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ARTICLES

Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing

Candace Zierdt¹ & Ellen S. Podgor²

INTRODUCTION

DEFERRED prosecution agreements have become common in the corporate sphere.³ The corporation and government reach an agreement which provides that a prosecutor will not immediately proceed with a criminal action in return for the corporation agreeing to a set of terms laid out in the agreement.⁴ These terms range from providing a law school chair,⁵ to waiving the attorney client privilege,⁶ to determining the methodology for whether the deferred prosecution contract has been breached.⁷ In some cases, the agreements will provide for the firing of specific personnel or will allow a monitor to retain oversight of the corporation.⁸

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³ See generally CORPORATE CRIME REPORTER, CRIME WITHOUT CONVICTION: THE RISE OF DEFERRED AND NON PROSECUTION AGREEMENTS (2005), available at <http://www.corporatecrime-reporter.com/deferredreport.htm> (discussing the rise in corporate deferred prosecution agreements); Laurie P. Cohen, *Executives on Trial: Deferred Deals Like Quattrone's Are on the Rise*, WALL ST. J., Aug. 24, 2006, at C1 (same).

⁴ See Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1863–1872 (2005) (discussing a general overview of deferred prosecution agreements).

⁵ See Deferred Prosecution Agreement between Bristol-Myers Squibb Company and the United States Attorney's Office for the District of New Jersey 6, § 20 (2005), available at <http://www.usdoj.gov/usao/nj/press/files/pdffiles/deferredpros.pdf> [hereinafter Bristol-Myers Squibb Deferred Prosecution Agreement] (agreeing to “endow a chair at Seton Hall University School of Law dedicated to the teaching of business ethics and corporate governance”).

⁶ See *infra* notes 41–83 and accompanying text.

⁷ See *infra* notes 84–94 and accompanying text.

⁸ See, e.g., Deferred Prosecution Agreement between the University of Medicine and Dentistry of New Jersey and the United States Attorney's Office for the District of New Jersey, at 3–4, § 11 (2005), available at [http://www.usdoj.gov/usao/nj/press/files/](http://www.usdoj.gov/usao/nj/press/files/pdffiles/)

In a post-*Arthur Andersen* world, corporations readily accept a deferred prosecution agreement, no matter what the terms, as an alternative to a corporate death sentence.⁹ Arthur Andersen, LLP's indictment and subsequent prosecution devastated the company.¹⁰ The later Supreme Court decision that reversed the conviction¹¹ against the company was superfluous in light of the collateral consequences already suffered as a result of the government indictment.¹² Thus, the innocence or guilt of the corporation becomes irrelevant in a world of potential civil shareholder lawsuits and devastating power wielded by the government.¹³ Companies are ready to sign agreements to cooperate fully with the government,¹⁴ even to the extent of not providing executives with previously contracted attorney fees, in order to obtain a deferred prosecution agreement that will allow the company to continue operating as a business.¹⁵

Absent from this deferred prosecution approach is a focused contract theory. Although contracts have served a critical role in the interpretation and enforcement of plea bargains,¹⁶ deferred prosecution agreements have

UMDNJFINALDPA.pdf#search=%22deferred%20prosecution%20%20University%20of%20oMedicine%20and%20Dentistry%20of%20New%20Jersey%20%22 [hereinafter University of Medicine and Dentistry of New Jersey Deferred Prosecution Agreement].

9 See *United States v. Stein I*, 435 F. Supp. 2d 330, 337 n.11 (S.D.N.Y. 2006) (noting that an amicus brief in the case had "point[ed] out that no major financial services firm has ever survived a criminal indictment"); *but see* First Superseding Indictment, *United States v. Milberg Weiss Bershad & Schulman LLP*, CR 05-587(A)-DDP (D.C. Cal. 2004), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/milberg_weiss_indictment.pdf (indicting a law firm).

10 Prior to being indicted, Arthur Andersen, LLP was considered one of the "big-five" accounting firms. The government indictment, followed by the conviction devastated the company. See Linda Greenhouse, *The Andersen Decision: The Overview; Justices Reject Auditor Verdict in Enron Scandal*, N.Y. TIMES, June 1, 2005, at A1 (noting how the accounting firm "shrunk from 28,000 employees in the United States to a skeleton crew of 200" who were closing down the partnership).

11 *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005).

12 Overturning the conviction is irrelevant as the collateral consequences of loss of business devastates the company. See generally Postings on Arthur Andersen, White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/arthur_andersen/index.html (last visited 9-2-06).

13 See Joan McPhec, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea By Another Name?*, INSIDE LITIG., Winter 2006, at 29 (noting how the corporation is bargaining from a position of extreme vulnerability in contrast to the government's powerful position).

14 In an interview with the *Corporate Crime Reporter*, Mary Jo White, a partner at Debevoise & Plimpton LLP and former U.S. Attorney for the Southern District of New York, stated that "[i]f the only choice is between a deferred prosecution agreement and an indictment, the company is going to choose the deferred because it doesn't have the same stigma and same collateral consequences." *Interview with Mary Jo White*, 19 CORP. CRIME REP. 48(11) (2005), available at <http://www.corporatecrimereporter.com/maryjowhiteinterview10806.htm>.

15 See *infra* notes 95-115 and accompanying text.

16 See *infra* notes 116-40 and accompanying text; see also Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV.

not been held to the test of contract law. Specifically, there is no recognition of established policing mechanisms developed by the courts to oversee the agreements reached by the parties to a contract.¹⁷ Thus, the government acquires total power over the alleged corporate offender. The net result is that deferred prosecution agreements are reached without considering theories of duress and unconscionability.

This article examines deferred and non-prosecution agreements entered into between corporations and the Department of Justice (DOJ) through the lens of contract policing theory. It adds a new dimension to the contractual law now applicable to plea bargains and proffer agreements by suggesting key provisions that should be prohibited in deferred prosecution agreements. Three provisions common to many deferred prosecution agreements, or used by the government as leverage to secure a deferred prosecution agreement, are of particular interest here. These are: (1) the requirement of a corporation to waive its attorney–client privilege;¹⁸ (2) the determination of a breach of the agreement being within the sole province of the government;¹⁹ and (3) the provision that corporations not abide by previously negotiated contract terms that allow the corporation to pay the attorney fees of corporate employees.²⁰

The next part of this article provides background on deferred prosecution agreements and examines terms of concern within these agreements.²¹ In this regard, it looks at constitutional, as well as ethical considerations. As contract law is not a new phenomena to the criminal law legal landscape, this article lays the groundwork for the contract discussion by providing an overview of contract issues that arise in the context of agreements used in criminal matters.²² Specifically, it then examines the viability of specific provisions within these agreements when matched up against contract policing principles.²³ This article concludes that corporations are deprived of

727 (2005) (arguing for a strict application of contract doctrine to the waiver of the right to appeal in plea bargains); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (applying contract law to plea bargains).

17 See Greenblum, *supra* note 4, at 1899–1903 (arguing that judicial involvement is necessary to help curb prosecutorial overreaching).

18 See *infra* notes 41–83 and accompanying text.

19 See *infra* notes 84–94 and accompanying text.

20 See *infra* notes 95–115 and accompanying text. There are many other provisions within deferred prosecution agreements that are considered controversial. For example, complaints have been levied against the government for the insertion of a clause precluding the corporation or key individuals within the corporation from taking a position contrary to the government on certain factual matters. See Eugene Illovsky, *Corporate Deferred Prosecution Agreements*, 21 CRIM. JUST. 36 (Summer 2006) (discussing a host of provisions within deferred prosecution agreements that are controversial).

21 See *infra* notes 25–116 and accompanying text.

22 See *infra* notes 117–40 and accompanying text.

23 See *infra* notes 141–230 and accompanying text.

basic contract rights as a result of the over-powering prosecutorial power used in reaching these agreements.²⁴

I. THE AGREEMENT

Deferred prosecutions are not new.²⁵ For years, prosecutors have used this tool as a way to combat future criminal conduct. A defendant receives the benefit of not being prosecuted,²⁶ or the prosecution is held in abeyance, in return for his or her compliance with set conditions. Often, the key condition is that the individual not engage in future criminal conduct. Upon a set period of time expiring, the deferred or non-prosecution agreement is considered completed and the individual is free to assume his or her life without restriction. If a case had, in fact, been filed against the individual, the expiration of the time period results in a dismissal of the matter. This procedure was particularly important to juvenile defendants, as it allowed compliance with the law without creating a criminal history that might impede the individual later in his or her life. Unlike the corporate scenario where people will forever be able to “google” the past conduct and have knowledge of the events leading to the deferred prosecution, in juvenile cases the record is closed and often-times expunged upon completion of the individual reaching maturity.

Recently, prosecutors have been routinely using deferred prosecution agreements in the corporate context.²⁷ This phenomena may, in part, be an outgrowth of the establishment of the President’s Corporate Fraud Task Force,²⁸ the revision of the Principles of Federal Prosecution of Business

²⁴ See *infra* notes 230–49 and accompanying text.

²⁵ See Greenblum, *supra* note 4, at 1866–71 (describing deferred prosecution agreements outside the corporate context).

²⁶ The government has a pre-trial diversion program that has the accused signing an agreement with the government to maintain future good conduct in return for non-prosecution by the government. See 715 USA Form 186 – Pretrial Diversion Agreement, United States Attorneys Criminal Resource Manual, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00715.htm (last visited 9–2–06).

²⁷ See CORPORATE CRIME REPORTER, *supra* note 3 (providing a discussion of the deferred and non-prosecution agreements up through December 2005); see also Leonard Post, *Deferrals on Rise in Foreign Bribery*, 27 NAT’L L.J. 1, 1 (2005) (discussing the rise of deferred prosecution agreements in Foreign Corrupt Practices Act cases).

²⁸ Executive Order 13,271, issued on July 9, 2002, established the President’s Corporate Fraud Task Force. Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), available at <http://www.usdoj.gov/dag/cftf/execorder.htm>. The Task Force chair is the Deputy Attorney General. Larry Thompson, the first individual to hold the position of chair stated that, “[a]s we establish with ever increasing certainty the prospect that corporate criminals will lose both their fortunes and their liberty, we will have gone a long way to restoring the integrity of the market and the confidence of the nation.” The President’s Corporate Fraud Task Force, <http://www.usdoj.gov/dag/cftf/> (last visited 9–2–06).

Organizations Memo under Deputy Attorney General Larry Thompson,²⁹ an increased emphasis on curtailing corporate fraud in a post–Enron world, a desire to avoid collateral consequences of prosecution such as seen in the *Arthur Anderson, LLP* case, a corporate need to contain possible civil litigation resulting from prosecution, or nothing more than an increased flexing of prosecutorial power. Clearly, the need to avoid debarment³⁰ or exclusion³¹ from government contracts or benefits often provides no choice to a company but to enter into a deferred prosecution agreement.³² Corporations agree to pay hefty fines,³³ restitution,³⁴ and agree to terms presented by the government³⁵ in return for not being prosecuted or having an existing

29 See Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Department Components, U.S. Attorneys (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memorandum].

30 Debarment, often seen in the context of defense procurement, holds the company ineligible from doing business with the government. In the defense industry, where most or all the business is from the government, a conviction carrying a collateral consequence of debarment can destroy a company. See JEROLD H. ISRAEL, ELLEN S. PODGOR, PAUL D. BORMAN, & PETER J. HENNING, *WHITE COLLAR CRIME: LAW AND PRACTICE* 2d 557–59 (2003).

31 Program exclusion will mean that the company will be unable to receive government benefits. This is seen in medical related cases when the company may be excluded from receiving Medicare or Medicaid benefits. See generally About the OIG Exclusion Program, <http://oig.hhs.gov/fraud/exclusions/aboutexclusions.html> (last visited 9–2–06) (describing how “[b]ases for exclusion include convictions for program–related fraud and patient abuse, licensing board actions and default on Health Education Assistance Loans.”).

32 See, e.g., Deferred Prosecution Agreement between the United States Attorney’s Office for the District of Rhode Island and Roger Williams Medical Center 16–17, § 40, available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/roger_williams_deferred_sentence_agreement.pdf (last visited 9–2–06) [hereinafter Roger Williams Medical Center Deferred Prosecution Agreement] (agreeing to terms that will allow the medical center to continue to participate in government programs).

33 See, e.g., Agreement between the United States Attorney’s Offices for the Central District of California and the Eastern District of Virginia and The Boeing Company 2–3, § 4, available at <http://www.corporatecrimereporter.com/documents/boeing2.pdf> [hereinafter Boeing Agreement] (showing how Boeing agreed to pay “a monetary penalty of \$50,000,000 to the United States” within fourteen days of executing the deferred prosecution agreement and an additional “\$565,000,000 to the United States as set forth in [a] Civil Settlement Agreement and Release executed concurrently.”). There are some deferred prosecution agreements with small fines. See Deferred Prosecution Agreement between the United States Attorney’s Office for the Central District of California, the United States Department of State, and Armour of America 2 (1993), available at <http://www.pmdtc.state.gov/Consent%20Agreements/1993/Armor%20of%20America.%20Inc/Deferred%20Prosecution%20Agreement.pdf> (agreeing to a civil penalty of \$20,000).

34 See Letter from David N. Kelley, U.S. Attorney, U.S. Dep’t of Justice, to Alan Vinegrad and Philip C. Korologos, Counsel to Adelphia Commc’ns Corp. 3 (Apr. 25, 2005) (on file with authors) (explaining a non–prosecution agreement with Adelphia agreeing to pay \$715 million to security holders who were victims of the fraud).

35 See CORPORATE CRIME Reporter, *supra* note 3 (discussing how America Online agreed to pay \$150 million into a settlement fund and \$60 million as a criminal penalty); see also Deferred Prosecution Agreement between America Online, Inc., the United States Attorney’s

prosecution deferred.

