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TABLE OF CONTENTS

THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHIEF JUDGE STEPHANIE K. SEYMOUR

Judge Seymour was born in Battle Creek, Michigan in 1940. She was graduated *magna cum laude* from Smith College in 1962, and from Harvard Law School in 1965. After graduating from law school, Judge Seymour practiced law in Boston, Massachusetts from 1965 until 1966, in Tulsa, Oklahoma in 1967 and in Houston, Texas from 1968 until 1969. From 1971 to 1979 she practiced with the Tulsa law firm of Doerner, Stuart, Saunders, Daniel & Anderson. In 1979, she was appointed to the United States Court of Appeals for the Tenth Circuit.

She is a member of Phi Beta Kappa and the American and Oklahoma County Bar Associations. Additionally, Judge Seymour served as a bar examiner from 1973 through 1979; she served on the United States Judicial Conference Committee on Defender Services, 1985-87, and as chair, 1987-90.

JUDGE JAMES K. LOGAN

Judge Logan was born in Quenemo, Kansas, in 1929. He received his B.A. from the University of Kansas in 1952 and was graduated *magna cum laude* from Harvard Law School in 1955. He became law clerk for United States Circuit Judge Walter Huxman and subsequently practiced with the Los Angeles law firm of Gibson, Dunn & Crutcher. Judge Logan became a professor at the University of Kansas Law School in 1957 and was selected in 1961 as Dean of that school. He served in that capacity until 1968. Since 1961, Judge Logan has been a visiting professor at Harvard Law School, the University of Texas Law School, Stanford University School of Law, and the University of Michigan Law School. He lectures at Duke University Law School. He was a special commissioner for the United States District Court for the District of Kansas from 1964 until 1967 and was a candidate for the United States Senate in 1968.

Judge Logan is a Rhodes Scholar, a member of Phi Beta Kappa, Order of the Coif, Beta Gamma Sigma, Omicron Delta Kappa, Pi Sigma Alpha, Alpha Kappa Psi, and Phi Delta Phi, and has co-authored books and numerous articles on estate planning, administration and corporate law. In 1977, he was appointed to the United States Court of Appeals for the Tenth Circuit.

JUDGE JOHN P. MOORE

Judge Moore was born in Denver, Colorado in 1934. He received his B.A. from the University of Denver in 1956 and received his LL.B. from the University of Denver College of Law in 1959. Judge Moore then practiced law with the Denver firm of Carbone & Walsmith until 1962. From 1962 until 1975, he worked in the Colorado Attorney General's Office. Specifically, Judge Moore served as Assistant Attorney General from 1962 until 1967, as Deputy Attorney General from 1967 to 1972, and as Attorney General for the State of Colorado from 1972 until 1975.

In January, 1975, Judge Moore was appointed to the Bankruptcy Court of the United States District Court for the District of Colorado where he served until 1982. Judge Moore was then appointed to the United States District Court for the District of Colorado. In 1985, he was appointed to the United States Court of Appeals for the Tenth Circuit.

JUDGE STEPHEN H. ANDERSON

Judge Anderson was born in 1932. He attended Eastern Oregon College from 1949 to 1951, and Brigham Young University from 1955 to 1956 when he graduated. Judge Anderson then attended the University of Utah College of Law where he received his LL.B. degree in 1960. He was Editor in Chief of the Utah Law Review, Order of the Coif, and Phi Kappa Phi. He then served as a trial attorney in the tax division of the United States Department of Justice until 1964.

Judge Anderson subsequently joined the law firm of Ray, Quinney & Nebeker in Salt Lake City, Utah in 1964 where he practiced until he was appointed to the United States Court of Appeals for the Tenth Circuit in 1985.

Judge Anderson has appeared as lead counsel in federal courts in seventeen states, and in the United States Supreme Court. He has served as President and Commissioner of the Utah State Bar. Additionally, Judge Anderson has been a member of the Utah Judicial Counsel and the Utah Judicial Conduct Commission, and he has served as

Chairman of the Utah Law and Justice Center Committee. Judge Anderson's civic activities include lectures at the University of Utah College of Law, member of the Executive Committee of the Salt Lake Area Chamber of Commerce, and director of numerous corporations. He is a Master of the Bench, American Inn of Court Number VII.

JUDGE DEANELL R. TACHA

Judge Tacha grew up in Scandia, Kansas. She received her B.A. in American Studies from the University of Kansas in 1968 and was a member of Mortar Board and Phi Beta Kappa. Judge Tacha then attended law school and received her J.D. from the University of Michigan in 1971.

In 1971, she was selected to be a White House Fellow. During her year as a White House Fellow, Judge Tacha was sent on official trips to southeast Asia, east and central Africa, and the European Economic Community. After her fellowship, Judge Tacha was an associate with the law firm of Hogan and Hartson in Washington, D.C. In 1973, she returned to Kansas and entered private practice in Concordia, Kansas.

Judge Tacha was appointed to the faculty of the University of Kansas Law School in 1974. In 1979, she became associate Vice Chancellor of Academic Affairs, and in 1981, she became the Vice Chancellor for Academic Affairs.

Judge Tacha was appointed to the U.S. Court of Appeals for the 10th Circuit in 1985.

JUDGE BOBBY R. BALDOCK

Judge Baldock was born in Rocky, Oklahoma, in 1936, however, he grew up in Hagerman and Roswell, New Mexico. Judge Baldock attended the New Mexico Military Institute, where he graduated in 1956. He received his J.D. from the University of Arizona College of Law in 1960.

From 1960 until 1983, Judge Baldock practiced as a trial lawyer for the firm of Sanders, Bruin & Baldock, P.A. In 1983, he became a federal district judge in Albuquerque, New Mexico and was appointed to the United States Court of Appeals for the Tenth Circuit in 1985. In 1988, Judge Baldock received an Outstanding Judge Award from the State Bar of New Mexico.

JUDGE WADE BRORBY

Judge Brorby was born May 23, 1934 in Omaha, Nebraska. He was raised in Upton and Newcastle, Wyoming. Judge Brorby attended the University of Wyoming and received a B.S. in Business. He graduated with a J.D. with Honor from the University of Wyoming in 1958.

Judge Brorby served in the United States Air Force from 1958 to 1961. He engaged in the private practice of law in Gillette, Wyoming from 1961 to 1988. Judge Brorby was appointed to the United States Court of Appeals for the Tenth Circuit in 1988.

Judge Brorby served on the Uniform Laws Commission and was Chairman of the Wyoming Judicial Supervisory Commission. He has served on numerous Bar committees.

JUDGE DAVID M. EBEL

Judge Ebel was born in Wichita, Kansas in 1940 and grew up in Topeka, Kansas. He received his B.A. in economics from Northwestern University in 1962 and received his J.D. from the University of Michigan Law School in 1965, where he graduated first in his class. While at the University of Michigan Law School, he was elected to the Order of Coif, the Barrister Society, and he was Editor-in-Chief of the Michigan Law Review.

Judge Ebel then clerked for Justice Byron R. White of the United States Supreme Court during the 1965-1966 term. From 1966 until 1988, he practiced as a trial lawyer with the Denver law firm of Davis, Graham & Stubbs. In 1988, Judge Ebel was appointed to the United States Court of Appeals for the Tenth Circuit.

Judge Ebel's civic activities include teaching Corporations as an adjunct professor at the University of Denver College of Law, teaching Professionalism and Ethics at Duke University School of Law, teaching the confirmation class at the St. James Presbyterian Church and participating in numerous Bar Association activities. He has served as vice-president of the Colorado Bar Association and is a fellow of the American College of Trial Lawyers, a senior judge of the Doyle Inns of Court, and a member of the Town & Gown Society.

JUDGE PAUL J. KELLY

Judge Paul J. Kelly, Jr. was born in Freeport, New York, in 1940. He received a B.B.A. in Economics and Finance from the University of Notre Dame in 1963 and his J.D. from Fordham University School of Law in 1967.

From 1968 to 1992, Judge Kelly engaged in a general litigation practice with

the New Mexico law firm of Hinkle, Cox, Eaton, Coffield & Hensley. Judge Kelly served in the New Mexico House of Representatives from 1977 to 1981.

Currently, Judge Kelly is a member of the Board of Visitors of the Fordham University School of Law and serves as President of the Northern New Mexico American Inn of Court. Judge Kelly has been active in various Bar activities. He has served on a New Mexico Board of Bar Examiners, the New Mexico Appellate Judges' Nominating Commission, as a reviewing officer and Hearing Committee chair for the Disciplinary Board of New Mexico Supreme Court, as a member of the New Mexico Public Defender Board, the New Mexico State Personnel Board and as President of the Chaves County Bar Association. Judge Kelly was appointed to the United States Court of Appeals for the Tenth Circuit in 1992.

JUDGE ROBERT H. HENRY

Judge Henry was born in Shawnee, Oklahoma on April 3, 1953. He received his B.A. in Political Science in 1974 and his J.D. in 1977, both from the University of Oklahoma.

After graduating from law school, Judge Henry opened a private law practice in Shawnee and served in the Oklahoma House of Representatives for five terms. In 1986, at the age of thirty-three, he was elected Oklahoma Attorney General, running unopposed for re-election in 1990. In 1991, he became Dean of the Oklahoma City University School of Law, where he taught in the areas of state and local government law and legislation.

Judge Henry served on numerous committees of the National Association of Attorneys General, including the Supreme Court Committee, which he chaired, and the State Constitutional Law Advisory Board. He is an American Bar Foundation Fellow, a Commissioner for Oklahoma on the National Conference of Commissioners on Uniform State Laws, and a member of the American Law Institute. Judge Henry has also served on numerous civic and educational boards including the Oklahoma Nature Conservancy, the Board of Visitors of the University of Oklahoma Press, and the Western History Collection of the University of Oklahoma. He has received the Conservationist of the Year Award from the Oklahoma Wildlife Federation, the Human Rights Award from the Oklahoma Human Rights Commission, and is a member of Phi Beta Kappa.

Judge Henry was appointed to the United States Court of Appeals for the Tenth Circuit in 1994.

SENIOR JUDGE MONROE G. McKAY

Judge McKay was born in Huntsville, Utah, in 1929. He graduated from Brigham Young University in 1957 with high honors. Judge McKay then received his J.D. from the University of Chicago in 1960 and was the law clerk for Justice Jesse A. Udall of the Arizona Supreme Court for the 1960-61 term. From 1961 to 1974, Judge McKay practiced with the law firm of Lewis and Roca in Phoenix, Arizona; however, he did take a two year leave to serve as Director of the United States Peace Corps in Malawi, Africa. Judge McKay was a law professor at Brigham Young University from 1974 until 1977. In 1977, he was appointed to the United States Court of Appeals for the Tenth Circuit. Judge McKay currently resides in Provo, Utah.

SENIOR JUDGE OLIVER SETH

Judge Seth was born in 1915 and grew up in Santa Fe, New Mexico. He received his A.B. degree from Stanford University in 1937 and his LL.B. from Yale University in 1940. During World War II he served as a Major in the U.S. Army and was decorated with the Croix de Guerre. In 1962, he was appointed to the United States Court of Appeals for the Tenth Circuit. He served as Chief Judge from 1977 until 1984. In 1984, Judge Seth assumed senior status.

Judge Seth has served as director of the Santa Fe National Bank, chairman of the Legal Committee of the New Mexico Cattlegrowers' Association, Regent of the Museum of New Mexico and as a director of the Santa Fe Boy's Club.

SENIOR JUDGE WILLIAM J. HOLLOWAY, JR.

The son of a former Oklahoma governor, Judge Holloway was born in Hugo, Oklahoma in 1923 and later moved to Oklahoma City in 1927. During World War II, he served as a First Lieutenant in the Army. After the war, Judge Holloway returned to complete his undergraduate studies at the University of Oklahoma, receiving his B.A. in 1947. Judge Holloway then attended Harvard Law School, where he graduated in 1950.

In 1951 and 1952, Judge Holloway was an attorney with the Department of Justice in Washington, D.C. He subsequently re-

turned to Oklahoma City and entered private practice. Judge Holloway was appointed to the United States Court of Appeals for the Tenth Circuit in 1968 and became Chief Judge in 1984. He is a member of Phi Beta Kappa and Phi Gamma Delta.

SENIOR JUDGE ROBERT H. McWILLIAMS

Judge McWilliams was born in Salina, Kansas, in 1916 and moved to Denver in 1927 where he has lived since. He received his A.B. and LL.B. degrees from the University of Denver. In 1971, he was awarded an Honorary Doctor of Law degree from the University.

During World War II, Judge McWilliams served in the United States Army and was with the Office of Strategic Services. He has served as a Deputy District Attorney and as a Colorado District Court Judge. In 1961, Judge McWilliams was elected to the Colorado Supreme Court where he served until he was appointed to the United States Court of Appeals for the Tenth Circuit in 1970. In 1984, he assumed senior status.

Judge McWilliams is a member of Phi Beta Kappa, Omicron Delta Kappa, Phi Delta Phi, and Kappa Sigma.

SENIOR JUDGE JAMES E. BARRETT

Judge Barrett was born in Lusk, Wyoming in 1922. He is the son of the late Frank A. Barrett, who served as Wyoming's Congressman, Governor and United States Senator. Judge Barrett attended the University of Wyoming for two years prior to his service in the Army during World War II. Following the war, he attended Saint Catherine's College at Oxford University and Catholic University of America and received his LL.B. from the University of Wyoming Law School in 1949. In 1973, he received the Distinguished Alumni Award from the University of Wyoming.

Judge Barrett was in private practice in Lusk, Wyoming for eighteen years. He also served as County and Prosecuting Attorney for Niobrara County, Town Attorney for the towns of Lusk and Manville and attorney for the Niobrara County Consolidated School District. From 1967 until 1971, Judge Barrett served as Attorney General for the State of Wyoming. In 1971, he was appointed to the United States Court of Appeals for the Tenth Circuit. In 1987, he assumed senior status.

Judge Barrett was a member of the Judicial Conference Subcommittee on Federal Jurisdiction, the United States Foreign Intelligence Surveillance Court of Review, and was a trustee of Saint Joseph's Children's Home.

LEE V. WEISMAN AND THE MAJORITARIAN IMPLICATIONS OF ESTABLISHMENT CLAUSE JURISPRUDENCE

INTRODUCTION

The Establishment Clause of the First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion."[1] In recent years, the Court has consistently applied the three prong test from *Lemon v. Kurtzman*[2] to determine whether a certain government action violates the Clause. In 1992, however, the Court deviated from these set principles in *Lee v. Weisman*.[3] The Court, while admitting that Establishment Clause analysis is fact-specific,[4] seemingly abandoned the three-prong *Lemon* test and adopted a new coercion standard.[5]

The Court found that an invocation and benediction at a high school graduation ceremony violated the Establishment Clause. By using a stricter coercion test, however, the Court made violations of the Establishment Clause more difficult to prove. Therefore, governmental actions that would not pass muster under more reasonable tests are now valid simply because they lack a coercive element.

This Note examines the recent decision in *Lee*.[6] Part I explores the background of Establishment Clause jurisprudence and addresses the conflict between the First and Sixth Circuits on the proper application of the Clause to prayer at high school graduation ceremonies. Part II discusses the facts of *Lee* and the reasoning underlying the Court's decision. Part III analyzes the case and addresses the future implications of the decision in light of recent federal circuit and district court cases. The Note concludes that the Court's adoption of a coercion standard fails to give the broad protection the Establishment Clause meant to provide. By not aggressively enforcing the Clause, the Court furthers majoritarian tyranny and abandons its role as protector of minority interests.

I. BACKGROUND

A. *The Framers' Intent*

The Supreme Court has considered analysis of the history of the Constitution to be essential to a proper understanding of the two religion

1. U.S. CONST. amend. I.
2. 403 U.S. 602 (1971). The test provides that "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 612-13 (citations omitted).
3. Lee v. Weisman, 112 S. Ct. 2649 (1992).
4. *Id.* at 2661.
5. *See id.* at 2655.
6. 112 S. Ct. 2649 (1992).

clauses—the Establishment Clause and the Free Exercise Clause.[7] Historical considerations have led the Court to assume the role of Constitutional historian.[8] While this type of inquiry is not determinative,[9] because the Framers could not have foreseen many of today's problems,[10] it does give a general understanding of the intent behind the Establishment Clause. This understanding helps formulate a proper application of the Clause to today's issues.

Three general philosophies surrounded the enactment of the Establishment Clause of the First Amendment.[11] The first view, associated with Roger Williams, was the evangelical view.[12] This view believed that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained."[13] The second view, promulgated by Thomas Jefferson, argued that the church should be separated from the state to protect secular interests "against ecclesiastical depredations and incursions."[14] The third view, advanced by James Madison, urged that both religion and the state would be furthered if religious power were decentralized so as to avoid domination of one religion over another.[15]

Roger Williams saw the religion clauses as a means to protect the church. Jefferson, however, argued the clauses were to protect the state. He demanded that there be a "wall of separation between church and state."[16] Madison believed that both religion and the state could better flourish if each were free to pursue its own goals without the other's encroaching influence.[17] To achieve this end Madison argued that religion and government would best be protected from each other "by an entire abstinence [sic] of the Government from interference [with religion] in any way whatever."[18]

While these views seem to overlap in some areas, the Supreme Court has distilled these philosophies into three generally accepted conclusions.[19] First, historical inquiry is relevant in determining the meaning of

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7. Everson v. Board of Educ., 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting) (recognizing that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment").

8. For a general discussion of the Court's use of history see CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

9. School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) (asserting that "too literal a quest for the advice of the Founding Fathers" is usually inconclusive).

10. *Id.* at 237-38.

11. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 816 (1st ed. 1978).

12. *Id.*; *see also* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS 6 (1965) (discussing Roger Williams' view of separation between church and state).

13. TRIBE, *supra* note 11, § 14-3, at 816; HOWE, *supra* note 12, at 6.

14. TRIBE, *supra* note 11, § 14-3, at 816; HOWE, *supra* note 12, at 2.

15. TRIBE, *supra* note 11, § 14-3, at 816; *see also* Robert C. Casad, *The Establishment Clause and the Ecumenical Movement*, 62 MICH. L. REV. 419, 421 (1964) (discussing Madison's view that the first amendment was designed to "promote a multiplicity of sects").

16. Everson v. Board of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).

17. TRIBE, *supra* note 11, § 14-3, at 817.

18. *Id.*; IX THE WRITINGS OF JAMES MADISON 487 (Gaillard Hunt ed., 1910).

19. TRIBE, *supra* note 11, § 14-3, at 817.

the religion clauses; second, because the views of Madison and Jefferson spawned the religion clauses they are necessary to a proper interpretation; and, third, the Court believes that any connection between church and state leads to social and political disharmony.[20] While the accuracy of the Court's view of history has been debated both on and off the Court,[21] this version has been generally accepted.[22] These conclusions have given rise to two fundamental principles that drive the Court's analysis of the First Amendment: separatism and voluntarism.[23]

The concept of voluntarism may seem to support a coercion element of the Establishment Clause. However, the idea attaches to the Free Exercise Clause.[24] Any compulsory recitation of religious beliefs necessarily violates the religious freedoms of that clause.[25] The separatist view, promulgated by Madison, more easily suits itself to the Establishment Clause. This philosophy demands more than official separation of church and state. Government behavior should not become enmeshed in religion at any level.[26]

Madison's view of separation embraced a philosophy not of coercion but of exclusion.[27] Under this inquiry government actions violate the Establishment Clause when citizens in the religious minority have an inferior status in society because of their beliefs. By keeping church and state completely separate, an individual's position in society is never compromised because of his or her religious leanings. The Framers understood the basic psychological principle that effective democracy would be handicapped

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20. *Id.* at 817-8; *see also Everson*, 330 U.S. at 1-18. For a discussion of the development of the theory see the majority opinions of Justice Black in McCollum v. Board of Educ., 333 U.S. 203 (1948), Torcaso v. Watkins, 367 U.S. 488 (1961), and Engel v. Vitale, 370 U.S. 421 (1962).

21. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history . . . ."); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 1-58 (1982); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM & MARY L. REV. 933, 933 (1986).

22. TRIBE, *supra* note 11, § 14-3, at 818; *see, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 (1973); Flast v. Cohen, 392 U.S. 83, 103-04 (1968); School Dist. v. Schempp, 374 U.S. 203, 214 (1963); McGowan v. Maryland, 366 U.S. 420, 437-43 (1961).

23. TRIBE, *supra* note 11, § 14-3, at 818.

24. *See id.*; *see also* James Madison, Memorial and Remonstrance Against Religious Assessments, *in* 5 THE FOUNDERS' CONSTITUTION 82, 84 (Philip B. Kurland & Ralph Lerner eds., 1987) (discussing one's right to free exercise of religion).

25. *See* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim about Original Intent*, 27 WM & MARY L. REV. 875, 922 (1986) (claiming "[i]f coercion is . . . an element of the establishment clause, establishment adds nothing to free exercise").

26. *See* TRIBE, *supra* note 11, § 14-3, at 819. *But see* CORD, *supra* note 21, at 5 (espousing separation of church and state only to the extent that would leave the states free to decide "the matter of religious establishments or disestablishment").

27. Referring to a bill which would have allowed the collection of taxes to be used for religious teachers, Madison stated:

> It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.

James Madison, Memorial and Remonstrance Against Religious Assessments, *in* 5 THE FOUNDERS' CONSTITUTION 82, 83 (Philip B. Kurland & Ralph Lerner eds., 1987).

if some citizens felt excluded from society—no matter that the government behavior may be entirely noncoercive.[28]

The Framers intended a broad reading of the Establishment Clause.[29] Madison's view probably exceeded the Court's present interpretation of the clause. He was against public funding for chaplains in either the military or the legislature.[30] Both of these practices have since been held constitutional.[31] Thomas Jefferson, while President, would not give Thanksgiving Day proclamations partly because he believed they implicated the religion clauses.[32] If Jefferson disapproved of these essentially noncoercive governmental acts, then it is logical to assume that he would have disapproved of any state certification of religion.[33] To Jefferson the Establishment Clause proscribed "not simply state coercion, but also state endorsement, of religious belief and observance."[34] This view supports an interpretation of the Establishment Clause that is based on exclusion.

While the debate over the Establishment Clause rages on,[35] there is enough evidence to support the proposition that the clause should be interpreted broadly. Such a construction furthers the Framers' intent that state endorsement of religion violates the clause regardless of whether the governmental behavior is coercive. Nothing in history is so compelling to demand a reevaluation of the clause[36] where coercion takes on a dispositive role.

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28. *See* Lee v. Weisman, 112 S. Ct. 2649, 2666 n.10 (1992) (quoting SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO 51 (1922) ("[A] religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it.").

29. *Lee*, 112 S. Ct. at 2672 (Souter, J., concurring).

30. James Madison, Detached Memoranda, *in* 5 THE FOUNDERS' CONSTITUTION 103, 104 (Philip B. Kurland & Ralph Lerner eds., 1987).

31. *See* Marsh v. Chambers, 463 U.S. 783 (1983) (allowing legislative chaplains does not violate the Establishment Clause); Katcoff v. Marsh. 755 F.2d 223 (2d Cir. 1985) (allowing military chaplains does not violate the Establishment Clause).

32. *See* Thomas Jefferson, Letter from Thomas Jefferson to Rev. Samuel Miller, *in* 5 THE FOUNDERS' CONSTITUTION 98, 98-99 (Philip B. Kurland & Ralph Lerner eds., 1987).

33. *Lee*, 112 S. Ct. at 2674 (Souter, J., concurring).

34. *Id.*

35. A substantial debate exists on whether the Establishment Clause allows "nonpreferential" aid. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 89, 111-14 (1986) (arguing against nonpreferential aid but claiming the Framers did not recognize a difference between preferential aid and non-preferential aid); Laycock, *supra* note 25, at 902-13 (arguing against nonpreferential aid and believing the Framers knew the difference between nonpreferential and preferential aid). *But see* Wallace v. Jaffree, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting) (arguing that through the use of a treaty provision allowing public funding of a priest and church for Indians the Establishment Clause allows nonpreferential aid); THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 207-15 (1986) (advancing the view that the Framers intended to allow nonpreferential aid although they did not know the difference between nonpreferential and preferential aid).

36. *See Lee*, 112 S. Ct. at 2676 (Souter, J., concurring).

B. *Case Law*

The Court first applied Establishment Clause analysis to a state law[37] in *Everson v. Board of Education.*[38] This case incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment, making it applicable to the states.[39] The Court considered a New Jersey statute that provided for reimbursement of funds spent by parents for public transportation of their children to private—including parochial—schools.[40] In deciding the statute did not violate the First Amendment,[41] the Court enunciated a fundamental principle of the Establishment Clause. Government, be it state or federal, may not aid one religion, all religions, or prefer one religion over another through its laws.[42]

While the Court gave specific examples of prohibited government behavior,[43] the opinions show the policies that drive the religion clauses generally and the Establishment Clause specifically. The religion clauses work together to create a single profound freedom.[44] The reason for the Establishment Clause was to further this freedom by causing a complete separation between religion and the state by "comprehensively forbidding every form of public aid or support for religion."[45] The Court's focus on "support" or "aid" to religion was a necessarily broader interpretation of the clause than a strict coercion analysis.

In the late forties and early fifties, the Court decided two cases involving religion in public schools. In *Illinois ex. rel. McCollum v. Board of Education,*[46] the Court dealt with a system whereby a tax-supported public school allowed private-sector teachers to teach courses in religion.[47] Although the classes were voluntary, students who chose not to attend were required to go to another part of the school to study secular topics.[48] At that time Illinois had a compulsory education law that required children to attend school while it was in session.[49] Here the Court applied a coercion analysis because Illinois's compulsory education law aided the religious education program.[50] Students "compelled by law" to attend school were set free from their legal obligation if they would attend religious classes.[51]

37. There are some earlier cases regarding the Establishment Clause that dealt with federal laws. *See, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899) (building a hospital with public funds did not violate the Establishment Clause despite the fact that Catholic nuns would run it); Davis v. Beason, 133 U.S. 333 (1890) (applying the Clause to federal bigamy laws); Reynolds v. United States, 98 U.S. 145 (1879) (accepting Jefferson's concept that the Establishment Clause constituted "a wall of separation between church and state").

38. 330 U.S. 1 (1947).

39. *Id.* at 14-15.

40. *Id.* at 3.

41. *Id.* at 8-18.

42. *Id.* at 15.

43. *See id.* at 15-16.

44. *See id.* at 40 (Rutledge, J., dissenting).

45. *Id.* at 32 (Rutledge, J., dissenting).

46. 333 U.S. 203 (1948).

47. *Id.* at 207.

48. *Id.* at 209.

49. *Id.* at 205.

50. *Id.* at 209.

51. *Id.* at 209-10.

The Court found this practice unconstitutional because Illinois's compulsory education system provided the religion classes with their students.[52]

In *Zorach v. Clauson*,[53] the Court considered a program similar to the one in *McCollum*. The New York City program allowed public school students to be released from school to receive religious education.[54] The instruction took place outside of public school classrooms and did not involve public spending.[55] The Court found that the program was neutral[56] toward religion and, therefore, not coercive.[57] In the Court's view a contrary holding would not further the accommodation of religion allowed by the First Amendment.[58] *Zorach* differs from *McCollum* because the New York program merely accommodated religion; the Illinois law, by providing classrooms, actually aided religion. Until *Lee*[59] these two cases were the only examples where the Supreme Court based Establishment Clause determinations upon the question of coercion.

The Court examined the constitutionality of prayer in public schools for the first time in *Engel v. Vitale*.[60] The Board of Education for New Hyde Park, New York directed the school district's principal to have a prayer read at the beginning of the school day.[61] Although the prayer was nonsectarian and participation was voluntary, the Court held the practice violated the Establishment Clause.[62] The majority opinion made clear the principle that a showing of coercion was unnecessary to make an Establishment Clause claim.[63] A coercion inquiry attaches to a Free Exercise Clause analysis.[64] While recognizing that coercion may be involved in an Establishment Clause violation, the Court stated that the Clause's protections encompass more than that.[65] It recognized the Madisonian view that religion and government are afforded greater prosperity when their affairs

52. *See id.* at 212.

53. 343 U.S. 306 (1952).

54. *Id.* at 308.

55. *Id.* at 308-09.

56. The Court has decided other cases using the neutrality principle as the legitimate opposite of coercion. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (holding that the Establishment Clause was violated because the state university permitted non-religious groups to use its facilities while banning religious groups from using them). In response to the *Widmar* decision, Congress passed The Equal Access Act, 20 U.S.C. §§ 4071-74 (1988). Under that Act, high schools receiving federal funding must allow religious groups to have meetings outside of school hours if other groups have the same rights. *Id.* § 4071(a)-(c). The meetings must be "voluntary," "student-initiated," and done without "sponsorship . . . by the school." *Id.* § 4071(c)(1)-(2).

57. *Zorach*, 343 U.S. at 314 (1952).

58. *See id.* (reasoning that a contrary holding "would be preferring those who believe in no religion over those who do believe").

59. 112 S. Ct. 2649 (1992).

60. 370 U.S. 421 (1962).

61. *Id.* at 422.

62. *Id.* at 430.

63. *Id.* (noting that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not").

64. *Id.*

65. *Id.* at 431.

are kept separate.[66] This case firmly stands for the proposition that coercion is an unnecessary element to an Establishment Clause claim.[67]

One year later the Court revisited the school prayer arena in *School District of Abington v. Schempp*.[68] Students began the school day with the reading of ten verses of the Bible and a recitation of the Lord's prayer.[69] The Court summarized the test for an Establishment Clause violation as it stood at that time: the purpose and the primary effect of the state action must not advance or inhibit religion.[70] Because the prayer and Bible reading equated to a state-sponsored religious ceremony, the Court held that the primary effect was the advancement of religion that violated the Establishment Clause.[71] Also, the Court specifically stated that coercion is not an element to an Establishment Clause claim.[72] In the context of school[73] prayer,[74] *Engel* and *Schempp* are especially persuasive.

The test for a violation of the Establishment Clause became entrenched in *Lemon v. Kurtzman*.[75] The Court considered a Pennsylvania statute that funded nonpublic schools by reimbursing them for educational expenses, and a Rhode Island statute that gave nonpublic school teachers a supplement equal to 15% of their annual salary.[76] Both statutes aided educational institutions associated with religion and were found unconstitutional.[77] The Court settled on a three prong test:[78] (1) the statute in question must have a secular purpose; (2) the primary effect must not advance or inhibit religion; and (3) the government must not become entangled in religion.[79] If a statute or practice fails any one of these prongs,

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66. *Id.* at 431 n.13.

67. *But see* McConnell, *supra* note 21, at 934-35 (arguing that the Court ignored precedent, offered no explanation for its negation of a coercion element, and found the prayer coercive anyway).

68. 374 U.S. 203 (1963).

69. *Id.* at 207.

70. *Id.* at 222.

71. *Id.* at 223-24.

72. *Id.* at 223 (recognizing a distinction between the clauses: "a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended").

73. The Court has considered Establishment Clause claims regarding the nature of the curriculum in public schools. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (holding unconstitutional a Louisiana statute that provided creationism be taught as well as evolution because the statute was enacted solely for religious purposes); Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that the Arkansas law preventing the teaching of evolution violated the Establishment Clause because it aided religion).

74. The Court has also held "moment of silence" statutes unconstitutional even though no coercion was involved. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (holding unconstitutional an Alabama statute which called for a one minute peiord of silence beginning each school day for voluntary prayer or meditation). Many states, however, still have moment of silence statutes on the books. *See, e.g.*, FLA. STAT. ANN. § 233.062 (West 1989); GA. CODE ANN. § 20-2-1050 (1992); ILL. ANN. STAT. ch. 105 para. 20/1 (Smith-Hurd 1993); IND. CODE ANN § 20-10.1-7-11 (Burns 1991); KAN. STAT. ANN. § 72-5308a (1992); TENN. CODE ANN. § 49-6-1004 (1990).

75. 403 U.S. 602 (1971).

76. *Id.* at 606-07.

77. *Id.* at 607.

78. *Id.* at 612-13.

79. *Id.* The entanglement prong was first promulgated in Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

then it is unconstitutional. Of the thirty-one Establishment Clause cases decided since *Lemon*, the Court has failed to use this test only once.[80]

The case that did not rely upon the *Lemon* standards was *Marsh v. Chambers*[81]. A chaplain, publicly financed, commenced each session of the Nebraska Legislature with a prayer.[82] The Court found this practice to be constitutional. The Court relied on "history and tradition" in making its finding.[83] Combining this analysis with a neutrality test, the practice was upheld because it was "nonsectarian," "nonproseltyzing," and did not prefer one religion over another.[84] The Court was persuaded by the fact "civil" invocations are used extensively in this country by many public institutions.[85] The Court also noted that there was less chance for coercion in legislative prayer than in school prayer.[86] Placed in proper perspective this case is one narrow deviation in a long line of Supreme Court precedent.[87]

C. *The Split in the Circuits*

The *Marsh* decision created a split in the circuits. In *Stein v. Plainwell Community Schools*,[88] the Court of Appeals for the Sixth Circuit relied on *Marsh* and found that public school graduation prayers are not necessarily unconstitutional.[89] The court held that graduation prayers are unlike classroom prayers but similar to the legislative and judicial prayers discussed in *Marsh*.[90] The court also noted that graduation prayers offer less chance for coercion than classroom prayers.[91] While holding that graduation prayers were not necessarily proscribed by the First Amendment, the

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80. Lee v. Weisman, 112 S. Ct. 2649, 2663 n.4 (1992) (Blackmun, J., concurring). The last Establishment Clause decision before *Lee* occurred in 1990. *See* Board of Educ. v. Mergens, 496 U.S. 226, 248-253 (1990) (plurality opinion) (analyzing the Equal Access Act with the *Lemon* test). For authority that the Court may be interested in a test that asks whether the government has endorsed religion, see Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 16-17 (1989) (plurality opinion).

81. 463 U.S. 783 (1983).

82. *Id.* at 784.

83. *Id.* at 786.

84. *Id.* at 793 n.14.

85. *Id.* For a detailed discussion of the nature of civil religion see Yehudah Mirsky, Note, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986).

86. *Marsh*, 463 U.S. at 792.

87. Although this opinion is flawed for various reasons, the coercion aspect is contradicted by precedent. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989) (public schools may not "convey a message that religion or a particular religious belief is favored or preferred"); School Dist. v. Ball, 473 U.S. 373, 397 (1985) (state system of sending public school teachers to parochial schools to teach secular subjects struck down despite lack of coercion because it threatened to express state support for religion); Wallace v. Jaffree, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring in judgment) (reasoning that "[t]he decisions in [*Engel* and *Schempp*] acknowledged the coercion implicit under the statutory schemes, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise"); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973) (asserting that "proof of coercion . . . [is] not a necessary element of any claim under the Establishment Clause").

88. 822 F.2d 1406 (6th Cir. 1987).

89. *Id.* at 1408-09.

90. *Id.* at 1409.

91. *Id.*

court held the specific prayers at issue to be unconstitutional because of their sectarian nature.[92]

In *Weisman v. Lee*[93] the Court of Appeals for the First Circuit rejected the *Stein* court's reasoning.[94] This holding put the First Circuit in direct conflict with the Sixth Circuit as to the scope of *Marsh* and the constitutionality of public school graduation prayers.

The split in the circuits set the stage for the Supreme Court's decision in *Lee v. Weisman*.[95] Since the adoption of the coercion test in *Lee*, a federal circuit court[96] and a recent federal district court[97] have each allowed graduation prayers, basing their decision on the new test. These cases illustrate the flaws of the coercion test.

II. INSTANT CASE

A. *Facts*

Before *Lee*, principals in the Providence, Rhode Island school system were allowed to ask members of the clergy to offer invocation and benediction prayers at the graduation ceremonies of middle and high school students.[98] In 1989, principal Robert E. Lee asked a rabbi to offer the invocation and benediction at the graduation ceremony at Nathan Bishop Middle School. Principal Lee provided the rabbi with a pamphlet entitled "Guidelines for Civic Occasions."[99] The pamphlet recommended a style of prayer that would reflect the sensitive nature of nonsectarian public ceremonies. Along with the pamphlet the principal told the rabbi that the prayers should be nonsectarian.[100]

Prior to the ceremony Daniel Weisman, acting for himself and his daughter Deborah, sought a temporary restraining order in federal district court to prevent the inclusion of prayers at the graduation ceremony.[101] The court denied the motion.[102] On June 29, 1989, Deborah attended her graduation accompanied by her family.[103] Attendance at the ceremony was voluntary.[104] The prayers were said; they lasted not more than two minutes.[105] Daniel Weisman then filed an amended complaint seek-

92. *Id.* at 1410 (noting "[t]hey employ the language of Christian theology and prayer").
93. 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992).
94. *Id.* at 1096-97; *see infra* text accompanying notes 111-17.
95. 112 S. Ct. 2649 (1992).
96. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).
97. Harris v. Joint Sch. Dist., 821 F. Supp. 638 (D. Idaho 1993).
98. *Lee*, 112 S. Ct. at 2652.
99. *Id.*
100. *Id.*
101. *Id.* at 2653-54.
102. *Id.* at 2654.
103. *Id.* at 2653-54.
104. *Id.* at 2653.
105. *Id.* at 2653-54. For the complete language of the prayer see *id.* at 2652-53.

ing a permanent injunction to prevent school officials of the Providence public school system from including prayers at future graduations.[106]

B. *Lower Court Rulings*

The district court granted the permanent injunction and held the graduation prayers to be an unconstitutional violation of the First Amendment.[107] The court applied the three prong *Lemon* test.[108] Finding that the invocation and benediction practice failed to satisfy the second prong, the court did not address the first and third prongs of the test.[109] The district court concluded that the prayers advanced religion by "creating an identification of school with a deity, and therefore religion."[110] The court also stated its determination not to follow *Stein v. Plainwell Community Schools*,[111] which had relied on *Marsh v. Chambers*.[112]

The First Circuit affirmed the district court's decision to grant a permanent injunction in favor of Weisman.[113] Judge Torruella, writing the majority opinion, adopted the district court's opinion.[114] Judge Bownes, in his concurring opinion, concluded that the graduation prayers failed all three prongs of the *Lemon* test.[115] Judge Bownes also questioned the *Stein* decision and found it unpersuasive.[116] Judge Campbell filed a dissenting opinion based on *Marsh* and *Stein*.[117] With this decision the First Circuit placed itself in direct conflict with the Sixth Circuit's decision in *Stein*.

