Gates*, 39 F.3d at 1439; *Bryant*, 84 F.3d at 246; *Crawford*, 115 F.3d at 481.
74. See *Amos*, 126 F.3d at 589; *White*, 82 F.3d at 364.
75. Id.
76. See *Crawford*, 115 F.3d at 481; *Amos*, 126 F.3d at 589.
A. The Facts and Lower Court Opinions

In 1994, Ronald Yeskey was sentenced to serve between eighteen and thirty-six months in a Pennsylvania prison. The sentencing judge recommended that Yeskey be sent to the Motivational Boot Camp for young offenders, although under Pennsylvania law the prison was not required to follow the judge’s suggestion. If permitted to go to the Boot Camp, Yeskey would only have to serve six months of his sentence, after which he would be placed on parole and receive state services such as work experience, continuing education, and counseling. However, because Yeskey had hypertension and was on medication, the Department of Corrections decided not to admit him. He subsequently sued the Pennsylvania Department of Corrections and certain officials in the Department for violation of Title II of the ADA. Yeskey sought damages and an injunction. The federal district court granted the state’s 12(b)(6) motion to dismiss on the grounds that the ADA does not apply to state prisoners. Yeskey appealed to the Court of Appeals for the Third Circuit, which reversed the lower court.

Some elaboration on the decision of the Third Circuit will be instructive. Beginning with the text of Title II, the court found nothing that would exclude state prisoners from the statute’s protections. The dictionary definitions and “ordinary meanings” of the words in the statute do not allow for the conclusion that the ADA is inapplicable to

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77. See Yeskey, 118 S. Ct. at 1953.
78. Id.
79. Id. (See PA. STAT. ANN. tit. 61, § 1126(d) (West 1998)).
80. See Yeskey, 118 S. Ct. at 1953.
81. Id. (See PA. STAT. ANN. tit. 61, § 1123 (West 1998)).
82. See Yeskey, 118 S. Ct. at 1953.
83. See Respondent’s Brief at 2, Yeskey (No. 97-634).
84. See Yeskey, 118 S. Ct. at 1953.
85. Id.
86. See Respondent’s Brief at 2, Yeskey (No. 97-634).
87. See Yeskey, 118 S. Ct. at 1953.
88. Id.
89. Yeskey, 118 F.3d at 168.
90. Id. at 170.
inmates in state prisons. Although not citing the case directly, the court followed the *Chevron* doctrine and accorded considerable deference to the DOJ regulations promulgated under Title II. Review of the regulations for section 504 and Title II led to the discovery of specific references to prisons, and this buttressed the court’s initial view that the ADA applies to state prisoners. Turning to the case law, the court embraced the Seventh Circuit’s decision in *Crawford* while labeling as “seriously flawed” the Fourth Circuit’s decision in *Torcasio* and the Eleventh Circuit’s decision in *White*. In light of the ADA’s explicit abrogation of state immunity from suit, as well as Congress’ clearly expressed intent to apply the ADA to all components of state and local government, the court described the *Torcasio* court’s use of the clear statement rule as an unnecessary extension. Citing *Gregory*, the court stated that the clear statement rule is a “rule of statutory construction to be applied where statutory intent is ambiguous . . . [i]t is not a warrant to disregard clearly expressed congressional intent.” Rejected as well was the Fourth Circuit’s interpretation of the terms “eligible” and “participate” in the ADA definition of “qualified individual with a disability.” According to the court, which found support in the dictionary, these words do not necessarily evoke the concept of voluntariness.

B. The U.S. Supreme Court’s Opinion and Reasoning

Justice Antonin Scalia’s opinion for the unanimous *Yeskey* Court is brief and to the point. He first addressed the petitioner’s argument that the clear statement rule of *Gregory* excludes state prisoners from the protections of the ADA in the same manner that the rule excluded the

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91. Id.
92. Id. at 171. The court stated the principle that it would assign “controlling weight” to the DOJ regulations unless it found them “arbitrary, capricious, or manifestly contrary to the statute.” Id. (quoting Babbit v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)).
93. Id.
94. See *Yeskey*, 118 F.3d at 168 (citing *Crawford*, 115 F.3d at 168; *Torcasio*, 57 F.3d at 1340; *White*, 82 F.3d at 364).
95. See *Yeskey*, 118 F.3d at 172-73.
96. Id. at 173 (quoting *Gregory*, 501 U.S. at 452).
97. Id.
98. Id.
99. 501 U.S. at 452.
state judges in *Gregory* from taking shelter under the ADEA. \(^{100}\) After citing two cases for the proposition that state prison management is a core governmental function, \(^{101}\) Scalia remarked that "[a]ssuming, without deciding, that the plain-statement rule does govern application of the ADA to the administration of state prisons, we think the requirement of the rule is amply met: the statute's language unmistakably includes State prisons and prisoners within its coverage." \(^{102}\) Thus, the Court announced its holding and proceeded to decide the case on the assumption that the clear-statement rule applied to the situation at hand, but it reserved judgement on this specific point. \(^{103}\) Quickly distinguishing *Gregory*, Justice Scalia pointed out that, unlike the ambiguous language in the Age Discrimination in Employment Act, the phrase "public entity" in the ADA is clear and admits of no exceptions for prisons. \(^{104}\)

Continuing with his examination of the statutory language, Justice Scalia also rejected the argument that the phrase "programs, services, or activities" is ambiguous and could not possibly apply to state prisoners. \(^{105}\) Rather, he cites examples from previous cases in which terms like "program" and "service" were used in the prison context. \(^{106}\) Even more compelling was the use of the word "program" in the Pennsylvania statute that set up the Motivational Boot Camp from which Yeskey was excluded. \(^{107}\) Moving on to the words "eligibility" and "participation" in the ADA definition of a "qualified individual with a disability," Justice Scalia rebuffed the notion that these words carry a connotation of voluntariness. \(^{108}\) Not only do the dictionary definitions of "eligibility" and "participation" belie such an interpretation, but these words may be quite easily associated with mandatory programs or services. \(^{109}\) As Justice Scalia put it, "[a] drug addict convicted of drug possession, for example, might, as part of his sentence, be required to

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100. See *Yeskey*, 118 S. Ct. at 1953.
103. *Id.* at 1954.
104. *Id.*
105. *Id.* at 1955.
106. See *Yeskey*, 118 S. Ct. at 1955 (citing *Hudson v. Palmer*, 468 U.S. 517, 522 (1984), which referred to "rehabilitative programs and services").
107. *Id.*
108. *Id.*
109. *Id.*
'participate' in a drug treatment program for which only addicts are 'eligible.'" Moreover, Justice Scalia argued, even under the assumption that the words "participate" and "eligible" connote voluntariness, some prison programs and services are voluntary and would not therefore be excluded from coverage under the ADA. In support of this last proposition, Justice Scalia makes reference to not only prison law libraries but also to the Motivational Boot Camp that Yeskey sought to attend. Prisoners are not required to use the services of prison law libraries, and under Pennsylvania law Yeskey did not have to participate in the Motivational Boot Camp program.

Justice Scalia concluded his discussion of the language in Title II by addressing two more of the state's arguments. First, the state argued that the Findings and Purpose section of the statute is silent on prisons. While this section does not explicitly mention prisons, Justice Scalia pointed out that it does refer to "institutionalization," a phrase that could very well extend to prisons. Nonetheless, he found this argument to be "irrelevant" in light of the clear statutory language, and he cited from the Court's opinion in Sedima, S.P.R.L. v. Imrex Co. to support his position. In a similar vein, the Court rejected the state's "appeal to the doctrine of constitutional doubt, which requires that we interpret statutes to avoid 'grave and doubtful constitutional questions....'" Justice Scalia noted that a statute must be capable of two interpretations before

110. Id.
111. See Yeskey, 118 S. Ct. at 1955.
112. Id.
113. Id. (Justice Scalia cites and parenthetically quotes PA. STAT. ANN. tit. 61, § 1126(a) (West 1998). Somewhat humorously, he also parenthetically quotes a footnote from Gabel v. Lynaugh, 835 F.2d 124, 125 (5th Cir. 1988). The footnote states that "pro se civil rights litigation has become a recreational activity for state prisoners in our Circuit ...." Id. In Gabel, the appellant state prisoners filed a frivolous appeal, and the court decided that sanctions were in order. Id. What Scalia seemed to be saying with this quote was that while state prisoners are free to use or not use the prison law library, they are using it quite frequently and for the purpose of filing meritless lawsuits.).
114. See Yeskey, 118 S. Ct. at 1955.
115. Id. at 1955-56.
116. Id. at 1956 (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)) (Sedima involved the RICO statute, and Justice Scalia referred to the part of the opinion that deals with how broadly RICO is to be construed. The Sedima Court stated that "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.").
117. Id. (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).
this doctrine applies, and the ADA language is clear. He found unhelpful the state's reference to the words "Public Services" in the title of the statute; relying on the Court's decision in Trainmen v. Baltimore & Ohio R. Co., Justice Scalia retorted that a statutory title should only be used for interpretation purposes where it is necessary to clarify text that is ambiguous.

In the final portion of the Court's opinion, Justice Scalia frankly refused to address the state's constitutional arguments. In its brief, the Commonwealth contended that Congress lacked the power to enact the ADA under either the Commerce Clause or section 5 of the Fourteenth Amendment, but these issues were not raised in the lower courts. As such, having fully expounded its reasons for finding that the ADA applies to state prisoners, the Supreme Court reiterated its holding and affirmed the decision of the Third Circuit.

ANALYSIS

A. Overview

Yeskey is perhaps the best recent example of Justice Scalia's "New Textualism" theory of statutory construction. This approach is well described in the following quote from an introductory text on statutory interpretation:

[O]nly the text of the statutory provision at issue and the text of the body of law into which the provision has been integrated is to be used in statutory interpretation; if the text fails, canons of construction may be consulted. The

118. Id.
120. See Yeskey, 118 S. Ct. at 1956.
121. Id.
123. See Yeskey, 118 S. Ct. at 1956.
key to understanding New Textualism is its abhorrence to any reference to a statute’s legislative history.\textsuperscript{125}

In \textit{Yeskey}, Justice Scalia parsed the phrases and definitions in Title II to divine the plain meaning of the text. He made no reference to legislative history,\textsuperscript{126} the DOJ regulations, or any other aid to interpretation save one canon of construction.\textsuperscript{127} This approach is in line with his view of statutory construction and his initial assumption that the \textit{Gregory} clear statement rule applied to the fact situation before the Court.\textsuperscript{128} However, the Court gave only a partial answer to the question of how clear a statute needs to be to meet the clear statement requirement, and the Court stopped short of providing guidance to courts in terms of when the doctrine applies.

\textbf{B. How Clear Does the Clear Statement Need To Be?}

Cases like \textit{Yeskey} arise because in drafting statutes Congress uses sweeping language and then leaves it to courts and administrative agencies to flesh out the details and determine specific applications. This is nothing new, and courts have crafted doctrines and rules to deal with this undesirable, yet seemingly necessary, situation. Title II of the ADA\textsuperscript{129} is a good example of a broadly worded statute, and the clear

\begin{footnotesize}
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    \item[125.] \textit{Id.} Textualism is to be contrasted with intentionalism. One commentator has described the difference between these two schools of interpretation as follows: “Intentionalism looks to the text, legislative history, and statutory purpose to discern the intent of the legislature when it chose the words used in the statute.... Textualism, in contrast, posits that Congress expresses its intent solely through the enacted language.” Emily Alexander, \textit{The Americans With Disabilities Act And State Prisons: A Question Of Statutory Interpretation}, 66 FORDHAM L. REV. 2233, 2245 (1998). Regarding textualism, “[i]f the statutory language is too broad or vague to have a clear meaning, textualists rely on the language of the statute, dictionaries, ‘common sense,’ ‘ordinary meaning,’ and rules of grammar to find the objective meaning of the text.” \textit{Id.} at 2245-46.
    \item[126.] While the legislative history is not overflowing with references to state prisoners, a 1983 report by the U.S. Civil Rights Commission discussing the plight of state prisoners was mentioned in both parties’ briefs and in oral arguments before the Supreme Court. See Respondent’s Brief at 26, \textit{Yeskey} (No. 97-634); Petitioner’s Brief at 18, 26, \textit{Yeskey} (No. 97-634); United States Supreme Court Official Transcript at 6, \textit{Yeskey} (No. 97-634).
    \item[127.] In citing \textit{Trainmen}, 331 U.S. at 528-29, Justice Scalia was relying on the canon of statutory construction that a title may aid in interpretation of an ambiguous statute but does not determine meaning. \textit{See also MIKVA & LANE, supra} note 124, at 25.
    \item[128.] \textit{See Yeskey}, 118 S. Ct. at 1953.
    \item[129.] 42 U.S.C. §§ 12131-12165 (West 1998).
\end{itemize}
\end{footnotesize}
The clear statement rule states that if Congress intends to regulate a core state function, and thereby upset the balance of power between the states and the federal government, then this intention must unequivocally be stated in the language of the statute. Finding prison administration to be a core state function, the Yeskey Court concluded that the clear statement standard was met.

Implicit in the Yeskey decision is the rule that Congress need not specifically enumerate every situation to which a statute applies in cases involving the clear statement doctrine. This "lenient" view is much preferred over the strict approach advocated by the Fourth Circuit in Amos v. Maryland Dept. of Public Safety and Correctional Services. Requiring Congress to enumerate every state function to which Title II applies would be costly and impractical. Compiling such a list would use up valuable yet limited congressional resources, it would stultify

130. See Gregory, 501 U.S. at 460.
131. Id.
132. There is a certain irony in the fact that the Respondent Yeskey argued that the Gregory clear statement rule did not apply to this case because the statute is unambiguous, Respondent's Brief at 15-16, Yeskey (No. 97-634), while the Petitioner, the state of Pennsylvania, contended that the plain statement rule applied, but upon application, showed that the ADA does not apply to state prisoners, Petitioner's Brief at 11, Yeskey (No. 97-634). In the end, the Court applied the clear statement rule and found that the ADA does apply to state inmates. See Yeskey, 118 S. Ct. at 1953.
133. This is consistent with Gregory, where, in the context of whether Congress intended the ADEA to apply to state judges, the Court stated that "[t]his does not mean that the Act must mention judges explicitly...Rather, it must be plain to anyone reading the Act that it covers judges." Gregory, 501 U.S. at 467. The Respondent, Yeskey, also argued that enumeration was not necessary: "[t]hat the ADA does not explicitly mention prisoners or prisons is not relevant. Gregory did not announce an 'enumeration' rule, and Congress is not required to list every entity, or every aspect of an entity, that it intends to cover in a statute of general application." Respondent's Brief at 16, Yeskey (No. 97-634).
In oral arguments before the Supreme Court, one of the justices asked the Petitioner, the state of Pennsylvania, the following question: "So any area that is not mentioned in the finding is not covered by the text of the act, even though the words otherwise would cover it. Is that the principle you want us to apply?" United States Supreme Court Official Transcript at 9, Yeskey (No. 97-634). The Petitioner responded by stating, "Well, that's part of the principle I'd want you to apply. The other part would to be --- to look at the meanings of the words in the statute regarding a qualified individual who meets the essential eligibility requirement." Id. at 9.
134. See Lee, supra note 5, at 257.
135. 126 F.3d at 600-01.
legislative initiatives, it would result in inflexible statutes, and it would still end in courts failing to apply congressional intent where Congress inadvertently fails to make a complete enumeration.\textsuperscript{136} So long as the statutory language clearly encompasses the core state function at issue and contains no exclusion for that function, the clear statement rule should be satisfied.\textsuperscript{137} In the case of Title II of the ADA, there is express language prohibiting any “public entity” from discriminating against disabled persons,\textsuperscript{138} and the statute contains no exclusions or exemptions for state prisons. Indeed, the words prison and prisoner are nowhere to be found in the statute.\textsuperscript{139}

While this analysis may seem to resolve clear statement problems with relative nicety, leaving little room for error, there remains a trouble spot. Justice Scalia intimated that prison administration was a core state function and proceeded to render the Court’s decision under the assumption that the clear statement rule applied,\textsuperscript{140} but he failed to delineate with any precision a line dividing core functions from non-core functions. This kind of uncertainty undoubtedly led Judge Posner, in \textit{Crawford v. Indiana Department of Corrections}, to conclude that prisons, like public schools, do not occupy the “inner core” of state functions.\textsuperscript{141} Although \textit{Gregory} and \textit{Yeskey} tell us that qualifications for state judges and the administration of prisons are core state functions, these two areas of state responsibility are intuitively different.\textsuperscript{142} Moreover, uncertainty abounds when the task turns to defining the other state functions to which the appellation “core state function” should attach.\textsuperscript{143} What saved the ADA from this quagmire is the “all encompassing”\textsuperscript{144} language of the statute – it covers all state functions, core or otherwise. Hence, one lesson from \textit{Yeskey} is that if Congress wishes to avoid being misunderstood by jurists who ponder distinctions

\textsuperscript{136}See Lee, supra note 5, at 260-61.
\textsuperscript{137}Id. at 261.
\textsuperscript{139}Id. at §§ 12131-12165.
\textsuperscript{140}See Yeskey, 118 S. Ct. at 1953.
\textsuperscript{141}See Crawford, 115 F.3d at 485.
\textsuperscript{142}Indeed, Justice Scalia used the weasel word “may” in indicating that prison administration was a core state function: “It may well be that exercising ultimate control over the management of state prisons, like establishing the qualifications of state government officials, is a traditional and essential State function subject to the plain statement rule of \textit{Gregory}.” \textit{Yeskey}, 118 S. Ct. at 1953.
\textsuperscript{143}See Lee, supra note 5, at 260.
\textsuperscript{144}See Torcasio, 57 F.3d at 1344.
between "core" functions and other state functions, Congress should write the statute broadly enough to cover all possible state functions.

C. When Does the Clear Statement Doctrine Apply?

An equally large and lingering question following the Yeskey decision is when the Gregory clear statement doctrine applies. Section 12202 of the ADA declares that "[a] State shall not be immune under the Eleventh Amendment to the Constitution of the United States...for a violation of this chapter." 145 In many ways this is the gravamen of the clear statement doctrine; if Congress intends to apply the ADA to state prisons and subject the states to suit for failure to comply, it should state this in unequivocal terms. 146 Thus, following Gregory, when a question arises as to whether Congress intended to abrogate state immunity regarding a core state function like state prison management, courts are to search the plain language of the statute for evidence of such an intent. This is what Justice Scalia was doing in Yeskey, and overarching terms like "public entity" led him to conclude that Congress did, indeed, intend to apply the ADA to state prisons. However, the clear statement doctrine was not the only weapon in the Court's interpretive arsenal. The Court could just as easily have pulled out the Chevron doctrine to resolve the ambiguity in the statute. 147 This approach would work as follows:

The Chevron doctrine first requires the court to look at the statutory language of the ADA to see if Congress intended it to apply to state prisons. If the court determines that the ADA is ambiguous or silent on the issue, the court, following Chevron, should then defer to the agency's interpretation. 148

146. See Alexander, supra note 125, at 2235. Significantly, Alexander points out that Gregory extended the traditional Atascadero Eleventh Amendment plain statement rule to apply to specific state functions. Instead of an inquiry into whether the statute generally abrogates the Eleventh Amendment immunity of the states, Gregory requires the court to determine whether the statute abrogates the Eleventh Amendment immunity for a specific core state function. Id. at 2254.
147. Id. at 2235.
148. Id. at 2236. See Chevron, 467 U.S. at 842-44.
In deciding *Yeskey*, the Third Circuit shunned the clear statement doctrine in the face of what it perceived to be an unambiguous statute, but it essentially applied the *Chevron* doctrine and gave considerable deference to the DOJ regulations.\(^{149}\) By contrast, Justice Scalia made no mention of the DOJ regulations in his *Yeskey* opinion,\(^{150}\) and this was congruent with his textualist approach to interpreting not only Title II of the ADA but all statutes.\(^{151}\) Since he started and ended with the plain language of the statute, and since he found that language unambiguous, there was no need to defer to the DOJ regulations. Conversely, had he begun his exegesis from an intentionalist perspective, he would probably have started with the statutory language, then moved on to the legislative history, and at some point have very likely deferred to the agency regulations as required by *Chevron*.\(^{152}\) Thus, in his attempt to cull congressional intent from Title II, Justice Scalia’s interpretive approach was a major factor in choosing the clear statement rule over the *Chevron* doctrine. While this helps us understand why the Supreme Court decided *Yeskey* as it did, it does not greatly enhance our ability to predict future decisions because Justices differ in their approach to statutory interpretation.

**D. Solution: A Protean Approach**

*Yeskey* portends continued problems in applying the clear statement doctrine. Not only will courts wrestle with the question of whether Congress has stated with sufficient clarity its intention to invade a “core state function,” some courts will answer this question by applying the clear statement rule while others reach for the *Chevron* doctrine. Compounding the confusion is the phrase “core state function,” which seems to defy definition.\(^{153}\) Add to this the various interpretive

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149. See *Yeskey*, 118 F.3d at 171-72.
150. See *Yeskey*, 118 S. Ct. at 1952.
151. See generally Alexander, *supra* note 125.
152. Id. at 2261. Interestingly, Alexander knew that the Supreme Court would soon be considering *Yeskey*, and she argued that the case should be decided on the basis of the *Chevron* doctrine. *Id.* at 2237.
approaches a judge may bring to bear on these issues and the result is an unadulterated conundrum. What is required is a protean approach.

First, a court must determine whether Congress is attempting to regulate a core state function. This is a two-part inquiry. In the first instance, the court must decide whether a core state function is involved, and perhaps the best guides here will be the U.S. Constitution and case law. Since it is impractical for Congress to enumerate every situation to which the ADA or other statutes that impinge on state sovereignty apply, the courts will have to look to previous cases and the Constitution in making this determination. Given the aforementioned problem of defining a "core state function," this part of the analysis may prove nearly impossible in practice. Nonetheless, if, in fact, the court determines that a core state function is at stake, the inquiry should shift to a search for clear congressional intent to regulate the core state function. Stated differently, the court must decide whether Congress intended to upset the federal-state balance and abrogate state immunity from suit with regard to the specific core function. A decision to intrude into an area of traditional state control is not to be taken lightly, and this is why the court must apply the clear statement rule to determine congressional intent in this situation. Congress must unequivocally state, in the actual language of the statute, its intent to regulate the function. If the face of the statute is unambiguous, like Title II in Yeskey, then the court will have its answer forthwith. If, on the other hand, the language of the statute gives rise to ambiguity, the court must conclude that Congress did not intend to regulate the core state function and thereby alter the federal-state balance.

Where the court determines that a core state function is not involved, the inquiry likewise focuses on whether Congress intended to

154. The most important federal constitutional provision reserving power to the states is the Tenth Amendment. U.S. Const. amend. X.
155. Future courts can cite Yeskey for the proposition that state prison management or administration is a core state function, and they can cite Gregory for the notion that determining the qualifications of state judges is a core state function.
156. See Lee, supra note 5, at 260-61.
157. See supra note 153 and accompanying text.
158. See Yeskey, 118 S. Ct. at 1953. A general statement of intent can cover more specific situations. The words "public entity" in Title II are not narrowed and clearly refer to all public entities, including prisons. Thus, congressional intent is not ambiguous. The Fourth Circuit in Amos seemed to be requiring a more specific enumeration, but this is not required by Gregory. See supra note 133 and accompanying text.
regulate the particular state function. However, since state sovereignty is not on the chopping block like it is in the case of a core state function, blind application of the clear statement rule will not do. If the statute is unambiguous regarding congressional intent, again the court should simply give effect to that intent. But where congressional intent is ambiguous on the face of the statute, the court should exhaust all the resources at its disposal. At an initial stage, the court should use the canons of statutory construction, look to the statutory purpose and findings, and review the legislative history in determining congressional intent. If, however, after this investigation the statute remains ambiguous, the court should defer to agency regulations as required by the Chevron doctrine.