With many possible rationales as the impetus for an increased use of deferred prosecution agreements, the blossoming of this procedure is apparent. In the federal system,³⁶ one finds a long list of companies entering into these agreements.³⁷ Some complaints have been levied against the government for not providing greater transparency to this process.³⁸ This is especially vital when some companies bypass criminal prosecution with a deferred prosecution agreement, while others are subjected to criminal action.³⁹

In addition to voices for consistency in providing the benefit of a deferred prosecution, objections are being raised to the agreements themselves or to the process used by the government in obtaining such an agreement. Although there may be many contentious aspects to the agreements reached between the government and a company, this article focuses on

Office for the Eastern District of Virginia, and the United States Department of Justice, Criminal Division 2, § 4, <http://www.corporatecrimereporter.com/documents/aol.pdf#search=%22aol%20deferred%20prosecution%20agreement%22> (last visited 8-30-06) [hereinafter America Online Deferred Prosecution Agreement].

36 Deferred prosecution agreements in the corporate context are not limited to the federal system, as one finds these agreements also being used by state prosecutors. *See, e.g.*, Deferred Prosecution Agreement between the Travis County Attorney's Office and the Republican Party of Texas (2005), <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/DEFERRED%20PROSECUTION%20AGREEMENT.doc>.

37 *See, e.g.*, Bristol-Myers Squipp Deferred Prosecution Agreement, *supra* note 5; Roger Williams Medical Center Deferred Prosecution Agreement, *supra* note 32; Deferred Prosecution Agreement between Banco Popular de Puerto Rico, the United States Department of Justice, Criminal Division, the Board of Governors of the Federal Reserve, and the United States Department of the Treasury's Financial Crimes Enforcement Network, *available at* <http://www.corporatecrimereporter.com/documents/banco.pdf> [hereinafter Banco Popular Deferred Prosecution Agreement] (last visited 8-30-06); DOJ-MCI Agreement, DOJ Letter to Charles Scheeler, Aug. 30, 2005 (on file with authors); Agreement between the United States Department of Justice, Criminal Division, Fraud Section, Micrus Corporation, and Micrus S.A. (2005), <http://www.corporatecrimereporter.com/documents/micrus.pdf> [hereinafter Micrus Agreement]; America Online Deferred Prosecution Agreement, *supra* note 35; Letter from Mary Jo White, U.S. Attorney, U.S. Dep't of Justice, to Scott W. Muller and Carey R. Dunne, Attorneys for Prudential Sec. Inc. (Oct. 27, 1994), *available at* <http://www.corporatecrimereporter.com/documents/prudential.pdf> [hereinafter Prudential Letter]; Letter from Michael J. Garcia, U.S. Attorney, U.S. Dep't of Justice, to Christopher S. Rizek and Scott D. Michel, Attorneys for Bayerische Hypo- und Vereinsbank AG (February 13, 2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/hvb_deferred_prosecution_agreement.pdf [hereinafter Bayerische Letter]; *see also* CORPORATE CRIME REPORTER, *supra* note 3 (discussing thirty-four deferred prosecution agreements).

38 *See* Leonard Post, *Deferred Prosecutions on Rise in Corporate Bribery Cases*, NAT'L L. J., Aug. 17, 2005, *available at* <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id+1123183109360> (discussing the lack of transparency and consistency in deferred prosecution agreements provided to companies with possible violations of the Foreign Corrupt Practices Act).

39 "Mark Mendelsohn, the DOJ criminal fraud section deputy chief, declined to comment about how his office makes charging decisions." *Id.*

three of the more egregious provisions found in these contracts or practices used to secure the agreement.⁴⁰ In examining the attorney–client privilege waiver, the determination of a breach of the agreement being within the sole province of the government, and government interference with a previously negotiated contract provision, it becomes clear that the government is using its expansive power to secure agreement terms and this raises grave concerns regarding contractual fairness.

A. *Waiving the Attorney–Client Privilege*⁴¹

Perhaps the most controversial provision sometimes seen in deferred prosecution agreements is a request that the corporation waive its attorney–client privilege.⁴² The source of this provision is likely found in the *Principles of Federal Prosecution of Business Organizations Memorandum* authored by Deputy Attorney General Larry Thompson, a Memorandum often referred to as the Thompson Memo.⁴³ This memo for internal guidance of Department of Justice attorneys lists factors to be considered in deciding whether to charge a corporation with criminal conduct. One of the factors that works in favor of the corporation not being indicted is its “timely and

40 Another controversial provision in deferred prosecution agreements is a provision prohibiting corporate “Board of Directors, agents, officers or employees, [from] mak[ing] any public statement contradicting any statement of fact contained in the Statement of Facts.” Bristol–Myers Squibb Deferred Prosecution Agreement, *supra* note 5, at 8, § 30; *see also, e.g.*, Roger Williams Medical Center Deferred Prosecution Agreement, *supra* note 32, at 15, § 37; Letter from Leslie R. Caldwell, Dir., Enron Task Force, U.S. Dep’t of Justice to Robert S. Morvillo and Charles Stillman, Counsel to Merrill Lynch & Co., Inc. 3, § 7 (Sept. 17, 2003), *available at* [http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/\\$FILE/Merrill_Lynch_Agreement.pdf](http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/$FILE/Merrill_Lynch_Agreement.pdf); Non–Prosecution Agreement Between the Bank of New York, the United States Attorney’s Office for the Eastern District of New York, and the United States Attorney’s Office for the Southern District of New York (2005) (on file with the authors) (providing that through individuals associated with the company it will not make statements that contradict with the company’s acceptance of responsibility). Companies are also often asked to waive the applicable statute of limitations, preindictment delay, and speedy trial rights. *See, e.g.*, Boeing Agreement, *supra* note 33, at 4.

41 This section is not exclusive to the attorney–client privilege, but also includes the work product doctrine. Although these doctrines differ, many of the concepts often overlap and many of the cases discuss both when an issue related to confidential information between an attorney and client arise. *See generally* EDNA SELAN EPSTEIN, *THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK–PRODUCT DOCTRINE* (4th ed. 2001).

42 A survey conducted by a host of organizations noted the decline of the attorney–client privilege in the corporate context. Am. Chemistry Council et al., *The Decline of the Attorney–Client Privilege in the Corporate Context*, *available at* [http://www.nacdl.org/public.nsf/whitecollar/wcnews024/\\$FILE/A–C_PrivSurvey.pdf](http://www.nacdl.org/public.nsf/whitecollar/wcnews024/$FILE/A–C_PrivSurvey.pdf) (last visited 9–4–06) (providing the survey results that were presented to Congress and the United States Sentencing Commission).

43 *See* Thompson Memorandum, *supra* note 29, § VI(A) *Principles of Federal Prosecution of Business Organizations* (January 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited 9–2–06).

voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney–client and work product protection.”⁴⁴ Thus, a corporation facing possible prosecution may avoid the government indictment when they cooperate with the government by providing attorney–client material.⁴⁵ From the government’s perspective, having the corporation provide this evidence will mean stronger cases against individuals.⁴⁶ The government also avoids a lengthy investigation process when the corporation packages the items for the government to use in a later prosecution of corporate employees.

Organizations such as the American Bar Association (ABA)⁴⁷ and the

44 *See id.* § II(A)(4).

45 *See generally*, Ross H. Garber, *The Attorney–Client Privilege Waiver Debate: A Practical Approach*, (paper on file with authors).

46 In the *Corporate Crime Reporter’s* Report on deferred prosecution agreements, they quote defense attorney Ted Wells as stating:

Ten years ago, it was—save the individuals and plead the corporation. Now, things have radically changed and it’s totally reversed. Now, the government has set up a system where it’s—save the corporation by sacrificing the individuals. The independent directors hire a law firm, which becomes in effect a deputized prosecutor. And the individual executives are sacrificed to save the corporation.

CORPORATE CRIME REPORTER, *supra* note 3.

47 The American Bar Association essentially adopted the Report of the Task Force on Attorney–Client Privilege to the House of Delegates that provides in part:

RESOLVED, that the American Bar Association opposes government policies, practices and procedures that have the effect of eroding the constitutional and other legal rights of (“Employees”) by requiring, encouraging or permitting prosecutors or other enforcement authorities to take into consideration any of the following factors in making a determination of whether an organization has been cooperative in the context of a government investigation:

(1) that the organization provided counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an Employee;

(2) that the organization entered into or continues to operate under a joint defense, information sharing and common interest agreement with an Employee or other represented party with whom the organization believes it has a common interest in defending against the investigation;

(3) that the organization shared its records or other historical information relating to the matter under investigation with an Employee; or

(4) that the organization chose to retain or otherwise declined to sanction an employee who exercised his or her Fifth Amendment right against self–incrimination in response to a government request for an interview, testimony, or other information.

AM. BAR ASS’N ET AL., REPORT TO THE HOUSE OF DELEGATES (2006), available at <http://www.abanet.org/media/docs/302Brevised.pdf>; see also White Collar Crime, *ABA Resolution Calls on Justice Department to Respect Rights of Corporate Employees*, 79 CRIM. L. REP. 688 (2006).

National Association of Criminal Defense Lawyers (NACDL),⁴⁸ groups that have expressed strong views when the government has issued directives in other contexts that infringe on the attorney–client privilege,⁴⁹ voiced strong opposition to the Memorandum’s statement that provides a benefit to companies that waive the attorney–client privilege.⁵⁰ Vocal criticism by these groups and others⁵¹ were the likely impetus for the Department of Justice’s revision of internal policy and issuance of a new Memorandum commonly referred to as the McNulty Memorandum.⁵² The McNulty Memo continues to allow waivers of the attorney–client privilege but provides restrictions on requests of this information, including the necessity to obtain approvals from the Deputy Attorney General for certain kinds of attorney–client or work product protections.⁵³

The United States Sentencing Commission initially had a provision that encouraged these waivers by providing a benefit to corporations in the limited circumstance that the waiver was “necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”⁵⁴ The Sentencing Commission, however, adopted an

48 NACDL issued a statement on corporate attorney–client privilege that presents strong arguments to government practices of requesting a waiver as a part of a cooperation agreement. See National Association of Criminal Defense Lawyers, NACDL Statement on Corporate Attorney–Client Privilege, available at [http://www.nacdl.org/public.nsf/WhiteCollar/WCnewso24/\\$FILE/Privilege_Statement06.pdf](http://www.nacdl.org/public.nsf/WhiteCollar/WCnewso24/$FILE/Privilege_Statement06.pdf) (last visited 9–3–06).

49 See, e.g., ABA Task Force on Attorney–Client Privilege, Recommendation 111, available at <http://www.nacdl.org/public.nsf/whitecollar/WCnewso07> (last visited 9–03–06) (providing that “the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney–client privilege or work product doctrine through the granting or denial of any benefit or advantage”). Both the NACDL and ABA opposed the imposition on the attorney–client privilege when the government engaged in monitoring conversations in prisons. See Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney–Client Communications: Invoked in the Name of Fighting Terrorism*, 17 GEO. J. LEGAL ETHICS 145, 148–49 (2003).

50 The Chamber of Commerce has also been actively opposed to a waiver of the attorney–client privilege. See Testimony Submitted by the United States Chamber of Commerce to the American Bar Association Task Force on Attorney–Client Privilege (February 22, 2005), available at <http://www.abanet.org/buslaw/attorneyclient/publichearing20050211/testimony/chamberofcommerce.pdf#search=%22us%20chamber%20of%20commerce%20and%20attorney-client%20privilege%22>.

51 See Lynnley Browning, *Ex–Officials of Justice Dept. Oppose Prosecutors’ Tactic in Corporate Criminal Cases*, N.Y. Times, Sept. 7, 2006, at C4.

52 See Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, U.S. Attorneys, available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum].

53 The McNulty Memo categorizes information in Categories I and II and explicitly states that “Category II information should only be sought in rare circumstances.” *Id.* at 10.

54 U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 n.12 (2004) (amended 2006). The United States Sentencing Commission had “added the final sentence in Application Note 12 in 2004” to address some concerns regarding the relationship between waivers and § 8C2.5(g).” JEROLD H. ISRAEL, ELLEN S. PODGOR, PAUL D. BORMAN, & PETER J. HENNING, 2006 STATUTORY,

amendment, effective November 1, 2006, that deletes from the corporate sentencing guidelines this particular sentence so as not to reflect an encouragement of corporations waiving the attorney–client privilege.⁵⁵

Finally, legislation⁵⁶ was offered for consideration that would restrict “[i]n any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States” from “demand[ing], request[ing] or conditioning treatment on” this information.⁵⁷ The bill proposed by Senator Specter has the purpose “to place on each agency clear and practical limits designed to preserve the attorney–client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization.”⁵⁸

The attorney–client privilege,⁵⁹ the work product protection,⁶⁰ and client confidentiality⁶¹ are principles with strong constitutional,⁶² evidential-

DOCUMENTARY AND CASE SUPPLEMENT TO WHITE COLLAR CRIME: LAW AND PRACTICE 2d 570 n. (2006) [hereinafter ISRAEL ET AL. Supplement] (*citing* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 historical n. (2006)). It stated “[w]aiver of attorney–client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 n.12 (2004) (amended 2006). At that time, the expectation was that waivers would not be used frequently. ISRAEL ET AL. Supplement, *supra* note 52, at 570.

55 The Sentencing Commission, however, deleted this sentence in fear that a mention of a waiver might serve to encourage the government to make a demand for waiver. *See* Posting of Sentencing Commission Votes to Remove Attorney–Client Waiver Language to White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/04/sentencing_comm.html (Apr. 5, 2006); *see also* Richard Ben–Veniste and Raj De, *Federal Privilege Waiver Demands Impact Corporate Compliance*, LEGAL BACKGROUND, Feb. 24, 2006, available at <http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/20060427000003.pdf#search=%22also%20Richard%20Ben-Veniste%20and%20Raj%20De%2C%20Federal%20Privilege%20Waiver%20Demands%20Impact%20Corporate%20Compliance%2C%20Washington%20Legal%20Foundation%20%22> (discussing the effect of waivers on the attorney–client privilege).

56 There has also been a proposed evidence rule change that would allow businesses to waive the attorney–client privilege and work product doctrine. *See* Proposed Rule 502 on Waiver of Attorney–Client Privilege and Work Product, <https://www.lexisnexis.com/applied-discovery/lawLibrary/Rule502.pdf> (last visited 2–23–07).