C. *The Majority Opinion*

Justice Kennedy delivered the opinion for the Supreme Court in *Lee v. Weisman*.[118] The Court concluded that the religious exercises performed at the graduation ceremony violated the Establishment Clause of the First Amendment.[119] The opinion was based on the school prayer cases[120] and the belief that adolescents are susceptible to peer pressure.[121] The Court interpreted these cases to forbid the state from compelling participation in a religious exercise.[122]

The Court began by reciting the specific facts that controlled the decision. State officials directed a religious exercise at a graduation cere-

106. Weisman v. Lee, 728 F. Supp. 68, 70 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct. 2649 (1992).
107. *Id.* at 75.
108. *Id.* at 71.
109. *Id.*
110. *Id.* at 72.
111. 822 F.2d 1406 (6th Cir. 1987).
112. 463 U.S. 783 (1983).
113. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *aff'd*, 112 S. Ct 2649 (1992).
114. *Id.* at 1090.
115. *Id.* at 1094-95.
116. *Id.* at 1096.
117. *Id.* at 1097-99 (Campbell, J., dissenting).
118. 112 S. Ct. 2649 (1992).
119. *Id.* at 2661.
120. *Id.*
121. *Id.* at 2659.
122. *Id.* at 2661.

mony.[123] While attendance was voluntary, student participation in the religious exercise was essentially mandatory.[124] Because of these facts the Court determined that it could decide the case based on the precedents of the school prayer cases.[125] Therefore, the Court concluded that is was unnecessary to apply or reconsider the test from *Lemon v. Kurtzman*.[126]

The Court then addressed the state's involvement in the religious exercise.[127] The principal decided to include prayers, selected a member of the clergy, and dictated the content of the prayer.[128] This was accomplished by providing the rabbi with the copy of "Guidelines for Civic Occasions" and by advising him that the prayers should be nonsectarian. In the Court's view these actions were attributable to the state.[129] While discussing the state's involvement, the Court dispelled any arguments that would recognize nonsectarian prayer as legitimate under the Establishment Clause.[130]

The court then examined the issue from the student's perspective. Citing *Engel v. Vitale*[131] and *School District v. Schempp*,[132] the Court explained that prayer exercises in public schools are particularly likely to cause indirect coercion. Because students were under public and peer pressure to stand or maintain a respectful silence, the Court found the prayers to be an example of the state coercing participation in a religious exercise.[133]

The Court's decision was unaffected by the de minimus character of the prayers.[134] The Court was also unconvinced by the petitioners' (the school board and the United States filed a brief as amicus curiae)[135] assertion that there was no coercion because attendance at the ceremony was voluntary. A teenage student has no real choice not to attend one of the most important occasions of a person's life.[136]

The Court then distinguished *Marsh v. Chambers*.[137] Noting the fact-sensitive nature of Establishment Clause analysis,[138] the Court found a graduation ceremony to be different than a legislative session. At legislative sessions, adults were free to come and go, while a graduation ceremony, a significant event in one's life, is conducted with more formality,

123. *Id.* at 2655.
124. *Id.*
125. *Id.*
126. 403 U.S. 602 (1971).
127. *Lee*, 112 S. Ct. at 2655.
128. *Id.* at 2655-56.
129. *Id.* at 2655.
130. *Id.* at 2656.
131. 370 U.S. 421 (1962).
132. 374 U.S. 203 (1963).
133. *Lee*, 112 S. Ct. at 2658.
134. *Id.* at 2659.
135. *Id.* at 2653.
136. *Id.* at 2659.
137. 463 U.S. 783 (1983).
138. *Lee*, 112 S. Ct. at 2661.

giving students less freedom to leave if they wish.[139] The Court concluded by stating that not every state action involving religion is invalid.

D. *The Concurring Opinions*

Justice Blackmun filed a concurring opinion in which Justice Stevens and Justice O'Connor joined.[140] Justice Blackmun applied the *Lemon* test to the graduation prayers at issue and found they failed the first two prongs of the test.[141] Justice Blackmun then proceeded to show why coercion is not a necessary element to an Establishment Clause claim. First, he cited Supreme Court precedent that refuted the idea.[142] Second, he analyzed the purpose of the Clause through Constitutional history and case precedent. Citing James Madison, he emphasized the exclusion felt by those in the minority when the government endorses a particular religious group.[143] Third, he expressed the importance of the separation between church and state. Justice Blackmun concluded by stating that these principles, combined with Supreme Court precedent, prohibit government endorsement, sponsorship, or involvement with religion regardless of whether coercion is involved.[144]

Justice Souter filed a concurrence in which Justice Stevens and Justice O'Connor joined.[145] Justice Souter also analyzed the history of the Establishment Clause and the relevant Supreme Court precedent to illustrate that coercion is not a relevant aspect of the Clause. He noted the First Amendment also contains the Free Exercise Clause.[146] That Clause contains the coercion element. Any law that coerces support or participation in a religious exercise would violate the Free Exercise Clause.[147] If coercion were part of the Establishment Clause, then the Establishment Clause would add nothing to the Free Exercise Clause. Using constitutional history, Justice Souter urged that the Framers meant the Establishment Clause to add something to the Constitution.[148] He confirmed that Supreme Court precedent follows this principle.[149]

E. *The Dissenting Opinion*

Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist, Justice White, and Justice Thomas joined.[150] Justice Scalia's heated dissent began by referring to tradition and history. He argued that nonsectarian prayer at public celebrations was such an entrenched tradition

139. *Id.* at 2660.
140. *Id.* at 2661.
141. *Id.* at 2664 (Blackmun, J., concurring).
142. *Id.* at 2664-65.
143. *Id.* at 2665-66.
144. *Id.* at 2667.
145. *Id.*
146. *Id.* at 2673 (Souter, J., concurring).
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 2678 (Scalia, J., dissenting).

that it could not violate the Establishment Clause.[151] Next, Justice Scalia stated that the real flaw in the Court's opinion was using the version of the coercion test promulgated by the majority.[152] In his view the Establishment Clause forbids the state from coercing participation in a religious exercise. However, governmental actions should only be classified as coercive if they are backed by a threat of legal (not psychological) penalty.[153]

Justice Scalia distinguished the school prayer cases by arguing that those decisions stemmed from a legal coercion to go to school.[154] He concluded by disparaging the *Lemon* test and claiming that the expulsion of that test may have been the one worthy aspect of the decision.[155] Justice Scalia noted that under the coercion test school prayer would still be able to take place. School officials need only make some announcement that no one is compelled to join in the prayers and standing would not necessarily signify participation.[156] As a final note, Justice Scalia argued that nonsectarian prayers serve a unifying function and should have been accommodated because a majority of the community desired them and the inconvenience to the non-believer was minimal.[157]

III. ANALYSIS

A. *Flaws in the* Lee *Decision and the Coercion Test*

The United States' brief tried to convince the Supreme Court that *Lee v. Weisman*[158] was not merely a disagreement about the extent of the *Marsh* exception to *Lemon*.[159] Instead, the United States, in support of the petitioner school board, filed a brief calling for *Lemon* to be overruled.[160] The United States claimed that only state practices coercing religious participation or belief can violate the Establishment Clause.[161]

A majority of the Court was convinced. Although the court did not expressly overrule *Lemon*, it failed to use the test despite its applicability. The majority did, however, find the coercion analysis to be the fundamental inquiry with an Establishment Clause claim. The Court ultimately found the prayers unconstitutional, but they could have arrived at the same result using *Lemon* or accurately applying school prayer precedent. These methods would have advanced the true goal of the Establishment Clause—the protection against exclusion. The Court would have struck a proper balance between the religion clauses.

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151. *Id.* at 2678-79.
152. *Id.* at 2683.
153. *Id.* at 2684.
154. *Id.*
155. *Id.* at 2685.
156. *Id.*
157. *Id.* at 2686.
158. 112 S. Ct. 2649 (1992).
159. Russell M. Mortyn, *The Rehnquist Court and the New Establishment Clause*, 19 HASTINGS CONST. L.Q. 567, 585 (1992).
160. Brief for United States as Amicus Curiae Supporting Petitioners at 6, 20, Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990) (No. 90-1014), *aff'd*, 112 S. Ct. 2649 (1992) (hereinafter Brief for United States).
161. *See* Brief for United States at 20-28.

The petitioners lost this battle, but by convincing the Court to adopt a coercion standard they moved a long way toward winning the war. This is born out by recent federal circuit and district court decisions that illustrate the flaws in the coercion test. During this writing the Supreme Court also ruled in such a way as to magnify those flaws.[162]

The Court could have found the prayers unconstitutional without adopting a coercion standard. The district court and the circuit court both found the prayers unconstitutional without leaving the confines of the *Lemon* test. Offering a prayer with the word "God" in it has a religious purpose. That a prayer was given by a member of the clergy at the request of a state official unquestionably has the primary effect of advancing religion. By choosing the speaker and directing the content of the prayer, the state became excessively entangled with religion. The invocations and benedictions failed all three prongs of the *Lemon* test. It was unnecessary for the Court to adopt a coercion standard to reach its conclusion.

Using the *Lemon* test would have been more faithful to the goals of the Establishment Clause. The Establishment Clause is violated whenever a person's citizenship is devalued because he or she is in the religious minority. That person is pushed toward the fringes of society because he or she is not part of the religious elite. It is this exclusion against which the Establishment Clause is meant to guard.[163] The Framers, especially James Madison, understood this principle. By allowing a coercion standard to be so important an inquiry, the Court has distanced itself from the Framers' interpretation of the Clause.

By using a coercion test the Court misapplied its own precedent. The majority opinion relied heavily on *Engle v. Vitale*[164] and *School District v. Schempp*.[165] Both of these cases, however, stand for the proposition that proof of coercion is unnecessary to an Establishment Clause claim.[166] Even though the Court did not apply *Lemon*, a proper application of these two cases would have achieved the same result had the majority been more faithful to the essence of the Establishment Clause. When the state endorses religion by sponsoring school prayer, the fundamental dilemma is not that students are forced to participate. Instead, the problem lies with the state's systematic exclusion of those students who do not hold the State's beliefs or who refuse to participate in its exercise.

When the rabbi offered the invocation and benediction at the request of Principal Lee, the state endorsed religion. In doing so, the state told Deborah Weisman that her rights and beliefs were not as cherished as

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162. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

163. *See generally The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 259-69 (1992) (discussing the exclusion principle in relation to the Establishment Clause and *Lee*).

164. 370 U.S. 421 (1962).

165. 374 U.S. 203 (1963).

166. *Vitale*, 370 U.S. at 430; *Schempp*, 374 U.S. at 223.

those who approved of the prayer.[167] That was why the Establishment Clause was violated. Such an analysis is consistent with school prayer precedent and the intent of the Establishment Clause. By adopting the coercion test the Court has distanced itself from its own precedent as well as the Framers' intent. The result is alienation from the basic principle that the Establishment Clause protects citizens from exclusion.

By using *Lemon* or properly applying school prayer precedent, the Court would have maintained the separate identity of the two religion clauses. Coercion is an element of the Free Exercise Clause—not the Establishment Clause.[168] By making an Establishment Clause claim rest on the existence of coercion, the Court has reduced the need for the Clause. The Court has made the Establishment Clause a shadow of the Free Exercise Clause.

Instead of using *Lemon* or accurately applying school prayer precedent, the Court adopted the coercion test. It is important to examine the flaws of this test, because there is evidence that the Court is unhappy with *Lemon*.[169] It may decide to completely abandon *Lemon* in favor of the coercion test. There are two fundamental problems with the coercion test.[170]

First, the coercion test is result-oriented. A court may easily manipulate the test to produce a desired outcome. This has been illustrated by two cases decided since *Lee*. In *Jones v. Clear Creek Independent School District*,[171] the court held the graduation prayers in question to be constitutional.[172] The key distinction in *Jones* was that public high school seniors could select a senior to deliver nonsectarian prayers at their graduation ceremonies.[173] It should be noted that the court held that the prayers passed the *Lemon* test.[174] However, if the Supreme Court had properly found the prayers in *Lee* to be unconstitutional due to *Lemon*, the circuit court would have had binding precedent that graduation prayers cannot pass the *Lemon* test. The circuit court's misuse of the *Lemon* test magnifies the error created by the Supreme Court's failure to use that test in *Lee*.

The most significant aspect of *Jones* is the court's manipulation of the coercion test. The court held that the prayers were not coercive because a majority of the students voted for the prayers.[175] The court could have found that the prayers were coercive. There is just as much opportunity for peer pressure in a student election as at a graduation ceremony. The court found no coercion, however, because a person attending graduation "should not be surprised to find the event affected by community stan-

167. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. REV. 1113, 1168 (1988).

168. *Schempp*, 374 U.S. at 223.

169. *See* Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting).

170. For a discussion of other problems with the test see Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 576-80 (1991).

171. 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993).

172. *Id.* at 965.

173. *Id.* at 964.

174. *Id.* at 966-68.

175. *See id.* at 969-72.

dards."[176] The court found no coercion because it wanted to reach a result that would satisfy the majority of the community. This case is not an aberration. In May 1993, in *Harris v. Joint School District*,[177] a federal district court upheld the constitutionality of a program similar to the one in *Jones* by relying upon the Fifth Circuit's rationale.[178]

These holdings give rise to the second problem with the coercion test. The test is an instrument that can be used by the majority to control the community. In *Jones* and *Harris*, both courts emphasized that if a majority of the students vote for the graduation prayers the coercion is removed and the prayers are constitutional. Based on that reasoning, a state could decide to adopt Christianity as the official state religion if a majority of the population voted for it. This example may seem extreme but it differs from the recent federal court holdings only in degree, not in kind.

Finding a practice constitutional because the majority approves of it violates the whole concept of democracy. The true test of a democracy is how it treats the least influential of its citizens.[179] The coercion test, as illustrated by the federal court holdings, shows an utter disregard for the beliefs and sensitivities of the religious minority. The test gives the majority the means to banish the minority from the privileges of society. The government endorses these actions by approving of prayer at graduation ceremonies. By endorsing this behavior the state tells the minority that their rights are not valued. The Establishment Clause is meant to protect against this type of exclusion. During this writing the Supreme Court essentially approved of this behavior by denying certiorari to *Jones*.[180] The Court told the rest of the country that the rationale in *Jones* is constitutional.

The two federal court holdings since *Lee* and the denial of certiorari to *Jones* show the implications of the coercion test. It is unlikely that these two cases will be isolated incidents. All over the country students and schools are attempting to have prayers in their graduation ceremonies.[181] If those in favor of prayer in each community are in the majority, then prayer will occur. Justice Scalia's dissent, which predicted that graduation prayers would still take place, seems prophetic.[182] The prayers will happen based on the principle of majority rule, while the Constitution will be conveniently ignored.

B. *The Fundamental Conflict*

The conflict between majority rule and the authority of the Constitution pervades the concept of democracy. The power of the majority to

176. *Id.* at 972.
177. 821 F. Supp. 638 (D. Idaho 1993).
178. *Id.* at 643.
179. *See* Stieberger v. Heckler, 615 F. Supp. 1315, 1362-63 (S.D.N.Y. 1985).
180. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, *cert. denied*, 113 S. Ct. 2950 (1993).
181. Larry Witham, *Schools Get Around Court's Ban on Prayer*, WASH. TIMES, May 22, 1993, at A1.
182. *See* Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting).

shape a democratic society seems rudimentary. Historically, tyranny resulted from the few controlling the many, the poor being "sacrificed to the rich."[183] To evade this elitist paradigm, democracy demands that the people make decisions about issues regarding their personal rights. Arguably, putting any limits upon the power of the majority forms a type of elitist paternalism that contradicts the nature of republican government. Alternatively, by giving the majority unfettered decision-making powers, the government subjects society to a vigilantism as harmful as any totalitarian power.

The role of the Constitution as the check against majoritarian tyranny raises equally serious issues. If the Constitution is imbued with such power that it cannot be changed by the will of the majority, then it exemplifies the ultimate form of elitism. The people cannot be trusted with authority. If, on the other hand, majoritarian forces could vote to disband any or all constitutional rights, then a minority member's position in society is tenuous. The decisions in *Lee* and *Jones* illustrate the need to consider an important question: whether majority rule is the cornerstone of democracy or the legal justification of tyranny? As *Lee* and *Jones* suggest, can a majority vote to abandon a constitutional safeguard?

A basic principle of a republican form of government is that the majority is the best protector of both public and private goals.[184] The U.S. Constitution promulgates such a view. Before the Constitution may be amended, specific majority criteria must be met to insure a proper "Mode of Ratification."[185] However, Framers such as Thomas Jefferson viewed the Constitution as a baseline which could not be transcended.[186] The Constitution acts as fundamental, unchangeable law.[187] It may be altered, however, by an express statement of the majority.[188] The Colorado Constitution expressly vests power in the people,[189] who may change the government unless it is "repugnant to the constitution of the United

183. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 410, 413 (1969).

184. *See id.* at 410.

185. U.S. CONST. art. V. The pertinent part of Article V reads as follows:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

Id.

186. *See* Kenneth W. Thompson, *Religion and Politics in the United States: An Overview*, 483 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 13 (1986).

187. *See* U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land . . . ."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ([W]ritten constitutions [are] contemplate[d] . . . as forming the fundamental and paramount law of the nation . . . ."); WOOD, *supra* note 183, at 281.

188. *See* WOOD, *supra* note 183, at 281.

189. COLO. CONST. art. II, § 1 ("All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.").

States."[190] Ambiguous results occur from the friction between the power of the majority and the authority of the Constitution.

When directly confronted with these issues the Supreme Court claims to side with the Constitution. As the Court stated, "[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[191] The Colorado Supreme Court echoed this position during the recent litigation over Amendment 2's prohibition of protected status to homosexuals, lesbians, or bisexuals.[192] These stands for the minority are appropriate responses by the judiciary. The federal judiciary in particular possesses a "political insularity" due to life tenure that makes it an important instrument in checking the political majority[193]—a role mandated by the Constitution.[194]

The Court has turned away from an aggressive enforcement of the Establishment Clause.[195] It has succumbed to the "principles of popular sovereignty."[196] This acquiescence equates to a reluctance to check the majority.[197] This transfer of authority means that bureaucrats will enforce the will of the majority making the crucial decisions regarding religion.[198]

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190. *Id.* art. II, § 2. The section reads as follows:

> The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the constitution of the United States.

Id.

191. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943); *see also* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964) (asserting "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be"). Decisions by the Court in the arena of individual participation in the political process are numerous. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968) (holding Ohio election laws unconstitutional because minority political parties were denied equal protection); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that an individual's right to vote may not be diluted); Baker v. Carr, 369 U.S. 186 (1962) (holding legislative apportionment issues justiciable). These decisions comport with the basic notion that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Madison*, 5 U.S. (1 Cranch) at 177. Also, it should be noted that almost half of the amendments to the Constitution since 1791 deal with participation in the political process. *See* U.S. CONST. amend. XII (dictating the procedure for electing the President and Vice-President); *id.* amend. XV (prohibiting the denial of voting rights based upon race, color, or previous condition of servitude); *id.* amend. XVII (providing the ability to vote directly for United States Senators); *id.* amend. XIX (providing the vote to women); *id.* amend. XXIII (providing the vote to District of Columbia residents); *id.* amend. XXIV (banning the poll tax); *id.* amend. XXVI (providing the vote to eighteen-year-olds).

192. *See* Evans v. Romer, 854 P.2d 1270, 1286 (1993) (citing both *Barnette* and *Lucas* although noting that the Amendment's passage by a majority of voters mandated "great deference"), *cert. denied*, 114 S. Ct. 419 (1993).

193. Daniel O. Conkle, *God Loveth Adverbs*, 42 DEPAUL L. REV. 339, 343 (1992); *see also* U.S. CONST. art. III, § 1.

194. *Madison*, 5 U.S. (1 Cranch) at 177.

195. Conkle, *supra* note 193, at 339.

196. *Id.* at 343.

197. *See id.*

198. *See id.*

In the graduation prayer context weighty constitutional issues will be decided by school administrators and, after *Jones*, by high school students.[199]

By delegating its core function, the Court violates the principle of separation of powers. The legislative branch provides a vehicle through which the majority's voice may be heard. The judicial branch checks the potential excesses of the majoritarian legislative branch. The judicial branch exists to insure the interests of the minority. When the judiciary abdicates this duty, the majoritarian forces are free to trample the rights of the minority. Usually, this stems from an unchecked legislature. In an Establishment Clause context, the Court's mistaken delegation of decision-making power results in constitutional rights that are even more fragile than those under an unchecked legislature. By transferring constitutional decisions to school administrators and students, the Court delegates power to entities that lack the authority to consider these matters. The Court delegates to entities that either lack subject matter expertise or who are private parties.

Members of the legislature are elected. They represent an added layer between the citizen majority and the laws that the legislature passes. While this majoritarian hierarchy creates a danger of tyranny based upon popularity, it does not foster the potential for abuse that delegation directly to citizenry does. The general population, unencumbered by even the slightest procedural safeguards, reigns free. The majority, shrouded in the legitimacy of its own existence,[200] creates or dismisses rights as it pleases. By abandoning its duty to protect minority rights the Court tacitly

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199. *See id.* (arguing that academics can participate in this process by at least educating the decision-makers so that they are "apprised of the competing considerations"). Arguably, a disparaging view of high school students making constitutional decisions exemplifies paternal elitism. To many people, students included, "[r]eligion speaks truth, both inwardly and outwardly. It tells believers who they are and where they stand." *Id.* at 344. However, the Court, by virtue of its position in government and the education of its members, is meant to make constitutional decisions. It rests above competing interests free to make objective, knowledgeable decisions. While it would be naive to suggest that the Court exudes objectivity during every legal consideration, believing that school administrators or high students are in any better position to decide these sensitive issues trivializes the Constitution.

200. Legitimacy considerations underlie any concept of government. Majority rule appeals to most advocates of democracy because of its apparent legitimacy. If government supports the most popular beliefs, then it seems to act with the people's consent. Governing with the consent of the governed characterizes legitimacy. To create this appearance of legitimacy, governments seek to obtain a majority. Historically, some governments muscle their way into power and then claim a majority. In Germany during the 1930's Adolf Hitler seized power through, among other things, an Enabling Act that provided the Chancellor with the ability to promulgate laws that violated the constitution. WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 229 (1960). On August 19, 1934, 90 per cent of the German people voted to approve Hitler's control of absolute power. *Id.* at 229-30. Once empowered to act on behalf of the majority, Hitler "legitimately" passed the Nuremberg Laws of September 15, 1935, which stripped Jews of their citizenship, outlawed marriage and extramarital relations between Jews and Aryans, and banned Jews from hiring female Aryans under thirty-five years of age as servants. *Id.* at 233.

For further discussions of the relationships between totalitarian governments and the church see Zdzislawa Walaszek, *An Open Issue of Legitimacy: The State and the Church in Poland*, 483 ANNALS AM. ACAD. POL. & SOC. SCI. 118 (1986); Philip Walters, *The Russian Orthodox Church and the Soviet State*, 483 ANNALS AM. ACAD. POL & SOC. SCI. 135 (1986). For an illustration of the extreme actions a "legitimized" law can produce see Murray Sayle, *Closing the File on Flight 007*, THE NEW YORKER, Dec. 13, 1993, at 90, 95 (discussing two Soviet laws which,

consents to the majoritarian tyranny. The government gives its stamp of approval to the popular religious views. This empowers the majority all the more. Those holding minority religious views are alienated and humiliated.[201] This exclusion violates the Establishment Clause.

C. *The Majoritarian Tradition in the United States*

The democratic tradition in the United States stems from the basic concept that power is vested in the people.[202] The people are, therefore, free to shape their government.[203] Without the people's consent, laws are invalid and illegitimate.[204] If a majority votes for a law or acquiesces to certain conduct, then it is legitimized. When the majority's will is followed, justice and fairness are presumed.

This theme pervaded the formation of law in new communities throughout the expansion of America.[205] During the mid-nineteenth century as people poured west, transient communities formed based upon the concept of majority rule.[206] This vigilantism did not displace established institutions.[207] Rather, it created courts and government where before none existed.[208] Even the decisions to be governed by moral standards were based upon majoritarian principles.[209] Possibly because of this moral homogeneity, these communities led fairly orderly existences.[210]

Recognition of the flaws of majority rule appeared early in American history. During the first session of the House of Representatives, James Madison stated, "the great danger lies not in the Executive, but in the great body of the people—in the disposition which the majority always

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read together, almost mandated shooting down Korean Airlines' Flight 007, which killed hundreds of innocent people).

201. *See* Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361, 367-68 (1992); *see also* Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 379 (1992) (arguing "[g]overnment observance of the majority religion does indeed tell religious minorities that they are outsiders and not fully accepted members of the community").

202. Madison Resolution (June 8, 1789), *in* CREATING THE BILL OF RIGHTS 11, 12 (Helen E. Veit et al. eds., 1991) (saying "all power is originally vested in, and consequently derived from the people").

203. *Id.* at 11-12 (asserting that "the people have an indubitable, unalienable, and indefeasible right to reform or change their government").

204. *See* WOOD, *supra* note 183, at 162.

205. *See, e.g.*, DANIEL J. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 81-90 (1965) (discussing vigilantism and majority rule as the natural law of the transient communities of the mid-nineteenth century).

206. *See id.* at 81-82.

207. *See id.*

208. *Id.*

209. *See id.* at 82. " 'We needed no law,' wrote an old pioneer of the mining camps, 'until the lawyers came.' " *Id.* at 84.

210. *See id.* at 85.

> Unguarded property was generally safe. In most mining camps a washbasinful of gold dust could be left on a table in an open tent while the owners were far out of sight working their claims. Though there were no police, provisions and tools were seldom stolen. Theft, murder, and all kinds of violence were rare.

Id.

discovers, to bear down, and depress the minority."[211] Alexis De Tocqueville, who spent a brief nine months in the United States between 1831-32,[212] wrote extensively on the tyranny of the majority.[213] He argued that the majority possesses the traits of an individual who has absolute power.[214] The majority can misuse its power in the same fashion as the individual.[215] In the face of this abuse an aggrieved member of a minority lacks redress to any but the majority.[216] De Tocqueville cites both Madison and Jefferson to support his proposition that the real danger in the United States is the "Omnipotence of the Majority."[217] These theorists understood the fragile nature of a minority member's fundamental rights under majority rule.

Thomas Jefferson viewed the Bill of Rights as necessary for "the legal check which it puts into the hands of the judiciary."[218] As an independent branch removed from majoritarian influences, the judiciary exists to protect the rights of the minority. By surrendering this duty in its Establishment Clause jurisprudence, the Court betrays and abandons the alienated member of the religious minority.

D. *The Religious Sector Contrasted with Other Factions*

Abolishing the whole idea of majority rule would justify a type of feudalism known in Europe from 1500-1800.[219] A small percentage of people

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211. Gazette of the United States (June 10, 1789), *in* CREATING THE BILL OF RIGHTS, 64, 67 (Helen E. Veit et al. eds., 1991). Evidence of Madison's awareness of the potential for majoritarian tyranny appears in his letters and essays.

> "Wherever the real power in a Government lies," [Madison] told Jefferson, "there is danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is a mere instrument of the major number of constituents." The people, it seemed, were as capable of despotism as any prince; public liberty was no guarantee after all of private liberty.

WOOD, *supra* note 183, at 410.

212. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 9 (Richard D. Heffner ed., New American Library 1956) (1835).

213. *Id.* (recognizing that "the book's central theme . . . [is] the tyranny of the majority in the United States"). Heffner, himself, notes the stubbornness of the belief that majority rule insures justice. "[T]he most pervasive myth to dominate American political thinking has been our rather naive—and mistaken—equation of equality with freedom, of democracy (or majority rule) with liberty." *Id.* at 9-10.

214. *See* TOCQUEVILLE, *supra* note 212, at 114.

215. *See id.*

216. *See id.* at 115.

> When an individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority, and implicitly obeys it; if to the executive power, it is appointed by the majority, and serves as a passive tool in its hands. The public force consists of the majority under arms; the jury is the majority invested with the right of hearing judicial cases; and in certain States, even the judges are elected by a majority. However iniquitous or absurd the measure of which you complain, you must submit to it as well as you can.

Id.

217. *See id.* at 120-21.

218. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* CREATING THE BILL OF RIGHTS, 218 (Helen E. Veit et al. eds., 1991).

219. *See* J. M. ROBERTS, THE PELICAN HISTORY OF THE WORLD 524-25 (1987).

would possess most of the land, wealth, and power.[220] Fundamental notions of democracy entail some form of power vested in the people. To deny the largest portion of society a voice in the political and social process ignores an essential element of republican government. While some areas of society may allow for majority rule, others should not.[221]

Decisions on governmental policy must be made.[222] A democracy gives that decision-making power to the majority.[223] Because decisions need to be made on these matters, it is appropriate that the majority makes them.[224] This effectively uses majority rule to further republican government. Decisions on religious matters, however, do not need to be made by the government.[225] When the government makes such rulings, it tells society what the proper religion is.[226] Citizens who do not espouse the government's beliefs are "a little bit un-American."[227]

Strong emotional and ideological attitudes characterize religious beliefs. Multitudes of views span the spectrum of religious thought.[228] Whether or not one believes in "God," how one chooses to worship or not worship, is intensely personal. When government forces its religious views on society by acquiescing to the majority belief, it invades one's innermost concept of identity. "Human beings cannot endure emptiness and desolation; they will fill the vacuum by creating a new focus of meaning."[229] The Court's recent Establishment Clause jurisprudence allows government to "fill the vacuum," a task best left to the individual.

E. *An Aggressive View of the Establishment Clause*

One commentator argues that the Supreme Court lacks sympathy for religion[230] and questions why religion cannot persuade society.[231] Such

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220. *See id.*

221. *See* Ira C. Lupu, *Models of Church-State Interaction and the Strategy of the Religion Clauses*, 42 DEPAUL L. REV. 223, 228 (1992) (asserting that "[t]he Framers, however, obviously thought—and many contemporary Americans continue to believe—that religious factions represent a different kind of phenomenon than political parties or other kinds of associations").

222. Laycock, *supra* note 201, at 379-80.

223. *See id.*

224. *See id.*

225. *Id.* at 380.

226. *Id.*

227. *Id.*

> There is no need for the government to make decisions about Christian rituals versus Jewish rituals versus no religious rituals at all. For government to make that choice is simply a gratuitous statement about the kind of people we really are. By making such statements, the government says the real American religion is watered-down Christianity, and everybody else is a little bit un-American.

Id.

228. For a discussion of different religious relationships see WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE (Macmillan Publishing Co. 1961) (1902). The author notes that "[t]he divine can mean no single quality, it must mean a group of qualities, by being champions of which in alternation, different . . . [persons] may all find worthy missions." *Id.* at 378-79.

229. KAREN ARMSTRONG, A HISTORY OF GOD 399 (1994).

230. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127 (1992).

an argument ignores the inherent dangers involved with the mix of church and state.[232] To avoid these dangers the Establishment Clause "implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes."[233] Society agreed upon the "secular mechanism" so religious battles would be avoided.[234]

Majoritarians likely argue that much is being made over a small matter. A non-sectarian prayer is inconsequential, especially when supported by the majority.[235] This attitude furthers an ignorance of minority views. Ignorance breeds intolerance. To provide proper protection to the minority, the Establishment Clause should be interpreted such that constitutional protections are not left to the popular opinion of eighteen-year-olds. The Clause acts as a barrier that prevents the government's dissemination of religious views through tacit approval of the majority will. By not taking an aggressive stance, the Court allows that barrier to erode, forcing the minority to accept alien beliefs.

CONCLUSION

In *Lee* the Supreme Court went against the Framers' intent and its own precedent by adopting a coercion test to determine Establishment Clause violations. A broad interpretation would properly hold that state actions violate the Establishment Clause when they endorse religion, whether those actions are coercive or not. Supreme Court precedent has consistently held that coercion is not an element of an Establishment Clause claim.

The Court could have arrived at the same result in *Lee* by using other tests. These methods would have been more faithful to the true goal of the Establishment Clause, which is the protection against exclusion. The coercion test is flawed because it does not protect this goal.

The test is also result-oriented, and it furthers the concept of majority rule. Majority rule, while fundamental to democracy, may threaten the rights of the minority. By allowing crucial constitutional decisions to be made by non-judiciary entities, the Court abandons its role as protector of the minority. To insure constitutional safeguards, the Establishment Clause should be aggressively interpreted. Based upon recent developments, however, it appears that graduation prayers will be allowed if a majority approves of them, regardless of any constitutional prohibitions.

Brook Millard

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231. *See* Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 220 (1992).

232. *See* Lupu, *supra* note 221, at 224 ("First, disputes between the state and agents of religion frequently result in dangers for religious liberty, and second, such disputes may also threaten injury to the state's legitimate purposes.").

233. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197 (1992).

234. *Id.*

235. *See id.* at 207 ("Majority practices are myopically seen by their own practitioners as uncontroversial . . . .").

SEC v. Peters: Stabilizing the Regulation of Tender Offer Insider Trading Without a Fiduciary Duty

Introduction

The late 1980's saw the convictions for insider trading of high-profile traders such as Ivan Boesky and Michael Milken. The courts also confronted allegations of insider trading by a variety of less well-known culprits, ranging from financial printers[1] to Wall Street Journal columnists.[2]

Recent decisions in the area reflect a recurring interaction between Congress, the federal courts and the Securities and Exchange Commission ("SEC") in the area of insider trading. Each legislative, judicial or regulatory action that attempted to define the parameters of lawful use of information has subsequently faced an expanding or narrowing rebuttal from another branch.

In October 1992, the Tenth Circuit decided in *SEC v. Peters*[3] that an insider trading defendant could be held liable under Rule 14e-3[4] without a breach of any fiduciary duty. This decision reflected the recently broadened scope of insider trading liability.

Section I of this Comment describes the major legislation, regulations and court decisions governing insider trading. Section II then discusses the *Peters* holding in light of these statutes, rules and judicial holdings. In Section III, the Comment examines the inappropriateness of a fiduciary duty requirement to liability for insider trading in tender offers and briefly discusses the future of insider trading liability under Rule 14e-3.

I. Background

SEC v. Peters[5] squarely confronted whether Rule 14e-3 required the existence of a fiduciary duty as a prerequisite to insider trading liability.

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1. *See* Chiarella v. United States, 445 U.S. 222 (1980).
2. *See* Carpenter v. United States, 484 U.S. 19 (1987).
3. 978 F.2d 1162 (10th Cir. 1992).
4. 17 C.F.R. § 240.14e-3 (1993). Rule 14e-3 reads in pertinent part:

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from:

(1) The offering person,

(2) The issuer of the securities sought or to be sought by such tender offer, or

(3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

5. 978 F.2d 1162 (10th Cir. 1992).

The problem at the heart of insider trading is that such insiders commit fraud by their actions.

Those against promulgating insider trading regulations without a fiduciary duty requirement frame their argument in the following manner. The definition of fraud under Rule 14e-3 is identical to definitions under other insider trading sections that do not pertain to tender offers,[6] and court decisions have required a fiduciary duty in these contexts.[7] Therefore, a fiduciary duty requirement under 14e-3 is also appropriate.[8] Without such a requirement, the rule may ensnare innocent market traders engaged in legitimate market research, thereby discouraging the free exchange of information and creating a less efficient securities market. Since *Peters* was grounded in the notions of insider trading, fiduciary duty and tender offers, a survey of the historical progression of statutory, regulatory and case law on insider trading provides a helpful background. This history clearly reveals the continuous struggle over the appropriate definition of insider trading.

A. *The Law of Insider Trading Before 1980*

The Securities Exchange Act of 1934[9] provided the first federal legislation aimed at insider trading. This statute, among its other provisions, required insiders, including corporate directors, officers and ten percent owners of equity securities, to report their registered equity holdings and the monthly changes in those holdings to the SEC.[10] These requirements were followed by what has become known as section 10(b).[11] The SEC used this provision to promulgate the regulation that required traders to either disclose material inside information or abstain from trading on the basis of the information—Rule 10b-5.[12]

As discussed earlier, the breach of fiduciary duty requirement for insider trading liability rests on the policy notion that only those who are

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6. *See, e.g.*, 17 C.F.R. § 240.10b-5 (1993) [hereinafter Rule 10b-5] (the general anti-fraud provision for the purchase and sale of securities).

7. *See, e.g.*, Chiarella v. United States, 445 U.S. 222 (1980) (takeover bid context).

8. This view was framed in a similar manner in DONALD C. LANGEVOORT, INSIDER TRADING REGULATION § 7.05, at 217 (1991 ed.).

9. Pub. L. No. 73-291, 48 Stat. 905 (codified as amended at 15 U.S.C. § 78 (1988 & Supp. IV 1992)).

10. Securities Exchange Act § 16, 15 U.S.C. § 78p(a) (1988); *see also* Iman Anabtawi, Note, *Toward a Definition of Insider Trading*, 41 STAN. L. REV. 377, 380 (1989) (discussing these requirements).