By following this dichotomy, courts can render decisions that are symmetric and consistent. The clear statement rule and the Chevron doctrine do not overlap and work fine if applied in their proper contexts. In Yeskey, Justice Scalia found that a core state function was at stake, and he correctly, though hesitantly, applied the clear statement rule to find that Title II applied to state prisons. The question is whether his “New Textualism” approach to statutory construction will become an obstacle when the situation before the Supreme Court calls for application of the Chevron doctrine, and a similar question will arise for justices with an intentionalist approach who are confronted with a case demanding the Court follow the clear statement rule.

CONCLUSION

Yeskey is an important decision because it resolved a conflict among the federal courts of appeal and because it clarified the scope of Title II of the ADA. The Supreme Court held that Title II applies to state prisons, and it reached this result by applying the clear statement rule. Justice Scalia determined that state prison management was a “core state function,” and he sought to discover congressional intent through a rigorous analysis of the statutory language. Broad phrases like “public entity” and “services, programs, or activities,” coupled with an absence of any statutory exclusions for state prisons, led Justice Scalia to

159. See Yeskey, 118 S. Ct. at 1953.
160. See, e.g., Amos, 126 F.3d at 596-600.
161. See Yeskey, 118 S. Ct. at 1953.
162. Id. at 1952.
conclude that Congress intended Title II to extend to state prisons and their inmates. However, the Court's opinion does not indicate how clear a statement needs to be to satisfy the clear statement rule in cases where Congress has not used overarching language like it did in Title II. The Court's failure to set out an analytical framework for determining when to apply the clear statement rule and when to apply the *Chevron* doctrine only exacerbates this problem. The solution proposed in this note is to create two separate and distinct tracks of analysis. Where Congress is attempting to regulate a core state function, courts must apply the clear statement rule; where Congress is seeking to regulate other state functions, the *Chevron* doctrine is the more appropriate analytical tool. The success or failure of this approach will greatly depend on the ability of the Supreme Court and other courts to define the term "core state function."

Although this two-track analysis may provide some guidance to courts in interpreting federal statutes that regulate state functions, the *Yeskey* decision leaves state officials with a problem of a different sort: how to accommodate all of the disabled prisoners that are now covered by Title II of the ADA. Assuming that Congress does not amend the statute and overturn *Yeskey*, the states have many options from which to choose. Beyond doing whatever is possible to keep the disabled from entering the prison system in the first place, states can begin by trying "some form of early-release or compassionate-parole structure." States might also accommodate disabled prisoners by moving them to medical facilities, or by housing them in a centralized facility. In the best of all possible worlds, the state would "provide decent care for all inmates in the first place," although in an environment where security is the state's foremost concern this laudable solution may be easier stated than implemented. Whatever the mix of solutions a state chooses, one thing is certain: either the state will have to accommodate disabled prisoners or face potential lawsuits under Title II of the ADA.

At bottom, the *Yeskey* decision will have a profound impact on state prison conditions, but the decision provides little direction to those who wish to understand the judicial mind and the probable course of

163. *Id.* at 1953-55.
165. *Id.* at 106.
166. *Id.* at 107.
167. *Id.* at 108.
168. *Id.*
future cases. Perhaps comfort may be found in knowing that the law is
not always so uncertain. As Justice Cardozo noted:

In countless litigations, the law is so clear that judges
have no discretion. They have the right to legislate
within gaps, but often there are no gaps. We shall have a
false view of the landscape if we look at the waste
spaces only, and refuse to see the acres already sown and
fruitful.169

REPORT ON THE FORTY-FIFTH ANNUAL NATIONAL CONFERENCE OF LAW REVIEWS: A PRACTICAL APPROACH FOR THE TWENTY-FIRST CENTURY

by Kevin T. Miles and Todd A. Biddle

The Forty-fifth National Conference of Law Reviews (NCLR) was held in Cincinnati Ohio, from March 25-29, 1999 at The Westin Hotel. The NCLR was hosted by the Northern Kentucky Law Review of the Salmon P. Chase College of Law at Northern Kentucky University. The Northern Kentucky Law Review won the bid to host the conference two years ago, at the Forty-third NCLR held in Washington D.C. by Catholic University School of Law. This conference marked the culmination of over two year's worth of planning and organization on the part of the Northern Kentucky Law Review staff. The four day conference was attended by representatives from over 100 law reviews and journals from across the United States and its territories, making it the largest conference in the NCLR's Forty-five year history. Incoming

1. Kevin T. Miles and Todd A. Biddle are third year students at Northern Kentucky University, Salmon P. Chase College of Law. They are members of the Northern Kentucky Law Review staff and the editors of the 1999 General Law Issue.

2. The conference was co-chaired by Paige L. Bendel and Michael E.M. Fielman, Editor-in-Chief and Executive Editor of the Northern Kentucky Law Review, respectively.

3. The 1998-99 staff of the Northern Kentucky Law Review would like to thank the members of the 1996-97 staff for securing the conference bid and giving the 1998-99 staff the honor of hosting this event.

4. Represented at the conference were: University of Alabama School of Law, Albany Law School (2), Arizona State University, University of Arkansas School of Law, University of Arkansas Little Rock, University of Baltimore School of Law, Brooklyn Law School (2), California Western School of Law, Campbell University, Capital University Law School, Catholic University of America (3), Chapman University School of Law, Chicago-Kent College of Law, University of Cincinnati College of Law, Columbus School of Law, Creighton University School of Law, University of Dayton School of Law, DePaul University College of Law (2), Detroit Mercy School of Law, Florida State University, Franklin Pierce Law Center (2), George Mason University, Georgia State University College of Law, Golden State University College of Law, UC Hastings College of Law (2), Howard University, University of Idaho College of Law, University of Illinois (2), University of Illinois College of Law, Indiana University – Indianapolis, John Marshall Law School (2), University of Kentucky College of Law (2), Louis D. Brandeis School of Law at the University of Louisville, Loyola Law School, Marquette University, University of Maryland School of Law, University of Memphis – Cecil C. Humphreys School of Law, Mercer University- Walter F. George School of Law, Mississippi College of Law, New England School of Law (2), University of New
and outgoing editors and staff members, alike, were in attendance. The purpose of this year’s NCLR was to provide practical guidance to incoming editors and staff members through interchanges with outgoing editors, presentations by distinguished panelists and speakers, as well as professional training on how to successfully run the internal and external components of an organization.

PANELS

The first full day of the conference was highlighted with a panel entitled *A Practical Perspective: The Role of Law Reviews in Today’s Legal World*. The purpose of this session was to kick-off the conference by examining the reasons that student-run and student-edited law reviews exist in today’s changing legal world. Each panelist expressed their views on the purpose of law reviews and how they are used, practically, by both practitioners, academics, and jurists. This distinguished panel included: Justice Evelyn Stratton of the Ohio Supreme Court; Justice Martin E. Johnstone of the Supreme Court of Kentucky; Justice J. William Graves of the Supreme Court of Kentucky; Judge William McAnulty of the Kentucky Court of Appeals; Mina Jefferson, Frost & Jacobs of Cincinnati; and Donna Bloemer, The Lawrence Firm of Cincinnati. The panel concluded by yielding to numerous questions.

Mexico, University of North Dakota School of Law, Northern Illinois University College of Law, Northern Kentucky University-Salmon P. Chase College of Law, Nova Southeastern University-Shepard Broad Law Center, Ohio Northern University School of Law, Oklahoma City University School of Law (2), University of Oklahoma, University of Oregon School of Law (2), University of the Pacific-McGeorge School of Law, Penn State University-Dickinson School of Law, Pepperdine University School of Law, Universidad de Puerto Rico, University of Richmond, Roger Williams School of Law, Samford University-Cumberland School of Law (2), Seattle University, Seton Hall University School of Law (3), University of South Dakota School of Law, South Texas College of Law, Southern Illinois University, Southwestern University School of Law (2), Southern Illinois University at Carbondale, St. John’s School of Law, St. Mary’s University School of Law, St. Thomas University, Stetson University College of Law, Southern University Law Center, Suffolk University, Texas Tech University School of Law, Thomas M. Cooley Law School (2), University of Toledo, Touro Jacob D. Fuchsberg Law Center, University of Tulsa College of Law, University of Utah, Wake Forest University, Washburn Law School, University of Washington School of Law, Wayne State University Law School, West Virginia University, Western New England College of Law, Whittier Law School, Widener University School of Law, Widener University School of Law-Harrisburg, Williamette University College of Law.
from conference delegates on how they can better serve their subscribers by making law reviews more practical for everyday use.

WORKSHOPS

Friday afternoon marked the NCLR’s annual student-run breakout sessions. In addition to the usual editor-in-chief, executive/managing editor, symposium editor, and casenote/comment sessions, which were run by students from various law journals, this year’s conference added additional workshops pertinent to running a successful law review. The additional sessions included: (1) How to sponsor the NCLR; (2) Marketing; (3) Internet use and law reviews; (4) Specialized law journals. These new breakout sessions were both well-attended and provided invaluable information to incoming editors and staff, while the traditional sessions afforded delegates an opportunity to be exposed to contrasting styles and approaches to performing their editorial responsibilities.

SPEAKERS

Each day of the conference was marked by presentations and speakers on a variety of pertinent topics. On Friday, Justice Donald Wintersheimer of the Supreme Court of Kentucky addressed the delegation at a luncheon by examining attorney discipline and various rules of professional responsibility. Friday evening, Chief Judge William O. Bertelsman of the U.S. District Court for the Eastern District of Kentucky spoke regarding the federal court system and how law review helps to prepare individuals for various job opportunities, including federal clerking positions.

An intensive writing seminar was held on Saturday morning. The session concentrated on proper citation forms and overviewed differing formats of legal articles. Conducted by Professor Darby Dickerson, Director of Research and Writing at Stetson College of Law, and Professor Edward Brewer, Assistant Professor of Law at Salmon P. Chase College of Law of Northern Kentucky University, this seminar provided attendees with substantive information on the editing process, conceptual approaches to running an effective law review organization, as well as insight into preparing a law review article for publication.
Copyright Issues Facing Law Reviews was the focus of Saturday's luncheon. Presented by Keith Johnson, an associate at Taft, Stettinius & Hollister in Cincinnati, delegates were questioned about the implications of copyright law in the law review editing process. Mr. Johnson gave a short overview of the law in this area and provided delegates with a copy of the Association of American Law Schools Model Author/ Journal Agreement as a guide for developing their own journal's assignment of rights contract.

Sunday started with an address by Judge John P. Petzold, President of the Ohio State Bar Association. Judge Petzold centered his attention on the soon-to-be attorneys in the audience and the ethical dilemmas they will encounter throughout their careers. In addition, Judge Petzold drew on his personal experience as both a practicing attorney and jurist on how to deal appropriately with tough ethical situations.

Sunday was highlighted by NCLR keynote presenter Michael Brandwein. Mr. Brandwein is a lawyer and nationally recognized speaker and trainer in the management and leadership of persons working in law, business, community, and social services, and other fields. Mr. Brandwein conducted two intense sessions with the conference delegations. First, he engaged the audience in the morning by speaking on The Truth About Sticks and Stones: Developing Personal and Professional Skills. The afternoon session built on the training accomplished earlier and focused on How to Deal With Disagreement, Resolve Conflicts & Handle Hot People Without Using a Blowtorch.

The NCLR concluded on Sunday evening with the final banquet including an address by Richard Lawrence of The Lawrence Firm in Cincinnati. Entitled Closing Remarks, Mr. Lawrence's speech concentrated on the elements which help to make a closing argument successful.

NCLR GENERAL ASSEMBLY SESSION

The presentation of the Model NCLR Constitution project was made by Michael Russell, 1998-99 Chairman of the National Conference of Law Reviews. Irma Russell, Professor at the University of Memphis, the NCLR headquarter school, was announced as the ongoing project coordinator. Each NCLR member school was encouraged to participate in the development of the Model Constitution project by forwarding
drafts of their school's constitution to NCLR headquarters. Further, the NCLR General Assembly selected the University of Baltimore as host school for the 2001 NCLR Conference.

**NCLR SPONSORSHIP**

The Forty-fifth Annual NCLR was made possible through the continued support of Darby Printing Company, Joe Christensen, Inc., LEXIS-NEXIS, West Group, and Western Newspaper Publishing Co., Inc. On a local level, the Northern Kentucky Law Review's hosting of this conference would not have been possible without the generous support of the following: Chase College Foundation; Frito-Lay, Inc.; Frost & Jacobs LLP; Roger and Patricia Fry; The Kroger Company; Kohnen & Patton LLP; O'Connor, Acciani & Levy; Rice & Diedrichs LLP; Skyline Chili; August A. Rendigs, Jr. Foundation; Rendigs, Fry, Kiely, & Dennis LLP; Taliaferro & Mehling; Vorys, Sater, Seymour, & Pease LLP; and Whitehall Printing Company.

**CONCLUSION**

Once again, the value of an annual law review forum was apparent. The NCLR continues to provide an outlet for the open exchange of ideas and criticisms as well as a practical approach to ensuring the success of law reviews as a critical institution in the legal process. The Forty-fifth NCLR Conference reinforced the role of law reviews in legal education and helped solidify these institutions as benchmarks for excellence in the legal profession.
ETHICAL TREATMENT OF PRIVATE PROPERTY OWNERS WHEN IMPLEMENTING PROTECTION MEASURES FOR RARE AND ENDANGERED SPECIES

by James A. Adkins

"Funny thing how it is. If a man owns a little property, that property is him, it's part of him, and it's like him. If he owns property only so he can walk on it and handle it and be sad when it isn't doing well, and feel fine when the rain falls on it, that property is him, and some way he's bigger because he owns it."2

- John Steinbeck
  The Grapes of Wrath

"We don't have to prove anything. If the landowner disagrees with our recommendations then he can hire an expert!"3

-Glen Therres, Maryland Department of Natural Resources Wildlife Biologist, in response to a comment that he had not proven the presence of Delmarva fox squirrels before mandating timber harvest restrictions on a tract in Dorchester County, Maryland.

1. Mr. Adkins is a law student at the Salmon P. Chase College of Law.
3. Interview with Glen Therres, Wildlife Biologist, Maryland Department of Natural Resources, in Wye Mills, Maryland (1995).
INTRODUCTION

The enforcement of statutes and regulations aimed at protecting rare and endangered species often adversely impacts private property owners that attempt to develop or manage their property. The Endangered Species Act, the Migratory Bird Treaty Act, and State and local laws, such as Maryland's Chesapeake Bay Critical Area Protection Act and the Florida Endangered and Threatened Species Act of 1977, provide for habitat protection for rare and endangered species on both public and private property. The enforcement of regulations may cause property owners to delay, modify, or cancel their plans to acquire building permits, subdivision approval, clearing and grading permits, or timber harvest permits. The enforcement of regulations may also make it necessary for private property owners to litigate.

In addition to the regulatory process of permit acquisition, a property owner may find his project enjoined by a citizen suit demanding the protection of rare and endangered species.

10. Id.; see also Bennett v. Spear, 117 S.Ct. 1154 (1997) (local ranchers brought suit after water restrictions were imposed due to potential harm to endangered species).
11. Morrill, 802 F. Supp., at 426. Citizens suits are authorized pursuant to 16 U.S.C. § 1540(g). The statute provides in part:

   (g) citizen suits
   (1) Any person may commence a civil suit on his own behalf
      (A) to enjoin any person . . . who is alleged to be in violation
          of any provision of this chapter or regulation issued
          under the authority thereof; or
      (B) to compel the Secretary [of Commerce] to apply . . . the
          prohibitions set forth in or authorized pursuant to
          section 1533(d) or 1538(a)(1)(B) of this title with
          respect to the taking of any resident endangered species
As a practical matter, the time and costs involved in challenging erroneously enforced regulations can prevent property owners from asserting their rights. Property owners may be coerced to make concessions and compromises on their project that they are not legally obligated to do in order to obtain permits.

While statutes and regulations aimed at protecting rare and endangered species may outline procedures that a property owner must follow and outline measures that an agency must take to protect the species of concern, they less often address the rights of property owners and the measures that enforcing agencies should take to avoid violating those rights.

Case law and the Administrative Procedure Act strongly suggest that agencies, that enforce rare and endangered species regulations that may adversely impact private property owners, owe affirmative duties to those owners.

Among these duties is a duty to act upon accurate biological information. There is a duty to determine the actual presence of a species of concern and to determine the impacts of habitat modification on rare and endangered species.

Once an agency determines that a property owner's activity presents an imminent threat of harm there is a duty both to the owner and the species of concern to compensate the property owner. First, there is a duty to

13. Id.
14. Goldstein, supra note 4; Doremus, supra note 4.
compensate takings. Second, when restrictions on the use of property do not meet the legal requirements of takings there is a duty both to the property owner and the species of concern to cooperate with property owners. Such cooperation not only treats owners fairly, but may be vital to the long term protection and recovery of endangered species.

DUTY TO DETERMINE PRESENCE OF A SPECIES

The Secretary of the Interior is required to designate critical habitat for endangered species when listing an endangered species. The critical habitat description includes a geographic description, as well as, descriptions of physical conditions necessary for the survival of the species. Endangered species warrant protection when they occur outside of their designated critical habitat.

Scientific observation can demonstrate that a given species is dependent upon specific environmental factors such as climate, geographic location, vegetation type and age, and hydrologic conditions, however, not all property with physical conditions suitable to host a species of concern is habitat. Restrictions on the use of property are not proper unless substantial evidence indicates that a species of concern utilizes the property.

A marine biologist instituted a citizen suit to enjoin the development of a hotel, lounge, and marina site in southern Alabama in an attempt to protect the Perdido Key Beach mouse. The site was near, but outside, the designated critical habitat of the beach mouse. Expert witnesses trapped a Perdido Key Beach mouse on or near the site

under the Fifth Amendment. See U.S. CONST. amend. V.

20. U.S. CONST. amend. V.
21. See Loggerhead Turtle v. County Council of Volusia County, Fla., 148 F.3d 1231 (11th Cir. 1998) (discussing incidental take permits which allow lawful activity that may impact an endangered species).
24. Id. at § 1532(5).
25. Id. at § 1538.
27. Morrill, 802 F. Supp. at 430.
28. Id.
29. Id.
30. Id. at 429.
approximately eight years before the suit was filed, but the witness could not
determine whether the mouse was actually trapped on the site.\textsuperscript{31} Mouse
track sightings near the site were part of the evidence, but it was not
conclusive whether those tracks were actually on the site or on an adjacent
property, or whether the tracks were actually Perdido Key Beach mouse
tracks.\textsuperscript{32} The court refused to grant an injunction, determining that the
proposed project was not likely to have an offsite impact on the Perdido Key
Beach mouse.\textsuperscript{33} The plaintiff did not present sufficient evidence to establish
a causal link between the construction project and the predicted habitat
destruction.\textsuperscript{34}

The Seventh Circuit considered whether the presence of migratory
birds provided a sufficient link to interstate commerce to give the
Environmental Protection Agency jurisdiction to fine a developer for filling
an isolated Illinois "wetland"\textsuperscript{35} under the Clean Water Act\textsuperscript{36} and the
corresponding EPA regulations.\textsuperscript{37} The court examined whether the EPA's
decision was supported by substantial evidence.\textsuperscript{38} There was evidence that
migratory birds used another wetland on the other side of the tract and a
United States Fish and Wildlife Service biologist testified that the wetland
was "suitable habitat", however, there was no direct evidence that migratory
birds actually used the isolated wetland.\textsuperscript{39} The court reasoned that the
migratory birds themselves were the best judges of what was suitable habitat
and that there was no justification to expand government control over
private property beyond reasonable limits considering that, "... the
migratory birds have thus spoken and submitted their own evidence. We see
no need to argue with them."\textsuperscript{40}

The Ninth Circuit considered a parallel case and upheld the Army
Corps of Engineers' jurisdiction over an isolated wetland because the use of

\begin{verbatim}
31. Id. at 427.
32. Id. at 430.
33. Id. at 430-34.
34. Id. at 431. The court states that "[t]here is a substantial difference between something that could be detrimental to a species than that which would jeopardize its existence." Id. at 428 (emphasis added).
35. Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993).
37. 33 C.F.R. § 328.3(b) (1998); 40 C.F.R. § 230.3(t) (1997).
38. Hoffman Homes, 999 F.2d at 261.
39. Id. at 261-62.
40. Id.
\end{verbatim}
the site by migratory birds was supported by evidence and not just theoretical.\textsuperscript{41}

The Minnesota Court of Appeals considered a challenge to St. Louis County's approval of a golf course and residential subdivision development without an Environmental Impact Statement.\textsuperscript{42} Among the plaintiffs' claims was that forest fragmentation would lead to nespredation of neotropical migrant birds by brown headed cowbirds.\textsuperscript{43} While the Minnesota Department of Natural Resources' comments suggested that fragmentation could disrupt the habitat for neotropical migrant songbirds, the court noted that there was no data showing there was a population of songbirds in northern Minnesota that would be affected.\textsuperscript{44} The court refused to uphold this claim on speculative factors.\textsuperscript{45}

Therefore, even though a site may have suitable conditions to support a species of concern, it is not proper to place restrictions on a private property owner unless the challenging party or enforcing agency can demonstrate that the species actually uses the site.\textsuperscript{46}

However, the Secretary of the Interior has defined the taking of endangered species to include habitat modification that interrupts essential breeding, feeding, and sheltering activities\textsuperscript{47}, and the Supreme Court has upheld that definition.\textsuperscript{48} But a species does not breed, feed, or shelter where it is not present. Human beings can label a site as habitat, but until that site is actually utilized by wildlife it is not wildlife habitat.

\begin{footnotes}
\item[43] \textit{Id.} at 881.
\item[44] \textit{Id.}
\item[45] \textit{Id.}
\item[46] \textit{See id.; Cf.} Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988) (woodpecker was known to use the site and the effect on the woodpecker population was shown), \textit{with} Morrill v. Lujan, 802 F. Supp. 424 (S.D. Ala. 1992) (no actual proof of beach mouse presence, nor proof of actual harm to the species).
\item[47] 50 C.F.R. § 17.3 (1997).
\item[48] \textit{Babbitt,} 515 U.S. at 687.
\end{footnotes}
DUTY TO DETERMINE THE IMPACTS OF PROPERTY OWNER'S ACTIVITY

Whether a restriction on the rights of private parties for the sake of protecting endangered species is proper depends on whether the restriction is necessary for the preservation of the species.\textsuperscript{49} Necessity must be demonstrated by accurate biological data.\textsuperscript{50}

The State of Massachusetts authorized a deer hunt on Quabbin Reservation, in Eastern Massachusetts, after a finding that an overpopulation of deer posed a substantial threat to forest health and water quality in the reservoir.\textsuperscript{51} Animal preservationists sought to enjoin the hunt on the grounds that it posed a risk to the local bald eagle population and, thus, violated the Endangered Species Act.\textsuperscript{52} The plaintiffs' theory was that eagles would consume deer that were shot by hunters but not recovered and contract lead poisoning.\textsuperscript{53} The district court refused to enjoin the hunt and the plaintiffs appealed contending that the district court failed to define significant risk.\textsuperscript{54} The First Circuit noted that under the Endangered Species Act, actual harm to a species of concern was the requirement.\textsuperscript{55} The court declined to establish a numerical standard for risk.\textsuperscript{56}