57 Attorney–Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3(b) (2007).

58 *Id.* §2(b). Similar legislation was offered in the House of Representatives. *See Attorney–Client Privilege Bill Picking Up Support*, available at <http://lawprofessors.typepad.com/whitecollarcrimeblog/2007/07/attorney-client.html>.

59 *See generally* EDNA SELAN EPSTEIN, *THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK–PRODUCT DOCTRINE* (3d ed. 1997) [hereinafter EPSTEIN Third Edition].

60 *Id.* at 287–425.

61 “A fundamental principle in the client–lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 2 (2002).

62 Courts have cited to violations of the Fourth, Fifth, and Sixth Amendment when dis-

ry,⁶³ and/or ethical roots.⁶⁴ At the heart of the attorney–client privilege is the goal of encouraging “full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and the administration of justice.”⁶⁵ The work product protection specifically covers pre–trial matters. Confidentiality, a core principle that promotes the ethical duty of loyalty to the client, is a part of a variety of ethical rules required of practicing attorneys.⁶⁶ The ethical rules often provide mandates beyond those encompassed within the attorney–client privilege and work product doctrines.⁶⁷

The attorney–client privilege is an important component of the United States justice system. It has been held by the Supreme Court to apply despite the demise of the client.⁶⁸ Some even maintain that confidentiality between the attorney and client rises to the level of Sixth Amendment coverage in that the Sixth Amendment right to counsel incorporates “meaningful” representation, something that cannot be assured absent protected communication between the attorney and client.⁶⁹ There are, however, exceptions to the attorney–client privilege. For example, one cannot use the attorney–client privilege to perpetrate a crime or fraud.⁷⁰

cluding rights of privacy, due process, and effective assistance of counsel. See Podgor & Hall, *supra* note 49, at 155–59.

63 The Federal Rules provide common law adoption of the privileges. At present, there is a proposed Rule 502 that incorporates attorney–client privilege and work–product protections. On June 30, 2006, the Committee released for comment the proposed rule that was “unanimously approved” by the Evidence Rules Committee. See Report of the Advisory Committee on Evidence Rules (June 30, 2006), *available at* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4.

64 See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002) (mandating client confidentiality); R. 1.16 (safekeeping client property).

65 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

66 See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).

67 There are many instances when a waiver of the attorney–client privilege may occur. These waivers are often not duplicated in the ethics rules. See EPSTEIN Third Edition, *supra* note 57, at 158–233 (discussing waivers of the attorney–client privilege).

68 *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (holding that attorney–client confidential information would be afforded that protection even after the death of the client).

69 See Podgor and Hall, *supra* note 49, at 158 n.92. (listing cases where courts have found a violation of the Sixth Amendment when there was a violation of the attorney–client privilege).

70 The crime–fraud exception relates to communications regarding present or future crimes and not past crimes. See ISRAEL ET AL., WHITE COLLAR CRIME, *supra* note 30, at 751; see also Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 459 (1993). In the case of *Enron Broadband Services, L.P. v. Travelers Casualty and Surety Co. of America (In re Enron Corp.)*, the court held that communications of executives with in–house counsel would not be protected by the attorney–client privilege because of the crime–fraud exception. 349 B.R. 115, 119 (Bankr. S.D.N.Y. 2006); see also Beth Bar, *Judge Rules No Privilege in Enron*

The strong historical basis and acceptance of the attorney–client privilege⁷¹ and the inclusion of ethical mandates of confidentiality within the ABA Rules of Professional Conduct have not deterred the government from requiring corporations to add waivers of this privilege in deferred prosecution agreements.⁷² In a recent press conference, Deputy Attorney General Paul J. McNulty stated that “[t]he waiving of attorney–client privileged information is a standard piece of the settlements that the Department of Justice has reached in the past.”⁷³ The waiver may merely incorporate an acknowledgment that privileged material has been turned over to the government and affirm that this cooperation will continue.⁷⁴ Other agreements may limit the waiver so as not to include certain information⁷⁵ or may specify exactly what material is included.⁷⁶ Many of the agreements limit the waiver to the government and the corporation, with an explicit

Fraud Case, 236 N.Y.L.J. 1, col. 3, Aug. 29, 2006, available at <http://www.law.com/jsp/article.jsp?id+1156855191019>.

71 See generally Mark A. Kressel, Note, *Contractual Waiver of Corporate Attorney–Client Privilege*, 116 Yale L.J. 412 (2006) (discussing the importance of prior contractual agreements between corporate directors and the corporation).

72 The DOJ and a company may also enter into a separate agreement exclusively focused on the waiver issues. See, e.g., Confidentiality and Limited Waiver Agreement between the United States Attorney’s Office and the Bank of New York (May 27, 2003) (on file with authors).

73 Transcript of Deputy Attorney General Paul J. McNulty at Press Conference Regarding Prudential Equity Group Securities Fraud Allegations, available at http://www.usdoj.gov/dag/speech/2006/dag_speech_060828.htm (last visited Sept. 4, 2006).

74 The U.S. Attorney’s Office for the Eastern District of New York and Symbol Technologies, Inc. Agreement states that pursuant to a prior agreement with the Securities Exchange Commission, “Symbol has shared the results of its investigation, including documents that could have otherwise been withheld under the attorney–client privilege and the work product doctrine, with the Investigative Entities.” Agreement between Symbol Technologies, Inc. and The U.S. Attorney’s Office for the Eastern District of New York 2, § 4 (2004), available at <http://www.corporatecrimereporter.com/documents/SymbolAgreement.FINALwpd.pdf>. This agreement also then states that “Symbol acknowledges that its prior, ongoing, and future cooperation are important factors in the Office’s decision to enter into the Agreement, and therefore, Symbol agrees to continue to cooperate fully with the Investigative Entities regarding any matter about which Symbol has knowledge.” *Id.*; see also Settlement Agreement between the United States of America, the Commonwealth of Massachusetts, and Lazard Freres & Co. LLC 19 (Oct. 26, 1995), available at <http://www.corporatecrimereporter.com/documents/lazard.pdf> (noting in a non–prosecution agreement that “Lazard and Lazard LLC responded promptly to requests for business records and waived the attorney–client privilege”).

75 The agreement between the United States and the Roger Williams Medical Center (RWMC) provides for a waiver of the attorney–client privilege and the work product protection, but in addition to stating that the waiver does not apply to third parties, also states that RWMC may assert the privilege with respect to privileged communications “that post–date the criminal investigation.” Roger Williams Medical Center Deferred Prosecution Agreement, *supra* note 32, at 3.

76 See, e.g., Micrus Agreement, *supra* note 37, at 5–6 (listing items that the company may not assert a claim of attorney–client and work product privilege).

statement that the waiver will not apply to third parties.⁷⁷ Others provide specific dates covered by the waiver of confidential information.⁷⁸ Still others permit dissemination to third parties when it is determined that it is in furtherance of a government objective.⁷⁹ Finally, some agreements recognize that the attorney–client privilege may need to be waived, but omit the specific conditions for this waiver from the deferred prosecution agreement.⁸⁰

There are clear ramifications to a corporate waiver of the attorney–client privilege.⁸¹ Compliance programs are likely to prove ineffective when employees are unwilling to participate and provide information for fear that the material may find its way to government prosecutors.⁸² Knowing that the corporation may waive the attorney–client privilege, corporate employees may be less likely to report internal corporate problems, to seek advice in resolving possible legal issues, or offer cooperation to internal and external auditors who may be investigating corporate misconduct.⁸³ Transparency

77 See, e.g., Prudential Letter, *supra* note 37, at 2 (stating that “PSI does not intend to waive as to third parties any attorney–client or other applicable privilege that may cover the materials or information.”); Deferred Prosecution Agreement Between the United States of America and FirstEnergy Nuclear Operating Company 4, § 9.3 (Jan. 1, 2006) (on file with the authors) (stating that “FENOC does not waive the attorney–client privilege or the work–product protection, or other applicable privileges as to third parties.”).

78 See, e.g., America Online Deferred Prosecution Agreement, *supra* note 35, at 4, § 8 (listing specific dates and type of materials covered by the waiver).

79 In the deferred prosecution agreement between Bristol–Myers Squibb Company and the U.S. Attorney’s Office for the District of New Jersey, it explicitly states that attorney–client material will not be disclosed to third parties unless “in its sole discretion, that disclosure is otherwise required by law or would be in furtherance of the discharge of the duties and responsibilities of the Office.” Bristol–Myers Squibb Deferred Prosecution Agreement, *supra* note 5, at 9, § 31(d).

80 In the deferred prosecution agreement between the United States Attorney’s Offices for the Central District of California and the Eastern District of Virginia and The Boeing Company, it leaves the question of waiver for further negotiation in stating that “if requested by the USAOs, [Boeing shall] negotiate in good faith to attempt to arrive at a limited waiver of the attorney–client privilege and work–product doctrine sufficient to allow the USAOs to be provided with identified materials otherwise withheld under a claim of these protections.” Boeing Agreement, *supra* note 33, at 5, § 6.

81 See generally Lonnie T. Brown Jr., *Reconsidering the Corporate Attorney–Client Privilege: A Response to the Compelled–Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897 (2006) (proposing the “establishment of a uniform corporate attorney–client privilege”).

82 See generally Testimony of Gerald B. Lefcourt, On Behalf of the National Association of Criminal Defense Lawyers, Before the ABA Task Force on Attorney–Client Privilege 5–6 (April 21, 2005), available at [http://www.nacdl.org/public.nsf/Legislation/WhiteCollar001/\\$FILE/Lefcourt_Testimony.pdf](http://www.nacdl.org/public.nsf/Legislation/WhiteCollar001/$FILE/Lefcourt_Testimony.pdf) (discussing problems with a corporate waiver of the attorney–client privilege, such as how “individuals cannot communicate candidly and effectively with in–house counsel in order to prevent compliance problems”).

83 See Ellen S. Podgor, *White Collar Cooperators: The Government in Employer–Employee Relationships*, 23 CARDOZO L. REV. 795 (2002) (discussing the ramifications of pitting the employer against the employee in instances of corporate cooperation).

diminishes when employees fear that their statements and documents may become government discovery. Additionally, the corporation is no longer working as a unified entity for the benefit of the shareholders and consumers. A corporate approach is lost as each person or entity strives to protect his or her individual interest.

*B. Government Exclusivity in Determining Breaches
of Deferred Prosecution Agreements*

Deferred and non-prosecution agreements often occur without judicial oversight or participation.⁸⁴ This is because the agreement may be reached prior to an indictment, and thus no court case will have been filed, or because the government may reach a settlement with a company that is entered into outside of the criminal justice system. Even in the rare case that has court participation, it is usually a mere formality of the document being filed in the court.⁸⁵ It may be presented to the court to satisfy the statutory provision that exempts the deferral of criminal matters from the speedy trial constraints.⁸⁶

Although negotiated resolutions offer enormous economic benefit, the omission of judicial oversight raises concerns when the determination of whether there is a breach of the agreement rests within the exclusive province of one party, and that party is the government, a party with extraordinary power.⁸⁷ Unlike the classic plea bargain scenario, a corporation

⁸⁴ In cases of court approval, it may just be a situation of the court participating pursuant to 18 U.S.C. § 3161(h)(2), to allow the case to be held in abeyance for a period of time to allow the “defendant to demonstrate its good conduct.” See *Unexecuted Order of the Court between the United States and Banco Popular de Puerto Rico* (2003), available at <http://www.corporatecrimereporter.com/documents/banco.pdf>.

⁸⁵ See *Roger Williams Medical Center Deferred Prosecution Agreement*, *supra* note 32 (showing a deferred prosecution agreement that has been filed in a court case); *America Online Deferred Prosecution Agreement*, *supra* note 35 (same).

⁸⁶ 18 U.S.C. § 3161(h)(2) provides that:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: . . .

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

18 U.S.C. § 3161(h)(2) (2000).

⁸⁷ One concern is that when a breach occurs, statements previously made by the corporation can now be used against it. See Ben Vernia, *Here's Your Story, and You're Sticking to It*, 29 LEGAL TIMES No. 34, Aug. 21, 2006, available at <http://www.cov.com/publications/download/>

enters into the agreement without a court first asking whether there is an understanding that rights are being waived and that there is a voluntary, intelligent, and knowing assent to the agreement.⁸⁸

One finds prosecution dominance in deferred prosecution agreements as these agreements often include provisions which provide that the government will be the sole determining body of any breach by the corporation.⁸⁹ Some agreements will specify that in addition to the government having the sole discretion to determine whether there has been a breach of the deferred prosecution agreement, this determination is not subject to review.⁹⁰ Often the agreement will provide that the company has a time period to contest the determination of breach with the Department of Justice.⁹¹ The agreement may even provide that upon the government deciding a breach has occurred, the admissions made by a company in reaching the agreement will be deemed admissible.⁹² One agreement goes so far as to

oid5446/661.pdf#search=%22Here%E2%80%9Bs%20Your%20Story%2C%20and%20You%E2%80%9Bre%20Sticking%20to%20It%2C%20%22.

⁸⁸ See *infra* notes 141–205 and accompanying text.

⁸⁹ See, e.g., Micrus Agreement, *supra* note 37, at 3, § 7 (stating that DOJ “in its sole reasonable discretion” determines whether there has been a breach of the agreement); Prudential Letter, *supra* note 37, at 4 (stating that “it is agreed that in the event that this office, in its sole discretion, determines that PSI has violated any provision of this Agreement . . .”); Deferred Prosecution Agreement between AmSouth Bancorporation, AmSouth Bank, and the United States 5, § 10, *available at* <http://www.corporatecrimereporter.com/documents/amsouth.pdf> (last visited 9–1–06) (stating that “[s]hould the United States, in its sole discretion, determine during the term of this Agreement that AmSouth has committed any federal crime commenced subsequent to the date of this Agreement, AmSouth shall thereafter be subject to prosecution for any federal crimes of which the United States has knowledge.”).