11. Securities Exchange Act § 10, 15 U.S.C. § 78j (1988). Section 10 reads in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
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> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

12. 17 C.F.R. § 240.10b-5 (1993). For a brief discussion of the "disclose or abstain" impact of Rule 10b-5, see Anabtawi, *supra* note 10, at 381.

truly culpable should be penalized.[13] If a relationship of trust and confidence between the accused insider and another party has been breached, it is more likely that the insider has used the information to trade for personal gain.

Early decisions applying Rule 10b-5 contained a fiduciary duty requirement for insider trading liability. *In re Cady, Roberts & Co.*,[14] a 1961 SEC decision, involved a partner in a broker-dealer firm who used advance knowledge of a dividend reduction in another company in which the partner was also a director to sell shares before the price dropped on the New York Stock Exchange.[15] In finding the partner liable, the SEC stated that "corporate 'insiders,' particularly officers, directors or controlling stockholders," have a duty to disclose material information before trading on the basis of that information,[16] a duty based on the fiduciary relationship between corporate officers and shareholders.[17]

The Second Circuit, in *SEC v. Texas Gulf Sulphur Co.*,[18] noted that Rule 10b-5 aimed to provide all securities market participants equal access to material information.[19] The court stated that corporate insiders such as directors or officers fell within the rule's ambit. Again, such individuals have a fiduciary duty to their shareholders not to "take 'advantage of such information knowing it is unavailable to those with whom [they are] dealing.' "[20]

In 1968, Congress recognized the need for stricter insider trading regulation and passed the Williams Act,[21] which, among other things, amended the 1934 Act by lowering the disclosure threshold for equity shareholders from ten percent to five percent.[22] Section 14(e),[23] a provision of the Williams Act, was designed to regulate insider trading related to tender offers. More specifically, the statute granted the SEC authority

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13. *See* Dirks v. SEC, 463 U.S. 646, 662 (1983) (holding that liability under Rule 10b-5 depended on whether the insider "personally . . . benefit[ted], directly or indirectly, from his disclosure").

14. 40 S.E.C. 907 (1961).

15. *Id.* at 910-11.

16. *Id.* at 911.

17. *See id.*

18. 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

19. *Id.* at 848.

20. *Id.* (quoting *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961)).

21. Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1988)).

22. 15 U.S.C. § 78n(d)(1) (1988). This provision should be distinguished from the ten percent *registration* requirement in 15 U.S.C. § 78(p)(a) (1988). *See also* Nathaniel B. Smith, Note, *Defining "Tender Offer" Under the Williams Act*, 53 BROOK. L. REV. 189, 191 (1987) (discussing congressional intent to mandate disclosure in passing the Williams Act).

23. Pub. L. No. 90-439 § 3(e), 82 Stat. 455 (codified at 15 U.S.C. § 78n(e) (1988)). Section 14(e) reads in pertinent part:

> It shall be unlawful for any person . . . to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

to regulate tender offers by "defin[ing], and prescrib[ing] means reasonably designed to prevent, such acts as are fraudulent, deceptive, or manipulative."[24] This broad grant of authority seemed to portend stricter regulation of the financial markets. The Supreme Court took the next major step in this area; however, it was a step backward.

B. Chiarella v. United States[25] *and its Progeny: Insider Trading Law Since 1980*

The Supreme Court discussed the fiduciary duty requirement in *Chiarella*,[26] a case which defined the insider trading liability debate for all subsequent federal court decisions in the area. *Chiarella* involved an alleged violation of Rule 10b-5. The defendant worked for a financial printer contracted to print takeover documents. The defendant used information from the documents to purchase shares in the target company and then sold the shares for a profit after the bids became public.[27]

The Supreme Court found the defendant not liable under Rule 10b-5 because he owed no fiduciary duty to the target company's shareholders and therefore had no duty to disclose the information.[28] The Court borrowed this fiduciary duty requirement from the notion of fraudulent nondisclosure in the Restatement (Second) of Torts.[29] Although the Court framed insider trading as fraudulent nondisclosure that deprived shareholders of the increased profits to be made after public announcement of takeover bids, it stated that without a fiduciary duty, there can be no fraud.[30]

A dissent by Chief Justice Burger, however, foreshadowed later federal court decisions, including *Peters* (albeit in a Rule 10b-5 context). The Chief Justice supported the concept of an absolute duty to disclose or abstain based on a defendant's misappropriation of information, without any breach of a specific fiduciary duty.[31]

Whether jumping through the window left open by Burger or simply responding to the narrow majority definition of impermissible insider trading in *Chiarella*, the SEC quickly fired back. Using the authority granted by § 14(e), it promulgated Rule 14e-3[32] in 1980. This rule prohibited securities trading on the basis of an impending, unannounced tender offer if knowledge of the offer comes from the offeror, the issuer of securities or an officer, director, partner or employee of the offering party or

24. *Id.*
25. 445 U.S. 222 (1980).
26. *Id.* at 227-28.
27. *Id.*
28. *Id.* at 232.
29. *See id.* at 228 & n.9 (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1977)).
30. *Chiarella*, 445 U.S. at 235.
31. *Id.* at 240 (Burger, C.J., dissenting).
32. 17 C.F.R. § 240.14e-3 (1993).

the issuer.[33] Most significantly, Rule 14e-3 did not require a breach of fiduciary duty as a prerequisite to liability.

The tender offer has presented a new challenge to the definition of insider trading liability. The challenge lies not only in the number of participants, any one of whom may potentially have access to information about the tender offer before it is publicly announced, but also in the potential harm to the vast number of shareholders of the target company. Although § 14(e) does not contain a definition of the tender offer, several federal courts, in construing the statute, have identified factors for determining the presence of a tender offer.[34]

Several other definitions of a tender offer have been forwarded, most of which contain overlapping elements.[35] Tender offers are usually made for a large percentage of the corporation's stock, for a price above the shares' market price, and are often open for a limited time.[36]

In this type of securities transaction, the range of individuals with access to inside information could include investment analysts,[37] financial printers contracted to print tender offers,[38] financial journalists[39] and others who have contact with either the acquiring company or the selling (target) company. In such a context, it is difficult to pinpoint information sources, and, as a result, the SEC adopted the broadly worded Rule 14e-3.

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33. 17 C.F.R. § 240.14e-3(a) (1993). For a discussion of Rule 14e-3's restrictions, see Anabtawi, *supra* note 10, at 382.

34. The Fifth Circuit looks to eight factors in determining whether a stock purchase is a tender offer: (1) active and widespread solicitation of shareholders for an issuer's shares; (2) solicitation is made for a substantial percentage of the issuer's stock; (3) offer to purchase at a premium over the prevailing market price; (4) terms of the offer are not negotiated; (5) offer is contingent on the tender of a fixed minimum number of shares, and perhaps, subject to a maximum number to be purchased; (6) offer is open for a limited time; (7) offerees are subject to pressure to sell; and (8) public announcements of a purchasing program concerning the target company precede or accompany a rapid accumulation of large amounts of target company securities. Pin v. Texaco, Inc., 793 F.2d 1448, 1454 (5th Cir. 1986). Other decisions incorporating this set of factors include SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945, 949-952 (9th Cir. 1985); Energy Ventures, Inc. v. Appalachian Co., 587 F. Supp. 734, 740 (D. Del. 1984); Wellman v. Dickinson, 475 F. Supp. 783, 823-26 (S.D.N.Y. 1979), *aff'd*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

The Second Circuit has used a two-part test to identify tender offers in § 14(d)'s tender offer disclosure context: (1) "a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal put before them;" (2) "whether the particular class of persons needs the protection of the [Securities] Act." Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir. 1985) (citation omitted).

The Fifth Circuit has incorporated both the preceding tests in determining whether a tender offer has been made, albeit in a § 14(e) discussion. *See* Anago Inc. v. Tecnol Medical Products, Inc., 792 F. Supp. 514, 516-517 (N.D. Tex. 1992), *aff'd*, 976 F.2d 248 (5th Cir. 1992), *cert. denied*, 114 S. Ct. 491 (1993).

35. *See, e.g.*, Proposed Amendments to Tender Offer Rules, SEC Release Nos. 33-6159, 34-16385, 44 Fed. Reg. 70,349, 70,350-51 (1979) (codified as amended without the proposed definition at 17 C.F.R. § 240.14d-1(b) (1993)). For a discussion of this proposal and others, see Steve Mather, *The Elusive Definition of a Tender Offer*, 7 J. CORP. L. 503, 513 (1982).

36. *See* Wellman v. Dickinson, 475 F. Supp. 783, 823-26 (S.D.N.Y. 1979) (looking to factors listed *supra* note 34), *aff'd*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

37. Dirks v. SEC, 463 U.S. 646 (1983).

38. Chiarella v. United States, 445 U.S. 222 (1980).

39. Carpenter v. United States, 484 U.S. 19 (1987).

Two years later, however, the Court expanded on its *Chiarella* analysis in *Dirks v. SEC.*[40] *Dirks* involved an investment analyst who heard from a former corporate officer that the company's assets were fraudulently overstated. The analyst, wanting to expose the fraud, did his own investigation by interviewing several company officers and employees. Some of the interviews corroborated the fraud allegation. Dirks discussed his findings with several clients, who then sold their equity funding shares in the company.[41]

The Court held Dirks breached no fiduciary duty to the corporate shareholders.[42] The Court began its analysis by reemphasizing its *Chiarella* holding that it is not illegal to trade on inside information when no fiduciary relationship exists.[43] The Court characterized Dirks as a tippee, because he received his information from company insiders, and asserted "a tippee assumes a fiduciary duty . . . when the [tipping] insider has breached his fiduciary duty . . . and the tippee knows or should know that there has been a breach."[44] It then found that, since Dirks' sources had breached no duty,[45] Dirks could not be guilty of a "derivative breach."[46]

The federal courts of appeals largely followed the Supreme Court's lead when confronted with opportunities to define insider trading liability. Situated in the nation's financial center, the Second Circuit spoke first in *United States v. Newman.*[47]

The defendant in *Newman,* a securities trader, received secret information from investment bankers about proposed acquisitions and mergers and then passed this information on to individuals who traded and profited.[48] The Second Circuit, using the duty requirement from *Chiarella,* held that the defendant violated Rule 10b-5 by aiding the tipping investment bankers in violating the fiduciary duty owed to their employers,[49] since those companies relied on their reputation as safe havens for their customers' confidence.[50]

Three years later, the Second Circuit held a defendant's insider trading to be a breach of duty in *SEC v. Materia,*[51] this time describing a financial printer's procurement of nonpublic information about a pending tender offer as a fraud against his employer's reputation.[52] The Third Circuit adopted the fiduciary duty requirement in *Rothberg v. Rosenbloom.*[53]

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40. 463 U.S. 646 (1983).
41. *Id.* at 648-49.
42. *Id.* at 667.
43. *Id.* at 654-55.
44. *Id.* at 660.
45. The court of appeals noted that the tippers derived no monetary gain from the information given Dirks and had no intent to divulge profitable information. To the contrary, "the tippers were motivated by a desire to expose fraud." *Id.* at 667.
46. *Id.*
47. 664 F.2d 12 (2d Cir. 1981).
48. *Id.* at 15.
49. *Id.* at 15-16.
50. *Id.* at 17.
51. 745 F.2d 197 (2d Cir. 1984), *cert. denied,* 471 U.S. 1053 (1985).
52. *Id.* at 199, 202.
53. 771 F.2d 818 (3d Cir. 1985).

According to the court, any insider to a proposed transaction is liable for insider trading if he or she breaches the fiduciary duty owed to his or her corporation.[54]

Many of the federal district court insider trading decisions during this era came from the Southern District of New York, whose jurisdiction encompasses Wall Street. This court held in *O'Connor & Associates v. Dean Witter Reynolds, Inc.*[55] that persons other than corporate shareholders have a duty to abstain or disclose if they acquire material nonpublic information.[56] This statement approximated a holding that the existence or absence of fiduciary duty is irrelevant to insider trader liability. Three years later, however, the same court relied on a breach of fiduciary duty to the target (selling) company in a takeover bid in *SEC v. Musella.*[57] The court later expanded the scope of liability slightly in *SEC v. Tome*[58] by holding the duty may be owed to anyone, not just the target company.[59] Nevertheless, the duty requirement remained.

With the *Chiarella* decision, the subsequent holding in *Dirks* and the consistent lower federal court decisions, the judiciary had drawn the most permissive parameters yet for insider trading. Fear of slanting the securities market playing field in favor of financial insiders created a situation ripe for a strengthening the law. Much later, the Supreme Court itself may have reacted to such a climate in *Carpenter v. United States*[60] when it viewed a *Wall Street Journal* columnist's insider trading activity as a breach of fiduciary duty to the newspaper itself.[61] Defendant Winans had given out advance information regarding the content of his column in return for a share of the profits made by trading on the information.[62] A divided Court upheld the defendants' convictions.[63]

The Court's decision, however, came seven years after *Chiarella* and hardly heralded a wholesale shift in insider trading restrictions. Additionally, its decision in *Dirks* did not invalidate Rule 14e-3. The Court's silence left the burden of clarifying the boundaries of insider trading liability under Rule 14e-3 to the Second Circuit's decision in *United States v. Chestman.*[64]

In 1990, a panel of the Second Circuit reversed Robert Chestman's conviction for insider trading in connection with a tender offer.[65] In so

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54. *Id.* at 822.

55. 529 F. Supp. 1179 (S.D.N.Y. 1981).

56. *Id.* at 1186. *O'Connor* also dealt with Rule 14e-3 liability, noting that the rule only requires " 'substantial . . . steps to commence' " a tender offer to bring an insider trader within the scope of the rule. *Id.* at 1189 (quoting 17 C.F.R. § 240.14e.3 (1993)).

57. 578 F. Supp. 425, 436 (S.D.N.Y. 1984).

58. 638 F. Supp. 596 (S.D.N.Y. 1986).

59. *Id.* at 618.

60. 484 U.S. 19 (1987) (evenly divided decision).

61. *Id.* at 27-28.

62. *Id.* at 25.

63. *Id.* at 28.

64. 947 F.2d 551 (2d Cir. 1991) (en banc) [hereinafter Chestman II], *cert. denied,* 112 S. Ct. 1759 (1992).

65. United States v. Chestman, 903 F.2d 75, 84 (2d Cir. 1990) [hereinafter Chestman I], *vacated on reh'g en banc,* 947 F.2d 551 (2d Cir. 1991), *cert. denied,* 112 S. Ct. 1759 (1992).

doing, the panel divided on the issue of the validity of Rule 14e-3. Although Judge Miner, writing for the court, specifically noted the SEC was acting within its § 14(e) authority in promulgating the rule,[66] two judges disagreed. Judges Mahoney[67] and Carman[68] concluded that the agency had exceeded its statutory powers in adopting the rule.

Upon rehearing *en banc*, the Second Circuit reaffirmed Rule 14e-3 as a valid exercise of the SEC's legislative mandate.[69] In the process, the court quoted the Supreme Court in *Schreiber v. Burlington Northern, Inc.*[70] for the proposition that the SEC had the authority to promulgate prophylactic rules under § 14(e).[71] The Second Circuit explicitly stated that no fiduciary duty is necessary to create liability for one who trades on material nonpublic information.[72]

With the need in *Chestman* for an *en banc* reconsideration of Rule 14e-3's validity and the absence of any pronouncements from the Supreme Court, the scope of tender offer-related insider trading liability was far from resolved. The next opportunity to consider the issue fell to the Tenth Circuit.

II. *SEC v. PETERS*[73]

In a partnership setting, partners have a duty to each other, limited to the scope of the partnership's business, not to gain advantage through false statements, failures to disclose, threats or pressure.[74] A partner's failure to disclose knowledge of information regarding an impending tender offer was at the center of the Tenth Circuit's discussion of fiduciary duty, and its validation of Rule 14e-3,[75] in *Peters*.[76]

A. *Facts*

Don Peters and Ivan West were partners in Investment Management Group ("IMG"). West did consulting work outside the partnership for Energy Resources Group, Inc. ("ERG"). This work included seeking a friendly acquirer for ERG.[77] West found a purchaser. Shortly before the announcement of the tender offer, Peters allegedly tipped information about the purchase to individuals who purchased shares of ERG stock.[78]

66. *Id.* at 83-84.
67. *Id.* at 84 (Mahoney, J., concurring in part and dissenting in part).
68. *Id.* at 86 (Carman, J., concurring in part and dissenting in part).
69. Chestman II, 947 F.2d at 559-60.
70. 472 U.S. 1 (1985).
71. Chestman II, 947 F.2d at 563 (quoting *Schreiber*, 472 U.S. at 11 n.11).
72. *Id.* at 557 (asserting that Rule 14e-3 "creates a duty in those traders who fall within its ambit to abstain or disclose, without regard to whether the trader owes a pre-existing fiduciary duty to respect the confidentiality of the information").
73. 978 F.2d 1162 (10th Cir. 1992).
74. 59A AM. JUR. 2D *Partnership* § 420 (1987) (outlining duties among partners); *see* Peters, 978 F.2d at 1168 (discussing some of these principles).
75. 17 C.F.R. § 240.14e.3 (1993).
76. 978 F.2d at 1164, 1167-68.
77. *Id.* at 1164.
78. *Id.*

After public announcement, these individuals sold their shares at a profit of $2.00 to $2.50 per share.[79] Peters allegedly gained access to the information from memos in a notebook West left on his desk at the IMG office.[80]

The SEC filed a civil suit against Peters, alleging violations of § 10(b)[81] of the Securities Exchange Act of 1934 as well as SEC Rules 10b-5[82] and 14e-3.[83] At trial, the jury found Peters not liable for any violations. The Tenth Circuit reversed and remanded, finding the district court erred in instructing the jury that a Rule 14e-3 violation required breach of a fiduciary duty.[84]

B. *The Court's Analysis*

In holding that Peters could be held liable without any fiduciary duty to West, the court of appeals found that Rule 14e-3 required no implied fiduciary duty[85] and was a valid promulgation under congressional authority granted through § 14(e).[86] The court explained that the district court's erroneous jury instruction was not harmless error, since the jury might have found for Peters because West's ERG work was outside the partnership's business and therefore beyond the reach of Peters' fiduciary relationship with West.[87]

The court concluded that § 14(e) granted the SEC liberal rulemaking authority to promulgate a rule as broad as 14e-3. The court adopted two policy arguments to support its holding. First, since Rule 14e-3 was aimed specifically at deterring insider trading in the tender offer context, it is not subject to the same fiduciary duty requirement as Rule 10b-5.[88] To hold otherwise, the court suggested, would "do nothing more than . . . proscribe conduct already proscribed by Section 10(b) and Rule 10b-5."[89] Second, the court ruled that in a tender offer context, where many players are involved who may have no loyalty to the target company, a fiduciary duty requirement posed an evidentiary hurdle incompatible with the spirit of the authority granted to the SEC in § 14(e).[90]

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79. *See* Appellant's Brief at 8, SEC v. Peters, 978 F.2d 1162 (10th Cir. 1992) (No. 90-3346).

80. *See* SEC v. Peters, 735 F. Supp. 1505, 1512-14 (D. Kan. 1990), *rev'd*, 978 F.2d 1162 (10th Cir. 1992).

81. 15 U.S.C. § 78j (1988).

82. 17 C.F.R. § 240.10b-5 (1993).

83. *Peters*, 978 F.2d at 1164.

84. *Id.* at 1165-68. The court found a second ground for reversal in an evidentiary issue that will not be discussed in this Comment. *See id.* at 1168-73; *see also id.* at 1173-77 (Alley, J., concurring in part and dissenting in part) (agreeing with the majority on the Rule 14e issue).

85. *Id.* at 1167.

86. *Id.*; *see* 15 U.S.C. § 78(n)(e) (1988).

87. *Id.* at 1167-68.

88. *Id.* at 1166 n.4. (citing Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 10-11 (1985) (stating that § 14(e) is addressed specifically to disclosure in the tender offer context)).

89. *Id.*

90. *See id.* at 1167; *see also* H.R. REP. No. 910, 100th Cong., 2d Sess. 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6052 (making the connection between the investor and inside information can be an obstacle to prosecuting insider trading cases).

The court of appeals buttressed these policy arguments with reference to the passage of the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA"),[91] which the court saw as a ratification of Rule 14e-3.[92] Although the ITSFEA hearings or reports made no reference to Rule 14e-3, the court presumed Congress was aware of the existence of a rule on such a closely related issue.[93] Congress designed the 1988 Act to strengthen the enforcement of existing insider trading laws,[94] and not to abridge the SEC's powers under § 14(e) and Rule 14e-3 to regulate insider trading.

The Tenth Circuit framed its decision as a natural extension of emerging insider trading law. It appealed to prior statutory mandate and legislative history and noted the SEC's need for adequate measures to police the securities marketplace by holding that insider trading liability in the tender offer context does not require a breach of fiduciary duty. The court cited *Chestman*, which directly stated this proposition.[95] *Peters* confirmed the en banc *Chestman* validation of Rule 14e-3 and continued the Second Circuit's broad proscription of insider trading activity.

III. ANALYSIS

Congress, the courts, and the SEC have struggled to properly define insider trading liability parameters. As the Williams Act,[96] *Chiarella v. United States*,[97] Rule 14e-3,[98] *Dirks v. SEC*,[99] *United States v. Chestman*[100] and *SEC v. Peters*[101] illustrate, these definitions have often taken the form of sharp reactions to another entity's pronouncements on the subject.

Recent court decisions, however, indicate the parameters may finally be stabilizing. The Tenth Circuit's refusal in *Peters* to read a fiduciary duty requirement into Rule 14e-3 is consistent with *Chestman*; moreover, the decision will enhance the integrity of securities markets without inhibiting legitimate market research and communication.

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91. Pub. L. No. 100-704, 102 Stat. 4677 (codified as amended at 15 U.S.C. § 78u-1 (1988 & Supp. IV 1992)).

92. *Peters*, 978 F.2d at 1167.

93. *Id.*

94. *See* H.R. REP. No. 910, 100th Cong., 2d Sess. 35 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6072; *see also* Howard M. Friedman, *The Insider Trading and Securities Fraud Enforcement Act of 1988*, 68 N.C. L. REV. 465, 475 (1990) (citing legislative history of the 1988 Act as validation of Rule 14e-3).

95. *See* United States v. Chestman, 947 F.2d 551, 557 (2d Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1759 (1992).

96. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1988).

97. 445 U.S. 222 (1980).

98. 17 C.F.R. § 240.14e-3 (1993).

99. 463 U.S. 646 (1983).

100. 947 F.2d 551 (2d Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1759 (1992).

101. 978 F.2d 1162 (10th Cir. 1992).

A. *Different Contexts, Different Bases for Insider Trading Liability: Rules 10b-5*[102] *and 14e-3*

1. Section 14(e)[103]

Section 14(e) grants the SEC power to take steps "reasonably designed"[104] to prevent unlawful activities in the tender offer context, and it contains no evident fiduciary duty requirement. Some writers have questioned whether Rule 14e-3 is simply a retread of Rule 10b-5 aimed at preventing fraud. These critics of the *Chestman/Peters* approach point to the similarity in language between Rule 10b-5 and Rule 14e-3 and reason that Rule 14e-3 should be subject to the same duty requirement as has been read into Rule 10b-5.[105]

This criticism ignores the difference between § 10(b) and § 14(e) and the problems they address. The SEC aimed Rule 14e-3 directly at tender offers.[106] The unique trading context of the tender offer creates a need for different regulatory techniques. In its release accompanying the promulgation of Rule 14e-3, the SEC clearly stated that Rule 14e-3 addresses a different concern than Rule 10b-5—tender offers.[107]

2. Legislative History of Insider Trading Statutes

The legislative history behind § 14(e) and ITSFEA[108] also supports the Tenth Circuit's holding in *Peters*. The SEC provided the Senate Subcommittee on Securities with a memorandum during the consideration of § 14(e).[109] The memorandum specifically referred to the problem of individuals trading on undisclosed information regarding an upcoming tender offer—the exact scenario played out in *Peters*. Significantly, the memo contained no mention of a fiduciary requirement in its discussion of liability for insider trading in tender offer contexts.[110]

It is not surprising that the SEC interpreted the legislation in an expansive manner. Statements by representatives of the financial community before the Senate Subcommittee indicated the group most affected by this new legislation also agreed on the need for broad SEC regulatory pow-

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102. 17 C.F.R. § 240.10b-5 (1993).

103. 15 U.S.C. § 78n(e) (1988).

104. *Id.*

105. *Report of the ABA Task Force on Regulation of Insider Trading, Part I: Regulation Under the Antifraud Provisions of the Securities Exchange Act of 1934, reprinted in* 41 BUS. LAW. 223, 251 (1985).

106. *See* 17 C.F.R. § 240.14e-3(a) (1993).

107. SEC Release Nos. 33-6239; 34-17120, 45 Fed. Reg. 60410, 60412 n.20 (1980); *see also* Karen A. Tallman, Note, *Private Causes of Action under SEC Rule 14e-3*, 51 GEO. WASH. L. REV. 290, 296 (1983) (discussing congressional concern with equal access to material information concerning tender offers).

108. 15 U.S.C. § 78u-1 (1988 & Supp. IV 1992).

109. *See Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen, Hearing on S. 336 and S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 12 (1970) (SEC memorandum submitted to Senate Subcommittee on Securities).

110. *See id.* For a brief discussion of the SEC memorandum, see Friedman, *supra* note 94, at 474.

ers in the tender offer context.[111] Congress was thus well aware of the notion of broad authority for the SEC under § 14(e), and the finished product, as discussed above, indicates no disagreement with such an interpretation—one which presages the *Peters* decision.

Legislative history of ITSFEA also supports the interpretation that § 14(e) does not require a fiduciary duty. Congress designed ITSFEA to strengthen existing enforcement of securities trading.[112] Committee reports indicate Congress was fully aware of the evidentiary hurdles that hindered the pinpointing of inside information in tender offers.[113]

Whatever the motive for the original omission, Congress had a clear opportunity to enact a duty requirement in 1988 if it so desired. During ITSFEA hearings, the Senate Securities Subcommittee was directly asked to consider the adequacy of the SEC's regulatory remedies,[114] and the parallel House Subcommittee was given a thorough explanation of the misappropriation theory, which contains no fiduciary duty requirement.[115] With a direct opportunity to reconsider restrictions on insider trading liability, Congress declined to add a fiduciary duty prerequisite to liability in the tender offer arena.

B. *The Tenth Circuit's Interpretation of Rule 14e-3: Promoting Fairness Without Discouraging the Lawful Flow of Information*

A broad scope of liability, including the absence of the fiduciary duty prerequisite, should enhance the integrity of the securities market. At the same time, it should not adversely affect the legitimate communication of information in the markets.

The need for broader regulatory authority vis-a-vis tender offers is apparent. Tender offers involve any number of shareholders who are rightfully entitled to the profits generated by selling shares after public announcement of the offer. Any individual who gains access to information about the impending offer, regardless of whether any fiduciary duty is owed to anyone, can trade (factually, not legally) on that information before public announcement. If a person does, the person defrauds the

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111. *See, e.g., Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen: Hearing on S. 336 and S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 116 (1970) (statement of Craig Severance, Chairman of the Federal Securities Acts Committee, Investment Bankers Association).

112. *See supra* note 94 and accompanying text.

113. *See, e.g.*, H.R. REP. No. 910, 100th Cong., 2d Sess. 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6043, 6052.

114. "The third and final question I have asked our witnesses to address is this. Does the SEC currently have adequate resources to do its job correctly and *does it possess adequate remedies to deter securities laws violations?*" *Oversight of the Securities and Exchange Commission and the Securities Industry: Hearing on the Proper Roles of Government and Self-Regulation in Light of the Shift in Policy Focus of the SEC in the Past Few Years Before the Subcomm. on Securities of the Senate Committee on Banking, Housing, and Urban Affairs*, 100th Cong., 1st Sess. 2 (1987) (statement of Sen. Donald W. Riegle, Jr., Chairman of the Subcomm. on Securities) (emphasis added).

115. *SEC and Insider Trading: Hearing Before the Subcomm. on Oversight and Investigations of the House Committee on Energy and Commerce*, 99th Cong., 2d Sess. 80-81 (1986) (statement of John Shad, Chairman of the SEC).

shareholders "as surely as if that person took their money."[116] In fact, such traders are taking money in the form of potential profits. The passage of § 14(e) reflected the need to eliminate such fraud, irrespective of any fiduciary relationship.[117]

The language in § 14(e), the legislative history of recent insider trading statutes, and the trend away from a fiduciary duty requirement in recent tender offer cases all support an absence of the fiduciary duty requirement under Rule 14e-3. These arguments are buttressed by reviewing who the fiduciaries generally are—corporate insiders. It is fraudulent for those insiders to trade on the basis of nonpublic material information without disclosure in the corporate context, because those insiders owe a fiduciary duty of disclosure to their shareholders when engaged in purchases from or sales to those shareholders.[118]

The "insider" relationship which gives rise to the fiduciary duty in the Rule 10b-5 context[119] may not be present in tender offers. The tender offeror is not a director or officer of the target company, and therefore, the offeror has no fiduciary duty to the shareholders of the target company. Limiting liability to those with a fiduciary duty to the target company's shareholders would insulate from liability all those who are privy to the information because of a relationship with the tender offeror.

The plans of the tender offeror are cloaked in secrecy from the target shareholders. Just as the Williams Act aimed to protect target shareholders through disclosure requirements,[120] the SEC must be able to protect those shareholders by broadly regulating the insider trading that potentially can be effected by anyone with nonpublic knowledge about a future tender offer.

This regulatory mandate should not have the effect of trampling the flow of information, including lawful market research and communication about transactions. The key to preserving legitimate dissemination of information is found in Rule 14e-3 itself. The Rule establishes liability only for those who know, or should know, that the information about the impending tender offer is not yet public and that the information came from any one of a list of 'insiders' to the upcoming tender offer.[121] Therefore, an insider or his tippee is subject to liability. The innocent individual who gleans information which he or she does not know, and has no reason to

116. United States v. Newman, 664 F.2d 12, 17 (2d Cir. 1981).

117. *See* H.R. REP. No. 1711, 90th Cong., 2d Sess. 11 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2811, 2821 (emphasizing need to prevent fraudulent or manipulative practices and making no mention of fiduciary duty requirement).

118. *See, e.g.*, Kohler v. Kohler Co., 319 F.2d 634, 637-38 (7th Cir. 1963); Kardon v. National Gypsum Co., 73 F. Supp. 798, 800 (E.D. Pa.), *opinion supplemented by* 83 F. Supp. 613 (E.D. Pa. 1947). For a historic overview of the corporate insider as fiduciary, see LANGEVOORT, *supra* note 8, § 2.02, at 35-39.

119. Tippees have a duty to abstain or disclose as well as corporate insiders under Rule 10b-5. HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 19.01[4] (1993 ed.). The tippee's fiduciary duty, however, stems from the fact an insider with a fiduciary duty has disclosed the information to the tippee. *Id.* § 19.01, at 19-10 (quoting Dirks v. SEC, 463 U.S. 646, 664 (1983)).

120. *See supra* note 117, at 2811-13.

121. 17 C.F.R. § 240.14e-3(a) (1993).

know, is nonpublic, even though it is in fact nonpublic, and who did not know the information came from someone on the Rule's "list," may still trade on that information without liability. The duty to abstain or disclose, however, is still intact under Rule 14e-3, as interpreted by *Peters*, for those persons who have "reason to know" that the information is not yet public or that the information has its source in one of the listed individuals in Rule 14e-3.[122]

The regulation also mandates that a "substantial step or steps to commence" a tender offer be taken before the abstain or disclose rule takes effect.[123] Therefore, market analysts making or recommending investment decisions on the basis of pure research, in the absence of any activity having been taken regarding the tender offer, are not subject to liability.

The Rule further limits liability by requiring that the nonpublic information traded on must be "material."[124] The SEC notes that information about intentions to make a tender offer, as well as information about the withdrawal of tender offers or increases in consideration being offered to target company shareholders, would be material.[125]

The "anti-tipping" provision in Rule 14e-3(d)[126] also allows for some flexibility.[127] The provision provides for liability only where it was "reasonably foreseeable" to the tipper that the tip could result in a Rule 14e-3 violation.[128] This language acts as a safeguard to the innocuous communication of market information to one, for example, who is not an investor or associated with investors.

Finally, the Rule provides for two exceptions to the abstain or disclose requirement. Brokers or agents for the tender offeror may purchase securities for the tender offeror.[129] Additionally, target company shareholders who have received material nonpublic information from the tender offeror may sell stock to the offeror.[130]

Rule 14e-3 thus has its intended effect: to enforce prohibitions of insider trading regarding tender offers without the irrelevant hindrance of a fiduciary duty prerequisite, while allowing legitimate, untainted market communication surrounding market transactions to take place.

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122. *Id.*

123. *Id.* Such steps could include: voting by the offeror's board of directors on a resolution to make an offer; devising a plan to make such an offer; arrangement of financing for the offer; preparing tender offer materials; and authorizing negotiations in connection with a tender offer. SEC Release Nos. 33-6239; 34-17120, *supra* note 107, at 60,413 n.33.

124. 17 C.F.R. § 240.14e-3(a) (1993).

125. SEC Release Nos. 33-6239; 34-17120, *supra* note 107, at 60,413 n.35.

126. 17 C.F.R. § 240.14e-3(d) (1993).

127. *See* LANGEVOORT, *supra* note 8, § 7.04 (discussing reach of Rule 14e-3(d) liability).

128. 17 C.F.R. § 240.14e-3(d)(1) (1993).

129. *Id.* § 240.14e-3(c).

130. *Id.* § 240.14e-3(c)(2). The SEC's rationale for this exception is that the potential for abuse of the information in such a scenario is "negligible." SEC Release Nos. 33-6239; 34-17120, *supra* note 107, at 60,416.

C. *Insider Trading Law After* Peters

1. Back to the Future: The Decline of the Fiduciary Duty Requirement

As noted, the *Peters* decision follows *Chestman* in refusing to read a fiduciary duty requirement into Rule 14e-3. The Supreme Court has yet to speak on Rule 14e-3 in the wake of *Chestman* and *Peters*. In *Chiarella* and other earlier lower-level federal decisions, however, one can find clues suggesting future federal decisions will omit the fiduciary duty requirement altogether.

The Supreme Court's 1980 *Chiarella* decision specifically laid out the fiduciary duty prerequisite to insider trading liability. Within that decision, however, lay a clue to the Court's underlying theory of liability. The duty to abstain or disclose, according to the Court, arose not just from a fiduciary relationship but also from "the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure."[131] The reference to "unfairness" reveals a concern for protecting honest traders that has at least as much to do with notions of a level playing field of information as it does with fiduciary relationships.[132]

The "fairness" basis for liability, although far from fruition at the Supreme Court level, has been more clearly evidenced in the federal courts of appeals. By the time of its decision in *SEC v. Materia*,[133] the Second Circuit was straining to fit notions of duty into a tender offer scenario. The Second Circuit then completely ended its reliance on a fiduciary duty requirement for Rule 14e-3 in *United States v. Chestman*.[134] Seen in this context, *Peters* looks a lot less like trail blazing and more like continuing an existing trend toward upholding the broad regulatory authority Congress intended to give the SEC.

2. Judicial Interpretation of "Reasonably Designed to Prevent"

The *Chestman* and *Peters* decisions may also reflect an increased willingness of federal courts to broadly interpret the "reasonably designed to prevent" language[135] that appears in several other SEC rules.[136] The Sec-

131. Chiarella v. United States, 445 U.S. 222, 227 (1980) (citing *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 & n.15 (1961)).

132. For further discussion on the trend away from fiduciary duty and toward "unfairness" as a basis for insider trading liability, even in the Rule 10b-5 context, see LANGEVOORT, *supra* note 8, § 2.02[3], at 44-45 (noting the fiduciary duty concept makes little sense in light of the fact the insider trading law now provides liability for tippees as well as corporate insiders).

133. 745 F.2d 197 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985).

134. 947 F.2d 551 (2d Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1759 (1992).

135. 17 C.F.R. § 240.14e-3(d)(1) (1993) reads:

> As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material, nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this section *except* that this paragraph shall not apply to a communication made in good faith.

ond Circuit held that the delegation of authority to the SEC to make rules "reasonably designed to prevent" fraudulent trading activity includes the power to regulate conduct other than fraud.[137] Likewise, the Tenth Circuit stated that such rulemaking authority allows the SEC to "ease the evidentiary burden" inherent in tender offer insider trading by eliminating the fiduciary duty requirement.[138]

What remains to be seen is whether these broad interpretations of the "reasonably designed to prevent" language will work their way into cases involving aspects of securities fraud beyond insider trading, such as the regulation of both tender offeror practices[139] and target company practices.[140] The Tenth Circuit's broad interpretation of this language may have an effect beyond insider trading.

CONCLUSION

Congress, the courts, and the SEC have engaged in a series of insider trading liability definitions since the Securities Exchange Act of 1934.[141] Their definitions have often represented negative reactions to another branch's definition, so that in recent years the parameters of insider trading liability have been in flux, particularly with respect to tender offers.

The Tenth Circuit's holding in *SEC v. Peters*[142] discloses a broad-based theory of insider trading liability in the tender offer context. It approves the SEC's promulgation of Rule 14e-3 as read on its face, without a requirement of fiduciary duty. This decision represents not an abrupt detour, but a logical extension of recent case law governing insider trading. Equally importantly, it seems to stabilize the definition of tender offer-related insider trading liability. At the same time, it may provide a precedent for broadly interpreting the "reasonably designed to prevent" language outside the tender offer context.