Plaintiffs had not met their burden of proof.\textsuperscript{57} They had not proffered any studies to demonstrate that lead slugs used in deer hunts caused lead poisoning in eagles, nor did they show any harm to eagles as a result of a 1991 hunt held at Quabbin Reservation.\textsuperscript{58} While they were able to demonstrate that lead slugs, such as those used in the past in waterfowl

\textsuperscript{49} Bennett, 117 S. Ct. at 1163-68.
\textsuperscript{50} Id. at 1168.
\textsuperscript{51} American Bald Eagle v. Bhatti, 9 F.3d 163 (1st Cir. 1993).
\textsuperscript{53} \textit{American Bald Eagle}, 9 F.3d at 164-65.
\textsuperscript{54} Id. at 165.
\textsuperscript{55} Id. at 166. Significant risk of harm is not actual harm, and so, does not meet the levels required for an injunction to be issued. \textit{Id}.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 165-66.
\textsuperscript{58} Id.
hunting, caused harm to eagles if ingested, there was no showing that lead slugs would actually be ingested by the eagles in this case.\textsuperscript{59}

The Ninth Circuit considered a challenge to the Navy's water usage.\textsuperscript{60} The Navy maintained a program at Fallon Naval Air Station in Nevada leasing buffer zones adjacent to runways to local farmers.\textsuperscript{61} Irrigated vegetation in the buffer zones reduced the potential for dust storms, impaired visibility, fire, and damage to jet engines from airborne particles and debris.\textsuperscript{62} The water for the irrigation which would otherwise flow naturally to Pyramid Lake was diverted from the Truckee River to Lahontan Reservoir via the Truckee Reservoir and the Truckee Canal.\textsuperscript{63} Diverting water in this manner reduced the size of Pyramid Lake, home of the endangered cui-ui fish.\textsuperscript{64}

The Navy relied on United States Fish and Wildlife Service biological opinions prior to each one year lease.\textsuperscript{65} Though the data in the opinions was weak (inconclusive as to whether harm would result to the cui-ui), the Ninth Circuit found that the Navy's reliance on the opinions was not arbitrary, capricious, or an abuse of discretion.\textsuperscript{66} The biological opinions found that water conservation measures would have had an insignificant impact on the cui-ui fish.\textsuperscript{67} The plaintiff, though it did not agree with the biological opinion, did not offer any additional information to demonstrate that the Navy's outlease program was a cause of actual harm to the cui-ui fish and the court refused to enjoin the program.\textsuperscript{68}

Both of the previous cases involved citizen suits that challenged management decisions of government agencies on land that the agencies controlled.\textsuperscript{69} But these cases illustrate principles that apply to actions that impact private property interests as well. First, the activity or proposed activity must be demonstrated to be a cause of harm to a species of concern

\textsuperscript{59} Id.
\textsuperscript{60} Pyramid Lake Paiute Tribe of Indians v. United States Dept. of the Navy, 898 F.2d 1410 (9th Cir. 1990).
\textsuperscript{61} Id. at 1412.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 1412-13.
\textsuperscript{64} Id. at 1413.
\textsuperscript{65} Id. at 1415.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 1418.
\textsuperscript{68} Id.
\textsuperscript{69} See id. at 1412; American Bald Eagle, 9 F.3d at 164.
before the activity can be enjoined. 70 That harm must be demonstrated by
evidence not just a possibility of harm. 71 Second, the burden of producing
that evidence lies with the party challenging the activity. 72

Ranch owners and irrigation districts that were dependent upon the
water supply from two reservoirs in Oregon challenged an application of the
Endangered Species Act that threatened to reduce the supply of water
available for irrigation. 73 A biological opinion prepared by the United States
Fish and Wildlife service recommended that the two reservoirs be
maintained at higher levels for the protection of the Lost River Sucker and
the Shortnose Sucker. 74 The plaintiffs noted that the current management of
the reservoirs had been essentially the same throughout the twentieth
century, there was no evidence that the two fish species were declining, and
there was no evidence that higher lake levels would provide any significant
benefit to the two species. 75 Justice Scalia noted that biological opinions can
directly affect private interests and that it was imperative to use the best
scientific and commercial data available so the Endangered Species Act is
not implemented on the basis of speculation or surmise. 76 He further stated
that data is necessary for species preservation and to avoid the needless
economic displacement produced by agency officials zealously, but
unintelligently pursuing their environmental objectives. 77

In contrast, when an environmental group challenged a timber
harvest on private property in Oregon to protect the northern spotted owl,
the Ninth Circuit upheld their challenge because there was sufficient
evidence that the proposed timber harvest presented an imminent threat of
harm to a pair of nesting spotted owls and their offspring. 78 The court
contrasted imminent harm, a harm ready to take place, from potential injury,
existing in possibility. 79

Therefore, any implementation of rare and endangered species
regulations that may adversely impact private interests should only be taken

70. American Bald Eagle, 9 F.3d at 166.
71. Id.
72. Pyramid Lake Paiute Tribe of Indians, 898 F.2d at 1415.
73. Bennett, 117 S. Ct. at 1157.
74. Id. at 1159.
75. Id. at 1159-60.
76. Id. at 1168.
77. Id.
78. Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995).
79. Id. at 784.
when there is adequate biological data to demonstrate that there is an imminent threat to a species of concern. 80 Private parties that sue for the enforcement of rare and endangered species need to show that the defendant's activities are an actual cause of harm to a species of concern. 81 Government agencies that take action on behalf of endangered species must base their decisions on the best biological data. 82 If that data does not demonstrate that a property owner's activities are a cause of actual harm to a species of concern then those decisions must be overturned as arbitrary and capricious. 83

A contrary argument is that any harm to the environment, and to endangered species or their habitat, has long term, often permanent, effects. 84 Therefore, it is advisable to err on the side of endangered organisms when the effects of habitat manipulation are not known. 85 However, while wildlife interests are protected by a relatively young statute, private property interests have had a long history of shaping our political system and are protected by the Constitution. 86 Citizens suing for the protection of endangered species must establish an injury fairly traceable to the actions of the defendant, which will be will likely be redressed by a favorable decision. 87 Agencies that enforce statutes and regulations aimed at protecting species of concern must act with restraint unless the best biological and commercial data demonstrates actual harm to a species of concern. 88 Therefore, it is necessary to accurately determine the effects of habitat manipulation before implementing restrictions that affect private

80. See Bennett, 117 S. Ct. at 1157-60.
81. American Bald Eagle, 9 F.3d at 166.
82. Bennett, 117 S. Ct. 1168.
83. Id.
84. See Hoffman Homes, Inc. v. EPA, 999 F.2d 256, 258-60 (7th Cir. 1993). The EPA fined Hoffman Homes for filling in two designated wetland areas in preparation for construction of new subdivision. Id. at 258. The EPA argued that migratory birds use these areas and required Hoffman Homes to make plans for restoring the areas to their original state. Id. at 259. No evidence, however, was actually presented by the EPA indicating the areas were, in fact, used. Id.
85. See Morrill, 802 F. Supp. at 426. The plaintiff contended that development by the defendant may affect the Perdido Key Beach mouse’s habitat. Id. Even though no date could be presented, plaintiff petitioned the court to prevent development by the defendant. Id. at 430-33.
86. U.S. CONST. amend. V.
88. Bennett, 117 S. Ct. at 1168.
DUTY TO COMPENSATE TAKINGS

Whether private property owners can be compensated for restrictions on the use of their property for the protection of rare and endangered species depends upon whether those restrictions constitute a taking.90 In order to prove a taking, a property owner must demonstrate either he has been deprived of economically viable and productive uses of his land91, or that he has been required to dedicate a portion of his property or grant an easement for public purposes.92

A forest products company was denied logging permits on a sixty-five acre Oregon tract due to the presence of the northern spotted owl.93 The State concluded that eight acres of the site could be harvested, but imposed a seasonal restriction on four of those acres concurring with the nesting season of the spotted owl.94 The tract was zoned as commercial timberland which limited commercial activities on the property to the growing and harvesting of timber and compatible uses.95 The Court upheld the landowner's challenge noting that there was a taking of the property, including a temporary taking of the portion of the tract subject to seasonal restrictions.96

In contrast, when a Florida developer challenged a decision of the Florida Game and Fresh Water Fish Commission to restrict development on forty-eight acres of a 173 acre parcel for the protection of bald eagle nesting sites, the court held there was no taking because the property owner was free to develop other portions of his property as long as he did not disturb the nest sites.97

Owners of undeveloped properties face special burdens.98 Property

89. Id.
92. Nollan, 483 U.S. at 842.
94. Id. at 1035.
95. Id.
96. Id. at 1041.
98. See Wm. Terry Bray et al., Environmental Permits: Land Use Regulation and Policy
that remains undisturbed for long periods of time while other sites are cleared, built on, excavated, or logged are more likely to become host to rare and endangered species. 99 Seasonal restrictions, that concur with the nesting season of neotropical migrant birds, may force a property owner to market timber when site damage is greater due to site wetness or inclement weather which depresses local timber markets. 100 Properties zoned as agricultural or timberland may not have legally permissible or economically feasible alternative uses. 101 While takings must be examined on a case-by-case basis, it is likely that restrictions on small parcels of land or on land with limited uses may be more likely to result in takings. 102

COMBINING ETHICAL TREATMENT OF PROPERTY OWNERS WITH LONG-TERM MANAGEMENT OF ENDANGERED SPECIES

Most restrictions on the use of private property do not meet the legal requirements of takings. 103 However, restrictions on private property owners can amount to a compromise in which neither the landowner nor the species of concern obtains an optimal result. 104 Such impositions on property owners treat them unfairly in that it forces an individual, attempting to engage in an otherwise legal activity and manage his property to meet personal objectives and economic needs, to bear a disproportionate cost of the public goal of protecting species of concern. 105 Such a policy can also be detrimental to the long-term protection and recovery of a species. 106 Property owners in the Southeast or Pacific northwest may harvest timber prematurely rather than have it mature and grow suitable to host the

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101. See Boise Cascade Corp., 886 P.2d 1033.
105. Babbit, 515 U.S. at 735 (Scalia, J., dissenting).
red cockaded woodpecker or the northern spotted owl. Marginal fields in low lying areas are sometimes cultivated not for the crop they produce but to keep them from reverting to regulated wetlands. Large crowned evergreens on the shoreline can be removed lest they become inviting to nesting eagles. Anti-management, aimed at preventing a site from becoming too attractive to rare and endangered species can occur.

In contrast, the purchase of private property or voluntary management agreements between landowners and agencies responsible for protecting rare and endangered species: (1) provides for fair treatment of property owners; (2) allows for targeting the best sites suitable for the recovery and preservation of species; and, (3) allows for the long-term management optimum for preservation and recovery of species, rather than reactive enforcement designed to minimize damage.

The Endangered Species Act provides that the Secretary of the Interior can issue an incidental take permit if the taking of endangered species is to occur in the course of an otherwise lawful activity. A property owner must submit a Habitat Conservation Plan to obtain an incidental take permit containing the following information:

1. The impact of the taking;
2. Steps to minimize and mitigate the impacts
3. What alternatives to the taking the applicant considered and the reasons why the alternatives are not being utilized; and
4. Other measures the Secretary may require.

From a property owner's perspective, the Habitat Conservation Plan approach has both positives and negatives. While a property owner may proceed with his intended use of land (habitat manipulation), he may find himself paying mitigation fees or in effect granting the Secretary of the Interior, or a local planning agency, an easement on his property for the

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108. Id.
109. Id.
110. Id.
113. Id.
privilege of doing so.\textsuperscript{115}

The Habitat Conservation Plan approach has both positives and negatives from the perspective of protecting species of concern.\textsuperscript{116} The Incidental Take Permit, by definition, results in some destruction of habitat and taking of endangered species.\textsuperscript{117}

Both the property owner and the species of concern find themselves in "as not as bad of shape as they could have been," under this approach, but neither obtains optimal results.\textsuperscript{118} The condemnation and public acquisition of private property containing endangered species could allow property owners to obtain fair market value for their property and could afford more complete protection to endangered species on that property.\textsuperscript{119}

Funding will prove to be the major obstacle to the large scale acquisition of private property for the protection of rare and endangered species. The Endangered Species Act\textsuperscript{120} and Migratory Bird Conservation Act\textsuperscript{121} do provide for the acquisition of private lands for habitat for species preservation and recovery, however, recent attempts to reauthorize the Endangered Species Act have failed because Congress can not agree to provide adequate funding.\textsuperscript{122} Courts have noted that agencies charged with the protection of endangered species do so without the necessary funding.\textsuperscript{123}

According to one report, "More than half of the species in the United States that are protected by the Endangered Species Act have at least eighty one percent of their habitat on non-federal land. Between a third and a half do not occur at all on federal land."\textsuperscript{124} Considering the importance of private property to the long-term preservation and recovery of endangered species, Congress should consider a scenario in which everyone wins.

\begin{itemize}
  \item[\textsuperscript{115}] Id.
  \item[\textsuperscript{117}] See Barton H. Thompson, Jr., \textit{The Endangered Species Act: A Case Study in Takings and Incentives}, 49 STAN. L. REV. 305, 309 (1997).
  \item[\textsuperscript{118}] Thornton, \textit{supra} note 114.
  \item[\textsuperscript{119}] Id.
  \item[\textsuperscript{120}] Endangered Species Act, 16 U.S.C. § 1534 (1994).
  \item[\textsuperscript{122}] 141 CONG. REC. S12002, S12009-14 (daily ed. August 9, 1995).
  \item[\textsuperscript{123}] Sierra Club, 694 F. Supp. 1260.
  \item[\textsuperscript{124}] R. Thornton, \textit{supra} note 114, at 9 (citing D.S. Wilcove et al., \textit{Rebuilding The Ark: Toward A More Effective Endangered Species Act For Private Land} (Environmental Defense Fund 1996)).
\end{itemize}
Environmentalists and endangered species lose when there is not adequate funding to acquire properties which provide habitat for endangered species. Individual property owners also lose because the valid exercise of police power sometimes forces them to make compromises in the use of their property. A model that may serve everyone well is the Pittman-Robertson Wildlife Restoration Act.\textsuperscript{125} The Pittman-Robertson Wildlife Restoration Act provided for an excise tax on sporting arms, ammunition, and related products.\textsuperscript{126} The proceeds were used for wildlife conservation, including the purchase of land.\textsuperscript{127} Both game and non-game species; and the and non-hunting public, received a benefit.\textsuperscript{128} Likewise, if Congress finds that timber harvesting or residential subdivisions are the cause of loss of endangered species habitat, a small excise tax could be placed on all sales of timber and real estate. This solution may not be politically popular, but a small transaction fee spread over millions of transactions could provide adequate funding for habitat acquisition for rare and endangered species. Furthermore, when was the last time a sportsman’s group lobbied for the repeal of the Pittman-Robertson Wildlife Restoration Act. The best sites for the long-term management of rare and endangered species can be targeted for acquisition. Such a solution also allows the financial burden of the public goal of protecting rare and endangered species to be spread among everyone rather than severely impacting individual private property owners.

CONCLUSION

Statutes and regulations aimed at protecting rare and endangered species fail to adequately address the rights of private property owners that may be adversely impacted by the enforcement of those laws. Case law suggests that parties challenging a property owner's activity under the Endangered Species Act owe an affirmative duty. First, the challenging party must demonstrate by evidence that there is actually a species of concern present, not just a set of physical conditions that is suitable for hosting the species. Second, the challenging party must show that the property owner's activity is a cause of actual harm to a species of concern not just a potential cause of harm.

\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
Takings of property for the protection of rare and endangered species must be compensated.

The compensation of property owners for restrictions on the use of their property due to endangered species not only treats the property owners fairly, it may be essential to the preservation and recovery of endangered species. It is imperative that Congress provide for adequate funding. A lack of funding not only places an unfair amount of the public burden of protecting endangered species upon individual property owners, it impedes the recovery of endangered species.
The Salmon P. Chase College of Law Moot Court Board hosted the Sixth Annual National Environmental Law Moot Court Competition. The competing law schools included: South Texas College of Law, University of Akron School of Law, University of Cincinnati College of Law, University of Toledo School of Law, University of Wisconsin School of Law, and Ohio Northern University-Claude W. Pettit College of Law.

Each team submitted an appellate brief and argued a minimum of four rounds before a panel of three judges. The Moot Court Board extends a special thanks to the attorneys in the Northern Kentucky-Greater Cincinnati area who, year in and year out, volunteer to serve as judges during the preliminary and semi-final rounds of the Competition. Additionally, seven of the area’s finest environmental law practitioners and members of the judiciary presided over the final round. This prestigious bench included: The Honorable J. Gregory Wehrman, Magistrate Judge, United States District Court, Eastern District of Kentucky, Covington, Kentucky; The Honorable Sara Walter Combs, Commonwealth of Kentucky Court of Appeals, Stanton, Kentucky; James Lockhart Dickinson, Esq., Hearing Officer, Office of Administrative Hearings, Natural Resources and Environmental Protection Cabinet, Frankfort, Kentucky; David A. Owen, Esq., Member, Environmental Section, Greenebaum Doll & McDonald, PLLC, Lexington, Kentucky; Philip J. Schworer, Esq., Partner, Environmental Law Practice Group, Dinsmore & Shohl, LLP, Cincinnati, Ohio; A. Christian Worrell III, Esq., Partner and Chair, Environmental Practice Group, Graydon, Head, & Richey, Cincinnati, Ohio; and Henry L. Stephens, Jr., Esq., Professor of Law and former Dean of the Salmon P. Chase College of Law, Highland Heights, Kentucky.

The winners of the Competition were Todd DeBoe and Leslie Kohli of the University of Toledo. Melissa Wilkinson and Durand Carroll of Ohio Northern University-Claude W. Pettit College of Law were runners-up. These two teams tied for the award of Best Respondent’s Brief. Nate Engel and John Morgan of the University of
Wisconsin received the award for Best Petitioner’s Brief and Best Overall Brief. Kristi Smith of the University of Cincinnati received the award for Best Oralist.

The Competition and the General Law Issue of the Northern Kentucky Law Review are funded by a generous gift from Greenebaum, Doll & McDonald, PLLC, of Louisville, Lexington, and Covington, Kentucky. The Salmon P. Chase College of Law expresses its thanks to the firm for its support.

The Salmon P. Chase College of Law Moot Court Board was organized in 1971 by professors Frederick Schneider and Frederic Gray. Professor Kamilla Mazanec currently serves as the Faculty Advisor for the student-run board. M. Patia R. Tabar served as Chief Justice for the 1997-98 Moot Court Board. The 1998 Chase National Environmental Law Moot Court Competition was chaired by Donna Kim. The problem was written by Candace Smith and myself.

Bryan Underwood, Chief Justice
1998-99 Moot Court Board
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1997

Case No. 97-100

DUMPKIE, INC.,

Petitioner,

v.

PRISTINE WATER COMPANY, INC.,

Respondent,

ON DIRECT APPEAL FROM THE
COURT OF APPEALS
FOR THE SIXTEENTH CIRCUIT

BRIEF FOR THE PETITIONERS

Durand Carroll
Melissa Wilkinson
Counsel for Petitioners
Ohio Northern University
School of Law
QUESTIONS PRESENTED

I. Whether the district court should have applied the preferred substantial continuation test or the traditional common law test in determining whether Respondent, Pristine Water Company Inc., was liable as a corporate successor to Dumpkie, Inc.?

II. Whether Respondent Pristine Water Company Inc., as a potentially responsible Party, may bring a cause of action against Dumpkie Inc. for removal and response costs incurred by the dumping of toxic Woodaway furniture stripper under section 9607 of CERCLA?

III. Whether the district court erred by employing a strict compliance standard to Respondent Pristine Water Company’s response under NCP requirements?

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STATEMENT OF THE CASE

The Dumps-R-Us landfill is privately owned and is located on 20 acres of land along the Pristine River in the state of Erewhon. (Record at 1). Dumps-R-Us is presently owned and operated by Dumpkie, Inc. (Record at 2). Dumpkie has owned the Dumps-R-Us landfill since October 24, 1986, when the company purchased all the real property and assets of the prior landfill owned by I.M. Toxic, Inc. Id.

I.M. Toxic produced “Woodaway”, a widely used furniture stripper. Woodaway contained methyl-ethyl-death, a hazardous substance listed under 40 C.F.R. § 302, and § 311 (b)(2)(A) of the Federal Water Pollution Control Act. Id. Prior to expanding into the waste disposal business, I.M. Toxic used the Dumps-R-Us landfill to dispose of waste from the Woodaway factory. Id. Dale Herdman, Toxic’s plant manager, oversaw operations. Id. At the behest of Sierra Klub, Toxic’s bookkeeper, the company stopped using methyl-ethyl-death in 1978 and found a safer ingredient. Id. However, with the newer, safer and more expensive ingredient, Woodaway could not compete with the cheaper products. In 1986, Mr. Toxic sold the Dumps-R-Us landfill to Dumpkie to raise cash. Id.

At the time of purchase, Dumpkie inquired whether a Clean Water Act discharge permit was required for the landfill. Mr. Toxic averred that no permits under section 402 of the Clean Water Act had ever been sought. Id. Upon purchase of the landfill, he agreed to indemnify I.M. Toxic for any and all costs resulting from Toxic’s acts made before the closing date. (Record at 3).

The Woodaway factory continued to operate until January of 1990, when Mr. Toxic announced that the Woodaway plant would be closed. Id. Upon this announcement, Dale Herdman organized the Woodaway employees and formed the Pristine Water Company. Id. Toxic sold the remainder of its assets to Pristine, including the factory, plant equipment, machine tools and the Woodaway trademark. Id. The plant opened a month later as the Pristine Water Company. Id. Pristine did not engage in the same line of business as Toxic. Id. Pristine was in the business of bottling water from the Pristine River for sale to customers in regional markets. Id.

Ms. Klub, became Chief Operations Officer and President of Pristine. (Record at 4). The purchase agreement between Toxic and
Pristine provided that Pristine would assume any and all liabilities for personal injury and damage to third parties. *Id.* As part of the deal with I.M. Toxie, approximately five million dollars which had been accrued for various contingent liabilities, including environmental liabilities, was used to fund the pension plans of former Woodaway employees and current Pristine employees. (Record at 5).

In September of 1995, the Smellville Division of Water discovered that the Pristine River, from which the Pristine Water Company obtained its bottled water, contained concentrations of methyl-ethyl-death. *Id.* The EPA learned that I.M. Toxie buried approximately 7,000 drums containing methyl-ethyl-death as well as other waste. *Id.* In addition to the 7,000 barrels of Woodaway’s waste buried at the landfill, there were an additional 1,000 barrels containing methyl-ethyl-death whose source could not be determined. *Id.* The EPA investigation determined that these barrels were leaking methyl-ethyl-death into the Pristine River thereby contaminating the aquifer from which the town of Smellville obtained its drinking water. *Id.*

Upon learning of the EPA’s findings, Pristine arranged to place a notice of a public meeting in the Smellville Gazette on June 3. (Record at 6). Pristine held the meeting on July 3, and facilitated a discussion about various plans for cleaning up the Pristine River. *Id.* At the meeting, a majority of the local residents decided that Dumpkie was to blame and should be responsible for cleanup costs. *Id.* Pristine noted the danger to the public and generously agreed to provide the Smellville citizens with drinking water for a nominal fee. *Id.* In January of 1996, Pristine began a highly technical, yet cost effective, method of filtering all methyl-ethyl-death from the water taken from the Pristine River for bottling to customers. *Id.*

Unhappy with Dumpkie’s efforts to clean up the river, Pristine filed this action against Dumpkie on October 25, 1996. *Id.* Pristine alleged that Dumpkie, as the current owner and operator of the contaminated facility, was liable for all cleanup costs. *Id.* Pristine sought response costs from Dumpkie under section 9607 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. *Id.*
STANDARD OF REVIEW

The issues in this case involve statutory language and the proper determination of successor corporation liability. Since these issues involve questions of law, the appropriate standard of review is de novo. See e.g., Pierce v. Underwood, 487 U.S. 552, 558 (1988). Therefore, this Court should carefully review the relevant facts of the instant case in determining whether the defendant’s actions subject it to liability under the applicable statutes and tests.