⁹⁰ See, e.g., University of Medicine and Dentistry of New Jersey Deferred Prosecution Agreement (UMDNJ), *supra* note 8, at 7, § 24 (stating that “whether UMDNJ has breached this Agreement rests solely in the discretion of the Office, and the exercise of discretion by the Office under this paragraph is not subject to review in any court or tribunal outside the Department of Justice”).

⁹¹ See, e.g., Banco Popular Deferred Prosecution Agreement, *supra* note 37, at 6 (providing the company with two weeks to respond to the Assistant Attorney General of the Criminal Division notice of an alleged breach); Deferred Prosecution Agreement between PNC ICLC Corp. and the United States Department of Justice, Criminal Division, Fraud Section 5–6, § 12 (2003), *available at* [http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/\\$FILE/DPA-PNC.pdf](http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/$FILE/DPA-PNC.pdf).

⁹² Micrus Agreement, *supra* note 37, at 7, § 21 (providing that admissions of the company which are included as Appendixes to the agreement will serve as a “binding admission to the Department only, and . . . the Department may use and admit into evidence in any proceeding and for any purpose, and without objection by Micrus”); Deferred Prosecution Agreement between AIG–FP Pagic Equity Holding Corp. and the United States Department of Justice, Criminal Division, Fraud Section 3, ¶ 9, *available at* <http://www.corporatecrimereporter.com/documents/aig.pdf#search=%22AIG-FP%20PAGIC%20deferred%20prosecution%22> (last visited 8–30–06) (stating that “[t]he decision whether conduct and statements of any individual will be imputed to AIG–FP PAGIC for the purpose of determining whether AIG–FP PAGIC has committed a willful and knowing material breach of any provision of this

allow the government to select from several different options the remedy it desires for the purported breach of the agreement by the company.⁹³

Thus, the signing of a deferred prosecution agreement may have enormous repercussions to a company if the government singlehandedly decides that a breach has occurred. The company signing the deferred prosecution agreement would be left with little recourse to object to the government determination that a breach had occurred,⁹⁴ and in some cases no right to appeal.

C. Government Interference With Contracts to Pay Attorney Fees

Among the many provisions found in the different deferred prosecution agreements are provisions that pertain to third parties or individuals who are not directly a part of the agreement. For example, one finds provisions that call for the termination of employees who fail to cooperate with the investigation.⁹⁵ There may also be provisions regarding what notifications need to be included if there is a sale or merger, so as to apprise a purchaser of the terms of the deferred prosecution agreement.⁹⁶

Recently, a practice that has caused significant controversy is one that calls for the company not to pay for or reimburse attorney fees of employees indicted by the government.⁹⁷ This comes from the Thompson Memo

Agreement shall be in the sole reasonable discretion of the Department.”).

93 See Bayerische Letter, *supra* note 37, at 11–12, § 17 (providing that the DOJ may select from a choice of remedies found in three different paragraphs in the agreement, “or instead choose to extend the period of deferral of prosecution pursuant to” another paragraph in the agreement).

94 It is difficult to ascertain the full effect of the acquiescence by the company to terms that name the government as the exclusive decision-maker of a breach, in that to date the government has not proceeded against a company for breach of the agreement. The mere possibility of this happening may cause a company to provide immediate resignation to government demands or pressure. See Posting of Is Bristol-Myers Risking a Violation of Its Deferred Prosecution Agreement? to White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2006/08/is_bristolmyers.html (Aug. 19, 2006).

95 See, e.g., Deferred Prosecution Agreement between Computer Associates International, Inc. and the United States Attorney’s Office for the Eastern District of New York 3, § 4(b) (Sept. 22, 2004), available at [http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/\\$FILE/DPA-CA.pdf](http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/$FILE/DPA-CA.pdf).

96 See, e.g., Agreement between AEP Energy Services, Inc., the United States Department of Justice, Criminal Division, Fraud Section, and the United States Attorney’s Office for the Southern District of Ohio § 15, available at <http://www.corporatecrimereporter.com/documents/aep.pdf> (last visited 9–1–06) (requiring the company to “include in any contract for sale or merger a provision binding the purchaser/successor to the obligations described in this Agreement.”).

97 See Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives’ Defense Costs, and the Federal Courts (Part I)*, 7 U.C. DAVIS BUS. L.J. 2 (2006) (discussing whether there should be an advancement of legal fees for executives defending themselves on corporate crime charges).

language which provides that a factor to be used by the government in deciding whether to charge “is whether the corporation appears to be protecting its culpable employees and agents.”⁹⁸ The Memo explicitly states that in weighing cooperation, the government will look at factors such as how the corporation supports “culpable employees and agents.”⁹⁹ This can be through the “advancing of attorney fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement.”¹⁰⁰ The more recent McNulty Memorandum somewhat tempers this position in stating that “[p]rosecutors generally should not take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation and indictment.”¹⁰¹

Although an actual term stating that the corporation is precluded from paying attorney fees of indicted individuals may be omitted from the deferred prosecution agreement, the agreement will call for full cooperation and the determination of a breach of the agreement will rest within the sole discretion of the government.¹⁰² This does not change with the more recent McNulty Memorandum, except attorneys within the Department of Justice will likely be hesitant to explicitly request that a corporation waive the payment of attorney fees.

In the deferred prosecution agreement in the KPMG case, it states that the company “acknowledges and understands that its cooperation with the criminal investigation by the Office is an important and material factor underlying the Office’s decision to enter into the Agreement.”¹⁰³ During the negotiation process to obtain the deferred prosecution agreement, the Assistant United States Attorney’s had meeting points that included questions of whether KPMG was paying or going to pay the legal fees of its employees.¹⁰⁴

98 Thompson Memorandum, *supra* note 29, § VI(B).

99 *Id.*

100 *Id.* The Memo does provide a footnote that “[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation’s compliance with governing law should not be considered a failure to cooperate.” *Id.* § VI(B) n.4.

101 McNulty Memorandum, *supra* note 52, at 11.

102 See *supra* notes 84–94 and accompanying text.

103 Letter from David N. Kelley, U.S. Attorney, U.S. Dep’t of Justice, to Robert S. Bennett, Attorney for KPMG LLP 9, § 7 (Aug. 26, 2005), available at [http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/\\$FILE/KPMG.pdf](http://www.nacdl.org/public.nsf/whitecollar/wc_DPA/$FILE/KPMG.pdf) [hereinafter KPMG Letter] (last visited 9–2–06). The agreement further provides that “KPMG agrees that its continuing cooperation with the Office’s investigation shall include, but not be limited to,” a list of items then specified, one of which calls for a waiver of the attorney–client privilege. *Id.* at 10, § 8(e).

104 See *United States v. Stein I*, 435 F. Supp. 2d 330, 341 (S.D.N.Y. 2006) (including questions such as “Is KPMG paying/going to pay the legal fees of employees? Current or former? What about taxpayers?”). There were also comments made that “misconduct [cannot] [b]e rewarded” and “misconduct [should not] be rewarded” referring to federal guidelines. *Id.* at

KPMG, a company that had a long-standing practice of paying “the legal defense of its personnel, regardless of the cost and regardless of whether its personnel were charged with crimes,”¹⁰⁵ refused to pay these fees in order to secure a deferred prosecution agreement and in order to maintain its continuing cooperation.¹⁰⁶ The deferred prosecution agreement was especially important for KPMG to have because of the auditing nature of its work, with debarment by the government as a possible consequence.¹⁰⁷ As eloquently stated by Judge Lewis Kaplan in an opinion, “KPMG refused to pay [the attorney fees of individuals indicted] because the government had the proverbial gun to its head.”¹⁰⁸ This district court judge noted that “[h]ad that pressure not been brought to bear, KPMG would have paid these defendants’ legal expenses.”¹⁰⁹

In *United States v. Stein I*,¹¹⁰ Judge Kaplan of the Southern District of New York found that government interference with employees’ rights “to a fair trial and to the effective assistance of counsel” violated the Fifth and Sixth Amendment to the Constitution.¹¹¹ The court stated that “[t]he Thompson Memorandum and the USAO pressure on KPMG to deny or cut off defendants’ attorneys’ fees necessarily impinge upon the KPMG Defendants’ ability to defend themselves.”¹¹² Judge Kaplan also stated that “the government’s interference in the KPMG Defendants’ ability to mount a defense ‘creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.’”¹¹³ The court in this first decision held that although this government conduct did not rise to the level of requiring dismissal of the indictment against the charged individuals related to KPMG, it did merit some relief for these particular defendants.¹¹⁴ In *United States v. Stein II*, Judge Kaplan re-examined

343 (clarification added since shorthand was used in the case).

105 *Id.* at 336; *see also id.* at 356 n.119.

106 *See id.* at 344–45.

107 It is particularly noteworthy here that some of the auditing work being performed by KPMG was regarding the Department of Justice’s financial statements. The agreement states that “[t]he Department of Justice’s debaring official has determined that KPMG is currently a responsible contractor.” KPMG Letter, *supra* note 103, at 26, § 21.

108 *Stein I*, 435 F.Supp.2d at 336.

109 *Id.*

110 435 F. Supp. 2d 330.

111 *Id.* at 382.

112 *Id.* at 362.

113 *Id.* at 372 (citation omitted).

114 The court’s remedy was:

1. The Court declares that so much of the Thompson Memorandum and the activities of the USAO as threatened to take into account, in deciding whether to indict KPMG, whether KPMG would advance attorneys’ fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment

the remedy issue and found that the prosecutor's conduct was "outrageous and shocking." He then dismissed thirteen defendants from this criminal case.¹¹⁵

Deferred prosecution agreements that require a company to disregard rights or contracts to third parties are asking the company to breach previously negotiated agreements. Even premising the ability to secure the benefit of a deferred prosecution agreement on a company disregarding previously negotiated contracts is improper. By asking a company not to pay attorney fees of employees, the government is using its enormous power to place individual defendants without the ability to properly defend themselves in actions against the government.¹¹⁶ This can be a detriment to the

interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution.

2. The government shall adhere to its representation that any payment by KPMG of the defense costs of the KPMG Defendants is acceptable to the government and will not be considered in determining whether KPMG has complied with the DPA or otherwise prejudice KPMG.

3. The Clerk shall open a civil docket number to accommodate the claims of the KPMG Defendants against KPMG for advancement of defense costs should they elect to pursue them. If they file a complaint within 14 days, the Clerk shall issue a summons to KPMG. The Court in that event will entertain the claims pursuant to its ancillary jurisdiction over this case.

The motions are denied insofar as they seek monetary sanctions against the government. The Court reserves decision as to whether to grant additional relief.

Id. at 382; see also *Judge Condemns DOJ Policy of Pressuring Companies Not to Pay Employees' Legal Fees*, 22 LAW. MANUAL ON PROF. CONDUCT 342 (July 12, 2006); Terry Carter, *Judge Blasts Prosecutor Fee Pressure*, 5 No. 27 A.B.A. J. E-Report 1 (2006). KPMG challenged the district court order and pursuant to a court invitation, Judge Lewis A. Kaplan filed a response commenting on issues related to the district court's jurisdiction. See Response to Rule 21(b)(4) Invitation, *United States v. Stein*, No. 06 Civ. 5007 (2d Cir. filed Jan. 8, 2007), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/kaplan20stein20memo20to20second20circuit20jan208202006.pdf.

¹¹⁵ *United States v. Stein II*, No. S1 05 Crim. 0888(LAK), 2007 WL 2050921, at *15–17, 26 (S.D.N.Y. July 16, 2007).

¹¹⁶ The cost of attorney fees in white collar cases can be extremely high. As stated by the court in *Stein I*:

This is by no means a garden-variety criminal case. It has been described as the largest tax fraud case in United States history. The government thus far has produced in discovery, in electronic or paper form, at least 5 million to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns. The briefs on pretrial motions passed the 1,000-page mark some time ago. The government expects its case in chief to last three months, while defendants expect

individual and to the company's ability to hire future employees and to negotiate future contracts with individuals. Further, it puts enormous pressure on the affected employees to cooperate with the government since they will not be reimbursed for their attorney fees.

II. THE APPLICATION OF CONTRACT LAW TO AGREEMENTS USED IN CRIMINAL MATTERS

A. *General Applications of Contract Law in the Criminal Justice Process*

It is well settled that principles of contract law apply to bargained agreements, regardless of their subject matter. Although courts may be very comfortable enforcing commercial contracts,¹¹⁷ they are also accustomed to using traditional contract law to determine the enforceability of many other types of agreements, whether they are in the criminal justice system,¹¹⁸ the family court system,¹¹⁹ the international arena,¹²⁰ or other areas of the law.

The use of contract law to enforce promises in the criminal justice sys-

theirs to be lengthy as well. To prepare for and try a case of such length requires substantial resources. Yet the government has interfered with the ability of the KPMG Defendants to obtain resources they otherwise would have had. Unless remedied, this interference almost certainly will affect what these defendants can afford to permit their counsel to do. This would impact the defendants' ability to present the defense they wish to present by limiting the means lawfully available to them. The Thompson Memorandum and the USAO's actions therefore are subject to strict scrutiny.

Stein I, 435 F. Supp. 2d at 362 (footnotes omitted).

¹¹⁷ This is stating the obvious. One can review any commercial law textbook and find a multitude of commercial contract cases. *See, e.g.*, DANIEL KEATING, *SALES A SYSTEMS APPROACH* (3d ed. 2006).

¹¹⁸ *See, e.g.*, *United States v. Crawford*, 20 F.3d 933, 935 (8th Cir. 1994) (explaining plea agreements are enforced under the doctrines of contract law); *United States v. Conway*, 81 F.3d 15, 17 (1st Cir. 1996) (stating plea agreements are subject to the principles of contract law); *United States v. Smith*, 976 F. 2d 861, 863 (4th Cir. 1992) (using contract law to interpret an immunity agreement); *United States v. Parra*, 302 F. Supp. 2d 226, 235-40 (S.D.N.Y. 2004) (holding that proffer agreement was enforceable under contract law principles).