The Tenth Circuit's so-called "removal" of the fiduciary duty requirement was actually a refusal to read such a requirement into Rule 14e-3 and reflects an appreciation of the uniqueness of tender offers and their potential for abuse by those without a fiduciary duty to the target company shareholders. Rule 14e-3 contains ample safeguards to ensure that those making decisions on the basis of legitimate market research are not penalized. The Tenth Circuit's reading of the Rule will help deter fraud perpe-

136. *See, e.g.*, 17 C.F.R. § 240.13e-3(b)(2) (1993); 17 C.F.R. § 240.13e-4(b)(2) (1993); 17 C.F.R. § 240.14e-1 (1993); 17 C.F.R. § 240.14e-2(a) (1993); 17 C.F.R. § 240.15c2-6(a) (1993); 17 C.F.R. § 240.15c2-11(a) (1993); 17 C.F.R. § 240.15c2-12(a) (1993); 17 C.F.R. § 240.15g-8 (1993).

137. United States v. Chestman, 947 F.2d 551, 558 (2d Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1759 (1992).

138. SEC v. Peters, 978 F.2d 1162, 1167 (10th Cir. 1992).

139. *See* 17 C.F.R. § 240.14e-1 (1993).

140. *See* 17 C.F.R. § 240.14e-2 (1993).

141. 15 U.S.C. § 78 (1988 & Supp. IV 1992).

142. 978 F.2d 1162 (10th Cir. 1992).

trated by insider traders in the tender offer context without discouraging the legitimate dissemination of information.

Joseph E. Miller, Jr.

ADMINISTRATIVE LAW SURVEY

INTRODUCTION

Federal administrative agencies play a large role in articulating and implementing public policy in the United States.[1] Thus, they wield a power that affects the lives of all Americans. Congress and the courts continue to develop legal principles that attempt to define the limits of that power. In doing so, however, they consistently take a deferential approach to agency action. This broad deference to agency action raises questions as to whether any meaningful limits on agency action exist.

In its most recent term, the United States Court of Appeals for the Tenth Circuit continued its policy of extending substantial deference to agency decision-making. The court did so by reaffirming its adherence to three widely accepted principles of administrative law: (1) deference to reasonable agency interpretation of its governing statute; (2) limiting review of agency action to "review on the record"; and (3) deference to agency action that is not "arbitrary or capricious." These highly deferential standards do not, however, provide a substantial check on agency power.

In *NLRB v. Viola Industries-Elevator Division, Inc.*,[2] the Tenth Circuit extended deference to the National Labor Relations Board's decision to reinterpret a portion of its governing statute.[3] The new interpretation displaced a long-standing rule that the Supreme Court had arguably articulated as the law.[4] The agency's adoption of a new, albeit, reasonable interpretation of the statute raised serious questions under the separation of powers doctrine.[5]

In *Bar MK Ranches v. Yuetter*,[6] the Tenth Circuit limited its review of a United States Forest Service decision to the "record." The court narrowly interpreted this "review on the record" limitation to include only those documents examined by the agency when it made its original determination.[7] In some cases, this narrow interpretation of the "record" will preclude the court from undertaking a more substantive evaluation of the legality of the agency's action.

Within the narrow boundaries of "review on the record," the court in *Yuetter* only sought to determine if the agency decision was arbitrary or capricious.[8] This is arguably the most deferential standard of review. This

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1. William L. Andreen, *An Introduction to Federal Administrative Law Part I: The Exercise of Administrative Power and Judicial Review*, 50 ALA. LAW. 322 (1989).
2. 979 F.2d 1384 (10th Cir. 1992).
3. *Id.* at 1394.
4. *Id.* at 1398.
5. *Id.* at 1397.
6. 994 F.2d 735 (10th Cir. 1993).
7. *Id.* at 739.
8. *Id.*

standard was also strictly applied in *Lewis v. Babbitt*,[9] where the Tenth Circuit reviewed various decisions by the National Park Service to determine if they were arbitrary or capricious.[10]

These cases illustrate the Tenth Circuit's adherence to broadly accepted principles of administrative law that extend substantial deference to agency action. This broadly deferential approach, however, raises questions as to whether there are meaningful limits on agency power.

I. When An Agency Changes Its Mind: Deference, Retroactivity and Constitutional Considerations in *NLRB v. Viola Industries-Elevator Division, Inc.*[11]

A. *Background*

1. Deference to Agency Interpretations

The Administrative Procedure Act[12] ("APA") provides a uniform set of legal principles to be applied to federal agencies.[13] The APA, and the Supreme Court's interpretation of its various provisions, establish the basis for judicial review of administrative decisions.[14]

From this foundation, Congress and the federal courts have continued to struggle with exactly how to control the authority of administrative agencies. Judicial review of agency action is generally considered a necessary check against abuses of agency authority.[15] Yet, judicial intervention can frustrate an agency's effectiveness.[16]

The APA does not explicitly indicate how much deference should be accorded to agency interpretations.[17] Thus, the question of when courts should defer to an agency's interpretation of its governing statute has been the basis of considerable debate. The judiciary's approach has ranged between two extremes: courts ignoring the administrative view and employing traditional tools of statutory interpretation to arrive at what they regard as the best interpretation of the statute; and courts framing the inquiry in terms of whether the administrative interpretation is one that a reasonable interpreter might make.[18] Under the latter deferential approach, a court acknowledges that the statute is susceptible to multiple interpretations.[19] The court does not attempt to discover the best inter-

9. 998 F.2d 880 (10th Cir. 1993).
10. *Id.* at 881.
11. 979 F.2d 1384 (10th Cir. 1992).
12. 5 U.S.C. §§ 551-559, 701-706 (1988 & Supp. IV 1992).
13. *Id.*
14. John C. Haas, Survey, *Administrative Law*, 70 Denv. U. L. Rev. 625, 625 (1993); *see also* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283, 307-08 (1986) (stating that courts are mandated by the APA to "check" administrative agencies).
15. Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A. Inc. v. NRDC, 87 Colum. L. Rev. 986, 987 (1987).
16. *Id.*
17. *See* 5 U.S.C. §§ 551-559, 701-706 (1988 & Supp. IV 1993).
18. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969, 971 (1992).
19. *Id.*

pretation, but rather seeks to assure that the agency view does not contradict the statute.[20]

Prior to the 1984 Supreme Court decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[21] courts were inconsistent in their approach toward the issue of deference.[22] *Chevron* provided a procedural formula for courts to follow in determining whether to defer to agency interpretations. The issue in *Chevron* was the meaning of the term "stationary source" in the 1970 and 1977 Amendments to the Clean Air Act.[23] The Environmental Protection Agency (EPA) interpreted the term to mean that an entire factory could be a single "stationary source" under certain circumstances.[24] This became known as the "bubble concept" since an entire factory would be treated as a single stationary source enclosed in a bubble.[25]

The court of appeals held that the EPA's interpretation conflicted with the statute.[26] The court recognized that neither the statutory language nor the legislative history compelled any particular interpretation of the term "stationary source."[27] The court reasoned, however, that the correct meaning of the term could nevertheless be drawn from the overall statutory purpose.[28] This approach allowed the court to conclude that the bubble concept was statutorily prohibited because the general purpose of the Clean Air Act Amendments was to improve, rather than merely maintain, air quality.[29]

The Supreme Court reversed,[30] declaring that the appellate court "misconceived the nature of its role in reviewing the regulations."[31] The Court then set out a two-step test for judicial review of agency statutory interpretations:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is

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20. *Id.*

21. 467 U.S. 837 (1984).

22. *See, e.g.*, Merrill, *supra* note 18, at 971; Claude T. Coffman, *Judicial Review of Administrative Interpretations of Statutes*, 6 W. NEW ENG. L. REV. 1, 3 (1983); *see also* Haas, *supra* note 14, at 625 (discussing the Supreme Court's inability to develop a consistent position on deference prior to 1984).

23. 467 U.S. at 840; *see* Clean Air Amendments of 1970, Pub. L. No. 91-604, § 111(a)(3), 84 Stat. 1676, 1683 (codified as amended at 42 U.S.C. § 7411(a)(3) (1988)); Clean Air Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747 (codified as amended at 42 U.S.C. § 7502(b)(6) (1988)). The term was important because to construct or modify a "stationary source" that emitted more than 100 tons of pollution per year and was located in an area that did not meet federal air quality standards, an applicant had to comply with rigorous statutory standards. *Chevron*, 467 U.S. at 864 n.38.

24. *Chevron*, 467 U.S. at 840; *see also* 46 Fed. Reg. 50,766 (1981) (notice of a final rule adopting the "plantwide" definition). The EPA's definition would limit the number of sources to be reviewed for permits. *See id.*

25. *See Chevron*, 467 U.S. at 840.

26. NRDC v. Gorsuch, 685 F.2d 718, 726 (D.C. Cir. 1982), *rev'd sub nom.* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

27. *Id.* at 726 n.39.

28. *Id.* at 726.

29. *Id.* at 726-27.

30. *Chevron*, 467 U.S. at 866.

31. *Id.* at 845.

> clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[32]

The Court equated "permissible" with "reasonable."[33] In order for an agency construction to be upheld as reasonable, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[34] Under *Chevron*, if the meaning of a statute is unclear, the agencies are the preferred gap fillers.[35] This is an deferential standard that may, in some cases, conflict with the separation of powers doctrine.

2. Deference and the Separation of Powers

The United States Constitution grants legislative powers to Congress,[36] executive power to the president,[37] and judicial power to the Supreme Court and its inferior courts.[38] Despite this scheme, there is overlap in the functions of each branch of government.[39] This overlap is especially evident in the power delegated to administrative agencies, which typically serve quasi-legislative, quasi-executive, and quasi-judicial functions.[40]

The power of administrative agencies to make determinations of law is an especially troubling area of overlap. The *Chevron* doctrine, which holds that courts must defer to reasonable interpretations of law made by administrative agencies, has been attacked on the grounds that it violates the separation of powers principle of the Constitution.[41] Moreover, the *Chevron* doctrine arguably usurps judicial authority and grants excessive power to administrative agencies.[42]

3. Retroactive Application of Administrative Rules

Courts generally favor prospective application of rules when an agency responds to actions of parties who have relied in good faith on

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32. *Id.* at 842-43.
33. *See id.* at 844.
34. *Id.* at 843 n.11.
35. *Id.* at 843-44. *See generally* Robert J. Gregory, *When a Delegation is Not a Delegation: Using Legislative Meaning To Define Statutory Gaps*, 39 CATH. U. L. REV. 725 (1990) (discussing congressional delegation of rulemaking authority to administrative agencies).
36. U.S. CONST. art. I, § 1.
37. *Id.* art. II, § 1, cl. 1.
38. *Id.* art. III, § 1, cl. 1.
39. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 430 (1987) (arguing that the notion of separation of powers is in some respects a mischaracterization of our constitutional system).
40. *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B. C. L. REV. 757, 758-59 (1991).
41. *See id.* at 759.
42. *Id.*

prior agency pronouncements.[43] However, retroactive application of rules may be necessary in some cases in order for the agency to carry out Congress' delegation efficiently.[44]

There are two different types of retroactive rulemaking.[45] First, an agency may make a curative rule by retroactively remedying a procedural defect in an existing rule without substantively changing the content of the rule.[46] Second, an agency may substantively modify an existing rule regardless of the presence of a prior defect.[47] This latter type of retroactive rule is more problematic. Its validity generally depends upon a balancing of congressional intent and the needs of the administrative agency against potential hardship to persons who have relied on the prior rule.[48]

A court may extend deference to any reasonable agency interpretation.[49] This is true even when the agency radically changes its mind.[50] When an agency does so, however, and attempts to apply the new interpretation retroactively, the court should try to avoid hardship to persons who relied on the prior agency rule.[51]

B. *Agency Action*

In *NLRB v. Viola Industries-Elevator Division, Inc.*,[52] the National Labor Relations Board ("NLRB" or "Board") found that Viola Industries-Elevator Division, Inc., and Viola Industries, Inc. (collectively, Viola Industries), violated the National Labor Relations Act[53] (the "Act") by not honoring a prehire agreement[54] it entered into with the International Union of Elevator Constructors (the "Union").[55]

Under the original provisions of the Act, employers were not permitted to bargain with a union that had not been selected by the majority of the employees.[56] Originally, the union could establish majority status only through voluntary recognition by the employees or formal certification.[57] Congress, however, determined that applying these rules to the construction industry posed some unique problems due to the usual short duration

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43. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974).

44. For instance, agencies occasionally must adjust public programs retroactively in order to allocate limited funds fairly.

45. Richard J. Wolf, Note, *Judicial Review of Retroactive Rulemaking: Has Georgetown Neglected the Plastic Remedies?*, 68 WASH. U. L. Q. 157, 163 (1990).

46. *Id.*

47. *Id.* at 164.

48. *Id.*

49. NLRB v. Local Union No. 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers (Higdon), 434 U.S. 335, 350 (1978).

50. *Id.* at 351.

51. *See* Consolidated Freightways v. NLRB, 892 F.2d 1052, 1058 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 817 (1990).

52. 979 F.2d 1384 (10th Cir. 1992).

53. 29 U.S.C. § 158(f) (1988).

54. "A prehire agreement is an arrangement unique to the construction industry in which an employer enters into an agreement with a union before the union has been designated or selected as the representative of the workforce." *Viola*, 979 F.2d at 1389.

55. *Id.* at 1389.

56. *Id.* at 1392.

57. *Id.*

of construction jobs.[58] Consequently, Congress amended the Act to provide that it was not an unfair labor practice for a construction employer to enter into a collective bargaining agreement with a union prior to the union attaining majority status.[59]

Thus, the newly adopted Section 8(f) permitted prehire agreements in the construction industry. In *R.J. Smith Construction Co.*,[60] the NLRB determined Section 8(f)'s relation to other provisions of the Act. The doctrine developed in *R.J. Smith Construction Co.* endured for seventeen years and has been interpreted to stand for the following rule:

> [A] § 8(f) prehire agreement was merely a preliminary step which contemplated further action [toward] the development of a full bargaining relationship. During this preliminary stage there was no presumption of majority status which would protect the signatory union from challenge during the contract's term. The agreement . . . could be repudiated by either party at any moment . . . .
>
> However, a prehire agreement could convert into a full Section 9(a) [majority status] relationship . . . upon a showing that the signatory union enjoyed majority support, during a relevant period, among an appropriate unit of the signatory employer's employees.[61]

From 1972 to 1982, Viola Industries, an installer and servicer of elevator equipment, entered into a series of prehire contracts with the Union.[62] After entering into the third prehire agreement, which was signed December 14, 1982, and was effective for five years, Viola Industries began several elevator-installation projects.[63] Viola Industries, however, repudiated this third prehire agreement on November 4, 1983.[64]

The Union immediately filed a claim with the NLRB alleging that Viola Industries violated the Act by repudiating the agreement.[65] An Administrative Law Judge ("ALJ") determined that the Union had attained majority support from Viola Industries' employees at some point between 1978 and 1980.[66] Pursuant to the rule from *R.J. Smith Construction Co.*, the union was retroactively converted into the full-fledged bargaining representative of Viola Industries' employees.[67] Because Viola Industries could not repudiate this agreement, the ALJ ordered Viola to pay back wages and benefits to its employees.[68]

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58. *Id.*
59. *Id.*
60. 191 N.L.R.B. 693 (1971), *vacated and remanded*, Local No. 150, International Union of Operating Engineers v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973).
61. *Viola*, 979 F.2d at 1392 (citations omitted).
62. *Id.* at 1389.
63. *Id.* at 1389-90.
64. *Id.* at 1390.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

After the decision of the ALJ, the NLRB overruled its prior interpretation of Section 8(f) in *John Deklewa & Sons.*[69] This new interpretation was affirmed on appeal by the Third Circuit in *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB (Iron Workers).*[70] The court of appeals enforced the Board's new rule that Section 8(f) agreements were no longer unilaterally voidable, thereby making these agreements enforceable until expiration.[71] The Board also abandoned the "conversion doctrine," holding that Section 8(f) prehire agreements were only enforceable during the term of the agreement and could not convert into traditional collective bargaining agreements without a standard election and certification.[72]

The Board announced that it would apply the new Section 8(f) principles "to all pending cases in whatever stage."[73] Thus, it applied the principles from *Deklewa* to *Viola* and found that the prehire agreement was binding and could not be repudiated by either party.[74]

C. *The Tenth Circuit Opinion*

1. Majority

Viola Industries argued on appeal to the Tenth Circuit that *Deklewa* was not a proper interpretation of the Act.[75] It further contended that those who had relied on the old rule should not be subject to retroactive application of the new rule, even if that rule was proper.[76]

Citing two prior Supreme Court opinions, *NLRB v. Local Union No. 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers (Higdon)*[77] and *Jim McNeff, Inc. v. Todd,*[78] Viola Industries argued that without majority status, the collective bargaining relationship and a union's authorization to represent the employees are not triggered.[79] Thus, it argued the Board exceeded its statutory authority by granting majority status under Section 9(a) based solely upon the signing of a prehire agreement.[80]

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69. 282 N.L.R.B. 1375 (1987), *enforced sub nom.* International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), *cert. denied,* 488 U.S. 889 (1988).

70. 843 F.2d 770 (3d Cir.), *cert. denied,* 488 U.S. 889 (1988).

71. *Id.* at 775.

72. *Id.*

73. *Deklewa,* 282 N.L.R.B. at 1389.

74. *Viola,* 979 F.2d at 1390.

75. *Id.* at 1391.

76. *Id.* For cases supporting Viola Industries argument see Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983); Trustees of Wyo. Laborers Health and Welfare Plan v. Morgan & Oswood Constr. Co., Inc., 850 F.2d 613 (10th Cir. 1988); Trustees of Colo. Statewide Iron Workers (Erector) Joint Apprenticeship and Training Trust Fund v. A & P Steel, Inc., 812 F.2d 1518 (10th Cir. 1987); New Mexico Dist. Council of Carpenters v. Jordan & Nobles Constr. Co., 802 F.2d 1253 (10th Cir. 1986).

77. 434 U.S. 335 (1978).

78. 461 U.S. 260 (1983).

79. *See Viola,* 979 F.2d at 1393 (citing *Higdon,* 434 U.S. at 346).

80. *Id.*

The Tenth Circuit examined *Higdon* first. In that case, the Supreme Court affirmed the Board's reliance on its earlier *R.J. Smith Construction Co.* decision that established the pre-*Deklewa* interpretation of Section 8(f).[81] The Tenth Circuit noted, however, that the *Higdon* court upheld the Board's decision because " '[t]he Board's resolution of the conflicting claims . . . represent[ed] a defensible construction of the statute and [was] entitled to considerable deference.' "[82] Therefore, the *Higdon* court was not stating the law with regard to Section 8(f), but merely was extending deference to the Board for a permissible statutory interpretation.[83]

In examining *McNeff*, the Tenth Circuit stated that *McNeff* simply relied on *Higdon* and did not reexamine the court's review function in these types of cases.[84] Thus, *McNeff* should not be viewed as a new approach distinct from the rule of deference in reviewing Board interpretations of the Act.[85] Therefore, the Tenth Circuit concluded that *McNeff* did not prevent the court's use of the *Deklewa* rule.[86]

The court then held that the *R.J. Smith Construction Co.* rule was not the only reasonable interpretation of the statute, but that the Board's *Deklewa* rule was also a reasonable interpretation.[87] "[I]n administrative adjudicatory proceedings courts 'will uphold a Board rule [so] long as it is rational and consistent with the Act.' "[88] A mere departure from precedent does not invalidate the Board's *Deklewa* decision.[89] Moreover, " '[a]n administrative agency is not disqualified from changing its mind.' "[90]

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81. *See Higdon*, 434 U.S. at 350-52.

82. *Viola*, 979 F.2d at 1393 (quoting *Higdon*, 434 U.S. at 350).

83. *Id.*

84. *Viola*, 979 F.2d at 1393 (citing *McNeff*, 461 U.S. at 265-71). The court went on to state that since *McNeff*, the Supreme Court has continued to stress the *Higdon* principle of deference. *Id.* (citing Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844 (1984) as an example).

85. *Viola*, 979 F.2d at 1394.

86. *Id.* The Tenth Circuit also held that its earlier decisions, *see* cases cited *supra* note 76, did not preclude it from adopting *Deklewa*. *Viola*, 979 F.2d at 1394. Although each case upheld the *R.J. Smith Construction Co.* repudiation principle, the court reasoned that because those cases also relied on *McNeff*, which does not bar application of the new *Deklewa* doctrine, neither do those cases. *Id.*

The court found the Third Circuit's opinion in *Iron Workers*, upholding *Deklewa*, to be persuasive. *Id.* at 1395. The Third Circuit stated that prior Supreme Court decisions involving the Board's *R.J. Smith Construction Co.* interpretation simply reviewed the Board's prior interpretation and did not adopt the *R.J. Smith Construction Co.* interpretation of the statute as binding. *Id.*

The court noted that four other circuits have followed the Third Circuit on this issue. *Id.* at 1394 n.3 (citing C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350, 357 (1st Cir. 1990); NLRB v. Bufco Corp., 899 F.2d 608, 609 (7th Cir. 1990); NLRB v. W.L. Miller Co., 871 F.2d 745, 748 (8th Cir. 1989); Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1126, 1134, 1137 (9th Cir. 1988)).

87. *Id.* at 1395.

88. *Id.* at 1394 (quoting NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990)).

89. *Id.* at 1395.

90. *Id.* (quoting *Higdon*, 434 U.S. at 351).

Finally, the court addressed the question of whether the new interpretation could be applied retroactively.[91] The court followed the Third Circuit[92] and held that the Board's new rule regarding Section 8(f) could be applied retroactively unless manifest injustice would result. The court held that any frustrated expectations resulting from the Board's application of the new *Deklewa* rule would not, in general, amount to manifest injustice.[93] Eliminating the right to repudiate prehire contracts only binds the parties to terms which they themselves negotiated.[94]

2. Dissent

In his dissent, Judge Baldock neither took issue with whether the new *Deklewa* rule was a permissible interpretation of the statute,[95] nor with the argument that the *Delkewa* rule achieved the goals of the NLRB more effectively than the rule from *R.J. Smith Construction Co.*[96] Judge Baldock's dissent focused instead on his concern for the separation of power between the courts and the executive branch.[97] He felt that the majority "revise[d], ultra vires, the Supreme Court's opinion in [*McNeff*] in order to avoid this substantial constitutional question."[98] The *McNeff* court interpreted the statute to settle a private lawsuit.[99] Unlike *Higdon*, the *McNeff* court was not reviewing an agency decision and nowhere limited its interpretation of Section 8(f) to "being merely a defensible construction."[100]

Judge Baldock stated that "the judicial deference afforded to an agency's construction of a statute has no place outside of . . . reviewing an agency decision."[101] To resolve the issue before it, the court in *McNeff* construed Section 8(f) and clearly stated that the *R.J. Smith Construction Co.* rule was the law.[102] Therefore, until an act of Congress or a Court decision overrules this precedent, it binds the lower courts as well as the administrative agency.[103]

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91. *Id.* at 1396. "Several Circuits have addressed the question of whether a new rule announced by an . . . agency in adjudicatory proceedings is to be applied retroactively and have upheld retroactive application unless manifest injustice would result." *Id.* (citing NLRB v. Bufco, 899 F.2d 608, 611 (7th Cir. 1990); Consolidated Freightways v. NLRB, 892 F.2d 1052, 1058 (D.C. Cir. 1989); NLRB v. Semco Printing Cent., Inc., 721 F.2d 886, 892 (2d Cir. 1983); NLRB v. New Columbus Nursing Home, Inc., 720 F.2d 726, 729 (1st Cir. 1983)).

92. *See supra* note 86.

93. *Viola*, 979 F.2d at 1396.

94. *Id.*

95. *Id.* at 1397.

96. *Id.*

97. *Id.*

98. *Id.* at 1397-98.

99. *Id.* at 1398.

100. *Id.*

101. *Id.*

102. *Id.* at 1399. "A [Section] 8(f) prehire agreement is subject to repudiation until the union establishes majority status." *Id.* (citing *McNeff*, 461 U.S. at 271). In addition, Judge Baldock noted that "subsequent cases interpreting *McNeff* never portended that the meaning given to [Section] 8(f) was merely a defensible construction; rather the [Tenth Circuit] applied the *McNeff* interpretation of [Section] 8(f) as if it were the law." *Id.* at 1399; *see supra* note 76.

103. *Viola*, 979 F.2d at 1399.

D. *Analysis*

Proponents of the deferential approach in *Chevron* argue, among other things, that agencies are more competent to interpret the statutes they administer.[104] When administering their governing statutes, agencies must do more than simply determine congressional intent; administrative statutory interpretation also involves complicated policy judgements.[105] Agencies are more efficient fact-finders, have greater technical expertise, and should be afforded great deference.[106]

Chevron, however, arguably went too far. The broad deferential approach in *Chevron* raises the question as to whether it will bring about an erosion of judicial review conferred by the constitution and by the APA.[107] This is especially true when a court defers to an agency interpretation that is contrary to a prior judicial interpretation. To defer under these circumstances raises serious issues concerning the separation of powers. The rules of deference should not be applied as an absolute rule, particularly when deferring might violate fundamental constitutional principles.

The court in *Viola* deferred to an agency interpretation that was a reasonable construction of the statute.[108] However, the interpretation constituted a change from a prior interpretation that had been articulated in the courts as law. Deference under these circumstances should have triggered analysis under the separation of powers doctrine. The court avoided this substantial constitutional question by asserting that the court in *McNeff* was operating under some deferential standard of review.[109] This is arguably an incorrect reading of *McNeff*. As the dissent indicates, the court in *McNeff* recited an interpretation of Section 8(f) in order to settle a dispute between private parties and was not reviewing an agency decision.[110] Therefore, to defer to the NLRB's new interpretation, which was contrary to the holding in *McNeff*, would allow an agency to overrule judicial precedent.

While deference is appropriate in some cases, *Viola* exemplifies the need for clear limits on its application. The principles of deference should never be used as a pretext for avoiding substantial constitutional questions.

In addition, the court in *Viola* applied the new rule retroactively. Citing Third Circuit rationale, the court held that to apply the new rule retroactively would not result in "manifest injustice."[111] It reasoned that application of this rule, which eliminated the right to repudiate prehire

104. *See* Braun, *supra* note 15, at 989.
105. *Id.*
106. *Id.*
107. Timothy B. Dyk, *The Supreme Court's Role in Not Shaping Administrative Law*, 44 ADMIN. L. REV. 429, 431 (1992); *see also* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) (stating that *Chevron* is widely regarded as a "counter-Marbury" for administrative law).
108. *Viola*, 979 F.2d at 1395.
109. *See id.* at 1394.
110. *Id.* at 1398.
111. *Id.* at 1396.

contracts, would only hold the parties to terms that they themselves negotiated.[112] Therefore, in the court's mind no manifest injustice occurred.

The court diminished the potential hardship to Viola Industries by suggesting that Viola Industries would have entered into the agreement regardless of the Board's new construction of Section 8(f) in *Deklewa*.[113] This is speculative at best. The prior rule from *R.J. Smith Construction Co.* had endured for seventeen years. It would have been reasonable for Viola Industries to have relied on this rule in making its contract decisions with the Union. The new rule from *Deklewa* removed the element of flexibility that the old rule provided employers that contract with unions. Application of the new rule in *Viola* saddled Viola Industries with financial obligations[114] it might have been able to avoid under the old rule. Therefore, retroactive application of the *Deklewa* rule created a hardship on Viola Industries and, arguably, constituted manifest injustice.

II. JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS AND THE ADMINISTRATIVE RECORD: *BAR MK RANCHES V. YUETTER*[115]

A. *Background*

Administrative agencies impact our society tremendously, and thus judicial review must provide meaningful checks to agency action. The APA authorizes judicial review of agency actions.[116] Courts, however, review whether the agency's action was arbitrary or capricious and not whether the agency should have decided the matter differently.[117] This is a very deferential standard.

While judicial review provides some protection against the unbridled power of an administrative agency, the Supreme Court has limited the role of courts in reviewing agency decisions.[118] Courts may not substitute their judgments for those of the agency.[119] In reviewing informal agency actions,[120] the APA limits courts to "review on the record."[121] This generally

112. *Id.* The majority also stated that the ALJ's determination that the Union did have majority status and, consequently, that the 8(f) agreement became enforceable undermined Viola Industries' claim of manifest injustice. *Id.* at 1397. However, it is unclear to what degree the court relied on this rationale in upholding retroactive application in *Viola*.

113. *See id.* at 1396.

114. Viola Industries' agreement with the Union obligated them to pay wages and benefits. *See id.* at 1390.

115. 994 F.2d 735 (10th Cir. 1993).

116. 5 U.S.C. §§ 701-706 (1988).

117. *See id.* § 706.

118. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973).

119. *Overton Park*, 401 U.S. at 416.

120. Under the APA, agency action can take the form of formal rulemaking or adjudication, with specified proceedings including trial hearings, witnesses and administrative law judges. 5 U.S.C. §§ 554-557 (1988 & Supp. IV 1992). This formal action results in a defined record similar to that in a court.

Agency rulemakings or adjudications can also be informal. There are sometimes general requirements for "informal" agency decisions, including proposed rules in the *Federal Register*, acceptance of comments from outside parties, and publication of a statement of purpose with final rules. *Id.* §§ 553(b)-(c). While formal types of administrative action define the record more clearly, informal agency actions often do not; the APA provides little guidance

means that courts should never examine an agency decision *de novo*; but rather, courts should limit the review to those documents examined by the agency when it made its original determination.[122]

For administrative agency decisions, the APA provides "thorough review" based on the "whole record" of a case.[123] The APA, however, does not explicitly define what that "record" should include. The statute and its legislative history provide little guidance as to the meaning and scope of this term.[124] In informal adjudication, the APA only requires a "brief statement of the grounds" for an agency's action.[125] This requirement, however, is so ambiguous as to provide little practical guidance in determining the scope of the "record" on review.

The Supreme Court has struggled with this ambiguous language and has chosen to define the scope of the record very narrowly. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[126] the Supreme Court instructed the lower court to look only at what the agency relied upon in the record as the basis for its rationale.[127] In *Camp v. Pitts*,[128] the Court applied the rule of *Overton Park* and held that an agency's failure to explain adequately its final decision does not warrant a completely new hearing consisting of additional oral testimony before the court.[129] Rather, the reviewing court should require the agency to explain its action by submitting only necessary additional evidence in the form of affidavits or written testimony.[130]

Overton Park and *Camp* provide the general scope of the doctrine of "review on the record." Despite the Supreme Court's narrow approach, the doctrine has developed over time to include various far-reaching exceptions that permit the admission of additional evidence that the agency claimed was not part of the record.[131] It has been argued that these broad

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beyond requiring a "brief statement of the grounds" for the agency action. *Id.* § 555(e). Courts have responded to this ambiguous language by requiring the agency whose conduct is being challenged to assemble the record for the court.

121. *Id.* § 706 (requiring the court to "review the whole record").

122. *See, e.g., Overton Park*, 401 U.S. at 420; *Camp*, 411 U.S. at 142. The record is more difficult to determine when the court reviews informal rather than formal agency actions. *See supra* note 120.

123. 5 U.S.C. § 706 (1988).

124. *See* William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 40-41 (1975); *see also supra* note 120 (comparing the unclear APA provisions for informal agency actions with the statute's more defined provisions for formal agency actions).

125. 5 U.S.C. § 555(e) (Supp. IV 1992).

126. 401 U.S. 402 (1971).

127. *Id.* at 420.

128. 411 U.S. 138 (1973).

129. *Id.* at 142-43.

130. *Id.* at 143.

131. *See* Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L.J. 333, 343-54 (1984). Stark and Wald note:

> [T]he exceptions which have developed to allow extra-record evidence are the following: (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National

exceptions essentially erode the *Overton Park-Camp* rule.[132] The Tenth Circuit, however, reaffirmed the viability of that rule in its most recent term.

B. *Agency Action*

In *Bar MK Ranches v. Yuetter*,[133] a group of landowners who held national forest grazing permits challenged the decision of the Forest Service to move 150 elk to the Manti-LaSal National Forest near Monticello, Utah.[134] Following regulatory procedure,[135] the landowners appealed the decision to the Regional Forester.[136] After the Regional Forester affirmed the original decision, the landowners appealed to the next administrative level.[137] The Chief of the Forest Service also affirmed, and the decision became final after the Secretary of Agriculture refused discretionary review.[138]

The landowners then filed for judicial review of the Forest Service's decision in federal district court.[139] The Forest Service accordingly filed its Administrative Record[140] along with a motion for summary judgment.[141] The landowners responded, arguing that the Forest Service did not comply with its regulations concerning the development of the agency appeal record[142] and that the Administrative Record was not adequately developed.[143]

The district court granted summary judgment in favor of the Forest Service, concluding that the Forest Service had complied with its own regulations and that the Administrative Record was adequate to evaluate the agency's decision.[144] The agency appeal record and the Administrative Record issues were then presented on appeal to the Tenth Circuit.[145]

C. *The Tenth Circuit Opinion*

The landowners first contended that the Forest Service improperly interpreted the regulatory provision, which states that "an appeal decision

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Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Id. at 344.

132. *See id.* at 358. *But see*, Dave Sive, *The Problem of the "Record" in Judicial Review of Environmental Administrative Action*, C637 ALI-ABA 29, 39 (1991) (stating that in his opinion the doctrine is still viable).

133. 994 F.2d 735 (10th Cir. 1993).

134. *Id.* at 737.

135. *See* 36 C.F.R. § 211.18(f) (1987).

136. *Yuetter*, 994 F.2d at 737.

137. *Id.*

138. *Id.* at 738.

139. *Id.*

140. The administrative record constitutes the record filed in the district court by the Forest Service for judicial review of the Forest Service's decision. *Id.*

141. *Id.*

142. The agency appeal record constitutes the record developed through the internal agency review process. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 737.

will be based only on the record."[146] They argued that the Forest Service violated the regulation by basing its decision on information not contained in the agency appeal record.[147] Thus, the agency appeal record was improperly developed.[148] The Tenth Circuit disagreed, holding that the Forest Service's interpretation and application of its regulation were "reasonable and consistent with the regulation's plain meaning."[149]

The landowners also alleged that the Administrative Record filed with the district court included some documents not considered by the agency and failed to include other documents that were considered by the agency, thereby preventing the court from adequately reviewing the Forest Service's actions.[150] The Tenth Circuit addressed this issue by returning to the principles set forth in *Overton Park* and *Camp*.[151] The court stated that a district court reviews an agency action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[152] This review is based on the record that was before all administrative decision makers, including the Deciding Officer and the Reviewing Officers.[153] Therefore, the Administrative Record submitted to the district court was sufficient if it contained all documents considered at all stages of the Forest Service's decision process.[154]

The court held that the landowners failed to establish that the Administrative Record in this case was developed improperly.[155] While the landowners could verify that certain documents included in the Administrative Record and filed with the district court were not part of the agency appeal record, they failed to show that these documents were not part of the documents considered by the Deciding Officer.[156]

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146. 36 C.F.R. § 211.18(r) (1987); *Yuetter*, 994 F.2d at 738.
147. *Yuetter*, 994 F.2d at 738.
148. *See id.*
149. *Id.*
150. *Id.* at 739.
151. *See id.*
152. *Id.* (citing 5 U.S.C. § 706(2)(A)).
153. *Id.* (citing *Overton Park*, 401 U.S. 402, 420 (1971)). The Tenth Circuit further stated the law as follows:

> The district court must have before it the "whole record" on which the agency acted. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.
>
> . . . .
>
> An agency may not unilaterally determine what constitutes the Administrative Record, nor can the agency supplement the Administrative Record submitted to the district court with post hoc rationalizations for its decision. However, the designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary. When a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question. The harmless error rule applies to judicial review of administrative proceedings, and errors in such administrative proceedings will not require reversal unless Plaintiffs can show they were prejudiced.

Id. at 739-40 (citations omitted) (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)).
154. *Id.* at 739.
155. *Id.* at 740.
156. *Id.*

Finally, the landowners alleged that certain documents submitted to the district court by the Forest Service were "post hoc rationalizations" for its decision.[157] The court held, though, that the landowners made no showing of prejudice from the alleged post hoc rationalizations.[158]

D. *Analysis*

Bar MK Ranches v. Yuetter clearly indicates that the *Overton Park-Camp* approach to judicial review on the record is still viable in the Tenth Circuit. The *Yuetter* court declared that the administrative record submitted to the district court is complete if it contains "nothing more and nothing less" than the full record considered and developed at all stages of an agency's decision process.[159] This language echoes the narrow standard of record review articulated in *Overton Park* and *Camp*.

The doctrine of review on the record stems from the concern that courts should not replace administrative agencies' decisions with their own.[160] Courts might begin acting more as independent decision makers if they are able to consider materials that were not before the agency when it made its decision.[161]

A broader notion of the record for informal agency decisions, however, does not necessarily suggest unacceptable court involvement.[162] With informal agency action, many of the procedural protections of the APA are unavailable.[163] Therefore, courts should "undertake a more searching review of the record and the merits in order to assure that agency action is lawful."[164] Without a broader notion of record review, agencies have almost unreviewable authority, which frustrates the objectives of judicial review.[165] Thus, like the *Chevron* doctrine, "review on the record" provides little opportunity for the court to limit agency action.