SUMMARY OF ARGUMENT

Motions for summary judgment are used in order to protect the court from claims that have no merit. The Court of Appeals did not err in overturning the district court opinion which found that the facts, when viewed in light most favorable to the plaintiff, did meet the standard set forth in Fed. R. Civ. P. 56 (c). This court must not reverse the decision of the court of appeals as plaintiff has met this rigorous standard.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") is intended to impose liability upon parties directly responsible for the contamination of the environment. Accordingly, the statute is precise in distinguishing acts that create liability and those that do not. Under CERCLA, a corporate successor may be held liable for the acts of the prior corporation.

The intent behind holding a corporate successor liable for the acts of the previous owners is pure public policy. If corporations were not held accountable, many would engage in "phantom" mergers and faulty buy-outs to escape liability. In determining liability, courts apply one of two tests: (1) the general rule that liabilities die with the corporation; or (2) the substantial continuation test. Each will be addressed in turn.

First, the general rule is that liabilities die with the corporation; however, there are four exceptions to that rule which will impose liability. These exceptions try to thwart those corporations that are merely performing a "paper merger" and continuing the previous business of the corporation under a different name. Pristine Water Company does not meet any of those four exceptions. The prior corporation produced Woodaway, a furniture stripper. Pristine Water...
Company produces safe drinking water. Clearly, there is no continuation of the business.

Secondly, many courts have expanded the aforementioned general rule in order to further the policy behind CERCLA. As a result, many circuits have adopted a second test in determining corporate successor liability; the substantial continuation test. This test has eight factors that strike at the very heart of the purchasing corporations’ activities. Since multiple courts have adopted the substantial continuation test as the preferred test for CERCLA liability, so too should this court.

Pristine, a potentially responsible party, may bring a cause of action against Dumpkie for removal and response costs under section 9607 of CERCLA and is not limited to recovery under section 9613. In fact, the liability provision in section 9607 implies that Congress intended the liability provision to “sweep broadly.” *United States v. New Castle County*, 642 F. Supp. 1258, 1264 (D. Del. 1986).

The district court erred by employing a strict compliance standard to Pristine’s response under NCP requirements. A substantial compliance is appropriate. Therefore, Dumpkie remains liable to Pristine for response costs.

ARGUMENT

I. WHETHER THE DISTRICT COURT SHOULD HAVE APPLIED THE SUBSTANTIAL CONTINUATION TEST OR ALTERNATIVELY, THE TRADITIONAL FEDERAL/STATE COMMON LAW APPROACH IN DETERMINING WHETHER PRISTINE WATER COMPANY IS A POTENTIALLY RESPONSIBLE PARTY AS A CORPORATE SUCCESSOR OF I.M. TOXIC.

A. The district court should not have applied the traditional federal/state common law test in determining Pristine Water Company’s liability concerning the dumping of toxic wood stripper in Dumpkie’s landfill.

Pristine Water Company is not liable under CERCLA when the traditional successor liability test is applied to the facts of this case. Generally, [u]nder the traditional rules of
successor liability, asset purchasers are not liable as successors unless one of the following four exceptions applies: 1) the purchasing corporation expressly or impliedly agrees to assume the liability; 2) the transaction amounts to a “de facto” consolidation merger; 3) the purchasing corporation is merely a continuation of the selling corporation; or 4) the transaction was fraudulently entered into in order to escape liability.

*Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990). Nowhere in the record does it state that the arrangement between Pristine Water Company (hereinafter “Pristine”) and I.M. Toxic was conducted with fraud, so the fourth element of the traditional test will not be discussed.

In *Interstate Power Co. v. City of Mason*, 909 F. Supp. 1241 (N.D. Iowa 1993), an assumption agreement was entered into as part of the purchasing corporation. The court held that items that were left out of the assumption agreement could not be imposed upon the purchasing company, including CERCLA liability. *Id.* at 1278.

The seller’s agreement between Pristine and I.M. Toxic was silent as to I.M. Toxic’s environmental liabilities. (Record at 4). The purchasing agreement merely stated that “Pristine would assume any and all liabilities for personal injury and property damage to third parties.” *Id.* Following the court’s rationale in *Interstate Power Co.*, this Court should hold that the assumption of liabilities agreement between Pristine and Toxic does not include liabilities for CERCLA.

The second exception under which Pristine may be held liable under the traditional approach is when the transaction amounts to a “de facto” merger or consolidation. To be a “de facto” merger, the following four factors must be in place:

1. There is a continuation of the enterprise of the seller in terms of the continuity of management, personnel, physical locations, assets and operations; 2. There is a continuity of shareholders; 3. The seller ceases operations, liquidates, and dissolves as soon as legally possible; and (4) the purchasing corporation assumes the obligations of the seller necessary for uninterrupted continuation of the business operations.
These four factors are very similar to those found in the substantial continuation test. However, no one exception is independently “sufficient to establish a de-facto merger.” *Id.*

These exceptions do not apply in the present case. While there is continuity of location, facilities, personnel and some management, there is no continuation of assets or operations. Pristine is producing a product that is vastly different from the one formerly produced at the site. Furthermore, the shareholders are not the same because Pristine is now owned by the employees, not solely by I.M. Toxic as Woodaway had been. (Record at 3). Pristine did not assume all liabilities generally necessary for the uninterrupted continuation of business operations. Therefore, this transaction was not a de facto merger.

Although under the traditional common law test Pristine would not be held liable as an asset purchaser, this was not the proper test for the district court to use. “Only the Sixth Circuit has held that state law should determine successor liability.” *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 723 (N.D. Ind. 1996). “The courts that have applied the substantial continuity test have concluded that environmental cleanup is one of those situations in which public policy dictates that the traditional notions of successor liability should be broadened.” *Id.* at 724.

The substantial continuation test (or continuity of enterprise theory) should have been applied by the district court in determining Pristine Water Company’s liability. Many circuits have adopted the substantial continuity test as the preferred test in determining corporate successor liability. *Id.* The most recent being the Second Circuit in *B.F. Goodrich v. Betkonski*, 112 F.3d 88 (2d Cir. 1997). The court in *Betkonski* held that the reason behind adopting the substantial continuity test over state common laws was for uniformity and that allowing state laws to use the “identity” laws would defeat the purpose of CERCLA. *Id.*
Under the substantial continuity test, Pristine is clearly not liable as a corporate successor. The substantial continuation test was set forth in *United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 488 (8th Cir. 1992). In *Mexico*, the Eighth Circuit held that the general liability standard for asset purchasers was too narrow. *Id.* at 487. CERCLA is aimed at imposing clean-up costs on the parties responsible for the creation or maintenance of hazardous waste sites. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988). By imposing a mere continuation test, the “imposition of successor liability is justified by showing that in substance, if not in form, the successor is a responsible party.” *Mexico Feed and Seed Co.* at 488.

In *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992), the Fourth Circuit went a step beyond the Eighth Circuit and used additional factors in determining whether a corporation was a successor to another. The factors were as follows:

1. retention of the same employees; 2. retention of the same supervisory personnel; 3. retention of the same facilities in the same location; 4. production of the same product; 5. retention of the same name; 6. continuity of the same assets; 7. continuity of general business operations; and 8. whether the successor holds itself out as the continuation of the previous enterprise.

*Id.* Additional factors such as knowledge and notice are also looked at in corporate liability. *Atlantic-Richfield Co. v. Blosenki*, 847 F. Supp. 1261 (E.D. Pa. 1994). However, “while successor liability is allowed under CERCLA, it is not required unless justified by the facts of each case.” *United States v. Carolina Transformer Co.*, 978 F.2d at 838. The facts in this case do not require corporate successor liability.

I.M. Toxic operated the Woodaway factory as a separate entity from Dumps-R-Us. (Record at 2). The employees that worked for Toxic in the Woodaway factory, not the dump, organized the new Pristine Water Company. Therefore, there is no retention of the same employees from the sale of Dumps-R-Us to Dumpkie. Dale Herdman was the only employee retained from the dumpsite. The retention of one employee is not sufficient under the substantial continuity test.

The second factor in deciding successor liability concerns retaining the same supervisory personnel. *Carolina Transformer Co.* at
838. I.M. Toxic’s granddaughter, Sierra Klub, had previously worked for Woodaway factory as a bookkeeper. She did not hold a supervisory position at Woodaway. Dale Herdman organized the factory employees in forming Pristine. Herdman is the only former employee of the dump. Therefore, this fact, standing alone, does not meet the second factor in successor liability.

Admittedly, Pristine meets the third element of the test, which is retaining of the same facilities and location. Id. When Woodaway was sold to Pristine, I.M. Toxic sold the factory grounds, plant equipment, and the machine tools. (Record at 3). However, when the plant reopened the next month, Woodaway ceased to exist. Id. Thus, Pristine is a completely separate entity.

The facts in this case further demonstrate that Pristine does not meet the fourth and fifth factors of the test. The fourth, being production of the same product and the fifth, the retention of the same name. Id. Pristine is in the business of bottling safe, clean drinking water for its customers. The bottling of safe drinking water is completely different from producing furniture stripper, Woodaway’s prior product. The new name was designated when the old Woodaway sign came down and the new Pristine Water Company sign was positioned. (Record at 3).

I.M. Toxic had already sold part of his assets to Dumpkie before entering into any agreement with Pristine. (Record at 2). Therefore, it is impossible to state that the continuity of assets, the seventh element of the test, has been met. Logic would follow that there cannot be continuity of assets if the assets of one company have been sold separately to two different companies.

Since, Pristine does not produce or sell anything remotely related to Woodaway’s furniture stripper, it fails to meet the seventh element of continuity of general business operations. Similarly, Pristine does not hold itself out to be Woodaway. Therefore, the final element of establishing successor liability is not satisfied.

As for knowledge, as an additional element of the substantial continuity test, “[c]ourts have repeatedly held that the purpose of applying the continuity of enterprise theory is to support the goals of CERCLA and to hold responsible parties liable, not only to hold those who knew of potential problems liable.” Gould v. A&M Battery and Tire Serv., 950 F. Supp. 653, 659 (M.D. Pa. 1997). The court in Gould further stated that “notice or knowledge is not a requisite factor for
corporate successor liability to attach through the continuity of enterprise theory.” Id. at 658.

The only people who had any knowledge of the Woodaway dumping were I.M. Toxic, Sierra Klub and Dale Herdman. Although, the record reflects that Dale Herdman was aware of the stripper being dumped on the site, knowledge alone should not determine liability.

Thus, the district court erred in not applying the substantial continuation test in determining Pristine's liability to Dumpkie. In applying this test to the case at bar, Pristine Water Co. is clearly not liable as a corporate successor for the cleanup costs at Dumpkie's landfill.

II. PRISTINE WATER COMPANY INC., AS A POTENTIALLY RESPONSIBLE PARTY MAY BRING A CAUSE OF ACTION AGAINST DUMPKIE, INC. FOR REMOVAL AND RESPONSE COSTS UNDER SECTION 9607 OF CERCLA AND IS NOT LIMITED TO RECOVERY UNDER SECTION 9613 OF CERCLA.

A. The district court erred by holding that Pristine could only bring a cause of action against Dumpkie under section 9613 of CERCLA. The proper cause of action for Pristine is under section 9607 of CERCLA.

The district court erred when it held that Pristine, a potentially responsible party, could only proceed with a cause of action against Dumpkie under section 9613 of CERCLA for the response costs incurred by Pristine. (Record at 11). Pristine incurred response costs after being alerted by the EPA that methyl-ethyl-death was leaking from Dumpkie's property into Smillville's water supply. (Record at 5).

The district court maintained that Pristine, a potentially responsible party, could not bring suit under section 9607 of CERCLA. (Record at 11). Section 9613(f) of CERCLA provides that "any person may seek contribution from any other person who is liable ... under section 9607(a)." 42 U.S.C. § 9613(f). The district court erroneously construed "any person" to mean that Pristine could not bring an action against Dumpkie under section 9607.

In fact, "the § 9607 liability provision, with its use of the term 'any other person' and its limited defenses to liability, implies that
Congress intended the liability provision to sweep broadly.” United States v. New Castle County, 642 F. Supp. 1258, 1264 (D. Del. 1986). Therefore, the district court erred in finding that Pristine could only have a cause of action under section 9613(f).

The primary distinction between section 9607 and section 9613 centers around the statutes of limitations. Barmet Aluminum Corp. v. Doug Brantly & Sons, 914 F. Supp. 159, 163 (W.D. Ky. 1996). Section 9607(a) provides a six year statute of limitations. 42 U.S.C. § 9613(g)(2). Section 9613(f), however, only offers a three year statute of limitations. 42 U.S.C. § 9613(g)(3). The Woodaway factory, the producer of the hazardous waste material containing methyl-ethyl-death, operated until January of 1990. Pristine did not become aware of the methyl-ethyl-death contamination in Dumpkie’s landfill until October of 1995. Therefore, if Pristine’s only cause of action was under section 9613(f), Pristine could potentially be barred by the three year statute of limitations.

However, the United States District Court of Kentucky, recently rejected the notion that a potentially responsible party’s only remedy is under section 9613(f) of CERCLA. Barmet Aluminum Corp. at 163. “§107(a)(4) provides . . . that any person who accepts hazardous substances from which there is a release shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan.” Id. Hereinafter NCP. Therefore, the district court erred by finding that Pristine could not bring a cause of action against Dumpkie under section 9607(a).

Pristine can bring a cause of action against Dumpkie for response costs under section 9607(a) because Dumpkie accepted Woodaway from I.M. Toxic. Woodaway is a hazardous substance containing methyl-ethyl-death, and a release of Woodaway subsequently occurred. Furthermore, a finding that a potentially responsible party has standing to seek reimbursement for their response costs under section 9607(a) supports the underlying policy of encouraging prompt and complete response actions to extremely dangerous contamination. Kelley v. Thomas Solvent Co., 790 F. Supp. 710, 717 (W. D. Mich. 1990).
B. Dumpkie is strictly liable to Pristine for response costs incurred by Pristine under section 9607 of CERCLA.

Section 9607(A)(4)(B) of CERCLA provides for a cause of action to any person "incurring response costs for which another person otherwise liable under the Act." *United States v. New Castle County*, 642 F. Supp. 1258, 1262 (D. Del. 1986). To establish a prima facie case for recovery under CERCLA, Pristine must prove the following four elements: First, that the site in question is a "facility" as defined in 42 U.S.C. section 9601(9); second, that Dumpkie is a responsible party under section 9607(a)(1)-(4); third, that the release or threatened release of a hazardous substance has occurred; and fourth, that the release or threatened release has caused Pristine to incur response costs. *Id.*

Dumpkie has stipulated to being a potentially responsible party in accordance with section 9607 of CERCLA. (Record at 12). The site of the methyl-ethyl-death contamination is a "facility." 42 U.S.C. § 9601(9). Dumpkie is the owner or operator of the contaminated facility. 42 U.S.C. § 9607(a)(1)-(4).

Congress included successor corporations within the description of entities potentially liable under CERCLA for cleanup costs. 42 U.S.C. § 9607(a)(3). Dumpkie is a successor corporation. Further, Dumpkie is the owner and operator of the facility causing the environmental hazard. Thus, Pristine should be allowed to bring suit against Dumpkie under section 9607(a) of CERCLA.

Likewise, section 9607(a)(3)-(4) of CERCLA establishes strict liability for arrangers of the disposal of treatment of hazardous substances:

Any person who by contract, agreement, or otherwise arranged for the disposal or treatment [or transport] . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party . . . shall be liable for . . . all costs of removal or remedial action incurred by the U.S. Government . . . not inconsistent with the national contingency plan.

42 U.S.C. § 9607(a)(3)-(4)(A). Thus, Dumpkie is liable as a potentially responsible party for the hazardous waste "dumped" on its property. The
Solid Waste Disposal Act defines "dumping" in connection with hazardous waste as:

[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3). Although Dumpkie did not actually "dump" the Woodaway which contained the methyl-ethyl-death, Dumpkie agreed to indemnify I.M. Toxic by being liable for any and all damages arising out of, resulting from, or incident to, the ownership or use of the property. (Record at 3). Thus, any liability that I.M. Toxic may have incurred has been imputed to Dumpkie. Therefore, Dumpkie will be held liable under the Solid Waste Disposal Act for the dumping of hazardous waste. See Pneumo Abex Corp. v. Bessamer and Lake Erie R.R. 921 F. Supp. 336, 345 (E.D. Va. 1996).

III. THE DISTRICT COURT ERRED BY EMPLOYING A STRICT STANDARD TO PRISTINE'S RESPONSE UNDER NCP REQUIREMENTS; A SUBSTANTIAL COMPLIANCE STANDARD IS APPROPRIATE.

A. Pristine's response costs were in substantial compliance with the NCP. Thus, the district court erred in finding that Pristine did not provide an opportunity for appropriate public comment.

CERCLA response costs are defined as the costs of investigating and remedying the effects of a release or threatened release of a hazardous substance into the environment. 42 U.S.C. § 9601(23). Where the action is a remedial action, section 9607 of CERCLA authorizes persons to recover certain response costs that are consistent with the NCP. 42 U.S.C. § 9607(a)(4)(A)-(B). "For purposes of cost recovery under section 9607, a response action will be consistent with the NCP if the person taking the response action . . . (A) Provides for appropriate site . . . and analysis of remedial alternatives; . . . (C) Selects
a cost effective response; and (D) Provides an opportunity for appropriate public comment concerning the selection of a remedial action . . . .” County Line Invest. Co. v. Tinney, 933 F.2d 1508, 1511 (10th Cir. 1991) (quoting 40 C.F.R. § 300.71). The “[Environmental Protection Agency] has declared that ‘a private party response action will be considered “consistent with the NCP” if the action, when evaluated as a whole, is in “substantial compliance” with applicable requirements in the NCP provisions and results in CERCLA quality cleanup’. ” County Line Invest. Co. at 1514. Thus, the district court erroneously held that Pristine did not comply with the 1990 NCP “substantial compliance” requirements. (Record at 13).

Upon learning of the Environmental Protection Agency’s finding that the Dumpkie landfill was leaking methyl-ethyl-death, Pristine undertook required action in an effort to “substantially comply” with the 1990 NCP requirements. Pristine placed a notice in the Smellville Gazette on June 3. The notice indicated that a meeting would be held for public discussion concerning the discovery of contamination leaking from Dumpkie’s landfill. (Record at 6). The notice stated that the meeting would be held on July 3, approximately 30 days after the notice was given to the Gazette. During the meeting, the residents were made aware of the dangers of the contaminated river. Pristine announced, and subsequently undertook, a removal action to filter all of the methyl-ethyl-death from the water. Id.

In the preamble to the 1990 NCP, the “EPA defined a ‘CERCLA-quality cleanup’ as a response action that satisfies the three remedy selection requirements of CERCLA 42 U.S.C. 9621.” County Line Invest. Co. at 1514. First, the remedial actions must be cost effective and protective of human health and the environment. The remedial action must “utilize ‘permanent solutions and alternative treatment technologies . . . to the maximum extent practicable . . . .’” Id. (quoting 55 Fed. Reg. at 8793).

Pristine meets the first criteria established in CERCLA section 9621(b)(1). After learning of the health hazard caused by the leaking of the methyl-ethyl-death, Pristine promptly provided the citizens of Smellville with drinking water for a nominal fee. (Record at 6). Thus, Pristine’s remedial action was not only cost effective but protected human health and the environment.

Second, the CERCLA-quality cleanup must provide for meaningful public participation. National Oil and Hazardous Substance
Pollution Contingency Plan, 55 Fed. Reg. at 8793 (1990). In compliance with this provision, Pristine placed a notice of a meeting in the Smellville Gazette on June 3. At the meeting, Pristine facilitated a public discussion concerning the discovery of contamination leaking from Dumpkie’s landfill. (Record at 6). Thus, Pristine substantially complied with 1990 NCP requirements of providing for meaningful public participation. Therefore, the district court erred when it held that Dumpkie was not liable because Pristine’s response action did not comply with the NCP. The district court held that Pristine did not provide for meaningful public comment. (Record at 13). However, Pristine’s response actions, in fact, substantially complied with the 1990 response requirements.

Pristine’s response is in accord with the substantial compliance standards of the NCP for a removal action. *PMC Inc. v. Sherwin Williams Co.*, No. 93 C 1379, 1997 U.S. Dist. LEXIS 6013 at *21 (N.D. Ill. Apr. 23, 1997). Thus, Dumpkie had notice of Pristine’s community-relations plan. Therefore, Dumpkie remains liable for either removal or remedial response costs claimed in this action. The district court erred by denying Pristine the right to hold Dumpkie accountable for Dumpkie’s contaminated landfill. The district court’s decision is erroneous and inconsistent with the principles of equity underlying the purpose of CERCLA. *ANSPEC Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991).

**B. Pristine’s entire response should be characterized as a “removal action” not a “remedial action.” Thus, there is no requirement for a community-relations plan.**

A “remedial action” under CERCLA includes investigation and cleanup actions “consistent with a permanent remedy” for a site. *County Line Invest. Co. v. Timney*, 933 F.2d 1508, 1514 (10th Cir. 1991). Pristine’s response, in the case at bar, was not consistent with a permanent remedy. The filtering system employed by Pristine to rid the drinking water of the contaminants would not alleviate the continued pollution emanating from Dumpkie’s landfill. Therefore, the only permanent remedy in this case would be a complete removal of the drums containing the methyl-ethyl-death from Dumpkie’s landfill.

Pristine’s response should be classified as a removal action. Under section 9601(23) of CERCLA, a removal action is an emergency,
interim response to particular site conditions that is governed by more limited and flexible requirements. 42 U.S.C. 9601(23). Section 9607 provides that a person is only liable for private party response costs to the extent that these costs are consistent with the NCP. 42 U.S.C. § 9607(a)(4)(B). However, there are some circumstances in which a CERCLA plaintiff may be entitled to a declaration of the defendant's liability even though the plaintiff has not established that all of the claimed response costs incurred were consistent with NCP. County Line Invest. Co. at 1512.

In the present case, the leaking of methyl-ethyl-death from Dumpkie's landfill constituted exigent circumstances. Methyl-ethyl-death began to leak from approximately 7,000 buried drums. (Record at 5). The hazardous waste was polluting the Pristine River. Thus, the lives of the residents of Smellville were endangered. Id. In response, Pristine enacted a removal action that entailed incurring response costs by providing drinking water to Smellville citizens and securing a cost effective method of filtering the hazardous waste from the water taken from the Pristine river. Id. Thus, Pristine substantially complied with NCP requirements and should recover from Dumpkie for removal costs incurred.

CONCLUSION

Under the substantial continuation test, Pristine Water Company is not liable as a corporate successor to Dumpkie, Inc. This is the preferred test used by many circuit courts and therefore should be applied in this case. As Pristine Water Company has a valid cause of action for response costs under section 9607, they must not be limited to recovery under section 9613 of CERCLA. Respondent respectfully submits that this Court should uphold the Sixteenth Circuit Court of Appeals decision in favor of Pristine Water Company.
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1997

Case No. 97-100

DUMPKIE, INC.,

Petitioner,

v.

PRISTINE WATER COMPANY, INC.,

Respondent,

ON DIRECT APPEAL FROM THE
COURT OF APPEALS
FOR THE SIXTEENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether, under CERCLA, the traditional common law rule governing successor liability is more appropriate for determining whether a successor must assume its predecessor's liabilities when the newer substantial continuity test will unfairly force innocent purchasers to assume their predecessor's liabilities.