¹¹⁹ *See, e.g.*, Faith H. Spencer, *Expanding Marital Options: Enforcement of Premarital Contracts During Marriage*, 1989 U. CHI. LEGAL F. 281 (1989) (documenting the use of contract law to enforce premarital agreements after death or divorce); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998) (discussing the intersection of contract and family law).

¹²⁰ *See, e.g.*, Sunil R. Harjani, *The Convention on Contracts For the International Sale of Goods in United States Courts*, 23 Hous. J. INT'L L. 49, 70-88 (2000) (analyzing five significant cases in United States courts that apply contract law to international transactions); Burt A. Leete, *Contract Formation Under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary*, 6 TEMP. INT'L & COMP. L.J. 193 (1992) (discussing United States contract formation principles as they intersect with international contract law).

tem began over thirty–five years ago with the Supreme Court’s decision in *Santobello v. New York*.¹²¹ In *Santobello*, the State failed to adhere to a bargained promise it had made to the accused as part of a plea negotiation. The state agreed it would make no recommendation as to the punishment the court should assess after the accused entered his guilty plea to gambling crimes. The Court used a typical contract analysis and noted that, although circumstances may vary, when a prosecutor makes a promise and it is at least part of the consideration for a defendant’s guilty plea, the promise must be fulfilled.¹²² Once the Court determined that the prosecution’s promise merited enforcement, it remanded the case to the state court to determine the appropriate relief. The court’s options included specific performance¹²³ or rescission of the contract. The latter would have allowed the accused to withdraw his promise to the prosecutor to plead guilty.¹²⁴ Since *Santobello*, courts consistently use contract law to analyze plea agreements gone awry in the criminal justice system.¹²⁵

Santobello provides the basis for courts to use contract principles in a host of criminal law matters. Following the lead in *Santobello*, one finds contract theory permeating the legal landscape in the plea bargain context¹²⁶ and also in other agreements¹²⁷ that arise in the criminal justice process. Courts in almost all scenarios follow traditional principles of contract doctrine when analyzing agreements¹²⁸ made and enforced in the criminal

¹²¹ 404 U.S. 257, 262 (1971) (holding plea agreements arranged through a contract or promise from the prosecution must be enforced).

¹²² *Id.*

¹²³ In the plea bargain context, specific performance is the least onerous of remedies because it simply requires resentencing by a different judge. *See e.g., id.* at 263 (reserving the decision regarding proper relief to the state court); *United States v. Peglera*, 33 F.3d 412, 415 (4th Cir. 1994) (requiring the prosecution to fulfill its promise under the plea agreement).

¹²⁴ *Santobello*, 404 U.S. at 263.

¹²⁵ *See, e.g., Buckley v. Terhune*, 441 F.3d 688, 695 (9th Cir. 2006) (stating that California law clearly requires a court to apply contract law to disputes about the enforceability of plea agreements), *cert. denied*, 127 S. Ct. 2094 (2007); *United States v. Smallwood*, 311 F. Supp. 2d 535, 542–43 (E.D. Va. 2004) (recognizing that general contract law principles apply to the enforcement of plea agreements); *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996) (stating that plea agreements are construed using contract law doctrine); *United States v. Olesen*, 920 F.2d 538, 541–42 (8th Cir. 1990) (applying contract principles to determine the reformation of a plea agreement).

¹²⁶ *See, e.g., United States v. Hare*, 269 F.3d 859, 861 (7th Cir. 2001) (applying the requirement of consideration in contract doctrine to plea agreements); *United States v. Garcia*, 956 F.2d 41, 43–44 (4th Cir. 1992) (discussing the relationship of commercial contract law to plea agreements); *Ready*, 82 F.3d at 558 (following the Fourth Circuit when analyzing plea agreements through contract law).

¹²⁷ *See, e.g., United States v. Gomez*, 210 F. Supp. 2d 465, 475 (S.D.N.Y. 2002) (holding that a proffer agreement is a contract and is analyzed using contract doctrine); *United States v. Oruche*, 257 F. Supp. 2d 230, 237–38 (D.D.C. 2003) (noting that immunity agreements are analyzed using contract law).

¹²⁸ *See United States v. Conway*, 81 F.3d 15, 17 (1st Cir. 1996) (clarifying that a plea

justice system. This includes interpretation of plea agreements,¹²⁹ use of canons of construction,¹³⁰ the law of conditions,¹³¹ promissory estoppel,¹³² the parol evidence rule when ascertaining the ability of a party to add an oral promise to a plea bargain,¹³³ material breach versus substantial performance analysis,¹³⁴ modification of contracts,¹³⁵ frustration of purpose,¹³⁶ intent driven interpretation,¹³⁷ the need for consideration to make an agreement binding,¹³⁸ illusory promises,¹³⁹ and assumption of the risk of future

bargain is a contract where the government obtains a conviction as consideration for the defendant's opportunity for a reduced sentence).

129 *See, e.g.*, *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997) (declaring plea agreements are interpreted in accordance with contract law); *United States v. Speelman*, 431 F.3d 1226, 1229 (9th Cir. 2005) (stating terms included in a plea agreement are interpreted through contract law); *United States v. Cimino*, 381 F.3d 124, 129 (2d Cir. 2004) (interpreting specific provisions of a plea agreement in favor of the prosecution).

130 Such uses include interpreting ambiguities against the drafter. *See United States v. Rivera*, 357 F.3d 290, 298 (3d Cir. 2004) (construing a plea agreement containing multiple sentencing provisions against the prosecution).

131 *See, e.g.*, *United States v. Saunders*, 226 F. Supp. 2d 796, 802 (E.D. Va. 2002) (noting that before the government would be required to file a motion under the plea agreement requesting a downward departure from the sentencing guidelines, the defendant must first meet a condition precedent of providing substantial assistance to the government), *aff'd*, 55 Fed. Appx. 694 (4th Cir. 2003).

132 Courts, however, always refer to detrimental reliance as the singular requirement. *See United States v. Coon*, 805 F.2d 822, 825 (8th Cir. 1986) (holding the defendant did not detrimentally rely on a plea agreement when he voluntarily agreed to it and was aware of its direct consequences).

133 *See, e.g.*, *United States v. Floyd*, 1 F.3d 867, 870 (9th Cir. 1993) (ruling modifications violated the parol evidence rule when a plea agreement was completely integrated); *Id.* at 872 (Wallace, J., dissenting) (referring to such important contract concepts as course of performance in interpretation); *United States v. Garcia*, 956 F.2d 41, 44 (4th Cir. 1992) (requiring the prosecution uphold the provisions contained in a cover letter that accompanied a plea agreement).

134 Although courts do not follow the typical analysis as they uphold plea agreements in spite of a material breach. *See United States v. Fitch*, 964 F.2d 571, 575 (6th Cir. 1992) (restricting the prosecution to specified remedies in the plea agreement despite a material breach).

135 *See, e.g.*, *United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004) (noting that in most cases contract principles apply when a party attempts to modify a plea agreement).

136 Frustration of purpose can be used as a defense when the government needs an escape valve to release it from the plea bargain. *See United States v. Thompson*, 237 F.3d 1258, 1261 (10th Cir. 2001) (ruling the prosecution was no longer bound to a plea bargain when a supervening event frustrated the purpose of the agreement).

137 *See, e.g.*, *Buckley v. Terhune*, 441 F.3d 688, 695–98 (9th Cir. 2006) (holding that the interpretation of a plea agreement is governed by contract law and that requires a court to determine the intent of the parties), *cert. denied*, 127 S. Ct. 2094 (2007).

138 *See, e.g.*, *United States v. Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998) (noting that there was consideration to support a waiver of appeal in plea agreement).

139 *See United States v. Zweber*, 913 F.2d 705, 711 (9th Cir. 1990) (holding the prosecution's promise under a plea bargain was not illusory when it agreed to recommend a reduced sentence).

changes in the criminal law that work to the disadvantage of the defendant.¹⁴⁰

B. Basic Contract Concepts Applied to Criminal Matters

Contract law requires all agreements to have consideration and assent. When applied in the criminal context, one of these concepts, assent, receives special treatment by courts.¹⁴¹ Other than in the requirement of assent, one does not find a major deviation from contract rules when examining enforcement principles.

As any first year contracts student quickly learns, consideration is a basic element for an enforceable contract. The main theory underpinning contract law is that the courts will enforce freely entered agreements when parties exchange promises with each other.¹⁴² Although this exchange does not demand equality, it does require that each party receive something of value in the bargain.¹⁴³

In addition to consideration, assent is also essential to the formation of a valid contract. Normally in contract law, the parties are the sole actors who assent to the agreement and it is a contract between private individuals. Applied in the criminal law arena, however, one finds an added layer to the assent process in that the judiciary plays a crucial role in determining whether true assent has in fact occurred.¹⁴⁴

¹⁴⁰ See, e.g., *United States v. Bownes*, 405 F.3d 634, 637 (7th Cir. 2005) (rejecting the defendant's argument that a change in law should be taken into consideration despite a pre-existing plea agreement); *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005) (enforcing an express agreement concerning restitution regardless of statutory requirements).

¹⁴¹ See, e.g., *United States v. Kennell*, 15 F.3d 134, 136–39 (9th Cir. 1994) (noting that civil contract law cannot be applied rigidly in the criminal context of plea agreements when determining whether a defendant voluntarily assented to a plea agreement because the Federal Rules of Criminal Procedure require a court to ascertain whether a plea agreement is voluntary and there is actual assent to a plea agreement).

¹⁴² See, e.g., *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1122 (7th Cir. 1998) (holding that an exchange of promises between an at will employee and his employer was sufficient to form a binding contract); *Samra v. Shaheen Bus. & Inv. Group, Inc.*, 355 F. Supp. 2d 483, 502 (D.D.C. 2005) (noting that American contract law enforces agreements where promises are exchanged freely and voluntarily with an intent to enter into a contract); *Owen v. MBPXL Corp.*, 173 F. Supp. 2d 905, 915 (N.D. Iowa 2001) (recognizing that contract doctrine also enforces unilateral agreements where one party makes a promise in exchange for an action on the part of the other party).

¹⁴³ See, e.g., *Ryan v. Upchurch*, 474 F. Supp. 211, 218–19 (S.D. Ind. 1979) (noting that the law of contracts does not require equal value or symmetry to have a valid contract and that a court will not inquire into the adequacy of the consideration), *rev'd sub nom.* *Ryan v. J. C. Penney Co.*, 627 F.2d 836 (7th Cir. 1980); *Pierson v. Willets Point Contracting Corp.*, 899 F. Supp. 1033, 1044 (E.D.N.Y. 1995) (explaining that the adequacy of the consideration is not a proper subject of judicial scrutiny because parties are free to enter into bargains where the considerations for a contract are totally unequal).

¹⁴⁴ Federal Rules of Criminal Procedure, Rule 11 provides extensive rules regarding the

court's review of a plea prior to its acceptance, and the determination of it being voluntary. Specifically it states in part (b)(1)–(3) the following:

(1) **Advising and Questioning the Defendant.** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) **Ensuring That a Plea Is Voluntary.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant per-

In the criminal law context, the government and accused have certain constraints upon their ability to enter into an enforceable contract. They are not left to their own devices to work out the agreement, as the agreement may be worthless if not accepted by the court.¹⁴⁵ Fundamental constitutional rights may be a factor in determining whether a court will accept a plea bargain entered into between the prosecution and defense. Judges are required to question the accused on the record to ascertain whether the defendant is pleading guilty voluntarily and of his or her own free will.¹⁴⁶ Thus, the judiciary provides oversight as to the validity of the assent of the agreement.

In addition to consideration and assent, there is another dimension to the application of contract law to plea bargain agreements. This pertains to whether there is a breach and the ability to withdraw from the agreement. Normally, in contract law a breach either results in litigation to enforce the promises, agreement between the parties as to how to deal with a breach, or the injured party chooses to return to a pre-negotiation status. This contrasts with criminal plea bargain law, where the government does not have the power to unilaterally declare a breach and withdraw its promise.¹⁴⁷

C. Duress & Unconscionability

Duress and unconscionability are policing concepts used by the courts to restrain a party with superior bargaining power from taking advantage of a less powerful party. These concepts place limits on the enforceability of agreements that are unfair and one-sided.¹⁴⁸ In providing this equal-

sonally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

FED. R. CRIM. P. 11(b).

¹⁴⁵ See *id.*

¹⁴⁶ See *supra* note 144; see also *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (requiring a showing on the record that a guilty plea was made “intelligently and knowingly”).

¹⁴⁷ See *United States v. Guzman*, 318 F.3d 1191, 1196 (10th Cir. 2003) (explaining the government may not withdraw from the agreement before holding a hearing to determine whether it breached).

¹⁴⁸ See, e.g., *LTV Energy Prods. Co. v. N. States Contracting Co. (In re Chateaugay Corp.)*, 162 B.R. 949, 959 (Bankr. S.D.N.Y. 1994) (stating that the doctrine of unconscionability prohibits one-sided contracts to prevent “oppression and unfair surprise” without upsetting the risks allocated to superior bargaining power); *Nat’l Rural Telecomms. Coop. v. Directv, Inc.*, 319 F. Supp. 2d 1040, 1054 (C.D. Cal. 2003) (stating that contracts may be avoided if they are so one-sided as to be unconscionable under the facts existing at the time of contracting); *Mercantile Bank & Trust Co. v. Eppinger (In re Eppinger)*, 61 B.R. 89, 94 (Bankr. W.D. Mo. 1986) (noting that duress from the marital relationship caused the debtor to sign a one-sided

izing function, it does not necessarily require elimination of the entire contract.¹⁴⁹ Rather, a court may remove troubling terms within a contract but keep intact the remainder of the agreement.¹⁵⁰

1. Duress.—The doctrine of duress considers whether a party to a contract is entering the contract because of compulsion instead of true assent to the contract.¹⁵¹ Parties who enter contracts under compulsion may be relieved of their duties under that contract if it is shown that the elements of duress were present at the time of contracting.¹⁵²

The problem with duress is one of degree. When duress is claimed, a court must determine whether the compulsion was so serious and wrongful that it should refuse to enforce the contract or, alternatively, undo the contract. Some cases of duress are easy to recognize as outside the scope of permissible conduct.¹⁵³ A classic case of duress requires a showing of (1) a threat, (2) that is improper or wrongful, (3) that induces the party's manifestation of assent to the contract or the terms, and (4) that is considered sufficiently grave to justify the fact that the "assenting" party gave in to the threat and agreed to the coerced contract or term.¹⁵⁴

The courts have recognized that the classic doctrine of duress does not always fit certain cases in the commercial world where deals have been agreed to because of coercion by a party with stronger bargaining power. To deal with these types of issues, the courts developed the concept of economic duress.¹⁵⁵ Economic duress looks at the business circumstances

contract).