III. The Arbitrary and Capricious Standard of Review in *Lewis v. Babbitt*[166]

A. *Background*

The APA provides standards to be applied by courts reviewing agency action.[167] These standards are intended to ensure that "the courts do not improperly usurp the prerogatives of the legislature" to administer the activities of agencies or hinder the agency's ability to exercise authority

157. *Id.* at 740.
158. *Id.* "Although allegations of a post hoc addition to the Administrative Record sufficiently alleges procedural error, an allegation of a post hoc addition does not in itself sufficiently allege prejudice." *Id.*
159. *Id.* at 739.
160. *See* Stark & Wald, *supra* note 131, at 334.
161. *Id.*
162. *Id.* at 361.
163. *Id.* at 362.
164. *Id.*
165. *Id.*
166. 998 F.2d 880 (10th Cir. 1993).
167. 5 U.S.C. § 706 (1988).

properly entrusted to it.[168] The APA applies the "substantial evidence" standard of review to formal rulemaking and formal adjudication.[169] In situations where an agency acts through informal rulemaking or informal adjudication, the APA requires a reviewing court to decide whether the agency's action was "arbitrary, capricious, [or] an abuse of discretion."[170] The substantial evidence and arbitrary and capricious standards of review are both reasonableness standards simply requiring that the administrative record reflect sufficient facts to support the agency's decision.[171]

The "arbitrary and capricious" standard permits a court to set aside an agency decision only if it is "so clearly outside the range of action expected from responsible decision makers that [it] cannot successfully be defended as an exercise of reasoned judgment."[172] This standard of review is arguably the most deferential form of review. The Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[173] held that a court must determine whether the agency decision was based on a

> consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[174]

In applying this standard, the "focal point for judicial review" is the administrative record.[175]

B. *Agency Action*

In *Lewis v. Babbitt*,[176] Lewis contested the National Park Service's ("NPS") interpretation of the National Park System Concessions Policy Act[177] and the NPS's decision not to negotiate a new permit with him.[178] Lewis sold firewood as the concessioner in Yellowstone National Park from 1976 to 1989.[179] In 1989, the NPS received two proposals for the concession permit for the next four-year period, including Lewis's, and ultimately decided to award the permit to Firebox Inc. ("Firebox") after determining that Lewis could not demonstrate the ability to finance his amended proposal.[180] After review, the district court granted the NPS's motion for summary judgment.[181]

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168. ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 9.2.12(f) (1986).
169. *See* 5 U.S.C. §§ 556, 557 (1988 & Supp. IV 1992).
170. *Id.* § 706(2)(A).
171. Melissa A. Dick, Survey, *Administrative Law*, 69 DENV. U. L. REV. 791, 791-92 (1992).
172. BONFIELD, *supra* note 168, § 9.2.12(b).
173. 401 U.S. 402 (1971).
174. *Id.* at 416.
175. Camp v. Pitts, 411 U.S. 138, 142 (1973); *see supra* part III.A.
176. 998 F.2d 880 (10th Cir. 1993).
177. 16 U.S.C. §§ 20-20g (1988).
178. *Babbitt*, 998 F.2d at 881.
179. *Id.*
180. *Id.*
181. *Id.*

C. *The Tenth Circuit Opinion*

The Tenth Circuit established at the outset that it was reviewing the agency decision to "determine whether it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' "[182] Applying this standard, the court held that the NPS did not act unreasonably in determining that Firebox's proposal was responsive to the Statement of Requirements ("SOR") for the permit or by requiring Lewis to match Firebox's proposal.[183] The Tenth Circuit held that the NPS's findings survived the arbitrary and capricious standard of review.[184]

The court also held that the NPS did not arbitrarily and capriciously determine that Lewis's amended proposal failed to satisfy the SOR's financial requirements.[185] Lewis was notified that Firebox had submitted a proposal to sell firewood from vending machines twenty-four hours a day.[186] Lewis then submitted an amended proposal which indicated that he also intended to sell firewood through vending machines and that he would match the terms of Firebox's proposal.[187] The amended proposal, however, did not provide information on how Lewis intended to finance the machines.[188]

On February 20, 1990, Lewis identified two possible sources of financing.[189] The next day, the NPS contacted both potential lenders and discovered that Lewis had not yet contacted either lender about his proposal.[190] On March 5, 1990, Lewis sent a letter to the NPS stating that he was also prepared to lease the vending machines in the event his loans were denied.[191] The NPS, however, did not receive the letter until the day after it had determined that Lewis was without adequate financing to implement his proposal.[192] Given these circumstances, the Tenth Circuit determined that the NPS's decision was not arbitrary or capricious.[193]

Finally, the court held that the NPS did not act arbitrarily by allowing Firebox, but not Lewis, to supplement its proposal with additional financial information.[194] The court found this argument unconvincing because the SOR stated, "[t]he National Park Service may verify information

182. *Id.* (citing 5 U.S.C. § 706(2)(A) (1988)).

183. *Babbitt*, 998 F.2d at 882. The SOR provided:

> To be responsive, proposals must be accompanied by a signed letter and *must contain sufficient information to convince the Secretary* acting through the Superintendent that the proponent meets the principal and secondary factors in the following paragraph. All responsive proposals will be further reviewed and evaluated to determine which is the best overall.

Id.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 882-83.

192. *Id.* at 883. The NPS then opted to negotiate a permit with FireBox. *Id.*

193. *Id.*

194. *Id.*

and clarify points as it feels necessary. It will not evaluate supplemental information or alterations of the proposal made that are submitted after the closing of the time period for receipt of proposals."[195] Based on its review of evidence in the administrative record, the court concluded that the NPS did not act "arbitrarily or capriciously" in rendering its decisions and thus affirmed the district court's decision to grant the NPS's motion for summary judgment.[196]

D. *Analysis*

Agencies are accorded substantial deference when they act through informal rulemaking or informal adjudication. It is thought that these actions typically require the agency to retain a high degree of discretion in order to exercise its congressionally delegated authority. *Lewis v. Babbitt* is a clear illustration of the Tenth Circuit's approval of this deferential approach.

Agencies should have some discretion in administering agency affairs because they are more knowledgeable in their delegated area of authority than the courts. This point is well illustrated in *Babbitt.* It is also true, however, that the power delegated to administrative agencies since the New Deal has increased dramatically.[197] Thus, agency decisions have a tremendous impact on contemporary life. In view of this trend, courts should reevaluate their role as reviewing bodies to ensure that agency power does not go unchecked.

Because the arbitrary and capricious standard of review is so deferential, agencies enjoy a great deal of latitude in informal decision making. This standard does not permit the court to disagree with an agency decision that is arguably wrong unless the decision rises to this heightened level of error. Thus the court is restricted in its ability to protect those aggrieved by an agency decision.

CONCLUSION

During the Tenth Circuit's most recent term, the court reviewed several agencies' decisions. The broad principle of deference to agency action remained a cornerstone of the Tenth Circuit's review. This deferential approach was reflected in the court's deference to an agency's reinterpretation of its governing statute, its upholding retroactive application of agency decisions, its adherence to the "review on the record" doctrine, and its application of the "arbitrary and capricious" standard of review.

Application of these deferential standards, however, while broadly accepted, does raise questions under the separation of powers doctrine in certain instances. In addition, given the broad impact that administrative agencies have on society, the deferential approach towards review of

195. *Id.*
196. *Id.*
197. *See* Andreen, *supra* note 1.

agency action should be reconsidered in light of the need for meaningful limits on agency power.

Phillip F. Smith Jr.

BANKRUPTCY SURVEY

INTRODUCTION

During the survey period, the Tenth Circuit Court of Appeals addressed a variety of bankruptcy issues. The cases in this Survey were chosen because they modified, rather than reaffirmed, existing precedent. Two cases clarify prior decisions by this circuit about the non-dischargeability of debts under Section 523 of the Bankruptcy Code, and one case discusses the preclusion of judicial review of trustees' fees under Chapter 12.

The first case, *In re Sampson*,[1] reconciles two inconsistent rulings by the Tenth Circuit respecting the actual nature of post-marital obligations. Under the Bankruptcy Code, property settlements between former spouses are dischargeable while support payments are not.[2] Often, however, these post-marital obligations have characteristics of both a property settlement and support. The Tenth Circuit has now articulated a rule to deal with such payments.

The second case, *In re Pasek*,[3] deals with the non-dischargeability exemption of debts that arise from a "willful and malicious injury by the Debtor to another entity or to the property of another entity."[4] This Survey examines the evolution of the "willful" and "malicious" standards of this exemption and clarifies the types of acts that satisfy this exemption.

Finally, *In re Scholleti*[5] demonstrates how the failure of Congress to expressly provide for judicial review of trustees' fees under Chapter 12 manifests an intent by Congress to preclude judicial review of such fees.

I. THE DISCHARGEABILITY OF DEBTS OWED BETWEEN FORMER SPOUSES

A. *Background*

The Bankruptcy Code of 1978 allows a debtor to seek a discharge of most debts that arise before the date of the order for relief.[6] The discharge extinguishes any personal liability of the debtor and is intended to further the "fresh start"[7] policy contained in the Bankruptcy Code.[8] Absolution, or a "fresh start," means that debtors may use the Bankruptcy Code to "reorder their affairs, make peace with their creditors, and enjoy 'a new

1. 997 F.2d 717 (10th Cir. 1993).
2. *See* 11 U.S.C. § 523 (1988 & Supp. IV. 1992).
3. 983 F.2d 1524 (10th Cir. 1993).
4. *Id.* at 1526.
5. 980 F.2d 639 (10th Cir. 1992).
6. 11 U.S.C. § 727(b) (1988); *In re* Sampson, 997 F.2d 717, 721 (10th Cir. 1993); *see also* 11 U.S.C. § 523 (exceptions to discharge).
7. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
8. *See* 11 U.S.C. § 524(a) (1988); Shaver v. Shaver, 736 F.2d 1314, 1315-16 (9th Cir. 1984); *see generally* Kenneth T. Fibich & Ben B. Floyd, *Impact of Bankruptcy on Family Law*, 29 S. TEX. L.J. 637, 646 (1988) (discussing § 524(a) discharge).

opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' "[9]

An individual debtor, however, does not receive a discharge for debts owed "to a spouse, former spouse, or child . . . for alimony to, maintenance for, or support of such spouse or child" if the debt is "actually in the nature of alimony, maintenance, or support."[10] This exception reflects a predominant public policy that favors the enforcement of familial obligations.[11] The policy rests on three rationales: (1) a spouse who lacks job skills or is incapable of working needs protection from destitution; (2) minor children may suffer if the custodial parent is forced into the work force due to the non-custodial parent's bankruptcy filing; and (3) society should abate the potential increased burden upon the welfare system which results from a debtor avoiding familial obligations through bankruptcy.[12]

Although post-marital obligations can be categorized as nondischargeable support or dischargeable property settlement,[13] sometimes the exact characterization of post-marital obligations is unclear. In these cases, the final clause of 11 U.S.C. § 523(a)(5) requires the post-marital obligation to actually be in the nature of support to be nondischargeable. However, determining the actual nature of the obligation has proven difficult.[14]

B. *Prior Case Law in the Tenth Circuit Regarding the Characterization of Post-Marital Obligations*

In *In re Yeates*,[15] the Tenth Circuit stated that the "intention of the parties" is "the initial inquiry" into the actual nature of the post-marital obligation,[16] and the parties' intent is dispositive on the question of nondischargeability under Section 523(a)(5).[17] The court also remarked that "[a] written agreement between the parties is persuasive evidence of intent, [and] if the agreement between the parties clearly shows that the parties intended the debt to reflect either support or a property settlement, then that characterization will normally control."[18] The *Yeates* court

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9. Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co.*, 292 U.S. at 244).

10. 11 U.S.C. § 523(a)(5)(B) (1988); *Shaver*, 736 F.2d at 1315.

11. *Shaver*, 736 F.2d at 1316; *see generally* Madison Grose, Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act*, 25 UCLA L. REV. 96 (1977) (discussing the purpose of the Bankruptcy code); Carl D. Young, Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten*, 52 IND. L.J. 469 (1977) (discussing the proposed Bankruptcy Act of 1973).

12. *Shaver*, 736 F.2d at 1316 n.3; Grose, *supra* note 11, at 96-97 n.7; *see also* Audubon v. Shufeldt, 181 U.S. 575 (1901)(debts arising out of a husband's natural legal duty to support his wife are not dischargeable under the Bankruptcy Act of 1898).

13. *See* 11 U.S.C. § 523(a)(5); *In re* Yeates, 807 F.2d 874, 876 (10th Cir. 1986); *see also* Fibich, *supra* note 8, at 647.

14. *See* Fibich, *supra* note 8, at 650-51.

15. 807 F.2d 874 (10th Cir. 1986).

16. *Id.* at 878.

17. *Id.*

18. *Id.*

further declared that resorting to extrinsic evidence of the parties' intent is necessary only when the agreement between the parties is ambiguous.[19]

Shortly after *Yeates* was issued, the Tenth Circuit articulated a seemingly different standard in *In re Goin*.[20] Instead of finding the intent of the parties in the expressed terms of the agreement, the *Goin* court stated "a bankruptcy court must look beyond the language of the [agreement] to the intent of the parties and to the substance of the obligation."[21] The court then enumerated four factors "pertinent" to the inquiry of whether an obligation is support:

> 1) if the agreement fails to provide explicitly for spousal support, the court may presume that the property settlement is intended for support if it appears under the circumstances that the spouse needs support; (2) when there are minor children and an imbalance of income, the payments are likely to be in the nature of support; (3) support or maintenance is indicated when the payments are made directly to the recipient and are paid in installments over a substantial period of time; and (4) an obligation that terminates on remarriage or death is indicative of an agreement for support.[22]

C. *Clarification of the Inquiry:* In re *Sampson*[23]

1. Facts

Ira N. Sampson and Katherine Lavonne Sampson divorced in 1984 after nine years of marriage.[24] As part of the divorce proceedings, the parties incorporated an agreement entitled "Property Settlement and Permanent Orders Agreement"[25] into the final judgment. Article I of the Agreement was entitled "Maintenance (Spousal Support)," in which Ira agreed to pay Katherine a specific monthly amount over an eight-year period.[26] Article III of the Agreement specifically dealt with the property settlement between the parties.[27]

In November 1990 Ira Sampson filed a voluntary petition under Chapter 7 of the Bankruptcy Code.[28] He claimed at an evidentiary hearing that the parties intended the payments specified in Article I of the Agreement to be a part of the property settlement but designated them as maintenance so Ira could deduct the payments from his gross income for tax purposes.[29] This claim was supported by testimony from his attorney and accountant. Katherine Sampson testified that she did not remember such an intention, but her testimony was unsupported because her attor-

19. *Id.*
20. 808 F.2d 1391 (10th Cir. 1987).
21. *Id.* at 1392.
22. *Id.* at 1392-93.
23. 997 F.2d 717 (10th Cir. 1993).
24. *Id.* at 719.
25. *Id.*
26. *Id.* at 719-20.
27. *Id.* at 720.
28. *Sampson*, 997 F.2d at 720.
29. *Id.*

ney from the divorce proceeding had died. Therefore, she was unable to refute the testimony of Ira Sampson's attorney and accountant.[30]

The bankruptcy court found for Katherine Sampson, stating that the Agreement unambiguously provided that the subject payment obligation was for Katherine's support, and reasoned that extrinsic evidence to the contrary should be precluded under *Yeates*.[31] The bankruptcy court did recognize that the *Yeates* decision conflicted with the Tenth Circuit's holding in *Goin*, which required a "bankruptcy court [to] look beyond the language of the [agreement] to the intent of the parties and the substance of the obligation."[32]

2. The Court's Opinion

The Tenth Circuit reconciled *Yeates* and *Goin* in *Sampson*. The court reasoned that a written agreement is persuasive evidence of the parties' intent at the time the obligation arose.[33] Additionally, in *Sampson* the Agreement " 'did more than simply label payments as alimony or property settlement; [i]t exhibited a structured drafting that purported to deal with separate issues in totally distinct segments of the document.' "[34] While recognizing that the language of the document "erected a substantial obstacle" for the party challenging the expressed terms to overcome, the court added that the express language was not determinative.[35]

The court then examined the extrinsic evidence surrounding the Agreement. The court found that the alimony and support provisions of the Agreement would survive Katherine's remarriage, which is suggestive of a property settlement.[36] The payments terminated on her death, however, which is characteristic of a support obligation.[37] The alimony and support payments also could be modified depending on their tax benefit to Ira, thereby strengthening Katherine's position that the payments were in the nature of alimony and support.[38] Finally, the court recognized that, at the time of the divorce, Katherine had an obvious need for support. She had no job, no marketable skills, little education, a health condition, no income, and monthly living expenses of $4165.00[39] Therefore, the court ruled that the parties' expressed intent, coupled with a functional analysis of the nature of the payments, demonstrated that the payments were nondischargeable in bankruptcy.[40]

30. *See id.*
31. *Id.*
32. *See id.* at 720 n.3.
33. *See Sampson*, 997 F.2d at 723.
34. *Id.* (quoting Tilley v. Jessee, 789 F.2d 1074, 1077-78 (4th Cir. 1986)).
35. *Sampson*, 997 F.2d at 723.
36. *Id.*
37. *Id.* at 724.
38. *Id.*
39. *Id.* at 725.
40. *See Sampson*, 997 F.2d at 726.

3. Analysis

The court seemed concerned that Ira Sampson was attempting to benefit under the tax and bankruptcy codes by arguing inconsistent positions. Like the Fifth Circuit in a similar case, the Tenth Circuit relied upon a "quasi-estoppel" doctrine that prevents a party from accepting the benefit of a statute and then taking an inconsistent position to avoid any deleterious effects.[41] The court emphasized that inconsistent positions would amount to a manipulation of the bankruptcy and tax codes.[42] The Tenth Circuit also found that proof of detrimental reliance, though not necessary, was an important factor in overturning Ira Sampson's position.[43] *Sampson* demonstrates a willingness on the part of the Tenth Circuit to look beyond the four *Goin* factors to other surrounding circumstances.

II. THE DISCHARGEABILITY OF DEBTS THAT ARISE FROM WILLFUL OR MALICIOUS ACTS

A. *Background*

Section 523(a)(6) of the Bankruptcy Code of 1978 provides that a debtor is not discharged from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."[44] The language "willful and malicious" is identical to the original exceptions from discharge found in the Bankruptcy Act of 1898, which provided a debtor "[a] discharge in bankruptcy . . . from all his provable debts, except such as . . . are . . . for willful and malicious injuries to the person or property of another."[45]

One of the first cases to deal with the non-dischargeability of debts for "willful and malicious" injuries was *Tinker v. Colwell*.[46] In *Tinker*, the debtor sought discharge in bankruptcy for a $50,000 judgment against him for the act of criminal conversation with Colwell's wife.[47] The United States Supreme Court held that the $50,000 judgment was for a willful and malicious injury, stating, "a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and

41. *Id.* at 724 n.6 (quoting *In re* Davidson, 947 F.2d 1294, 1297 (5th Cir. 1991)).

42. *See Sampson*, 997 F.2d at 724-25 n.6 (citing *Davidson*, 947 F.2d 1294, 1297).

43. *See Sampson*, 997 F.2d at 726 ("Plaintiff had an obvious need for support at the time of the divorce . . .[and] [d]efendant was clearly in a position to provide support."). *See also Davidson*, 947 F.2d at 1297. For other decisions within the Fifth Circuit explaining this "quasi-estoppel" theory, see Neiman-Marcus Group, Inc. v. Dworkin, 919 F.2d 368, 371 (5th Cir. 1990); Kaneb Serv., Inc. v. FSLIC, 650 F.2d 78, 81 (5th Cir. 1981).

44. 11 U.S.C. § 523(a)(6) (1988).

45. Bankruptcy Act of 1898 § 17(a)(2), 11 U.S.C. § 35(a)(2) (1941) (current version at 11 U.S.C. § 523 (a)(16) (1988 & Supp. IV 1992); *see* Jeffrey H. Weinberg, Comment, *Accidental "Willful and Malicious Injury": The Intoxicated Driver and Section 523(a)(6)*, 1 BANKR. DEV. J. 135, 139 (1984).

46. 193 U.S. 473 (1904).

47. *Id.* at 474.

which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously."[48]

After *Tinker*, the ensuing decisions by bankruptcy courts evolved into two separate interpretations of "willful and malicious" injury. One interpretation focused on whether the debtor acted "deliberately and intentional[ly]" in causing injury.[49] The other focused on whether the debtor acted with "reckless disregard" of the known rights of others.[50] Thereafter, in drafting the current Bankruptcy Code, Congress explicitly rejected the "reckless disregard" standard under the new Section 523(a)(6).[51]

The Tenth Circuit defines the willful component as "deliberate and intentional."[52] To define "malicious," the court inquires into the debtor's actual knowledge, or reasonable foreseeability that his conduct will result in injury to the creditor.[53] The malice inquiry is not upon "abstract and perhaps moralistic notions of the 'wrongfulness' of the debtor's act."[54] Malicious intent can be demonstrated two ways: (1) through direct evidence that the debtor's conduct was specifically intended to harm the creditor; and (2) by evidence, inferred from the debtor's experiences, acts, or admissions that he "had knowledge of the creditor's rights and that, with that knowledge, proceeded to take action in violation of those rights."[55] Therefore, in light of these two components, the Tenth Circuit has ruled that not every intentional act falls within the exception to discharge if that act is not malicious.[56]

B. In re *Pasek*[57]

1. Facts

Debtor Gregory James Pasek was an accountant employed by a CPA firm. On the firm's request, Pasek signed a covenant not to compete within fifty miles of a city where the firm had an office for a period of three years should Pasek leave the firm.[58] Liquidated damages for violation of this covenant were set at "150% of the amount billed by [the firm]

48. *Id.* at 487.

49. *See In re* Compos, 768 F.2d 1155, 1157 (10th Cir. 1985) (discussing different interpretations of the "willful and malicious" injury provision).

50. *See id.*; Weinberg, *supra* note 45, at 140.

51. H.R. Rep. No. 595, 95th Cong., 1st Sess. 362-65 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865 ("[t]o the extent that Tinker v. Colwell, 193 U.S. 473 (190[4]), held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled."); *see* Weinberg, *supra* note 45, at 140.

52. *Compos*, 768 F.2d at 1158; *see In re* Posta, 866 F.2d 364, 367 (10th Cir. 1989) ("[w]illful conduct is conduct that is volitional and deliberate and over which the debtor exercises meaningful control."); *cf.* RESTATEMENT (SECOND) OF TORTS, § 8A, cmt. b (1965) (acts "substantially certain" to cause harm are treated as intentional).

53. *Posta*, 866 F.2d at 367 (citing *In re* Egan, 52 B.R. 501, 507 n.4 (Bankr. D. Minn. 1985)).

54. *Posta*, 866 F.2d at 367.

55. *Id.* (citations omitted).

56. *See Posta*, 866 F.2d at 367; *Compos*, 768 F.2d at 1158.

57. 983 F.2d 1524 (10th Cir. 1993).

58. *Id.* at 1525.

to the client for services rendered in the prior twelve months."[59] Soon afterward, the CPA firm began to make additional demands of Pasek. The firm decided that the accountants and their spouses should project a certain image to the community and clients. The image required conformity in home decoration, automobile selection, spousal attire, grooming, and manners.[60] The firm was particularly critical of Pasek's wife.[61] The firm also assigned Pasek one of the two highest billing quotas, even though Pasek had two children with serious, time-consuming medical problems.[62] Pasek disagreed with the firm's decisions about client allocation, leverage, and what he perceived as inequitable enforcement of the non-competition covenant.[63]

Eventually, Pasek left the firm for the sake of his family.[64] He opened a competing office and several of his clients followed him.[65] The CPA firm sued Pasek. Several days before the trial commenced, Pasek filed a voluntary petition for bankruptcy and sought discharge of the damages alleged by his former firm.[66]

2. Opinion

The bankruptcy court found that, although Pasek was aware of the covenant not to compete,[67] the CPA firm had not established a "willful and malicious" injury partly because Pasek acted due to severe economic and family needs.[68] On appeal, the Tenth Circuit opined that non-dischargeability under Section 523(a)(6) requires proof of deliberate and intentional injury.[69] Malicious intent may be demonstrated by evidence that the debtor knew of the creditor's rights and, with that knowledge, acted in violation of those rights.[70] Therefore, " 'the debtor's actual knowledge or the reasonable foreseeability that his conduct will result in injury to the creditor'[is] highly relevant."[71] Nevertheless, the *Pasek* court ruled that such knowledge or reasonable foreseeability does not automatically require a finding of "willful and malicious" injury. The court reasoned that any asserted motivation, justification, or excuse must also be examined to discover the malice in addition to willfulness.[72] In the case at bar, the bankruptcy court's ruling that Pasek had adequate justifications and ex-

59. *Id.* at 1525-16.
60. *Id.* at 1526.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Pasek*, 983 F.2d at 1526.
67. *Id.*
68. *Id.*
69. *Id.* at 1527.
70. *Id.* at 1527; *see Posta*, 866 F.2d at 367; *see also In re* Grey, 902 F.2d 1479, 1481 (10th Cir. 1990).
71. *Pasek*, 983 F.2d at 1527 (quoting *Posta*, 866 F.2d at 367).
72. *Pasek*, 983 F.2d at 1527; *see Posta*, 866 F.2d at 367 ("willfulness" is straightforward; "maliciousness" is more complex).

cuses for his conduct was affirmed.[73] Given the justification, the conclusion of the bankruptcy court that the CPA firm's injury was not the result of "willful and malicious" actions on the part of Pasek was not clearly erroneous.[74]

3. Analysis

Before *Pasek*, the "willful and malicious" standard applied to a debtor who knew or could reasonably foresee that his conduct would cause injury.[75] Under this old standard, it was clear that Pasek's intentional acts (of opening his own office and taking clients with him) were "willful and malicious" because Pasek knowingly violated the CPA firm's contractual rights.

In *Pasek*, however, the Tenth Circuit viewed the debtor's personal excuse as a defense to the non-dischargeability of alleged "willful and malicious" injuries. *Pasek* thus expands on *Posta*, which rejected consideration of "abstract and perhaps moralistic notions of the 'wrongfulness' of the debtor's act" when analyzing the malice component.[76] The Tenth Circuit has significantly broadened the "malice" inquiry, and has done so in a manner that furthers the Bankruptcy Code's policy of "fresh start."[77] In this case, the discharge of Pasek's debts to the CPA firm will allow him to start his life over, free from any "pressure or discouragement"[78] from the covenant not to compete.

III. THE PRECLUSION OF JUDICIAL REVIEW OVER TRUSTEE'S FEES UNDER CHAPTER 12: IN RE *SCHOLLETT*.[79]

A. *Background*

Bankruptcy courts handled both judicial and administrative functions prior to the passage of the Bankruptcy Reform Act of 1978.[80] These administrative functions included: organizing and scheduling meetings of creditors, composing creditors' committees, appointing trustees, and setting trustees' fees.[81] Under the former statutory scheme, the bankruptcy court had the power to review and adjust the trustee's fee in individual cases.[82] Congress believed this combination of judicial and administrative functions eroded public confidence in bankruptcy proceedings and un-

73. *Pasek*, 983 F.2d at 1528. These justifications and excuses included the material alterations of the partnership agreement by the CPA firm including: the attempt to regulate debtor's personal affairs, imposing unreasonable billable hour quotas, and the reasonable reliance by the debtor on a legal opinion that the covenant not to compete was unenforceable. *Id.*

74. *Id.*

75. *Posta*, 866 F.2d at 367.

76. *Id.*

77. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

78. *Id.*

79. 980 F.2d 639 (10th Cir. 1992).

80. *Id.* at 641.

81. *Id.*

82. *See id.*

necessarily burdened bankruptcy judges.[83] Therefore, Congress created the United States Trustee "pilot program" as part of the Bankruptcy Code of 1978 to address these concerns.[84] Under this "pilot program," a limited number of bankruptcy jurisdictions transferred their administrative functions under Chapter 13 to the United States Trustees.[85]

The United States Trustees, appointed by the United States Attorney General,[86] are authorized to appoint private trustees for all bankruptcy cases arising under Chapters 7 and 13, and where appropriate to appoint standing trustees for all Chapter 13 cases within a given judicial district.[87] Over time, this "pilot program" appointment of standing trustees "resulted in a more efficient . . . Chapter 13 program than the appointment of different trustees to serve in particular Chapter 13 cases."[88]

The "pilot program" was such a success that it was included in the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986[89] for phase-in nationwide under the newly created Chapter 12 bankruptcy.[90] Under the 1986 Act, certain judicial districts are chosen by the Attorney General for implementation of the United States Trustee System. Once a district is certified, the United States Trustee for that district determines the district's need for a standing trustee.[91] Compensation for the standing trustee is determined by the Attorney General after consultation with the United States Trustee.[92]

Under the compensation plan, a standing trustee receives a fee set by a fixed percentage of the payments to the trustee by the debtor.[93] This fee is not to exceed ten percent of payments up to $450,000 under a Chapter 12 reorganization plan.[94] If the payments exceed $450,000, then the trustee's fee is reduced to three percent for the surplus payments.[95] The total fees collected from all debtors is limited to the basic pay for level V employees on the executive schedule.[96] Excess fees are then used to fund the United States Trustee System.[97]

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83. *Id.* (citing H.R. Rep. No. 764, 99th Cong. 2nd Sess. 17-18 (1988), *reprinted in* 1986 U.S.C.C.A.N 5227, 5230).

84. *See In re* Savage, 67 B.R. 700, 702 (Bankr. D.R.I. 1986).

85. *Schollett*, 980 F.2d at 641.

86. *Id.*

87. *Id.* at 642; 28 U.S.C. § 586(b) (1988).

88. *Savage*, 67 B.R. at 702 (quoting 5 COLLIER ON BANKRUPTCY ¶ 1302.01 at 1302-20 (15th ed. 1984)).

89. Pub.L. No. 99-554, 100 Stat. 3088 (1986).

90. *Schollett*, 980 F.2d at 642.

91. *See id.*

92. 28 U.S.C. § 586(e) (1988).

93. *Schollett*, 980 F.2d at 643 (citing 28 U.S.C. § 586(e)).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

B. In re *Schollett*

1. Facts

The day the 1986 Act took effect, the bankruptcy judge for the District of Wyoming appointed Sharon Dunivent as standing trustee for all Chapter 12 cases in the district.[98] Wyoming was eventually certified by the Attorney General, and the United States Trustee determined that a standing trustee in Wyoming was warranted.[99] Therefore, Sharon Dunivent was immediately reappointed on August 31, 1987 as standing trustee[100] with a fee arrangement of ten percent as set by the Attorney General.[101]

Andrew and Lynn Schollett filed a Chapter 12 reorganization plan for their family farm with the bankruptcy court for the District of Wyoming on April 15, 1987. This plan required the Scholletts to make five annual payments of approximately $30,000 to the standing trustee, Sharon Dunivent, who would then pay their various creditors.[102] Although the reorganization plan was approved before the Attorney General certified Wyoming, the plan was to take effect after certification. Therefore, the Attorney General's fee schedule applied to the standing trustee.[103]

The first payment by the Scholletts was made to Dunivent on August 4, 1988, but Dunivent refused to pay the creditors until the Scholletts paid the ten percent fee as well.[104] On September 23, 1988, the bankruptcy court issued an order to the Scholletts, requiring them to pay Dunivent her ten percent fee. The Scholletts refused.[105] They appealed to the district court, arguing that the ten percent fee of $15,000 was unreasonable since Dunivent's duties, involving writing seven checks over the next five years, would take no more than a total of fifteen hours.[106] The district court determined that Dunivent's fee was unreasonable, reduced the fee to five percent, and remanded the case.[107] The district court reasoned that, even though 11 U.S.C. § 326(b) and 28 U.S.C. § 586 removed the bankruptcy court's authority to appoint standing trustees, the statute did not explicitly preclude a review of the trustees' fees. Since the bankruptcy court did have the power to review the fees prior to the 1978 and 1986 Acts, and since those acts failed to explicitly preclude review, the court reasoned that "the power to review trustees' fees for reasonableness had not been stripped from the courts."[108] Dunivent appealed.[109]

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98. *Schollett*, 980 F.2d at 642.
99. *Id.*
100. *Id.*
101. *Id.*; *see supra* text accompanying note 80.
102. *Schollett*, 980 F.2d at 640.
103. *Id.* at 642.
104. *Id.* at 640.
105. *See id.* at 641.
106. *Id.*
107. *Schollett*, 980 F.2d at 641.
108. *Id.*
109. *See id.*

2. Opinion

In *Schollett*, the Tenth Circuit had to decide whether the 1986 Act removed the power of federal courts to review the fees set by the Attorney General for standing trustees.[110] The Scholletts argued that preclusion of review would be contrary to the legislative intent of the 1986 Act, which was to provide family farmers advantages not available in other forms of bankruptcy.[111] They further argued the ten percent fees added cost to a reorganization plan, risking the destruction of an otherwise viable opportunity for reorganization.[112]

The Tenth Circuit recognized that the Chapter 12 statutory scheme did not expressly preclude judicial review of trustees' fees.[113] Nevertheless, the court decided that the statutory language and structure indicated that such review was not possible. The court reviewed the "clear and categorical"[114] language of 28 U.S.C. § 586(e) regarding the Attorney General's explicit duty to set fees for trustees. This language "[did] not suggest an oversight function for the courts."[115] The court noted that "28 U.S.C. § 586(e)(1) requires the Attorney General to 'fix' the maximum annual compensation of trustees . . . [and] § 586(e)(2) states that the standing trustee 'shall collect such percentage fee from all payments under the plan.' "[116] This explicit language differs from the language for Chapter 7 and 11 bankruptcy cases. Under these Chapters, the trustee's fees are specifically committed to the discretion of the bankruptcy courts,[117] and the reasonableness of the trustee's fees are to be "based on the nature, the extent, and the value of such services."[118] Thus, the Tenth Circuit concluded that when Congress wanted judicial review of trustees' fees under Chapter 7 and 11 it made that intent clear, and that the absence of similar language for Chapter 12 reflected a congressional intent to preclude such review of trustees' fees.[119]

Finally, the court reasoned that because the amount of the trustee's fee depends upon the total of the payment by the debtor to the trustee, most trustees' fees will be reasonable in each particular case.[120] Also, the fee reduces to three percent once the payments exceed $450,000. This reduction reflects a method to reduce fees when the trustee enjoys "economies of scale."[121] Therefore, the statutory reduction to three percent limits the possibility of abuse for large fees, thereby lessening the need for

110. *Id.*
111. *Id.* at 642.
112. *Schollett*, 980 F.2d at 642. The Scholletts cited *In re* Kline, 94 B.R. 557 (Bankr. N.D. Ind. 1988) in support of this argument.
113. *Schollett*, 980 F.2d at 643.
114. *Id.*
115. *Id.* (citing *In re* Savage, 67 B.R. 700, 705-6 (D.R.I. 1986)).
116. *Schollett*, 980 F.2d at 644.
117. *Id.*; 11 U.S.C. § 326 (1988).
118. 11 U.S.C. § 330(a)(1) (1988); *Schollett*, 980 F.2d at 644.
119. *Schollett*, 980 F.2d at 644.
120. *See id.*
121. *Id.*

judicial review.[122] The court reversed the district court and remanded the case to the bankruptcy court for proceedings consistent with the opinion.[123]

3. Analysis

The *Schollett* decision departs from the bankruptcy policy of "fresh start."[124] The decision to preclude judicial review of trustees' fees places the burden of financing the United States Trustee System upon those debtors who can afford to pay the fee. The court found that large fees in cases where payments are high, but where work is small, will subsidize other cases where the debtor's payments are low but involve a great deal of work.[125] The *Schollett* court noted that it would be unfair to the trustee, who has agreed to serve in all cases regardless of the compensation, to impose another layer of review.[126] However, the court omitted mention of the unfairness to debtors who, already in financial difficulty, are forced to bear the administrative cost of other debtors. This is contrary to the policy of "fresh start"[127] because the debtor under Chapter 12 retains "the pressure and discouragement of [their] preexisting debt"[128] in the form of unreasonably high trustee fees when compared to "the nature, the extent, and the value"[129] of the trustee's services.

IV. CONCLUSION

The cases surveyed reveal the federal judiciary's awareness of other policy considerations beyond the original bankruptcy policy of "fresh start." This is particularly clear in *In re Pasek*, where the court discharged a facially "willful and malicious" injury by the debtor when the debtor had an excuse for the conduct. However, *In re Sampson* shows that the "fresh start" policy must give way when an overriding policy exists, such as the enforcement of familial obligations. Finally, *In re Schollett* demonstrates that certain policies regarding the efficient administration of the bankruptcy system can also override the "fresh start" policy in appropriate cases.

Richard Postma

122. *See id.*
123. *Id.* at 645.
124. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
125. *See Schollett*, 980 F.2d at 644-45.
126. *See id.* at 645.
127. *See supra* note 9 and accompanying text.
128. Grogan v. Garner, 498 U.S. 279, 286 (1991) (quoting *Local Loan Co.*, 292 U.S. at 244).
129. 11 U.S.C. § 330(a)(1) (1988).

CIVIL PROCEDURE SURVEY

INTRODUCTION

In 1993 and the latter part of 1992, the Tenth Circuit addressed several procedurally significant issues. Two rules are of particular interest due to the current debate surrounding them: Rule 11[1] and Rule 16.[2] Rule 11 is controversial this year because it was recently amended.[3] Rule 16 also has been subject to recent debate among judges and scholars.[4] Although some of the Rule 16 requirements are fairly well established,[5] questions have arisen as to whether Rule 16 is serving its purpose and whether new standards are needed.[6]

The Tenth Circuit decided two Rule 11 cases that exhibit the court's reluctance to impose sanctions. The court appears weary of the satellite litigation surrounding Rule 11 motions. In *Coffey v. Healthtrust, Inc.*,[7] the Tenth Circuit reversed the district court's imposition of Rule 11 sanctions on an attorney who testified falsely concerning his research.[8] In *Griffen v. Oklahoma City*,[9] the Tenth Circuit joined other circuits that have refused to impose a continuing obligation on an attorney to update previously filed pleadings.[10] These decisions demonstrate that federal courts are becom-

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1. FED. R. CIV. P. 11 governs sanctions for the filing of frivolous pleadings, motions, and other papers in federal court.