II. Whether Pristine, having met all of the requirements, may assert a cause of action under CERCLA § 107 against Dumpkie for the recovery of response costs, in order that the cost of cleanup be imposed on the party actually responsible for the contamination?

III. Whether Pristine's response costs are recoverable as against Dumpkie, having satisfied the requirements of the National Contingency Plan (NCP) for both removal and remedial actions, allowing Pristine to be reimbursed for its efforts to protect the public and the environment?

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered. Petitioner timely filed a petition for certiorari. The Court granted the petition limited to the questions set forth on November 16, 1997. The Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This is an appeal from a decision rendered by the United States Court of Appeals for the Sixteenth Circuit. The court held that the traditional common law rule, which governs successor liability, applied to the facts in the case sub judice. Under that rule in the CERCLA context, Respondent, Pristine Water Company (Pristine), is not liable for its predecessor’s environmental torts and is thus not a potentially responsible party (PRP). However, the court did find that Pristine may be held liable for its predecessor’s environmental torts and thus a PRP because it assumed some of its predecessor’s other liabilities in an indemnification agreement. Additionally, the court held that a PRP may
bring an action under CERCLA §107 and that Pristine had complied with the National Contingency Plan (NCP).

The suit began when Pristine filed a cause of action in the United States District Court for the Northeastern District of Erewhon on October 25, 1996. In its complaint, Pristine prayed for response costs pursuant to CERCLA §107 associated with its cleanup of the Pristine River. Pristine argued that Petitioner, Dumpkie, Inc., was liable for the cleanup costs because it was the current owner and operator of the contaminating facility. Dumpkie alleged that Pristine was a PRP because it was a successor to I.M. Toxic, Inc., which transported toxic waste to the Dumpkie-owned site. Dumpkie also argued that Pristine was barred from bringing an action under §107 because it was a PRP. Lastly, Dumpkie argued that it should not be found liable for Pristine's response costs because Pristine failed to comply with the requirements under the NCP.

Dumpkie filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). The district court treated the motion as a summary judgment motion because Dumpkie had presented matters outside the pleadings. The district court applied the substantial continuity test and held that Pristine was a PRP and accordingly, was barred from bringing a §107 claim. Further, the court held Pristine could bring only an action for contribution under §113. Finally, the court held that Pristine had failed to comply with the requirements of the NCP.

On November 16, 1997 Pristine filed a timely appeal from the district court to the United States Court of Appeals for the Sixteenth Circuit. The appeals court reversed the district court as stated supra. Dumpkie now appeals that decision to this honorable Court.

STATEMENT OF THE FACTS

The parties to this suit include Respondent, Pristine Water Company (Pristine) and Petitioner, Dumpkie, Inc. (Dumpkie). Pristine sells bottled water, which comes from the Pristine River, to regional supermarkets. (R. at 3). It has been in existence since January of 1990, when its current owners and managers purchased the assets of I.M. Toxic, Inc. in order to create Pristine. (R. at 3). Dumpkie owns a landfill, named Dumps-R-Us, located directly downstream and adjacent to Pristine. (R. at 2). Dumpkie purchased the land and all the assets of
Dumps-R-Us from I.M. Toxic, Inc. in 1986 in a cash transaction. (R. at 2).

I.M. Toxic, Inc., a company in which Mr. I.M. Toxic was sole shareholder and President, operated two separate businesses. (R. at 2). One business, which Mr. Toxic founded in 1944 and incorporated in 1955, consisted of producing a furniture stripper named Woodaway of which one of the ingredients was methyl-ethyl-death (MED). (R. at 2). In 1978, at the request of Sierra Klub, his environmentally conscious granddaughter, Mr. Toxic stopped using MED in the production of Woodaway. (R. at 2). Instead, the company began using an ingredient that was environmentally safer. (R. at 2). Mr. Toxic also operated the Dumps-R-Us landfill which was opened in 1955 by I.M. Toxic. (R. at 2). The landfill served the town of Smellville and surrounding areas. (R. at 2). I.M. Toxic, Inc. owned and operated the landfill until it was sold to Dumpkie in 1986 as stated supra. (R. at 2).

The Woodaway factory operated until January of 1990, when Mr. Toxic decided to close it. (R. at 3). The I.M. Toxic manager, Dale Herdman, organized the employees to purchase I.M. Toxic's assets and Sierra Klub negotiated the purchase of said assets. (R. at 3). Once they purchased the assets, the employees immediately began creating a completely new and different company. (R. at 3). They closed the plant for a month to retool it. (R. at 3). When the employees finished remodeling and retooling the factory, they opened it as the Pristine Water Company. (R. at 3).

Pristine's management and owners were different from those at I.M. Toxic. Sierra Klub became President and Chief Operations Officer. (R. at 4). Mr. Toxic dissolved I.M. Toxic, moved to Mexico and is not engaged in the management of Pristine. (R. at 4). Ms. Klub owns fifty percent of the stock while the employees own the remaining stock. (R. at 4).

There were other signs that Pristine was a new and different company. There was a ceremony, at which the Mayor of Smellville removed the "I.M. Toxic" sign and replaced it with a sign that reads "Pristine Water Company: An Employee Owned Company." (R. at 3). In addition, Pristine sold the Woodaway trademark which it obtained when it purchased I.M. Toxic's assets. (R. at 3).

The parties to the purchase of I.M. Toxic's assets executed a purchase agreement. (R. at 4). Under the agreement, Pristine expressly
agreed to assume only those liabilities for personal injury and property
damage to third parties. (R. at 4, 5). The agreement was silent with
regard to I.M. Toxic’s environmental liabilities. (R. at 4, 5). Under the
agreement, Pristine promised to fund the pensions of former Woodaway
and present Pristine employees. (R. at 5).

In September of 1995, the Smellville Division of Water
discovered that the Pristine River was contaminated with concentrations
of MED. (R. at 5). The Environmental Protection Agency (EPA)
determined that the source of the contamination was the Dumps-R-Us
landfill owned by Dumpkie. (R. at 5). The landfill was leaking MED
into and contaminating an aquifer in the Pristine River, the source of
Smellville’s drinking water. (R. at 5).

When the contamination was discovered Pristine took
immediate steps to remedy the problem. (R. at 5). First, it developed a
plan to clean up the Pristine River. (R. at 5). Second, Pristine placed a
notice in the classified section of the local newspaper, the Smellville
Gazette, notifying the town’s residents of the time and place of a town
meeting where the cleanup of the river would be discussed. (R. at 6).
Pristine then hosted the meeting where it proposed undertaking filtering
MED from the river and offered Smellville drinking water at a nominal
fee until the river was clean. (R. at 6). The meeting resulted in an
agreement to accept Pristine’s proposals. (R. at 6).

Dumpkie began to develop its own plan to remediate the soil,
sediment, and groundwater at the Dumps-R-Us landfill. (R. at 5, 6).
However, it did not offer a plan to clean up the Pristine River. (R. at 5,
6).

Unfortunately, Pristine continued to incur significant response
costs because of Dumpkie’s insufficient efforts to clean up the river. (R.
at 6). Frustrated with Dumpkie’s insufficient effort, Pristine filed this
cause of action under CERCLA §107 on October 25, 1996 to recover
response costs. (R. at 6).

STANDARD OF REVIEW

This case presents two questions of law: whether the common
law test or substantial continuity exception applies to successor liability
under CERCLA, and whether a potentially responsible party may bring a
claim under CERCLA §107. Because this case presents questions of
law, the Court should review this case *de novo*. *Town of Munster, Indiana v. Sherwin Williams*, 27 F.3d 1268, 1269-70 (7th Cir. 1994). *See also, Luckie v. EPA*, 752 F.2d 454, 456 (9th Cir. 1985).

The Court must also review this case *de novo* because motions for summary judgment are reviewed *de novo*. *Raju v. Rhodes*, 7 F.3d 1210, 1212 (5th Cir. 1993). The question is whether there exists some issue of material fact such that the moving party is entitled to judgment as a matter of law. *Schuster v. Martin*, 861 F.2d 1369, 1371 (5th Cir. 1988). The Court must draw all inferences in a light most favorable to the party opposing the motion. *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

**SUMMARY OF ARGUMENT**

Pristine asks the Court to apply the traditional common law rule governing successor liability in the instant case. Further, the Court should find that under said rule Pristine cannot be held liable for its predecessor’s environmental liabilities. Accordingly, Pristine is not a potentially responsible party (PRP) and may bring a claim under CERCLA §107 against Dumpkie. Even if the Court finds that Pristine is a PRP, it should hold that Pristine may bring a response cost recovery action against Dumpkie pursuant to §107. Additionally, Pristine asks the Court to find that its actions, whether they be considered removal or remedial, were in compliance with the National Contingency Plan (NCP).

Pristine is not a PRP as successor to I.M. Toxic, Inc. A PRP is a party that, under CERCLA, could be liable for response costs associated with the cleanup of hazardous waste. Under CERCLA, one group of potentially responsible parties includes persons who have transported hazardous waste to a contaminated site. Dumpkie alleges that I.M. Toxic transported toxic waste to the dumpsite and that, as its successor, Pristine is a PRP. In the CERCLA context, courts apply two different tests to determine whether a successor should be held liable for its predecessor’s liabilities: the traditional common law approach, and the substantial continuity approach.

Under the traditional common law rule, a successor that purchases its predecessor’s assets is not liable for its predecessor’s debts. The successor will only be held liable for the predecessor’s debts
when it assumes the liabilities, merges with the predecessor, is a mere continuity of the predecessor or entered the transaction fraudulently to escape liability. Under the substantial continuity test, some courts first determine whether the successor had knowledge of the contamination. If there is no knowledge requirement, or if it is met, then the court will consider a number of factors in determining whether the successor should be held liable for its predecessor’s debts. Some of the factors are whether the successor maintains the same business operations, keeps the same name, produces the same product or holds itself out as a continuation of the predecessor.

The Court should hold that the traditional common law rule applies in the instant case because it is the appropriate standard. The substantial continuity test has been improperly created by the courts. First, the substantial continuity test is the product of federal common law which federal courts, as courts of limited jurisdiction, are not able to create. Second, application of the rule presents numerous problems. Under the substantial continuity test, an innocent successor is more likely to be held liable for its predecessor’s environmental torts and forced to assume unanticipated liabilities. This may have a devastating effect on investment and commerce. Application of the substantial continuity test also produces uncertainty because it is a new rule that has not been refined.

However, application of the traditional test avoids the problems created by the substantial continuity test. It will mean that only blameworthy successors are held accountable for their predecessors’ environmental torts. Also, under this rule, a company can anticipate whether or not it will be held liable because it has been in operation in most states and, indeed, in Erewhon. Lastly, this rule has been developed by state courts which are courts of general jurisdiction that may develop common law.

Under the traditional rule, a court could not find that Pristine is a PRP because it did not agree to assume I.M. Toxic’s environmental liabilities, there was no merger of the two companies, Pristine is definitely not a continuation of I.M. Toxic and Pristine did not fraudulently purchase I.M. Toxic in order to escape any liabilities.

Even if the Court decides to apply the substantial continuity test, it should not find Pristine liable for the actions of I.M. Toxic because Pristine obtained new management, produced a new product, changed its
name, discontinued its predecessor's business operations and did not hold itself out as a continuation of its predecessor.

Pristine may bring a response cost recovery action under CERCLA §107 against Dumpkie because Pristine is not a PRP and it has complied with all other §107 requirements. Even if the Court finds that Pristine is a PRP, it may still bring a cause of action under CERCLA §107 because courts have held that a party may bring a §107 claim under certain exceptions, particularly where the PRP is not responsible for the contamination.

Pristine has complied with all the standards of the NCP for remedial or removal actions. Accordingly, Pristine may recover response costs from Dumpkie.

ARGUMENT

The statute relevant to this litigation is §107 of the Comprehensive Environmental and Response, Compensation and Liability Act (CERCLA) 42 U.S.C. §§ 9607, et seq. Congress enacted the law to provide for the clean up of hazardous waste sites and to impose liability on those responsible for the contamination. Pennsylvania v. Union Gas Co., 491 U.S. 1, 7, 109 S. Ct. 2273, 2277 (1989). In order to effectuate these ends, CERCLA provides that private parties may recover response costs from those responsible for the contamination. See CERCLA §107, 42 U.S.C. § 9607. An issue presented in this case is whether a party which is potentially responsible for the contamination may bring a §107 claim provided its cleanup measures are in compliance with the NCP, as provided by CERCLA §107 and defined by the Code of Federal Regulations (C.F.R.). One reason a party may be a PRP is because it is the successor to another party that contributed to the contamination. Thus, the law determining successor liability is very important in determining who is a PRP under CERCLA.

I. THE TRADITIONAL COMMON LAW STANDARD FOR SUCCESSOR LIABILITY IN THE CERCLA CONTEXT IS APPLICABLE AND PRISTINE IS NOT A POTENTIALLY RESPONSIBLE PARTY THEREUNDER.

CERCLA liability, under the substantial continuity exception to the limitation on successor liability, has been described as a "black hole that indiscriminately devours all who come near it." Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Calif. Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994). See also Gregory Sisk and Jerry Anderson, The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny & Meyers (Sic), 16 VA. ENVTL. L.J. 505 (1997). Due to the unfettered reach of the substantial continuity test, this Court should hold that in determining whether a successor is liable for the debts of a predecessor, the appropriate test is the traditional common law test that is applied in the majority of the states and should reject the "substantial continuity exception." Applying the common law of Erehwon, as opposed to the substantial continuity exception, would avoid undue interference in Erehwon's carefully developed corporation law, would not hinder investment and needed business activity and would not frustrate the objectives of CERCLA.

CERCLA § 9607(a) provides that "persons" owning any facility where hazardous wastes are disposed, or who arranged to transport hazardous wastes to a site may be held liable for the damages caused by the release of said waste into the environment. See CERCLA § 9607(a) (1997). CERCLA includes corporations within the definition of "person." CERCLA § 101, 42 U.S.C.A. § 9601(G)(21) (1997). See also, City Management v. U.S. Chem. Inc., 43 F.3d 244, 250 (6th Cir. 1994). Although the Act does not state whether or not the definition of corporation includes successor corporations, courts have held that under certain circumstances successor corporations may come within the scope of liability for a corporation under CERCLA. Anspec Co., Inc. v. Johnson Controls Inc., 922 F.2d 1240 (6th Cir. 1991) (holding that state law governs the question of successor liability under CERCLA). However, in interpreting and applying the statute, the circuits are
divided over the proper test to apply in determining whether a given successor may be held liable.

The traditional common law test is what governs successor liability in Erewhon and in the majority of states. *Id.* at 1249. *See also*, Sisk, *supra* at 512-13; *See, e.g.*, Salvati *v.* Blaw-Knox Food, 497 N.Y.S.2d 242, 130 Misc. 2d 626 (1985); Martin *v.* Abbott Laboratories, 102 Wash. 2d 581, 609, 689 P.2d 368, 384 (1984); Welco Industries *v.* Applied Cos., 67 Ohio St. 3d 344, 347, 617 N.E.2d 1129, 1132 (1993). Under this test a successor corporation is generally not held liable for the liabilities of its predecessor unless one or more of four exceptions are met. *Louisiana-Pacific Corp. v.* Asarco Inc., 909 F.2d 1263 (9th Cir. 1990). These exceptions are that the successor: expressly or impliedly assumes its predecessor's liabilities, merges with its predecessor, is a mere continuation of its predecessor, or enters the transaction fraudulently to escape liability. *Id.* This test is deeply ingrained in American law. *See* W. Fletcher, 15 CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS, § 7122 (perm. ed. rev. vol. 1990).

In the CERCLA context, some courts have created and applied a "substantial continuity test." *United States v.* Carolina-Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992) (holding that the substantial continuity test applied in the CERCLA context). Under this test, a court considers a number of factors when determining whether to hold a successor responsible for the liabilities of its predecessor. *Id.* If the substantial continuity test is applied, many courts require that the successor have knowledge of the potential liability. *Id.* If there is no knowledge requirement or the knowledge requirement is met, other factors are considered. *Id.* The factors include whether the successor retains the same employees, retains the same supervisory employees, retains the same production facilities at the same location, produces the same product, retains the same name, maintains a continuity of assets, engages in a continuity of general business operations, and holds itself out as a continuation of its predecessor. *Id.*

The application of federal common law requires the existence of such law on a particular topic, and this Court has held that there is no federal general common law. *O'Melveny & Myers v. FDIC*, 512 U.S. 79-80, 114 S. Ct. 2051, 2053 (1994) (*citing* Erie R.R. Co. *v.* Tomkins, 304 U.S. 64, 78, 58 S. Ct. 817 (1938) and holding that there is no federal common law and that state law governs imputation of knowledge to a
corporation asserting a cause of action under state law). A court should presume that matters left unaddressed in a complex statutory scheme are subject to state law. *Id.* at 85, 114 S. Ct. at 2053. This Court has also held that application of federal common law is generally appropriate only in areas such as those concerning the rights and obligations of the United States, interstate and international business disputes implicating the conflicting rights of states or U.S. relations with other countries and admiralty law. *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 641, 101 S. Ct. 2067 (1981).

In *O'Melveny*, this Court reasoned that federal courts are courts of limited jurisdiction that do not have unlimited power. As such, federal courts should be reluctant to create new rules unless Congress has expressly given them that authority in a statute. *O'Melveny*, 512 U.S. at 90, 114 S. Ct. at 2056 (Stevens, J., concurring). Additionally, the determination of successor liability involves the weighing of different policy objectives and the legislature is the most appropriate place for such weighing. *Id.* at 89, 114 S. Ct. 2055.

The use of "federal common law is especially inappropriate when its effect is to displace organic state law in an area of traditional state concern, such as the creation, status, successorship, and dissolution of corporations." *Sisk*, *supra* at 507. Congress has not indicated its desire for federal law to trump state corporation law merely because a cause of action is governed by a federal statute. *Burks v. Lasker*, 441 U.S. 471, 478, 99 S. Ct. 1837 (1979). Indeed, Congress neither intended for CERCLA to displace state corporation law, nor for CERCLA cases to be a forum where federal common law could be used to create a uniform federal rule of decision. *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248, n.3 (6th Cir. 1991) (Kennedy, J., concurring) (citing *Burks v. Lasker*, 441 U.S. 478, 99 S. Ct. 1831 (1979)).

The application of state law is more appropriate. First, state law is more developed and easier to find. *DeSylva v. Ballentine*, 351 U.S. 570, 580-81, 76 S. Ct. 974, 980 (1956) (using state law to define the word "children," which was used in a federal statute, because there was no federal domestic relations law). Second, state law is appropriate in determining whether or not a successor is liable for its predecessor's debts because it is state law which creates and defines corporations. Indeed, corporations depend upon state law for their existence. "State
law defines their powers, rights and liabilities, prescribes their procedures, governs their continued existence, and defines the terms upon which mergers may occur and the effect to be given to mergers.” Anspec, 922 F.2d at 1248-49 (Kennedy, J., concurring)(citing Chicago Title and Trust Co. v. Forty One Thirty Six Wilcox Bldg., 302 U.S. 127-28, n.4, 58 S. Ct. 125, 128 (1937)).

Application of state law is particularly useful when a federal statute is silent on an issue and that issue is one typically governed by state law. State rules may be used to provide interstitial rules where a federal statute does not address an issue. Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671-72, 99 S. Ct. 2529, 2540 (1979). Here, CERCLA does not address successor liability, so application of state law is appropriate to provide such an interstitial rule. Atchison, Topeka v. Brown and Bryant, No. 96-15529, at *14991-92 (9th Cir. Dec. 30, 1997) (holding that there is no substantial continuity test in the ninth circuit and observing that CERCLA does not address successor liability).

Accordingly, judicial creation of special federal rules is generally warranted when there is a significant conflict between some federal policy and the use of state law. O'Melveny, 512 U.S. at 87, 114 S. Ct. at 2055. In determining whether to apply state law or federal common law, courts are to consider three factors. Courts are to decide whether there is a need for uniformity, whether state law frustrates the specific goals of the federal law, and the extent to which application of federal law would disrupt commercial relationships established pursuant to state law. United States v. Kimbell Foods Inc., 440 U.S. 715, 728, 99 S. Ct. 1448, 1458-59 (1979).

In the instant case, the application of state law is required based upon the three factors enunciated in Kimbell Foods. Application of Erehwon's law in the instant case would not preclude the development of a uniform federal standard because Erehwon's law is identical to the traditional common law that many federal courts and most states already rely upon.

Moreover, the application of state law in the instant case will not frustrate the objectives of CERCLA. The purpose of CERCLA is to provide for the cleanup of hazardous waste sites and to impose liability on the responsible parties. Anspec, 922 F.2d at 1247. See also, H. REP. NO. 96-1016 (II), pt. 1, at 1 (1980). There is no evidence that state law will frustrate this objective. Atchison, Topeka, No. 96-15529 at 14994.
More importantly, state law provides a proper test for determining a successor's liability for the contamination caused by its predecessors. If a successor meets any of the exceptions, it may be held liable. *Louisiana-Pacific*, 909 F.2d at 1263 (9th Cir. 1990). There is no danger that corporations will incorporate in states with less strict environmental or successorship laws in order to escape liability; there will be no "race to the bottom." This is because state laws on successorship liability are largely uniform. *Anspec* at 1249. See also, *Atcheson, Topeka*, No. 96-15529 at 14993; *Sisk*, *supra* at 564. Additionally, States have an interest in protecting their citizens from the harm caused by environmental torts. Indeed, most states have their own versions of CERCLA and the Clean Water Act, which indicates that they have an interest equal to that of the Federal government in maintaining a clean environment. *Anspec*, 922 F.2d at 1251.

While application of Erewhon law in no way frustrates CERCLA, application of the substantial continuity approach will disrupt commercial relationships entered into under state law. When one corporation purchases the assets of another, it does so with the expectation that state law will apply. *Anspec*, 922 F.2d at 1250. When private parties have entered into commercial relationships with an expectation that their relationships will be governed by state law, application of state law is more appropriate. *Kamen v. Kemper Fin. Serv.*, 500 U.S. 90, 98, 111 S. Ct. 1711, 1717 (1991). When a Federal court creates a new rule governing an area traditionally governed by the states (such as successor liability), it creates a risk that it will disrupt existing commercial relationships and paralyze future transactions due to fear of liability and the uncertainty the new rule creates. *Sisk*, *supra* at 571. This Court has stated before that it would not create a new federal rule because it would create uncertainties that were difficult to foresee. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739-40 (1979).

Erehwon uses the traditional common law test to determine successor liability. The rule is that a successor corporation will not be found liable for its predecessor's debts unless one or more exceptions can be met. *Louisiana-Pacific*, 909 F.2d at 1263. The exceptions are that the successor: expressly or impliedly assumes the predecessor's liabilities, merges with its predecessor, is a mere continuation of its predecessor, or the transaction is entered into fraudulently to escape liability. *Id.* See also *FLETCHER, CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS*, § 7122 (perm. ed. rev. vol. 1990). Under this test, Pristine cannot be held liable as a successor, so Pristine cannot be found to be a potentially responsible party under CERCLA.