149 See *Weidman v. Tomaselli*, 365 N.Y.S.2d 681, 688 (N.Y. Co. Ct.) (upholding an adhesion contract for the lease of an apartment while striking a clause exacting attorney fees as unconscionable), *aff'd*, 386 N.Y.S.2d 276 (N.Y. App. Term 1975).

150 See *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003) (identifying the justifications for eliminating unconscionable terms as opposed to voiding the whole contract).

151 RESTATEMENT (SECOND) OF CONTRACTS § 174 (1981) (explaining compelled conduct is not sufficient to manifest assent).

152 See *Kaplan v. Keith*, 377 N.E.2d 279, 281 (Ill. App. Ct. 1978) (stating a contract entered into under duress is voidable).

153 An example of behavior that clearly falls within the parameters of duress is where a party makes a promise due to a threat of physical violence. See, e.g., *United States v. McBride*, 571 F. Supp. 596, 610-12 (S.D. Tex. 1983) (stating that a plea agreement offered by the government in exchange for information about the location of bombs that would save thousands of lives and millions of dollars was made under duress), *aff'd*, 915 F.2d 1569 (5th Cir. 1990); *United States v. West*, 607 F.2d 300, 304 (9th Cir. 1979) (stating that a promise of amnesty made by prison officials in exchange for a promise not to harm hostages was induced by duress).

154 RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (identifying the necessary elements of duress that make a contract voidable).

155 See *Resolution Trust Corp. v. Ruggiero*, 977 F.2d 309, 313 (7th Cir. 1992) (recognizing that economic duress exists where circumstances deprive a party of her free will and the resulting contract is voidable).

of the parties to the contract. When a party with superior bargaining power coerces the other party into agreeing to a contract out of severe economic necessity, the contract may be avoided if the economic realities were such that it would effectively destroy the weaker party's business.¹⁵⁶

Economic duress thus allows a party to a business transaction to avoid certain agreements entered into because of business compulsion.¹⁵⁷ Although economic duress has been used most often to deal with cases when one party has threatened to breach a contract if the other party does not agree to a modification in a current contract, the equitable concept of economic duress should apply also to initial contracts that have been forced upon a party under economic compulsion.¹⁵⁸ For example, if a weaker party agrees to a contract because the other contracting party will take action that will destroy the weaker party's business, that contract may be avoided under a theory of economic duress.

Additionally, a few courts have recognized that moral duress may exist in certain cases. Moral duress has been explained as, ". . . imposition, oppression, under influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weakness of another; the theory under which relief is granted being that the party profiting thereby has received money, property, or other advantage, which in equity and good conscience he ought not be permitted to retain."¹⁵⁹

Not all threats will amount to duress.¹⁶⁰ An improper threat occurs when one party expresses a deliberate intent to cause a harm or loss to another. The concept, however, is not fixed with specific characteristics, as it is a matter of degree. Courts examine the factual scenarios on a case-by-case basis deciding whether it is the type of threat that voids the contract.¹⁶¹ The decision whether a statement is a threat or not may include a determination whether the threat is the type that the law should allow or deter.¹⁶² The

156 See *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971).

157 See *Capps v. Ga. Pac. Corp.*, 453 P.2d 935, 938 (Or. 1969) (stating that a contract may be unenforceable due to economic duress when undue advantage is taken of a person's economic necessity).

158 See, e.g., *Multimedia 2000, Inc. v. Attard*, 374 F.3d 377 (6th Cir. 2004) (recognizing economic duress as a defense in Tennessee); *VKK Corp. v. Nat'l. Football League*, 244 F.3d 114, 122 (2d Cir. 2001) (recognizing economic duress as a defense under New York law); *Gen. Motors Corp. v. Paramount Metal Prods. Co.*, 90 F. Supp. 2d 861 (E.D. Mich. 2000) (recognizing the doctrine of economic duress as a way to avoid a contract).

159 *Norton v. Mich. State Highway Dep't*, 24 N.W.2d 132, 135 (Mich. 1946) (quoting *Rees v. Schmits*, 164 Ill. App. 250, 258 (Ill. App. Ct. 1911)).

160 See *Dunbar v. Dunbar*, 429 P.2d 949, 953 (Ariz. 1967) (holding a threat to utilize the courts to enforce a perceived right does not constitute duress).

161 See *Hellenic Lines, Ltd. v. Louis Dreyfus Corp.*, 372 F.2d 753, 757 (2d Cir. 1967) (explaining that a finding of duress is dependant upon the threatened person's state of mind and is a question of degree).

162 See *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 927 (7th Cir. 1983) (stating that the fundamental issue in determining whether a threat amounts to duress is whether the

classic duress situation is one where a party enters into a contract because the other choices given to her or him are totally unacceptable and would result in grievous loss.¹⁶³

The second element of duress requires the court to consider the intention behind the threat. As with the first element of duress, this second requirement is also fluid and dependent on the specific facts of the individual case. Obviously, a threat of physical harm is improper.¹⁶⁴ The doctrine of duress, however, encompasses threats that may be perfectly legal and still be improper.¹⁶⁵ This element requires the court to consider the disparity of bargaining power between the parties and the resulting unfairness of the agreement.¹⁶⁶ Thus, if the stronger party threatens a consequence for the sole purpose of gaining the other party's assent and it is a consequence that the court determines is unfair¹⁶⁷ or against public policy,¹⁶⁸ it may be held to be wrongful.¹⁶⁹ The court will look at the threat in conjunction with the facts surrounding the exchange. Is the party with the stronger bargaining power requiring agreement to a term that is unacceptable and only being agreed to because of the potential consequences of not reaching an agree-

statement that induced the promise is the kind we want to discourage).

163 It is not uncommon to issue a threat during contract negotiations, such as telling the other party that it is your last offer and if they do not agree to the contract you will withdraw it and look for another business partner. Hard bargaining alone is generally not contracting under duress. *See* DuFort v. Aetna Life Ins. Co., 818 F. Supp. 578, 582 (S.D.N.Y. 1993) (stating that mere hard bargaining and the press of financial circumstances is not sufficient to constitute duress).

164 No court would enforce a contract if it were induced by a threat to cause death or serious bodily harm. Thus, a contract signed because a gun was held to a party's head would clearly be avoidable under a theory of duress. *See* United States v. Bell, 855 F. Supp. 239, 241 (N.D. Ill. 1994) (stating that duress is a valid defense where a party fears immediate death or severe bodily injury).

165 *See* Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1330 (Fed. Cir. 2003) (stating that precedent has eliminated the requirement of an illegal threat and that even actions by the government that are lawful may still support a claim of duress, if those actions violate the concept of fair dealing).

166 An ordinary offer to make a contract often involves an implied threat by a party with stronger bargaining power not to make a contract unless the terms are accepted. The critical factor is often the fairness of the exchange as well as the disparity of bargaining power. *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 cmts. a, f (1981).

167 *See* Noble v. White, 783 A.2d 1145, 1149-50 (Conn. App. Ct. 2001) (noting that one factor in proving duress is whether the resulting transaction was unfair to the victim).

168 A threat of criminal prosecution that induces a contract is often said to be made under duress and against public policy. *See e.g.*, Meech v. Lee, 46 N.W. 383 (Mich. 1890) (holding that a mother who mortgaged her home to save her son from threatened criminal prosecution could avoid the mortgage because it was signed under duress and against public policy); Ingalls v. Neidlinger, 216 P.2d 387, 391 (Ariz. 1950) (holding that under the modern rule of duress a threat of criminal prosecution may invalidate a contract even if the victim of duress is guilty of criminal wrongdoing).

169 *See infra* notes 173-77 and accompanying text.

ment? For example, if the stronger party requires a term that waives the attorney–client privilege, although the ethical rules would normally support the privilege, is that a threat that is wrongful? Although it is not easy to determine what exactly the proper limits are in bargaining, this article suggests that the government has clearly gone beyond the acceptable limits in three different situations.

Next, the court must consider whether the threat was the actual cause of the weaker party’s agreement to the offending terms.¹⁷⁰ Are there other legitimate reasons why the weaker party might agree to these terms? As long as the threat caused the apparent assent to the agreement, this element is satisfied.

Finally, the court must consider the gravity of the threat.¹⁷¹ How severe does the threat need to be before it will justify a party’s succumbing to the will of another party? This element has caused some difficulty at times because some courts have defined the severity of the threat in terms of whether it overcomes the free will of the assenting party.¹⁷² This element cannot really be considered unless the court looks at it in the context where it happened. Obviously, the threat to sue a party who has injured you by running a red light and causing you thousands of dollars in significant monetary damages sounds very severe. If, however, there is a reasonable alternative to choose, the threat is not severe enough to qualify for the defense of duress.¹⁷³ Instead, the weaker party may choose to go to court and assert her rights there.

Though some courts have referred to contracts entered into under duress as “void” contracts, that term is actually improper because a void contract may never be enforced. If a party agrees to a contract while under duress, the usual remedy is to declare the contract voidable at the option of the victim.¹⁷⁴ If, however, the victim ratifies the contract after the threat has ceased, he or she loses the power to avoid the contract.¹⁷⁵ Additionally,

¹⁷⁰ See *N. Star Steel Co. v. United States*, 477 F.3d 1324, 1334 (Fed. Cir. 2007) (noting that duress requires a consideration of whether the threat and coercive acts actually caused assent to the agreement).

¹⁷¹ See *Wurtz v. Fleischman*, 278 N.W.2d 266, 269 (Wis. Ct. App. 1979) (stating that one criteria to consider when determining whether duress exists is the gravity of the threatened evil), *rev’d on other grounds*, 293 N.W.2d 155 (Wis. 1980).

¹⁷² See *Capps v. Ga. Pac. Corp.*, 453 P.2d 935, 938 (Or. 1969) (noting that the *Restatement Second of Contracts* defines duress as a situation that precludes a party from exercising free will and judgment).

¹⁷³ See *Dunes Hospitality, L.L.C. v. Country Kitchen Int’l, Inc.*, 623 N.W.2d 484, 492 (S.D. 2001) (holding that economic duress requires a party to show that there was no reasonable alternative but to agree to the other party’s demands).

¹⁷⁴ See *U.S. for the Use of the Trane Co. v. Bond*, 586 A.2d 734, 735 (Md. 1991) (discussing the difference between void and voidable contracts entered into under duress).

¹⁷⁵ See *Tidwell v. Critz*, 282 S.E.2d 104, 108 (Ga. 1981) (noting that when a party ratifies a contract, he or she may no longer assert duress and disaffirm a contract).

a party desiring to avoid a contract using the defense of duress must seek avoidance quickly after the threat of duress has been removed.¹⁷⁶ Duress may be used affirmatively as a sword or defensively as a shield. Thus, a victim may sue to have the offending contract declared unenforceable due to the duress or he or she may use duress as a defense if the other party attempts to enforce the contract in court.

Once a court determines that a contract has been entered into under duress, it may order the contract avoided and, where appropriate, may require either party to pay restitution, so that everyone is returned to the status quo.¹⁷⁷ The usual remedy for agreements entered into under duress is to compel the victim to choose between affirming the entire contract or total avoidance.¹⁷⁸ Once the duress is removed and the contract rescinded, a party is free to enter into another contract that is fair with the offending party.

2. *Unconscionability.*—The next doctrine that may be useful in determining whether deferred prosecution agreements or specific terms in these agreements can withstand scrutiny is the doctrine of unconscionability. An inquiry into whether a contract or any term of a contract is unconscionable requires the court to consider first whether the contract is a result of free bargaining. If a contract is not the result of true bargaining and the stronger party essentially dictates the terms, the resulting contract is one of adhesion.¹⁷⁹ Because adhesion contracts are economically useful,¹⁸⁰ the mere fact that a contract is one of adhesion will not mean that a contract is unconscionable per se. Contracts of adhesion, however, require a court to scrutinize the contract more carefully for fairness issues than one that is the result of bargaining and dickered terms.¹⁸¹ Adhesion contracts are often found to be fair if the goods or services that are the subject matter of the

¹⁷⁶ See *Weisert v. Bramman*, 216 S.W.2d 430, 435 (Mo. 1948) (holding that a party who is attempting to avoid a contract because of duress must seek to repudiate the contract promptly after the threat of duress is removed).

¹⁷⁷ See *Millheiser v. Wallace*, 21 P.3d 752, 756 (Wyo. 2001) (noting that a party who has avoided a contract may recover restitution for any benefit given to the other party and that the court has discretion to return the parties to the status quo).

¹⁷⁸ See *T.A.C. v. J.R.C.*, No. CK02-03171, 2003 WL 23269498, at *5 (Del. Fam. Ct. Nov. 21, 2003) (noting that a victim of duress normally must disaffirm the entire contract).

¹⁷⁹ See *Deminsky v. Arlington Plastics Mach.*, 657 N.W.2d 411, 423 (Wis. 2003) (defining a contract of adhesion as one “in which a party has, in effect, no choice to accept the contract offered, often where the buyer does not have the opportunity to do comparative shopping or the organization offering the contract has little or no competition”).

¹⁸⁰ See *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981) (discussing the history of adhesion contracts and the fact that they provide many advantages that must be balanced with the possibility of oppression by the party with superior bargaining power).

