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ARTICLES

ABUSIVE LENDING PRACTICES: A SURVEY OF KENTUCKY'S LEGISLATIVE RESPONSE

James P. Dady and Ashley N. Brucato***

I. INTRODUCTION

The American dream of homeownership turned to nightmare when the housing market began to collapse in 2007. As the housing market crumbled, the number of foreclosures increased as homeownership declined.[1] This widespread epidemic has had a negative impact on communities across America.[2] Communities with high rates of foreclosure can experience an increase in long-term vacant properties, which are often poorly maintained,[3] leading to reduced neighborhood property values and increased crime rates.[4] Foreclosure can also have a devastating impact on families[5] who face one of the great losses, the loss of their homes. Unfortunately, Kentucky communities and families have not escaped the harmful effects of foreclosure. In 2010 alone, foreclosure rates in Jefferson County, Kentucky increased by twenty percent.[6] Fortunately though, the detrimental impact of the housing market collapse has led the Kentucky General Assembly to target one of the causes of increased foreclosure: abusive lending practices.

Financial experts and lawmakers have identified abusive lending practices as one of the major contributing factors to the housing crisis.[7] In addition to federal regulation, some state legislatures have passed laws to prevent abusive lending

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1. *See* HUD-Treasury Task Force, *Report Recommending Actions to Curb Predatory Lending* (June 20, 2000), http://www.treasury.gov/press-center/press-releases/Documents/treasrpt.pdf (last visited Jan. 22, 2012).
2. *Id.* at 24.
3. *Id.*
4. *Id.*
5. *Id.*
6. Chris Otts, *Pain Grows as Area Foreclosure Rises 20%; U.S. Rate Still Higher; Signs Hint Crisis May be Easing*, COURIER-J., Jan. 14, 2011, at A1.
7. *See* Randall S. Kroszner, Board of Governors, Fed. Reserve Sys., Speech at the National Associate of Hispanic Real Estate Professionals Legislative Conference in Washington D.C. (Mar. 27, 2008) (transcript available online at http://www.federalreserve.gov/newsevents/speech/kroszner20080327a.htm); *What Caused the Financial Crisis? Quotes by Bankers and Other Experts*, CTR. FOR RESPONSIBLE LENDING (July 17, 2011), http://www.responsiblelending.org/mortgage-lending/tools-resources/Quotes-What-Caused-Crisis.pdf (last visited Jan. 22, 2012).

practices.[8] Kentucky is among the states that created new laws, while reforming existing laws to protect borrowers from abusive lending practices that can result in foreclosure.[9]

This article surveys Kentucky legislation enacted to protect borrowers from the destructive effects of abusive lending. Part II of this article discusses Kentucky's legislative response to two types of abusive lending practices that have contributed to the lending market's current condition: predatory lending and residential mortgage fraud. Part III compares and contrasts Kentucky's laws with similar laws enacted in other jurisdictions. This article concludes by arguing that the Kentucky General Assembly should enact additional legislation utilizing the strengths of other jurisdictions' laws to optimize its protection against abusive lending practices.

II. KENTUCKY'S LEGISLATIVE RESPONSE TO PREDATORY LENDING AND MORTGAGE FRAUD

A. Kentucky's Response to Predatory Lending

Predatory lending is most prevalent in the subprime market. This practice, however, lacks a clear and uniform definition.[10] Some have suggested that predatory lending describes lending tactics that unfairly take advantage of a borrower.[11] Others believe it involves loans containing burdensome conditions, which are typically aimed at low income, or otherwise vulnerable segments of the population.[12] Although predatory lending historically has been defined in a variety of ways, the modern concept refers to prepayment penalties,[13] failure to consider a borrower's ability to repay, excessive fees, loan flipping, and inflated appraisals.[14]

Increases in subprime lending and rising foreclosure rates in the subprime market indicate the negative effects of predatory lending.[15] After the collapse of the housing market, economic and financial experts blamed predatory lending practices and insufficient government regulation of the subprime market.[16] In

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8. *See generally* Julie R. Caggiano, Therese G. Franzén & Jennifer L. Dozier, *Mortgage and Predatory Lending Law Developments*, 64 BUS. LAW. 517 (2009).

9. *See generally* 2008 Ky. Acts 175.

10. Angela Rowland, *Defending the American Dream: Legislative Attempts to Combat Predatory Lending*, 50 S. TEX. L. REV. 343, 350 (2008).

11. *Id.* at 350-52.

12. *Id.* at 349.

13. *Id.* at 351.

14. *Id.* at 351-52, 364.

15. HUD-Treasury Task Force, *Report Recommending Actions to Curb Predatory Lending*, 1 (June 20, 2000), http://www.treasury.gov/press-center/press-releases/Documents/treasrpt.pdf (last visited Jan. 22, 2012).

16. Jennifer M. Smith, *Mortgage Foreclosures, Mortgage Morality, and Maine Street: What's Really Happening?*, 25 J. CIV. RTS. & ECON. DEV. 525, 530 (2011).

response to these concerns, Kentucky, along with several other states, has enacted legislation to heavily regulate predatory lending practices in the subprime market.

In 2003, before the collapse of the housing market, Kentucky had already begun regulating high-cost home loans.[17] But in 2008, the Kentucky General Assembly enacted legislation that placed tighter restrictions on lending associated with high-cost home loans designed to address abusive lending problems in the subprime mortgage market. This article will discuss four elements of that legislation, including: (1) the expanded definition of high-cost loans;[18] (2) the duties on lenders to verify that borrowers are able to repay the loan;[19] (3) the curbing of late-payment penalties;[20] (4) and the new limits on late-payment fees.[21]

1. High-Cost Home Loans

One of the elements designed to address abusive lending problems involves bringing more loans within the definition of "high-cost" home loans. Before 2008, a high-cost home loan was defined as a loan for residential real property; obtained by a natural person for personal, family, or household purposes; that qualifies as a "mortgage" under the Home Ownership and Equity Protection Act of 1994 ("HOEPA"). Further, the borrower must occupy the residential property secured by the lien.[22] A loan is considered a mortgage under HOEPA if it is secured by the borrower's principal dwelling and either the annual interest rate is eight percent more on first-lien loans (ten percent on subordinate-lien loans) than the current Treasure Yield Rates for comparable maturity terms, or the points and fees the borrower must pay at closing exceed either eight percent of the total loan amount or $400.[23]

In 2008, the Kentucky legislature passed House Bill 552 and effectively expanded the definition of a high-cost home loan.[24] Before its passage, a high-cost home loan was defined only under HOEPA; however, the 2008 legislation provided a lower points and fees threshold as compared to HOEPA. Currently, a loan is still high cost if it meets the HOEPA requirements, but it also qualifies if the total points and fees are six percent of the total loan amount.[25] Because the new legislation provides a points and fees threshold two percent lower than federal standards, more loans in Kentucky qualify as high-cost home loans,

17. KY. REV. STAT. ANN. § 360.100 (West 2012) (first enacted and codified with the adoption of House Bill 287).
18. 2008 Ky. Acts 175 § 31(1)(a) (amending KY. REV. STAT. § 360.100).
19. *Id.* at § 31(1)(a); § 31(2)(i).
20. *Id.* at § 31(2)(q)1.
21. *Id.* at § 31(2)(q)1.
22. 2003 Ky. Acts 64 (H.B. 287) (codified as KY. REV. STAT. § 360.100).
23. 15 U.S.C. § 1602(aa)(1) (2006).
24. 2008 Ky. Acts 175.
25. KY. REV. STAT. ANN. § 360.100 (West 2012).

resulting in more home loans being protected by Kentucky's regulations - a fact lenders must take into account before lending to a borrower.[26]

In addition to lowering the points and fees threshold, House Bill 552 defined points and fees. Under current Kentucky law, points and fees are "all amounts payable by a borrower at or before the closing of a home loan, excluding any interest or time-price differential due at closing on the loan proceeds . . . ."[27] Such fees include but are not limited to: service charges; loans; assumption and finder's fees; appraisals; credit report and investigation fees; and mortgage broker fees.[28] This definition has remedied any possible confusion over the interpretation of points and fees.

Under the legislation, lenders[29] of high-cost home loans are subject to several limitations.[30] Additionally, purchasers or assignees of high-cost home loans are only responsible for violations if a violation is apparent on the face of a promissory note or any disclosures.[31] Therefore, Kentucky's legislation protects borrowers against the lenders of their loan more than subsequent purchasers or assignees of the loan.

2. Verification of a Borrower's Ability to Repay

Another measure taken by the Kentucky General Assembly imposes additional duties on lenders to verify a borrower's ability to repay a loan. Experts argue that low-documentation or no-documentation loans have been a cause of rising home loan defaults and foreclosures. Between 2000 and 2006, the number of low-documentation and no-documentation loans in the subprime market rose from twenty percent to an astonishing eighty percent.[32] According to the Federal Reserve Board, loans with little or no documentation have caused lenders to falsely inflate borrowers' income and assets.[33] This overstated income leads to borrowers obtaining larger loans that often require larger payments than the borrower can afford.[34] As a result of obtaining such an unaffordable loan, borrowers will likely be unable to make the required payments,[35] thus increasing the risk of default and foreclosure.[36]

26. Richard A. Vance, *Mortgage Lending Variations in the Bluegrass Nation: Kentucky Enacts Sweeping Mortgage Lending Bill*, 62 CONSUMER FIN. L. Q. REP. 117, 119 (2008).
27. 2008 Ky. Acts 175.
28. *Id.* at § 31(1)(c).
29. A lender is a person who "funds or negotiates the terms of a high-cost home loan or acts as a mortgage broker or lender, finance company, or retain installment seller with respect to a high-cost home loan." *Id.*
30. *Id.*
31. *Id.* at § 31(1)(b).
32. 12 C.F.R. § 226.35 (2010).
33. *See generally id.*
34. 2003 Ky. Acts 64.
35. *Id.* at 1691.
36. *Id.*

Heightening verification requirements is one way Kentucky has combated the problem of low-documentation and no-documentation loans. Heightened verification requirements in loan procedures can protect a borrower not only from an abusive lender, but also from his or her own financial irresponsibility. Additional verification procedures can prevent a lender from inflating a borrower's income and assets. The procedures also prevent borrowers from engaging in the same inflation practices.

Prior to 2008, Kentucky law required that a lender have a reasonable belief that a high-cost loan borrower is able to repay the loan in accord with the scheduled monthly payments.[37] Prior laws required lenders to consider a borrower's income, financial obligations, employment, and other financial resources.[38] Both before and after 2008, statutes allowed lenders to presume a borrower had the ability to repay the loan if the borrower's monthly debts were less than or equal to fifty percent of the borrower's total income.[39] However, before 2008, Kentucky law did not require that a lender's reasonable belief be based on physical evidence of the borrower's financial standing.[40]

With the enactment of House Bill 552, lenders of high-cost home loans in Kentucky are now required to verify and document borrowers' assets. Assets must either meet the fifty-percent standard or a loan must be "approved by an automated underwriting service offered by FNMA or Freddie Mac,"[41] which are technological tools used to determine a borrower's ability to make monthly payments.[42] However, if a lender chooses to verify the borrower's ability to repay without using an automated underwriting service, the lender must now rely on approved forms of documentation such as tax returns, payroll receipts, and bank records.[43]

3. Prepayment Penalties

Another problem facing borrowers that Kentucky has sought to redress is the assessment of prepayment penalties, which can often be predatory in nature.[44] A prepayment penalty is imposed on a borrower when the principal of the loan is paid before the end of the loan term.[45] Borrowers may be unaware of the severe costs associated with paying off their loans early.[46] If a borrower is not able to pay the prepayment penalty, it may prevent the borrower from refinancing a

37. *Id.*
38. *Id.*
39. *Id.*; 2008 Ky. Acts 175 § 31(2)(i).
40. 2003 Ky. Acts 64.
41. 2008 Ky. Acts 175.
42. *Automated Underwriting*, FREDDIE MAC (July 17, 2011), http://www.freddiemac.com/corporate/citizenship/protecting_consumers/au.html (last visited Jan. 22, 2012).
43. 2008 Ky. Acts 175.
44. 12 C.F.R. § 226.35 (2010).
45. *Id.*
46. *Id.*

home loan for lower interest rates or exiting the loan by selling the property.[47] And even if a borrower is willing and able to pay the penalty and refinance a home loan, the borrower's equity in the home may decrease while the balance owed on the loan increases.[48]

Consequently, Kentucky's legislature tightened restrictions on prepayment penalties in 2008. Before 2008 and House Bill 522, Kentucky law prohibited a lender from collecting prepayment penalties three years after loan origination.[49] The old law also prohibited a lender from collecting prepayment penalties that "exceed[ed] three percent of the amount prepaid during the first twelve months, two percent of the amount prepaid in the second twelve months, or one percent of the amount prepaid during the third twelve months."[50] Before 2008, lenders were permitted to give borrowers a choice between accepting a loan with or without a prepayment penalty.[51] A borrower may have been inclined to choose a loan despite the prepayment penalty because that loan often had a lower interest rate.[52]

Aiming to solve some of these problems, the Kentucky General Assembly placed additional restrictions on prepayment penalties with the passage of House Bill 522.[53] Under the new law, a lender of a high cost home loan must first offer a borrower - in writing - a loan without prepayment penalties.[54] The lender is further required to disclose any discounted interest rate on a loan with prepayment penalties.[55] After a lender makes the required disclosures, the borrower must initial the written loan offer containing no prepayment penalties.[56] Although the statute already barred collection of a prepayment penalty after a loan's third anniversary, it now additionally prevents a lender from charging a prepayment penalty sixty days before the date of the first interest rate reset.[57] Further, the new legislation prohibits assessing a prepayment penalty against a borrower who is refinancing a mortgage with its funder.[58]

Before House Bill 552 passed, the Kentucky General Assembly attempted to enact other far-reaching prepayment penalty laws. On February 7, 2008, House Bill 488 was introduced to the Kentucky House of Representatives.[59] The

47. *Id.*
48. *Id.*
49. 2003 Ky. Acts 64.
50. *Id.*
51. Vance, *supra* note 26, at 119-20.
52. *Id.*
53. *Id.*
54. *See* 2008 Ky. Acts 175.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. H.B. 488, 2008 Leg., Reg. Sess. (Ky. 2008) (*See* RS BR 1819 for text), *available at* http://www.lrc.ky.gov/record/08rs/HB488.htm.

proposed bill would have made it unlawful to arrange for *any* prepayment penalty against the buyer of a residential mortgage loan.[60] Earlier in the same Regular Session, House Bill 272 similarly proposed to eliminate prepayment penalties in connection with high-cost home loans.[61] Although House Bill 552 may not have abolished prepayment penalties, it struck a balance on regulating prepayment penalties that the legislature could agree upon.

4. Late Fees

Service and late fees can also constitute abusive lending practices when the administration of such charges results in what is known as "fee pyramiding."[62] "Fee pyramiding occurs when loan servicers apply a borrower's monthly mortgage payment to previously-acquired late fees before applying the payment to the loan's principal.[63] This may result in the borrower's monthly payment falling short of the amount due and the assessment of additional late fees.[64] These additional fees can cause a borrower to accumulate more late fees each month, thus repeating the cycle.

The Kentucky General Assembly first addressed the fee pyramiding problem in 2003 when it enacted legislation prohibiting lenders from charging late-payment fees in excess of five percent of the monthly payment of high cost home loans.[65] The 2003 legislation also prohibited lenders from assessing late-payment fees until payments were fifteen days past due;[66] and prevented lenders from charging a late fee more than once for a single late payment.[67]

In 2008, the Kentucky Legislature enacted § 367.320 of the Kentucky Revised Statutes to further alleviate borrowers from some of the harm associated with late fees.[68] Under 2008 Ky. Acts 175, a high-cost home loan servicer must now apply all received payments to a loan's principal and interest before applying the payment to a late fee.[69] Additionally, a servicer may not charge a late fee if a borrower's payment would otherwise be timely and fully paid if not for late fees.[70]

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60. *Id.*
61. H.B. 272, 2008 Leg., Reg. Sess. (Ky. 2008) (*See* 08 RS BR 217 (6) for text), *available at* http://www.lrc.ky.gov/record/08rs/HB272.htm.
62. 12 C.F.R. § 226.36 (2010).
63. *Id.* at 1702.
64. *Id.*
65. 2003 Ky. Acts 64.
66. *Id.*
67. *Id.*
68. Vance, *supra* note 26, at 120.
69. 2008 Ky. Acts 175.
70. *Id.*

B. Kentucky's Legislative Response to Mortgage Fraud

In addition to predatory lending, the financial industry also cites residential mortgage fraud as a factor in the deterioration of the housing market.[71] Reminiscent of the housing collapse in the 1980's and 1990's, the public's attention is again focused on abusive practices in the housing market, including mortgage fraud.[72] The Federal Bureau of Investigation defines mortgage fraud as "the intentional misstatement, misrepresentation, or omission by an applicant or other interested parties, relied upon by a lender or underwriter to provide funding for, to purchase, or insure a mortgage loan."[73] Residential mortgage fraud can be classified in two ways: fraud for property or fraud for profit.[74] Fraud for property occurs when a home loan applicant makes misrepresentations on the loan application in order to purchase property.[75] On the other hand, fraud-for-profit consists of elaborate schemes involving several home loans employed for the purpose of profiting from property sales.[76] Fraud-for-profit schemes make up the majority of mortgage fraud cases.[77] As such, mortgage fraud investigations focus on fraud-for-profit schemes rather than cases of fraud for property.[78]

Not all fraud-for-profit schemes are identical; there are different types of fraudulent activities associated with fraud-for-profit. For example, "flipping" schemes can amount to residential mortgage fraud.[79] "Flipping" occurs when a person or entity invests in or purchases a home and shortly thereafter sells the home at a price higher than the purchase price.[80] This practice does not necessarily involve fraudulent activity, particularly when the investor makes improvements to the home or property. However, if the investor uses inflated appraisal values to sell the home for a greater price shortly after purchasing the property, the flipping scheme is fraudulent.[81]

The Kentucky Legislature responded to mortgage fraud problems by enacting the Kentucky Residential Mortgage Fraud Act ("Mortgage Fraud

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71. James C. Smith, *The Structural Causes of Mortgage Fraud*, 60 SYRACUSE L. REV. 473, 473-74 (2010). *See also* Dulce J. Foster, *Pursuing the Predators: Regulators' Response to Mortgage Fraud*, 64 BENCH & B. MINN. 18 (2007).

72. Alvin C. Harrell, *The Great Credit Contradiction: Who, What, When, Where and Why*, 26 GA. ST. U. L. REV. 1209, 1231-32 (2010).

73. FBI, *2007 Mortgage Fraud Report* (2007), http://www.fbi.gov/stats-services/publications/mortgage-fraud-2007/mortgage-fraud-2007 (last visited Jan. 22, 2012).

74. James C. Smith, *The Structural Causes of Mortgage Fraud*, 60 SYRACUSE L. REV. 473, 478 (2010).

75. *Id.* at 478-79.

76. *Id.*

77. *Id.* at 479.

78. *Id.*

79. *Id.*

80. Smith, *supra* note 74, at 479.

81. *Id.*

Act").[82] Before its enactment in 2008, Kentucky's residential mortgage fraud laws were vague and unclear.[83] The Mortgage Fraud Act attempts to eliminate any confusion on residential mortgage fraud.[84] To accomplish these goals, the Mortgage Fraud Act outlines conduct that constitutes mortgage fraud and penalties for engaging in such conduct.[85] In particular, the statute details eight specific acts that, if committed with the intent to defraud, amount to residential mortgage fraud.[86] For example, it is fraudulent for a person to make use of a scheme to defraud in connection with the mortgage lending process or attempt to make or use a material misrepresentation or omission with the intention that a person in the mortgage lending process will rely upon it. However, the Mortgage Fraud Act does not require financial harm before an act may be considered mortgage fraud.[87] As such, Kentucky's legislation protects those involved in the lending process, even before any harm occurs, so long as the prohibited conduct was committed with intent to defraud.[88]

The Mortgage Fraud Act criminalizes the types of conduct constituting residential mortgage fraud in Kentucky.[89] First and second time offenders of the Mortgage Fraud Act are guilty of Class D felonies;[90] beyond the second offense, violations of the Act become Class C felonies.[91] As such, a person guilty of residential mortgage fraud for first or second offenses under Kentucky law is subject to one to five years' imprisonment.[92] For any additional offenses, a person guilty under the Act is subject to a minimum five-year and maximum ten-year term of imprisonment.[93] Additionally, the Mortgage Fraud Act permits a court to assess a fine between $1,000 and $5,000 against a person guilty of residential mortgage fraud.[94] These penalties demonstrate Kentucky's dedication to preventing mortgage fraud that would further harm the struggling housing market.

82. 2008 Ky. Acts 175 (enacting KY. REV. STAT. ANN. § 286.8-990).
83. *See, e.g.*, 2008 Ky. Acts 175 (modifying KY. REV. STAT. ANN. § 286.8-220) (§ 286.8-220 declares fraud in the mortgage-lending process unlawful but fails to specify penalty).
84. *See* KY. REV. STAT. ANN. § 286.8-990 (West 2012).
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. KY. REV. STAT. ANN. § 286.8-990 (West 2012).
91. *Id.*
92. KY. REV. STAT. ANN. § 532.060 (West 2012).
93. *Id.*
94. § 286.8-990.

III. KENTUCKY'S LAWS COMPARED TO OTHER JURISDICTIONS

A. Georgia's Predatory Lending Legislation

Many other states have also enacted predatory lending laws to protect borrowers from abusive lending practices. Among them is Georgia, which has passed extensive legislation targeting the same predatory lending practices as Kentucky. Specifically, Georgia's legislation also covers prepayment penalties, verification of a borrower's financial standing, and late fees associated with high-cost home loans.[95] However, Georgia's legislature further addresses other predatory lending practices not addressed under Kentucky law. Moreover, the Georgia case *In re Salvador v. Bank of America* provides insight into possible federal preemption issues that arise in enforcing state predatory lending law.[96]

1. Comparing Definitions of High-Cost Home Loans: Georgia and Kentucky

The Georgia legislature's definition of a high-cost home loan differs slightly from Kentucky's definition. Under the Georgia Fair Lending Act, a loan is high cost if the loan meets or exceeds at least one of the act's thresholds.[97] Much like Kentucky's legislation, Georgia's legislature adopted HOEPA's standards – that is, a home loan is high-cost if its annual percentage rate is greater than or equal to HOEPA's interest-rate requirements.[98]

Additionally, Georgia implemented its own total points and fees threshold, which actually contains two separate thresholds depending on the loan amount.[99] First, if a loan amount is greater than or equal to $20,000, and the total points and fees are five percent or more of the total loan amount, then the loan is high cost. Second, if the amount of a loan is less than $20,000 and the total points and fees are equal to or more than eight percent of the total loan amount, the loan is high cost.[100]

There are two key distinctions between Georgia's and Kentucky's thresholds for high-cost loans. The first distinction is that Kentucky's legislation sets forth certain parameters on the loan amount of a high-cost loan, whereas Georgia's legislation lacks similar restrictions.[101] A home loan in Kentucky must have a principal between $15,000 and $200,000 to be considered high-cost, whereas the Georgia Fair Lending Act does not have a set dollar requirement for high-cost

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95. GA. CODE ANN. § 7-6A-5 (West 2012); § 7-6A-3.
96. *In re* Salvador, 456 B.R. 610 (Bankr. M.D. Ga. 2011).
97. GA. CODE ANN. § 7-6A-2(7) (West 2012).
98. GA. CODE ANN. § 7-6A-2(17) (West 2012); KY. REV. STAT. ANN. § 360.100(1)(a) (West 2012).
99. GA. CODE ANN. § 7-6A-2(17) (West 2012).
100. *Id.*
101. KY. REV. STAT. ANN. § 360.100(1)(a)(1) (West 2012).

home loans.[102] The second important distinction between Kentucky and Georgia law is Georgia's use of two different points and fees thresholds.[103] Unlike Kentucky's single six-percent threshold, Georgia distinguishes its points and fees requirement based on the loan amount.[104]

The differences in the two states' high-cost home loan definitions leads to differences in the number of borrowers protected against predatory lending practices in each state. Because Kentucky law restricts high-cost home loans to those loans between $15,000 and $200,000, and Georgia law allows loans to be classified as high-cost regardless of the principal amount, Georgia's legislation will likely protect more borrowers.[105] Although it may be difficult to imagine a home loan for an amount under $15,000, loans for amounts greater than $200,000 are realistic given the modern price of residential property. As such, many Kentucky borrowers whose loans have principals in excess of $200,000 will not be protected against the predatory lending of high-cost home loans, even if the loan's points and fees violate statutory requirements. Yet, the same borrower living in Georgia would be protected against certain predatory lending practices provided that the loan met the other requirements imposed by its statute. Accordingly, the absence of a certain principal amount in Georgia's high-cost home loan definition protects more borrowers than Kentucky.