Pristine did not assume I.M. Toxic's environmental liabilities when it executed the indemnification agreement. Courts have held that indemnification agreements are to be judged according to standards set by state law. *Hatco Corp. v. Allstate Ins. Co.*, 59 F.3d 400, 405 (3d Cir. 1995). A clear intent must be manifested in the contract. *Id.* A court's overriding goal is to interpret the contract in a manner giving effect to the parties' expectations. *North Shore Gas Co. v. Salomon, Inc.*, 963 F. Supp. 694, 700 (N.D. Ill. 1997). If the court determines that the terms are ambiguous, it may examine extrinsic evidence to determine the parties' expectations. See also *Hatco*, 59 F.3d at 405. A finding that a party assumed some liabilities does not constitute a finding that it assumed other liabilities. *Interstate Power Co. v. Kansas City Power and Light Co.*, 909 F.Supp. 1241, 1278 (N.D. Iowa 1993).

There is no evidence that Pristine intended to assume I.M. Toxic's environmental liabilities. The purchase agreement is silent with regard to environmental liabilities. (R. at 4). Furthermore, as part of its deal with I.M. Toxic, Pristine agreed to use funds that had been accrued for contingent (including environmental) liabilities and to fund a shortage in pension funding for former Woodaway employees. (R. at 5). Given the parties' express agreement to use such funds toward the pension plans rather than as a reserve against potential environmental and other liabilities, the parties clearly considered the potential for environmental liabilities but chose not to have Pristine expressly assume said environmental liabilities. (R. at 5). Furthermore, I.M. Toxic had stopped using toxic substances to produce Woodaway in 1978, and there is no evidence of contamination at the facility that was purchased. (R. at
2). Accordingly, Pristine management would not have expected Pristine to incur environmental liability as part of the asset sale.

Thus, the intent of the parties clearly shows that although the scope of the agreement includes assumption of liabilities under the pension plan and third party personal injury and damage claims, such an assumption of liability is insufficient to find that Pristine assumed its predecessor's environmental liabilities. Interstate Power, 909 F. Supp. at 1278.

Pristine and I.M. Toxic did not merge. Courts have recognized a de facto merger when 1) there is a continuity of the seller's enterprise in terms of management, personnel and assets, 2) there is a continuity of shareholders, 3) the seller ceases operations, liquidates and dissolves as soon as is legally possible, and 4) the purchasing corporation assumes the obligations of the seller necessary for uninterrupted continuation of business operations. Louisiana-Pacific v. Asarco, 909 F.2d 1263, 1264 (9th Cir. 1990).

Here, there has been a change in management. For instance, there is a new President and Operating Officer. (R. at 3, 4). Second, there is a change of shareholders. (R. at 3, 4). At Pristine, the shareholders include the employees and Ms. Klub. (R. at 4). However, in the old company, Mr. Toxic was sole shareholder. (R. at 3, 4). Pristine entered a new line of business and terminated opportunities associated with I.M. Toxic. (R. at 3, 4). Although the seller liquidated his company soon after sale, all three of the other factors are not met, so the Court must find that Pristine is not liable as a successor due to merger.

Pristine is not a mere continuation of I.M. Toxic. The traditional rule is that a corporation is not a continuation of its predecessor unless, after transfer of assets, only one corporation remains and there is a difference in identity of stock, stockholders and directors between the two corporations. Mozingo v. Correct Manufacturing Corp., 752 F.2d 168, 174 (5th Cir. 1985). Some courts have also created a product line theory to determine when a successor is a mere continuation. Under this test a successor may be found liable for its predecessor's debts if it produces the same product, under the same name, with no outward indication of any change of ownership of the business. Id. at 175 (citing Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3 (1977)). Some courts have created a continuity of enterprise theory. Under this test, the court considers whether the successor: retains the same employees, retains the
same supervisory employees, retains the same production facilities at the same location, produces the same product, retains the same name, maintains a continuity of assets, engages in a continuity of general business operations, and holds itself out as a continuation of its predecessor. *Id.* (citing *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974)).

In the case *sub judice*, Pristine is not a mere continuation of I.M. Toxic under either of these tests. Pristine is not a continuation of its predecessor under the traditional test. First, only Pristine remains after the asset sale because I.M. Toxic immediately dissolved his company. (R. at 4). Second, there is a difference in identity between Pristine’s management and shareholders and I.M. Toxic’s management and shareholders. While I.M. Toxic was President of I.M. Toxic, Ms. Klub is President of Pristine. (R. at 3, 4). Pristine’s stockholders were different. I.M. Toxic was the sole shareholder in the I.M. Toxic company, while the employees along with Ms. Klub are the shareholders of Pristine. (R. at 3, 4). Third, there is an identity of stock between the companies. As stated *supra*, Mr. Toxic dissolved his company, while Pristine issued its own new stock. (R. at 4).

Pristine also fails to meet the definition of a mere continuation of I.M. Toxic under the product line test. It does not manufacture the same product, it makes water in contrast to I.M. Toxic which made furniture stripper. (R. at 3). It does not have the same name and Pristine has outwardly expressed its intention to change its business. (R. at 3). Pristine did so when it changed the product from furniture stripper to bottled water, the name from I.M. Toxic to Pristine and held a public ceremony with the Mayor to announce the opening of Pristine. (R. at 3).

Pristine fails to meet the definition of a mere continuation of its predecessor under the continuity of enterprise theory as well. Pristine has changed supervisory personnel as stated *supra* (R. at 3, 4). It produces a different product. (R. at 3). It changed its name, its business operations and does not hold itself out as a continuation of its predecessor. (R. at 3).

A court could find that Pristine was a mere continuation of I.M. Toxic if it found that it purchased I.M. Toxic’s assets fraudulently so that it could escape liability, however, the parties have stipulated that there was no fraud. (R. at 8). *Louisiana-Pacific v. Asarco*, 909 F.2d 1263 (9th Cir. 1990).
Accordingly, the Court must find that under the traditional state common law rule, Pristine is not a PRP.

C. Alternatively, If This Court Adopts The Substantial Continuity Test, Pristine Is Not A Potentially Responsible Party Because Pristine Does Not Meet The Definition Of A Liable Successor Under That Test.

Assuming arguendo that the Court holds that the substantial continuity test applies, Pristine would nevertheless fail to meet the definition of a potentially responsible party (PRP). Therefore, the Court should find that Pristine is not a PRP. Under the substantial continuity test, a court must determine whether the successor knew or should have known that its predecessor had liabilities under CERCLA. United States v. Carolina-Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992). If such knowledge test is met, then the court considers a number of factors when determining whether to hold the successor liable for the debts of its predecessor. Id. These factors are whether the successor: retains the same employees, retains the same supervisory employees, retains the same production facilities at the same location, produces the same product, retains the same name, maintains a continuity of assets, engages in a continuity of general business operations, and whether the successor holds itself out as a continuation of its predecessor. Id. If the Court applies this test, it must conclude that Pristine is not a PRP because the majority of factors do not apply to the facts of this case. First, Pristine obtained new supervisory employees. (R. at 3, 4). While I.M. Toxic was run by Mr. Toxic, Pristine is run by Ms. Sierra Klub. (R. at 3, 4). Second, Pristine produces a different product. I.M.Toxic produced furniture stripper and Pristine produces bottled water. (R. at 3). Third, the name of the company was changed from I.M.Toxic to Pristine Water, Incorporated. (R. at 3). There has been no continuity of general business operations. I.M.Toxic was dissolved and Pristine no longer produces its product or does business with its customers. (R. at 4). Pristine has never held itself out as a continuation of I.M. Toxic. (R. at 3). In fact, a ceremony was held in which Pristine publicly announced that it was a new and different business. (R. at 3). Also, Pristine sold the I.M. Toxic trademark, which indicates that it had
no intent to continue the business or hold itself out as a continuation of that company. (R. at 3).

These facts demonstrate Pristine’s intention to discontinue its predecessor’s business, to start a completely new company and to publicize these facts. Therefore, the Court should hold that Pristine is not a continuation of I.M. Toxic and thus not a PRP.

II. PRISTINE MAY ASSERT A CAUSE OF ACTION AGAINST DUMPKIE FOR RECOVERY OF RESPONSE COSTS UNDER CERCLA SECTION 107(a), BECAUSE IT MEETS ALL OF THE NECESSARY §107 REQUIREMENTS.

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), there are two statutory provisions established, §§107 and 113, which provide parties with legal recourse to recover cleanup expenses from contamination of hazardous materials. The provision chosen by a plaintiff for a cause of action is significant because under §107 one must only prove that the defendant is a covered person; but, it is not necessary to show causation. 42 U.S.C.A. § 9607(a) (1997).

A. Pristine May Bring A §107 CERCLA Cause Of Action Because It Is Not A Potentially Responsible Party As Long As All Of The Other §107 Requirements Have Been Satisfied.

As has been shown, under any potentially applicable test Pristine is not a PRP because it is not liable as a successor to I.M. Toxic. The statutory language in §107(a)(4)(B) of CERCLA allows recovery of response costs incurred by “any other person” consistent with the NCP. Therefore, Pristine is able to bring a §107 cause of action, assuming that all of the §107 requirements have been satisfied.

The elements of a §107 action require: that the Defendant be a PRP liable under §107 (42 U.S.C.A. §§ 9601 (20-21) (1997)), that it caused a release of a hazardous substance into the environment (42 U.S.C.A. §§ 9601 (14) & (22) (1997)), that the release occurred at a facility (42 U.S.C.A. § 9601 (9) (1997)), that the response costs were incurred because of a release or threat of release (42 U.S.C.A. § 9607 (a)(1) (1997)), and that the costs were consistent with the NCP (42
U.S.C.A. § 9607(a)(4)(B) (1997)). Dumpkie has already stipulated that it is a PRP, that a release of a hazardous substance has occurred, that the site is a “facility” and that the responses incurred were necessary because of the threat of the release. Finally, it will later be shown that Pristine’s response costs were consistent with the NCP.

B. Alternatively, If the Court Finds That Pristine Is A Potentially Responsible Party, It Is Well Established That Pristine May Bring A CERCLA §107 Cause Of Action.


1. Bringing a §107 CERCLA cause of action is supported by statutory language, legislative history and public policy.

The actual text of the statute states that covered persons shall be liable for “any other necessary costs of response incurred by any other person consistent with the NCP.” 42 U.S.C.A. § 9607(a)(4)(B) (1997). PRPs fit into the category of “any other person” and should be able to recover response costs under §107 of CERCLA. There is no indication that this right is limited only to “innocent” private parties and the government. Because the language of the statute is so broad, it suggests that Congress intended §107 liability to sweep broadly. Bethlehem, 891 F. Supp. at 224.
Originally, CERCLA provided only for a cost recovery action under §107. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (SARA), amending CERCLA to clarify and confirm the judicially created right of a person who is held jointly and severally liable to recover costs of cleanup, which are above his/her equitable share, from other potentially liable parties as established by CERCLA. 42 U.S.C.A. § 9613(f) (1997). See also H.R. REP. NO. 99-253, pt. 1 at 79 (1986). Allowing PRPs to bring cost recovery actions under §107 also serves the goals set out in CERCLA by encouraging quick, safe and voluntary cleanup of hazardous waste sites. United States v. Kramer, 757 F. Supp. 397, 416-17 (D.N.J. 1991).

By not allowing PRPs to recover under §107, they are discouraged from undertaking a voluntary cleanup because they are afraid that they will end up carrying the financial burden for all other responsible parties. This is especially true in cases such as the one at hand where one contributor, Mr. Toxic, is insolvent or unavailable. It is also more difficult for PRPs to disperse response costs among other PRPs under a §113 cause of action because the burden of proof is higher than under a §107 cause of action. However, if the PRP knows that it may be able to recover all of those costs from other PRPs, then it will be more likely to undertake cleanup methods voluntarily. It is important to encourage expedient and willing cleanup because, otherwise, these cases could be tied up in lengthy legal formalities and allow dangerous situations to continue without any remediation or removal being accomplished. This puts the public at increased and unnecessary danger. Allowing recovery actions is also advantageous to the government because it can then direct its efforts more efficiently by pursuing other PRPs.

When examined as a whole, through statutory language, legislative intent and public policy, CERCLA’s provisions make it clear that PRPs are permitted to pursue cost recovery actions under §107 in initial actions. To interpret this provision any differently would rewrite CERCLA and seriously undermine the future effectiveness of Superfund cleanups in the United States.

2. The ability to bring a §107 CERCLA cause of action is supported by case law.
There is only one United States Supreme Court decision addressing this issue of a PRP pursuing a cause of action under CERCLA §107(a)(4)(B) for response costs. *Key Tronic Corp. v. United States*, 511 U.S. 809, 816, 114 S. Ct. 1960, 1966 (1994). In *Key Tronic*, this Court allowed such a claim to occur. *Id.* This Court expressly recognized that a PRP may proceed under §107 and that the enactment of §113(f) in no way precludes the continued applicability of §107. *Id.*

Although §107 of CERCLA has historically been used by governments to recover costs incurred in the cleanup of hazardous sites, it is possible that a private person may recover response costs under §107 as well. *New Castle County v. Halliburton Nus Corp.*, 111 F.3d 1116, 1123 (3d Cir. 1997), *citing Rumpke of Indiana*, 107 F.3d at 1239-42 (“noting that landowner may bring §107 action if party seeking relief is itself not responsible for having caused any hazardous materials to be spilled onto property”); *United Technologies Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 n.8 (1st Cir. 1994) (“suggesting . . . that potentially responsible person who initiates cleanup without government prodding might be permitted to bring §107 action”); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (“implies "that private landowner forced to clean up hazardous materials that third party spilled onto its property or that migrated there from adjacent lands might pursue §107 claim"). In *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342 (7th Cir. 1997), the court of appeals applied the concept of an innocent landowner exception recognized in *Akzo*. The court viewed an innocent landowner as one who did not directly contribute to the contamination but was a PRP only because it owned the land or was liable as a successor. *Id.* However, in *AM Int'l, Inc.*, the landowner knew that the land he was buying required expensive cleanup and as a result he paid a lower purchase price. *Id.* This made the landowner less innocent than under the analysis applied in *Akzo*, 106 F.3d at 1347. In spite of this distinction, the court in *AM Int'l, Inc.* allowed this private party to rely on a §107 claim. *Id.* Every court of appeals that has examined this direct issue has come to the conclusion that a §107 action for recovery of response costs may be brought by innocent parties that have undertaken clean-ups. *New Castle County*, 111 F.3d at 1120.

Dumpkie cites *Akzo Coatings, Inc.*, 30 F.3d at 761, to argue that only a §113 cause of action should be allowed for PRPs. In *Akzo*, the party that was ordered by the EPA to perform emergency removal
activities at the hazardous site and later sought contribution from other liable parties was not liable merely because it was the present landowner, but also because it had actually generated hazardous waste and arranged for its disposal. *Id.* In contrast, assuming arguendo that this court finds that Pristine is a PRP because it is a corporate successor of I.M. Toxic, Pristine has never directly contributed to the generation of the hazardous waste or participated in its disposal. The waste disposal by I.M. Toxic was discontinued in 1978, almost 20 years ago. (R.at 2). Akzo also states that because §107 permits "any other person," not just the state or federal government, to recover costs incurred in cleaning up hazardous waste sites such a private claim would arise when, for example, a landowner was forced to clean up hazardous material that was spilled onto its property by a third party or that migrated onto the property from adjacent land. *Id.* at 764. This is similar to the case at hand. Dumpkie is adjacent to Pristine Water Company and Dumpkie’s landfill is leaching methyl-ethyl-death into and contaminating an aquifer from which the town of Smellville, as well as Pristine Bottled Water Company, obtain their drinking water. Therefore, Pristine is being forced to aid in a remedy or it will not have a business.


*Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235 (7th Cir. 1997), and *Wolf, Inc. v. L. & W. Serv. Ctr., Inc.*, 1997 WL 141685 (D. Neb. 1997), are two recent cases that directly demonstrate the continuing trend towards allowing PRPs the ability to bring a cause of action under both §§ 107 and 113 of CERCLA, especially in situations where the PRP is not actually a contributor to the hazardous waste. In *Rumpke*, a landowner filed a cost recovery suit under both §§ 107 and 113 of CERCLA, alleging that he did not pollute the site in any way. *Id.* Similar to Rumpke, Pristine has not contributed to the actual
contamination of the Pristine River. In *Rumpke*, the court found the landowner to be a PRP under CERCLA only because of his ownership of the site. *Id.* Whereas, the fact that Pristine does not own the site emphasizes Pristine's innocence and allows it to bring a § 107 claim under an innocent landowner exception. In both *Rumpke* and *Wolf*, the court found that the plaintiffs were entitled to pursue their CERCLA claims under §107. *Wolf*, 1997 WL 141685 at *8. Using the analysis of these cases, this makes it even less likely that Pristine is liable as a PRP and allows it to bring a §107 CERCLA cause of action.

III. PRISTINE'S RESPONSE COSTS ARE RECOVERABLE AS AGAINST DUMPKIE BECAUSE IT HAS SATISFIED THE REQUIREMENTS OF THE NATIONAL CONTINGENCY PLAN (NCP) FOR REMOVAL OR REMEDIAL ACTIONS.

The NCP is a set of regulations promulgated by the EPA establishing procedures and standards for responding to releases of hazardous substances. 42 U.S.C.A. § 9605 (1997). Dumpkie asserts that Pristine has not complied with the NCP requirements for remedial action and, therefore, cannot successfully bring a §107 cause of action. However, Pristine’s response was a removal action and it has met all of the NCP requirements. Even if this Court finds that Pristine’s response was a remedial action, Pristine has still abided by the requirements established by the NCP.

A. Pristine’s Response Costs Were Incurred Through Removal Actions Rather Than Remedial Actions.

In the instant case, Pristine’s response to the methyl-ethyl-death release was a removal action, not a remedial action. The standards for compliance are more demanding for remedial actions than for removal actions under the NCP. The response costs incurred began in January of 1996, which makes the 1990 NCP the appropriate set of regulations with which to comply. (R. at 6).

A removal action is usually a short-term response and a remedial action a long-term or permanent response to particular site conditions. 42 U.S.C.A. § 9601(23)&(24) (1997). See also, *United States v. Lowe*, 118 F.3d 399, 401 (5th Cir. 1997); *Daigle v. Shell Oil Co.*, 972 F.2d
Removal actions are governed by more flexible NCP requirements. 42 U.S.C.A. § 9601(23) (1997). Removal is authorized when there is an immediate and significant risk of harm to the environment or to human life or health, thereby constituting an emergency situation requiring immediate removal action. Lowe, 118 F.3d at 401. If the danger is not immediate and significant then further investigation must be conducted to determine whether a temporary (planned removal) or permanent (remedial action) solution is necessary. William B. Johnson, J.D., Annotation, Application of Requirement in §107(a) of CERCLA That Private Cost-recovery Actions be Consistent With the National Contingency Plan, 107 A.L.R. FED. 562 (1997).

To determine whether a removal action is appropriate, the removal site evaluation, any information produced through a remedial site evaluation, if any was previously done, and the current site conditions, must be reviewed. 40 C.F.R. § 300.415(a)(1) (1997). If it is determined that a removal action is appropriate, the removal action should begin as soon as possible. 40 C.F.R. § 300.415(b)(3) (1997). Pristine began this filtering process in January of 1996, soon after the contamination was discovered. (R. at 6). Because there was a danger to the public’s main source of drinking water, Pristine agreed to provide the public with safe drinking water until a permanent plan could be established. (R. at 6). This demonstrates that the action was an emergency measure taken by Pristine. Pristine’s next action should also be considered as removal and not remedial because it was a temporary plan to remove the contaminants by using a method of filtering the methyl-ethyl-death from the water taken from the Pristine River for bottling and sale to consumers. (R. at 6). This is not remedial because it in no way seeks to stop the contamination from occurring, it merely finds a way to keep the contamination from reaching the public until a permanent solution is achieved. Dumpkie also admits that it was working on a remediation plan during this time, further supporting the concept that Pristine’s actions were merely intended to fill the interim. (R. at 5, 6). Pristine’s action was meant to be a temporary response while Dumpkie prepared a remedial measure.

The Code of Federal Regulations section relevant to removal actions provides a non-exhaustive list of appropriate types of actions that are considered to be removal actions. Pristine’s first step of providing bottled water is reflected in § 300.415(d)(9), stating that a “provision of
alternative water supply where necessary immediately to reduce exposure to contaminated household water" is an appropriate removal action. *Id.* Pristine's next step was to provide a filtering system to keep the contamination from infiltrating the public drinking water. It states in § 300.415(d)(8) that containment and treatment of hazardous materials, where needed to reduce the likelihood of human, animal, or food chain exposure, are both measures considered appropriate removal actions. 40 C.F.R. § 300.415(d)(8) (1997).

**B. Alternatively, If The Court Finds That Pristine's Action Was A Remedial Action, Pristine Has Satisfied the Requirements of the National Contingency Plan For A Removal Or A Remedial Response Action.**

"Responses consist of removals and remedial actions and enforcement activities related thereto." 42 U.S.C.A. § 9601(25) (1997). A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements and results in a CERCLA-quality cleanup. 40 C.F.R. § 300.700(e)(3)(i) (1997). The private party must also show that the costs incurred were "necessary" cleanup costs. 42 U.S.C.A. § 9607(a)(4)(B) (1997). The three basic remedy selection requirements of CERCLA §121 are that the action (1) be protective of human health and the environment, (2) utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable, and (3) be cost-effective, attaining applicable, relevant and appropriate requirements (ARARs). 42 U.S.C.A. § 9621(b)(1) - (d)(4) (1997). According to CERCLA §117, the action must also provide for meaningful public participation. 42 U.S.C.A. § 9617 (1997).

Pristine's action was protective of human health and the environment because it noted the danger to the public caused by contaminated drinking water and attempted to alleviate this danger. It announced its plan to the public and began its removal action in January of 1996. Pristine's use of filtering was an alternative treatment technology or resource recovery technology utilized to the maximum extent practicable. Pristine's response action was intended to be temporary. Therefore, any action more permanent than filtering would
have been remedial rather than removal. The third requirement is that
the treatment be cost-effective. 42 U.S.C.A. § 9621(d)(4) (1997). The
filtering process used by Pristine was highly technical but was necessary
and appropriate for the needs of the community.

The additional requirement for a private party’s response action is
that the party provide for meaningful public participation. 42 U.S.C.A.
§ 9617 (1997). The EPA stated in the preamble to the NCP of 1990 “that
an omission based on lack of experience with the Superfund program
should not be grounds for defeating an otherwise valid cost recovery
claim, assuming the omission does not affect the quality of the cleanup.”
County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1511 (10th Cir. 1991).
See also, 55 Fed. Reg. at 8793 (1990). For example, the EPA
commented that the failure of a private party to provide a public hearing
should not prohibit a cost recovery action if the public was afforded an
ample opportunity for comment. 55 Fed. Reg. at 8793 (1990). See also,
County Line Inv. Co., 933 F.2d at 1513. Pristine published a notice in
the classified section of the Smellville Gazette on June 3, 1995, stating
that there would be a public meeting on July 3, 1995 and that a copy
of the proposed plans was available by calling the Pristine Water Company.
Pristine then held a public meeting and discussed various plans for
cleaning up the Pristine River. This satisfies the requirement of public
opportunity for comment. Actions under 40 C.F.R. §
300.700(c)(2) will not be considered “inconsistent with the NCP” based
on immaterial or insubstantial deviations from the provisions of 40
C.F.R. part 300. 40 C.F.R. § 300.700(c)(4) (1997). The EPA contests
that these requirements should not be construed as a fixed list that must
be met in order for a party to qualify for cost recovery under CERCLA
300.700(c)(3)). Therefore, strict compliance with the list of NCP
provisions is not required in order to be “consistent with the NCP.” Id.
The EPA realizes that private parties do not usually have much
experience in conducting cleanups under the NCP, and therefore are
going to be unfamiliar with all of the detailed practices and procedures
that accompany this complex and lengthy regulation. Id. Although
Pristine has never previously brought a §107 claim and is not familiar
with all of the detailed procedures, Pristine has made every effort to
comply with all of the NCP requirements.
CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court apply the traditional common law test and find that Pristine is not a PRP as a successor. Also, Respondent asks the Court to find that Pristine may bring a CERCLA §107 cause of action and that it has met all of the NCP requirements for a removal or remedial action, allowing it to recover all response costs.
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1997

Case No. 97-100

DUMPKIE, INC.,

Petitioner,

v.