2. FED. R. CIV. P. 16 covers the scheduling and management of pretrial conferences.

3. *See* Denis F. McLaughlin, *New Federal Rules of Civil Procedures*, [sic] N.J. LAW., Jan. 1994, at 1. *See also* Henry J. Reske, *A New Rule 11? Court Oks Procedural Amendments*, A.B.A. J., July 1993, at 26 (noting the controversy surrounding the rule changes). The full text of the new rule can be found at 61 U.S.L.W. 4365 (Apr. 22, 1993).

4. *See* Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, C829 ALI-ABA 177, 183 (1993) (viewing Rule 16 litigation as an indication of the tension between the roles of judging and lawyering); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1970-71 (1989) (noting that Rule 16 was innovative when it was drafted and that it has since been a focal point in the continuing debate over the judge's pretrial role).

5. For instance, the rule states that a final pretrial order shall be modified only to prevent manifest injustice. FED. R. CIV. P. 16. As this survey will discuss, however, courts have had difficulty determining exactly when manifest injustice is likely to occur. *See infra* note 164 and accompanying text.

6. *See generally* John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883 (1989) (reviewing the successes and failures of the first 50 years of the Federal Rules of Civil Procedure); *see also* Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1916-17 (1989) (arguing that Rule 16 is ripe for judicial reconsideration, because it is vulnerable to a myriad of new questions and interpretations).

7. 1 F.3d 1101 (10th Cir. 1993). The first time this case reached the Tenth Circuit, the court vacated and remanded for further findings. Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992). References to this earlier case are *Coffey I*. References to Coffey v. Healthtrust, Inc. 1 F.3d 1101 (10th Cir. 1993), the subject of this discussion, are *Coffey II*.

8. *Coffey II*, 1 F.3d at 1103.

9. 3 F.3d 336 (10th Cir. 1993).

10. *Id.* at 339.

ing less likely to impose Rule 11 sanctions because many judges think the rule in action has defeated its purpose in theory.[11]

The Tenth Circuit dealt with Rule 16 in two cases involving the modification of pretrial orders. In *Joseph Manufacturing Co. v. Olympic Fire Corp.*,[12] the court reversed a decision allowing a party to modify a pretrial order. The court determined that preventing modification would not result in manifest injustice, even though the result was the exclusion of a state claim preclusion defense that would have settled the litigation.[13] In *Moss v. Feldmeyer*,[14] the court affirmed the district court's decision allowing a witness to testify as an expert even though the witness had not been so designated in the pretrial order.[15] Further, the court allowed another witness to testify about matters that had not been specified in the order.[16] These cases demonstrate some conflict in the court's interpretation of manifest injustice under Rule 16. To avoid further conflict, a new standard should be implemented to give courts clearer guidance in determining when a pretrial order should be modified.

I. RULE 11

A. *Background*

The revised Rule 11 went into effect on December 1, 1993.[17] The United States Supreme Court approved the revisions in April 1993,[18] and implemented them when Congress made no move to change the rule prior to the December 1, 1993 deadline.[19] Under the revised rule, a party must be notified in writing that the rule may have been violated before opposing counsel can move for sanctions.[20] Upon notice, the party may withdraw or correct the pleading, claim, or defense to avoid a penalty.[21]

Other changes to Rule 11 include allowing parties to make factual assertions they believe will be supported after reasonable discovery.[22] This is a change from the prior requirement that assertions be "well grounded in fact" at the time the pleadings are filed.[23] Also, the revised rule gives

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11. *See* James R. Simpson, Note, *Why Change Rule 11? Ramifications of the 1992 Amendment Proposal*, 29 CAL. W. L. REV. 495, 498 (1993) (noting that many judges view Rule 11 as only the fifth most effective method to manage frivolous suits); Carl Tobias, *New Rule in Need of Trial Run*, NAT'L L. J., June 21, 1993, at 15 (stating that numerous federal judges think Rule 11 has detrimental side effects and is not a very effective deterrent to frivolous cases).

12. 986 F.2d 416 (10th Cir. 1993).

13. *Id.* at 418.

14. 979 F.2d 1454 (10th Cir. 1992).

15. *Id.* at 1456-57.

16. *Id.*

17. FED. R. CIV. P. 11; *see also* supra note 3 and accompanying text.

18. John F. Rooney, *Revamped Sanctions Among Largest Federal Rules Changes in 20 Years*, CHI. DAILY L. BULL., Nov. 30, 1993, at 1.

19. Robert E. Bartkus, *Rule 11's New Teeth Have a Broader Bite*, N.J.L.J., Dec. 20, 1993, at 11.

20. FED. R. CIV. P. 11.

21. *Id.*

22. *Id.*

23. Fed. R. Civ. P. 11 (28 U.S.C. app. (1988)).

judges more discretion in imposing sanctions and allows fines to be paid to the court instead of to the opposing side.[24]

These changes occurred because of the controversy that has surrounded Rule 11 since its initial amendment in 1983.[25] The majority of the commentary criticizes Rule 11 for defeating its own purpose, which is to decrease the amount of frivolous litigation.[26] Instead, the amount of satellite litigation surrounding sanctions has increased.[27] Rule 11 is also criticized for its vague description of exactly what behavior is subject to sanctions.[28] Another problem is the extent of an attorney's duty to correct or withdraw frivolous filings. Circuits are split over whether the attorney has a duty to update previously filed pleadings.[29]

The following two Tenth Circuit opinions illustrate the court's reluctance to apply Rule 11 sanctions, perhaps in anticipation of the rule changes, and its interpretation of continuing duty under the rule.

B. *Tenth Circuit Opinion*

1. *Coffey v. Healthtrust, Inc.*[30]

a. *Facts*

David High represented a radiologist, Kenneth Coffey, in an antitrust suit against Edmond Memorial Hospital.[31] Coffey was part of a group that provided exclusive radiology services to the hospital.[32] In 1988, the hospital entered into an exclusive contract with another doctor, thereby preventing Coffey from treating patients at the hospital.[33] Dr. Coffey's argument depended on a finding that the hospital's geographic market was the City of Edmond.[34] High submitted the deposition of Dr. James Horrell, an expert economist, who stated that since the hospital was the only one in Edmond, it had market power over that area.[35] Defendants

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24. FED. R. CIV. P. 11.

25. Victor H. Kramer, *Viewing Rule 11 as a Tool to Improve Professional Responsibility*, 75 MINN. L. REV. 793, 793 (1991) (noting that since Rule 11 was amended, it has generated over a thousand judicial opinions and a growing number of articles that fiercely debate the advantages and disadvantages of the rule); Melinda G. Baum, Note, *The Seven Year Itch: Is it Time to Reamend Rule 11?* 40 WASH. U. J. URB. & CONTEMP. L. 227, 247 (1991) (arguing that the use of Rule 11 increased dramatically after the 1983 amendment, but such use has brought with it inconsistent application and enforcement).

26. Tobias, *supra* note 11, at 15.

27. *Id.* (reporting that the amended Rule 11 has engendered much expensive, unnecessary satellite litigation); Simpson, *supra* note 11, at 500 (arguing that Rule 11 has created destructive satellite litigation).

28. *See* Baum, *supra* note 25, at 234.

29. *E.g.*, Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991) (no continuing liability of attorney after the pleading is signed); *contra* Mann v. G. & G. Mfg., 900 F.2d 953 (6th Cir. 1990) (after the complaint is filed, attorney has continuing responsibility to review pleadings and modify them to conform to Rule 11), *cert. denied*, 498 U.S. 959 (1990).

30. 1 F.3d 1101 (10th Cir. 1993) (*Coffey II*).

31. *Id.* at 1103.

32. Coffey v. Healthtrust, Inc, 955 F.2d 1388, 1390 (10th Cir. 1992) (*Coffey I*).

33. *Coffey II*, 1 F.3d at 1103.

34. *Id.*

35. *Id.*

offered contradictory evidence and moved for summary judgment.[36] The district court took judicial notice of the short distance between Edmond and eight Oklahoma City hospitals, leading to a probable finding that Edmond Memorial Hospital did not have the necessary geographic market to support Dr. Coffey's argument.[37]

At this point, High submitted, as newly discovered evidence, a study conducted by Health Care Investment Analysts, Inc. ("Health Care"). The study considered urban and suburban hospitals to be in the same competitive market only if they were within five miles of each other.[38] High attached an affidavit of Dr. Horrell stating that the study supported High's position.[39]

Defendants filed for Rule 11 sanctions against High, presenting affidavits of Health Care officials stating that they told High his intended use of the study was misguided.[40] The officials told High that the study used an arbitrary market definition which did not support his position as to the relevant geographic area.[41] At the Rule 11 hearing, High testified he had not been so informed.[42]

The district court imposed sanctions.[43] On the first appeal, the Tenth Circuit vacated and remanded because it could not tell whether the court had imposed sanctions based on High's filing of the pleading or for having testified falsely.[44] On remand, the district court again imposed sanctions based on knowingly filing a false and misleading pleading.[45] The court relied on High's testifying falsely simply to support its finding that High knew the pleading was false when he filed it.[46]

b. *Opinion of the Court*

The Tenth Circuit reversed the district court's imposition of Rule 11 sanctions.[47] The Tenth Circuit held that testifying falsely was punishable under different rules; thus, the determination of Rule 11 sanctions would be no different if High had testified truthfully.[48] The court stated that "while lying may be a disciplinary problem, it is not a subject for Rule 11 sanctions."[49] The court then held that High reasonably relied on Dr. Horrell's expert opinion that the study supported his argument.[50] Therefore,

36. *Id.*
37. *Id.* Although not stated in the opinion, it is helpful to know that Edmond is approximately 15 miles from Oklahoma City. RAND MCNALLY ROAD ATLAS 79 (1991).
38. *Coffey II*, 1 F.3d at 1103.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1395 (10th Cir. 1992) (*Coffey I*).
45. *Coffey II*, 1 F.3d at 1103.
46. *Id.* at 1103-04.
47. *Id.* at 1104-05.
48. *Id.* at 1104.
49. *Id.*
50. *Id.*

High had no duty to disclose that the authors of the study did not think it supported his position.[51]

c. *Analysis*

The Tenth Circuit decided *Coffey II* by relying almost exclusively on one prior case, *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*,[52] which held that conflict of opinion alone is an insufficient basis for Rule 11 sanctions.[53] This is problematic, because after examining the facts of *Coffey II*, it does not appear that the district court's imposition of sanctions was based on conflict of opinion alone. As previously stated, the district court based its sanctions on High's filing of a misleading pleading. Further, High's testimony concerning what he knew at the time of filing was proven to be a lie. In fact, the district court had responded to High's motion for rehearing as follows:

> [I]n its prior Order, the Court sought to put its finding gently. In view of the instant motion, the time has come to be more blunt. . . . The finding: HCIA [Health Care] witnesses told the truth when they said that they told High his . . . exhibit could not be legitimately proffered for the purpose he proposed. Mr. High did not tell the truth when he denied this.[54]

The Tenth Circuit found that it could not impose sanctions based on High's lie to the court. The Tenth Circuit ignored the United States Supreme Court's holding in *Chambers v. NASCO, Inc.*[55] That case dealt with an attorney who defrauded the district court by putting property subject to a pending temporary restraining order (TRO) out of the court's reach.[56] The district court sanctioned the attorney, using its inherent power to impose sanctions for "attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court."[57] The court, however, could not use Rule 11 because it did not directly apply to the attorney's actions.[58] The United States Supreme Court upheld the district court's

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51. *Id.*

52. 889 F.2d 490 (3d Cir. 1989).

53. *Id.* at 499. This case dealt with attorneys who relied on four medical articles and published FDA ratings to support their argument that the substitution of an advertised generic drug for another drug could cause serious health risks. The court found that the attorneys reasonably relied on this information to make their claim, even though the attorneys were aware of a study that neither proved nor disproved the health risk from substitution. This case seems to differ from *Coffey II* because David High had only one source of information to support his argument; he was clearly told the study did not support his argument; and the study in *Schering Corp.* was inconclusive.

54. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1394 (10th Cir. 1992) (*Coffey I*).

55. 111 S. Ct. 2123 (1991).

56. The attorney was notified by opposing counsel on a Friday that a TRO order against the property at issue was pending, and would be heard by the court on Monday. That weekend, the attorney and his client began transferring the property to the client's sister in order to deprive the court of jurisdiction to issue the TRO. During the TRO hearing, the judge telephoned the attorney to ask about the possibility that the property was in the process of being sold. The attorney made no mention of the recordation of the deeds earlier that morning. Later, after the transfer of the property was complete, the attorney informed the judge he had intentionally withheld the information from the court. *Id.* at 2128-29.

57. *Id.* at 2131.

58. *Id.*

imposition of sanctions.[59] The Court held that the sanctioning scheme of the Federal Rules does not displace the inherent power of a court to impose sanctions for bad-faith conduct.[60] This is true even if procedural rules exist that sanction the same conduct.[61]

The district court in the *Coffey* cases sanctioned High once and reinstated the sanctions on remand. Even if the district court had not felt High's actions fell under Rule 11, it could have used its inherent power to sanction High's conduct. The United States Supreme Court's decision in *Cooter & Gell v. Hartmarx Corp.*[62] makes the Tenth Circuit's reversal even more surprising. In *Cooter*, the Court held that an appellate court should use an abuse of discretion standard when reviewing a district court's award of sanctions.[63] The Court stated that district courts are in the best position to determine whether a sanction is warranted because such a determination is fact-intensive and based on some assessment of the signer's credibility.[64]

The Tenth Circuit did address *Cooter* in the first *Coffey* decision. In fact, the court quoted *Cooter*'s holding by stating a court's inquiry in determining Rule 11 sanctions is rooted in factual determinations.[65] Nevertheless, in the second *Coffey* decision, the Tenth Circuit completely backtracked, stating that "[a]lthough imposition of Rule 11 sanctions is subject to an abuse of discretion standard of review, . . .[Rule 11] is an evolving area of the law"[66] The court further asserted that "it is difficult for a district court to predict accurately the development of the law in light of the various decisions that are being made."[67]

This last statement by the Tenth Circuit warrants the conclusion that the court was anticipating the changes to Rule 11. For instance, the old rule required that pleadings be supported by existing law or by a good faith argument for its extension.[68] The new version calls for a non-frivolous, rather than good faith, argument.[69] Courts have interpreted "frivolous" to mean the absence of any basis for the proffered argument—a lower standard than the previous good faith requirement.[70] Some commentators have said this change is in response to Rule 11's chilling effect

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59. *Id.* at 2136.
60. *Id.*
61. The Court addressed Rule 11 as follows:
> It is true that the District Court could have employed Rule 11 to sanction Chambers for filing "false and frivolous pleadings" . . . and that some of the other conduct might have been reached through other rules. Much of the bad-faith conduct by Chambers, however, was beyond the reach of the rules . . . and the conduct sanctionable under the rules was intertwined within conduct that only the inherent power could address.

Id. This language seems directly applicable to the facts in the *Coffey* cases.
62. 496 U.S. 384 (1990).
63. *Id.* at 405.
64. *Id.* at 402, 404.
65. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393-94 (10th Cir. 1992)(*Coffey I*).
66. Coffey v. Healthtrust, Inc., 1 F.3d 1101, 1104 (10th Cir. 1993)(*Coffey II*).
67. *Id.*
68. Fed. R. Civ. P. 11 (28 U.S.C. app. (1988)).
69. Fed. R. Civ. P. 11.
70. Simpson, *supra* note 11, at 505.

on creative advocacy.[71] Arguably, knowledge of this new direction helped the court get around High's bad faith in not mentioning that the writers of the study did not think it supported his argument. Further, the court gave great weight to Dr. Horrell's testimony at the Rule 11 hearing. Dr. Horrell stated that "even when presented with the contradictory conclusion of the authors of the study," he did not change his belief that the study supported High's position.[72] Therefore, the court felt that some basis existed for High's argument despite his bad faith in presenting it.

Even if the Tenth Circuit did not specifically gear its decision to the revised Rule 11, perhaps it was merely expressing its weariness with the litigation surrounding the old rule. The *Coffey* case was appealed to the Tenth Circuit twice. The court appeared to see the irony in the amount of litigation surrounding a rule that is supposed to reduce the amount of filings in the legal system. Future decisions will reveal whether the revised rule will alleviate this problem, perhaps through the provision calling for sanctions to be paid to the court, rather than to the opposing party.[73]

2. *Griffen v. Oklahoma City*[74]

a. *Facts*

The plaintiffs were employees of the Oklahoma City Jail who filed suit against the City in state court alleging negligent infliction of emotional distress, as well as several Constitutional claims.[75] The plaintiffs claimed that the City knowingly exposed them to asbestos fibers contained in the insulation on water pipes in the jail, causing anxiety, mental anguish, and an increased risk of cancer.[76] The City removed the action to federal court based on the Constitutional claims.[77] The court granted the City's motion for summary judgment on the merits, determining that the plaintiffs failed to present any evidence of compensable injury.[78] The City then filed a motion for sanctions under Rule 11, 28 U.S.C. § 1927,[79] and title 12, section 2011 of the Oklahoma Code.[80] The court denied the motion,

71. *Id. See also* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1938 (1989) (noting that in a one-year period in the Third Circuit, Rule 11 had a disproportionately adverse impact on civil rights plaintiffs).

72. Coffey v. Healthtrust, Inc., 1 F.3d 1101, 1104 (10th Cir. 1993) (*Coffey II*).

73. FED. R. CIV. P. 11. The rule states that sanctions may consist of an order to pay a penalty into court. Penalties will be paid to the other party only if "warranted for effective deterrence." *Id.*

74. 3 F.3d 336 (10th Cir. 1993).

75. *Id.* at 337. The Constitutional claims were based on the First, Fourth, Sixth, Eighth, and Fourteenth amendments to the U.S. Constitution. *Id.*

76. *Id.* at 337-38.

77. *Id.* at 338.

78. *Id.* at 338 n.2.

79. The City appealed the trial court's denial of its claim for attorney's fees, costs, and sanctions under 28 U.S.C. § 1927. This section provides that an attorney who manipulates proceedings "unreasonably and vexatiously may be required by the court to satisfy personally, the excess costs, expenses and attorney's fees reasonably incurred because of such conduct." The Tenth Circuit remanded this issue back to the district court for a finding in support of its denial. *Id.* at 342 n.13.

80. *Griffen*, 3 F.3d at 338. OKLA. STAT. ANN. tit. 12 § 2011 (West 1993) is the state's counterpart to Rule 11.

holding that the plaintiffs had not violated any of the rules.[81] The City appealed, contending the court abused its discretion by concluding the rules had not been violated.[82]

b. *Opinion of the Court*

The Tenth Circuit reversed and remanded, but only with regard to whether the district court should have applied the state counterpart to Rule 11 and 28 U.S.C. § 1927. The Tenth Circuit agreed with the district court that Rule 11 sanctions did not apply to the pleadings filed in state court.[83] The court divided the case into three separate issues: 1) Whether the plaintiff could be subject to Rule 11 sanctions based on the plaintiff's original complaint, which was filed in state court prior to removal to federal court; 2) Whether the district court abused its discretion in failing to impose Rule 11 sanctions based on pleadings filed after removal; and 3) Whether the district court had the authority to impose sanctions for the filing of the original complaint based on title 12, section 2011 of the Oklahoma Code.[84]

Regarding the first issue, the court followed precedent holding that Rule 11 does not apply to a pleading made in state court, even if the case is later removed to federal court.[85] The court went further, however, and established the Tenth Circuit's stance on whether there is a continuing duty to update previously filed pleadings. The court noted that the removal of an action to federal court supports the imposition of Rule 11 sanctions only if the rule imposes a continuing obligation on the signer to update previously filed pleadings.[86] The Tenth Circuit went on to assert, "today we join those circuits that have concluded that Rule 11 does not impose such an obligation."[87]

Secondly, the court addressed whether the district court abused its discretion in refusing to impose sanctions on those pleadings made by the plaintiff after removal.[88] The Tenth Circuit noted that the district court had not made any findings or given any explanation for its denial of sanctions on this basis. Therefore, the Tenth Circuit had no way to judge the exercise of the court's discretion, and remanded for those findings.[89]

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81. *Griffen*, 3 F.3d at 338.

82. *Id.*

83. *Id.* at 340.

84. *Id.* at 338.

85. *Id.* at 339 (following Dahnke v. Teamsters Local 695, 906 F.2d 1192 (7th Cir. 1990), Foval v. First Nat'l Bank of Commerce, 841 F.2d 126 (5th Cir. 1988) and Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987)). These cases derived their decisions from two of the Federal Rules of Civil Procedure. FED. R. CIV. P. 1 states that the rules govern the procedure in the United States district courts, and FED. R. CIV. P. 81(c) dictates that the rules apply to civil actions removed to the United States district courts from the state courts and govern procedure *after removal* (emphasis added).

86. *Griffen*, 3 F.3d at 339.

87. *Id.*

88. *Id.* at 340.

89. *Id.*

Finally, the court addressed whether the district court could impose sanctions under Oklahoma's counterpart to Rule 11. The court noted that the few courts addressing this issue had decided a district court possessed this authority.[90] The Tenth Circuit, finding no authority to the contrary, agreed, and again instructed the district court to state its reasons on remand for the denial of sanctions under the state counterpart to Rule 11.[91]

c. *Analysis*

Griffen answered two previously unaddressed questions concerning Rule 11 in the Tenth Circuit. First, the Tenth Circuit aligned itself with those circuits holding an attorney does not have a continuing duty to update previously filed pleadings.[92] The court will need to reinterpret this holding in light of the revised Rule 11. The *Griffen* court based its decision on the old requirement that the pleading be evaluated at the time of signing the pleading.[93] Under the revised Rule 11, this language now reads: "by presenting to the court (*whether by signing, filing, submitting, or later advocating*) a pleading . . . ."[94] Some commentators who have reviewed the revisions and the advisory comments have concluded that this new language, while broader than the current rule, does not impose a continuing duty to amend or withdraw previously filed pleadings. Rather, the attorney merely cannot advocate that specific pleading in later argument.[95] Nevertheless, this new requirement most likely will be open to interpretation by the courts, and a few commentators say the language is confusing.[96] Further, even if there is not a continuing duty to update a pleading, the attorney would be wise to withdraw that pleading and avoid the unin-

90. *Id.* at 341; *see* Harrison v. Luse, 760 F.Supp. 1394, 1401 (D. Col.), *aff'd*, 951 F.2d 1259 (10th Cir. 1991); Schmitz v. Campbell-Mithun, Inc., 124 F.D.R. 189, 192 (N.D. Ill.); 1989 Crowell v. Holy Order of Mans, 39 Fed.R.Serv. 2d 1223, 1224 (D. Mass. 1984).

91. *Id.* at 342.

92. *See* Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991); Schoenberger v. Oselka, 909 F.2d 1086 (7th Cir. 1990); Hilton Hotels Corp. v. Banov, 899 F.2d 40 (D.C. Cir. 1990); Corporation of the Presiding Bishop v. Associated Contractors, Inc., 877 F.2d 938 (11th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990).

93. *Griffen*, 3 F.3d at 339.

94. FED. R. CIV. P. 11 (emphasis added).

95. *See* Simpson, *supra* note 11, at 508 (stating that the proposal does not impose a continuing duty); Georgene M. Vairo, *Civil Practice and Litigation Techniques in the Federal Courts*, C837 ALI-ABA 21, 26 (May 20, 1993) (reporting that the new language does not incorporate the continuing duty to withdraw papers, but means an attorney could not continue to press a position that was no longer tenable). Both sources note an earlier version of the proposed rule change, which would have imposed a continuing duty, that was met with severe criticism. The proposed rule was then modified to the present language. Simpson, *supra* note 11, at 508, Vairo, *supra*, at 26-27.

96. *See, e.g.*, J. Stratton Shartel, *Litigators Say Rule 11 Proposal Will Lead to Gamesmanship*, 6 No. 11 PH-INLIT 1 (Nov. 1992). Shartel reports that some litigators think the new requirement remedies nothing and creates a problem, because it fails to define "later advocating." An advantage of having no continuing obligation is that you have a "clear benchmark." One attorney surveyed says that the extension of the obligation to any point in the litigation could require "eternal notification of the countless number" of Rule 11 controversies that could arise. *Id.*

tentional mention of it later in the proceedings.[97] It is likely, however, that the Tenth Circuit, having just decided there is no continuing duty to amend or withdraw previously filed pleadings, would interpret the new Rule 11 consistently with that opinion.

Second, the *Griffen* court decided that a federal court can apply a state sanction rule after the case is removed to federal court. This case did not trigger an *Erie*[98] question, because it was removed to federal court under a federal question, rather than diversity jurisdiction. It is unclear, however, whether the *Griffen* holding would apply to a case removed to federal court under diversity jurisdiction. The Tenth Circuit, by its reliance on *Schmitz v. Campbell-Mithun, Inc.*,[99] a diversity jurisdiction case, appeared to indicate that it would apply *Griffen* in the diversity context. The *Schmitz* court discussed *Erie*, but found it irrelevant because "Rule 11 does not apply to the filing of a complaint in state court."[100] The court reasoned that since there was no conflict between state and federal law, *Erie* did not apply.[101] The *Schmitz* court rationalized that if a federal court could not apply the state counterpart to Rule 11, plaintiffs could file baseless papers in state court and escape sanctions if the defendant removed the case to federal court.[102] The Tenth Circuit also relied on other federal cases which held that a federal court could apply state rules of procedure to conduct occurring prior to removal.[103]

Although, at first glance, the Tenth Circuit's reasoning and reliance on other decisions seems well-grounded, the outcome in a future diversity case is uncertain due to the confusion surrounding the *Erie* doctrine.[104] At least one scholar has argued that federal courts should not apply state procedural rules in a federal court setting.[105] This is because *Erie* generally dictates the application of state *substantive* rules and federal *procedural*

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97. *See* Vairo, *supra* note 95, at 27 (noting that although there is no duty under the new rule to formally withdraw the paper or position taken, withdrawal of the paper generally will immunize the target from sanctions). *Cf.* McLaughlin, *supra* note 3, at 12 (interpreting the new Rule 11 as imposing an affirmative duty to withdraw a frivolous claim regardless of whether a subsequent paper has been filed).

98. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The case is generally thought to hold that federal courts must apply state substantive law to cases brought before them under diversity jurisdiction. *See* DAVID W. LOUISELL ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE 569 (6th ed. 1989).

99. 124 F.R.D. 189 (N.D. Ill. 1989) (employment discrimination action in which sanctions were requested on pleadings filed prior to removal to the federal district court).

100. *Id.* at 192.

101. *Id.*

102. *Id.*

103. McKenna v. Beezy, 130 F.R.D. 655 (N.D. Ill. 1989) (applying Illinois law concerning failure to prosecute for conduct which occurred prior to removal); Winkels v. George A. Hormel & Co., 874 F.2d 567 (8th Cir. 1989) (holding that Minnesota rule governing commencement of actions applied to action removed to federal court); Nealy v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275 (9th Cir. 1980) (state service of process rule applied to service made while action was in state court prior to removal).

104. *See* John B. Corr, *Thoughts on the Vitality of Erie*, 41 AMER. U. L. REV. 1087, 1130 (1992) (noting that many scholars have described *Erie* as "confused").

105. Jeffrey A. Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere*, 49 U. PITT. L. REV. 393, 395-96 (1988). Parness asserts that state procedural rules were intended to be used in state courts and have no business being applied in a federal court. *Id.*

rules in federal courts.[106] Additionally, state rules of procedure arguably are not intended for use in federal courts, since states usually have a fairly small interest in the conduct of federal litigation.[107] In sum, the *Erie* issue concerning a federal court's application of a state procedural rule appears open for further interpretation.

II. RULE 16

A. *Background*

Although it has not spawned as much controversy as Rule 11, Rule 16 has generated its own share of criticism and commentary.[108] The goal of the original rule promulgated in 1938 was to encourage, but not require, judges to participate in sharpening and simplifying the issues to be litigated at trial.[109] The broad language of the original rule[110] resulted in a great range of practices among judges.[111] As a result, judges began questioning the rule and suggesting reform.[112] Judge Charles E. Clark, formerly of the Second Circuit Federal Court of Appeals, criticized the rule because it was so cumbersome that judges were spending more time organizing pretrials than actual trials.[113] He suggested the rule should be reformed to focus on the conference, rather than the pretrial pleadings, and that pretrial should be kept in perspective as an accessory rather than a substitute for trial.[114] Judge Milton Pollack, District Judge, Southern District of New York, argued that pretrial should serve to narrow issues and expedite trials. Therefore, the rule needed to be streamlined in order to allow judges to take control early in the case.[115] One purpose of the 1983 amendment to Rule 16 was to increase judicial control of litiga-

106. *Id.* at 395 (emphasis added). The author argues that federal courts have misinterpreted footnote 31 of Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), which states that when a state law does not run counter to a valid federal statute or rule of court, a state law concerning attorney's fees that reflects a substantial policy of the state should be followed. *Alyeska*, 421 U.S. at 259 n.31. Parness interprets this language as applying to state *substantive* laws concerning attorney's fees, but not to state *procedural* rules governing attorney's fees. Parness, *supra* note 105, at 414. For instance, a rule related to conduct triggering a cause of action is substantive, but a rule related to conduct during litigation is procedural. *Id.* at 401.

107. Parness, *supra* note 105, at 395.

108. *See supra* note 4 and accompanying text.

109. Shapiro, *supra* note 4, at 1978.

110. The original rule provided in part:

> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered . . . and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided . . . .

FED. R. CIV. P. 16 (1983); Shapiro, *supra* note 4, at 1970 n.2.

111. Shapiro, *supra* note 4, at 1981. Shapiro reports that surveys done between the rule's introduction and amendment revealed that some judges made little use of the rule while others invented elaborate local rules requiring pretrial conferences in most cases. *Id.*

112. Charles E. Clark, *To an Understanding Use of Pre-Trial*, 29 F.R.D. 191, 454 (1962); Milton Pollack, *Pretrial Conferences*, 50 F.R.D. 427, 451 (1971).

113. Clark, *supra* note 112, at 458.

114. *Id.* at 461.

115. Pollack, *supra* note 112, at 451-52.

tion.[116] The amendment authorized early scheduling conferences, called for "the elimination of frivolous claims or defenses," and provided for sanctions against parties for failing to comply with pretrial orders.[117]

Since the amendment, questions have arisen as to the imposition of sanctions, the judge's role in settlement, and the modification of pretrial orders.[118] One commentator has questioned whether the authorization of sanctions has made matters worse by adding a layer of tactical maneuvering by lawyers.[119] The judge's role in settlement was hotly debated after the Seventh Circuit's decision in *G. Heileman Brewing Co. v. Joseph Oat Corp.*[120] That case held that a judge has authority under Rule 16 to sanction parties for failing to appear at a settlement conference.[121] One critic of the holding argues that it allows judges to force alternative dispute resolution on parties in order to avoid sanctions.[122]

The most heavily litigated aspect of Rule 16 is the modification of pretrial orders.[123] This aspect of the Rule is the subject of the following Tenth Circuit opinions.

B. *Tenth Circuit Opinion*

1. *Joseph Manufacturing Co. v. Olympic Fire Corp.*[124]

a. *Facts*

Joseph Manufacturing Company ("Joseph") contracted with Olympic Fire Corporation ("Olympic") to inspect and service Joseph's two fire extinguishers.[125] Olympic serviced and pressurized the extinguishers, and Joseph paid for the service.[126] A month later, a fire broke out, causing extensive property damage to Joseph's property. Neither extinguisher functioned.[127]

Joseph filed a diversity action against Olympic in federal court, claiming breach of contract and implied warranty in negligently maintaining the extinguishers.[128] A week later, the owner of the building leased by Joseph filed suit in state court against Joseph, as her lessee, and against

116. Richey, *supra* note 4, at 182; Shapiro, *supra* note 4, at 1985.
117. FED. R. CIV. P. 16.
118. *See* Richey, *supra* note 4; *see also* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 314-18 (1986) (reviewing the debate between those who think increased managerial judging is needed to increase efficiency in the system, and those who oppose increased judicial involvement because it forces litigants to abandon positions on the merits); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (generally opposing managerial judging).
119. Elliott, *supra* note 118, at 319-20.
120. 871 F.2d 648 (7th Cir. 1989).
121. *Id.* at 656-57.
122. Kelly J. Applegate, Note, G. Heileman Brewing Co. v. Joseph Oat Corp.: *The Use of Inherent Judicial Power Within the Limitations of the Federal Rules of Civil Procedure*, 17 J. CONTEMP. L. 159, 165-69 (1991).
123. Richey, *supra* note 4, at 191.
124. 986 F.2d 416 (10th Cir. 1993).
125. *Id.* at 417.
126. *Id.*
127. *Id.*
128. Joseph Mfg. Co., v. Olympic Fire Corp., 781 F.Supp. 718 (D. Kan. 1991).

Olympic.[129] In August 1990, the state court granted Joseph's motion for directed verdict based on a lease provision exonerating Joseph from liability to the owner.[130] Despite the directed verdict, the court permitted the jury to compare fault between Joseph and Olympic.[131] The jury found that Olympic was 55% at fault and Joseph was 45% at fault.[132]

On September 6, 1990, Olympic asked the federal court for permission to modify its pretrial order so Olympic could file for summary judgment based on the state court judgment.[133] However, the federal court had set February 5, 1990, as the date of the final pretrial conference and April 16, 1990, as the deadline for filing all dispositive motions.[134] Joseph objected to the motion to amend, but in November 1991, the district court granted the motion to amend and entered summary judgment in favor of Olympic. Joseph appealed.[135]

b. *Opinion of the Court*

The Tenth Circuit began by reviewing the district court's analysis in order to determine whether the court had abused its discretion.[136] The Tenth Circuit concluded that the district court had muddled its analysis by failing to separate two distinct issues: first, whether the order should have been modified, and second, whether the district court was required to give judgment to Olympic because the state court had done so.[137] The Tenth Circuit stated that the "keystone" of this case was Rule 16(e),[138] because before Olympic could even raise the state preclusion defense, it had to demonstrate it was entitled to modify the pretrial order.[139]

The Tenth Circuit conceded that the district court had correctly followed the language of Rule 16, which requires that a pretrial order shall not be modified absent a showing of manifest injustice.[140] According to the Tenth Circuit, however, the district court allowed the order to be modified without any explanation of the manifest injustice that would have otherwise resulted.[141] The Tenth Circuit, upon reviewing the facts of the case, decided that if anyone suffered from manifest injustice, it was Joseph,

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129. *Id.* at 719.
130. *Id.*
131. *Id.* at 720. This was done in accordance with KAN. STAT. ANN. § 60-258a(c) (1991). *Joseph Mfg. Co.*, 986 F.2d at 418 n.2.
132. *Joseph Mfg. Co.*, 986 F.2d at 418.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* The court relied on the holding of Burnette v. Dresser Indus., 849 F.2d 1277, 1282 (10th Cir. 1988) that an abuse of discretion standard is to be used when reviewing the district court's decision to modify a pretrial order.
137. *Joseph Mfg. Co.*, 986 F.2d at 418.
138. *Id.* Rule 16(e) reads, "After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice." FED. R. CIV. P. 16(e).
139. *Joseph Mfg. Co.*, 986 F.2d at 418-19.
140. *Id.* at 419. *See supra* note 138 for the pertinent text of Rule 16(e).
141. *Id.*

rather than Olympic.[142] The court noted that when the federal pretrial order was concluded, Olympic knew of the pendency and status of the state action, but failed to mention this at the hearing.[143] Further, Joseph's counsel claimed he was not apprised of the state action's status at that time.[144] The court indicated it was Olympic's duty to bring the matter up at the pretrial hearing, and not having done so, it could not later have the order amended.[145] The Tenth Circuit concluded that the district court's modification of the pretrial order effectively denied Joseph a fair day in court, and reversed and remanded the case.[146]

c. *Analysis*

As the Tenth Circuit noted, a district court's decision whether to modify a pretrial order is subject to an abuse of discretion standard.[147] Several cases have held that a court of appeals generally should not interfere with a district court's finding in this area.[148] The Tenth Circuit's reversal was thus somewhat unusual. Although the court stated it was basing reversal on the district court's mixing of two separate issues,[149] the court's main disagreement was with the district court's findings of fact concerning manifest injustice.[150] The district court had decided to modify the order based on the following facts:

The district court thought it was important that when Joseph filed its original answer in state court, Joseph failed to include a crossclaim against Olympic.[151] The district court noted that Kansas courts adhere to an "extremely tenacious" one-trial-of-issues policy in cases subject to comparative fault.[152] The district court held that Joseph was required by Kansas law to bring its crossclaim against Olympic in the state court action.[153] Because Joseph neglected to do so, the federal court interpreted Kansas law to dictate that Joseph was barred from re-litigating the issue in federal court.[154]

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142. *Id.* at 420. The court quoted from 6A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1527, at 287-89 (1990): "[I]f the evidence or issue was within the knowledge of the party seeking modification [of the pretrial order] at the time of the [pretrial] conference or if modification would place a great burden on the opposing party, then it may not be allowed." The court concluded that if any injustice ever arose from these facts, it was the effect of Olympic's silence on Joseph. *Joseph Mfg. Co.*, 986 F.2d at 420.

143. *Joseph Mfg. Co.*, 986 F.2d at 419.

144. *Id.*

145. *Id.* at 419-20.

146. *Id.* at 420-21.

147. *See supra* note 136 and accompanying text.

148. Nickerson v. G.D. Searle & Co., 900 F.2d 412, 422 (1st Cir. 1990) (stating that the handling and enforcement of pretrial orders is an area in which appellate courts are, quite properly, loathe to tread); Daniels v. Bd. of Education, 805 F.2d 203, 210 (6th Cir. 1986) (describing the decision whether to modify a final pretrial order as a matter within the sound discretion of the district court). *See also* Ramires Pomales v. Becton Dickinson & Co., 839 F.2d 1 (1st Cir. 1990); Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir. 1982).