The second key distinction between Kentucky's and Georgia's definitions of high-cost home loans is the different percentage thresholds for points and fees. The difference between their points and fees thresholds is apparently minor: Georgia's percentage threshold is one percent for loans over $20,000 and Kentucky's percentage threshold is two percent for loans between $15,000 and $20,000.[106] Although this percentage difference seems small, it nevertheless bears on the number of protected borrowers in each state. For example, a borrower of a $20,000 loan with points and fees that equal five percent of the principal ($1,000) will be protected in Georgia but not in Kentucky. Therefore, Georgia's points and fees threshold provides greater protection against abusive lending than Kentucky's.

Consequently, because Georgia does not have limitations on the amount of a loan and has a lower points and fees threshold, Georgia's definition of a high-cost home loan provides greater protection against abusive lending practices than Kentucky's.

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102. *Id.* *Cf.* GA. CODE ANN. §7-6A-2(17) (West 2012).
103. GA. CODE ANN. § 7-6A-2(17) (West 2012).
104. *Id.*
105. KY. REV. STAT. ANN. § 360.100(1)(a) (West 2012); GA. CODE ANN. § 7-6A-2(17) (West 2012).
106. *See* sources cited *supra* note 105.

2. Prepayment Penalties in Georgia

Like Kentucky, Georgia has restrictions on prepayment penalties associated with high-cost home loans.[107] However, Georgia's limits on prepayment penalties better resemble Kentucky's pre-2008 statute more than the current one.[108] Specifically, the Georgia Fair Lending Act prohibits prepayment fees or penalties after the first two years following the closing date on the loan.[109] Additionally, under Georgia law, the prepayment penalty or fee may not exceed two percent of the prepayment amount in the first year and one percent of the prepayment amount in the second year.[110] Georgia's two-year limit on prepayment penalties decreases the number of prepayment penalties collected by lenders overall.

However, Kentucky's prepayment penalty restrictions provide better protection for borrowers. For example, Kentucky's inclusion of tightened disclosure requirements and the requirement that a lender must offer a loan without a prepayment penalty ensures that a borrower is aware of the possibility of a prepayment penalty. Also, Kentucky's prohibition against charging prepayment penalties for loan refinancing protects borrowers that desire lower interest rates on their loans through refinancing.[111] Although Georgia's two-year prepayment penalty limitation is better than Kentucky's three-year limitation, Kentucky's legislation on prepayment penalties protects more borrowers in more ways than Georgia's legislation.

3. Verification and Late Fees

Both Kentucky's and Georgia's high-cost home loan legislation address problems associated with low-documentation and no-documentation loans.[112] With respect to this issue, the Kentucky legislature once again provided more protection for borrowers than the Georgia legislature.[113] Georgia law requires that a lender must reasonably believe a borrower is able to make the necessary monthly payments before making a loan.[114] This verification requirement is almost identical to Kentucky's verification requirements before 2008.[115] Similarly, in Georgia there is a rebuttable presumption that a person will be able to repay a loan if the person's debt does not exceed fifty percent of his or her income.[116] However, unlike Kentucky, Georgia does not yet require a lender to

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107. GA. CODE ANN. § 7-6A-5(1) (West 2012).
108. *Id. See also* 2003 Ky. Acts 64.
109. GA. CODE ANN. § 7-6A-5(1) (West 2012).
110. *Id.*
111. 2008 Ky. Acts 175.
112. GA. CODE ANN. § 7-6A-5(8) (West 2012).
113. *Compare* GA. CODE ANN. § 7-6A-5 (West 2012) *with* 2003 Ky. Acts 64.
114. *See supra* note 113.
115. *See* 2003 Ky. Acts 64.
116. GA. CODE ANN. § 7-6A-5(8) (West 2012).

verify a person's assets and income using reliable proof.[117] The Georgia statute does not identify specific types of documents the lender should use to determine a person's the ability to repay a loan.[118] Because Kentucky law requires a lender to verify income using reliable proof before granting a loan, it better limits occurrences of loan documents with inflated income values. Accordingly, Kentucky's verification requirements are more comprehensive and are more protective of the interests of the borrower, the lender, and the housing market.

With respect to regulation of late fees, Georgia's legislation achieves essentially the same goal as Kentucky's.[119] Georgia's statute prohibits late fees in excess of five percent of the late payment and prohibits lenders from charging more than one late fee on a single payment.[120] Furthermore, Georgia's law does not require that a monthly payment be applied to the interest and principal first, rather than to late fees, but the law does prohibit a lender from charging a late fee when a monthly payment is first applied to previously accumulated fees.[121] However, there is one difference between the two states' restrictions on late fees: Georgia's late-fee restrictions apply to all residential loans, whereas Kentucky's applies only to high-cost home loans.[122] Despite this one difference in late fee restrictions, both states' legislation equally protect high-cost home loan borrowers from abusive lending practices associated with late fees.

4. Additional Regulations on Predatory Lending in Georgia

The Georgia Fair Lending Act regulates two additional predatory lending practices that Kentucky's legislation does not. First, the Georgia Fair Lending Act requires high-cost home loan borrowers to undergo counseling before taking out a loan.[123] Second, Georgia's legislation restricts abusive practices associated with loan flipping.[124] These two additional restrictions on practices that are often considered abusive provide an example of additional ways Kentucky can protect borrowers and the housing market from predatory lending practices.

The first regulation implemented by Georgia that Kentucky lacks is the requirement that borrowers undergo counseling before taking out a loan. The Georgia Fair Lending Act prohibits a lender from issuing a high-cost home loan to a borrower until the borrower has received counseling on the advisability of the loan transaction.[125] To verify that a borrower has received the necessary counseling, the lender must receive certification of counseling from an approved

117. *Id.*
118. *Id.*
119. *See* KY. REV. STAT. ANN. § 367.320 (West 2012).
120. GA. CODE ANN. § 7-6A-3(3) (West 2012).
121. *Id.*
122. *Id.*
123. GA. CODE ANN. § 7-6A-5(7) (West 2012).
124. *Id.*
125. *Id.*

organization.[126] Approved organizations under the Act include third-party non-profit organizations that are approved by either the United States Department of Housing and Urban Development ("HUD") or the Georgia Housing and Finance Authority.[127] Georgia's counseling requirement protects potential borrowers in two ways. First, counseling provides an opportunity to learn about the benefits and burdens of high-cost home loans. Second, the requirement ensures that borrowers have received guidance before assuming such a significant financial obligation.

Kentucky's legislation does not have a counseling requirement similar to the Georgia Fair Lending Act; however, House Bill 552 did create the Kentucky Homeownership Protection Center ("HPC") in 2008.[128] The HPC's purpose is to provide information on services available to the public from the federal, state, and even local government or community entities.[129] Specifically, the HPC provides information on services to help a homeowner who is in default or is facing the possibility of defaulting on a home loan.[130] For instance, the HPC assists homeowners free of charge by providing them with information about counseling agencies approved by HUD.[131] To ensure that potential homeowners are aware of the HPC's available services, Kentucky legislation requires a lender to give a borrower, at the time of closing, any documents prepared or approved by the HPC that outline available services.[132]

Georgia's counseling requirement is more effective at protecting high-cost home loan borrowers than Kentucky's requirement that a lender distribute HPC materials to a borrower at the time of loan closing. The counseling requirement better protects borrowers because it guarantees that a person considering a loan has been informed on the nature of the loan and all accompanying obligations. To the contrary, the requirement to distribute materials in Kentucky only provides borrowers with information on counseling services, which a borrower may or may not use. Thus, Kentucky's legislation does not guarantee that a borrower is aware of obligations and risks of taking on a high-cost home loan. Furthermore, the HPC's services focus on assisting a homeowner that is at risk of, or is defaulting on a home loan, as opposed to focusing on an individual long before any possibility of loan default. Accordingly, Georgia's counseling requirement is a helpful model to help Kentucky achieve greater borrower protection.

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126. *Id.*

127. *Id.*

128. KY. REV. STAT. ANN. § 198A.400 (West 2012). *See also* Vance, *supra* note 26, at 125; *Resources*, KY. HOMEOWNERSHIP PROTECTION CTR. (July 17, 2011), http://www.kyhousing.org/protect/default.aspx?ID=270 (last visited Jan. 22, 2012).

129. *See* sources cited *supra* note 128.

130. *See* KY. REV. STAT. ANN. § 198A.400 (West 2012).

131. *Id.*

132. KY. REV. STAT. ANN. § 286.2-020 (West 2012).

The Georgia Fair Lending Act also includes restrictions on the practice of flipping a home loan.[133] The Act provides that flipping occurs when a lender refinances a high-cost home loan and then issues a new loan within five years to no benefit of the borrower.[134] The new loan does not benefit a borrower when circumstances such as the terms or costs of the new loan, indicate no "reasonable, tangible net benefit to the borrower."[135] To protect borrowers from this practice, Georgia law prohibits a lender from knowingly or intentionally flipping a home loan that has no benefit to the borrower.[136] Because Kentucky does not specifically restrict home loan flipping, borrowers are not as protected against this practice as borrowers in Georgia.

5. Federal Preemption

Although the Georgia Fair Lending Act provides a judicial remedy to victims of predatory lending practices, a remedy may not always be available.[137] The Georgia case *In re Salvador v. Bank of America* indicates that federal preemption may prevent a borrower from recovering under state law.[138] In *Salvador*, the plaintiff asserted that a bank committed three violations of the Georgia Fair Lending Act.[139] First, the plaintiff argued the bank violated the statute when it issued a high-cost home loan without certifying that the plaintiff submitted to required counseling.[140] Second, the plaintiff asserted that the bank violated Georgia law because it did not provide notice that the loan was subject to the act on the first page of the loan documents.[141] Finally, the plaintiff argued that the bank violated the statute by engaging in prohibited loan-flipping practices.[142] The court, however, held that federal law preempted all the plaintiff's claims under the Georgia Fair Lending Act.[143]

The court in *Salvador* noted that the United States Treasury Department had previously issued a Preemption and Determination Order,[144] which provided that a national bank's practices within the state are not subject to the Georgia Fair Lending Act.[145] The court held that the Department's order, as a federal

133. GA. CODE ANN. § 7-6A-4(a) (West 2012).
134. *Id.*
135. *See generally id.*
136. *Id.*
137. GA. CODE ANN. §7-6A-4(c) (West 2012).
138. *In re* Salvador, 456 B.R. 610 (Bankr. M.D. Ga. 2011).
139. *Id.* at 615.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 617.
144. *In re* Salvador, 456 B.R. at 615.
145. Preemption Determination and Order, 68 Fed. Reg. 46264-02 (Aug. 5, 2003) (ordering federal law preempts state law actions against National City) ("The scope of our Order providing that the GFLA is preempted therefore includes any national bank or national bank operating subsidiary that is engaged in real estate lending activities in Georgia.").

regulation, had the same preemptive effect on plaintiff's state-law claims as a federal statute.[146] Furthermore, the court held that the *Salvador* case was similar to *Wachovia Bank v. Burke*, wherein the Second Circuit held that state banking laws are preempted by the National Bank Act and cannot be enforced against a national bank.[147] In light of the federal order and the Second Circuit's decision in *Burke*, the court held that plaintiff's claims against the bank were moot.[148]

The outcome in *Salvador* demonstrates how state predatory lending legislation can be ineffective and unenforceable against national banks.[149] Therefore, Kentucky's predatory lending laws arguably have no effect on national banks' lending practices within the state, thereby preventing a borrower from bringing a state law claim against a national bank or one of its subsidiaries.[150] However, preemption of state-law claims will not leave a plaintiff remediless because the plaintiff can pursue claims under federal law.[151] Unfortunately, federal laws that address problems with predatory lending are not as extensive and protective of borrowers as Kentucky's state law.[152] Therefore, federal preemption can prevent borrowers from obtaining judicial relief for harm suffered as a result of predatory lending practices.

B. Mortgage Fraud Legislation Among Top Mortgage Fraud States

In 2005, both Florida and Michigan ranked among the top ten states for occurrences of mortgage fraud.[153] Each retained its status in 2008.[154] However, the two states took very different approaches to legislating residential mortgage fraud. The differences in Florida and Michigan's legislation highlight the strengths and weaknesses of the Kentucky Residential Mortgage Fraud Act.

1. Florida's Mortgage Fraud Legislation

Florida, like Kentucky, enacted legislation that criminalizes residential mortgage fraud.[155] However, Florida's legislation, unlike Kentucky's, focuses solely on making, using, and facilitating material misstatements,

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146. *In re* Salvador, 456 B.R. at 616.
147. *Id.* at 615 (citing Wachovia Bank v. Burke, 414 F.3d. 305 (2d Cir. 2005)).
148. *Id.* at 616.
149. Preemption Determination and Order, 68 Fed. Reg. 46264-02 (Aug. 5, 2003).
150. *Id.*
151. *See* 12 C.F.R. § 226 (2012).
152. *See generally id.*
153. *See* Loretta Salzano & A. Michelle Canter, *Identifying and Stopping Mortgage Fraud*, 61 CONSUMER FIN. L.Q. REP. 16 (2007) (rankings based on data compiled by FinCEN, the Mortgage Asset Research Institute and the Federal National Mortgage Association).
154. *See* FinCEN, *State Mortgage Fraud Suspicious Activity* (2011), http://www.fincen.gov/mlf_sar_data/FinCEN_State_Mortgage_Fraud_Suspicious_Activity.pdf (last visited Jan. 22, 2012) (Mortgage Fraud Suspicious Activity Reports do not report confirmed instances of mortgage fraud).
155. FLA. STAT. ANN. § 817.545(2) (West 2012).

misrepresentations, or omissions in the lending process.[156] The lending process begins when a person first pursues a residential mortgage loan and continues until the time the loan is funded.[157] During this process, an individual commits mortgage fraud if he knowingly receives funds in connection with any material misstatements, misrepresentations, or omissions.[158] In addition to receiving funds, an individual can also commit mortgage fraud if he "files or causes to be filed" a document that contains any material misstatements, misrepresentations, or omissions.[159]

Kentucky's Residential Mortgage Fraud Act is more comprehensive than Florida's legislation. For example, Kentucky's statute, like Florida's, addresses fraud in the form of material misstatements, misrepresentations, and omissions during the lending process.[160] However, Florida's statute does not include omissions made on a loan application regarding an individual's employment, income, or financial assets on loan applications that do not require that information.[161] Although other provisions of Kentucky's legislation require a lender to verify a borrower's employment, income, and financial assets,[162] there is a possibility that a loan application does not initially require disclosure of that information. As such, if a borrower does not include the information on an application, and omitting it is a material omission, the borrower committed mortgage fraud.[163] Notwithstanding the fact that it is uncommon for a loan application to not require this information, Florida's exception for this particular omission on behalf of the borrower is more protective of borrowers. This exception protects borrowers by placing the burden on the lender to ask for a loan applicant's financial information instead of placing the burden on the applicant to have independent knowledge of what information is material when applying for a loan.

Despite this difference, the Kentucky Residential Mortgage Fraud Act is more comprehensive than Florida law because it goes beyond defining mortgage fraud as only material misstatements, misrepresentations, and omissions in the lending process.[164] Kentucky also defines mortgage fraud to include: carrying out schemes to defraud, engaging in a practice or course of business that operates as fraud or deceit, and failing to disburse funds in accordance with a loan obligation.[165] Furthermore, in Kentucky, mortgage fraud covers any person that conspires or solicits another to commit any of the acts outlined in the

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156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. KY. REV. STAT. ANN. § 286.8-990 (West 2012).
161. FLA. STAT. ANN. § 817.545 (West 2012).
162. 2008 Ky. Acts 175 § 31(2)(i).
163. KY. REV. STAT. ANN. § 286.8-990 (West 2012).
164. *Id.*
165. *Id.*

statute.[166] Therefore Kentucky's residential mortgage fraud laws cover a broad range of conduct not limited to misrepresentations. As a result, more deceptive practices are criminal in Kentucky and therefore protect more individuals against residential mortgage fraud.

Another distinction between Florida and Kentucky residential mortgage fraud legislation is the differing sentencing options for guilty offenders. Under Florida law, residential mortgage fraud is either a third or second-degree felony.[167] Whether an offense is a third-degree or second-degree felony depends on the value of the residential loan.[168] If the loan value is less than $100,000, residential mortgage fraud will be classified as a third-degree felony[169] with a maximum sentence of five years imprisonment, a maximum fine of $5,000, or both.[170] If the loan value is more than $100,000, mortgage fraud is guilty of a second-degree felony with a maximum punishment of fifteen years imprisonment,[171] a fine of $10,000, or both.[172]

This type of felony classification differs from Kentucky law, which distinguishes felony class on the number of times an individual committed an offense. The difference in classification methods creates a difference in the law's deterrent effect. Specifically, Florida's felony classification deters residential mortgage fraud in loans with a higher value, whereas Kentucky's felony classification deters repeat offenders. Neither approach is inherently better at protecting individuals from mortgage fraud. However, legislation that incorporates both states' felony classification approaches can deter mortgage fraud on higher value loans and also deter repeat offenders.

2. Michigan's Mortgage Fraud Legislation

Michigan law governing residential mortgage fraud does not define an offense as criminal, and therefore, is much different from Kentucky and Florida law.[173] Rather than defining an offense as criminal, Michigan's legislation provides that residential mortgage fraud violates the Mortgage Brokers, Lenders, and Servicers Licensing Act ("Licensing Act").[174] As such, licensing requirements, not criminal sentencing guidelines, govern punishment for mortgage fraud.[175] Mortgage fraud in violation of Michigan's Licensing Act occurs when a mortgage broker, lender, or servicer "[e]ngages in fraud, deceit, or

166. *Id.*
167. FLA. STAT. ANN. § 817.545 (West 2012).
168. *Id.*
169. *Id.*
170. § 775.082; §775.083.
171. § 817.545.
172. § 775.082; § 775.083.
173. *See* MICH. COMP. LAWS ANN. § 445.1672 (West 2012).
174. *Id.*
175. *Id.*

material misrepresentation" during mortgage transactions outlined in the Act.[176] These transactions include: acting as an agent for a person seeking a mortgage loan or person making or offering a mortgage loan; directly or indirectly making or offering a mortgage loan; or directly or indirectly servicing or offering to service a mortgage loan.[177] A broker, lender, or servicer who commits mortgage fraud is subject to punishment determined by the state's Commissioner of Financial and Insurance Regulation.[178] The Commissioner has the authority to suspend or revoke a license, require restitution, or assess a civil fine against a person for violating the Licensing Act.[179]

In comparison, Kentucky's Mortgage Fraud Act is more effectively designed to prevent mortgage fraud than the Michigan Licensing Act for two reasons. First, Kentucky's legislation is more likely to deter mortgage fraud because imprisonment for committing a felony is a more severe punishment than a civil fine or license revocation. Second, Kentucky's legislation, unlike Michigan's, does not limit mortgage fraud to brokers, lenders, and servicers. For example, a borrower can commit mortgage fraud in Kentucky if he or she makes a material misrepresentation relied on by a lender.[180] Therefore, Kentucky law provides more protection against mortgage fraud to all parties involved in the lending process. Additionally, Kentucky's legislation is progressive because the state is one of only thirteen states that have criminalized residential mortgage fraud.[181]

Although Michigan's mortgage fraud laws differ from Kentucky, Michigan case law provides applicable insight into judicial enforcement of its mortgage fraud legislation. The Michigan case *Barkho v. Homecomings Financial LLC* demonstrates that proving mortgage fraud in court can be difficult. In *Barkho*, a homeowner brought an action against a mortgage lending and servicing corporation.[182] The homeowner had obtained financing to purchase a new home from the defendant.[183] The homeowner argued that the defendant was liable for three violations of Michigan's Mortgage Brokers, Lenders, and Servicers Act.[184]

First, the homeowner argued that the loan application was falsified because it overstated his income.[185] However, the plaintiff's signature appeared on the

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176. *Id.*
177. *Id.*
178. *See* MICH. COMP. LAWS ANN. § 445.1661 (West 2012); Mich. Executive Ord., E.R.O. No. 2000-2.
179. *See* MICH. COMP. LAWS ANN. § 445.1661 (West 2012); Mich. Executive Ord., E.R.O. No. 2000-2.
180. *See* KY. REV. STAT. ANN. § 286.8-990 (West 2012).
181. *See* James C. Smith, *The Structural Causes of Mortgage Fraud*, 60 SYRACUSE L. REV. 473, 475 n.15 (2010) (listing states that have statutes criminalizing mortgage fraud, which include: Arizona, Colorado, Florida, Georgia, Kentucky, Maryland, Minnesota, Mississippi, Missouri, New York, North Carolina, Utah, and Washington).
182. Barkho v. Homecomings Fin., LLC, 657 F. Supp. 2d 857, 859 (E.D. Mich. 2009).
183. *Id.* at 860.
184. *Id.* at 859.
185. *Id.* at 862.

application that contained the alleged fraudulent information.[186] As a result, the court rejected this argument because the plaintiff did not assert that the application information was falsified after he signed it.[187]

Second, the plaintiff argued that the defendant made misrepresentations in connection with the loan because the defendant advised the homeowner that the house could be sold or the loan refinanced if necessary.[188] However, the homeowner was unable to identify the individual who made the statements. Accordingly, the court was not persuaded by the homeowner's argument.[189] Furthermore, the court noted that this argument also fails because future promises do not constitute fraud.[190]

Finally, the homeowner argued that the defendant engaged in an "industry-wide conspiracy" by compelling borrowers to accept unaffordable loans to later recover the property for a profit.[191] The court rejected this argument because the homeowner was unable to provide any factual proof of fraudulent conduct.[192] Additionally, the homeowner could not state that the alleged conspiracy influenced his decision to accept a loan, and was also unable to highlight any misrepresentations made by the defendant.[193] The court dismissed the homeowner's claim because the allegations lacked factual support[194] and the homeowner was unable to supplement his allegations of fraudulent conduct.[195] As a result, the plaintiff's claim under the Mortgage Brokers, Lenders, and Servicers Licensing Act was dismissed.[196]

Barkho illustrates that a plaintiff must have actual factual allegations to support his or her claim for residential mortgage fraud. For example, to support a claim for misrepresentation or that the defendant was engaged in a scheme to defraud, a plaintiff must present actual factual allegations. As *Barko* demonstrates, the requirement of a plaintiff to make these types of allegations based on fact can be burdensome. Furthermore, under Kentucky law a plaintiff would also be required to prove that the defendant acted with intent to defraud.[197] As such, because it can be difficult for a plaintiff to prove residential mortgage law under the Kentucky Mortgage Fraud Act, a plaintiff may be unable to obtain judicial relief for an injury caused by mortgage fraud.

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186. *Id.*
187. *Id.*at 863.
188. *Barkho,* 657 F. Supp. 2d at 863.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Barkho,* 657 F. Supp. 2d at 864.
195. *Id.*
196. *Id.* at 865-66.
197. KY. REV. STAT. ANN. § 286.8-990 (West 2012).

IV. CONCLUSION

The enactment of House Bill 552 implemented reforms to Kentucky law that provide high-cost home loan borrowers with more protection against abusive lending practices. The legislation has effectively increased borrower protection against predatory lending practices and residential mortgage fraud. Although Kentucky has done more to prevent predatory lending and mortgage fraud, there is room for improvement. The General Assembly should implement certain provisions of Georgia's legislation to increase the amount of borrower protection against predatory lending. Likewise, Kentucky lawmakers should incorporate Florida's approach to classifying mortgage fraud to provide better deterrence.

Certain provisions of Georgia's predatory lending legislation should be implemented by the Kentucky legislature to strengthen protection against predatory lending. Kentucky's definition of a high-cost home loan increased the number of loans protected by predatory lending legislation. However, more loans would be protected if Kentucky followed Georgia and did not restrict high-cost loan amounts. Additionally, Kentucky would protect more borrowers if it lowered the points and fees threshold to Georgia's five percent. Furthermore, restricting the assessment of prepayment penalties after two years instead of three would be beneficial to borrowers. Also, Georgia's counseling requirement and prohibition on loan flipping should be adopted in Kentucky to ensure that borrowers are aware of the benefits and burdens of taking on a high-cost home loan.

Kentucky can further increase the deterrence value of the Mortgage Fraud Act by supplementing its statute with portions of Florida's mortgage fraud laws. Specifically, Kentucky should continue to use the number of times an offender committed mortgage fraud to determine the felony class. Kentucky should also add a provision that classifies felonies based on the amount of the home loan subjected to mortgage fraud. Implementing these additional provisions will deter individuals from repeatedly committing mortgage fraud and committing mortgage fraud on higher value home loans. Furthermore, Kentucky should adopt Florida's material omission exception for borrowers. Providing a mortgage fraud exception for borrowers that omit certain information on a loan application that does not require the particular information will eliminate the burden on a borrower to understand what information is material. Eliminating this burden on borrowers will ensure borrowers are not punished for not providing information on a loan application that does not require such information. Through key provisions implementing Georgia's predatory lending laws and Florida's mortgage fraud legislation, Kentucky will better protect borrowers from abusive lending practices.