¹⁸¹ See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600-01 (1991) (explaining adhesion contracts must be examined to determine their reasonableness).

contract may be purchased elsewhere,¹⁸² although some courts have found that by definition an adhesion contract is procedurally unconscionable.¹⁸³

One of the most troubling features of unconscionability is that there is no clear definition of the concept. Neither the *Uniform Commercial Code*¹⁸⁴ nor the *Restatement of Contracts*¹⁸⁵ offers sufficient guidance for courts to use when determining whether an offending contract is unconscionable. Instead, it is left to the judge to hear all of the evidence and decide whether one party truly took unfair advantage of the other party in the contracting process. The closest a court has come to a definition is in the celebrated case of *Williams v. Walker-Thomas Furniture Co.*¹⁸⁶ where the Court of Appeals for the District of Columbia declared, “[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”¹⁸⁷

This has led courts to use a two-part analysis in determining the applicability of the doctrine of unconscionability.¹⁸⁸ Although a few courts have held that a single term may be so unconscionable as to infect an entire contract,¹⁸⁹ most courts agree that before a court strikes down a term or an entire contract for unconscionability, it must find both procedural unconscionability¹⁹⁰ and substantive unconscionability.¹⁹¹ Although often the contracts that are declared unconscionable are consumer contracts, it does not follow that only consumers may use the doctrine of unconscionability to escape an oppressive contract or an oppressive term in the contract. Contracts outside of the consumer area have been declared unconsciona-

182 See *Stout v. J.D. Byrider*, 50 F. Supp. 2d 733, 739 (N.D. Ohio 1999) (noting that an unconscionable adhesion contract is one where the terms are one-sided, there is a disparity of bargaining power, and the services or products cannot be obtained elsewhere), *aff'd*, 228 F.3d 709 (6th Cir. 2000).

183 See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1148–49 (9th Cir. 2003) (holding that a contract of adhesion is procedurally unconscionable).

184 See U.C.C. § 2–302 (2003).

185 See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

186 350 F.2d 445 (D.C. Cir. 1965).

187 *Id.* at 449.

188 See, e.g., *Jones Distrib. Co. v. White Consol. Indus., Inc.*, 943 F. Supp. 1445, 1460 (N.D. Iowa 1996) (noting that before a court finds a contract or term unconscionable, it must find both procedural and substantive unconscionability).

189 See e.g., *Trinkle v. Schumacher Co.*, 301 N.W.2d 255, 259 (Wis. Ct. App. 1980) (finding that a term in the contract that limited damages for defective goods was unconscionable even though both parties were commercially experienced business people who had equal bargaining power).

190 See *Jones Distrib. Co.*, 943 F. Supp. at 1460 (defining procedural unconscionability as one where the individualized circumstances show a great disparity of bargaining power between the parties such that true assent is not possible).

191 *Id.* (defining substantive unconscionability as one where the terms of a contract are unfair and unreasonable).

ble.¹⁹²

First, in determining whether there is procedural unconscionability, courts look at the process the parties used when they entered into the contract. There is often a disparity of bargaining power between contracting parties, but the existence of a mere disparity of bargaining power is insufficient for a finding of procedural unconscionability.¹⁹³ Courts, however, have followed the *Restatement (Second) of Contracts* and recognized that a gross inequality of bargaining power may satisfy this requirement.¹⁹⁴

Typically, when deciding whether procedural unconscionability exists, the inquiry requires examining the degree of compulsion being exerted, how much pressure was brought to bear on the less powerful party, and the process that led to the agreement.¹⁹⁵ Although there is no definition of unconscionability, the *Restatement (Second) of Contracts* lists factors in the comments that may be helpful to a court in determining whether procedural unconscionability exists.¹⁹⁶ They include: where the party in a superior bargaining position does not believe there is a reasonable probability that the other party will perform the contract; where the more powerful party knows that the other party will not be able to receive a substantial benefit from the contract, or knowledge by the stronger party that the other party is

192 See, e.g., *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (holding an arbitration clause in a franchise agreement to be unenforceable because it was unconscionable); *Rozeboom v. Nw. Bell Tel. Co.*, 358 N.W.2d 241 (S.D. 1984) (holding that a contract between an individual business person and a monopoly that contained a limitation of liability term was so unfair that it was against public policy and unconscionable); *Pittsfield Weaving Co. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981) (holding that a contract between a commercial weaving corporation and a corporation in the business of texturizing and selling yarn was unconscionable due to a disparity of bargaining power and an oppressive term that effectively prevented the buyer from obtaining damages for defective yarn); *Ashland Oil, Inc. v. Donahue*, 223 S.E.2d 433 (W. Va. 1976) (holding that a commercial contract between a lessee and an oil company was unconscionable without regard to whether there was a disparity of bargaining power between the parties, since there is always some disparity of bargaining power in commercial contracts); *Shell Oil Co. v. Marinello*, 307 A.2d 598 (N.J. 1973) (holding that a clause in a contract that gave the oil company an absolute right to terminate the contract was so unconscionable and unfair that it was void as against public policy); *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948) (holding that a provision in a commercial contract between a farmer and a soup company that had many onerous provisions in it, including a clause that forbid the farmer from selling his goods even though the soup company could not accept them, was unconscionable and "carrying a good joke too far").

193 See *Bennett v. Behring Corp.*, 466 F.Supp. 689, 695 (S.D. Fla. 1979) (noting that the purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise and not to disturb risk allocations because of superior bargaining power).

194 See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1148-49 (9th Cir. 2003) (holding that a gross disparity of bargaining power will satisfy the requirement of procedural unconscionability); *RESTATEMENT (SECOND) OF CONTRACTS* § 208 cmt. d (1981).

195 See, e.g., *Jones Distrib. Co.*, 943 F. Supp. at 1460 (noting that before a court can find procedural unconscionability it must review the specific facts of the case to determine whether there is unfair bargaining power between the parties).

196 See *RESTATEMENT (SECOND) OF CONTRACTS* § 208 cmt. d (1981).

unable to reasonably protect his or her interests.¹⁹⁷ Other factors that may be important are the timing of the contract and the alternatives available to the complaining party.¹⁹⁸

The second prong of the test requires a court to decide whether the entire contract, or any term in the contract, is substantively unconscionable. The court must review the terms of the contract to ascertain the fairness of the agreement.¹⁹⁹ Obviously, this determination goes hand in hand with the inquiry into whether procedural unconscionability exists. The contract terms may seem more unfair if the weaker party did not want to enter into the contract but was pressured into doing so. When determining substantive fairness, the court looks at the harshness of the terms and whether they are so “one-sided as to be unconscionable under the circumstances existing at the time of the contract.”²⁰⁰ A few decisions have held that a term in a contract was so unfair substantively that it did not need to proceed to a finding of procedural unconscionability before invalidating terms of the contract.²⁰¹

The *Uniform Commercial Code* requires a court to give the parties an opportunity to be heard and present evidence before ruling on the issue of unconscionability.²⁰² After a court determines the contract or a term in the contract is unconscionable, it has wide leeway to fashion an appropriate remedy. It may refuse to enforce the entire contract, it may strike the unconscionable term and enforce the remainder of the contract, or it may limit the contract in any fair way that will avoid an unconscionable result.²⁰³ This allows the court to reform the contract in a way that makes the agreement enforceable.²⁰⁴ Obviously, this gives a judge enormous flexibility when

197 *Id.*

198 *See, e.g., Ting*, 319 F.2d at 1148–49 (holding that even where a party has an option to switch to a different competing company for their service, a contract may still be procedurally unconscionable); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002) (stating that where a customer only had the option of agreeing to an amendment in his bank account agreement or close the account there was effectively no option and that satisfied the requirement of procedural unconscionability).

199 *See Batory v. Sears, Roebuck & Co.*, 456 F.Supp. 2d 1137, 1140 (D. Ariz. 2006) (noting that a determination of substantive unconscionability requires an analysis of the terms of the contract as well as the fairness of the contract).

200 U.C.C. § 2–302 cmt. 1 (2003).

201 *See e.g., Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1259 (9th Cir. 2005) (noting that the Washington Supreme Court has held that a finding of substantive unconscionability alone is sufficient to support a claim of unconscionability); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (holding that an arbitration clause was substantively unconscionable and unenforceable even though the contract was not procedurally unconscionable); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969) (holding that the price for a refrigerator was so excessive that it made the contract unconscionable).

202 U.C.C. § 2–302(2).

203 *Id.* § 2–302(1).

204 *See Langemeier v. Nat'l Oats Co.*, 775 F.2d 975, 977–78 (8th Cir. 1985) (affirming a

fashioning a remedy to deal with an unconscionable term or contract.²⁰⁵

*D. Differences When Contract Law is Applied
in the Criminal Law Context*

Before applying contract policing principles to deferred prosecution agreements, it is important to note one other very important difference in the application of contract doctrine to agreements made in the criminal justice system. Even though courts have declared that contract doctrine applies to agreements between the government and the accused,²⁰⁶ they have also made it abundantly clear that there are some exceptions to traditional contract theory when applied in the criminal justice context. Most notably, courts do not apply contract law strictly when analyzing these agreements.²⁰⁷ They infuse constitutional considerations and fairness doctrines as important components to the analysis of these agreements.

Historically, much of the development of contract doctrine has centered in the area of commercial law. This makes sense because commerce needed contract doctrine to help establish rules and parameters for parties operating in the ever-growing business arena.²⁰⁸ Likewise, the criminal justice system will not move forward without rules and boundaries for the agreements made between the government and the accused. It is common knowledge that the criminal justice system would grind to a halt if every case were brought to trial.²⁰⁹ This results in a proliferation of plea agreements and other agreements such as deferred prosecutions that keep many

district court's holding that a contract was unconscionable and permitting damages for the seller by enforcing the contract without the offensive term).

205 See Asifa Quraishi, Comment, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. 187, 195–206 (1991) (discussing the development of the concept of unconscionability under the UCC, the unrestricted judicial discretion allowed, and the need for clearer standards).

206 See *United States v. Aleman*, 286 F.3d 86, 89–90 (2d Cir. 2002) (stressing prosecutorial agreements are subject to the principles of contract law).

207 See, e.g., *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000) (discussing the differences in contract law applied among private individuals as compared to the government contracting in the criminal justice system); *United States v. Ready*, 82 F.3d 551, 558–59 (2d Cir. 1996) (recognizing that there are differences between contract law and contracts made in the criminal justice system that require holding the government to a stricter standard than a private contracting party); *United States v. Garcia*, 956 F.2d 41, 43–44 (4th Cir. 1992) (noting that the differences between private contracting parties and the government and a defendant, along with the court's constitutional and supervisory concerns, require the court to not apply the parole evidence rule in a strict manner).

208 See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466–91 (1987) (discussing the development of the Uniform Commercial Code).

209 See generally GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

defendants out of the court system or require less court time on resolving the criminal matter. Without these agreements, the criminal justice system could not function.²¹⁰ This does not, however, negate the fact that courts have to develop rules and parameters for enforcing these agreements.

Contracting parties in the criminal justice system are held to a different standard than those in the commercial law field. Contract doctrine governs how private individuals contract with each other, although private parties are given significant freedom to structure contracts.²¹¹ When contract law meets the criminal justice system one critical fact changes. The parties are no longer private individuals exchanging promises for the benefit of each other; replacing one of the parties is now the government, a party with enormous power. This changes the stakes dramatically. Courts recognize that when one of the contracting parties is the government, the typical contract rules that are used in the commercial area should not be applied exactly the same.²¹² Overriding concerns must be factored into the equation when applying contract doctrine to agreements made in the criminal justice system.²¹³ These concerns shift the rules to favor the accused who enters into an agreement with the government.²¹⁴

Defendants have constitutionally mandated rights²¹⁵ that may not be ignored in the judicial process. Because the Constitution places limitations on the prosecution in a criminal case and gives a defendant certain funda-

210 *See Cambridge v. Duckworth*, 859 F.2d 526, 530 (7th Cir. 1988) (recognizing that the sheer volume of criminal trials would overload the criminal justice system if it did not use plea bargaining).

211 *See Printing & Numerical Registering Co. v. Sampson*, (1875) 19 L.R. Eq. 462 (Chancery Ct.) (stating individuals should have full liberty to contract and that their contracts should be honored by the courts).

212 A similar discussion occurs in the government contracting area when the government is a party to a contract with private individuals. *See generally* W. Stanfield Johnson, *Mixed Nuts and Other Humdrum Disputes: Holding the Government Accountable Under the Law of Contracts Between Private Individuals*, 32 PUB. CONT. L.J. 677 (2003) (discussing whether the government is being held to the rules of contract law that govern private parties); James A. Harley, *Economic Duress and Unconscionability: How Fair Must the Government Be?*, 18 PUB. CONT. L.J. 76, 148–50 (1988) (discussing using private contract law to hold the government accountable when a party alleges economic duress and unconscionability when contracting with the government).

213 *See United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002) (asserting courts must consider the government's overwhelming advantage in bargaining power when examining plea agreements).

214 This rule appears similar to how the Rule of Lenity is used in the criminal justice process. The Rule of Lenity, “[u]nique to criminal law, is the statutory maxim that criminal statutes should be interpreted narrowly in order to ensure that a defendant is not convicted for a crime about which the person may have been unaware.” ELLEN S. PODGOR, PETER J. HENNING, ANDREW E. TASLITZ, & ALFREDO GARCIA, *CRIMINAL LAW: CONCEPTS AND PRACTICE* 65 (2005).

215 *See Mabry v. Johnson*, 467 U.S. 504, 509 (1984) (noting that it is the guilty plea, not the plea bargain, that merits constitutional protection).

mental rights, the law of contract, which may seem harsh at times when applied to private contracting individuals,²¹⁶ is tempered. These underlying Constitutional limitations do not have a direct corollary in the commercial world. Private individuals have more latitude to enter into contracts, irrespective of whether those contracts represent poor negotiations. In contrast, the accused in a criminal case is given certain protections under contract law.²¹⁷ Thus, when courts rule on the formation and enforceability of these criminal-related contracts, they are obliged to consider the agreements more critically than they would if they were simply determining the rights of private individuals who enter into a contract for their own benefit.