149. *Joseph Mfg. Co.*, 986 F.2d at 418-20.

150. *Id.* at 419.

151. Joseph Mfg. Co. v. Olympic Fire Corp., 781 F.Supp. 718, 720-22. (D. Kan. 1991), *rev'd*, 986 F.2d 416 (10th Cir. 1993).

152. *Id.* at 721.

153. *Id.* at 722.

154. *Id.* at 721-22.

The court so held despite Joseph's argument that Olympic waived the right to rely on the preclusive state judgment by failing to discuss that possible defense in the pretrial order.[155] The court based its holding on Kansas decisions which held that the triggering event for a one-action defense was an actual verdict in a state court.[156] Therefore, the district court concluded that Olympic did not waive the defense by not bringing up the state court action when no verdict had been rendered at the time of the pretrial hearing.[157]

Although the district court never explicitly stated its finding of manifest injustice, it is apparent the court found manifest injustice would result to Olympic if it were not allowed to raise its state preclusion defense, especially in light of Joseph's failure to adhere to the Kansas one-trial rule. It appears likely that the court concluded it would do manifest injustice to Kansas law by not recognizing that state's strong belief in the one-trial rule.

The Tenth Circuit took a differing view of the facts, arguing that Joseph did attempt to make a late cross-claim in state court, but Olympic opposed the motion.[158] The Tenth Circuit stated that Olympic could not advocate a "double standard" regarding the joinder of claims by taking "diametrically opposed positions in state and federal court."[159] The Tenth Circuit also disagreed with Olympic's argument that it did not mention the state action at the pretrial hearing because the verdict had not yet been rendered at that time. The court relied on Rule 16 to come to this conclusion, stating, "[n]othing in Rule 16 prevents a party from identifying a potentially controlling legal principle simply because it is inchoate at the time the pretrial order is drafted."[160] The court dismissed the district court's reliance on Kansas precedent in determining that Olympic could not waive its preclusion defense by its failure to address the defense at the pretrial hearing. The court reasoned that the question presented did not require consideration of whether Olympic could waive its preclusion defense.[161]

Although the Tenth Circuit never stated exactly how the district court abused its discretion, it appears that the court thought the district court misinterpreted the facts surrounding manifest injustice. This exposes the problem with the language of Rule 16, because if determining manifest injustice is merely a fact-specific inquiry, little guidance is provided to practitioners as to exactly when a pretrial order can be modified.

Commentators have recognized that Rule 16 allows judges broad discretion.[162] However, when judges decide cases on a fact-specific basis, the

155. *Id.* at 722-23.
156. *Id.* at 723.
157. *Id.*
158. Joseph Mfg. Co. v. Olympic Fire Corp., 986 F.2d 416, 419 (10th Cir. 1993).
159. *Id.*
160. *Id.* at 419-20.
161. *Id.* at 420.
162. *See* Richey, *supra* note 4, at 177 (arguing that Rule 16 effectively lays to rest the historical model of the passive judge); Shapiro, *supra* note 4, at 1992-93 (noting that "flexibil-

drafters corresponding goal of uniformity in the Federal Rules[163] seems to go by the wayside. An examination of decisions regarding the modification of pretrial orders reveals that the Tenth Circuit and other circuits have not been consistent in determining the meaning of manifest injustice.[164]

A few decisions provide a better method of determining this elusive requirement, at least when dealing with the exclusion of witnesses or testimony not specified in a pretrial order.[165] The following Tenth Circuit case illustrates the application of a balancing test to define manifest injustice.

2. *Moss v. Feldmeyer*[166]

a. *Facts*

Amanda Moss sued Dr. Seeley Feldmeyer for malpractice, claiming that his failure to hospitalize her mother, Linda Fincham, led to Fincham's death.[167] On August 10, 1990, the district court issued a pretrial order.[168] The order listed Dr. David DeJong as a witness, and Drs. Dennis Kepka and Roger Evans as expert witnesses for Feldmeyer.[169] The order provided that a list of all witnesses and exhibits which the parties failed to describe in the order should be filed not later than October 5, 1990.[170] Trial was set for October 9, 1990.[171] In August of 1990, Feldmeyer provided Moss with Dr. Evans' report, but Moss did not depose Dr. Evans.[172] On September 24, 1990, Feldmeyer notified Moss that he intended to call Dr. DeJong, designated only as a witness in the pretrial order, as an expert witness.[173] Moss objected on the basis that the time permitted to name expert witnesses had expired, and Dr. DeJong was

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ity and discretion were major themes of the rulemakers, and thus they should not have been surprised that many judges used that flexibility to implement ideas the rulemakers did not wholly share").

163. 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1002-04 (1987), Charles E. Clark & James W. Moore, *A New Federal Civil Procedure*, 44 YALE L. J. 387, 389 (1935), Michael E. Smith & Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002-06 (1990).

164. Burnette v. Dresser Indus., 849 F.2d 1277, 1282-84 (10th Cir. 1988) (engaging in a two-page factual inquiry to determine whether disallowing modification to add a design and manufacturing defect claim would result in manifest injustice); Pope v. Savings Bank of Puget Sound, 850 F.2d 1345, 1347 (9th Cir. 1988) (deciding that although an amendment to a pretrial order did prejudice the nonmoving party, since the moving party acted in good faith, the lower court correctly granted the amendment); *In re* Delagrange, 820 F.2d 229, 232 (7th Cir. 1987) (weighing "possible hardships" to the parties, "the need for doing justice," and the need for "orderly procedural arrangements").

165. *See infra* section (B)(2)(c) and accompanying notes 192-203.

166. 979 F.2d 1454 (10th Cir. 1992).

167. *Id.* at 1456.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

named outside the time permitted by the pretrial order.[174] At a hearing on October 4, 1990, the court ruled that Dr. DeJong would not be allowed to testify.[175]

Prior to trial on October 9, 1990, the court conducted an in camera hearing to consider a new report submitted by Dr. Evans.[176] Feldmeyer argued that since Dr. DeJong, a pathologist, had not been permitted to testify, Dr. Evans now needed to use the new report in order to testify concerning pathology.[177] Moss objected, stating that Dr. Evans was a cardiologist, and now Feldmeyer wanted to "make him" a pathologist.[178] The court ruled that both Dr. DeJong and Dr. Evans could testify, as long as they would be available for Moss to conduct discovery concerning their proposed testimony.[179] Moss did not ask for a continuance, and although she deposed Dr. DeJong, she did not depose Dr. Evans.[180] Feldmeyer won the trial, and Moss appealed, contending that the court abused its discretion in allowing Feldmeyer to add Dr. DeJong as an expert and to expand Dr. Evans' testimony.[181]

b. *Opinion of the Court*

In affirming the district court, the Tenth Circuit rejected Moss' argument that the district court's actions were in direct violation of *Smith v. Ford Motor Co.*[182] *Smith* held that a district court had abused its discretion by allowing a medical doctor, designated in the pretrial order as an expert on treatment and prognosis, to testify about proximate causation between seatbelts and injury.[183] In *Smith*, the Tenth Circuit adopted a four-part test to determine whether a district court has abused its discretion in excluding or allowing testimony not specified in a pretrial order:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified; (2) the ability of that party to cure the prejudice; (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in court; and (4) bad faith or willfulness in failing to comply with the court's order.[184]

The Tenth Circuit distinguished *Moss* from *Smith*, noting that first: Moss was not prejudiced or surprised because both Dr. Evans and Dr.

174. *Id.* Although the pretrial order specified October 5, 1990, as the deadline for amending the order to add new witnesses or exhibits, the order was issued August 10, 1990. Moss most likely argued that if the order was to be amended between August and October, it should be amended only to prevent manifest injustice.

175. *Id.*

176. *Id.* at 1457.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1458.

182. 626 F.2d 784 (10th Cir. 1980), *cert denied*, 450 U.S. 918 (1981).

183. *Id.* at 798.

184. *Id.* at 797 (quoting Myers v. Pennyback Woods Home Ownership Ass'n., 559 F.2d 894, 904-05 (3d Cir. 1977)).

DeJong were listed as witnesses in the pretrial order; Moss received a summary of their reports prior to their testimony; and both doctors were available for discovery prior to testifying.[185] Further, Moss, at her option, did not depose Dr. Evans.[186] Second, while the attorney in *Smith* had only eleven minutes to prepare for cross-examination, Moss had over two weeks to prepare for Dr. DeJong and eight days to prepare for Dr. Evans.[187] Therefore, her "ability to cure was not significantly impaired."[188] Third, the challenged testimony in *Smith* was revealed in the middle of the trial, whereas Moss was aware of both doctors' testimony prior to trial.[189] Therefore, no disruption of the trial was threatened in *Moss*.[190] Finally, the court did not find bad faith, because the lower court knew it was "dealing with good lawyers who [knew] the subject," and who could inquire into the testimony to avoid surprise.[191]

c. *Analysis*

While the Tenth Circuit's determination of manifest injustice in *Moss* was fact-specific, the court followed a test identified in prior case law to reach its decision. Unfortunately, the test seems to apply only to the exclusion of witnesses or testimony, rather than to the exclusion or inclusion of a claim or defense. When dealing with the latter, the Tenth Circuit has often used a fact-specific inquiry such as the one in *Griffen v. Oklahoma City*.[192] Other circuit decisions have varied, sometimes relying on whether an amendment would change the result as a matter of law,[193] or even whether a party is proceeding pro se.[194] Again, if uniformity is a desired goal of Rule 16, a test like that used in *Smith* might assist judges in making consistent determinations concerning the exclusion or inclusion of claims not set out in the pretrial order.

A second concern is that, although the test articulated in *Smith* has been around since 1980, courts have not consistently applied it to cases on point with *Smith*. The Tenth Circuit has applied the *Smith* factors in a fairly consistent manner to cases involving the inclusion or exclusion of witnesses.[195]

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185. Moss v. Feldmeyer, 979 F.2d 1454, 1459 (10th Cir. 1992).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1460.

192. 3 F.3d 336 (10th Cir. 1993); *see supra* section (B)(1)(c) and accompanying note 165.

193. Malhiot v. Southern Cal. Retail Clerks Union, 735 F.2d 1133, 1137 (9th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

194. Carter v. Hutto, 781 F.2d 1028 (4th Cir. 1986).

195. *See, e.g.*, Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1425 (10th Cir. 1991); Miller v. Union Pacific R. Co., 900 F.2d 223, 225 (10th Cir. 1990); MacCuish v. United States, 844 F.2d 733, 736-37 (10th Cir. 1988). All directly applied the *Smith* factors to determine if manifest injustice would occur from the exclusion or inclusion of witnesses or testimony not specified in the pretrial order.

There are a few exceptions, however. In *Grant v. Brandt*,[196] the Tenth Circuit addressed whether the lower court abused its discretion in excluding the testimony of a witness not specified in the pretrial order.[197] The Tenth Circuit quoted *Smith*'s abuse of discretion standard, but did not utilize the *Smith* test in making its determination. The court appeared to weigh only the prejudice to the nonmoving party against the loss of the witness's testimony.[198] In *LeMaire v. United States*,[199] the Tenth Circuit addressed whether an expert witness who was designated in the pretrial order as testifying about one matter should have been allowed to testify about another topic.[200] The court relied on *Perry v. Winspur*,[201] stating that the complaining party should have anticipated the witness's testimony based on the issues in the case, even though the testimony was not specifically identified in the pretrial order.[202] The court also noted that the complaining party had failed to ask for a continuance upon learning of the testimony.[203] It is therefore somewhat difficult for a practitioner to anticipate how the Tenth Circuit will weigh an appeal of the district court's exclusion or inclusion of witnesses or testimony not designated in the pretrial order.

The Federal Rules of Civil Procedure were intended to promote uniformity in all federal courts.[204] Federal courts could advance this goal by interpreting Rule 16 with some sort of consistency. The balancing test such as the one in *Smith* for cases involving the exclusion or inclusion of witnesses, is just one attempt at a useful test. Other cases illustrate that there are also other tests. In *Lirette v. Popich Bros. Water Transport Inc.*,[205] the court held that the lower court did not abuse its discretion in refusing to modify a pretrial order to allow a witness not specified in the order to testify.[206] The court placed the most emphasis on the moving party's failure to explain why the witness was not listed in the order.[207] The court also addressed "unfairness" to the other party.[208] In *Bradley v. United States*,[209] the court based its determination of manifest injustice on: 1) the importance of the experts' testimony; 2) potential prejudice to the nonmoving party; 3) the possibility of a continuance; and 4) the moving party's explanation for its conduct.[210] The court concluded that witnesses not specified in the pretrial order should have been precluded from testi-

196. 796 F.2d 351 (10th Cir. 1986).
197. *Id.* at 354-55.
198. *See id.* at 355.
199. 826 F.2d 949 (10th Cir. 1987).
200. *Id.* at 951-52.
201. 782 F.2d 893 (10th Cir. 1986).
202. *LeMaire*, 826 F.2d at 952.
203. *Id.* at 953.
204. *See supra* note 163 and accompanying text.
205. 660 F.2d 142 (5th Cir. 1981).
206. *Id.* at 144-45.
207. *Id.*
208. *Id.* at 145.
209. 866 F.2d 120 (5th Cir. 1989).
210. *Id.* at 125-26.

fying.[211] Finally, in *Nickerson v. G.D. Searle & Co.*,[212] the court determined no manifest injustice occurred solely on the basis that the nonmoving party had an opportunity to depose witnesses prior to the issuance of the pretrial order.[213]

Given the above variations, it remains unclear how a particular federal court will address the modification of pretrial orders to exclude or include witnesses.

CONCLUSION

During the survey period, the Tenth Circuit followed the latest trend to reevaluate Rule 11 sanctions. The court showed a reluctance to impose sanctions against an attorney whose actions seemed to warrant them. The Tenth Circuit also joined other circuits that have refused, under Rule 11, to impose a continuing obligation on attorneys to update previously filed pleadings. With respect to Rule 16, the Tenth Circuit illustrated that while *Smith* provides a viable test, greater consistency is needed in determining the meaning of manifest injustice under the rule. Further guidance from the court in this area would be welcome.

Kathryn A. Plonsky

211. *Id.* at 127.
212. 900 F.2d 412 (1st Cir. 1990).
213. *Id.* at 421-22.

CIVIL RIGHTS SURVEY

INTRODUCTION

During the 1992-93 survey period, the Tenth Circuit dealt with important procedural issues affecting the ability of both individual litigants and administrative agencies to bring civil rights claims. In *Castner v. Colorado Springs Cablevision*[1] the Tenth Circuit followed other circuits by requiring district courts to give "serious consideration" to requests for appointed counsel in employment discrimination cases.[2] This may enhance the ability of disadvantaged parties to bring claims pursuant to Title VII of the Civil Rights Act of 1964.[3] The subpoena power of the Equal Employment Opportunity Commission ("EEOC") was expanded by *EEOC v. Citicorp Diners Club.*[4] Holding that the EEOC can compel an employer to compile information within the employer's control, the Tenth Circuit has arguably given the EEOC the power to require employers to manufacture or create previously undocumented information.[5] In *Baker v. Board of Regents of Kansas*[6] the Tenth Circuit, utilizing the rationale of *Garcia v. Wilson,*[7] held that claims brought under Title VI of the Civil Rights Act of 1964[8] and section 504 of the Rehabilitation Act[9] should be governed by a state's general personal injury statute of limitations.[10]

I. ACCESS TO THE COURT SYSTEM FOR DISADVANTAGED LITIGANTS THROUGH DISCRETIONARY APPOINTMENT OF COUNSEL IN EMPLOYMENT DISCRIMINATION LITIGATION

A. *Background*

Section 706(f) of the Civil Rights Act of 1964[11] deals with enforcement of the equal opportunity employment provisions. In conjunction with the power for an aggrieved party to file a civil action, section 706(f)(1) provides that in employment discrimination cases, the district court has the discretion to appoint an attorney upon the plaintiff's request.[12] This power to appoint counsel in employment discrimination

1. 979 F.2d 1417 (10th Cir. 1992).
2. *Id.* at 1421.
3. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1988).
4. 985 F.2d 1036 (10th Cir. 1993).
5. *Id.* at 1041 (Kelly, J., dissenting).
6. 991 F.2d 628 (10th Cir. 1993).
7. 731 F.2d 640 (10th Cir. 1984), *aff'd,* 471 U.S. 261 (1985). *See infra* text accompanying notes 146-54.
8. Title VI prohibits discrimination on the basis of race, color, or national origin by any program or activity receiving federal funding. 42 U.S.C. § 2000d (1988).
9. Section 504 of the Rehabilitation Act prohibits discrimination against handicapped persons by programs or activities receiving federal funding. 29 U.S.C. § 794 (1988).
10. *Baker,* 991 F.2d at 632-33.
11. 42 U.S.C. § 2000e-5(f) (1988).
12. 42 U.S.C. § 2000e-5(f)(1) (1988).

cases is in addition to the more general provisions of the in forma pauperis statute.[13]

Section 706(f)(1) provides little guidance to courts to determine when a request for an appointed attorney is just.[14] This lack of guidance, however, does not diminish the importance of the provision within the statute; legislative history indicates that the provision was a valued part of the legislation.[15] The provision's continued presence, despite numerous amendments to the Act as a whole, also indicates consistent congressional support.[16] In fact, a House Report on the Equal Employment Opportunity Act of 1972 indicates that Congress continues to include the provision because the "nature of Title VII actions more often than not pits parties of unequal strength and resources against each other."[17] Early cases indicate the importance for courts, through the exercise of sound discretion, to support the implicit intentions of Congress when making a decision to appoint counsel.[18]

Judicial interpretation of section 706(f)(1) has established that the appointment of counsel in an employment discrimination case is not a statutory or constitutional right.[19] The decision rests solely upon the discretion of the district court judge.[20] Generally, circuits will only reverse a trial court's failure to appoint counsel if the trial court abuses its discretion.[21] The decision may also be reviewable, however, if "the district

13. The general in forma pauperis provision found at 28 U.S.C. § 1915 authorizes court discretion to allow proceedings to commence without court costs and allows the court to "request an attorney to represent any such person unable to employ counsel." 28 U.S.C. § 1915(d) (1988).

In Edmonds v. E.I. duPont deNemours & Co., 315 F. Supp. 523 (D. Kan. 1970) the United States District Court for the District of Kansas held that when a plaintiff requests an appointed attorney in an employment discrimination case the governing statute is 42 U.S.C. § 2000e-5(f)(1) as opposed to 28 U.S.C. § 1915. *Edmonds*, 315 F. Supp. at 525.

14. Poindexter v. F.B.I., 737 F.2d 1173, 1179 (D.C. Cir. 1984).

15. 110 CONG. REC. 12,722 (1964)(indicating the necessity of the provision because "the maintenance of the suit may impose a great burden on the poor individual complainant"); *id.* at 14,196 (rejection by Senate of Act that would have taken away the courts' power to appoint attorneys under Title VII); *id.* at 14,201 (rejection by Senate of amendment that would have allowed appointment of attorneys contingent to the consent of the attorney).

16. Hilliard v. Volcker, 659 F.2d 1125, 1128-29 n.24 (D.C. Cir. 1981).

17. H.R. REP. NO. 238, 92d Cong., 1st Sess. 12 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2148.

18. *See* Bradshaw v. Zoological Soc'y of San Diego, 662 F.2d 1301, 1319 (9th Cir. 1981)(concluding that a possible award of attorney's fees may be insufficient incentive for counsel to take a case); Edmonds v. E.I. duPont deNemours, 315 F. Supp. 532, 525 (D.Kan. 1970) (indicating that a proceeding in employment discrimination is one in which "the public has a substantial interest").

19. *See, e.g.*, Poindexter v. F.B.I., 737 F.2d 1173, 1179 (D.C. Cir. 1984); Jenkins v. Chemical Bank, 721 F.2d 876, 879 (2d Cir. 1983); Ivey v. Board of Regents of Univ. of Alaska, 673 F.2d 266, 269 (9th Cir. 1982); Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1309 (5th Cir. 1977).

20. *Poindexter*, 737 F.2d at 1179.

21. White v. United States Pipe & Foundry Co., 646 F.2d 203, 205 (5th Cir. 1981); Spanos v. Penn. Central Transp. Co., 470 F.2d 806, 808 (3d Cir. 1972).

court's decision does not represent the reasoned judgement necessary to application of that standard."[22]

Many circuits have established three factors to be considered when determining a need to appoint counsel in employment discrimination cases:[23] (1) the ability of the plaintiff to afford an attorney; (2) the efforts of the plaintiff to secure counsel; and (3) the merits of the plaintiff's case.[24] In addition, a number of circuits have established a fourth factor—the plaintiff's ability to prepare and present the case without aid of counsel.[25]

B. *Castner v. Colorado Springs Cablevision*[26]

1. Facts

Susan Castner filed a charge with the EEOC alleging that her employer, Colorado Springs Cablevision, violated provisions of Title VII and the Equal Pay Act.[27] Although the EEOC dismissed the charges, Ms. Castner pursued her Title VII claim in the United States District Court for the District of Colorado alleging gender discrimination and retaliation.[28] At the time of filing she was unemployed, lived in Oregon, and had no savings.[29] She had contacted a number of attorneys, none of whom agreed to represent her.[30] She applied for leave to file in forma pauperis, and for the appointment of counsel pursuant to both section 706(f)(1) and 28 U.S.C. § 1915.[31] The district court allowed her to proceed without paying court costs but denied the appointment of counsel.[32]

Ms. Castner made three more attempts to acquire appointed counsel. One week after the first denial she wrote to the court explaining her situation, including her inability to pay for an attorney, her absence from Colorado, her lack of familiarity with law, and her inability to obtain counsel on a contingency basis.[33] The court denied the motion stating, "[a] plaintiff is not entitled to court-appointed counsel in a civil action."[34] Next, in re-

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22. *Bradshaw*, 662 F.2d at 1318. *See also Caston*, 556 F.2d at 1310 (remanding because the court was "unable to conclude that the district exercised a reasoned and well informed discretion").

23. *See Poindexter*, 737 F.2d at 1180 n.10 (discussing the importance of having guidance when a decision is left to the "informed decision of the District Court").

24. Gadson v. Concord Hosp., 966 F.2d 32, 35 (1st Cir. 1992); Gonzalez v. Carlin, 907 F.2d 573, 580 (5th Cir. 1990); Henry v. City of Detroit Manpower Dep't, 763 F.2d 757, 760 (6th Cir.) (en banc), *cert. denied*, 474 U.S. 1036 (1985); Slaughter v. City of Maplewood, 731 F.2d 587, 590 (8th Cir. 1984); Bradshaw v. Zoological Soc'y, 662 F.2d 1301, 1318 (9th Cir. 1981); Jones v. WFYR Radio/RKO Gen., 626 F.2d 576, 577 (7th Cir. 1980).

25. *Poindexter*, 737 F.2d at 1185; Jenkins v. Chemical Bank, 721 F.2d 876, 880 (2d Cir. 1983); Hudak v. Curators of Univ. of Mo., 586 F.2d 105, 106 (8th Cir. 1978), *cert. denied*, 440 U.S. 985 (1979).

26. 979 F.2d 1417 (10th Cir. 1992).

27. *Id.* at 1419.

28. *Id.*

29. *Id.* at 1420.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

sponse to a scheduling conference being set, Ms. Castner motioned for a ninety-day extension and a reconsideration of the court's denial of appointed counsel.[35] The motions were again denied.[36] Finally, seven days before the scheduling conference, she again requested appointed counsel and informed the court that she would be unable to pay for a flight to Denver for the conference.[37] The court issued a show cause order requiring Ms. Castner to explain why the case should not be dismissed for failure to prosecute.[38] Her response detailed her inability to travel between Oregon and Colorado and stated that the difficulties could be remedied by appointment of local counsel.[39] The court dismissed the case and addressed the repeated requests for appointed counsel stating that this was "a civil case and plaintiff simply has no right to prosecute her claim at government expense."[40] Ms. Castner appealed the court's denial of appointed counsel and the dismissal of her action for lack of prosecution.[41]

2. Tenth Circuit Opinion

Articulating the factors utilized by other circuits, the Tenth Circuit Court of Appeals held that a plaintiff seeking appointed counsel "must make affirmative showings of (1) financial inability to pay for counsel, (2) diligence in attempting to secure counsel and (3) meritorious allegations of discrimination."[42] In addition, the court indicated that the fourth factor, "capacity to present case without counsel," should be considered by courts in close cases to "aid in exercising discretion."[43]

With respect to the reviewability of the decision not to appoint counsel, the court indicated that the general rule limited review to abuses of discretion.[44] The court reasoned that this would presuppose "the application of a reasoned and well informed judgement, guided by sound legal principles."[45] Finding that the district court failed to give an adequate reason for denying appointed counsel, the court of appeals held that the record did not contain sufficient information to determine whether there was an abuse of discretion, and remanded.[46] The court also vacated the dismissal of the action because the failure to prosecute appeared to be "reasonably attributable to the lack of counsel."[47]

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35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 1419.
42. *Id.* at 1421.
43. *Id.*
44. *Id.* at 1422-23.
45. *Id.* at 1423.
46. *Id.*
47. *Id.* (quoting Johnson v. United States Dep't of Treasury, 939 F.2d 820, 825 (9th Cir. 1991)).

C. *Analysis*

In addition to articulating and accepting the four factors utilized by the majority of the circuits in determining the need for appointed counsel, the Tenth Circuit further explained these standards and their applications. Concerning the "ability to afford" factor, the court stated that a party need not be destitute for counsel to be appointed.[48] In fact, the court indicated that a qualification for in forma pauperis constitutes a clear indication of inability to pay.[49] According to the Tenth Circuit, the proper inquiry was the ability of the plaintiff to hire counsel and still meet daily expenses.[50] This concrete standard allows courts to consider specific facts and make more accurate decisions.

The court provided an analytical base to determine adequate "efforts to secure counsel," by enumerating that lower courts consider the number of attorneys contacted, the availability of appropriate counsel, and the plaintiff's level of skill at acquiring help.[51] This base is helpful because it illustrates a number of reasons why a person may be unable to obtain counsel that are unrelated to the merits of the claim or the plaintiff's financial needs.[52]

With respect to the "merits" factor, the court made clear that trial courts should not give preclusive effect to an EEOC finding of a lack of evidence to support a claim of discrimination.[53] The court stated that while an EEOC decision should be a "highly probative" factor in making a determination on the merits, the district court should always make an independent determination.[54] This treatment of the effect of the EEOC determination seems consistent with congressional intent, since the statute provides that a plaintiff can bring a civil suit upon a dismissal of the claim by the EEOC.[55]

The Tenth Circuit indicated that in close cases, courts should utilize the fourth factor, the plaintiff's ability to present the case without counsel.[56] The use of this factor as a type of tiebreaker is different from a number of decisions in other circuits that have treated the plaintiff's ability to present a case equally with the other factors.[57] Other circuits have

48. *Id.* at 1421-22.
49. *Id.* at 1422.
50. *Id.*
51. *Id.*
52. *See* Poindexter v. F.B.I., 737 F.2d 1173, 1181 (D.C. Cir. 1984) (providing a discussion of the competing notions of the role of the attorney in weeding out frivolous claims); *see also* Bradshaw v. Zoological Soc'y of San Diego, 662 F.2d 1301, 1319 (9th Cir. 1981) (arguing that accepting failure to obtain counsel as evidence the claim is without merit directly contradicts the congressional mandate and purpose of 42 U.S.C. § 2000e-5(f)(1)); Caston v. Sears, Roebuck, & Co., 556 F.2d 1305, 1309 (5th Cir. 1977) (indicating that a plaintiff with a meritorious claim may be unable to obtain counsel due to unpopularity or unfamiliarity).
53. *Castner*, 979 F.2d at 1422.
54. *Id.*
55. *See* 110 CONG. REC. 12,722 (1964).
56. *Castner*, 979 F.2d at 1421.
57. *See* Hunter v. Department of Air Force Agency, 846 F.2d 1314, 1317 (11th Cir. 1988) (citing ability of plaintiff to understand procedural and substantive issues as factor for court consideration); Poindexter v. F.B.I., 737 F.2d 1173, 1185 (D.C. Cir. 1984) (articulating all

recognized that a plaintiff with the ability to represent oneself pro se should be precluded from appointed counsel despite the fact the first three factors are met.[58] In the Tenth Circuit, the fourth factor serves as an additional guide for lower courts only when the first three factors do not clearly indicate that appointed counsel is appropriate.

The articulation of these four important factors, and the remand of the case, give rise to a number of differing viewpoints on lower courts' use of discretionary power.[59] In this case, the Tenth Circuit rightly concluded that trial judges need to indicate the underlying considerations used in making the decision to deny appointed counsel.[60] Although it is important to allow trial courts flexibility in exercising discretion,[61] Congress has indicated its policy intentions in employment discrimination cases,[62] and it is important for courts to interpret the statute in light thereof.[63] Considering the difficulties caused by coercive appointments of counsel, a flexible application of balanced discretion is needed to both support the intentions of Congress and protect the scarce resources of the court system.[64]

Pro se litigants are saddled with numerous difficulties.[65] The trial court's terse rejection of the plaintiff's request for counsel in *Castner* is evidence of but one of the hurdles such litigants face.[66] By articulating the four factors and requiring the "serious consideration" of requests for counsel, the Tenth Circuit has sent a strong message to the district courts, namely, that the discretionary appointment of counsel is a valued and necessary part of the employment discrimination legislation.

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four factors as important for consideration); Jenkins v. Chemical Bank, 721 F.2d 876, 880 (2d Cir. 1983) (indicating that the additional considerations of the plaintiffs legal ability were needed to expand the inquiry for a more flexible approach).

58. *See* Hudak v. Curators of Univ. of Mo., 586 F.2d 105, 106 (8th Cir. 1978) (former law professor denied appointed counsel despite meeting the criteria for the first three factors), *cert. denied*, 440 U.S. 985 (1979).

59. The Honorable Henry J. Friendly contends that there are at least a "half dozen different definitions of 'abuse of discretion'." Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 763 (1982).

60. *Castner*, 979 F.2d at 1423.

61. Friendly, *supra* note 59, at 764 (concluding that different definitions of discretion are "not only defensible but essential").

62. *Castner*, 979 F.2d at 1421; *see also Jenkins*, 721 F.2d at 879 (indicating Congress' concern for representation in Title VII actions).

63. Friendly, *supra* note 59, at 783.

64. *See* Cooper v. A. Sargenti Co., 877 F.2d 170, 172-73 (2d Cir. 1989) (discussion of disadvantages to indiscriminate appointment of counsel in civil cases). *See generally* William B. Fisch, *Coercive Appointments of Counsel in Civil Cases in Forma Pauperis: An Easy Case Makes Hard Law*, 50 MO. L. REV. 527 (1985) (discussion specific to coercive appointments through the Missouri in forma pauperis statute).

65. *See* Steven C. Tempelman, Survey, *Civil Procedure Survey*, 70 DENV. L. REV. 665, 668-70 (1993) (outlining difficulties pro se litigants face in the court system).

66. *See* text accompanying note 34.

II. EXPANSION OF THE INVESTIGATORY POWERS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

A. *Background*

The Equal Employment Opportunity Commission ("EEOC") is a federal administrative agency that was established by Title VII of the Civil Rights Act of 1964.[67] One of the EEOC's purposes is to investigate allegations of discrimination against employees in violation of Title VII.[68] Pursuant to a charge being filed, Title VII of the 1964 Act allows the EEOC "access to, for the purposes of examination, and the right to copy any evidence . . . relevant to the charge under investigation."[69] The 1964 Act gave the commission the power to "examine witnesses under oath and to require documentary evidence relevant and material to the charge under investigation."[70]

The 1972 amendments to Title VII[71] conferred additional powers on the commission. The amendments replaced the 1964 language that authorized testimony of witnesses and production of documentary evidence[72] with a statement making a provision of the National Labor Relations Act ("NLRA") applicable to all hearings and investigations by the commission.[73] This provision made the investigatory powers of the EEOC equivalent to those of the National Labor Relations Board.[74]

Similar to the 1964 Act, section 161 of the NLRA addresses "access, for the purpose of examination, and the right to copy" relevant evidence in the possession of the employer.[75] Section 161 also grants the power to issue subpoenas and to request enforcement of those subpoenas by the federal district courts.[76] This subpoena power includes "requiring the attendance and testimony of witnesses and production of *any evidence* in such proceeding or investigation requested in such application."[77] The provision states further that any person served with a subpoena "requiring production of any evidence in his possession or under his control" may petition to have a subpoena revoked.[78] The distinction between documentary evidence and "any evidence" in a party's possession or control has created confusion as to whether the EEOC has the power to force employers to compile evidence not in documentary form.

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67. 42 U.S.C. § 2000e-4(a) (1988).

68. 42 U.S.C. § 2000e-5(b) (1988).

69. Civil Rights Act of 1964, Pub. L. No. 88-352, § 709(a), 78 Stat. 241, 264 (1964) (codified as amended at 42 U.S.C. § 2000e-8(a) (1988)).

70. Civil Rights Act of 1964, Pub. L. No. 88-352, § 710(a), 78 Stat. 241, 264 (1964) (as amended 1972).

71. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 7, 86 Stat. 103, 109 (1972) (codified at 42 U.S.C. § 2000e-9 (1988)).

72. Civil Rights Act of 1964 § 709(a).

73. Equal Employment Opportunity Act of 1972 § 7.

74. National Labor Relations Act § 11, 29 U.S.C. § 161 (1988).

75. *Id.*

76. *Id.*

77. *Id.* (emphasis added).

78. *Id.*

In determining the limits of the EEOC's power to enforce Title VII, courts have generally interpreted the Act and its investigatory provisions broadly.[79] Some cases prior to the 1972 amendments, however, held that the statutory language of the Civil Rights Act did not empower the EEOC to force employers to compile information.[80] Since the 1972 amendments, a number of jurisdictions have concluded that the amendments expanded the EEOC's power, allowing it to force an employer to compile information.[81] Other jurisdictions have drawn a distinction between an order to compile existing information, and one that requires the manufacture and compilation of previously undocumented information.[82] The Tenth Circuit has not previously addressed these specific issues.[83]

B. *Citicorp Diners Club v. EEOC*[84]

1. Facts

Deborah Hinson, a black female employee of Citicorp Diners Club, Inc., filed a charge with the EEOC alleging that she was denied a promotion because of her race and sex.[85] The EEOC commenced an investigation, and Diners Club initially complied with requests for information concerning their promotion policies.[86] However, when the EEOC made

79. *See* Motorola Inc. v. Mclain, 484 F.2d 1339, 1344 (7th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

80. *See* Joslin Dry Goods Co. v. EEOC, 336 F. Supp. 941, 947 (D. Colo. 1971) (holding that "no statute requires the employer to compile anything"); Georgia Power Co. v. EEOC, 295 F. Supp. 950, 953-54 (N.D. Ga. 1968) (holding that the EEOC could not compel compilation or preparation of research or summary), *aff'd*, 412 F.2d 462 (5th Cir. 1969). *But see* Local No. 104, Sheet Metal Workers Int'l v. EEOC, 439 F.2d 237, 243 (9th Cir. 1971) ("Local 104 contends that there is something unique about an order to compile lists. Local 104 is mistaken.").

81. *See* EEOC v. Maryland Cup Corp., 785 F.2d 471, 478 (4th Cir. 1986) (concluding that the EEOC had the power to both compel production of evidence not presently in documentary form and require an employer to compile evidence), *cert. denied*, 479 U.S. 815 (1986); EEOC v. Bay Shipbuilding Corp., 668 F.2d 304, 313 (7th Cir. 1981) (stating that the argument against the power to force compilation has been correctly rejected in other cases); New Orleans Public Serv., Inc. v. Brown, 507 F.2d 160, 164-65 (5th Cir. 1975) (holding that a subpoena is not invalid simply because it requires compilation of evidence by the employer).

82. *See* EEOC v. Gladieux Refinery, Inc., 631 F. Supp. 927, 935 n.2 (N.D. Ind. 1986). In a case discussing the scope of pre-trial discovery in which a number of EEOC cases were cited to support the contention that courts can require defendants to compile information, the Second Circuit drew a distinction between compiling information and manufacturing evidence. *See* Parents' Comm. of Pub. Sch. 19 v. Community Sch. Bd., N.Y., 524 F.2d 1138, 1141-42 (2d Cir. 1975).

83. Although Joslin Dry Goods Co. v. EEOC, 336 F. Supp. 941 (1971), did come up on appeal, the Tenth Circuit did not address the issue of the power of the EEOC to require compilation of evidence. Joslin Dry Goods Co. v. EEOC, 483 F.2d 178 (10th Cir. 1973). Also, although Circle K Corp. v. EEOC, 501 F.2d 1052 (10th Cir. 1974), is cited as a case supporting the power of the EEOC to compel compilations of evidence, in fact the case was limited to the issues of the "unduly burdensome" and "scope" aspects of the evidence subpoenaed. *See* Rich v. Martin Marietta Corp., 522 F.2d 333, 344 (10th Cir. 1975) (stating that the court in *Circle K* refused "to recognize the objections that the information lacked relevancy and was too burdensome").

84. 985 F.2d 1036 (10th Cir. 1993).

85. *Id.* at 1037.