BREAKING DOWN BARRIERS TO JUSTICE: SURVEYING THE PRACTICAL APPLICATION OF KENTUCKY'S LANDLORD-TENANT LAWS AND CALLING FOR BASIC REFORM

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I. INTRODUCTION

Access to counsel is unattainable for a large number of Kentuckians facing civil legal problems.[1] In many residential disputes between landlords and tenants, parties either cannot or do not obtain an attorney,[2] and consequently Kentucky's eviction dockets paint a persuasive picture of the problems caused by litigants entering the courts without counsel.[3] Courtrooms filled with "*pro se"* litigants are not only bad form in consideration of obtaining fair outcomes for the litigants,[4] they are also bad business for courts.[5]

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1. *See* Chief Justice John D. Minton, Jr., Remarks (Oct. 14, 2011), http://courts.ky.gov/NR/rdonlyres/AE50604A-78A3-4393-A52F-AF3130D18D67/0/AccesstoJustice_CJMintonRemarks_101410.pdf (last visited Jan. 21, 2012) ("The need [for representation] in Kentucky is great and it is growing. Currently, Kentucky Legal Aid receives 4,000 calls a month requesting legal help. Legal Aid closes about 24,000 cases each year, providing assistance to 68,000 low-income families and children who can't obtain legal assistance anywhere else. While the number served may seem high, in fact less than half of those who need help actually receive it. About 55 percent of the people who apply and are eligible for legal aid services are turned away because of lack of resources.").

2. *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999), *available at* http://ir.lawnet.fordham.edu/flr/vol67/iss5/14 (last visited Jan 21, 2012); Anthony Fusco et al., *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93 (1979); Steve Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385 (1995) (noting that the majority of tenants appear unrepresented). *See also* JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 49 (1998) ("Court managers believe that the volume of cases involving self-represented litigants has increased substantially in recent years.").

3. *See generally* LSC Funded Programs in Kentucky, LEGAL SERVICES CORP., http://www.lsc.gov/program/program_profile.asp?RNO=618010 (last visited Jan. 21, 2012) (documenting the large number of housing cases accepted by Kentucky's legal aid programs).

4. *See* ABA Coalition for Justice, *Report on the Survey of Judges on the Impact of the Economic Downturn* (July 12, 2010), http://www.americanbar.org/content/dam/aba/

In recognition of the flood of *pro se* litigants entering Kentucky's courts, Chief Justice John D. Minton Jr. of the Kentucky Supreme Court established the Kentucky Access to Justice Commission (KAJC) in October of 2010.[6] Judiciaries across the country have taken similar approaches to combatting this *pro se* epidemic.[7] Leaders of state judiciaries have focused on obtaining results in three areas: (1) removing impediments to access to the justice system, including physical, economical, psychological and language barriers; (2) developing effective plans for funding civil legal aid programs to benefit those who have no meaningful access to the justice system; and (3) expanding assistance available for self-represented litigants.[8] Certainly the judiciary should do all it can to reduce barriers to justice; however, as Chief Justice Minton noted at the KAJC's unveiling, "[t]he key to the commission's success is teamwork."[9]

When it comes to garnering fair outcomes for residential landlords and tenants in Kentucky's courts, the legislature must get off the bench, put on a jersey, and take the field. In 1974, the Kentucky legislature enacted an abrogated version of uniform landlord-tenant legislation.[10] These statutory laws override the judiciary's ability to control many of the substantive and procedural impediments affecting landlords and tenants, and therefore the legislature must act to reform a justice system that has failed a large number of residential landlords and tenants in Kentucky.[11]

Keeping Kentucky's *pro se* epidemic in mind, this article surveys the current state of Kentucky's residential landlord-tenant law and analyzes whether reform is available to breakdown the barriers to justice that body of law presents. Part II will introduce Kentucky's residential landlord and tenant laws and focus specifically on the "territorial application" statute that creates a dichotomy in the

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migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf (last visited Jan. 21, 2012).

5. *Id.*

6. Chief Justice John D. Minton, Jr., Remarks (Oct. 14, 2010), http://courts.ky.gov/NR/rdonlyres/AE50604A-78A3-4393-A52F-AF3130D18D67/0/AccesstoJustice_CJMintonRemarks_101410.pdf (last visited Jan. 21, 2012).

7. Kentucky Court of Justice, *Chief Justice Minton announces creation of Kentucky Access to Justice* Commission (Oct. 14, 2010), http://courts.ky.gov/pressreleases/10142010LAH1.htm (last visited Jan. 21, 2012) ("While the roots of the Access to Justice movement date back to the 1990s, the Texas Access to Justice Commission created in 2001 is credited as being the first formal model. Leaders of less formal AJC groups from other states soon followed Texas and moved to solidify their efforts with various modifications to their respective commissions. As of spring 2008, the American Bar Association Resources Center reported that 19 states had created commissions with similar goals. They included Alabama, Mississippi, North Carolina, South Carolina, Tennessee, West Virginia and Wyoming.").

8. Chief Justice John D. Minton, Jr., Remarks (Oct. 14, 2010), http://courts.ky.gov/NR/rdonlyres/AE50604A-78A3-4393-A52F-AF3130D18D67/0/AccesstoJustice_CJMintonRemarks_101410.pdf (last visited Jan. 21, 2012).

9. *Id.*

10. *See* KY. REV. STAT. ANN. §§ 383.500-383.715 (West 2012).

11. *See* LSC Funded Programs in Kentucky, LEGAL SERVICES CORP., http://www.lsc.gov/program/program_profile.asp?RNO=618010 (last visited Jan. 21, 2012).

application of landlord-tenant law. Part III will document the benefits of uniformity in the law. Part IV will embark on a substantive analysis of KRLTA's statutory construct and note major differences between it and Kentucky's common law, and find that the issue of habitability is the only plausible reason that a dichotomy in the law still exists. Part V addresses that dichotomy directly and argues that the dichotomy in Kentucky's landlord-tenant law only creates another barrier to justice for landlords and tenants, a majority of whom navigate the court system without any legal training and without a lawyer to serve as their guide.[12] Part VI concludes with a look into our reasoning for writing this paper: Uniformity in the law will constitute a significant first-step towards achieving justice for Kentucky's landlords and tenants and will free up both the judiciary and the legislature to do all that they can to ensure fair outcomes and equitable relations for residential landlords and tenants in Kentucky.

II. THE FAILED HISTORY OF KRLTA'S TERRITORIAL APPLICATION

A movement to change landlord-tenant law in the United States led to the creation of the Uniform Residential Landlord and Tenant Act (URLTA), a body of law created by the Uniform Law Commission (ULC)[13] in 1973.[14] Twenty-one states have adopted URLTA in one form or another, with Kentucky having joined the ranks when it adopted KRS §§ 383.500 to 383.715 on August 1, 1974.[15] The ULC sought to modernize landlord-tenant law when it created URLTA, and in adopting its own version of URLTA (referred to as "KRLTA"

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12. Rebecca Sandefur, Effects of Representation on Trial and Hearing Outcomes in Two Common Law Countries 15 (July 7, 2005) (unpublished manuscript) (available at http://www.reds.msh-paris.fr/communication/docs/sandefur.pdf) (presenting the results of fourteen studies involving over 14,000 civil cases showing that having a lawyer increases a party's chances of a positive outcome by seventy-two percent).

13. *See generally* THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.nccusl.org (last visited Jan. 21, 2012).

14. Uniform Residential Landlord and Tenant Act, art. I § 1.102(b)(1) (1974), http://www.law.upenn.edu/bll/archives/ulc/fnact99/1970s/urlta72.pdf (last visited Jan. 21, 2012) [hereinafter URLTA] ("Purposes; Rules of Construction").

15. *See* KY. REV. STAT. ANN. § 383.500, Refs & Annos (West 2012) (listing jurisdictions wherein URLTA has been adopted in one form or another). *But cf.* Enactment Status Map, Residential Landlord and Tenant Act, UNIFORM LAW COMMISSION, http://www.nccusl.org/Act.aspx?title=Residential%20Landlord%20and%20Tenant%20Act (last visited Jan. 21, 2012) (illustrating that 12 states have enacted URLTA; the fact that Kentucky has enacted URLTA in a different form, and yet it is not listed on the UCL website, supports a presumption that the UCL does not list those states that alter the uniform legislation). *See also* Lynn Foster, *Uniform Laws, Legislation and the Arkansas Bar Association: A History and Report*, 46-WTR ARK. LAW. 10, 11 (2011) ("Does a uniform act cease to be uniform, and entitled to that term, because a state has changed it too much? One example of this is the Arkansas Residential Landlord and Tenant Act, which started its existence as the Uniform Residential Landlord and Tenant Act. The law as enacted, however, contained virtually none of the many pro-tenant provisions present in the original uniform act. Thus, the ULC does not list Arkansas as a state that has enacted the uniform law.").

herein),[16] the Commonwealth of Kentucky recognized that time for a change had come as well.[17] However, while Kentucky agreed with URLTA's basic purpose and adopted many of URLTA's original provisions, it also abrogated a few provisions.[18] One such altered provision, KRS § 383.715, the "territorial application" provision, has confused Kentuckians since its adoption.[19]

A. Starting off on the Wrong Foot: Conflicting Territorial Application Provisions

In 1974, KRS § 383.530 indicated that KRLTA "applies to, regulates, and determines rights and obligations under a rental agreement wherever made, for a dwelling unit located in the state."[20] In other words, KRLTA included a provision that applied the new body of residential landlord-tenant law uniformly across the state – in every city and every county.[21] Conversely, another KRLTA provision, KRS § 383.715, limited KRLTA's territorial application to counties containing "first class" cities and urban-county governments.[22] In effect, this provision limited the statute's applicability to Louisville and Lexington only.[23]

A former professor of law, who was also an active participant in KRLTA's legislative process, noted a simple explanation for the confusion: legislators failed to exclude KRS § 383.530, the provision adopting KRLTA statewide, after supporters of the bill inserted KRS § 383.715, the Louisville and Lexington provision, as an amendment.[24] Legislators from smaller class cities believed

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16. *See* KY. REV. STAT. ANN. §§ 383.500-383.715 (West 2012). Kentucky adopted an edited version of URLTA, a version that does not make the laws uniform within Kentucky, and yet it is still named KRS §§ 383.500-383.715, the "Uniform Residential Landlord and Tenant Act." In this paper, to differentiate Kentucky's version of URLTA from the UCL's original version, Kentucky's version will be referred to as the "Kentucky Residential Landlord and Tenant Act" or "KRLTA."

17. *See* Miles v. Shauntee, 664 S.W.2d 512, 515 (Ky. 1983) ("The Kentucky Legislature adopted the Act, recognizing what progress had been made in other legislatures in the tenant-landlord area.").

18. *Compare* URLTA, http://www.law.upenn.edu/bll/archives/ulc/fnact99/1970s/urlta72.pdf (last visited Jan. 21, 2012) *with* KY. REV. STAT. ANN. §§ 383.500-383.715 (West 2012).

19. 1980-1981 Ky. Op. Att'y Gen. 2-389 (1980) ("There has always been some confusion regarding the territorial application of the Uniform Residential Landlord-Tenant Act of 1974 (URLTA)."); KY. REV. STAT. ANN. § 383.715 (West 2012).

20. George Wm. Moss III, *The Kentucky Uniform Residential Landlord and Tenant Act: Tenants' New Lease on Life*, 14 J. FAM. L. 597, 599 (1975-76) (citing KY. REV. STAT. ANN. § 383.715 (1975)).

21. KY. REV. STAT. ANN. § 383.530 (West 2012).

22. *See* KY. REV. STAT. ANN. § 383.715 (1975); *Miles*, 664 S.W.2d at 516 .

23. *Miles*, 664 S.W.2d at 516.

24. Moss, *supra* note 20, at 600 ("When adding § 383.715 the legislature forgot to exclude § 383.530 according to William E. Biggs, Professor of Law at the University of Louisville School of Law and Acting Director of the Local Government Law Center. Professor Biggs worked closely with municipal government officials on legislative proposals for the 1974 General Assembly. Mr. Biggs suggests that legislators from smaller class cities believed the Act was not needed for their districts and commanded sufficient strength to defeat the bill. He further states that supporters of the bill introduced an amendment which limited coverage to the Louisville and Lexington metropolitan areas.").

KRLTA was unnecessary in their districts, and therefore an amendment was necessary to preserve the legislation for Lexington and Louisville.[25] Presumably, legislators failed to review the other KRLTA provisions before passing the new amendment.[26] In effect, KRS § 383.530 and KRS § 383.715 were in direct conflict, and KRLTA's territorial application started off on the wrong foot.[27]

B. Another Drafting Nightmare: KRLTA's Befuddling Purpose

At KRLTA's inception, the conflicting territorial provisions were not the only problem caused by the altered territorial application. Under KRS § 383.505, the General Assembly articulated that KRLTA's purpose was "[t]o make uniform the law with respect to the subject of KRS §§ 383.505 to 383.715 *among those states which enact it*."[28] This underlying purpose is befuddling. A national committee designing a model act would naturally seek uniformity throughout the country, just as the ULC did when creating URLTA.[29] But it makes little sense for the Kentucky legislature to have had any interest in such a policy for KRLTA.[30] Having noted the General Assembly's mistake in adopting contradictory territorial application provisions,[31] it is not difficult to imagine that the General Assembly simply copied the ULC's purpose for URLTA.[32] After all, the provisions were nearly identical.[33]

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25. *See* Moss, *supra* note 20, at 600.

26. *See generally* 1976-1977 Ky. Op. Att'y Gen. 2-603 (1977) ("There is a conflict between KRS 383.530 and 383.715. The enrolled bill (H.B. 125, 1974 Acts) shows that prior to a Senate Amendment the bill was made applicable only to counties containing cities of the first, second class and urban-county governments. A Senate amendment deleted the word "second". The last section of the bill [Section 46, designated KRS § 383.715], as amended, restricts its application to counties containing a first class city and urban-county government. However Section 7 [KRS § 383.530] suggests vaguely that the Act applies in connection with any rented premises located within Kentucky.").

27. *Miles*, 664 S.W.2d at 516 ("In limitation of general scope and purpose of the URLTA, and in conflict with the provisions set forth in KRS 383.505(2)(a) and (b) and KRS 383.530, the Legislature limited the applicability of the URLTA to counties containing cities of the first class and urban-county governments. KRS 383.715."). *See generally* 1976-1977 Ky. Op. Att'y Gen. 2-603 (1977) (concluding that KRS § 383.715 controls) ("Thus in our opinion KRS 383.715 controls, which means that the Act applies only in Jefferson and Fayette Counties. A contract relating to a tenancy in Rowan County does not come under the operative provisions of the Act.").

28. KY. REV. STAT. ANN. § 383.505(b)(2) (West 2012) (emphasis added).

29. URLTA, *supra* note 14, at art. I § 1.102(b)(1) ("(a) This Act shall be liberally construed and applied to promote its underlying purposes and policies. (b) Underlying purposes and policies of this Act are (1) to simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants; (2) to encourage landlords and tenants to maintain and improve the quality of housing; and (3) to make uniform the law with respect to the subject of this Act among those states which enact it.").

30. *See* KY. REV. STAT. ANN. § 383.505 (West 2012).

31. *Compare* KY. REV. STAT. ANN. § 383.530 (1974) *with* KY. REV. STAT. ANN. § 383.715 (1974); *supra* note 24.

32. *Compare* URLTA, *supra* note 14, at art. I § 1.102(3) ("to make uniform the law with respect to the subject of this Act among those states which enact it") *with* KY. REV. STAT. ANN. § 383.505(2)(b) (West 2012) ("[t]o make uniform the law with respect to the subject of KRS 383.505

One commentator attempted to resolve the mystery when he hypothesized that, "[t]he goal of uniformity amongst the states is presumably prompted by the frequency and number of interstate moves."[34] However, it is difficult to conceive that one of two listed purposes for a major overhaul to Kentucky's landlord-tenant law was to ensure a uniform body of law for out-of-state residents moving into the Commonwealth; or vice versa, Kentuckians moving across the border into other states.[35] If the General Assembly was concerned with creating a uniform body of landlord-tenant law to support interstate moves, why would the General Assembly not also be concerned with supporting intrastate moves? The presence of a purpose to support interstate uniformity and therefore interstate residential moves, and a lack of a purpose to support intrastate moves, strengthens the likelihood that KRLTA's drafters simply copied the ULC's purpose.[36] The General Assembly's mistakes at KRLTA's launch, its conflicting territorial provisions, and its befuddling purpose foreshadowed a long history of troubles for KRLTA's territorial application.

C. The Judiciary Steps in: KRLTA's Unconstitutional Territorial Application

On October 12, 1983, nearly ten years after KRLTA's rocky start, the Supreme Court of Kentucky struck down KRLTA's original territorial application – the amendment added at the last minute[37] – because it violated the Kentucky Constitution.[38] In *Miles v. Shauntee*, the Kentucky Supreme Court struck down KRLTA as "special legislation" in violation of Sections 59 and 60 of Kentucky's Constitution.[39]

> Section 59 of the Constitution of Kentucky provides that the General Assembly shall not pass local or special acts in any case where a general law can be made applicable. Section 60 of the Constitution of Kentucky provides that the General Assembly shall not indirectly enact

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to 383.715 among those states which enact it"). *See generally* Legislative Research Commission, *Bill Drafting Manual for the Kentucky General Assembly* 3 (Revised 2011), http://www.lrc.ky.gov/lrcpubs/ib117.pdf (last visited Jan. 21, 2012) ("In some cases, considerable study of the problem is required before actual drafting can begin. The drafter should check the uniform acts of the National Conference of Commissioners on Uniform State Laws and the suggested state legislation of the Council of State Governments, which may be found in the Legislative Research Commission library.").

33. *Compare* URLTA, *supra* note 14, at art. I § 1.102(3) ("to make uniform the law with respect to the subject of this Act among those states which enact it.") *with* KY. REV. STAT. ANN. § 383.505(2)(b) (West 2012) ("to make uniform the law with respect to the subject of KRS 383.505 to 383.715 among those states which enact it").

34. Moss, *supra* note 20, at 599.

35. *See* KY. REV. STAT. ANN. § 383.505 (West 2012).

36. *Supra* note 32.

37. Moss, *supra* note 20.

38. *Miles*, 664 S.W.2d at 512.

39. *Id.* at 517.

> any special or local act by exempting from the operations of a general act any city, town, district or county.[40] [sic]

The *Miles* Court reasoned that, in terms of absolute numbers, Pike County and Hardin County had the second and third most substandard renter-occupied homes; Jefferson County and Fayette County were first and fourth respectively.[41] Bearing in mind these statistics, Kentucky's highest court held that substandard rental housing was not a problem limited to Fayette County and Jefferson County, and therefore the first-class cities amendment did not bear a rational relation to the purpose at hand – improving substandard housing.[42] The Supreme Court's condemnation of KRLTA's territorial application left the legislation in shambles and offered damning evidence of the mistake made by those advocating for the last-minute amendment to KRLTA's territorial application provision.[43]

D. Clinging to a Failed Idea: KRLTA's Amended Territorial Application

Subsequently, in its 1984 regular session, the General Assembly enacted an edited KRLTA.[44] The General Assembly acknowledged its prior mistake by remedying the territorial application provision and replacing it with a provision acceptable under Kentucky's Constitution.[45] Recall that, originally, the ULC's version of URLTA recommended a statewide territorial application.[46] Given the problems created initially by the General Assembly's failure to advance a uniform territorial application, one would think the General Assembly would have jumped at a chance to start anew and apply KRLTA statewide. However, the General Assembly opted to create its own provision once more, again refusing to apply the law across Kentucky.[47] The amended territorial application provision allows cities, counties, and urban-county governments to choose whether to adopt KRLTA or to allow traditional common law to govern.[48] To date, only a few Kentucky communities have adopted KRLTA.[49] Having

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40. *Id.* at 516.
41. *Id.* at 517.
42. *Id.*
43. *Id*.
44. KY. REV. STAT. ANN. § 383.500 (West 2012) ("Local governments authorized to adopt provisions of the Uniform Residential Landlord and Tenant Act in their entirety and without amendment.").
45. *Id.* ("The General Assembly hereby authorizes cities, counties and urban-county governments to enact the provisions of the Uniform Residential Landlord and Tenant Act as set forth in KRS 383.505 to 383.705. If adopted, these provisions shall be adopted in their entirety and without amendment. No other ordinance shall be enacted by a city, county or urban-county government which relates to the subjects embraced in KRS 383.505 to 383.705.").
46. *See* URLTA, *supra* note 14.
47. KY. REV. STAT. ANN. § 383.500 (West 2012).
48. *Id*.
49. *Reading Your Lease*, LEGAL AID NETWORK OF KENTUCKY, http://kyjustice.mayfirst.org/node/707 (last visited Jan. 21, 2012) (listing Barbourville, Bellevue,

documented the history of Kentucky's territorial application provision, the pertinent question is now presented: Do these cities and counties have good reason to cling to the common law, or would landlords and tenants benefit from a uniform body of residential landlord-tenant law across the state?

III. UNIFORMITY IN THE LAW: DOCUMENTING THE PROBLEMS ASSOCIATED WITH KENTUCKY'S NON-UNIFORM LANDLORD-TENANT LAWS

Before analyzing whether a dichotomy in Kentucky's landlord-tenant law is necessary, it is important to outline the concept of uniformity in the law and the benefits that flow from this concept. The ULC is the country's oldest state governmental association, comprised of commissions on uniform laws from each state, and the ULC's purpose is to promote uniformity in the law where uniformity is both "desirable and practicable."[50] In other words, when the ULC drafted the original URLTA legislation, the association of state commissions decided that landlord-tenant law is an area of law where uniformity is both desirable and practicable.[51]

Interstate movement is certainly one of the defining reasons that uniformity in landlord-tenant law is advantageous.[52] As noted above, this purpose is one of the two listed purposes for Kentucky's adoption of KRLTA,[53] and it was one of the ULC's three purposes when drafting URLTA.[54] Flowing from the concept that it is practicable for interstate movers not to be burdened by states' different

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Bromley, Covington, Dayton, Florence, Lexington-Fayette County, Georgetown, Louisville-Jefferson County, Ludlow, Melbourne, Newport, Oldham County, Pulaski County, Shelbyville, Silver Grove, Southgate, Taylor Mill, and Woodlawn).

50. Frequently Asked Questions, UNIFORM LAW COMMISSION, http://www.nccusl.org/Narrative.aspx?title=Frequently%20Asked%20Questions (last visited Jan. 21, 2012) ("For more than a century, the Uniform Law Commission (ULC) has worked for the improvement of state laws by drafting uniform state laws on subjects where uniformity is desirable and practicable. It is a non-profit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Now in its 119th year, the ULC is the oldest state governmental association and is the source of more than 300 uniform acts which seek to secure uniformity of state laws where diversity obstructs the interests of all the citizens of the United States."). *See also* Name and Purpose Section, ULC Constitution, UNIFORM LAW COMMISSION, http://www.nccusl.org/Narrative.aspx?title=Constitution (last visited Jan. 21, 2012).

51. Lynn Foster, *Uniform Laws, Legislation and the Arkansas Bar Association: A History and Report*, 46-WTR ARK. LAW. 10, 11 (2011) (citing to Uniform Law Commission, *Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts* § 2, *in* UNIFORM LAW COMMISSION 2009-2010 REFERENCE BOOK (2009)) (noting that the ULC looks to the following factors to determine whether the substantive area of law is one in which uniformity is desirable: "1) whether the subject is appropriate for state legislation; 2) whether there is an obvious reason for an act; 3) whether there is a reasonable probability that an act will be enacted by a substantial number of jurisdictions; and 4) whether uniformity of the law will produce significant benefits to the public").

52. URLTA, *supra* note 14, at art. I § 1.102(b)(3).

53. *See* KY. REV. STAT. ANN. § 383.505(2)(b) (West 2012).

54. URLTA, *supra* note 14, at art. I § 1.102(b)(3).

landlord-tenant laws, it is a stronger argument that *intrastate* movers should not be burdened with conflicting landlord-tenant laws when there is no articulable reason for non-uniformity.[55]

The lack of uniformity in Kentucky's landlord-tenant law has provided significant consternation among judges, attorneys, property management companies, landlords, and tenants because the law is applied differently based solely on where the residential property is located.[56] This problem takes on greater meaning because most landlords and tenants in Kentucky either cannot or do not obtain counsel.[57] For example, Kentucky's non-uniform landlord-tenant laws burden the provision of civil legal aid to landlords and tenants. Providing basic advice to a landlord or tenant requires a detailed explanation concerning the differences between KRLTA and common law, which are significant when it comes to basic issues such as notice requirements, security deposits, the tenant's right to cure, and a host of other issues.[58] Another problem caused by Kentucky's non-uniform landlord-tenant law is that it hampers the judiciary's ability to address the *pro se* epidemic because the Administrative Office of Courts is unable to create forms or adopt rules and procedures to efficiently and effectively resolve *pro se* landlord-tenant claims.[59] The various difficulties associated with Kentucky's heterogeneous landlord-tenant laws make it appropriate to act under the presumption that the legislature should enact uniform laws where there is no articulable reason for having a non-uniform body of landlord-tenant law in Kentucky.

IV. ANALYZING THE SUBSTANCE OF KRLTA IN SEARCH OF AN ARTICULABLE REASON FOR NON-UNIFORMITY

KRLTA's current territorial application suggests a legislative assumption that a dichotomy in Kentucky's landlord-tenant laws is necessary and therefore a statewide application is not feasible. This assumption is founded on the notion

55. *See generally* KY. REV. STAT. ANN. § 383.500 (West 2012).