PRISTINE WATER COMPANY, INC.,

Respondent,

ON DIRECT APPEAL FROM THE
COURT OF APPEALS
FOR THE SIXTEENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

I. Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") is a Corporation a Potentially Responsible Party ("PRP") as a successor in interest when the Corporation knew or should have known of the predecessor's potential liability, when the Corporation acquires all of the predecessor's assets, when the management and employees of the two corporations are virtually indistinguishable, and when the new owners have benefited from the polluting enterprise?

II. Under § 9607 of CERCLA is a PRP barred from bringing an action to recover its entire costs of response when such action exposes other PRP’s jointly and severally to more than their pro-rata share of liability, and when Congress has amended CERCLA, expressly establishing contribution as a remedy between PRP’s in § 9613 of CERCLA?

III. Under the 1990 National Contingency Plan ("NCP") has a private party conducting a response action failed to comply substantially with the community relations requirements of the NCP when its actions were consistent with a permanent response, it did not develop a Community Relations Plan, it did not conduct community interviews, it did not allow 30 days for public comment, it did not designate a spokesperson, and it did not publish any details of its plans?

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A. CERCLA is a broad, remedial statute requiring a uniform national standard, which Congress entrusted to the Court to determine.

1. Federal law is the best source of law to determine successor liability because it furthers CERCLA's purpose to impose liability on all parties responsible for polluting enterprises.

2. State law conflicts with CERCLA's legislative purpose of holding responsible parties accountable.

3. Adopting the 'average' state law as federal law, like the state law it is based upon, is inadequate to further CERCLA's legislative intent.

B. The Substantial Continuation Test is more equitable than the Federal/State Common Law tests because it better encapsulates the relevant factors to justify successor liability.

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STATEMENT OF THE CASE

Petitioner Dumpkie, Inc.\(^1\) is the owner of the Dumps-R-Us landfill located along the Pristine River near Smellville, Erewhon. (R. at 1.) The landfill, part of the Smellville Regional Waste Management District that is in compliance with all relevant state and federal law, was acquired in a cash transaction from I. M. Toxic, Inc. in 1986. (R. at 1-2.) I. M. Toxic, sole owner of I. M. Toxic, Inc., made his fortune producing “Woodaway,” a well-known furniture stripper. (R. at 2.) He had used the site prior to opening the dump to dispose of wastes from his Woodaway factory. \textit{Id.} Dale Herdman, manager of the Woodaway factory, supervised this activity. Regretfully, Woodaway contains a known carcinogen, methyl-ethyl-death.\(^2\) \textit{Id.} I. M. Toxic, Inc. stopped using methyl-ethyl-death in 1978 and switched to a different ingredient at the urging of his granddaughter and bookkeeper, Sierra Klub. \textit{Id.} This change, however, marked the end of an era for I. M. Toxic, Inc. \textit{Id.} The landfill was sold to Dumpkie in 1986 to raise cash for the factory. \textit{Id.} In 1990, Mr. Toxic announced he would close the factory. (R. at 3.)

At the same time, Dale Herdman organized the Woodaway employees into the Pristine Water Company ("PWC"), an employee owned company. \textit{Id.} PWC had Ms. Klub negotiate the sale of the factory with Mr. Toxic, her grandfather. \textit{Id.} The sale was a cash transaction for all the remaining assets of I. M. Toxic, Inc. \textit{Id.} Ms. Klub, who owns over fifty percent of PWC stock, was named PWC President and Chief Operations Officer. (R. at 4.) After the sale, PWC sold the Woodaway trademark to raise capital, retooled the plant and began to bottle Pristine River water for sale. (R. at 3.)

The only I. M. Toxic, Inc. employee to lose his job was Mr. Toxic; however, from time to time he is a PWC consultant. (R. at 3-4.) Mr. Toxic dissolved his corporation as soon as legally

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1. Dumpkie owns landfills throughout the midwestern United States.
possible, and retired to Cuernavaca, Mexico. (R. at 4.) Approximately five million dollars set aside for contingent liabilities, including environmental liabilities, was used to fund the PWC employees' pension plans which had been negligently underfunded. (R. at 5.)

The Smellville Division of Water discovered that the Pristine River contains concentrations of methyl-ethyl-death. Id. A subsequent EPA investigation revealed that the methyl-ethyl-death was leaching from the landfill. Id. PWC's predecessor, I.M. Toxic, knowingly dumped 7,000 barrels of methyl-ethyl-death under the supervision of PWC's current stockholder/employee, Dale Herdman. (R. at 2, 5.) The source of the other 1,000 barrels could not be determined. (R. at 5.) Although not directly responsible for the barrels Herdman dumped for I. M. Toxic, Inc., and probably not to blame for accepting the other barrels, Dumpkie has accepted responsibility by stipulating that it is a PRP, eschewing the possibility of litigating its status. (See R. at 12.)

As a result of these findings, Dumpkie heeded an EPA warning and began developing a plan for remediation of the contaminated areas at its landfill. (R. at 5.) At this time, PWC, fearing future liability, placed a classified advertisement in the local newspaper on June 3 to serve as notice that a meeting was being held on July 3. (R. at 6.) The advertisement contained no mention of contamination of the Pristine River or the groundwater table, nor did it solicit any public comment. Id.

At the meeting dominated by PWC stockholders and employees, PWC stressed the danger of contaminated drinking water and offered to sell its product to the citizens of Smellville. Id. Yet, PWC did not begin to clean the water from the river until six months later. Id. PWC's clean-up of the river consisted of using new, expensive equipment to filter the methyl-ethyl-death from the river water for subsequent sale. Id.

PWC filed this suit against Dumpkie on October 25, 1996. (R. at 6.) The trial court granted summary judgment to Dumpkie concluding: that PWC was a Potentially Responsible Party ("PRP") under the substantial continuation test; that PWC, as a
PRP, cannot make a claim under CERCLA § 9607; and that PWC did not substantially comply with the National Contingency Plan ("NCP"). (See R. at 7-13.) The Sixteenth Circuit Court of Appeals, while agreeing that PWC was a PRP, reversed and remanded on the other issues. (See R. at 16-18.)

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixteenth Circuit (See R. at 16.) is unpublished. The opinion of the United States District Court for the Northeastern District of Erhwon (See R. at 1-13.) is unreported.

JURISDICTION

Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) by petition. This Court subsequently granted review.

RELEVANT STATUTES

The statutes relevant to these proceedings are set forth in the Appendix pp. A-20 to A-25.

SUMMARY OF THE ARGUMENT

THE SUBSTANTIAL CONTINUATION TEST IS NECESSARY BECAUSE CERCLA REQUIRES A UNIFORM, BROAD METHODOLOGY TO PREVENT THE ESCAPE OF RESPONSIBLE PARTIES.

CERCLA is a broad, remedial statute that requires a uniform and unique national standard to achieve the ends Congress created it to solve. Congress' enactment is not perfect; therefore, Congress must have left to the federal judiciary the duty and responsibility to interpret the statute to achieve its goals. Congress
gave several relevant goals. First, CERCLA was created to protect the public health and environment. Second, CERCLA was enacted with the knowledge that state and federal law had failed to provide this protection to the public. Finally, CERCLA was written to require that the parties responsible for environmental contamination should, whenever possible, pay for the clean-up costs. Consequently, the issue of successor liability has been left for the Court's consideration.

Often the court relies on state law to provide rules of decision on issues like successor liability, but CERCLA's nature precludes this possibility. Relying on failed state law is completely inconsistent with enactment of a remedial, uniform federal statute. Corporations must not be able to escape from responsibility for clean-up costs by dying painless paper deaths under a lenient state law. Adopting the "average" state law as a uniform federal law does not improve matters. First, there is no such thing as "average" state law. This rule would allow each judge to determine the "right" average. Second, these rules are the same state laws that allowed corporations to escape responsibility prior to CERCLA. The substantial continuity test avoids both of these problems. This Court recognized this test in the context of labor law, and the Courts of Appeals have adopted it in discrimination, pension and environmental law contexts; therefore, it has a uniform, federal character providing reliable interpretations. Finally, it holds responsible all corporations that, in equity, have benefited from the polluting enterprise.

The substantial continuity test is more fair and more equitable than its federal or state common law competitors. The substantial continuity test requires at least constructive knowledge of the potential liability, allowing corporations to allocate risk among themselves responsibly, either through indemnification or sale price. This allows the marketplace to do the work to protect the public from polluting enterprises, thereby promoting clean-up without government intervention. Second, it allows the trial courts to weigh the relevant factors equitably to ensure that, whenever possible, the responsible corporations, and only the responsible
corporations, pay for the clean-up costs, not the taxpayers via the Superfund. Finally, the federal or state common law tests unfairly place responsibility by using ritualistic, mechanistic factors that do not take responsibility into account. Instead these tests rely only upon continuity of shareholders, officers, and directors, which any intelligent corporation can and will avoid.

RESPONDENT IS A PRP AND THEREFORE MAY NOT MAKE A CLAIM FOR RECOVERY OF RESPONSE COSTS UNDER CERCLA § 9607.

As the successor to I. M. Toxic, Respondent is a PRP under CERCLA. Section 9607 of CERCLA is intended only to allow innocent private parties to recover their cleanup expenses. Being responsible for at least 7,000 barrels containing methyl-ethyl-death, PWC is not innocent. Allowing PRP’s like PWC to recover their response costs would lead to inequitable results and procedural chaos. Dumpkie would be forced to pay more than its pro-rata share of responsibility for the contamination if it were held jointly and severally liable under § 9607. The Superfund Amendments and Reauthorization Act of 1986 (“SARA”) amendments manifest Congress’ intent that PRPs should be limited to actions for contribution under § 9613.

RESPONDENT DOES NOT MEET ITS BURDEN OF SHOWING THAT IT COMPLIED WITH THE NCP.

Respondent’s cleanup efforts are best characterized as a remedial action. The installation of costly filtering equipment and a delay of six months before the response was initiated are not consistent with an urgent or immediate threat. Even if Respondent’s cleanup activity is deemed a removal action, Respondent fails to present evidence making a prima facie case that it substantially complied with the NCP. Respondent did not follow the community relations requirements for either remedial or removal actions. The community action requirements are a vital
component of the 1990 NCP, especially considering that it contains new requirements for private parties. Respondent's failure to comply with the community relations requirements was not an immaterial or insubstantial deviation from the NCP.

ARGUMENT

Summary judgment is appropriate when the evidence before the court "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). This court has held that summary judgment may be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The court reviews a grant of summary judgment de novo. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 465 n.10 (1992).

I. THE SUBSTANTIAL CONTINUATION TEST IS MORE CONSISTENT WITH CERCLA'S LEGISLATIVE INTENT TO HAVE A UNIFORM, NATIONAL STANDARD FOR ENVIRONMENTAL CLEAN-UP AND IS A BETTER BALANCE OF THE COMPETING POLICY GOALS JUSTIFYING EXPANSION OF RESPONSIBILITY FOR ENVIRONMENTAL CLEAN-UP.

PWC should be a PRP. The employees and managers of PWC knew of the risks of methyl-ethyl-death and that it was disposed of at the Dumps-R-Us landfill. (See R. at 1-6.) They benefited from its production both in jobs and pensions. Id. They acquired all of Toxic's assets, except the site where the pollution was placed, including their current facility. Id. They sold the "Woodaway" name to raise funds, again benefiting. Id. The issue before the court is: Why are they responsible? If PWC is
responsible, it must be as a corporate successor. See e.g., *B.F. Goodrich v. Betkoski I*, 99 F.3d 505, 518 (2nd Cir. 1996) (concluding that the plain language of CERCLA, bolstered by the legislative intent, requires successor liability). Regarding an asset purchase, the general rule is that there is no successor liability unless there is: (1) an express or implied agreement to assume a liability; (2) a *de facto* merger or consolidation of the companies; (3) a fraudulent effort to avoid liability; or (4) a “mere continuation” of the predecessor. 15 Fletcher Cyc Corp § 7122 at 231 (Perm Ed.) [hereinafter “Fletcher”]. Only the second and fourth exceptions are potentially relevant on the record before the court.

Under state common law, the *de facto* merger test requires: (1) continuation of the seller’s enterprise (i.e., same management, personnel, physical location, assets, and operations); (2) continuity of shareholders; (3) the seller dissolves the corporation as soon as possible; and (4) the purchaser uninterruptedly continues the seller’s business. *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1264 (9th Cir. 1990). The mere continuation test focuses on an “identity of officers, directors, and stock between the selling and purchasing corporations.” *United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992) (internal citation omitted). While the language of this common law is uniform from state to state, in practice the priority placed on each element varies. See 15 Fletcher § 7122 nn.11-12 at 245-253.

The Substantial Continuation Test requires the asset purchaser to have knowledge of an unremedied wrong, and if the asset purchaser is a beneficiary of its predecessor, the purchaser is

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3. The presentation of both the *de facto* merger and mere continuation tests are typical constructions of these tests; the actual law varies from state to state. See, e.g., *Ambrose v. Southworth Prods. Corp.*, 953 F. Supp. 728, 735 (W.D. Va. 1997) (noting that Maine law does not recognize the *de facto* merger doctrine, nor the mere continuation doctrine). See, 15 Fletcher Cyc. Corp § 7122 at 235 for the problems these differences in state law create.

4. This test is also known as the continuing business enterprise exception. See *Asarco*, 909 F.2d at 1264. Throughout this brief, the test is referred to as the Substantial Continuation Test.
responsible. See Mexico Feed, 980 F.2d at 488. "Beneficiary" is evaluated by the following factors: the retention of the same (1) facilities; (2) employees; (3) name; (4) production facilities in the same location; (5) supervisory personnel; (6) general business methods; (7) assets; and (8) presents itself as a continuation of the old enterprise. Id. at 488 n.10. These factors are relevant to show that in substance, if not in form, the new entity is a responsible party. Id. at 488. The test is used in labor, product liability and federal environmental law. Id. at 487.

A. CERCLA is a broad, remedial statute requiring a uniform national standard, which Congress entrusted to the court to determine.

Not all federal programs require uniform federal rules. United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28 (1979). This court looks at three factors: (1) the need for a uniform rule throughout the United States; (2) whether the use of state law would interfere with the objectives of the federal program; and (3) how the federal rule would interfere with current economic relationships predicated on state law. Id. at 728. More is required than a general plea for uniformity. Id. at 730. Conflict between the federal program and the state law will always justify a uniform federal rule. O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (holding that California law, not federal law, governed rules for imputing corporate officer’s knowledge on corporation). In Kimbell Foods, the court, in reviewing the Farmer’s Home Administration (FHA) loan program, saw that the agency implementing the program prescreened the applicants, designed individual loan agreements, and realized that state law governed the contracts. See Kimbell Foods, 440 U.S. at 730-733. Comparing the FHA program to the collection of taxes, the need of the government to recover defaulted loans was insufficient to justify the same priority. Id. at 734-35. Collecting as an involuntary creditor for tax revenue is completely different from a voluntary loan transaction. Id. at 736.
1. Federal law is the best source of law to determine successor liability because it furthers CERCLA's purpose to impose liability on all parties responsible for polluting enterprises.

CERCLA is a broad, remedial statute that must be liberally construed to effect its purposes. Betkoski I, 99 F.3d at 514; see also, United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1495 (D. Utah 1987). These purposes are to clean-up effectively hazardous wastes, and to assure that the beneficiaries of the polluting enterprises are responsible for the costs of the clean-up. Betkoski I, 99 F.3d at 514; Sharon Steel, 681 F. Supp. at 1495. To achieve these ends, Congress imposed liability for clean-up costs based solely on responsibility, and not fault. See Sharon Steel, 681 F. Supp. at 1496. No corporation can be allowed to evade this responsibility by manipulating asset transactions. Mexico Feed, 980 F.2d at 488. The Substantial Continuity Test prevents this evasion any time the receiver of the assets is, in substance, a responsible party. Id.

The Substantial Continuity Test is a uniquely powerful federal common law tool to hold parties equitably accountable when it is necessary to further the purposes of a Congressional enactment. See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179 (1973). The Court affirmed the NLRB's adoption of this methodology because it furthered the goals of the National Labor Relations Act—the goal of industrial-labor peace. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987). Because the employees, under the facts required for the test, expect things to be substantially unchanged if the employee's union is eliminated, it will create unrest between the employer and the employees. Id. at 44. Beyond the labor context, the test has been applied in the context of other broad remedial statutes. See Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkin, Inc., 59 F.3d 48 (7th Cir. 1995) (holding that a successor could be liable for the predecessor's
underfunding of pension requirements under ERISA); *EEOC v. G-K-G, Inc.*, 39 F.3d 740 (7th Cir. 1994) (applying the test to an age discrimination claim). This federal underpinning gives the rule a uniform definition with an equitable, fact based application dependant upon the situation presented to the reviewing court. *See Chicago Truck Drivers*, 59 F.3d at 49. This equitable test is unlikely to "unduly upset existing corporate relationships." *Betkoski II*, 112 F.3d at 91; *See Kimbell Foods*, 440 U.S. at 728. For example, in *Mexico Feed*, the court, after adopting the test, ran through the factors and concluded that given a lack of constructive knowledge, an arms-length transaction, and adequate consideration, responsibility would not equitably follow the assets. *Mexico Feed*, 980 F.2d at 489-90.

2. **State law conflicts with CERCLA's legislative purpose of holding responsible parties accountable.**

Both the Sixth and Ninth Circuits adopted state law as the rule of decision governing successor liability. *See Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295 (9th Cir. 1997) (overruling the Ninth Circuit decision in *Asarco*, 909 F.2d 1260, considering the *Kimbell Foods* factors as elucidated by *O'Melveny*, 512 U.S. 79; *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991)). Both relied extensively on the *Kimbell Foods* factors. *See Atchison*, 132 F.3d 1295; *Anspec*, 922 F.2d 1240. This view is unacceptable because corporations should not be allowed to use lenient state law to evade CERCLA. *See B.F. Goodrich v. Betkoski II*, 112 F.3d 88, 90 (2nd Cir. 1997). This is especially troublesome as CERCLA was enacted because state law had failed to deal with the problem of environmental contamination. *See Committee on Environment and Public Works, Report to Accompany S. 1480, The Environmental Emergency Response Act*, S. Rep. No. 848, 96th Cong., 2d Sess. 37 (1980) [hereinafter Senate CERCLA Report] (reporting on the bill that was enacted as CERCLA). Both courts, unlike *Kimbell Foods* and its voluntary transaction, have failed to consider that pollution
absent responsibility, like taxation, is forced upon the public to clean-up. Cf. Kimbell Foods, 440 U.S. at 736.

Both the *de facto* merger and the mere continuation test rely upon the “identity” of shareholders, directors, and managers. See Betkoski II, 112 F.3d at 90; Mexico Feed, 980 F.2d at 487; United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992). Intelligent corporations can easily evade this rule. See Carolina Transformer, 978 F.2d at 838-41 (finding that there was not “identity” under the traditional test, affirming the trial court’s use of the Substantial Continuity Test, and noting that a responsible party would otherwise avoid liability). The ability to structure a transaction to escape responsibility runs counter to the statutory scheme. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(e)(1)(1994) (“No indemnification, hold harmless, or similar agreement . . . shall be effective to transfer [liability] . . . to another person . . . .”); Mexico Feed, 980 F.2d at 488. Many states have variations of the common law rules that make it even easier to escape responsibility. See Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252 (1st Cir. 1997) (finding that Rhode Island law requires evidence of inadequate consideration); Kaiser Found. Health Plan v. Clary & Moore, P.C., 123 F.3d 201 (4th Cir. 1997) (noting that Virginia law exempts all bona fide “arms-length” transactions from successor liability); French v. Eagle Nursing Home, Inc., 973 F. Supp. 870 (D. Minn. 1997) (suggesting that under Minnesota law there must be proof that the transaction was used to escape responsibility); Ambrose v. Southworth Prods. Corp., 953 F. Supp. 728, 735 (W.D. Va. 1997) (noting that Maine law does not recognize the de facto merger doctrine, nor the mere continuation doctrine); Royal Ins. Co. v. Smatco Indus., Inc., 201 B.R. 755 (E.D. La. 1996) (observing that Louisiana Law arguably may eliminate successor liability in all products liability cases, but using Admiralty jurisdiction to avoid the issue); G.P. Publications, Inc v. Quebecor Printing—St. Paul, Inc., 481 S.E.2d 674 (N.C. Ct. App. 1997) (finding that under North Carolina law a mere continuation requires evidence of inadequate consideration and lack of elements
of a "good faith" purchase).

3. Adopting the 'average' state law as federal law, like the state law it is based upon, is inadequate to further CERCLA's legislative intent.

As Carolina Transformer pointed out, intelligent corporations can evade tests based on strict requirements found in the 'average' common law. See Carolina Transformer, 978 F.2d at 838-41. CERCLA was created to deal with the inability of state law to solve the problems of environmental pollution. See Senate CERCLA Report, supra at 37. The middle ground of simply adopting the average state law has all the disadvantages of the state common law with none of the advantages of the Substantial Continuation Test. The dangers of generic federal common law are well known. See, e.g., Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (stating that, "[T]here is no federal general common law" because it leads to maneuvering to avoid applicable state law). When reviewing exactly how to enshrine the state common law into federal jurisprudence, the decision on which rules to keep and which to discard is more likely to encumber commercial relationships based upon reliance of a growing 'average' rule. Cf. Kimbell Foods, 440 U.S. at 739 ("Developing [rules] on a case-by-case basis, depending on [the situation] leaves creditors without the definite body of law they require in structuring sound business transactions").

The Substantial Continuation Test meets all the Kimbell Foods factors. Kimbell Foods, 440 U.S. at 728. CERCLA requires a uniform national standard to prevent evasion of responsibility. See Mexico Feed, 980 F.2d at 488. State law conflicts with those aims both in promoting uniformity, and because many of the default rules of state law allow parties to evade responsibility. See Carolina Transformer, 978 F.2d at 838-

5. Compare I.A.1 with I.A.2, supra, pp. 308-314. See also n.4 Asarco, 909 F.2d at 1264.
41. The Substantial Continuation Test is well articulated, and with its knowledge requirement, it will protect those who innocently acquire 'tainted' assets. This is how the court used the Substantial Continuation Test in Mexico Feed. See 980 F.2d at 489-90. This will protect those corporations that innocently relied upon state law, rather than those corporations using it a shield from responsibility. See Carolina Transformer, 978 F.2d at 838-41.

B. The Substantial Continuation Test is more equitable than the Federal or State common law tests because it better encapsulates the relevant factors to justify successor liability.

As outlined above, the Substantial Continuation Test requires knowledge of the predecessor's potential responsibility, a transfer of assets, and a continuity of the beneficiaries of the responsible predecessor. See Mexico Feed, 980 F.2d at 488. In Carolina Transformer, the court equitably determined that the successor was evading responsibility because the successor had knowledge of the wrongdoing, and so overlapped the transfer with related stockholders, employees, assets, and customers, to require successor responsibility. See United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989), aff'd, 978 F.2d 832. The Court of Appeals, in reviewing Carolina Transformer, was certain that the successor was using the transfer to escape responsibility, but felt that the law would not reach them without the Substantial Continuity Test. See Carolina Transformer, 978 F.2d at 838-41.

1. Actual or constructive knowledge of the potential liability is essential, so asset purchasers can adequately reflect the costs of the assets in the purchase price.