Courts also use their supervisory power to address the fairness of agreements between the government and the accused. The Court in *Santobello* stated, "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor."²¹⁸ The cases are replete with concern beyond protecting strict constitutional rights "to concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government."²¹⁹ The courts' demands for utmost fairness by the prosecution are very relevant to the issues of policing agreements in the criminal justice system. Due to this supervisory concern for fairness, courts have held the government to a greater degree of responsibility than they would have if they were individuals entering into private contracts.²²⁰

For example, private individuals often have contract disputes once performance of the contract has begun. If the private parties litigate the dispute, a court will apply general rules of contract doctrine when settling the disagreement. One common contract maxim is that parties represented by counsel bargain at arms length and thus are held strictly to their agreements.²²¹ If a loophole exists to the benefit of one party and not another, that party may use it to his or her own advantage.²²² Contrast that scenario

216 See *United States v. Garcia*, 956 F.2d 41, 44 (4th Cir. 1992) (refusing to apply the parole evidence rule in a strict manner because it would lead to an inequitable result).

217 See *United States v. Clark*, 55 F.3d 9, 12 (1st Cir. 1995) (explaining courts hold the government to the highest standards of promise and performance because plea agreements require defendants to relinquish primary constitutional rights).

218 *Santobello v. New York*, 404 U.S. 257, 261 (1971).

219 *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996) (quoting *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)).

220 See *Garcia*, 956 F.2d at 44 (stating that although the private law of contracts may be appropriately applied in some cases, other matters, such as a court's supervisory concern, require holding the government to a greater degree of responsibility than a defendant).

221 See G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 232, 236-38 (1991) (discussing opportunistic behavior during the bargaining process and arguing for a change in the maxim).

222 See *Mkt. St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 593-94 (7th Cir. 1991) (discussing that the law often contemplates that a party to a contract may take advantage of the

with a situation where a prosecutor tries to use the same contract doctrine to the government's advantage. The courts will not permit the government such leeway when it would cause an inequitable result.²²³ Thus, prosecutors have been foiled when they have tried to take advantage of the parol evidence rule to keep promises out of written agreements,²²⁴ to use imprecise language to the government's advantage,²²⁵ to use narrow interpretation principles to change the government's obligations as to further prosecutions of the defendant,²²⁶ and to use other rules of interpretation to get to what appears to be an inequitable result.²²⁷

One reason for scrutinizing the government's behavior and its agreements is that courts are cognizant of the fact that government attorneys wield far superior bargaining power than the individual or corporation who is accused of criminal conduct.²²⁸ As one court noted, "[s]ometimes general fairness principles will require us to invalidate particular agreement terms."²²⁹ This vastly differs from how courts resolve issues concerning private contractual agreements.²³⁰

III. CONTRACT LAW MEETS DEFERRED PROSECUTION AGREEMENTS

When examining deferred prosecution agreements through the lens of contract law one finds differences unique to the criminal justice system. Although there may be many questionable provisions in various deferred prosecution agreements, the three selected here are particularly egregious. The doctrines of duress and unconscionability raise serious concerns as to

ignorance of a contracting partner without incurring liability).

223 See *Garcia*, 956 F.2d at 44 (stating "the inequity of the result below illustrates why courts ought not rigidly apply commercial contract law to all disputes concerning plea agreements. The government does not dispute that it made the promise—it just wants to take advantage of a rule of contract law to profit from an omission in a contract it prepared. We cannot countenance such unfair dealing").

224 *Id.*

225 See *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (stating that a plea agreement is not the appropriate place for the government to resort to a rigidly literal approach in the language of the plea agreement).

226 See *United States v. Harvey*, 791 F.2d 294, 300–03 (4th Cir. 1986) (holding that the law of commercial contracts has to be applied differently when the government is involved so that the plea agreement in the instant case was interpreted narrowly to prevent further prosecutions of the defendant).

227 See *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000) (noting that if an ambiguity is found when interpreting a plea agreement, the government will normally bear the responsibility for it).

228 See *United States v. Aleman*, 286 F.3d 86, 90 (2d Cir. 2002) (recognizing the superior bargaining power of the government).

229 *Id.*

230 See *Mkt. St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 593 (7th Cir. 1991) (stating that contract law is not intended to make every party to a contract his brother's keeper).

the viability of these three provisions. This is particularly true in light of the fact that courts examine contracts in the criminal justice system much more closely than an agreement between two private individuals.²³¹

Corporations have a strong incentive to enter into agreements that waive the attorney–client privilege and waive the right to have a judicial determination of whether there is a breach of contract. The government power also forces them to breach a duty to pay previously negotiated attorney fees of corporate employees being accused by the government of possible crime.²³² Despite the reversal of the *Arthur Andersen, LLP* case, the destruction of the company provides a compelling motivation to other corporations to agree to whatever terms are requested by the government. Being successful in the judicial system may not save the corporation from the reality of the ruin of the corporate entity caused by merely being indicted by the government. Even those companies that do not face the loss of clients due to their professional role, and those that are not subject to exclusion or debarment, face potentially crippling civil actions.²³³

These agreements are made under duress. There is the threat of government indictment and resulting destruction of the entire business that induces the manifestation of assent to the deferred prosecution agreement. But for the threat of possible prosecution by the government and its resulting consequences, these terms would not normally be agreed to by the corporation.²³⁴ In fact, normally there would be no incentive for a corporation to willingly agree to these terms. Without doubt, the threat is serious and sufficiently grave in that the possible manifestations of a failure to agree and the destruction or loss of business, are overwhelming. Should a company not sign the agreement with the government, it opens itself up to potential derivative actions by shareholders. Outsiders may also find a basis for a civil action, or use this evidence in pending civil matters, to claim that the company was not acting responsibly. The shaming caused by the publicity of this matter is a strong motivation for a company to agree to any terms presented by the government. This can be especially true when the company has a product sold on the open market. Other businesses may also feel compelled to avoid association with the company out of fear of the stigma caused by the government allegations.²³⁵

Even though conduct by the government may be legal and with the

231 *See supra* notes 206–17 and accompanying text.

232 *See supra* notes 95–116 and accompanying text.

233 *See* Cohen, *supra* note 3.

234 *See* *United States v. Stein I*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006) (noting that the corporation would not have refused to pay attorney fees for its employees except that the government “had the proverbial gun to its head”).

235 Companies may also feel that if the government is proceeding against a company that it is doing business with, they may become a part of the investigation and open themselves up to potential criminal or civil liability.

beneficial motivation of stopping criminal conduct within the public, it is improper and wrongful to force the corporation to agree to terms that they would not accept under normal bargaining circumstances. Contract provisions such as agreeing to abide by the law, placing internal monitors as oversight,²³⁶ and paying a fine for prior wrongdoing are legitimate provisions, as these provisions are directly connected to the alleged wrongdoing and will protect the public.²³⁷ In contrast, the waiving of the attorney–client privilege raises ethical issues, has constitutional implications, and is diametrically opposed to a basic tenet in the evidentiary structure of our legal system. The removal of the judiciary from the decision whether there has been a breach of contract also extends beyond the bounds of normal contract terms because it removes the objective decision–maker from the process.²³⁸ Asking a corporation to sign an agreement that essentially interferes²³⁹ with the private contract rights between the corporation and its employees, puts the corporation in the position of potentially being sued by the corporate employee for breach of contract. Forcing a party to breach a contract is improper and wrongful.²⁴⁰

In addition to the elements of classic duress, these provisions should be removed because they are agreed to under economic duress. The economic reality is that if the corporation refuses to assent to the deferred prosecution agreement, the result will likely be the death of the corporation or alternatively, severe financial repercussions that will gravely injure the corporation. These consequences may result from an indictment eve-

236 See Agreement between United States Department of Justice, Criminal Division, Fraud Section and InVision Technologies, Inc. 2, 4 (Dec. 3, 2004), available at <http://www.corporatecrimereporter.com/documents/invision1.pdf> (agreeing that InVision will appoint a monitor, and that the individual will be approved by the DOJ).

237 A deferred prosecution agreement that calls for a company to file amended tax returns, as was seen in the non–prosecution agreement with Tommy Hilfiger, U.S.A., offers a remedy that is directly tied to the wrongful conduct. See Press Release, Tommy Hilfiger Corp., Tommy Hilfiger Corporation Announces Resolution of U.S. Attorney’s Office Investigation (Aug. 10, 2005), available at <http://investor.tommy.com/phoenix.zhtml?c=98332&p=irol-news-Article&ID=742085&highlight=>.

238 See *Allen v. Hadden*, 57 F.3d 1529, 1534 (10th Cir. 1995) (describing the process for determining a breach of contract such as a plea agreement as a question of law for the court to decide).

239 See, e.g., Justin E. Myers, *Sneaking Around the Corporate Veil: Tattooing a Parent Corporation with Liability for Tortious Interference With its Subsidiary’s Contract*, 35 TEX. TECH. L. REV. 193, 201–03 (2004) (discussing how a third party stranger, who is not a party to a contract, may be liable for tortious interference of contract when she or he intentionally causes a party to a contract to breach); Wade Holt, Wal–Mart v. Sturges *Tortious Interference With Prospective Contractual Relations: Texas Officially Adopts the Modern Rule*, 54 BAYLOR L. REV. 537, 538–39 (2002) (discussing the development of the claim for tortious interference with contract).

240 In some instances, interfering with contract rights will bring liability in tort. See Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097, 1107–20 (discussing liability for tortious interference with contract).

nif the corporation is later declared innocent.

Although there are both procedural and substantive aspects to unconscionability, there are occasions when either the procedural or substantive terms or processes are so egregious that they cause the contract or the terms within the contract to fail. Both types of unconscionability exist in deferred prosecution agreements, but even without a finding of procedural and substantive unconscionability, courts may find that the government entering into certain deferred prosecution agreements is inherently unfair. Courts may use supervisory powers to quash these agreements.²⁴¹

The procedural deficiencies are apparent when one looks at the gross disparity in bargaining power of the parties. The power of the government is massive in comparison to the corporation's need to avoid publicity, stigma of an investigation, shareholder lawsuits, or a possible death sentence for the corporate entity. This unequal bargaining position of the parties is a far cry from what is seen in the normal circumstances between private parties who enter into contracts at arms length.²⁴²

The specific terms within the contract also evidence substantive unconscionability. A term, such as waiving the attorney–client privilege, is offensive because it goes against fundamental tenets of the adversary system of justice in the United States. Asking for this waiver is diametrically opposed to ethical considerations within the legal profession.²⁴³ So too, allowing one party to have the sole determination as to whether there was a breach of contract also is substantively unconscionable as it removes the legal system

241 As the Fourth Circuit has recognized, in interpreting plea agreements,

courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts. But the courts have recognized that those rules have to be applied to plea agreements with two things in mind which may require their tempering in particular cases. First, the defendant's underlying "contract" right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. Second, with respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights—to concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government."

United States v. Ready, 82 F.3d 551, 558 (2d Cir. 1996) (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)).

242 Because procedural unconscionability focuses on how a contract is presented to a party, the sophistication of a party or the fact that a party is represented by counsel will not necessarily defeat a finding of procedural unconscionability. *See* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1283–84 (9th Cir. 2006) (discussing the meaning of procedural unconscionability and that just because a party is sophisticated or represented by an attorney does not mean that procedural unconscionability is non-existent).

243 *See supra* notes 64–67 and accompanying text.

from the enforcement phase of the contract process. One can hardly call it a fair bargain when one party is left to the whim of the opposing party to determine the basis, the existence, and the punishment for a breach. Likewise, allowing the government to provide a benefit to a corporation for breaching a pre-existing contract is especially unfair to the contract rights of the third parties who suffer from this government interference. This can result in litigation against the corporation for the breach of contract.

CONCLUSION

Prosecutors have enormous discretion in the charging process.²⁴⁴ They also have discretion in deciding whether or not to proceed once a case has been filed.²⁴⁵ This discretion, however, has not applied to contractual agreements entered into between the prosecution and defense.²⁴⁶ For example, in the plea bargain context the court plays a role in reviewing the contents of the agreement.²⁴⁷ This article maintains that courts need to take a similar role in the deferred prosecution context.

Deferred and non-prosecution agreements serve an important role in securing corporate compliance,²⁴⁸ avoiding costly trials, and protecting innocent parties from corporate malfeasance. Despite the benefits here, it is important that the terms in these agreements pass contractual muster. Courts are reluctant to avoid contracts merely because a single or a few terms within the agreements are entered into under duress or are procedurally or substantively unconscionable. The more appropriate remedy is to reform the contract by deleting the egregious terms to effectuate the contractual agreement. That can be done here.

Courts need to scrutinize these deferred and non-prosecution agreements to ascertain which terms are improper. Eliminating the offending terms would allow the contracts to continue for the benefit of the government, the corporations, associated parties, and public. To coin an old

244 See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (holding that prosecutors have broad discretion in deciding whom to prosecute); *United States v. Goodwin*, 457 U.S. 368, 380 (1982) (permitting prosecutor to forgo legitimate charges in an effort to save time and money).

245 See, e.g., *Rinaldi v. United States*, 434 U.S. 22, 32 (1977) (holding it to be an abuse of discretion for a court not to accept the prosecutor's motion to dismiss a case that violated the *Petite* policy); *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) (holding that prosecutors have total discretion in initiating and terminating a prosecution).

246 See *supra* notes 121–25 and accompanying text.

247 See *supra* notes 211–27 and accompanying text.

248 See generally Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043 (2006) (discussing the benefits of the deferred prosecution agreement in the Bristol-Myers Squibb Co. case).

adage, the courts do not have to throw out the baby with the bathwater.²⁴⁹

²⁴⁹ This idiomatic phrase means that “[i]n getting rid of waste, don’t also discard what is worth keeping.” E.D. HIRSCH, JR., JOSEPH F. KETT & JAMES TREFIL, *THE NEW DICTIONARY OF CULTURAL LITERACY* (3d ed. 2002), *available at* <http://www.bartleby.com/59/3/donthrowout.html>.