56. *See id.* For example, a county judge must remain mindful of which of the two laws applies in every case before the court. The same is true for attorneys. Attorneys first have to determine which body of law applies to their client's residence – and this is no easy matter. It could involve researching land records, including deeds and property valuation records, to discover which city a residence is located in. Representing a client in court could involve a trip to the city or county headquarters to find out whether the city or county has adopted KRLTA. These trips often involve explaining to the mayor's office exactly what KRLTA is, because many local government personnel have no idea. Lawyers that present evidence are burdened by an evidentiary rule, enforced by some but not all judges, requiring a certified copy of the city or county ordinance evidencing the local government's adoption of KRLTA – a fresh, certified copy for each court appearance.

57. *See supra* note 2.

58. *See infra* Part IV.A.

59. *See generally* KY Courts Website, AOC Forms, http://courts.ky.gov/forms/formslibrarybycategory.htm (last visited Jan. 21, 2012).

that Kentucky's smaller and rural communities do not need or want KRLTA.[60] After all, this is the belief that led to the creation of the unconstitutional territorial-application provision in the first instance.[61] Those representing the interests of smaller communities did not want KRLTA, and therefore an amendment was inserted at the last minute to preserve the legislation for Lexington and Louisville.[62] This is an important issue to analyze because economic indicators illustrate that an urban-rural divide exists in Kentucky.[63]

A. Comparing the Substantive Laws of KRLTA with Kentucky's Common Law

The fact that an urban-rural divide exists in economic terms does not mean that a dichotomy in landlord-tenant law is necessary. Such an argument would be akin to arguing that Kentucky's statewide high school basketball tournament should be comprised of separate rural and urban divisions simply because the two areas are divided economically. However, one would be hard-pressed to find this illogical argument being offered in any corner of the Commonwealth. Therefore, a separate analysis is warranted: Is there a substantive reason that KRLTA should not govern landlords and tenants in smaller and rural communities? An analysis of KRLTA's potential effect on Kentucky's smaller and rural communities requires an investigation of the substantive differences between KRLTA and Kentucky's common law.

Although KRLTA includes a host of modern reforms separate and apart from Kentucky's common law,[64] a survey of the most important, practical

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60. *See supra* note 24.

61. *See* Moss, *supra* note 20.

62. *See* Moss, *supra* note 20.

63. Alison F. Davis, *Kentucky's Urban/Rural Landscape: What is Driving the Differences in Wealth Across Kentucky?*, KY. ANN. ECON. REP. 2009, http://www2.ca.uky.edu/CEDIK-files/KYRuralUrbanWealthDifferences.pdf (last visited Jan. 21, 2012) (noting that Kentucky is composed of 120 counties – 35 classified as urban and 85 as rural – and stating that there are vast differences across the rural and urban areas of Kentucky causing Kentucky to be ranked 46th in per capita income).

64. *See* KY. REV. STAT. ANN. § 383.510 (West 2012) (preserving principles of law and equity for landlords and tenants); § 383.520, (creating neutral concepts for landlords and tenants, including duty to mitigate); § 383.550 (creating a clear "good faith" obligation for both landlords and tenants); § 383.555 (creating clear expectations and definitions for the court to deal with unconscionability in landlord-tenant contracts and dealings); § 383.570 (prohibiting tenants from waiving protections provided by KRLTA, for example, prohibiting tenants from paying or agreeing to pay landlord attorney's fees); § 383.575 (preventing waiver or exception from warrant of habitability within a rental agreement, must be separate writing, separate agreement); § 383.580 (creating significant and specific list of requirements regarding security deposits); § 383.585 (requiring disclosure of person(s) and/or company responsible for rental property, accepted manners in which rent may be paid); § 383.595 (creating minimum standards for residential rental properties, warranty of habitability, ability to waive through a separate and specific agreement); § 383.600 (express protection to landlords who sell their properties); § 383.605 (creating tenant maintenance obligations); § 383.610 (express creation of landlord's right to adopt rules concerning the tenant's use and occupancy of the premises and protections for tenants from unreasonable or unfairly applied rules); § 383.615 (clarifies roles and creates rules of access when one party has

differences must include: (1) constructive eviction; (2) minimum standard of habitability; (3) notice; (4) right to cure; (5) security deposits; and (6) utilities. Although there are dozens of substantive differences between KRLTA as compared to Kentucky's common law, the six with the most significant impact follow below:

1. Constructive Eviction/Unlawful Ouster

KRLTA provides a specific cause of action and a statutory remedy where a tenant with a lawful right to possession is ousted.[65] KRS § 383.655 provides tenants with a statutory right to reasonable attorney's fees, making the prosecution of constructive eviction more practical for tenants that are unable to afford an attorney.[66] KRLTA also provides an opportunity for treble damages, increasing the likelihood of a lawsuit being filed and providing an additional level of protection from unlawful ouster.[67]

In a common law jurisdiction, a cause of action for constructive eviction is also available, but the remedy is not as straightforward as the cause of action

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right of possession and one retains legal title and physical responsibilities); § 383.625 (provides specific remedies for breach/material noncompliance by landlord); § 383.630 (creates specific performance requirements and/or damages payable to tenant for landlord's failure to deliver possession); § 383.635 (creates a remedy for tenants for landlord noncompliance that affects health and safety); § 383.640 (creating a requirement to supply essential utility services and tenant remedy for wrongful failure to supply heat, running water, hot water, electric, gas, or other essential service); § 383.645 (creating tenant defense and or counterclaim in an action non payment based on landlord's noncompliance); § 383.650 (providing protection for both landlords and tenants in case of fire or casualty damage); § 383.655 (creating cause of action requirements and remedies for tenants for unlawful ouster, exclusion or diminution of services); § 383.660 (providing landlords with a clear remedy for tenant's noncompliance including failure to pay rent and tenants duty to pay rent, also including tenants' right to cure); § 383.665 (creates a remedy for landlords for tenant's failure to maintain the property); § 383.670 (creates remedies for absence, nonuse and abandonment of residential rental property); § 383.675 (protecting tenants from an action to terminate or evict when landlords accept rent; waiver of landlord's right to terminate); § 383.685 (acknowledging and clarifying landlords' rights to claims for rent and/or other actual damages and possible reasonable attorney's fees due to breach after termination of rental agreement); § 383.690 (demanding the landlords may not recover possession through the willful diminution of utility or other essential services, essentially must avail themselves of appropriate court procedures); § 383.695 (creation of specific periodic tenancies through holdover tenants); § 383.700 (establishes neutral remedies for both landlords and tenants for abuse of access by either party); § 383.705 (protection for both tenants and landlords from retaliatory conduct by the other).

65. KY. REV. STAT. ANN. § 383.655 (West 2012) ("Tenant's remedies for unlawful ouster, exclusion or diminution of service: If a landlord unlawfully removes or excludes the tenant from the premises or willfully diminishes services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electric, gas, or other essential service, the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount not more than three (3) months periodic rent and a reasonable attorney's fee. If the rental agreement is terminated, the landlord shall return all prepaid rent.").

66. *Id.*

67. *Id.*

offered under KRLTA.[68] In practice, it is more difficult to bring a cause of action for constructive eviction under common law because the common law is not as clear as KRLTA about what facts may give rise to a claim of constructive eviction.

2. Minimum Standard of Habitability

The doctrine of *caveat emptor*[69] is alive and well for the majority of Kentucky's residential landlords and tenants.[70] In what is perceived as the ultimate division between KRLTA and common law jurisdictions, residential rental properties within a KRLTA jurisdiction must meet a minimum standard of habitability,[71] but those in common law jurisdictions need not.[72] Although KRLTA does not explicitly establish a traditional "warranty of habitability," KRLTA creates a minimum standard of habitability through the landlord's duty to maintain and repair the premises.[73] KRLTA requires landlords to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition."[74]

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68. *See* Estes v. Gatliff, 163 S.W.2d 273, 276 (Ky. 1942) ("The appellee insists there was no lawful eviction of the appellant as tenant, since constructive eviction is not recognized in this jurisdiction, citing in support of the argument cases involving a breach of warranty of title. We do not think the strictness of that rule applies to the relation of landlord and tenant. To evict a tenant is to deprive him of the possession of the leased premises or disturb him in their beneficial enjoyment so as to cause the tenant to abandon the premises. This amounts to a constructive eviction. It is not necessary that there should have been an actual, physical ejection or even a lawsuit. There is an eviction if the acts of the landlord are such as will justify or warrant the tenant in leaving the premises and he does in fact abandon them."); Cox v. Hardy, 371 S.W.2d 945, 946 (Ky. 1963) ("In order to have constructive eviction two conditions must exist: (1) an act or omission of the landlord which substantially interferes with the tenant's beneficial enjoyment of the leased premises, and (2) the tenant's abandonment of the premises by reason thereof.").

69. Mark S. Dennison, *Cause of Action for Breach of Implied Warranty of Habitability in Residential Lease*, 25 CAUSES OF ACTION 2D 493, § 2 (2004) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 95A (5th ed. 1984) ("Caveat emptor stands for the proposition that a seller is not legally responsible to the buyer for the fitness of a transaction's subject matter, absent fraud or an express warranty.").

70. Home Ins. Co. v. Hamilton, 395 F.2d 108 (6th Cir. 1968); Miles v. Shauntee, 664 S.W.2d 512 (Ky. 1983); Horstman v. Newman, 291 S.W.2d 567 (Ky. 1956); Mahan-Jellico Coal Co. v. Dulling, 139 S.W.2d 749 (Ky. 1940); Gheens v. Bush, 80 S.W.2d 581 (Ky. 1935); Lambert v. Franklin Real Estate Co., 37 S.W.3d 770 (Ky. Ct. App. 2000) *See also* Kessler v. Grasser, 187 S.W.2d 1012 (Ky. 1945) (holding that a tenant cannot make necessary repairs and charge to landlord in absence of express contract to contrary); Howard v. Newton, 172 S.W.2d 33 (Ky. 1943);.

71. *See* KY. REV. STAT. ANN. § 383.595 (West 2012).

72. *Id.*

73. *Id.*

74. KY. REV. STAT. ANN. § 383.595(1)(b) (West 2012).

3. Notice

Notice periods are much shorter under KRLTA as compared to common law. In a KRLTA jurisdiction, a landlord may terminate a rental agreement for nonpayment of rent after only seven days' notice.[75] For breaches of a lease other than nonpayment, landlords must provide fourteen days' notice under KRLTA.[76] Kentucky common law allows the parties to contract for notice periods in a lease agreement and provides a straightforward thirty-day notice period where there is no lease.[77] While KRLTA allows tenants to contract for a longer notice period and offers protection by forbidding a shorter period,[78] common law allows landlords and tenants to waive the thirty-day notice period and contract for shorter notice periods.[79] Under KRLTA, it is important to note that written notice must also specifically provide the tenant with a "right to cure," a concept discussed below.[80]

4. Right to Cure

KRLTA requires that landlords put tenants on notice of a breach and provide tenants with notice of their right to cure the breach prior to terminating their rental agreements.[81] This right provides substantial protection for tenants who choose to remain in their homes and cure the alleged breach and allows a tenant to challenge the existence of the breach in court.[82] The most common form of breach is nonpayment of rent, and KRLTA allows tenants to cure this breach for up to seven days.[83] Under common law, there is no right to cure any breach – even an issue as petty as a complaint of loud music. Therefore, landlords can evict tenants who are left without a legal right to address the complaint.[84]

5. Security Deposits

KRLTA lists a plethora of duties and requirements for landlords and tenants to ensure an equitable process for retaining and refunding security deposits.[85] At the time of move-in and move-out, landlords and tenants have a shared

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75. *See* KY. REV. STAT. ANN. § 383.660 (West 2012).
76. *Id.*
77. When there is no lease under common law, KRS § 383.195 states, "[i]n those jurisdictions where the Uniform Residential Landlord and Tenant Act is not in effect, a tenancy at will or by sufferance may be terminated by the landlord giving one (1) month's notice, in writing, to the tenant requiring him to remove." KY. REV. STAT. ANN. § 383.195 (West 2012).
78. *See* KY. REV. STAT. ANN. § 383.570 (West 2012).
79. Stoll Oil Ref. Co. v. Pierce, 337 S.W.2d 263, 264 (Ky. 1960). *See also* Dean v. Stillwell, 145 S.W.2d 830 (Ky. 1940).
80. KY. REV. STAT. ANN. §§ 383.660(1)-(2) (West 2012).
81. KY. REV. STAT. ANN. § 383.660 (West 2012).
82. *Id.*
83. *See* KY. REV. STAT. ANN. § 383.660(2) (West 2012).
84. *See generally* KY. REV. STAT. ANN. § 383.195 (West 2012).
85. KY. REV. STAT. ANN. § 383.580 (West 2012).

responsibility to execute lists of any damages to the property.[86] Landlords must store security deposits in an account used only for that purpose, and they must also provide the name of the bank and the account number to the tenant.[87] KRLTA also presents a specific timeline for return of the security deposit.[88] On the other hand, common law provides no direction for the handling of security deposits, and therefore landlords and tenants are left to fend for themselves.

6. Utilities

KRLTA specifically addresses a tenant's right to the receipt of essential services and punishes landlords that fail to fulfill their duty to supply utilities or other essential services.[89] KRLTA also provides a statutory remedy in the form of damages to tenants who are denied the supply of essential services.[90] However, the common law is silent as to landlords' duties to provide utilities and other essential services, and therefore creative causes of action are the only hope for tenants in common law jurisdictions.

B. Analyzing KRLTA Through the Lens of Kentucky's Smaller and Rural Communities

Although there are differences between Kentucky's common law and KRLTA, the only substantive law that could be perceived as negatively impacting smaller and rural areas is KRS § 383.595 – the adoption of a minimum standard of habitability.[91] A residential tenant living in a city, county, or urban-county government that has not adopted KRLTA is without the protections of the warranty of habitability.[92] Meanwhile, the local governments that have adopted KRLTA provide tenants with a minimum standard of habitability.[93] KRS § 383.595, "Landlords Maintenance Obligations and Agreements," was enacted in 1984 after the Kentucky Supreme Court's decision in *Miles*, and it imposes various minimum requirements for landlords with regard to maintenance and repair of a residence.[94]

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86. *Id*.
87. KY. REV. STAT. ANN. § 383.580(1) (West 2012).
88. KY. REV. STAT. ANN. §§ 383.580(6)–(7) (West 2012).
89. KY. REV. STAT. ANN. § 383.595(1) (West 2012); § 383.640.
90. KY. REV. STAT. ANN. § 383.640 (West 2012).
91. KY. REV. STAT. ANN. §383.595 (West 2012) ("Landlords Maintenance Obligations and Agreements"). *See* Alan Romero, *Rural Property Law*, 112 W. VA. L. REV. 765 (2010).
92. *Miles*, 664 S.W.2d at 518 (quoting Milby v. Mears, S.W.2d 724, 728 (Ky. Ct. App. 1979)) ("It has been a long standing rule in Kentucky that a tenant takes the premises as he finds them. The landlord need not exercise even ordinary care to furnish reasonably safe premises, and he is not generally liable for injuries caused by defects therein.").
93. Miller v. Cundiff, 245 S.W.3d 786 (Ky. Ct. App. 2007) (holding that Uniform Residential Landlord Tenant Act did impose liability beyond that authorized at common law); KY. REV. STAT. ANN. § 383.595 (West 2012) ("Landlord's maintenance obligations and agreements").
94. KY. REV. STAT. ANN. § 383.595 (West 2012).

Professor Alan Romero, Director of the Rural Law Center at the University of Wyoming College of Law, has focused his attention on this exact issue – whether there needs to be a dichotomy between urban and rural residences for the warranty of habitability.[95] Professor Romero concluded that both urban and rural residential tenants are expecting and depending on habitable homes, and therefore a minimum standard of habitability is necessary in rural communities.[96] "To whatever degree implied warranty protection is less available to rural tenants, it seems to be another example of the law being influenced by rural assumptions and stereotypes rather than rural realities. But perhaps to some degree it also reflects lack of attention to rural needs and issues."[97] Not only does Romero find it necessary for rural areas to have a warranty of habitability, but he also argues that rural tenants are *more* in need of a warranty of habitability than urban tenants.[98]

The purpose behind URLTA's minimum standard of habitability was "to encourage landlords and tenants to maintain and improve the quality of housing."[99]

> [T]he 250 practicing lawyers, judges and law professors who drafted [URLTA] agreed the basic reform of the landlord-tenant laws could prevent marginal housing from sliding into the area of "uninhabitable housing" – and then, inevitably, into abandonment. Present laws in most states encourage landlords to "defer maintenance" to net high short-terms profits and tax benefits. In this way apartment buildings die by degree as plumbing, electrical and other systems decay and

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95. Alan Romero, Professor of Law, University of Wyoming College of Law, Resume, http://www.uwyo.edu/law/faculty-and-staff/resumes/romero.pdf (last visited Jan. 21, 2012).

96. *See* Alan Romero, *Rural Property Law*, 112 W. VA. L. REV. 765 (2010).

97. *Id.* at 783.

98. *Id.* at 782-83. ("But the warranty of habitability should be applied just as readily to rural landlords as urban landlords. Even if contrary assumptions about rural tenants were once true, today rural tenants who rent houses are expecting and depending upon habitable homes just as much as urban tenants. There is no reason to think rural home renters have more practical skills to inspect and repair the home either. In some ways, the need and justification for the implied warranty may be even greater in rural settings. The implied warranty of habitability has been explained as an assumption about the parties' expectations, but many courts have held that the warranty cannot be waived, regardless of whether tenants know what they are waiving. Prohibiting even a knowing waiver emphasizes that the warranty is based not just on parties' intentions, but also on a public policy to ensure decent housing – the policy reflected in building and housing codes. Today, rural housing is more likely to be substandard than urban housing. Furthermore, even if some continue to believe that rural tenants have more practical skills to make their housing more habitable themselves, it takes more than skills to repair and maintain housing. It takes money for tools and materials, too, and as a group, rural renters may have a harder time affording tools and materials because they spend an especially high percentage of their income on housing. So to whatever extent we impose the warranty of habitability on landlords to help ensure decent housing, the need may be even greater in rural areas. To whatever degree implied warranty protection is less available to rural tenants, it seems to be another example of the law being influenced by rural assumptions and stereotypes rather than rural realities. But perhaps to some degree it also reflects lack of attention to rural needs and issues.") (emphasis added).

99. URLTA, *supra* note 14, at art. I § 1.102(b)(3).

> eventually stop functioning entirely. At the same time, trash and garbage piles up, yards or common areas are unusable, and the property becomes a neighborhood eyesore eventually, fit only as housing for rats. Whenever a building reaches that point where taxes, mortgage rates and other fixed expenses eat up all the rent collected from tenants who have a decreasing ability to pay it, the property is unsalvageable. That's why the Uniform Residential Landlord and Tenant Act is aimed at keeping decent housing clean and safe. Our legislature, by placing duties to care for the property on both the landlord and tenant (see KRS 383.595 and KRS 383.605, respectively), has attempted to keep the property on the market, provide a fair return for the landlord, and provide the tenant with a habitable place to live.[100] [sic]

Due to KRLTA's unique territorial application provision, which fails to extend a minimum standard of habitability across the state,[101] Kentucky finds itself in exclusive company.[102]

> [E]very state, except Arkansas, currently has adopted a minimum-standard approach. The two most common approaches are the implied warranty of habitability, usually supported by statute, or a version of the URLTA model law. These standards require that a residence, to the landlord's knowledge, be free of latent defects and compliant with any applicable housing law, ordinance, or regulation that necessitate the premises be safe, sanitary and fit for living purposes.[103]

Although the statement that "every state . . . has adopted a minimum-standard approach" is correct,[104] those jurisdictions adopting URLTA do in fact have a minimum standard of habitability, this statement is also misleading because Kentucky's minimum standard of habitability is not applicable in communities that have not adopted KRLTA.[105] Kentucky and Arkansas are the only two states that have yet to adopt a minimum standard.[106] Alabama was one of the last states to pass a habitability statute, and it did so "with some fanfare . . . so it would not be one of only two states not recognizing the concept."[107] While Kentucky is stuck in a pre-modern age, having failed to adopt a minimum

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100. *Miles*, 664 S.W.2d at 515.
101. *See* KY. REV. STAT. ANN. § 383.500 (West 2011).
102. *See generally* Mark S. Dennison, *Cause of Action for Breach of Implied Warranty of Habitability in Residential Lease*, 25 CAUSES OF ACTION 2D 493, § 3 (2004) (listing specific causes of action and remedies relating to the implied warranty of habitability in residential leases, yet failing to list any causes of action available for Kentuckians outside of KRLTA).
103. Ashley E. Norman, *A Tenant's Dilemma: The Arkansas Residential Landlord-Tenant Act of 2007*, 62 ARK. L. REV. 859, 862-63 (2009).
104. *See supra* Part IV(A)(2).
105. *See* KY. REV. STAT. ANN. § 383.500 (West 2012).
106. Marshall Prettyman, *The Landlord Protection Act, Arkansas Code Section 18-17-101 et seq.*, 2008 ARK. L. NOTES 71, 72 (2008).
107. *Id.*

standard of habitability across the state,[108] modern debate has focused on whether habitability laws should go further to protect tenants.[109]

The detractors arguing against a statewide adoption of the warranty of habitability are likely to argue that Kentucky's economy makes the state different from the rest. After all, so the argument goes, Kentucky has a significant agriculture industry and this industry would be negatively affected if landowners were forced to invest in upgrading buildings on their property. Fortunately, the drafters of URLTA had the foresight to address this problem from the outset.[110] KRS § 383.535 excepts from application any "[o]ccupancy of a dwelling unit located on land devoted to the production of livestock, livestock products, poultry, poultry products or the growing of tobacco or other crops including timber."[111] In other words, KRLTA does not apply to farmhouses and other agricultural residences.[112]

Further, KRLTA detractors are likely to argue that landlords and tenants should have the freedom to contract, and therefore the state should not impose a statewide minimum standard. Once again, URLTA's drafters addressed this potential argument. KRLTA allows residential tenants to choose to maintain and repair their own residences, thereby waiving the landlord's obligations to uphold a minimum standard of habitability.[113] KRS § 383.595 provides that a landlord and tenant can agree to waive certain requirements of the landlord's obligation to

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108. *See supra* Part IV(A)(2).

109. Barbara Jo Smith, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty,* 72 WASH. U. L.Q. 475, 491 (1994) ("The rationale behind legislation protecting consumers of personal goods also applies to consumers of living space. Many of the characteristics of the modern tenant highlighted in *Javins* are similar to those of other consumers meriting legal protection. Both tenants and consumers in today's society cannot meaningfully inspect products and services because today's goods are too complex. Moreover, the landlord-tenant relationship, like the consumer merchant relationship, is not one of equal bargaining power. In fact, even wealthy tenants may not have enough bargaining power when there is a housing shortage."). *See also* Solow v. Wellner, 658 N.E.2d 1005 (N.Y 1995) (extending NY State's implied warranty of habitability to include the tenant's reasonable expectations whether or not the conditions threaten the tenant's life, health, or safety); Romero, *supra* note 95.

110. KY. REV. STAT. ANN. § 383.535(7) (West 2012).

111. *Id.*

112. *Id.*

113. KY. REV. STAT. ANN. § 383.595(3) (West 2012) ("The landlord and tenant of a single family residence may agree in writing that the tenant perform the landlord's duties specified in paragraph (e) of subsection (1) and also specified repairs, maintenance tasks, alterations, and remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord."); § 383.595(4) ("The landlord and tenant of any dwelling unit other than a single family residency may agree that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling only if: (a) The agreement of the parties is entered into in good faith and not for the purpose of evading the obligations of the landlord and is set forth in a separate writing signed by the parties and supported by adequate consideration; (b) The work is not necessary to cure noncompliance with subsection (1)(a) of this section; and (c) The agreement does not diminish or affect the obligation of the landlord to other tenants in the premises.").

maintain and repair.[114] The waiver agreement must be entered into in good faith and not for the purpose of evading a landlord's obligations; it must also be set forth in a separate writing, signed by the parties, and supported by adequate consideration.[115] This provision helps to ensure that a waiver agreement is not lost on tenants, who must fully understand what rights they are giving up.[116] Therefore, regarding the issue of habitability, those opposing a statewide approach cannot complain about the state's interfering with their right to define their own contractual obligations because KRLTA currently allows landlords and tenants to do so.[117]

Quite simply, the ideas that all rural communities are created equal[118] and that they can be defined simply by population figures[119] are both false notions. Further, not all urban counties are solely urban in nature – often they include rural residences as well.[120] Certainly, the adoption of a minimum standard of habitability may require some landlords to make investments in their properties to reach and maintain the requisite standard of habitability. However, the General Assembly also has the ability to consider this factor, and it may decide to postpone the legislation's efficacy a few years to give landlords time to make the necessary upgrades. A minimum standard of habitability should be applied to every city and county in Kentucky because agricultural residences are excepted from KRLTA's minimum-standard approach to habitability[121] and also because landlords and tenants can contract around KRLTA's maintenance requirements.[122]

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114. KY. REV. STAT. ANN. § 383.595(4) (West 2012).