Knowledge of the wrongdoing allows the successor to reflect the matter in the price of the asset. See Golden State, 414
U.S. at 185. This minimizes the costs on the successor by making it part of the transaction. *Id.* This is especially important when the actual violator cannot be held responsible. *Cf. G-K-G*, 39 F.3d at 748 (questioning the wisdom of the rule when the predecessor still has assets to cover the liability, but imposing liability anyway). This knowledge of the transaction guarantees that a successor will be available to meet the responsibility of the original enterprise to clean-up the contamination. *See id.* Successor liability is a second chance to recover on liabilities when the original corporation cannot meet its obligations. *See Chicago Truck Drivers*, 59 F.3d at 51. Purchasers entering with knowledge of the risk will bargain for a price consistent with these liabilities and, absent the knowledge, are not responsible. *See id.* at 50-51.

2. *The beneficiaries of the polluting enterprise should pay for the costs of the clean-up, not the public.*

Continuity of the beneficiaries is necessary to ensure that those responsible pay for burden's of their activity, not the innocent taxpayers. *See Carolina Transformer*, 978 F.2d at 837. CERCLA exists to internalize the burden of environmental clean-up in the prices of the polluting industries. *See Senate CERCLA Report, supra* at 34. However, without successor liability the fund would be bereft of these resources and responsible parties would not pay to remedy the harms for which they are responsible. *See Anspec*, 922 F.2d 1247. Public liability for the clean-up should only be as a last resort. *Smith Land and Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

3. *PWC is as equitably responsible for the Methyl-Ethyl-Death in the landfill as the current owner.*

We are a responsible party; we have admitted it, and we have taken steps to remedy the problem. (R. at 5-6.) Toxic is a potentially responsible party. *See CERCLA § 9607(a)(2) (owning
or operating at time of disposal). However, Toxic is now in Mexico, and the record is unclear whether it and its resources can be held accountable. (R. at 4.) PWC knew of the hazard and that it was in the landfill. (See R. at 2-4.) PWC stockholders benefited from the Woodaway trademark, their pension fund was funded by a contingency fee marked for such things as environmental contingencies, and they own the plant and property of the original polluting enterprise. (R. at 3, 5.) PWC will receive the benefits of the polluting enterprise without being responsible for cleaning up the mess created by the enterprise, unless the court concludes that successor liability is applicable. All of the parties who received the benefits should be responsible: I. M. Toxic, Inc. and PWC should not be allowed to hide behind a transaction to evade responsibility.

II. AS A POTENTIALLY RESPONSIBLE PARTY, RESPONDENT DOES NOT ASSERT A CAUSE OF ACTION AGAINST PETITIONER UNDER CERCLA § 9607 TO RECOVER RESPONSE COSTS.

Congress intended § 9607 of CERCLA (42 U.S.C. §9607) to be a broadly sweeping provision for imposing liability on potentially responsible parties. United States v. New Castle County, 642 F. Supp. 1258, 1264 (D. Del. 1986). This is evidenced by the narrow defenses to liability available to defendants. Id. 42 U.S.C. § 9607(a)(4)(B) enables private parties to recover costs expended in a clean-up of a hazardous waste site if the clean-up was consistent with the National Contingency Plan. Section 9607 imposes strict liability on defendants for necessary costs incurred by private parties associated with the clean-up of a site. New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120-21 (3d Cir. 1997). Because § 9607 allows private parties to recover fully their expenditures in cleaning up hazardous waste sites, “it is sensible to assume that Congress intended only innocent parties— not parties who were themselves liable— to be permitted to recoup the whole of their expenditures.” United

A. As the successor of I.M. Toxic, Inc., Respondent is a PRP for the purposes of CERCLA.

A "person" is liable under CERCLA "who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). For the purposes of CERCLA, a corporation is a "person." 42 U.S.C. § 9601(21). I.M. Toxic owned the Dumps R Us landfill when 7000 barrels of methyl-ethyl-death waste from the Woodaway factory were buried at that site. Due to the fact that I.M. Toxic would have been considered a PRP, as its successor, PWC is liable under CERCLA and is a PRP.

B. As a PRP, Respondent is limited to a claim for contribution from Petitioner under § 9613, and may not make a claim under CERCLA § 9607 for payment of response costs in their entirety.

A claim by one PRP against another PRP is necessarily a claim for contribution, as all PRPs are liable under CERCLA. Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997). Sections 9613 and 9607 work together to provide and regulate a PRP’s right to contribution. Id. at 1303. Section 9607 creates a cause of action whereby the right of contribution may be asserted, and § 9613 provides the procedure by which contribution operates. Id.

The Seventh Circuit has called a claim such as PWC’s a “quintessential claim for contribution.” Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994). The court held that because Akzo was responsible, at least in part, for the contamination, it was not entitled to recover the full costs under § 9607, but must be limited to recovering only the costs for which it was not responsible. Id. PWC is in a similar situation. Because
PWC is Toxic’s successor, it is responsible for the 7,000 barrels of methyl-ethyl-death that Toxic knowingly disposed of on the property presently owned by Dumpkie. Section 9613 limits a PRP seeking contribution to recouping only those expenses exceeding its pro-rata share of liability for the expenses incurred in cleaning up a hazardous waste site. United Technologies, 33 F.3d at 100.

1. Requiring plaintiff PRPs to make a claim for contribution rather than for the entire amount of response costs prevents the inequitable result of forcing defendant PRPs to pay the entire amount of any "orphan shares."

Allowing plaintiff PRPs to claim all response costs results in defendant PRPs covering the “orphan shares” of liability, the portions of liability for which the responsible parties are insolvent or cannot be located or identified. Pinal Creek, 118 F.3d at 1303. Under § 9607, the defendants are held jointly and severally liable for the total response costs incurred by the plaintiff PRP. Id. These defendants are left paying this orphan share for which they are not responsible. Id. This is especially unfair if there are a small number of defendants or the percentage of liability orphaned is large. In the instant case, while Dumpkie could claim contribution from PWC for the 7,000 barrels which the EPA has traced to Toxic, it would be stuck paying the entire amount of the clean-up attributable to the 1000 barrels whose source is unknown. This result is unfair because it is just as likely that these barrels were dumped in the landfill while Toxic operated it as it is that they were dumped there under Dumpkie’s ownership.

The joint and several allocation of liability PWC urges is contrary to CERCLA’s statutory scheme because it immunizes a PRP from orphan shares liability. Id. If a PRP plaintiff is limited to a claim for contribution under § 9613(f)(1), the court can distribute orphan shares equitably among all PRPs, just like clean-up costs.
2. Limiting plaintiff PRPs to actions for contribution rather than for payment of response costs in their entirety clarifies and simplifies litigation procedures under CERCLA.

As in traditional contribution actions between tortfeasors, § 9613 creates several-only liability among PRPs. *Pinal Creek*, 118 F.3d at 1303. The approach allowing joint and several liability would result in the defendants shouldering the entire liability burden until they bring an action for contribution. This result "is inconsistent with the traditional doctrine of contribution, entails a significant risk of producing unfair results, and runs the risk of creating procedural chaos." *Id.*

Another problem with allowing plaintiff PRPs to claim response costs under § 9607 is that it upsets the settlement scheme created in § 9613 in cases where the government compels the clean-up. *In the Matter of Reading Co.*, 115 F.3d 1111, 1119 (3d Cir. 1997) (citing 42 U.S.C. § 9613(f)(2), (3)). A settlement with the government is protected from a contribution action. *Id.* (citing 42 U.S.C. § 9613(f)(1)). This encourages early settlement and reduces litigation. If a party were allowed to nullify the settlements by suing for the cost of response, the incentive for early settlement would disappear and the amount of litigation would increase dramatically. *Id.*

3. Limiting plaintiff PRPs to actions for contribution under § 9613 does not eliminate the incentive for private parties to clean-up voluntarily hazardous waste sites.

A party's degree of cooperation with governmental authorities may be taken into account when courts allocate liability equitably under CERCLA § 9613(f)(1). *Pinal Creek*, 118 F.3d at 1304-05. This should encourage PRPs to engage voluntarily in response activities. Also, a party that voluntarily conducts clean-
up operations is able to protect its business at the site and manage the costs of the clean-up. *Id.* at 1305. These are some incentives that a PRP would lose if it waited for the government to intervene. *Id.*

C. Limiting plaintiff PRPs to actions for contribution against defendant PRPs advances Congress' intent as expressed by the Superfund Amendment and Reauthorization Act of 1986 (SARA).

The goal of Congress with the 1986 SARA process regarding § 9613 of CERCLA was to clarify and confirm the right of responsible parties to seek contribution from each other. *United Technologies*, 33 F.3d at 100, (citing S. Rep. No. 11, 99th Cong., 1st Ses. 44 (1985)). One senator predicted that the amended § 9613 would “remove any doubt as to the right of contribution.” *Id.* (quoting Sen. Stafford, 131 Cong. Rec. 24, 450 (1985)). The Congress’ intent was to limit PRPs to § 9613 actions for contribution.

1. *SARA’s amendments to § 9613 simply codify the methodology that courts were using under § 9607 in apportioning liability among PRPs prior to the amendments.*


This Court recognized that § 9613 expressly authorizes an action for contribution and stated that § 9607 “impliedly authorizes a similar and somewhat overlapping remedy.” *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 (1994). However, this statement
is dicta, and there are reasons to reevaluate it as the controverted issue was whether attorney’s fees were recoverable. Id. at 812.

Some federal district courts have held, based on the Key Tronic dicta, that PRPs may use § 9607 to recover response costs and contribution from defendants. E.g., Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc., 914 F. Supp. 159, 161-62 (W.D. Ky. 1995). The overlap that this Court mentioned in Key Tronic has been construed by some circuits to exist only to the extent that a landowner whose property was contaminated by a third party spill may be able to bring a § 9607 action to recover its response costs from a polluter. Reading, 115 F.3d at 1120; Akzo, 30 F.3d at 765. PWC does not fit into this overlapping exception, as it was the source of the pollution.

2. Allowing plaintiff PRPs to recover response costs under § 9607 renders subsections of § 9613 null and void, and is an impermissible construction of the statute.

Under ordinary canons of statutory construction, courts must strive to give effect to each subsection contained in a statute, even to every word and phrase. United Technologies, 33 F.3d at 101. Examining CERCLA § 9607 and § 9613 in light of this rule of statutory construction, some courts have found that permitting responsible parties to seek a reimbursement of costs solely under § 9607 deprives some subsections of § 9613 of any purpose.

Section 9613 provides two different lengths on statutes of limitation for bringing claims for reimbursement. See 42 U.S.C. § 9613(g). CERCLA § 9613(g)(2) provides 6-year statute of limitations for claims of cost recovery for remedial actions brought under § 9607. Section 9613(g)(3) provides a 3 year statute of limitations for contribution for any response costs, with no mention of any difference between remedial and removal actions.

Allowing responsible parties to bring actions under § 9607 to receive the longer statute of limitations would lead PRPs to “quickly abandon § 113 in favor of the substantially more generous
provisions of § 607.” Halliburton, 111 F.3d at 1123.

Allowing PRPs to bring actions for response costs without relying on CERCLA § 9613(f)(1) to provide a remedy for contribution also destroys the purpose of the settlement provisions of § 9613. United Technologies, 33 F.3d at 101. Section 9613(f)(2), creates a provision whereby PRPs can settle their liability with the government and bars other PRPs from bringing contribution claims against them under § 9613(f)(1). In Matter of Reading, 115 F.3d at 1119. Allowing PRPs to sue under § 9607(a)(4)(B) permits a party to avoid the settlement bar to cost recovery. Id. This would eliminate the incentive to settle early, and increase litigation, suggesting clearly that Congress intended to replace § 9607(a)(4)(B)’s implied contribution remedy when it enacted the SARA amendments to § 9613(f).

Allowing PWC to bring an action for cost recovery under § 9607 would further confuse the situation and contribute a strong precedent severely weakening § 9613, even in the face of congressional intent to the contrary. “[A] course that ineluctably produces judicial nullification of an entire SARA subsection” is not why Congress adopted SARA. United Technologies, 33 F.3d at 101.

III. DISTRICT COURT PROPERLY GRANTED PETITIONER SUMMARY JUDGMENT AS TO RESPONDENT’S CLAIM FOR COST RECOVERY UNDER § 9607 BECAUSE RESPONDENT FAILED TO COMPLY SUBSTANTIALLY WITH THE NATIONAL CONTINGENCY PLAN.

Under both § 9607 and § 9613 of CERCLA, a plaintiff must prove four elements to prevail on a claim for recovery of necessary costs or contribution against a defendant:

1. the site in question is a “facility” as defined in 42 U.S.C. § 9601(9);
2. a release or a threatened release of a hazardous
3. the release or threatened release has caused plaintiff to incur response costs consistent with the "national contingency plan" (NCP); and
4. the defendant is a "covered person" under § 9607(a) of CERCLA.

Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496-97 (11th Cir. 1996). The parties have stipulated to the first and second elements. (R. at 12.) Even if PWC is not a successor to I. M. Toxic, Inc., whether PWC incurred response costs consistent with the 1990 NCP is disputable. Proof that response activity was consistent with the NCP is a necessary element of a private plaintiff's prima facie claim under CERCLA. County Line Invs. v. Tinney, 933 F.2d 1508, 1512 (10th Cir. 1991). The plaintiff has the burden of proving compliance with the NCP requirements. Pierson Sand & Gravel, Inc. v. Pierson Township, 851 F. Supp. 850, 855 (W.D. Mich. 1994), aff'd, 43 Env't Rep. Cas. (BNA) 1559 (6th Cir. 1996). It is immaterial whether PWC's claim is one for recovery of costs under § 9607 or for contribution under § 9613 because if Dumpkie failed to comply with the NCP, it can no longer face liability for any of their costs. Redwing Carriers, 94 F.3d at 1496.

The goal of the NCP is to achieve a "CERCLA-quality" clean-up. 40 C.F.R. § 300.700(c)(3)(i). A "CERCLA-quality" clean-up is accomplished when the response action, considered as a whole, is consistent with the NCP. Id. The standard required for consistence with the NCP is "substantial compliance" with the applicable requirements. Id. Actions will not be considered "not inconsistent" with the NCP based on "immaterial or insubstantial deviations" from the regulatory requirements. 40 C.F.R. § 300.700(c)(4).

A. Respondent's remedial activities failed to comply substantially with the stringent requirements of the NCP.
1. **Respondent’s response actions were more consistent with a permanent remedy than with quickly removing an urgent and immediate threat to the public health or environment.**

Under CERCLA, there are two types of response activities, removal and remedial. *See* 42 U.S.C. § 9601 (23), (24). These broad statutory definitions are problematic because “provision of alternative water supplies” is a type of response action contained in both removal and remedial actions. *Id.* In response to the possible confusion that could result from such overlap, case law has developed interpretations of the statutory definitions. *See Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp.*, 748 F. Supp. 373, 385 (E.D.N.C. 1990). Remedial actions are generally long-term, permanent remedies. *Id.* Removal activities are usually used in situations requiring rapid responses to emergency releases endangering human health or the environment. *Id.* All non-urgent situations are deemed remedial rather than removal actions. *C & C Millwright v. Town of Greeneville*, 946 F. Supp. 555, 558 (E.D. Tenn. 1996)(quoting *Channel Master*, 748 F. Supp. at 385(E.D.N.C. 1990)); *G.J. Leasing v. Union Elec.*, 854 F. Supp. 539, 564 (S.D. Ill. 1994), aff’d, 54 F.3d 379 (7th Cir. 1995). The plaintiff seeking to characterize the response action as removal bears the burden of showing facts sufficient to justify such a categorization. *C & C Millwright*, 946 F. Supp. at 558.

PWC held its public meeting on July 3, and did not begin its response action of selling its product to the citizens of Smellville until next January. (R. at 6.) This lengthy time period before beginning a response action is not consistent with an “urgent” or “immediate” threat to the public’s drinking water supply. As the district court noted, PWC’s installation of costly equipment for filtering the methyl-ethyl-death from the water it bottles and sells is more consistent with a permanent remedy than a short term removal action. (R. at 12.)
2. Respondent failed to comply with the community relations requirements of the NCP.

Remedial action requirements under the 1990 NCP are more stringent than the requirements for removal actions. Alcan-Toyo v. Northern Ill. Gas Co., 904 F. Supp. 833, 836 n.4 (N.D. Ill. 1995). Substantial compliance with the NCP requires private parties to meet a number of requirements for remedial actions. 40 C.F.R. § 300.700(c)(5), (c)(6). First, a party must prepare a formal Community Relations Plan ("CRP"). 40 C.F.R. § 300.430(c)(2)(ii). The CRP must include community interviews and specify the community relations activities that the party plans to execute during the remedial response. Id. Second, the party must publish a notice of availability and a brief analysis of the proposed remedial plan in a local newspaper. 40 C.F.R. § 300.430(f)(3)(i)(A). Third, the party must provide not less than 30 calendar days for public comments on the proposed plan. 40 C.F.R. § 300.430(f)(3)(i)(C).

Merely publishing a notice in the classified ads and holding a public meeting does not meet the standard of substantial compliance with the NCP. See Pierson Sand, 851 F. Supp. 850, 856-57 (ruling that a private party holding two public meetings did not substantially comply with the NCP). PWC presented no evidence that it had developed a CRP or had conducted community interviews. PWC did not provide 30 days for public comment. See infra, II.B.1. PWC did not publish a description of the proposed plan in the newspaper. Failure to perform these integral components of the NCP was not an "immaterial or insubstantial deviation." Pierson Sand, 851 F. Supp. 850, 856. Taken as a whole, PWC's failure to comply with all of these requirements shows that it did not substantially comply with the NCP because the "EPA has decided that providing public participation opportunities should be a condition for cost recovery under CERCLA." Alcan-Toyo, 904 F. Supp. at 837.
B. *Even if Respondent's cleanup is characterized as a removal action, it fails to comply substantially with the 1990 NCP.*

1. *Respondent's failure to designate a spokesperson and failure to provide 30 days for public comment prior to the public meeting shows a failure to comply substantially with the NCP.*

Removal actions by private parties under CERCLA require substantial compliance with several community relations requirements under the NCP. 40 C.F.R. § 300.700(c)(6)(ii). The 1990 NCP requires private parties in removal actions to designate a spokesperson to interact with the public. 40 C.F.R. § 300.415(n)(1). PWC failed to present evidence that they had designated such a spokesperson.

The NCP also requires a public comment period of not less than 30 days. 40 C.F.R. § 300.415(n)(2)(ii), (n)(4)(iii). Characterizing PWC's posting of a telephone number by which the public may request copies of the proposed plans strains the language of the NCP. The language in the ad published in the Smellville Gazette does not invite public comment. (R. at 6.)

As a matter of law, PWC did not meet the "not less than 30 days" requirement, even if this classified ad is construed as eliciting public comment. In computing any period of time under the NCP, "the day of the event from which the designated period begins to run shall not be included." 40 C.F.R. § 300.7. This rule is consistent with the general rule regarding the computation of a time period as prescribed by a statute—that the first day is included and the last day is excluded. 74 Am. Jur. 2d *Time* § 15 (1974). However, the language of both the remedial and removal requirements of the NCP implicates an exception to the general rule by stating that a period of not less than 30 days must be provided for public comment. 40 C.F.R. § 300.415(n)(2)(ii), (n)(4)(iii), 40 C.F.R. § 300.430(f)(3)(i)(C). The exception to the general rule is that when "not less" than a certain number of days
are required to intervene, then both the first and last days are excluded. 74 Am. Jur. 2d Time § 15. For example, in Connecticut, this rule states that "where so many days 'at least' are given to do an act or 'not less than' so many days to intervene, both the terminal days are excluded from the computation." Pander v. French, 215 A.2d 690, 691 (Conn. Cir. Ct. 1965) (citing Lunt v. Zoning Bd. of Appeals, 191 A.2d 553 (Conn. 1963)). Applying this rule, PWC gave only 29 days of notice, because July 3 is not counted among the entire days that must have intervened. Thus, PWC failed to comply with the 30-day public comment requirement.

2. Affirmation of the District Court decision vindicates the importance of requiring public comment and community relations in CERCLA removal actions in substantial compliance with the 1990 NCP.

The preamble to the 1990 NCP emphasizes the importance of the public notice and comment requirements in cleanups performed by private parties without government supervision. 55 Fed. Reg. 8795 (March 8, 1990); see also, VME Americas, Inc. v. Hein-Werner Corp., 946 F. Supp. 683, 690 (E.D. Wis. 1996), Alcan-Toyo, 904 F. Supp. at 836-37; Pierson Sand, 851 F. Supp. at 856. Both PRPs and concerned citizens have a strong interest in ensuring that cleanups by private parties are conducted in an environmentally sound manner. 55 Fed. Reg. 8795. Providing public participation opportunities should be a condition for cost recovery under CERCLA. Id.

Some courts have held that government involvement in a cleanup is enough to satisfy the public comment requirement. Other courts have held that any type of public comment whatsoever satisfies the requirement. These decisions are against the intent of the 1990 NCP.

Prior to the 1990 NCP, private parties were not required to solicit public comment or provide any notice of clean-up activities to the public. VME, 946 F. Supp. at 690. The section of the NCP
covering removal requirements lists the public comment requirement in two separate sections. See 40 C.F.R. § 300.415(n)(2)(ii), (n)(4)(iii). This indicates that failing to meet the public comment requirement is not an “immaterial or insubstantial deviation” from the NCP’s requirements. Alcan-Toyo, 904 F. Supp. at 836 (quoting 40 C.F.R. § 300.700(c)(4)). The NCP requires that 30 days be allowed for public comment on removal activities. 40 C.F.R. § 300.415(n)(2)(ii), (n)(4)(iii). PWC failed to provide meaningful opportunity for public comment by providing less than 30 days notice before holding the public meeting at which comment could be made.

The public participation requirements of the NCP do not conflict with CERCLA’s goal of cost effective and timely cleanups of hazardous waste. These requirements indicate the importance of involving the community in the process of cleaning up pollution. Congress chose to create a detailed regulatory scheme governing CERCLA, and it decided “to make adherence to the regulatory scheme more important than making CERCLA an unlimited vehicle for cleanup cost recovery.” VME, 946 F. Supp. at 692-93; Channel Master, 748 F. Supp. at 393. As a potentially responsible party, PWC was also responsible for complying with the applicable regulatory requirements governing its response actions.

CONCLUSION

Because CERCLA requires a uniform national standard we pray that the Court adopt the Substantial Continuation Test. No other test can fulfill the goals of CERCLA—to protect the public health and environment by having the parties responsible for environmental contamination pay for the clean-up costs.

Because state law is inadequate to the task, we pray that the court reject using State law as the federal rule of decision in the area of successor responsibility. State law has many variations and loopholes that will be exploited by those seeking to avoid responsibility. This ability to evade responsibility directly conflicts with CERCLA’s concern that the beneficiaries of
polluting enterprises pay, not the innocent public.

A federal common law based on the 'average' state law is no better than the state law with which it started. However, the Substantial Continuation Test has a solid foundation in federal case law. The Substantial Continuation Test is the most equitable balance of the competing policies, because it intensively analyzes the facts necessary to determine whether a party is responsible.

If the Court should conclude that PWC is the successor of I. M. Toxic, PWC is a PRP under CERCLA. We therefore would pray that the Court conclude that it is inappropriate for a PRP to file a claim under § 9607. A PRP's sole claim is for contribution under § 9613.

PWC's attempts to notify the public of its response plan are inadequate. Therefore, we pray that the Court conclude that PWC failed to comply substantially with the NCP.

Therefore, we request that summary judgment should be granted for the Petitioner, Dumpkie, Inc.