115. *Id.*

116. *Id.*

117. *Id.*

118. Charles S. Perry, *Economic Activity and Social Indicators: A Rural-Urban Discontinuum*, 43 AM. J. ECON. & SOC. 61, 61-74 (1984), *available at* http://www.jstor.org/stable/3486395 ("Much rural sociology seems to hold a more-or-less implicit assumption that rural areas are farm areas and that rural residents have farm work, commute to city work or are self-employed, or have no work at all . . . . Rural areas are quite heterogeneous. Research that characterizes rural areas only on the basis of their low population densities may overlook many of their interesting features.").

119. *Id.* (concluding that rural areas in Kentucky are "quite heterogeneous" and that characterizing Kentucky's rural areas only on their basis of low population is problematic).

120. Amy Liu, Remarks at The Bluegrass Economic Advancement Movement, http://origin.peg.tv/pegtv_player?id=T01343&video=25828 (speaking on behalf of Brookings, a world-renowned, public-policy think-tank, Amy Liu argued that many so-called "urban" areas also contain subsets of "rural" land). *See generally* Tom Eblen, *Tom Eblen: Lexington-Louisville economic initiative has a lot going for it*, http://www.kentucky.com/2011/08/15/1845899/tom-eblen-lexington-louisville.html (discussing the talk conducted by Louisville mayor, Greg Fischer, Lexington mayor, Jim Gray, and Brookings' employee, Amy Liu).

121. KY. REV. STAT. ANN. § 383.535(7) (West 2012).

122. KY. REV. STAT. ANN. § 383.595(3) (West 2012).

V. BACK TO SQUARE ONE: ARGUING FOR A STATEWIDE TERRITORIAL APPLICATION AND A UNIFORM BODY OF LANDLORD-TENANT LAW IN KENTUCKY

The issue presented in this paper is similar to the issue the Supreme Court addressed in *Miles v. Shauntee*, the landmark decision which struck down KRLTA's original territorial application.[123] The question in *Miles* was whether a rational basis existed for limiting KRLTA to the state's foremost urban areas – Louisville and Lexington.[124]

> The appellant Miles asserts that the rational basis for limiting the URLTA to counties containing cities of the first class and urban-county governments is (1) the number and density of tenants in such counties, (2) the closeness of the dwellings in these urban areas and the corresponding health problems, (3) the amount of substandard housing and prevention of economic waste, and (4) its current non-application. *517 Although it may be conceded that Jefferson and Fayette Counties have the first and fourth, respectively, largest number of tenants occupying substandard housing of the one hundred and twenty (120) counties in the Commonwealth, the mere acuteness of the problem with respect to these two counties does not serve as a rational basis for eliminating or refusing to deal with similar situations, involving the other 118 counties in the Commonwealth. The problems of public health, economic waste and substandard dwelling dealt with by the act are no less important in the other 118 counties in the Commonwealth.[125]

The Court found *no rational basis* for limiting the application of KRLTA solely to urban communities because KRLTA's modern protections addressed problems that were not limited to larger urban areas.[126]

The Tennessee Court of Appeals' decision in *Crawford v. Buckner* expressed a similar viewpoint to that in *Miles* - that smaller and rural communities should not be swallowed up by the need for uniform laws in larger, urban areas.[127]

> It is highly probable that populations are crowded into rental properties in urban areas. The Legislature has determined that there is a need for greater restrictions in landlord/tenant relationship in crowded urban areas. In addition, large metropolitan areas historically have greater numbers of residents on public assistance and in low income housing. Uniform rules are arguably needed to establish guidelines for landlord/tenant responsibilities, to provide a modicum of protection to

123. *Miles*, 664 S.W.2d at 516-17.
124. *Id.*
125. *Id.*
126. *Id.* (emphasis added).
127. Crawford v. Buckner, C.A. No. 158, 1991 WL 127626 (Tenn. Ct. App. July 16, 1991), *rev'd on other grounds*, 839 S.W.2d 754 (1992).

> tenants who cannot readily procure legal services, and to reduce the filing of lawsuits in already overcrowded dockets.[128]

The premise underlying this viewpoint is that smaller counties do not need the protections afforded by a uniform body of landlord-tenant law *because* urban areas need the protections offered by uniform laws.[129] The argument advanced by the *Crawford* Court reeks of a political underpinning because the opinion contains loose arguments and it provides no hard evidence to support its position.[130] The Court's argument assumes that uniform rules are unnecessary in smaller and rural areas; it assumes that landlords do not need a "modicum of protection" when proceeding without counsel; and it assumes that only tenants are unable to procure legal services.[131] At this time, none of these assumptions carries weight in Kentucky. Meanwhile, the pertinent question remains: Why do smaller and rural communities insist that they do not need the modern protections offered by KRLTA?

Today, the dichotomy in Kentucky's landlord-tenant laws is unnecessary and only leads to confusion. "Of course, states are free to amend uniform laws as they choose, but the more a uniform law is amended, the more the benefit of uniformity is diminished."[132] The current territorial application is a significant departure from URLTA,[133] the uniform body of law that was abrogated and turned into KRLTA.[134] Of the twenty one states that have adopted URLTA in one form or another, only two states – Kentucky and Tennessee – utilize a territorial application that fails to create a uniform, statewide body of landlord-tenant law.[135]

Kentucky is the only state that gives local governments the power to adopt URLTA.[136] As one commentator noted even as far back as 1976, "[a] strong argument can be made for an amendment so that the statute is uniformly applied to all areas of the Commonwealth. The problems that plague the landlord-tenant relationship, while perhaps more acute in the more densely populated areas, are by no means unique to metropolitan Louisville and Lexington."[137] It is time for the General Assembly to amend KRLTA's territorial-application provision and create a uniform body of landlord-tenant law.

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128. *Id.* (sustaining Tennessee's territorial application provision and limiting its version of URLTA to counties with a population greater than 68,000).

129. *See id.*

130. *See id.*

131. *See id.*

132. Lynn Foster, *Uniform Laws, Legislation and the Arkansas Bar Association: A History and Report*, 46-WTR ARK. LAW. 10, 11 (2011).

133. *See* URLTA, *supra* note 14.

134. *See* KY. REV. STAT. ANN. §§ 383.500-383.715 (West 2012).

135. Barbara Jo Smith, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH. U. L.Q. 475, 487 (1994). *See supra* note 14.

136. *See* Smith, *supra* note 109.

137. Moss, *supra* note 20, at 597.

VI. CONCLUSION

In truth, this paper should never have been necessary. Yet, at the same time, this paper is long overdue. Essentially, a stubborn subset of legislators stonewalled a uniform act, the very purpose of which was to make landlord-tenant laws uniform; and it was their continued stubbornness that brought us to this moment. Although we intend to advocate vigorously on this topic, given the lack of movement since 1984, we do not anticipate seeing a change in the law anytime soon. Meanwhile, should the legislature fail to act, this paper should provide leaders of local governments with a strong foundation for adopting the modern protections of KRLTA.

KRLTA is by no means a perfect body of landlord-tenant law. However, before Kentucky can begin to upgrade the substance of its landlord-tenant laws, a body of law that has not been addressed in over 25 years, there first must *be* a body of law to update. The General Assembly cannot be expected to address the substance of KRLTA when these laws only affect a minority of our communities across the state. In the same light, our judiciary cannot be expected to upgrade the substance of our common law. Further, we must also consider the difficulty of passing legislation when many of the citizens most affected by these issues are without adequate resources to advocate for change. While the Kentucky Access to Justice Commission presses forward in providing relief to *pro se* litigants, the legislature should make a simple change to the landlord-tenant laws that will have a significant impact on the lives of Kentucky's residential landlords and tenants.

CANDID KENTUCKY: THE COMMONWEALTH'S DEVOTION TO AN OPEN GOVERNMENT

Alex Havlin[*]

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[1]

The Commonwealth of Kentucky displays a strong commitment to maintaining an open government. This article focuses on three mechanisms that allow Kentucky to operate with a great deal of transparency: the Open Records Act,[2] the Open Meetings Act,[3] and public access to courts.[4] Part I of this article discusses the Open Records Act, which the legislature intended to allow for public examination of government records and constituted perhaps the greatest step towards Kentucky's transparent government. Part II reviews the Open Meetings Act, which is similar to the Open Records Act except it allows for public attendance at certain public agency meetings. Finally, Part III summarizes the Kentucky and federal case law regarding public access to courts. By examining Kentucky's transparency mechanisms, this article uncovers the ways that Kentucky is realizing its commitment to fostering an open and accountable government.

I. THE OPEN RECORDS ACT

Perhaps the greatest indication of Kentucky's devotion to open government is found in the Open Records Act ("ORA").[5] The ORA was originally enacted by the General Assembly in 1976 and has since been amended on several occasions.[6] The General Assembly declared the "basic policy" of the ORA to be that "free and open examination of public records is in the public interest,"[7] and that "[a]t its most basic level, the purpose of disclosure focuses on the citizens' right to be informed as to what their government is doing."[8] In construing the ORA, the Supreme Court of Kentucky has explained:

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1. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).
2. KY. REV. STAT. ANN. §§ 61.870-61.884 (West 2012).
3. KY. REV. STAT. ANN. §§ 61.800-61.850 (West 2012).
4. *See infra* Part III.
5. KY. REV. STAT. ANN. §§ 61.870-61.884 (West 2012).
6. Sections of the Act were amended in 1986, 1992, 1994, 2000, 2005, and 2009.
7. KY. REV. STAT. ANN. § 61.871 (West 2012).
8. Zink v. Commonwealth, 902 S.W.2d 825, 829 (Ky. Ct. App. 1994).

> [t]he public's "right to know" under the Open Records Act is premised upon the public's right to expect its agencies properly to execute their statutory functions. In general, inspection of records may reveal whether the public servants are indeed serving the public, and the policy of disclosure provides impetus for an agency steadfastly to pursue the public good.[9]

Despite the importance of disclosure enunciated by the legislature and courts, the ORA contains a fairly extensive list of exemptions.[10] However, these exemptions should be "strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others."[11] Perhaps most importantly, judicial application of the ORA demonstrates that its provisions provide powerful protections for individual privacy.[12] This discussion begins with a particularly interesting aspect of the ORA – its inapplicability to the courts.

A. Basic Function

The ORA applies to all public agencies[13] in Kentucky.[14] Pursuant to the ORA, every public agency must adopt rules that ensure it operates "in conformity with the provisions" of the ORA.[15] Although anyone can request to view a record,[16] the agency maintaining the record may require the requesting party to submit a written application.[17] The agency then must provide an answer to the applicant regarding the request within three days.[18] If the agency denies the request, the applicant can appeal the decision to the Attorney General for a determination of the denial's validity.[19] The Attorney General's decision can then be appealed to "[t]he Circuit Court of the county where the public agency has its principal place of business or the Circuit Court of the county where the public record is maintained."[20]

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9. Kentucky Bd. of Exam'rs of Psychologists v. Courier-Journal & Louisville Times Co., 826 S.W.2d 324, 328 (Ky. 1992).

10. KY. REV. STAT. ANN. §§ 61.878(1)(a)-(n) (West 2012).

11. KY. REV. STAT. ANN. § 61.871 (West 2012).

12. Specifically exempted are "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." KY. REV. STAT. ANN. § 61.878(1)(a) (West 2012).

13. The term "public agency" is defined at KY. REV. STAT. ANN. § 61.870 (West 2012).

14. Interestingly, "any body which derives at least twenty-five percent (25%) of its funds expended" is included in the definition of "public agency." KY. REV. STAT. ANN. § 61.870(1)(h) (West 2012).

15. KY. REV. STAT. ANN. § 61.876 (West 2012).

16. KY. REV. STAT. ANN. § 61.872(1) (West 2012).

17. KY. REV. STAT. ANN. § 61.872(2) (West 2012).

18. KY. REV. STAT. ANN. § 61.872(5) (West 2012).

19. KY. REV. STAT. ANN. § 61.880 (West 2012).

20. KY. REV. STAT. ANN. § 61.882 (West 2012). It is very important to note that "[i]f an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision shall have the force and effect of law and shall be enforceable in the Circuit Court of the county where the

B. Exemptions

As mentioned above, the ORA contains numerous exemptions.[21] The ORA's mandate that its exemptions "shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others"[22] prevents the exemptions from eviscerating the ORA. This language ensures that the ORA's primary purpose—disclosure in the public interest—is maintained.[23]

Perhaps the most important exemption relates to personal privacy.[24] KRS § 61.878(1)(a) (the "personal privacy exemption") exempts from disclosure "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." The Supreme Court of Kentucky explained this exemption's import in *Kentucky Board of Examiners of Psychologists v. Courier-Journal & Louisville Times Co.*, stating:

> The language of subsection (1)(a) implies a number of other conclusions as well. First, it reflects a public interest in privacy, acknowledging that personal privacy is of legitimate concern and worthy of protection from invasion by unwarranted public scrutiny. Second, the statute exhibits a general bias favoring disclosure. Third, given the privacy interest on the one hand and, on the other, the general rule of inspection and its underlying policy of openness for the public good, there is but one available mode of decision, and that is by comparative weighing of the antagonistic interests. Necessarily, the circumstances of a particular case will affect the balance.[25]

This established the balancing test that has been used by courts to determine whether or not the personal privacy exemption applies.[26] It is important to note that the public interest must be a legitimate one because "the policy of disclosure is purported to subserve the public interest, not to satisfy the public's

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public agency has its principal place of business or the Circuit Court of the county where the public record is maintained." KY. REV. STAT. ANN. § 61.880(5)(b) (West 2012).

21. KY. REV. STAT. ANN. § 61.878(1)(a)-(n) (West 2012).

22. KY. REV. STAT. ANN. § 61.871 (West 2012).

23. *See supra* Part II.A.

24. *See Ky. Bd. of Exam'rs*, 826 S.W.2d at 327 ("Judging by order, if nothing more, one might say that (1)(a) is the foremost exception to the disclosure rule. Certainly it is an independently viable exception, not subordinate to any other, and not restricted to preliminary materials or non-final matters.").

25. *Ky. Bd. of Exam'rs*, 826 S.W.2d at 327-28. The court continued to explain the fact-specific nature of the analysis by stating that "[t]he statute contemplates a case-specific approach" and that "the question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.* at 328.

26. The balancing test "entails a 'comparative weighing of antagonistic interests' in which the privacy interest of nondisclosure is balanced against the general rule of inspection and its underlying policy of openness for the public good." *Zink*, 902 S.W.2d at 828 (quoting *Ky. Bd. of Exam'rs*, 826 S.W.2d at 327).

curiosity."[27] Further, the public interest "is not fostered . . . by disclosure of information about private citizens that is accumulated in various government files that [reveal] little or nothing about an agency's own conduct."[28]

The identity of the individual whose privacy is at risk is an important factor when considering a personal privacy exemption. At issue in *Lexington H-L Services, Inc. v. Lexington-Fayette Urban County Government* was a police case file from which the name of an alleged rapist was redacted.[29] Although a newspaper had received "some 900 pages of documents concerning the police investigation into the alleged rape," it sought to obtain a file without the suspect's name redacted, arguing only that this "would generally promote the public interest of monitoring police conduct."[30] The Kentucky Court of Appeals found this argument inadequate and denied the newspaper's request after "balancing the rape suspect's intrinsic personal privacy interest against such a nebulously asserted public interest."[31]

However, *Lexington H-L Services., Inc.* stands in contrast to *Palmer v. Driggers*,[32] where a newspaper sought information regarding disciplinary action taken against a city police officer.[33] The *Palmer* court distinguished the case from those similar to *Lexington H-L Services, Inc.* because in such cases "the information sought by the newspaper . . . [did] not contain information concerning an innocent, private citizen."[34] In contrast, the court noted that "[a]t the time of the complaint, Palmer was an Owensboro police officer, who was sworn to protect the public,"[35] necessarily making his actions in his official capacity of the public interest.[36] Simply because of his status, the court determined that, even though the complaint included allegations that were personal in nature, the disclosure "would not constitute a clearly unwarranted

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27. *Ky. Bd. of Exam'rs*, 826 S.W.2d at 328.

28. *Zink*, 902 S.W.2d at 829.

29. Lexington H-L Serv., Inc. v. Lexington-Fayette Urban Cnty. Gov't, 297 S.W.3d 579, 581 (Ky. Ct. App. 2009).

30. *Id*. at 585.

31. *Id.* The court continues to explain in a footnote that certain facts may justify the disclosure of a rape suspect's identity, "for example, in a case where a full investigation into police conduct could only be accomplished by disclosure of a suspect's identity. However, in the case *sub judice*, the Herald-Leader has failed to establish that disclosure of the rape suspect's identity was necessary to fully investigate police conduct." *Id.* It is important to note that the individual in this case was a rape *suspect*. The court explained in another footnote that the instant case "is contrasted with a circumstance where an individual has been arrested, charged and indicted for a sexual offense. In such a case, the individual's identity would clearly be subject to public disclosure." *Id.*

32. Palmer v. Driggers, 60 S.W.3d 591 (Ky. Ct. App. 2001).

33. *Id.* at 594.

34. *Id*. at 598.

35. *Id.* at 599.

36. *Id.* ("We believe the public has a legitimate interest in knowing the underlying basis for a disciplinary charge against a police officer who has been charged with misconduct . . . .").

invasion of Palmer's personal privacy," and it was therefore not exempt under the personal privacy exemption.[37]

Another example of public interest overcoming an asserted privacy interest is found in *University of Kentucky v. Courier-Journal & Louisville Times Co.*,[38] which involved a National Collegiate Athletic Association ("NCAA") inquiry into allegations that the University of Kentucky sent money to recruits in violation of NCAA rules.[39] In response to the inquiry, the University hired a private law firm to prepare a response to the NCAA at a cost of over $400,000.[40] The Supreme Court of Kentucky rejected the University of Kentucky's argument that disclosure of the response would "constitute a clearly unwarranted invasion of personal privacy."[41] The Court explained that:

> [t]he Response represents a legitimate inquiry into the operation of an agency of the Commonwealth. One of the purposes of the Act is to allow the public to scrutinize the action of such agencies. The University spent over $400,000.00 for the Response and the public has a legitimate interest in its contents.[42]

Accordingly, these cases demonstrate what the Supreme Court of Kentucky had previously explained in *Kentucky Board of Examiners*: the personal privacy exemption requires a case-by-case evaluation of the facts because "the circumstances of a particular case will affect the balance."[43]

The ORA plays an important role in ensuring that Kentucky's citizens have access to information about their government's practices. Consequently, that access makes it easier for the Commonwealth's citizens to hold their public officers accountable. An accountable government is an efficient government, benefitting those whom it serves. However, the ORA's personal privacy exemption ensures that government employees and private citizens will not have sensitive personal information disclosed when that information does not serve this purpose. Kentucky's courts have done an exemplary job in construing the ORA by taking a fact intensive approach to each case to balance the public need for information with the personal privacy interest at stake.

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37. *Id.*
38. Univ. of Ky. v. Courier-Journal & Louisville Times Co., 830 S.W.2d 373 (Ky. 1992).
39. *Id.* at 374.
40. *Id.* at 375.
41. *Id.* at 377.
42. *Id.*
43. *Ky. Bd. of Exam'rs*, 826 S.W.2d at 328. "The statute contemplates a case-specific approach by providing for de novo judicial review of agency actions, and by requiring that the agency sustain its action by proof. Moreover, the question of whether an invasion of privacy is 'clearly unwarranted' is intrinsically situational, and can only be determined within a specific context." *Id.*

II. THE OPEN MEETINGS ACT[44]

Like the ORA, the Open Meetings Act ("OMA") promotes the Commonwealth of Kentucky's policy of an open and accountable government. The General Assembly indicated that the "basic policy" of the OMA "is that the formation of public policy is public business and shall not be conducted in secret."[45] The OMA provides that "[a]ll meetings of a quorum of the members of any public agency[46] at which any public business is discussed or at which any action is taken by the agency, shall be public meetings, open to the public at all times,"[47] subject to certain enumerated exceptions.[48] The Kentucky Supreme Court has explained that "[t]he express purpose of the Open Meetings Act is to maximize notice of public meetings and actions. The failure to comply with the strict letter of the law in conducting meetings of a public agency violates the public good."[49]

A. Basic Function

The OMA's plain language demonstrates a strong preference for openness. For example, the OMA mandates that:

> [a]ll meetings of all public agencies of this state, and any committees or subcommittees thereof, shall be held at specified times and places which are convenient to the public, and all public agencies shall provide for a schedule of regular meetings . . . . The schedule of regular meetings shall be made available to the public.[50]

Although numerous, the exceptions to the OMA are to be "strictly construed,"[51] like those in the ORA.[52] For two of the listed exceptions, the statute only allows for "closed sessions" when a public agency meets four conditions.[53] Even if the conditions are met, "[n]o final action may be taken" during these closed sessions,[54] and the only matters that may be discussed are those that were previously announced in a prior open meeting.[55] Further, the OMA restricts the public agency from creating conditions for attendance "other than those required

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44. For an overview of the Open Meetings Act, see the outline prepared by the Attorney General's Office, available at http://ag.ky.gov/NR/rdonlyres/33223BFC-399E-4158-966E-539C92D940AD/0/orom_outline.pdf.
45. KY. REV. STAT. ANN. § 61.800 (West 2012).
46. "Public agency" is defined very broadly at KY. REV. STAT. ANN. §§ 61.805(2)(a)-(h) (West 2012) to allow for greater public access.
47. KY. REV. STAT. ANN. § 61.810(1) (West 2012).
48. *See infra* Part II.B.4.
49. Floyd Cnty. Bd. of Educ. v. Ratliff, 955 S.W.2d 921, 923 (Ky. 1997).
50. KY. REV. STAT. ANN. § 61.820 (West 2012).
51. KY. REV. STAT. ANN. § 61.800 (West 2012).
52. *See supra* Part I.B.
53. Ky. REV. STAT. ANN. §§ 61.815(1)(a)-(d) (West 2012).
54. KY. REV. STAT. ANN. § 61.815(1)(c) (West 2012).
55. KY. REV. STAT. ANN. § 61.815(1)(d) (West 2012).

for the maintenance of order" during the open meeting.[56] Most importantly for public agencies, "[a]ny rule, resolution, regulation, ordinance, or other formal action" made or taken "without substantial compliance with the requirements" of the OMA "shall be voidable by a court of competent jurisdiction."[57]

The OMA does allow for special or emergency meetings, but they are also subject to certain restrictions that promote openness. Even for these emergency meetings, the agency must give notice to media outlets that have requested it, and "[t]he notice shall be calculated so that it shall be received at least twenty-four (24) hours before the special meeting."[58] Additionally, "[a]s soon as possible, written notice shall . . . be posted in a conspicuous place in the building where the special meeting will take place and in a conspicuous place in the building which houses the headquarters of the agency."[59] Like notice to the media, the agency must post this notice at least twenty-four hours prior to the meeting.[60]

Finally, the OMA allows for an appeals process that is largely the same as that of the ORA;[61] a person may submit a complaint to the Attorney General's Office,[62] whose decision may be appealed within thirty days to "[t]he Circuit Court of the county where the public agency has its principal place of business or where the alleged violation occurred."[63]

B. Interpretations of the Open Meetings Act

As explained previously, the language of the OMA favors open access. This is also evidenced by the interpretation of both the Attorney General and the courts.

1. Location of Open Meetings

An Open Meetings Decision ("OMD") was rendered on April 15, 2002, where the Attorney General was asked to consider whether the location of

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56. KY. REV. STAT. ANN. § 61.840 (West 2012). Perhaps most interesting is the explicit instruction that "[n]o person may be required to identify himself in order to attend any such meeting."

57. KY. REV. STAT. ANN. § 61.848(5) (West 2012). It is important to remember that the actions of the agency are only *voidable*, not automatically void. *See*, *e.g.*, Chandler v. Bullitt Cnty. Joint Planning Comm'n, 125 S.W.3d 851, 856 (Ky. Ct. App. 2002) (holding that "[s]ince there was no showing of prejudice by the Commission's violation, the trial court properly upheld the Commission's action.").

58. KY. REV. STAT. ANN. § 61.823(4)(a) (West 2012).

59. KY. REV. STAT. ANN. § 61.823(4)(c) (West 2012).

60. *Id.*

61. *See supra* Part I.A.

62. KY. REV. STAT. ANN. § 61.846 (West 2012).

63. KY. REV. STAT. ANN. § 61.848(1) (West 2012). The OMA contains the same language as the ORA regarding the failure to appeal the Attorney General's decision, which results in that decision having "the force and effect of law." KY. REV. STAT. ANN. § 61.846(4)(b) (West 2012).

certain open meetings was proper.[64] The OMA challenge arose after the Covington City Commission held a retreat in Lexington, Kentucky.[65] The complainant argued that Lexington "is not 'a convenient place for a municipal meeting when that municipality is located over 80 miles away . . . ,'"[66] and therefore, the meetings violated the OMA. Although the Covington City Commission argued that it gave proper notice of the meetings, held them in rooms open to the public, and that "several citizens of Covington" attended,[67] the Attorney General agreed with the complainant that the meetings were in violation of the OMA.[68] The opinion stated that "a city commission meeting is not convenient to the public if it requires the citizenry directly concerned to leave the incorporated limits of the municipality in order to attend."[69] More generally, the opinion concluded that all "local government agencies such as county fiscal courts, [are] to conduct their meetings within the jurisdictional limits of the governmental units they serve."[70] The opinion also explains that "[a]nything that tends to inhibit the public's ability to freely attend local government agency meetings, including distance, is destructive of the rights granted to the public, and the duties imposed on public agencies, by the Open Meetings Act."[71]

2. The Meaning of "Public Agency"

The Supreme Court of Kentucky addressed the definition of "public agency" as it relates to the OMA in *Lexington Herald-Leader Co. v. University of Kentucky Presidential Search Committee*,[72] a case that involved a committee established by the University of Kentucky Board of Trustees to serve an advisory role in the selection of a new university president.[73] The committee held meetings that were closed to the public, because it did not believe it was subject to the OMA, yet "the Lexington Herald-Leader Co. and its reporter thought the opposite was true and considered themselves entitled to notice of meetings, minutes of these meetings, and personal attendance at the meetings."[74] The Court held that the committee was a public agency and therefore subject to the

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64. No. 02-OMD-78 2002 Ky. AG LEXIS 219 (Apr. 15, 2002).
65. *Id.* at 1.
66. *Id.* at 3 (quoting Howard B. Hodge, the complainant in the Open Meetings Decision).
67. *Id.* at 1.
68. *Id.*
69. *Id.* at 4 (citing MCQUILLIN MUNICIPAL CORPORATIONS (THIRD) § 13.07.20 (2011)).
70. No. 02-OMD-78 2002 Ky. AG LEXIS 219 at 6 (Apr. 15, 2002). The opinion later reiterates that it "is limited to local government agencies, including but not limited to city and county legislative bodies," but does not include "public agencies with statewide authority . . . [whose] meetings may properly be held anywhere in the Commonwealth." *Id.* at 7.
71. *Id.* at 6.
72. Lexington Herald-Leader Co. v. Univ. of Ky. Pres. Search Comm., 732 S.W.2d 884 (Ky. 1987).
73. *Univ. of Ky. Pres. Search Comm.*, 732 S.W. 2d at 885.
74. *Id.*

OMA.[75] The Court explained that "the statute in question, perhaps inartfully [sic] drawn, means that a public agency is any agency which is created by statute, executive order, local ordinance or resolution or other legislative act, or any committee, ad hoc committee, subagency or advisory body of said public agency."[76] Applying this understanding of the OMA, the Court reasoned that because the Board of Trustees was a statutorily created public agency that created a new committee, that committee was also a public agency.[77] The Court reasoned that "[a]ny other holding would clearly thwart the intent of the law."[78]

The Kentucky Court of Appeals addressed the definition of "public agency" further in *Howard v. City of Independence*,[79] a case involving the termination of Howard, the police captain of Independence (the "City"), at a hearing presided over by the City's mayor.[80] Howard sought to be reinstated because he believed the hearing violated the OMA.[81] Although Howard made a motion to advertise a public meeting, the mayor never addressed the motion and Howard failed to press the issue again.[82] The City argued that the OMA did not apply because the actions were the mayor's alone.[83] The City attempted to distinguish the statutory language "meetings of a quorum of the members of any public agency" from "acts of an individual authority."[84] The court, however, held that "the coverage of the Open Meetings Law is broad enough to include the action taken here," specifically citing the statutory definition of "public agency,"[85] which includes "[e]very state or local government board, commission and *authority*."[86] Thus, *Crawford* emphasizes that the OMA applies to some individual public employees as well as public agencies.

3. The Meaning of "Convenient"

The OMA promotes open government and access to public agencies. However, the Kentucky Supreme Court drew a clear line regarding the convenience of meetings in *Knox County v. Hammons*.[87] In *Hammons*, taxpayers requested that the Court void an ordinance passed at a special meeting, alleging that the meeting violated the OMA's "convenience" requirement.[88] Specifically, "[b]y scheduling the October 8 special meeting during the Daniel Boone

75. *Id.* at 886.
76. *Id.*
77. *Id.*
78. *Id.*
79. Howard v. City of Independence, 199 S.W.3d 741 (Ky. Ct. App. 2005).
80. *Id.* at 742.
81. *Id.* at 743.
82. *Id.* at 743-44.
83. *Id.* at 744.
84. *Id.*
85. *Howard*, 199 S.W.3d at 744 (citing § 61.805).
86. *Id.* (emphasis in original).
87. Knox Cnty. v. Hammons,129 S.W.3d 839 (Ky. 2004).
88. *Id.* at 844.

Festival, the Appellees argue[d] that Knox County did not conduct the meeting at a time or in a location that was 'convenient to the public' and, consequently, the Ordinance should be invalidated."[89] The Appellees also contended that the special meeting did not allow "'effective public observation,'" because "numerous citizens were not able to enter the crowded district courtroom and observed the proceedings from the hallway."[90]

The Supreme Court of Kentucky recognized that it would have been more convenient to hold the special meeting at a time so as not to conflict with the festival, or if it had to be held concurrently, "the fiscal court might have held the meeting at a location that was more convenient than the county courthouse, literally the epicenter of activity."[91] Despite these observations, the Court held that the special meeting did not violate the OMA because "Kentucky's Open Meetings Act does not impose upon government agencies the requirement to conduct business only in the *most* convenient locations at the *most* convenient times."[92] The Court held that "the open meetings statutes are designed to prevent government bodies from conducting its [sic] business at such inconvenient times or locations as to effectively render public knowledge or participation impossible, not to require such agencies to seek out the most convenient time or location."[93] The Court recognized that the OMA's purpose is to prevent agencies from acting in secret, not to force them to conduct business at the convenience of everyone.

4. Exceptions to the OMA

The Supreme Court of Kentucky addressed the strict construction of exceptions to the OMA in *Floyd County Board of Education v. Ratliff*.[94] The complaint in this case arose from four closed meetings of the Floyd County Board of Education during which the Board was to discuss "personnel" matters, specifically "the reorganization of the central office of the Board."[95] This reorganization would lead to three employees losing their jobs who challenged the Board's use of the OMA's personnel exception.[96] Prior to the last of the closed meetings, the three employees "circulated copies of a complaint which

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89. *Id.* The Court continued: "[T]he area surrounding the Knox County Courthouse is extremely congested during the festival week. The record reflects that available parking near the courthouse during the festival is virtually non-existent, and that it is inconvenient to maneuver through the festival area to reach the courthouse." *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 845 (emphasis in original).

93. *Hammons*, 129 S.W.3d at 845. Specifically regarding the special meeting in this case, the Court stated that "it certainly was not an inconvenient time or location. The fact that a large number of citizens did attend proves this point." *Id.*

94. Floyd Cnty. Bd. of Educ. v. Ratliff, 955 S.W.2d 921 (Ky. 1997).

95. *Id.* at 922.

96. *Id.*

they indicated they were contemplating filing in the United States District Court."[97] The Board defended the last closed meeting under the OMA's litigation exception claiming it closed the final meeting "in order to discuss pending litigation, that [wa]s, the potential suit of the [three employees]."[98] The Supreme Court of Kentucky held that neither the litigation exception nor the personnel applied in this case.[99] Regarding the litigation exception, the Court stated "that the drafters of this legislation clearly envisioned that this exception would apply to matters commonly inherent to litigation, such as preparation, strategy or tactics."[100] The Court then quoted *Jefferson County Board of Education v. Courier-Journal*,[101] in which the Court of Appeals of Kentucky stated that "the exception should not be construed to apply 'any time the public agency has its attorney present' or where the possibility of litigation is still remote."[102]

The Court then addressed the OMA's personnel exception, stating that it "does not allow a general discussion concerning a school reorganization plan when it involves multiple employees."[103] The Court held that "[t]he personnel exemption to the Open Meetings Act does not allow a general discussion concerning a school reorganization plan when it involves multiple employees."[104] The Board then argued that it was in substantial compliance with the OMA "because of the so-called veiled threats of potential litigation which justified the secret meeting."[105] The Court found this argument unconvincing and noted that the exceptions must be "strictly construed" and also that the Board did not comply with the OMA's requirements for a closed session related to litigation.[106] The Court closed its discussion by quoting the Court of Appeals of Kentucky's prior holding on the matter: "[T]he exceptions to the open meetings laws are not to be used to shield the agency from unwanted or unpleasant public input, interference or scrutiny. Unfortunately, we believe that is precisely how they were used in this case."[107]

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97. *Id.* at 923.
98. *Id.*
99. *Id.* at 924.
100. *Ratliff*, 955 S.W.2d at 923-24.
101. Jefferson Cnty. Bd. of Educ. v. Courier-Journal, 551 S.W.2d 25 (1977).
102. *Ratliff*, 955 S.W.2d at 924. The Court further quoted *Jefferson Co.*: "the matters discussed under KRS 61.810(1)(c) must not be expanded to include general discussion of 'everything tangential to the topic.'" After making these observations, the Court held that there was simply no evidence in the record to support the litigation exception. *Id.*
103. *Id.*
104. *Id.* at 924 (citing Reed v. City of Richmond, 582 S.W.2d 651 (Ky. Ct. App. 1979)).
105. *Id.*
106. *Id.*
107. *Id.* (internal quotation marks omitted).

III. PUBLIC ACCESS TO THE COURTS

Ensuring that the public has access to the courts is an essential element for maintaining accountability in any justice system. The Commonwealth of Kentucky shows its devotion to this ideal both in the Kentucky Constitution and in the decisions of its courts.[108] In *Ashland Publishing Co. v. Asbury*, the Court of Appeals of Kentucky explained that the relevant sections of the Kentucky Constitution "when viewed in the context of their history and of the history and traditions of our people can only be taken as an expression of the principle that justice cannot survive behind walls of silence and of an intent and spirit that there be a 'presumption of openness' to criminal proceedings in the courts."[109] This presumption is remarkable because the ORA, one of Kentucky's foremost open government mechanisms, does not bind Kentucky's courts.

A. Courts Exempt from the ORA

On its face, the ORA certainly appears to apply to the records of Kentucky; in fact, it explicitly states so.[110] This, however, is not the case. The Supreme Court of Kentucky initially denied this assertion in *Ex Parte Farley* when it stated "we are firmly of the opinion that the custody and control of the records generated by the courts in the course of their work are inseparable from the judicial function itself, and are not subject to statutory regulation."[111] In *Farley*, the Court decided whether a Public Advocate should have the right to "'periodic inspections' and the right to copy whatever records are being compiled pursuant to KRS 532.075(6)."[112] The Court stated that there was no reason to argue with statutory regulations when those regulations did not "interfere with the orderly administration of justice,"[113] but statutes that may or do interfere would not be treated the same.[114] The Court held that "with respect to records that belong to

108. Ashland Publ'g Co. v. Asbury, 612 S.W.2d 749, 751 (Ky. Ct. App. 1980) ("Section 8 of the Kentucky Constitution provides that '(p)rinting presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof.' Section 11 provides that '(i)n all criminal prosecutions the accused … shall have a speedy public trial by an impartial jury of the vicinage(,)' and Section 14 that '(a)ll Courts shall be open . . . .") (internal citations omitted).

109. *Id.* at 751-752.

110. *See* KY. REV. STAT. ANN. § 61.870(1)(e) (West 2012) ("(1) 'Public agency' means: . . . (e) Every state or local court or judicial agency."); KY. REV. STAT. ANN. § 61.8715 (West 2012) ("to ensure the efficient administration of government and to provide accountability of government activities, public agencies are required to manage and maintain their records according to these statutes").

111. *Ex Parte* Farley, 570 S.W.2d 617, 624 (Ky. 1978).

112. *Id.* at 619. KRS § 532.075(6) addresses capital punishment.

113. *Farley*, 570 S.W.2d at 624.

114. *Id.* at 624-25. In this instance, the Court explained the potential interruption: "If this latter subsection means materials and data in the process of being accumulated, or which already have been accumulated, to the end that the court may select from it such portions as it deems pertinent

the courts and are a part of their ongoing work, the only conclusion consistent with the constitutional right of control over their own records is that the public policy must be articulated by the courts themselves."[115] The policy created in this instance is that the courts do not have to disclose records that they have not yet themselves had an opportunity to review.[116] The Court further strengthened its position that at least some court records have some protection from ORA requests by relying on KRS § 26A.200, which makes all court records "the property of the Court of Justice and are subject to the control of the Supreme Court."[117]

In response, the Attorney General stated that "[i]t is for the Court, and not this office, to determine which policies evinced by the Open Records Law present interferences with the orderly conduct of its business, and which policies it will accept as a matter of comity."[118] Therefore, following *Farley*, the ORA does not apply to Kentucky's courts although the ORA explicitly states that Kentucky courts are subject to its rules.[119] This result demonstrates the strong need for decisions that protect the public's access to Kentucky's courts.

B. Public Access Case Law

When considering a question of public access to courts, the interests of the public must be balanced with the need for a fair trial, two notions that have changed over time. "Just as modern notions of what is embodied in the constitutional safeguard of a free press are much broader than what once was thought to suffice, so too have notions of what is embodied in the safeguard of a fair trial expanded."[120] The state of this balance is the essential measure in any conflict regarding public access to courts and it is the focus of the following cases.

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for comparison with the facts of a case or cases to be reviewed by it, then a compliance with the statute would interfere with our work." *Id.* at 625.

115. *Id.*

116. The *Farley* Court used a hypothetical explanation to prove its point: "Suppose that during the accumulation of facts, figures and studies which became the hallmark of his work the late Mr. Justice Brandeis had been obliged to let the lawyers and litigants make Xerox copies of what lay on his library table from day to day." *Id.*

117. KY. REV. STAT. ANN. § 26A.200 (1) (West 2012).

118. No. 04-ORD-037, 2004 Ky. AG LEXIS 194, at 4 (Feb. 24, 2004).

119. The Kentucky Supreme Court's reasoning in *Farley* was followed by the Kentucky Court of Appeals in *York v. Commonwealth*. There, the court explained: "the only statute which specifically names courts as public agencies has been held not to apply to court records." York v. Commonwealth, 815 S.W.2d 415, 417-18 (Ky. Ct. App. 1991).

120. *Asbury*, 612 S.W.2d at 752. The Court continued, stating "these two safeguards collide only when an extremist view is taken of either." *Id.*

1. *Riley v. Gibson*

The Supreme Court of Kentucky's most recent case regarding public access to courts is *Riley v. Gibson*.[121] The complaint in the case was filed after a judge held a contempt of court hearing in chambers and did not allow a reporter from the Courier-Journal ("Appellant") to enter.[122] Appellant filed and won a motion for release of a recording of the hearing, but also filed a petition for a writ of mandamus or prohibition against closure of the hearing."[123] After the Court of Appeals denied the writ, the matter came before the Supreme Court of Kentucky.[124] The Court began its right-of-access discussion with a discussion of the First Amendment, observing that "the United States Supreme Court has declared that these freedoms of expression may sometimes imply a constitutional right of access. '[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'"[125] The United States Supreme Court thereby established that, in certain situations "where access to certain proceedings, or documents, is essential for bedrock First Amendment expression to be exercised," there exists an affirmative right of access.[126]

The Supreme Court of Kentucky then analyzed whether that affirmative right existed in the specific hearing at issue using the "two-tiered history-and-logic test"[127] of *Richmond Newspapers v. Virginia*.[128] The United States Supreme Court explained the test by stating "'[t]hese considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.'"[129]

The Supreme Court of Kentucky then addressed the "integral public purpose" of access to proceedings, explaining:

> "The value [to the public] of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known."[130]

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121. Riley v. Gibson, 338 S.W.3d 230 (Ky. 2011).
122. *Id.* at 232.
123. *Id.*
124. *Id.*
125. *Id.* at 235 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
126. *Id.*
127. *Riley*, 338 S.W.3d at 235.
128. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).
129. *Riley*, 338 S.W.3d at 235 (quoting Press-Enterprise v. Superior Court II, 478 U.S. 1, 9 (1986)).
130. *Riley*, 338 S.W.3d at 235 (quoting Press-Enterprise v. Superior Court I, 464 U.S. 501, 508 (1984) (alterations in original)). The Court further quoted *Press-Enterprise I* in explaining the public interest in criminal matters: "This openness has what is sometimes described as a

This value, the Court stated, is found in "public access to most, if not all, stages of standard criminal prosecutions."[131] It concluded the public access discussion with:

> Thus, if it can be established that all defendants, or the public at large, have a stake in the process and outcome of such proceedings, then public access must be allowed. Clearly, this would include public access to criminal contempt proceedings, which are analogous to criminal trials in general, given that the purpose of criminal contempt proceedings is to impose punishment. The public's interest in access is to make sure that the court's contempt power is not being abused, either to the unfair benefit or detriment of those accused of acting contemptuously. This interest is sufficient to require access under the First Amendment.[132]

Accordingly, the Court held that "[b]ecause the public's interest in a criminal contempt proceeding is essentially the same as its interest in any criminal trial, criminal contempt proceedings must be open to the public, including the media."[133]

2. Other Public Access Decisions

The Supreme Court of Kentucky considered public access to *voir dire* proceedings in *Lexington Herald-Leader Co., Inc. v. Meigs*,[134] a case which was quickly followed by United States Supreme Court decisions in *Press-Enterprise v. Superior Court*[135] and *Waller v. Georgia*.[136] Each of these decisions reached a similar conclusion and offers valuable insight.[137]

In *Meigs*, the Supreme Court of Kentucky stated that "the basic dilemma is fair trial versus free press," and that with regard to *voir dire*, "[t]he closure question turns on a balancing of constitutional rights, those of the accused and

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'community therapeutic value.' Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected." *Id.* at 235-36 (quoting *Press-Enterprise I*, 464 U.S. at 508-09).

131. *Id.* at 236.

132. *Id.*

133. *Id.* at 238.

134. Lexington Herald-Leader Co. v. Meigs, 660 S.W.2d 658 (Ky. 1983).

135. Press-Enterprise v. Superior Court, 464 U.S. 501 (1984).

136. Waller v. Georgia, 467 U.S. 39 (1984).

137. Courts have also recognized a public right of access to proceedings other than those in the courts, such as administrative hearings. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (relating to deportation hearings).

those of the press and public, not on deciding the moment when the trial commences."[138] The Court established three "rules regarding closure."[139] The first rule is that "[t]here must be a hearing."[140] The second rule is that at the hearing, "[t]he burden of proof is on those who would infringe the First Amendment right of access, not on those who assert it."[141] The last rule establishes the threefold burden of proof that the accused must show: (1) that the right to be protected "is sufficiently important to warrant the extraordinary protection of the closed court," (2) that there are probably not "less restrictive alternatives to closure," and (3) that the right will probably "be protected by a closed proceeding."[142] The Court found that closure of *voir dire* was warranted in *Meigs* and stated, more generally, "[i]f we intend to pay more than mere lip service to the concept of an impartial jury, we must give the trial court discretion to prevent other jurors from being exposed to their answers."[143]

In *Press-Enterprise v. Superior Court I*, the United States Supreme Court considered a California case in which all but three days of six weeks of *voir dire* were closed.[144] The Court determined that there is a presumption of openness established by history and stated that it "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[145] The Court also noted the need to consider alternatives to closure, holding that "[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*."[146]

The United States Supreme Court considered the closure of suppression hearings in *Waller v. Georgia*, specifically "the extent of the accused's right under the Sixth Amendment to insist upon a public" suppression hearing.[147] When the defendants sought to suppress wiretaps and other evidence, the state moved to close the suppression hearing, stating "that in order to validate the

138. *Meigs*, 660 S.W.2d at 662. The *Meigs* Court also gave a summation of United States Supreme Court decisions regarding public access up to that point, which remains largely unchanged: "The Sixth Amendment guarantee of public trial is a right personal to the accused, but the First Amendment gives the press and public a right of access to trial separate and apart from the accused's Sixth Amendment right. It is only when necessary for protection of a defendant's Sixth Amendment fair trial rights that a court may, after a proper hearing, bar members of the press and public. The right of press and public access is not absolute, but the accused has no exclusive right to either demand or deny the presence of the press and public." *Id.*

139. *Id.* at 663.

140. *Id.* The Court also quoted *Richmond Newspapers*: "Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 581).

141. *Id.*

142. *Id.* at 664.

143. *Id.* at 667.

144. *Press-Enterprise I*, 464 U.S. at 503.

145. *Id.* at 510.

146. *Id.* at 511.

147. *Waller*, 467 U.S. at 44.

seizure of evidence derived from the wiretaps the state would have to introduce evidence 'which [might] involve a reasonable expectation of privacy of persons other than' the defendants."[148] Like the Supreme Court of Kentucky in *Meigs*, the Court in *Waller* explained that the fact that a suppression hearing is not an actual trial is not dispositive, and, in fact, "suppression hearings often are as important as the trial itself."[149] The Court also restated the test from *Press-Enterprise I* as follows:

> the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.[150]

Ultimately, the Court found that "the state's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes," and therefore insufficient to justify closure of the suppression hearing.[151]

IV. CONCLUSION

The Open Records Act, Open Meetings Act, and Kentucky's public access decisions are excellent examples of the Commonwealth's devotion to maintaining an open government. These laws allow the people of Kentucky to stay informed about, and participate more actively in, the actions of their government, thereby improving the government's accountability throughout the Commonwealth's agencies.

148. *Id.* (alteration in original).
149. *Id.* at 46.
150. *Id.* at 48.
151. *Id.*

DETERMINING WHO GETS THE WINDFALL: RECENT DEVELOPMENTS OF THE COLLATERAL SOURCE RULE IN KENTUCKY

Linda H. Schaffer[*] *and Olesja L. Cormney*[**]

I. INTRODUCTION

In 1988, the Kentucky General Assembly passed a law that abrogated the common-law collateral source rule.[1] Several years later, however, the Kentucky Supreme Court declared the statute unconstitutional.[2] A series of decisions soon followed that addressed how the collateral source rule would apply to a variety of third party payments.

This article surveys these recent developments in Kentucky courts' application of the collateral source rule. Part II provides an overview of the rule's development in America, tracking its changes over the last several decades. Part III discusses how Kentucky courts have recently applied the collateral source rule to a range of common third party payments in the following contexts: underinsured motorist payments; Medicare adjustments; worker's compensation payments; and Social Security disability payments. Part IV then discusses whether Kentucky courts favor plaintiffs wanting to waive the collateral source rule's protection. Part V addresses two emerging exceptions to the collateral source rule: a "malingering" exception and a "financial hardship" exception. Finally, Part VI focuses on the compatibility between the collateral source rule and the subrogation doctrine in Kentucky. Ultimately, this survey will familiarize practitioners with the most recent Kentucky court decisions regarding the collateral source rule and how it applies to various types of third party payments.

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1. KY. REV. STAT. ANN. § 411.188 (West 2012) *declared unconstitutional by* O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995).

2. O'Bryan v. Hedgespeth, 892 S.W.2d 571, 578 (Ky. 1995).

II. BACKGROUND AND HISTORY

A. Operation of the Collateral Source Rule

When an individual's unreasonable or negligent acts harm an innocent person, that individual may be liable for damages under tort law.[3] However, the common law collateral source rule ("CSR") provides that any benefits an injured party receives for his injuries from a source independent of - or collateral to - a tortfeasor shall not diminish the tortfeasor's damage liability.[4] The Restatement (Second) of Torts discusses the CSR by stating that "payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."[5]

The purpose of the CSR is to serve several public policy functions.[6] First, as the Restatement (Second) of Torts states, the CSR prevents a windfall or benefit to the tortfeasor by ensuring that his liability is not diminished by an injured party's independent benefits.[7] Second, the rule makes certain that the injured party is not punished for having the foresight to acquire insurance or alternative sources of payment.[8] Finally, the CSR is both substantive and evidentiary in nature.[9] Substantively, the rule's goal is to prevent reduction of damages by any amount received from sources independent from the tortfeasor.[10] However, the CSR also bars the tortfeasor from introducing as evidence any payments made to the injured party by collateral sources. This is to prevent the jury from improperly awarding the victim a lesser amount, knowing that a third party has already covered some or all of the expenses.[11]

3. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 1 (2d ed. 1955).
4. 22 AM. JUR. 2D *Damages* § 392 (2003).
5. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).
6. Ty A. Patton, Comment, *Common Sense and the Common Law, They're Not as Common as They Used to Be: A Critique of the Kansas Supreme Court's New Application of the Collateral Source Rule,* 50 WASHBURN L.J. 537, 538 (2011).
7. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).
8. Patton, *supra* note 8.
9. Natalie J. Kussart, Comment, *Paid Bills v. Charged Bills: Insurance & the Collateral Source* Rule Arthur v. Catour, 833 N.E.2D 847, 31 S. ILL. U. L.J. 151, 153 (2005).
10. *Id.*
11. *Id.*

B. Development of the Collateral Source Rule in America

The CSR originated in England in 1823.[12] The United States Supreme Court adopted the rule several decades later in 1854, in *Propeller Monticello v. Mollison*,[13] when it held that insurance benefits would not reduce damages awards.[14] In that case, the Court held that an insurance contract was "in the nature of a wager between third parties, with which the trespasser ha[d] no concern. The insurer [did] not stand in the relation of a joint trespasser, so that the satisfaction accepted from him [should] be a release of others."[15] Although the *Propeller Monticello* decision embodied the spirit of the CSR, the term "collateral source" was first used by the Vermont Supreme Court in *Harding v. Town of Townsend*[16] in 1870.[17] Specifically, the court held that "the policy of insurance [was] collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory."[18]

Subsequently, every jurisdiction adopted the CSR in some capacity, with Alabama being the last state to adopt it in 1977.[19] Most states adopted their own versions of the CSR, with many jurisdictions imposing statutory or judicial restrictions on the rule.[20] Currently, fourteen states have abrogated the CRS in suits for medical malpractice, and another seventeen states have abrogated the rule entirely.[21] Additionally, Kentucky, New Hampshire, Georgia, and Kansas have all tried to abolish or limit the rule, but each of their state supreme courts have overturned the statutes as violating their state constitutions.[22]

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12. Robert Hernquist, Comment, Arthur v. Catour: *An Examination of the Collateral Source Rule in Illinois*, 38 LOY. U. CHI. L.J. 169, 176 (2006) (citing THOMAS MOORE, MEDICAL MALPRACTICE § 5:2.1 (7th ed. Supp. 2005)).

13. Propeller Monticello v. Mollison, 58 U.S. 152 (1854).

14. *Id.* at 155.

15. *Id*.

16. Harding v. Town of Townsend, 43 Vt. 536, 538 (1870).

17. Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 741 (1964).

18. *Harding*, 43 Vt. at 538.

19. Hernquist, *supra* note 14, at 176 (citing John L. Antracoli, Comment, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 HASTINGS L.J. 667 (1986)).

20. *Id.* at 177.

21. Patton, *supra* note 8, at 542 (citing Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards,* 76 DEF. COUNS. J. 210, 210-46 (2009)).

22. Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort's Soul*, 48 U. LOUISVILLE L. REV. 1, 4-5 (2009). *See* Denton v. Con-Way S. Express, Inc., 402 S.E.2d 269, 272 (Ga. 1991), *overruled by* Grissom v. Gleason, 418 S.E.2d 27, 29 (Ga. 1992) (overturning a Georgia statute eliminating the CSR on constitutional grounds); Thompson v. KFB Ins. Co., 850 P.2d 773, 782 (Kan. 1993) (invalidating a Kansas statute attempting to eradicate the CSR); *O'Bryan*, 892 S.W.2d at 578 (holding that a Kentucky statute that abrogated the CSR was unconstitutional); Carson v.

This inconsistency among the states in adopting the CSR has resulted from the continuous battle between the rule's opponents and supporters.[23] Many states sought to limit or abolish the CSR in response to widespread criticisms of the rule,[24] the most common critique being its perceived punitive effect.[25] Critics argue that the application of the CSR leads to the overcompensation of plaintiffs;[26] and that the policy of modern tort law is to make a victim whole and not to punish a tortfeasor.[27] According to these critics, the CSR contravenes this policy by allowing "double recovery" that places a plaintiff in a better position than before the tort occurred.[28]

CSR supporters, on the other hand, defend the rule by advancing one of three propositions.[29] First, because a tortfeasor harmed a plaintiff, any windfall created by collateral source payments should go to the victim and not the tortfeasor.[30] Second, because the injured party has often paid for collateral benefits, it is unfair for the tortfeasor to benefit from the victim's foresight to acquire insurance or another source of collateral payments.[31] Third, because the "American rule" provides that victims bear their own attorney's fees,[32] any windfall the CRS creates is necessary to make the injured parties whole.[33] Some advocates of the CSR even claim that the rule is the best tool to correct the imbalance that tortfeasors create with their harmful acts.[34]

Although there are both advantages and disadvantages to the CSR, completely ignoring the benefits of this rule and abolishing it can be harmful to a state's tort law system in the long run. Instead of simply abrogating the CSR, legislators and courts should consider the rule's applicability to different third party payments. Then, if necessary, the appropriate body may impose limitations on its application.

Maurer, 424 A.2d 825, 826 (N.H. 1980), *overruled by* Cmty. Res. for Justice, Inc. v. City of Manchester, 917 A.2d 707, 721 (N.H. 2007) (holding a New Hampshire statute abolishing the CSR as unconstitutional).

23. Hernquist, *supra* note 14, at 181-82.
24. Krauss & Kidd, *supra* note 24, at 4.
25. Hernquist, *supra* note 14, at 181-82.
26. *Id.* at 182.
27. *Id.*
28. *Id.*
29. Krauss & Kidd, *supra* note 24, at 5-6.
30. *Id.* at 6.
31. *Id.*
32. BLACK'S LAW DICTIONARY 98 (9th ed. 2009).
33. Krauss & Kidd, *supra* note 24, at 6.
34. *Id.* at 51-52.

C. Development of the Collateral Source Rule in Kentucky

The CSR has been subjected to significant trials and tribulations since the Kentucky Court of Appeals, the predecessor to the Kentucky Supreme Court, first discussed the rule in 1901.[35] Over the next sixty years, the Court addressed the subject of the CSR on several other occasions.[36] Eventually, the Kentucky Supreme Court formally adopted the CSR in *Taylor v. Jennison*.[37] In *Taylor*, the Court first described the rule and noted that it had been widely adopted in other jurisdictions.[38] The Court then provided its rationale for adopting what it considered to be a "sound" rule: "We are convinced this rule is sound, particularly since there is no logical or legal reason why a wrongdoer should receive the benefit of insurance obtained by the injured party for his own protection."[39]

In 1988, however, the Kentucky General Assembly enacted Kentucky Revised Statute (KSR) § 411.188,[40] which abrogated the CSR.[41] KRS § 411.188 required that (1) all collateral source payments, except for life insurance, be admissible in civil actions, and (2) parties holding subrogation rights to any portion of the damage award be listed and notified by the plaintiff or his attorney.[42] The Kentucky Court of Appeals first discussed the constitutionality of this statute in *Edwards v.*

35. Louisville & N.R. Co. v. Carothers, 65 S.W. 833, 834 (Ky. 1901).

36. *See, e.g.*, McFarland v. Bruening, 185 S.W.2d 247, 249 (Ky. 1945); Barr v. Searcy, 133 S.W.2d 714, 715 (Ky. 1939).

37. Taylor v. Jennison, 335 S.W.2d 902 (Ky. 1960).

38. *Id.* at 903.

39. *Id*.

40. KY. REV. STAT. ANN. § 411.188 (West 2012) provides in its entirety:

> (1) This section shall apply to all actions for damages, whether in contract or tort, commenced after July 15, 1988.
>
> (2) At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.
>
> (3) Collateral source payments, except life insurance, the value of any premiums paid by or on behalf of the plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial.
>
> (4) A certified list of the parties notified pursuant to subsection (2) of this section shall also be filed with the clerk of the court at the commencement of the action.

41. *See generally* Craig L. Farrish, Comment, *Restoration of the Collateral Source Rule in Kentucky: A Review of* O'Bryan v. Hedgespeth, 23 N. KY. L. REV. 357, 357-61 (1996) (discussing the perceived liability insurance crisis in Kentucky, which prompted the Kentucky General Assembly to abrogate the CSR. The liability insurance crisis evolved as the insurance industry experienced significant financial losses and, as a result, raised premiums, cancelled existing policies, and profusely avoided high-risk policies).

42. KY. REV. STAT. ANN. § 411.188 (West 2012).

Land.[43] In that case, the court reversed the decision of the Boyle County Circuit Court and declared that KRS § 411.188 was constitutional.[44] Among other bases for constitutionality, the appellate court looked at whether KRS § 411.188 violated section 54 of the Kentucky Constitution,[45] which states that "[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."[46] The court ruled that KRS § 411.188 did not set any cap on the recovery of damages in civil actions, pointing out that the statute made "no mention at all of limiting damages."[47] Although the court of appeals admitted that the statute could lead to the reduction of damages awarded in civil actions,[48] the Supreme Court of Kentucky declined discretionary review of the decision.[49]

Only two years later, however, the Supreme Court of Kentucky declared KRS § 411.188 unconstitutional in *O'Bryan v. Hedgespeth*.[50] In *O'Bryan*, the Court found that "all evidence of collateral source payment was constitutionally impermissible, and prejudicial to the jury's consideration of damages."[51] The question of which government branch has the power to determine the relevance of evidence was at the heart of the *O'Bryan* decision.[52] The Court concluded that the relevance of evidence should be determined judicially, not legislatively.[53] The Court reasoned:

> Before KRS 411.188 was enacted, evidence of payments to the plaintiff from medical or disability insurers was excluded as irrelevant, recognizing that such payments have no bearing on the issue to be judicially decided, the amount of damages the plaintiff has incurred and is entitled to recover from the wrongdoer in the civil action, nor does it matter that the source of the collateral source benefits may be entitled to reimbursement from the recovery because of contractual or statutory subrogation rights. (citations omitted) . . . There is no legal reason why the tortfeasor or his liability insurance company should receive a "windfall" for benefits to which the plaintiff may be entitled by reason of his own foresight in paying the premium or as part of what he has earned in his employment . . . .[54]

43. Edwards v. Land, 851 S.W.2d 484, 485 (Ky. Ct. App. 1992).
44. *Id*. at 484.
45. *Id*. at 488.
46. KY. CONST. § 54.
47. *Edwards*, 851 S.W.2d at 488.
48. *Id*.
49. Land v. Edwards, 858 S.W.2d 698 (Ky. 1993).
50. O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995).
51. *Id.* at 574.
52. *Id.* at 576.
53. *Id*.
54. *Id*.

Thus, by pronouncing KRS § 411.188 unconstitutional, the Court in *O'Bryan* firmly established that determining the relevancy of evidence was a judicial function.[55] The Court also recognized some very important advantages of the CSR.[56] Specifically, the Court found it important for any windfall from collateral source payments to go to the victim and not the tortfeasor.[57] Furthermore, the Court refused to punish the victim for having the foresight to acquire insurance and pay its premiums.[58]

In a society where insurance is fundamental to everyday personal and business activities, it would be counterintuitive to discourage individuals from acquiring insurance and timely paying premiums. The CSR provides an incentive to individuals to maintain their insurance by ensuring that their foresight and diligence will be rewarded.

III. THE COLLATERAL SOURCE RULE AS APPLIED TO COMMON THIRD PARTY PAYMENT SCENARIOS

In recent years, Kentucky's courts have ruled on the CSR's applicability to several third party payment scenarios. This section addresses four of the most common scenarios in which this issue arises.

A. Underinsured Motorist Payments

In 2005, the Kentucky Court of Appeals held that the CSR applies to Underinsured Motorist ("UIM") payments in *Schwartz v. Hasty*.[59] In that case, Schwartz suffered severe injuries when he collided with Hasty, whose negligence was adjudged to have caused the accident.[60] Hasty had automobile liability insurance coverage through Kentucky Farm Bureau Mutual Insurance Company ("Farm Bureau") with a liability limit of $100,000.[61] Schwartz had UIM coverage from State Farm Insurance Company ("State Farm") for $100,000 and from Progressive Northern Insurance Company ("Progressive") for $25,000.[62] After a jury trial, the jury awarded Schwartz $198,650.40 in damages, plus costs and fees.[63] Hasty appealed.[64] While the appeal was pending, Schwartz settled his

55. *Id.*
56. *O'Bryan*, 892 S.W.2d at 576.
57. *Id.*
58. *Id*. at 578.
59. Schwartz v. Hasty, 175 S.W.3d 621 (Ky. Ct. App. 2005).
60. *Id.* at 624.
61. *Id*.
62. *Id.* According to KRS § 304.39-320, an underinsured motorist is "a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on account of injury due to a motor vehicle accident."
63. *Id*.
64. *Id.*

UIM claims against State Farm and Progressive for $78,614.27 and $25,000, respectively (collectively, the "UIM payments").[65]

Schwartz, Hasty, and Farm Bureau also entered into a partial settlement agreement before Hasty's appeal was heard; however, the parties disagreed about whether the UIM payments would offset the jury's verdict as collateral source payments.[66] Farm Bureau filed a motion for order of satisfaction with the trial court to obtain a ruling on that issue.[67] In support of its motion, Farm Bureau asserted that the CSR did not apply to the UIM benefits.[68] Specifically, Farm Bureau cited KRS § 304.39-320[69] to prove the effect of the UIM payments.[70] In response, Schwartz

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65. *Schwartz*, 175 S.W.3d at 624.
66. *Id.* at 624-25.
67. *Id.* at 625.
68. *Id.*
69. KY. REV. STAT. ANN. § 304.39-320 (West 2012). The statute provides in its entirety:

> (1) As used in this section, "underinsured motorist" means a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on account of injury due to a motor vehicle accident.
>
> (2) Every insurer shall make available upon request to its insureds underinsured motorist coverage, whereby subject to the terms and conditions of such coverage not inconsistent with this section the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against the owner of the other vehicle exceeds the liability policy limits thereon, to the extent of the underinsurance policy limits on the vehicle of the party recovering.
>
> (3) If an injured person or, in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured, and the settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of thirty (30) days to consent to the settlement or retention of subrogation rights. An injured person, or in the case of death, the personal representative, may agree to settle a claim with a liability insurer and its insured for less than the underinsured motorist's full liability policy limits. If an underinsured motorist insurer consents to settlement or fails to respond as required by subsection (4) of this section to the settlement request within the thirty (30) day period, the injured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim.
>
> (4) If an underinsured motorist insurer chooses to preserve its subrogation rights by refusing to consent to settle, the underinsured motorist insurer must, within thirty (30) days after receipt of the notice of the proposed settlement, pay to the injured party the amount of the written offer from the underinsured motorist's liability insurer. Thereafter, upon final resolution of the underinsured motorist claim, the underinsured motorist insurer is entitled to seek subrogation against the liability insurer to the extent of its limits of liability insurance, and the underinsured motorist for the amounts paid to the injured party.

contended that the CSR was applicable to the UIM payments and that KRS § 304.39-320 did not apply to Farm Bureau.[71] The Garrard County Circuit Court ruled in Farm Bureau's favor and held that the jury verdict would be reduced by the UIM payments.[72] The court also maintained that there was "nothing in KRS 304.39-320 to indicate an intent to allow an injured party to receive a double recovery."[73]

Schwartz appealed the circuit court's decision to the Kentucky Court of Appeals, arguing that the CSR should have applied to the UIM payments.[74] In response, Farm Bureau contended that to apply the CSR to UIM payments would allow double recovery.[75] Farm Bureau further asserted that UIM benefits were only payable when a tortfeasor was determined to be at fault; therefore, UIM payments did not resemble other collateral payment sources, such as disability or health insurance, which were payable regardless of fault.[76] Farm Bureau argued that the lack of an immediate obligation without determination of fault to pay UIM benefits excepted it from the CSR.[77]

The Kentucky Court of Appeals recognized that the issue of the CSR's applicability to the UIM benefits was one of first impression in Kentucky.[78] The court acknowledged that although an injured party was not typically entitled to more than one recovery for the same harm,[79] the CSR was an exception to the rule barring double recovery.[80] The court explained that "[t]he fact that UIM coverage [was] based on fault [did] not preclude its characterization as a collateral source but [was] merely an

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> (5) The underinsured motorist insurer is entitled to a credit against total damages in the amount of the limits of the underinsured motorist's liability policies in all cases to which this section applies, even if the settlement with the underinsured motorist under subsection (3) of this section or the payment by the underinsured motorist insurer under subsection (4) of this section is for less than the underinsured motorist's full liability policy limits. The term "total damages" as used in this section means the full amount of damages determined to have been sustained by the injured party, regardless of the amount of underinsured motorist coverage. Nothing in this section, including any payment or credit under this subsection, reduces or affects the total amount of underinsured motorist coverage available to the injured party.

70. *Schwartz*, 175 S.W.3d at 625.
71. *Id*.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Schwartz*, 175 S.W.3d at 627.
77. *Id.*
78. *Id*. at 623.
79. *Id*. at 625 (citing Morrison v. Kentucky Cent. Ins. Co., 731 S.W.2d 822, 825 (Ky. Ct. App. 1987)).
80. *Id*. (citing Hardaway Mgmt. Co. v. Southerland, 977 S.W.2d 910, 918 (Ky. 1998)).

aspect of its contractual terms."[81] Furthermore, the court explained that to recognize the UIM benefits as collateral source payments was consistent with the purposes of the CSR.[82] The court summarized its decision by noting that "[a]llowing tortfeasors a credit or setoff for UIM payments would provide an unintended benefit to the tortfeasor and relieve him of some responsibility for his actions, while depriving the injured party/insured of the benefit of his payments of premiums for the insurance."[83]

In addressing the trial court's assertions that KRS § 304.39-320 implicitly overrode the CSR, the appellate held that the trial court misinterpreted the statute by overextending its language and purpose.[84] The appellate court further explained that KRS § 304.39-320 did not address the effect of the UIM payments on the tortfeasor's liability and did not explicitly allow UIM payments to be credited against the tortfeasor's liability.[85] In addition, the appellate court noted that "[i]f the legislature wanted to provide a credit benefiting the tortfeasor against the total damages, . . . it would have done so with more direct, precise language."[86]

Finally, the appellate court held that the trial court's interpretation of KRS § 304.39-320 as allowing a credit of the UIM payments against the damages recoverable from the tortfeasor would violate Section 54 of the Kentucky Constitution.[87] The appellate court emphasized the importance of recognizing the critical "difference between the tort damages recoverable from a wrongdoer and the collateral benefits recovered by an insured on an insurance contract."[88]

The Kentucky Court of Appeals' holding in *Schwartz* was an important step toward expanding the applicability of the CSR in Kentucky. The court reiterated the important idea expressed in *O'Bryan* that tortfeasors should not be entitled to any credit against their liability for payments victims receive from collateral sources pursuant to contractual obligations.[89] In fact, as *Schwartz* indicated, damages recoverable from a

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81. *Id*. at 628. In an earlier case, *Coots v. Allstate Insurance Co.*, the Kentucky Supreme Court held that UIM coverage is "first party" insurance coverage, meaning that the insurance company has a contractual obligation directly to the insured person; the fact that the tortfeasor's fault must be established before the insurer's liability arises does not mean that the tortfeasor is a party to the insurance contract. 853 S.W.2d 895, 898 (1993).

82. *Schwartz*, 175 S.W.3d at 628.

83. *Id.*

84. *Id.* at 629.

85. *Id.*

86. *Id.*

87. *Id.* at 630. Section 54 of the Kentucky Constitution states that "[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."

88. *Schwartz*, 175 S.W.3d at 629-30.

89. *Id.* at 628.

tortfeasor are in a completely different category than damages recoverable on an insurance contract and cannot be credited against each other.[90]

Ten years after *O'Bryan*, *Schwartz* established a very important precedent in Kentucky regarding the CSR's applicability to UIM payments by reaffirming the importance of the rule. Public policy and justice for victims require that CSR be applied to more third party payments. If the *Schwartz* holding is any indication of where the CSR is heading in Kentucky, more positive developments of the rule are in store.

B. Medicare Adjustments

Like UIM benefits, Medicare adjustments are another common source of third party payments which Kentucky courts have had to address in the CSR context. Shortly after *Schwartz*, the Kentucky Supreme Court decided *Baptist Healthcare Systems, Inc. v. Miller* and held that the CSR applied to Medicare adjustments.[91] In *Miller*, Central Baptist Hospital ("Central Baptist") appealed a judgment awarding Golda Miller $100,100 for injuries resulting from a phlebotomist's negligence in leaving a tourniquet on her arm for an extended period of time.[92] Central Baptist argued that Miller's recovery of medical expenses should be limited to those that were actually paid or payable and should exclude a payor's contractual allowances.[93] Central Baptist billed Medicare $31,840 for the services even though it had only received $3,356.[94] The difference was classified as a Medicare write-off or Medicare adjustment.[95] Central Baptist did not claim this to be a collateral source issue; instead, it simply asserted that the amount for which there is neither payment nor an obligation to pay should not be submitted to the jury for consideration and awarded as damages.[96] Central Baptist also claimed that the Medicare adjustment was a windfall for Miller.[97] The trial court denied Central Baptist's motion to limit damages, stating that in negligence actions, any windfall should go to the injured party.[98] The Kentucky Court of Appeals agreed and affirmed the trial court's decision.[99]

Upon discretionary review, the Kentucky Supreme Court classified the difference between the amount charged by Central Baptist and the amount actually received as collateral source benefits, allowing Miller to collect the

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90. *Id.* at 629-30.
91. Baptist Healthcare Sys., Inc. v. Miller, 177 S.W.3d 676, 677-78 (Ky. 2005).
92. *Id.* at 677-78.
93. *Id*. at 679.
94. *Id.* at 682.
95. *Id*.
96. *Id*.
97. Miller, 177 S.W.3d at 679.
98. *Id.*
99. *Id.*

amount charged, $31,840, instead of $3,356.[100] The Court primarily based its decision on favoring injured parties when it came to any windfalls associated with collateral source payments.[101] The Court held that because "Ms. Miller paid her premiums," she was entitled to all appropriate benefits.[102] The Court explained its decision:

> [I]t is absurd to suggest that the tortfeasor should receive a benefit from a contractual agreement between Medicare and the health care provider. Simply because Medicare contracted with Ms. Miller's physician to provide care at a rate below usual fees does not relieve a tortfeasor from negligence or the duty to pay the reasonable value of Ms. Miller's medical expenses. Therefore, we hold that evidence of collateral source payments or contractual allowances was properly withheld from the jury and her award of medical expenses was proper.[103]

In a dissenting opinion, Justice Cooper criticized the fact that the majority allowed Miller "to prove and collect the amount 'charged' and preclud[ed] Central Baptist from proving and limiting the judgment to the amount accepted as payment-in-full."[104] In justifying his view, Justice Cooper emphasized that the majority's decision "ignore[d] the realities of modern health care, i.e., 'managed care,' and the relationship between medical providers and medical payers, especially when the payer [was], as here, the government."[105] He called the Medicare adjustment a "phantom expense" and opposed allowing Miller to receive a windfall recovery at the expense of taxpayers, who made the Medicare benefits possible.[106] In conclusion, Justice Cooper referred to opinions from Idaho,[107] New York,[108] and Pennsylvania[109] that refused to apply the CSR to expenses that were never actually incurred.[110] Additionally, he cited to a Florida Court of Appeals case that specifically limited recovery to paid and not billed amounts.[111]

As one commentator has pointed out, overall, government benefits such as Medicare and Medicaid have significantly complicated the application of the

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100. *Id*. at 684.
101. *Id*. at 683 (citing Schwartz v. Hasty, 175 S.W.3d 621, 626 (Ky. Ct. App. 2005)).
102. *Id.*
103. *Miller*, 177 S.W.3d at 683-84.
104. *Id.* at 684.
105. *Id.* at 684-85.
106. *Id.* at 689.
107. Dyet v. McKinley, 81 P.3d 1236, 1239 (Idaho 2003) (holding that a plaintiff could not be allowed to recover Medicare write-off's to avoid a double payment)
108. Kastick v. U-Haul Co. of W. Mich., 740 N.Y.S.2d 167, 169 (N.Y. 2002) ("the [Medicare] write-off . . . is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefore").
109. Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786, 789-90 (Pa. 2001) (finding that the CSR is not applicable to the Medicare adjustment amount).
110. *Miller*, 177 S.W.3d at 690.
111. *Id.* (citing Coop. Leasing, Inc. v. Johnson, 872 So.2d 956, 958 (Fla. Ct. App. 2004)).

CSR.[112] As a result, different jurisdictions' decisions range from those freely granting the Medicare adjustment amount to plaintiffs,[113] to those disallowing those kinds of payments.[114] The question that must be answered is whether the plaintiff should be entitled to the actual amount paid or the amount that was originally billed by the medical provider.[115] Each party persistently argues that the ruling against one will constitute a windfall for the other.[116] On one hand, tortfeasors contend that write-off payments should not be distributed to plaintiffs because nobody has incurred the costs.[117] On the other hand, injured parties argue that disallowing write-off payments relieves tortfeasors from liability and provides them with undeserved benefits.[118]

In discussing whether to apply the CSR to Medicare adjustments, experts and legislators across the country often discuss one of two theories: (1) the reasonable-value theory and (2) the benefit-of-the-bargain theory.[119] Under the reasonable-value theory, an injured plaintiff should only be able to recover the amount Medicare actually paid to the medical services provider.[120] Alternatively, under the benefit-of-the-bargain theory, courts allow the plaintiff to obtain the full value of the medical services, including the write-off amount.[121]

Jurisdictions that adopt the benefit-of-the-bargain theory tend to equate Medicare write-offs to private insurance payments, declaring them recoverable under the CSR.[122] The distinction between these two theories can be confusing, and Justice Cooper's dissent in *Miller* criticized the majority for falling into the trap of that confusion.[123] He favored applying the reasonable-value theory to the Medicare adjustments,[124] pronouncing that doing so would decrease the burden on the taxpayers.[125] He also concluded that Medicaid payments should be treated in a similar fashion as Medicare payments - that is, by limiting the judgment to the amount actually paid to the medical services provider.[126]

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112. Guillermo Gabriel Zorogastua, Comment, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs*, 55 U. KAN. L. REV. 463, 465 (2007).
113. *See, e.g.*, Bynum v. Magno, 101 P.3d 1149, 1157 (Haw. 2004) (entitling the plaintiff to the adjustment amount).
114. *See, e.g.*, *Moorhead*, 765 A.2d at 790.
115. Zorogastua, *supra* note 114.
116. *Id.* at 465-66.
117. *Id.* at 466.
118. *Id.*
119. Michael W. Cromwell, Comment, *Cutting the Fat out of Health-Care Costs: Why Medicare and Medicaid Write-Offs Should Not Be Recoverable Under Oklahoma's Collateral Source Rule*, 62 OKLA. L. REV. 585, 600 (2010).
120. *Id.* at 605.
121. *Id.* at 600.
122. *Id.* (citing Bozeman v. State, 879 So.2d 692, 701-05 (La. 2004)).
123. *Miller*, 177 S.W.3d at 689.
124. *Id.*
125. *Id.*
126. *Id.* at 690.

In light of the health care crisis in the United States and the public's dissatisfaction with the inefficiency of the health care system,[127] Kentucky courts likely examine the issue of the CSR's applicability to Medicare and Medicaid adjustments more closely. Instead of being guided by the strong inclination to avoid a windfall to a tortfeasor as in *Miller*,[128] Kentucky courts should contemplate the economic and policy implications of allowing the application of the CSR to Medicare and Medicaid write-offs. From a policy standpoint, it is unfair to burden taxpayers with providing free medical care to a person and then permitting that person to receive a windfall from a medical provider in an amount higher than was actually paid.[129] Although the Kentucky Supreme Court expressed its opinion on whether the Medicare adjustment fell within the realm of the CSR, the court never addressed the treatment of the Medicaid write-offs.[130] When Kentucky courts consider this issue, practitioners will be in a unique position to encourage the court to provide economic and policy justifications for the basis of its decision.

C. Worker's Compensation

Continuing the trend set by the *Schwartz* and *Miller* decisions, in the 2006 case of *Ferry v. Cundiff Steel Erectors, Inc,* the Kentucky Court of Appeals held that the CSR applies to another common source of third party payments: worker's compensation.[131] In that case, Ferry, an at-will employee of Cundiff Steel Erectors, Inc. ("Cundiff"), injured his back in the course of his employment and consequently filed a worker's compensation claim.[132] When Cundiff dismissed him only a few months later, Ferry sued his former employer in an action pursuant to KRS § 342.197.[133] [134] The Jefferson Circuit Court ordered Ferry's damages to be

127. Cromwell, *supra* note 121, at 585.
128. *Miller*, 177 S.W.3d at 683-84.
129. Cromwell, *supra* note 121, at 621.
130. *Miller,* 177 S.W.3d at 683-84.
131. Ferry v. Cundiff Steel Erectors, Inc., 218 S.W.3d 390 (Ky. Ct. App. 2006).
132. *Id.* at 391.
133. KY. REV. STAT. ANN. § 342.197 (West 2012). The statute provides in its entirety:

> (1) No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter.
> (2) It is unlawful practice for an employer:
> (a) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because such individual has been diagnosed as having category 1/0, 1/1, or 1/2 occupational pneumoconiosis with no respiratory impairment resulting from exposure to coal dust; or
> (b) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because such individual has been diagnosed as having category 1/0, 1/1, or 1/2 occupational

limited to lost wages, reduced by the worker's compensation benefits, and any other amounts received from comparable employment.[135] Ferry appealed, contending that this damage reduction was an abuse of discretion.[136]

The Kentucky Court of Appeals agreed with Ferry, holding that the CSR applied in employment discrimination claims.[137] Due to the lack of specific direction from the Kentucky Supreme Court on this issue, the court of appeals turned to federal discrimination case law for guidance.[138]

The Kentucky Court of Appeals first looked to the Sixth Circuit Court of Appeals, which had previously explained the underlying principle behind the applicability of the CSR in the employment-discrimination context in *Hamlin v. Charter Township of Flint*.[139] In *Hamlin*, the Sixth Circuit clarified that the goal was to prevent a "discriminatory employer from avoiding liability and experiencing a windfall" and to promote "the deterrence functions of discrimination statutes."[140] In reaching its decision, the *Hamlin* court also referred to another discrimination case in the Sixth Circuit, *Thurman v. Yellow Freight Systems, Inc.*,[141] in which the court opined:

> Permitting an employer to benefit from other sources of income like unemployment compensation and worker's compensation would not serve the deterrence function of [Title VII]. . . . [U]nemployment compensation is not paid to discharge a liability of the employer. It is paid to carry out the social policies of the state.[142]

These Sixth Circuit holdings were consistent with how other circuits had applied the CSR to discrimination cases.[143]

The *Ferry* court then turned to *Gaworski v. ITT Commercial Financial Corp.*, an age-discrimination case in which the Eighth Circuit applied the

> pneumoconiosis with no respiratory impairment resulting from exposure to coal dust.
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> (3) Any individual injured by any act in violation of the provisions of subsection (1) or (2) of this section shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record.

134. *Ferry*, 218 S.W.3d at 391.
135. *Id.*
136. *Id.* at 393.
137. *Id.*
138. *Id.*
139. *Id.* (citing Hamlin v. Charter Twp. of Flint, 165 F.3d 426 (6th Cir. 1999)).
140. *Hamlin*, 165 F.3d at 434.
141. Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160 (6th Cir. 1996).
142. *Hamlin,* 165 F.3d at 434-45 (citing *Thurman,* 90 F.3d at 1171).
143. *Id.* at 435. *See, e.g.*, EEOC v. O'Grady, 857 F.2d 383 (7th Cir. 1988); Doyne v. Union Elec. Co., 953 F.2d 447 (8th Cir. 1992).

CSR and refused to deduct benefits under a worker's compensation act from a back pay award.[144] The court explained that the purpose of the back pay was: (1) to make a victim whole; and (2) to deter the employer's future discrimination practices.[145] Accordingly, the court refused to provide a windfall to the employer "who committed illegal discrimination" by making it less costly for the employer "to wrongfully terminate a protected employee."[146]

Having looked to the federal cases for guidance, the *Ferry* court then noted that the Kentucky Supreme Court had previously confirmed the applicability of the CSR to statutory discrimination claims in *Hardaway Management Co. v. Southerland*.[147] Based on this Kentucky precedent and decisions from other circuits, the court of appeals held that Ferry's worker's compensation benefits were inappropriately deducted from his back pay, thus extending the CSR to worker's compensation benefits.[148]

As the Sixth Circuit pointed out in *Thurman*, worker's compensation benefits - much like unemployment compensation - were not created to benefit employers.[149] Therefore, logic dictates that these benefits should not create a windfall for employers. Employees earn worker's compensation benefits by way of their employment and therefore are statutorily entitled to those benefits.[150] Thus, because employees have effectively "paid their dues" for worker's compensation benefits by working for their employers, they should receive the benefit. Moreover, allowing discriminatory employers to receive a windfall goes against sound public policy - our society should condemn discrimination, not reward it. Applying the CSR to worker's compensation benefits in employment discrimination cases is an important step in advancing that public policy.

D. Social Security Disability Payments

Although Kentucky courts have properly extended the CSR to other common third party payment sources in recent years,[151] one such source to which the CSR has yet to be applied is Social Security disability payments. Although the issue was before the Kentucky Court of Appeals in *Ellis v.*

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144. Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1112 (8th Cir. 1994), *cert. denied*, 513 U.S. 496 (1994).
145. *Id.* at 1113.
146. *Id.*
147. *Ferry,* 218 S.W.3d at 394 (citing Hardaway Mgmt. Co. v. Southerland 977 S.W.2d 910 (Ky. 1998)).
148. *Id.*
149. *Thurman*, 90 F.3d at 1170-71.
150. KY. REV. STAT. ANN. § 342.020 (West 2012).
151. *See supra* Part III.A-C.

Rightmyer,[152] the court declined to rule on it.[153] In *Ellis*, doctors diagnosed Ellis with acute cholecystitis and ordered to have her troublesome gallbladder removed.[154] Subsequently, the surgeon performed the required operation, and Ellis began recovering normally.[155] Several days later, however, Ellis suffered a neurological event that permanently damaged her brain.[156] Shortly thereafter, Ellis filed a medical malpractice lawsuit against her treating doctor and surgeon.[157] The jury returned a verdict in favor of the doctors and, therefore, never addressed the issue of damages.[158]

On appeal, Ellis raised six allegations of error, one of which claimed that the trial court abused its discretion when it allowed testimony concerning collateral source payments received by Ellis.[159] Specifically, she claimed that the trial court erred in overruling her objection to testimony being introduced from her economic and vocational expert regarding her Social Security disability benefits.[160] Ellis contended that such testimony violated the CSR.[161] In her argument, Ellis relied on *Transit Authority of River City v. Vinson*,[162] which had merely discussed whether the testimony regarding Social Security disability payments was admissible to establish malingering,[163] to indicate that Social Security disability benefits were within the realm of the CSR.[164] The court of appeals, however, stated that Ellis' reliance on *Vinson* was "misplaced";[165] instead, the court looked to its decision in an earlier case, *Hackworth v. Hackworth.*[166] The *Hackworth* court had reserved judgment on the applicability of the CSR to Social Security disability payments. The *Ellis* court followed suit and similarly reserved clarification for another day.[167] The court did find, however, that a mere passing mention of the Social Security disability benefits during a lengthy trial could not reasonably have swayed the jury's deliberations.[168]

152. Ellis v. Rightmyer, No. 2007-CA-000791-MR, 2010 WL 133050, at *2 (Ky. Ct. App. Jan. 15, 2010).
153. *Id.* at *6.
154. *Id.* at *2.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Ellis*, 2010 WL 133050 at *2.
159. *Id.*at *1.
160. *Id.* at *6.
161. *Id.*
162. Transit Auth. of River City v. Vinson, 703 S.W.2d 482 (Ky. Ct. App. 1985).
163. The *Vinson* court ruled that such testimony was inadmissible.
164. *Ellis,* 2010 WL 133050 at *6.
165. *Id.*
166. *Id.* (citing Hackworth v. Hackworth, 896 S.W.2d 914 (Ky. Ct. App. 1995)).
167. *Id.*
168. *Id.*

As the Kentucky Court of Appeals declined to address the hanging question of the CSR's applicability to the Social Security disability benefits on two separate occasions,[169] the Kentucky Supreme Court has never decided this issue. However, some other courts have. For example, the United States District Court for the Western District of Kentucky has excluded from evidence the fact that a plaintiff applied for and was receiving Social Security disability benefits, declaring this type of payment a collateral source payment.[170] Conversely, the Supreme Court of Connecticut has ruled that Social Security disability benefits are not collateral source payments.[171] In addition, several states have statutes that specifically indicate whether Social Security disability payments are collateral source payments.[172]

Overall, there is no consistency among jurisdictions regarding whether the CSR applies to Social Security disability benefits. Thus, there is little consensus to guide Kentucky courts on this issue in the future. Nevertheless, when a Kentucky court decides that it is time to rule on this issue, it should contemplate the fact that Social Security is widely seen as insurance purchased by individuals who pay a percentage of their paychecks and thus very similar to private insurance.[173] All participants pay in to receive a benefit in the future.[174] Therefore, Social Security disability benefits should properly fall under the purview of the CSR. This decision is long overdue in Kentucky.

IV. PLAINTIFF'S WAIVER OF PROTECTION PROVIDED BY THE COLLATERAL SOURCE RULE

Another pertinent issue that has arisen in Kentucky courts is an injured party's ability to waive the protection of the CSR. The Kentucky Court of Appeals addressed this very issue in *King v. Allen.*[175] In that case, King's leg was amputated after two bypass surgeries failed to treat his peripheral vascular disease.[176] King filed a lawsuit against his doctor who had performed a weekly debridement of his wound and whom King believed was responsible for the injury that eventually led to his leg's

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169. *See id.*; *Hackworth*, 896 S.W.2d at 916.

170. Rideout v. Nguyen, No. 4:05CV-00001-JHM, 2008 WL 3850390, at *1 (W.D. Ky. Aug. 15, 2008).

171. Schroeder v. Triangulum Assoc., 789 A.2d 459, 470-71 (Conn. 2002).

172. *See, e.g.*, FLA. STAT. ANN. § 768.76 (West 2012) (defining collateral source to include Social Security payments); N.D. CENT. CODE ANN. § 32-03.2-06 (West 2012) (disallowing reduction of damages recovery because of Social Security benefits).

173. Kathryn L. Moore, *Privatization of Social Security: Misguided Reform*, 71 TEMP. L. REV. 131, 143 (1998).

174. *Id.*

175. King v. Allen, 2008-CA-000540-MR, 2009 WL 4405836, *1 (Ky. Ct. App. Dec. 4, 2009).

176. *Id.* at *1.

amputation.[177] When the jury returned a verdict in favor of the doctor, King appealed claiming that the trial court erred in its ruling on the application of the CSR, among other things.[178] King contended that the trial court should not have applied the CSR to prohibit him from introducing testimony regarding $80,000 in medical bills paid to him by his insurance company.[179] King had attempted to introduce this evidence to clarify two earlier statements he had made that the jury could have found contradicting:[180] first, that he was on a fixed income of $20,000 a year, and second, that his $80,000 in medical bills had been paid.[181] King argued that without proof of the insurance payments, the jury might doubt his credibility regarding his financial situation.[182] Moreover, King wanted to introduce the evidence of these payments as "corroboration that he suffered an injury and the extent of the treatment he received."[183] The doctor's counsel objected, citing the CSR.[184]

In response to King's contentions, the Kentucky Court of Appeals noted that this case was "unusual in that usually it [was] the plaintiff who object[ed] to the defendant or tortfeasor's attempt to introduce this type of evidence."[185] The court held that the trial court erred in disallowing King to introduce the evidence of his insurance payments for two reasons.[186] First, the court noted that the CSR was created for the plaintiff's protection, and thus, the plaintiff could waive that protection at his will.[187] Second, the court ruled that the introduction of evidence of collateral source payments could be admissible when used for purposes other than the calculation of an award of damages.[188] Nevertheless, the court held that the trial court's error was harmless and would likely not impact the jury's decision significantly.[189]

King confirmed that the CSR exists to benefit plaintiffs. Therefore, on a rare occasion when the CSR disadvantages them, plaintiffs may choose to waive the rule's protections. As *King* indicates, plaintiffs may decide to forego the protections of the CSR to showcase their financial situations. Thus, practitioners should be aware that the CSR can be a very powerful tool for plaintiffs, regardless of whether they elect to take advantage of it.

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177. *Id.*
178. *Id.* at *3.
179. *Id.*
180. *Id.*
181. *King,* 2009 WL 4405836 at *3.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at *4.
186. *Id.*
187. *King,* 2009 WL 4405836 at *4.
188. *Id.*
189. *Id.*

V. USING THE COLLATERAL SOURCE RULE TO MISLEAD THE JURY: MALINGERING AND "FINANCIAL HARDSHIP" EXCEPTIONS

The CSR is generally considered a sound legal doctrine with sensible policy reasons providing support.[190] Nevertheless, there are two general exceptions to the rule: "malingering" and "financial hardship."[191]

A. The Malingering Exception

Malingering occurs in circumstances where a plaintiff is potentially exaggerating his or her injury in an attempt to mislead the jury and to impact recovery.[192] When there is potential for malingering, evidence of collateral source payments may be admissible.[193] The main purpose of the malingering exception to the CSR is to prevent misleading the jury.[194]

In *Peters v. Wooten*, Wooten's vehicle struck Peters's pickup truck from behind.[195] As a result of the collision, Peters hit the back of his head against the truck's glass. Afterward, he refused treatment offered by paramedics and was able to drive himself away from the accident scene.[196] Later, however, he complained of headaches, tremors, and pain in his extremities and neck.[197] Consequently, Peters filed a claim against Wooten in the Warren Circuit Court, which resulted in a jury verdict for Wooten.[198] When he appealed, one of the central issues before the Kentucky Court of Appeals was whether Peters's testimony about his medical condition and his wife's testimony about his well-being had "opened the door to the reference to collateral source benefits."[199] The court held that both testimonies opened the door to permit the introduction of collateral source evidence.[200]

B. The "Financial Hardship" Exception

Another exception to the CSR has surfaced in several other jurisdictions.[201] Specifically, "when the plaintiff has put into issue hardships and financial distress or implies financial distress caused by a defendant's action, the defendant may rebut this by showing that other

190. *See* Burke Enter., Inc. v. Mitchell, 700 S.W.2d 789, 796 (Ky. 1985).
191. *See* Peters v. Wooten, 297 S.W.3d 55, 62 (Ky. Ct. App. 2009).
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 58.
196. *Id.*
197. *Peters*, 297 S.W.3d at 58.
198. *Id.*
199. *Id.* at 57.
200. *Id.*
201. *Id.* at 62.

financial means were available to plaintiff."[202] The rationale behind this "financial hardship" exception is similar to that of the malingering exception: it boils down to the simple idea that the courts do not want plaintiffs to mislead the jury.[203]

Although some jurisdictions have adopted the "financial hardship" exception, others have not.[204] The court of appeals in *Peters* disagreed with the reasoning behind rejecting this exception, and instead, agreed with the dissenting opinion in *Jurgensen v. Smith*.[205] The central idea of the dissenting opinion in *Jurgensen* is that the CSR should not "provide a shield for the introduction of evidence which has nothing to do with the determination of the damages amount."[206] Moreover, the dissenting judge stressed that once a plaintiff opened the door about his or her financial hardship, a defendant should be able to challenge that evidence;[207] otherwise, there is potential for misleading the jury.[208] The dissenting judge emphasized the importance of fairness in a trial, and therefore stated that the court "should not allow the collateral source rule to place blinders on its consideration of the case."[209]

The *Peters* court agreed that it could not allow misleading of the jury.[210] The court recognized the similarity between the malingering exception to the CSR and the "financial hardship" exception and held that the latter exception should also be recognized in the Commonwealth.[211] The Kentucky Court of Appeals justified its decision by stating that "Kentucky ha[d] a long history of holding accountable parties who open[ed] the door to evidence where the jury [might] be [misled]."[212]

Although recognizing the importance of the CSR, the Kentucky Court of Appeals has refused to allow the abuse of the rule and exploit what was created for their benefit.[213] As the court in *Peters* maintained, the integrity of the trial is of foremost importance.[214] Anytime there is a threat for jury misleading, the CSR may become inapplicable.[215] This should serve as a

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202. *Id.*
203. *See, e.g.*, *Peters*, 297 S.W.3d at 63.
204. *Id.*. *See also* Jurgensen v. Smith, 611 N.W.2d 439, 442 (S.D. 2000) (holding that a plaintiff's truthful and accurate testimony of financial status was not enough to open the door for evidence of collateral source payments).
205. *Id.* (citing Jurgensen v. Smith, 611 N.W.2d 439, 443-44).
206. *Jurgensen*, 611 N.W.2d at 446 (Amundson, J., dissenting).
207. *Id.* at 447.
208. *Id.*
209. *Id.*
210. *Peters*, 297 S.W.3d at 63.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*

warning for plaintiffs who seek to push the limits during trials by trying to introduce evidence that has nothing to do with the determination of the damages amount.[216] The court of appeals in *Peters* stressed the importance of fair trial and disallowed the use of the CSR for purposes other than the calculation of the damages awarded.[217]

VI. SUBROGATION AND THE COLLATERAL SOURCE RULE IN KENTUCKY

Discussion of the CSR often raises the issue of subrogation. Subrogation is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy."[218] Subrogation exists to prevent unjust enrichment by making sure that those who benefit from others paying for their debts ultimately pay it themselves.[219] The right of subrogation may arise as a result of a contract[220] or by statute.[221] In *Coots v. Allstate Insurance Co.*,

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216. *Peters*, 297 S.W.3d at 63.

217. *Id.*

218. BLACK'S LAW DICTIONARY 1564 (9th ed. 2009).

219. Wine v. Globe Am. Gas. Co., 917 S.W.2d 558, 561 (Ky. 1996) (citing Rollins v. Board of Drainage Com'rs, 136 S.W.2d 1094 (Ky. 1940)).

220. *See, e.g.*, Remedial Sys. of Loaning v. New Hampshire Fire Ins. Co., 13 S.W.2d 1005, 1006 (Ky. 1929).

221. KY. REV. STAT. ANN. § 304.39-070 (West 2012). The statute provides in its entirety:

> (1) "Secured person" means the owner, operator or occupant of a secured motor vehicle, and any other person or organization legally responsible for the acts or omissions of such owner, operator or occupant.
>
> (2) A reparation obligor which has paid or may become obligated to pay basic reparation benefits shall be subrogated to the extent of its obligations to all of the rights of the person suffering the injury against any person or organization other than a secured person.
>
> (3) A reparation obligor shall have the right to recover basic reparation benefits paid to or for the benefit of a person suffering the injury from the reparation obligor of a secured person as provided in this subsection, except as provided in KRS 304.39-140(3). The reparation obligor shall elect to assert its claim (i) by joining as a party in an action that may be commenced by the person suffering the injury, or (ii) to reimbursement, pursuant to KRS 304.39-030, sixty (60) days after said claim has been presented to the reparation obligor of secured persons. The right to recover basic reparation benefits paid under (ii) shall be limited to those instances established as applicable by the Kentucky Insurance Arbitration Association as provided in KRS 304.39-290.
>
> (4) Any entitlement to recovery for basic or added reparation benefits paid or to be paid by the subrogee shall in no event exceed the limits of automobile bodily injury liability coverage available to the secured party after priority of entitlement as provided in this section and KRS 304.39-140(3) has been satisfied.
>
> (5) An attorney representing a secured person in any action filed under KRS 304.39-060 shall be entitled to a reasonable attorneys' fee in the event that reparation benefits paid to said secured person by that secured person's reparation's obligor are reimbursed by any insurance carrier on behalf of a

the Kentucky Supreme Court held that insurers had both an equitable and a contractual right to subrogation.[222] The court of appeals in *American Premier Insurance Co. v. McBride* has also recognized that a person who pays for the third party's obligation has an equitable right of subrogation.[223]

According to *Schwartz*, the doctrines of the CSR and subrogation are compatible despite the initial appearance of the double recovery aspect of the CSR and subrogation clashing.[224] The court stated that the CSR and:

> the principles of subrogation work[ed] in tandem by ensuring that the tortfeasor [bore] the ultimate responsibility for payment of damages without diminishment for benefits received by the injured party from collateral sources, while preventing double recovery by the injured party where the party providing the collateral source benefits [sought] reimbursement through subrogation.[225]

Further, the court stressed that the CSR and subrogation doctrines deal with two different types of relationships.[226] The CSR addresses the injured party/tortfeasor relationship, and subrogation deals with the injured party/insurer contractual relationship "with the subrogee obtaining the rights of the injured party against the tortfeasor to the extent of its payments."[227] Similarly, the Kentucky Supreme Court reasoned in *O'Bryan* that the fact that the injured party received collateral source payments was irrelevant to the amount of damages the plaintiff had incurred or should receive.[228] Moreover, the Court added that it was irrelevant that the source of collateral source payments might be entitled to reimbursement for its payments because of statutory or contractual subrogation rights.[229] In other words, "any agreements concerning subrogation rights between the insured and insurer are of no consequence or concern of the tortfeasor except to avoid his subjection to double recovery exceeding the amount of tort damages."[230]

The CSR and subrogation doctrines work in unison toward a common goal of ensuring that tortfeasors pay in full for the harm they inflicted, yet avoiding the potential "double recovery" by plaintiffs. Kentucky courts

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> tortfeasor who is the defendant in any such action filed by the said secured person or in the event such potential "action" is settled by said potential tortfeasor's insurance carrier on his behalf prior to the filing of any such suit.

222. *Coots*, 853 S.W.2d at 901.
223. Am. Premier Ins. Co. v. Mc Bride, 159 S.W.3d 342, 346 (Ky. Ct. App. 2004).
224. *Schwartz*, 175 S.W.3d at 626.
225. *Id.* at 626-27.
226. *Id.* at 627.
227. *Id.*
228. *O'Bryan*, 892 S.W.2d at 576.
229. *Id.*
230. *Schwartz*, 175 S.W.3d at 627.

have embraced both doctrines and created a proper framework for their application. Subrogation is instrumental to the long term success of the CSR in Kentucky because both doctrines work to achieve a common objective. Subrogation exists to prevent unjust enrichment by both tortfeasors and plaintiffs, making certain that victims are properly compensated (but not unjustly rewarded) and wrongdoers are fully liable for the harm they cause.

VII. CONCLUSION

Since 1995, when Kentucky's highest court validated the CSR,[231] Kentucky courts have examined a variety of third party payments to determine whether they were good candidates for the admissibility for review by the jury. Although the courts were clear about recognizing some types of payments as valid third party benefits under the CSR, they have left ruling on some other types of benefits, such as Social Security disability payments, for a later day. Kentucky courts' interpretation of the collateral source rule is still evolving, and legal precedent is still being established by case law. Nevertheless, this rule can be a very important tool for practitioners. While accomplishing the purpose of the collateral source rule to protect the injured parties, practitioners can be instrumental in developing this rule to its fullest potential.

231. *O'Bryan*, 892 S.W.2d at 578.