86. *Id.*

further requests concerning Diners Club's "within promotion"[87] policy, Diners Club refused to comply, contending that the information did not exist.[88]

The EEOC issued and served a subpoena to compel Diners Club to produce the information regarding "within promotion" policies.[89] Among other things, the subpoena required descriptions of positions awarded as "within promotions"; the name, race, and sex of employees awarded those positions as well as those who selected and/or recommended them; the name, race, and sex of individuals in a position to recommend a "within promotion"; and a statement detailing reasons for using the "within promotion" policy.[90] Diners Club requested that the EEOC modify or revoke the subpoena.[91] The EEOC refused and Diners Club then notified the EEOC that it would not comply with the subpoena.[92]

The EEOC petitioned the United States District Court for the District of Colorado for an order to enforce the subpoena.[93] At the hearing, to show cause why the order should not be enforced, Diners Club argued that the EEOC had no authority to compel development and compilation of information not then in existence.[94] In an affidavit presented at the hearing, an employee of Diners Club explained that the information requested was not "retrievable in any existing and/or accessible format."[95] The district court rejected the argument that the EEOC was without authority to require compilation stating that the fact "that some of the information sought exists in the minds of Citicorp employees does not absolve Citicorp from compiling the information."[96] Citicorp Diners Club appealed.[97]

On appeal, Diners Club argued that the EEOC does not have the power to force employers to interview employees and review files to pre-

87. "Within promotion" refers to promotion of current employees selected by managers as opposed to posting the position. *Id.* at 1037 n.1.

88. *Id.* Diners Club also refused to give the EEOC information regarding promotions outside Ms. Brown's workgroup because they did not feel it was relevant to Ms. Brown's charge. Diners Club agreed only to provide information it felt was relevant and not unduly burdensome. *Id.*

89. *Id.* The subpoena also required information regarding Diners Club's facilities outside of Colorado. *Id.*

90. *Id.* at 1042-43 (Attachment A).

91. *Id.* at 1038.

92. *Id.*

93. *Id.*

94. *Id.* Diners Club had three other arguments. First, they argued that requests for information on nationwide facilities were overbroad. Second, they argued that because Ms. Brown had individually settled her claim and requested a withdrawal of the charge, that the subpoena was moot. Third, they argued that the requests to develop and compile information were burdensome and overbroad. *Id.*

95. *Id.* at 1044 (Attachment B).

96. *Id.* at 1039 n.3. With respect to Diners Club's other arguments, the district court agreed that the requests for information regarding nationwide facilities was overbroad. The district court rejected Diners Club's contention that the subpoena was moot because Ms. Brown had settled individually. The district court also rejected the contention that the subpoena was burdensome and overbroad. *Id.* at 1038.

97. *Id.* at 1038.

pare summaries.[98] Diners Club contended that the subpoena power of the EEOC was limited to requiring production of documents in existence for the purposes of examination and copying.[99] Diners Club asserted that the Tenth Circuit opinion in *Joslin Dry Goods Co. v. EEOC*[100] established this limit on the Commission's subpoena power.[101]

2. Tenth Circuit Majority Opinion

The majority opinion of the Tenth Circuit rejected the argument that *Joslin* limited the subpoena power of the EEOC.[102] The court agreed that the district court in *Joslin* held that the EEOC could not compel compilation of information.[103] As the court pointed out, however, the issue was not brought up on appeal and thus was not addressed in the Tenth Circuit opinion.[104] The court considered *Circle K Corp. v. EEOC*[105] to be instructive on the issue of the subpoena power of the EEOC.[106] Despite the fact that the *Circle K* opinion did not use the word "compile," the court argued that the subpoena enforced by the court in *Circle K* required the employer to develop and compile information.[107]

The court added that other circuits have held that the EEOC can require an employer to compile information within its control and that the power is not limited to production of already existing documents.[108] The Tenth Circuit held that the EEOC could require Diners Club to compile the requested information, including information existing solely in the minds of employees.[109]

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98. *Id.* Diners Club brought two other matters up on appeal as well. First, it argued that since Ms. Brown's alleged discrimination was based on race and sex, the EEOC should not be allowed to subpoena documents and information on possible discrimination by national origin. Second, it argued that the subpoena requests were unduly burdensome. *Id.*

99. *Id.*

100. 483 F.2d 178 (10th Cir. 1973).

101. *Diners Club*, 985 F.2d at 1038.

102. *Id.* at 1038-39.

103. *Id.*

104. *Id.* at 1039. *Joslin* involved a subpoena requiring the employer to review thousands of personnel files and information index cards and compile the information for the EEOC. 336 F. Supp. at 945. The district court held that the power of the EEOC was limited to production of documentary evidence and that the EEOC could not force employers to compile anything. *Id.* at 947. On appeal, the EEOC did not dispute the district court's holding regarding compilation of information. *Joslin*, 483 F.2d at 183.

105. 501 F.2d 1052 (10th Cir. 1974).

106. *Diners Club*, 985 F.2d at 1039.

107. *Id.* The subpoena in *Circle K* required the following:

> a list of all applicants and present employees subjected to the polygraph examination, their racial ethnic identity and whether they were accepted or rejected; documentation of the nature, standardization and validity of the polygraph test and a list of questions asked of each applicant; qualifications of the examiners who administered the tests; testimony under oath of all knowledgeable employees and officers; and all related matters.

Circle K, 501 F.2d at 1054.

108. *Diners Club*, 985 F.2d at 1039. The court cited cases from the Fourth and Seventh circuits.

109. *Id.* at 1039 n.3. The court added that nothing in the order required Diners Club to track down and interview former employees. *Id.*

3. Tenth Circuit Dissenting Opinion

Judge Paul J. Kelly dissented from the part of the court's opinion requiring interviews of employees and production of documents resulting from those interviews.[110] The dissent did not agree that the EEOC's subpoena power includes the authority to require the development or creation of new information.[111] Addressing the use of *Circle K* by the majority, the dissent pointed out that *Circle K* was limited on appeal to the issues regarding the "unduly burdensome" and "scope of investigation" aspects of the evidence subpoenaed.[112] With respect to the subpoena enforced by *Circle K*, the dissent concluded that the court only required compilation of data already in existence and under the control of an employer.[113] Drawing a distinction between compiling statistical information and creating new information, the dissent contended that the information requested by the EEOC in this case required Diners Club to conduct interviews and produce new documents from those interviews.[114] The dissent argued that this "manufacturing of evidence" is not the proper function of a subpoena[115] and that the information may be properly pursued through subpoena of witnesses.[116]

In support of these conclusions, the dissent pointed directly to the statutory language of the Civil Rights Act and distinguished the request in this case from those requests in the cases cited by the majority.[117] Despite the amendments to Title VII of the Civil Rights Act and 29 U.S.C. § 161, the dissent relied on the fact that the first sentence of section 161 still limits access to evidence "for the purpose of examining or to copy."[118] Distinguishing *EEOC v. Maryland Cup Corp.*[119] from the present case, the dissent argued that requesting previously non-existent position statements is far different from simply requesting lists of former employees and their race.[120] The dissent concluded that at least some of the requests by the

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With respect to the other issues on appeal the Tenth Circuit held that the EEOC could request information on possible discrimination based on national origin and that the subpoena request was not unduly burdensome. *Id.* at 1039-40.

110. *Id.* at 1041-42. Judge Kelly concurred with the court holdings regarding the extension of the investigation to include possible discrimination based on national origin and the employer's failure to make a showing regarding the unduly burdensome nature of the subpoena. *Id.* at 1040.

111. *Id.* at 1040.

112. *Id.*

113. *Id.* at 1041.

114. *Id.*

115. *Id.* (quoting Parents Comm. v. Community Sch. Bd., 524 F.2d 1138, 1141 & n.7 (2d Cir. 1975)).

116. *Id.* at 1041.

117. *Id. See infra* text accompanying notes 128-31.

118. *Id.* The implication being that the terms "copy" and "examination" refer solely to documentary evidence.

119. 785 F.2d 471 (4th Cir. 1986).

120. *Diners Club*, 985 F.2d at 1041. In *Maryland Cup* the EEOC requested the employer to compile information about the race and sex of former employees through examination of photographs and interviews with current employees. *Maryland Cup*, 785 F.2d at 478.

EEOC were beyond their statutory power and should therefore not be enforced.[121]

C. *Analysis*

An important congressional concern with the passage of the Civil Rights Act of 1964 was that the EEOC not have the power to conduct "fishing expeditions."[122] Given this concern, it is questionable whether the intent of the 1972 amendment was to expand the power of the EEOC to the point at which the Commission can compel employers to conduct their own investigations against themselves.[123] In fact, Congress did not amend section 709 of Title VII, which still, with respect to evidence, authorizes "access to, for the purposes of examination, and the right to copy."[124] This language implies that authorization is limited to documentary evidence.[125]

A careful reading of the majority's opinion illuminates flaws in the foundation of its argument. First, the majority patently rejected the use of *Joslin* because the compilation issue was not addressed at the appellate level.[126] However, the court in *Circle K Corp. v. EEOC* did not discuss the issue on appeal either.[127] The court argued that the subpoena enforced by the Tenth Circuit in *Circle K* required compilation of information.[128] Regardless, the majority's application of *Circle K* undermines its basis for not applying *Joslin.*

A second flaw in the majority's argument is pointed out in the dissenting opinion. The information required in *Diners Club* is much different than the information sought in the cases that the majority used to support its conclusion.[129] For example, *Maryland Cup* required inspection of photo identification badges and interviews with employees to determine the race of former employees;[130] *Local 104* involved an order to compile a list of names;[131] and *Circle K* involved information about the administration of polygraph examinations.[132] In contrast, the subpoena in *Diners Club* required the employer to interview employees and develop position

121. *Diners Club,* 985 F.2d at 1041-42.

122. The term "fishing expedition" refers specifically to the concern that the scope of investigations be limited to evidence relative to the charge. *See* 110 CONG. REC. 6449 (1964) (illustrating Senator Dirksen's concerns that the scope of EEOC investigations be limited). However, it could be argued that the scope of an investigation is directly affected by the investigatory powers utilized.

123. *Diners Club,* 985 F.2d at 1041 (Kelly, J., dissenting).

124. 42 U.S.C. § 2000e-8(a) (1988).

125. *See Maryland Cup,* 785 F.2d at 478.

126. *Diners Club,* 985 F.2d at 1038-39.

127. *Id.* In fact, the district court in *Circle K* set aside the EEOC subpoena on the grounds that the information sought was not relevant to the charge and was too burdensome and broad. *Circle K,* 501 F.2d at 1054. Therefore, the only issues on appeal were the relevancy and the burdensome aspects of the subpoena.

128. *Id.* at 1039.

129. *See Diners Club,* 985 F.2d at 1041 (distinguishing between compiling statistical information and creating new information).

130. 785 F.2d at 479.

131. 439 F.2d 237, 240 (9th Cir. 1971).

132. 501 F.2d at 1054.

papers with respect to a "within promotion" policy.[133] The dissent's distinction between compiling information and creating information is an important point that is not addressed by the majority.

Another issue ignored by the majority is whether the EEOC utilized the most appropriate investigatory tool for the type of information sought. When the pieces of information sought by the EEOC are undocumented policies allegedly existing in the minds of employees, it would seem that the more appropriate investigatory tool is a subpoena of witness testimony. In this case, the information sought by the EEOC could have more easily been obtained through the testimony of witnesses.[134]

Despite any concern as to how the decision was reached, the majority's opinion clearly supports the contention that the expanded power of the EEOC includes the power to compel employers to compile existing information that includes information not presently in documentary form.

III. Application of General Personal Injury Statutes of Limitation to Federal Civil Rights Claims

A. *Background*

Enactment of federal legislation creating a civil cause of action, but without a specified statute of limitations, is not uncommon in federal statutory law.[135] When federal legislation is without a statute of limitations an appropriate state statute of limitations is borrowed.[136] Section 1988 provides in part that where the provisions of federal civil rights laws are insufficient to provide remedies, the laws of the jurisdiction in which the case is filed should apply, so long as they are not inconsistent with the Constitution and the laws of the United States.[137]

Section 1983 is an example of federal legislation enacted without a statute of limitations.[138] In applying the provisions of section 1988 to section 1983 claims the courts have required a three-step inquiry.[139] First, the court must determine that a federal rule does not apply.[140] Second, the court selects and borrows an analogous state rule.[141] Third, if the state rule is consistent with federal law, it is applied.[142]

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133. 985 F.2d at 1037.

134. *Id.* at 1041. The EEOC has the power to subpoena both documents and witness. 29 U.S.C. § 161(1) (1988).

135. Board of Regents of N.Y. v. Tomanio, 446 U.S. 478, 483 (1980).

136. *See* Paul Rathburn, *Amending a Statute of Limitations for 42 U.S.C. § 1983: More Than 'A Half Measure of Uniformity'*, 73 Minn. L. Rev. 85, 90-91 (1988) (discussing the borrowing of state limitations periods for federal claims under § 1983).

137. 42 U.S.C. § 1988 (1988). The practice of applying state limitations periods so long as not inconsistent with the Constitution, treaties, or laws of the United States is also sanctioned by the Rules of Decision Act, 28 U.S.C. § 1652 (1988).

138. 42 U.S.C. § 1983 (1988). Section 1983 allows persons whose rights have been deprived under color of state law to seek redress by the courts. *Id. See also* Rathburn, *supra* note 136, at 87 (arguing that Congress should set a statute of limitations for § 1983).

139. Burnett v. Gratten, 468 U.S. 42, 47-48 (1984).

140. *Id.*

141. *Id.*

142. *Id.*

Prior to *Wilson v. Garcia*[143] the Supreme Court advised federal courts to apply the state statute of limitations that was "most appropriate"[144] or "most analogous."[145] The approaches utilized by different states to apply these tests and determine the "most appropriate" or "most analogous" statute of limitations created a large amount of confusion and inconsistency among the circuits.[146]

The Supreme Court attempted to minimize confusion and increase uniformity and certainty in section 1983 litigation with its holding in *Wilson v. Garcia.*[147] Applying the standards set in *Board of Regents of N.Y. v. Tomanio* and *Johnson v. Railway Express Agency,* the Court reiterated that the statute most analogous to section 1983 claims should borrowed.[148] Since federal law governs the choice of statutes of limitation, the court reasoned that federal law should govern the decision as to which state cause of action is most analogous to section 1983.[149] In the interests of "uniformity, certainty, and minimization of unnecessary litigation," the Court concluded that the inquiry should no longer be on a case-by-case basis and that the state statute most analogous to all section 1983 claims should be applied.[150] Affirming the Tenth Circuit *Garcia* opinion, the Supreme Court held that the appropriate statute of limitations for all § 1983 claims was the state statute applicable to personal injury tort claims.[151]

The *Garcia* opinion has not been completely accepted as the solution to the statute of limitation dilemma.[152] Legal theorists have proposed a number of solutions to the problems still remaining.[153] Nevertheless, the rule from *Wilson* has been extended by a number of courts to include claims under 42 U.S.C § 1981[154] and 42 U.S.C

143. 471 U.S. 261 (1985).

144. Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975).

145. Board of Regents of N.Y. v. Tomanio, 446 U.S. 478, 488 (1980).

146. *See* Lee L. Cameron, Note, *Civil Rights: Determining the Appropriate Statute of Limitations for Section 1983 Claims,* 61 NOTRE DAME L. REV. 440, 442-43 (1986); Lawrence K. Hoyt, Survey, *Civil Rights,* 62 DENV. U. L. REV. 59, 67 (1985); Rathburn, *supra* note 136, at 91-97.

147. 471 U.S. 261 (1985). Wilson v. Garcia came out of the Tenth Circuit. Gary Garcia brought a § 1983 claim against a police officer for violating his civil rights and against the police chief for negligently hiring and failing to train the officer. 731 F.2d 640, 642 (1984). The defendants moved to dismiss, asserting that the suit was time barred. *Id.* The only issue on appeal was which limitations period should be applied to the § 1983 federal claim. *Id.*

148. *Wilson,* 471 U.S. at 268.

149. *Id.* at 269-70.

150. *Id.* at 272-73.

151. *Id.* at 277.

152. In her dissenting opinion Justice O'Connor considered the majority's "half baked uniformity . . . a poor substitute for the careful selection of the appropriate state law analogy." 471 U.S. at 286.

153. *See* Robert M. Jarvis & Judith Anne Jarvis, Commentary, *The Continuing Problem of Statutes of Limitations in Section 1983 Cases: Is the Answer Out at Sea?,* 22 J. MARSHALL L. REV. 285, 291 (1988) (proposing the use of the laches doctrine); Rathburn, *supra* note 136, at 113-14 (proposing congressional legislation).

154. Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984).

Section 1981 guarantees to all persons in the United States equal rights under the law "as is enjoyed by white citizens." 42 U.S.C. § 1981 (1981 and Supp. 1992).

§ 1985.[155] This continuing extension of the *Wilson* holding is indicative of a judicial intent to characterize all civil rights claims as actions in personal injury.

B. *Baker v. Board of Regents of the State of Kansas*[156]

1. Facts

Marvin Baker, a Kansas state resident, was denied admission to the 1986 class of the University of Kansas Medical School.[157] The letter informing Mr. Baker of his rejection was dated January 29, 1986.[158] On February 12, 1986, Mr. Baker met with the school's associate dean to discuss the reasons for the denial of admission.[159] At this meeting, Mr. Baker was informed that he was not accepted due to his poor performance at his admission interview.[160] On December 1, 1987, Mr. Baker's counsel received a letter from the University of Kansas stating that Mr. Baker had the highest GPA and MCAT score of any Kansas resident that was denied admission for the 1986 class.[161] Mr. Baker filed suit against the Board of Regents of the State of Kansas and the University of Kansas Medical School on June 14, 1988.[162]

Mr. Baker initially sought a temporary injunction directing the Board of Regents and the University of Kansas to admit him as a first year medical student pending the outcome of a trial.[163] Mr. Baker filed four claims, including reverse discrimination on the basis of race alleging a violation of Title VI of the Civil Rights Act of 1964.[164] Although the defendants argued

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155. Marquis v. U.S. Sugar Corp., 652 F. Supp. 598, 602 (S.D. Fla. 1987). *See also* Williams v. City of Atlanta, 794 F.2d 624, 625 n.1 (11th Cir. 1986); Mulligan v. Hazard, 777 F.2d 340, 343-45 (6th Cir. 1985).

Section 1985 provides redress for persons injured by conspiracies to deprive equal protection or equal privileges and immunities under the law. 42 U.S.C. § 1985 (1988).

156. 721 F. Supp. 270 (D. Kan. 1989).

157. *Id.* at 272. Mr. Baker had also been denied admission in 1984 and in 1985. *Id.*

158. Baker v. Board of Regents of Kansas, 768 F. Supp. 1436, 1437 (D. Kan. 1991).

159. *Id.* at 1438.

160. *Id.* During his interview, conducted by a panel of four people, Mr. Baker was asked questions concerning abortion, religion, family history, and financial need. Mr. Baker felt many of the questions were inappropriate and that no procedure governed the format or substance of the interview. *Baker*, 721 F. Supp. at 273.

161. *Baker*, 768 F. Supp. at 1438. Admissions at the University of Kansas Medical School are based on four criteria: GPA, MCAT, advisor's recommendation, and interviews. *Baker*, 721 F. Supp. at 272.

162. *Id.* at 274.

163. *Id.* at 271.

164. *Id.* at 272. Mr. Baker also alleged violations of the 14th amendment of the U.S. Constitution, 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, § 1 of the Bill of Rights of the State of Kansas Constitution, and due process of law guaranteed by the U.S. Constitution. *Id.* The district court stated that claims cannot be brought under the Fifth and Fourteenth Amendments and that the plaintiff was limited to actions pursuant to federal statutes enforcing the Constitution. *Id.* at 273. Also, relief was not available under Title VII because it is reserved for employment discrimination. *Id.* at 274. Finally, the court stated that Mr. Baker's claims under § 1981 and the Kansas Constitution were barred by the Eleventh Amendment to the U.S. Constitution. *Id.* Mr. Baker was left with only his claim under Title VI. *Id.*

The district court also noted that Mr. Baker had filed a motion to add claims under 42 U.S.C. § 1983 and the Rehabilitation Act, § 504, 29 U.S.C. § 794. *Id.*

that a private citizen could not sue under Title VI, the court ruled that it was proper to imply a private cause of action.[165]

There is no federal statute of limitations for an implied cause of action.[166] The defendants argued that the state's two-year statute of limitations, which is routinely borrowed for civil rights actions under 42 U.S.C. §§ 1981 and 1983, should also be applied for Title VI claims.[167] Seeing no reason why the same statute should not be applied to a claim which could have been prosecuted under section 1981 or section 1983, the district court applied the two-year personal injury statute of limitations to the Title VI claim.[168] The court concluded that Mr. Baker knew or had reason to know of the possible violation of his rights when he first learned of his denial of admission.[169] Mr. Baker had received his rejection letter more than two years before the filing of the action.[170] For this reason, among others, Mr. Baker was denied injunctive relief.[171]

At trial, the court continued to hold that the two-year statute of limitations period should apply to Mr. Baker's claims asserted under Title VI and section 1981.[172] The court also stated that the two-year statute of limitations would apply to the claims asserted under section 1983 of the Civil Rights Act and section 504 of the Rehabilitation Act which Mr. Baker moved to add to his complaint.[173] Holding that Mr. Baker filed his case after the limitations period for his federal claims had expired, the district court granted the defendant's motion for summary judgment.[174]

2. Tenth Circuit Opinion

The Tenth Circuit agreed with the trial court's analysis that the two-year statute of limitation should be applied to the federal civil rights claims asserted by Mr. Baker.[175] Citing 42 U.S.C. § 1988, the court stated that Congress has directed courts to apply state statute of limitations to federal claims so long as they are not inconsistent with the Constitution or the laws of the United States.[176] Utilizing the rule of *Wilson*, the court explained that the first step in selecting an appropriate statute of limitations is to characterize the essential nature of the federal action, which is a mat-

165. *Id.* at 274.
166. *Id.*
167. *Id.*
168. *Id.* at 275. The court reasoned that in *Garcia* the Tenth Circuit held that § 1983 civil rights claims should be characterized as personal injury actions. *Id.* at 274. Additionally, the Tenth Circuit indicated that the same analysis should apply to § 1981 claims in EEOC v. Gaddis, 733 F.2d 1373, 1377 (10th Cir. 1984). *Id.* at 275. Finally, most courts have held that under Title VI or analogous statutes state statutes of limitation should apply. *Id.* (citing a number of cases). According to the court, Pike v. City Mission, 731 F.2d 655 (10th Cir. 1984) established that Kansas' two-year statute was the appropriate limitation to apply. *Id.* at 275.
169. *Id.* at 275.
170. See text accompanying notes 145-49.
171. *Baker*, 768 F. Supp. at 1438.
172. *Id.*
173. *Id.*
174. *Id.* at 1442.
175. Baker v. Board of Regents of Kansas, 991 F.2d 628, 630 (10th Cir. 1993).
176. *Id.*

ter of federal law.[177] The court pointed out that *Wilson* characterized all section 1983 claims as actions of injury to personal rights.[178] The court also pointed out that section 1981 claims have likewise been characterized as actions of injury to personal rights.[179] According to the court, Kansas' two-year statute of limitations is appropriate for claims under sections 1981 and 1983 because they are claims based on injury to the rights of others.[180]

The Tenth Circuit next considered whether the two-year statute of limitations appliable to the other civil rights claims should apply to Title VI claims.[181] In characterizing the nature of the claim, the court focused on the elements of a cause of action under Title VI, as opposed to the remedy, because the elements more fully describe a claim's essence.[182] The elements for Title VI of the Civil Rights Act of 1964 are: "(1) that there is racial or national origin discrimination and (2) the entity engaging in discrimination is receiving federal financial assistance."[183] The court stated that Title VI is a civil rights statute closely analogous to sections 1981 and 1983 because it specifically refers to discrimination against a "person," which is similar to the language in sections 1981 and 1983 protecting "persons" from deprivation of rights, and because it provides equal rights under the law to all "persons."[184]

The court concluded that Title VI claims are best characterized as actions for injury to personal rights.[185] Citing directly from the Tenth Circuit decision in *Garcia*, the court stated that this decision would promote a "consistent and uniform framework by which suitable statutes of limitations can be determined for civil rights claims."[186]

The court next considered Mr. Baker's claim pursuant to section 504 of the Rehabilitation Act.[187] The court, citing other districts, stated that section 504 is a "civil rights statute . . . closely analogous to section 1983."[188] Since the Supreme Court held that all section 1983 claims are best characterized as claims for personal injuries, and as section 504 claims are closely analogous to section 1983 claims, the court held that section 504 claims are also best characterized as claims for personal injuries.[189] Therefore, the court concluded that Mr. Baker's section 504 claim was also barred by Kansas' two-year statute of limitations.[190]

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177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* (citing Pike v. City of Mission, Kan., 731 F.2d 655, 658 (10th Cir. 1984)).
181. *Id.* at 631.
182. *Id.* (citing *Garcia*, 731 F.2d at 650-51).
183. *Id.* (citing Jackson v. Conway, 476 F. Supp. 896, 903 (E.D.Mo. 1979), *aff'd*, 620 F.2d 680 (8th Cir. 1980)).
184. *Id.*
185. *Id.*
186. *Id.* (citing *Garcia*, 731 F.2d at 643).
187. *Id.*
188. *Id.*
189. *Id.* at 632.
190. *Id.*

C. *Analysis*

An initial concern with the Tenth Circuit's decision in *Baker* is the lack of depth with which the court considered the proper characterization of the federal civil rights claims. In *Wilson*, the Supreme Court focused on the intent of the legislature when enacting the Civil Rights Act of 1871. The Supreme Court examined the issue as a question of legislative intent, arguing that Congress "intended the identification of the appropriate statute of limitations to be an uncomplicated task."[191] Examining the catalyst of the Civil Rights Act of 1871, and the violence and deprivation of rights in the South, the court concluded that the "atrocities that concerned Congress in 1871 plainly sounded in tort."[192] No such examination of legislative intent was relied on by the Tenth Circuit in *Baker*. On the contrary, the *Baker* decision is grounded solely in similarities of the elements and language of Title IV and section 504 of the Rehabilitation Act to section 1983 of the Civil Rights Act.[193] Despite the meticulous inquiry modeled in *Wilson*, the Tenth Circuit barely addresses the intent of Congress in enacting Title VI and section 504.

The extension of the *Wilson* rationale in *Baker* highlights a concern initially articulated after the *Wilson* decision. By applying state statutes of limitation a conflict may arise between federal and state interests.[194] State statutes of limitation are determined by state legislatures according to state policy.[195] A state statute of limitations may be so short as to undermine the federal interest in protecting civil rights. Although the Supreme Court has indicated that the state statute should not be borrowed if it conflicts with federal law or federal interest,[196] neither *Wilson* nor *Baker* provide any guidance as to when a state statute of limitations is so short that it infringes on federal interests.[197]

An overriding concern in *Wilson* and *Baker* is uniformity.[198] Both the Tenth Circuit and the Supreme Court characterize uniformity as an important federal interest vindicated by the civil rights statutes at issue.[199] On the other hand, the dissent in *Wilson* argued that the need for uniformity is simply a judicial perception that the courts have seized as an opportunity to legislate.[200] Subsequent decisions consistent with *Wilson*

191. *Wilson*, 471 U.S. at 275.

192. *Id.* at 277.

193. With respect to Title VI, the Tenth Circuit focuses on the use of the word "person" in both Title VI and §§ 1983 and 1981. *Baker*, 991 F.2d at 631. With both Title VI and § 504 of the Rehabilitation Act, the court relies on the fact that they are analogous to § 1983 claims. *Id.* at 631-32.

194. *See* Cameron, *supra* note 146, at 448-50.

195. *Id.* at 449.

196. *Id.* at 451.

197. There are cases that have articulated that federal policy should establish a minimum limitation period so as not to infringe on federal interests. *See* Pauk v. Board of Trustees, 654 F.2d 856, 862 (2d Cir. 1981) (advocating a two-year floor for § 1983 statutes of limitation).

198. *See Wilson*, 471 U.S. at 275-76; *Baker*, 991 F.2d at 631.

199. *Wilson*, 471 U.S. at 279; *Baker*, 991 F.2d at 631.

200. *Wilson*, 471 U.S. at 284 (O'Connor, J., dissenting).

have solved some remaining uniformity problems.[201] Nevertheless, these decisions fail to address the disparity of limitations periods among different states.[202]

It has been argued that the only viable solution to the uniformity problem is congressional legislation.[203] In 1990 Congress enacted a four-year statute of limitations but limited its use to federal claims and causes of action created by Congress after December 1, 1990.[204] However, a Supreme Court decision arguably opened the door to apply the statute to other federal claims. In *Agency Holding Corp. v. Malley-Duff & Assoc.* the court stated that "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes . . . we have not hesitated to turn away from state law."[205] Using *Agency* to apply the 1990 legislation to all federal civil rights statutes without limitations periods is another possible solution to the uniformity problem that both the Tenth Circuit and the Supreme Court find so disturbing. Any movement in this direction by the courts would arguably be contrary to the express intent of Congress that the statute only apply to federal claims enacted after 1990. It is not likely that the Tenth Circuit or the Supreme Court is willing to go that far for uniformity.

CONCLUSION

During the 1993 survey period the Tenth Circuit addressed some procedural issues affecting the ability of parties to bring civil rights claims. *Castner* enhanced the ability of the disadvantaged to pursue employment discrimination claims by supporting the value of discretionary appointments of counsel. *Baker* affects the ability of any party to bring a civil rights claim under Title VI or section 504 of the Rehabilitation Act by extending *Wilson* and applying a state's general personal injury statute of limitations to these federal claims. Finally, the Tenth Circuit enhanced the ability of the EEOC to investigate employment discrimination in *Diners Club* by enforcing an EEOC subpoena to compile previously undocumented information.

Daniel E. Rohner

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201. *See* Owens v. Okure, 488 U.S. 235 (1989) (holding that states with more than one personal injury statute of limitations should apply the general or residual statute).

202. *See* Rathburn, *supra* note 136, at 108-09 n.154 (illustrating a hypothetical forum-shopping situation where the disparity in limitations for same claim ranges from one to six years).

203. *See* Rathburn, *supra* note 136, at 113-14.

204. Judicial Improvements Act of 1990, § 1658 (Pub. L. No. 101-650). *See* David D. Siegal, *The Statute of Limitations in Federal Practice, Including the New "General" One in Federal Question Cases*, 134 F.R.D. 481 (1991).

205. Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 148 (1987) (applying four-year statute of limitations from the Clayton Act, 15 U.S.C. § 15 (1982), to civil "RICO" suits).

COMMERCIAL LAW SURVEY

INTRODUCTION

During the 1993 survey period, notable Tenth Circuit commercial law decisions addressed banking and corporate law issues. Part I of this Survey examines recent banking law decisions. In 1993, the Tenth Circuit variously restricted and expanded federal banking regulators' powers under the *D'Oench* doctrine[1] and § 1823(e)[2] of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").[3] In *Oklahoma Radio Associates v. FDIC*,[4] the court restricted federal superpowers by endorsing a complete innocence exception to the *D'Oench* estoppel doctrine and by refusing to give retroactive effect to FIRREA's extensions of § 1823(e). In contrast, *Castleglen, Inc. v. RTC*[5] enlarged federal superpowers by applying *D'Oench* and § 1823(e) to bar debtor defenses to liability based on affirmative tort claims as well as those based on unwritten agreements or verbal misrepresentations.

Part II of this Survey discusses a recent corporate law decision. *NLRB v. Greater Kansas City Roofing*[6] summarizes the Tenth Circuit's stance concerning piercing the corporate veil with the federal common law alter ego doctrine. While the decision adds little to the substantive law, it merits attention for its clairification and explanation of the alter ego doctrine.

I. BANKING LAW

In response to the savings and loan crisis of the eighties, Congress passed FIRREA.[7] FIRREA extensively revised federal regulation of the savings and loan industry to insure its integrity, safety and stability.[8] Among its specific purposes, FIRREA sought to improve federal supervision of financial institutions and to strengthen federal regulators' enforcement powers.[9] Towards these ends, Congress expanded the application of

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1. The *D'Oench* doctrine was articulated in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1941), *reh'g denied*, 315 U.S. 830 (1942). See *infra* notes 16-29 and accompanying text for an explanation of the *D'Oench* doctrine.

2. 12 U.S.C. § 1823(e) (Supp. IV 1992) partially codifies the common law *D'Oench* doctrine. See *infra* notes 25-30 and accompanying text for an explanation of § 1823(e).

3. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in scattered sections of 12 U.S.C.).

4. 987 F.2d 685 (10th Cir. 1993).

5. 984 F.2d 1571 (10th Cir. 1993).

6. 2 F.3d 1047 (10th Cir. 1993).

7. H.R. REP. No. 54, 101st Cong., 1st Sess., pt. 1 at 291-94 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 87-90 (discussing the history of the savings and loan industry and the genesis of the crisis). *See also* James F. Hogg, *Section 1823(e) and the D'Oench, Duhme Doctrine*, 16 HAMLINE L.REV. 55, 55-56 (1992).

8. *See* Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101-73, § 101, 1989 U.S.C.C.A.N. (103 Stat.) 187.

9. *Id.* § 101(2), (9).

FIRREA's special enforcement provisions contained in section 1823(e).[10] FIRREA's special enforcement provisions prohibit debtors from asserting nearly every defense in a lawsuit by federal regulators to collect an institution's outstanding loan obligations.[11]

These statutory provisions, combined with the common law enforcement powers available to the FDIC and the RTC, give federal banking regulators a substantial advantage in debt collection litigation.[12] Some commentators, troubled by the magnitude of these prerogatives, and the manifest injustice they frequently work, have called upon courts to restrain their scope.[13] Recent decisions leave it uncertain whether the Tenth Circuit is prepared to answer this call.

A. *Scope of the D'Oench Estoppel Doctrine and FIRREA § 1823(e):* Oklahoma Radio Associates v. FOIL[14] *and* Castleglen Inc. v. RTC[15]

When the FDIC or the RTC takes over a failed financial institution's assets and sues to collect debts still owed to the institution, a growing body of statutory and common law strips debtors of most otherwise valid defenses or counterclaims against liability. These "superpowers" are designed to enhance federal regulators' ability to deal effectively with the failure of a financial insitution.[16] During the 1993 Survey period, the Tenth Circuit addressed two of the FDIC's and RTC's most commonly employed superpowers: the *D'Oench* estoppel doctrine and FIRREA § 1823(e).[17]

The Supreme Court articulated the D'Oench doctrine in *D'Oench, Duhme & Co. v. FDIC.*[18] In that case, the FDIC sued to collect on a promissory note obtained from a bank as collateral for a loan.[19] The maker of the note denied liability based on a written agreement by the bank promis-

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10. 12 U.S.C. § 1823(e) (Supp. IV 1992). FIRREA specifically extended § 1823(e) to cover the FDIC and the RTC in their capacity as either conservator or receiver. Prior to FIRREA, § 1823(e) only applied to the FDIC in its receivership capacity. GREGORY PULLES ET AL., FIRREA: A LEGISLATIVE HISTORY AND SECTION-BY-SECTION ANALYSIS OF THE FINANCIAL INSTITUTIONS RECOVERY, REFORM AND ENFORCEMENT ACT 255 (1993).

11. *See infra* part II.A.

12. *See* Fred Galves, *FDIC and RTC Special Powers in Failed Bank Litigation*, 22 COLO. LAW. 473 (1993).

13. *See generally* Richard E. Flint, *Why D'Oench, Duhme? An Economic, Legal and Philosophical Critique of a Failed Bank Policy*, 26 VAL. U. L. REV 465 (1992) (arguing for the repeal of § 1823(e) and the overruling of *D'Oench* and its progeny); Hogg, *supra* note 5, at 56 ("[w]ith Congress' enthusiasm for reform, it is not surprising that the reform pendulum . . . may have swung too far in favor of the federal banking agencies.").

14. 987 F.2d 685 (10th Cir. 1993).

15. 984 F.2d 1571 (10th Cir. 1993).

16. The best known of the FDIC's and RTC's superpowers are the *D'Oench* doctrine, 12 U.S.C. § 1823(e), and the federal Holder in Due Course Doctrine. Galves, *supra* note 12, at 473.

17. Between 1989 and 1992, 12 U.S.C. § 1823(e) was cited in over three hundred cases. *See* Hogg, *supra* note 7, at 56 (describing the level of citation as "extraordinary . . . compared to other FIRREA sections"). Likewise, *D'Oench* and its extensions are "uniformly accepted in failed bank litigation." *See* Galves, *supra* note 12, at 474.

18. 315 U.S. 447 (1941), *reh'g denied*, 315 U.S. 830 (1942).

19. *Id.* at 454.

ing that the note would not be enforced.[20] The FDIC lacked knowledge of the agreement until after demand for payment.[21] The Supreme Court deemed the maker to have participated in a scheme to misrepresent the bank's assets to the FDIC by executing a facially unqualified note.[22] Noting that federal legislation reflected a strong policy in favor of protecting the FDIC and the public funds it administers from such misrepresentations, the court estopped the maker from asserting the agreement as a defense to liability.[23]

Justice Douglas' majority opinion specifically provided that the FDIC is not required to prove either intent to deceive or specific injury.[24] It would suffice that the maker had "lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled."[25] Schemes subject to estoppel under *D'Oench* have expanded well beyond oral agreements to encompass defenses such as failure of consideration,[26] fraud in the inducement,[27] and unconscionability,[28] among others.[29]

Section 1823(e) of FIRREA partially codifies the *D'Oench* doctrine.[30] The section also adds specific requirements prohibiting assertion of agreements tending to diminish or defeat the interest of the FDIC in any asset it acquires unless the agreement is: (1) in writing, (2) executed by the bank and the obligor, (3) established as approved in the board or loan committee minutes and (4) continuously part of official records.[31] Section 1823(e) essentially bars the same defenses as *D'Oench*.[32]

Courts have recognized a narrow set of potential exceptions to both *D'Oench* and section 1823(e). These exceptions include fraud in the factum,[33] forgery or material alteration,[34] and defenses based on breach of

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20. *Id.*
21. *Id.*
22. *Id.* at 459-61.
23. *Id.* at 457, 461.
24. *Id.* at 461.
25. *Id.* at 460. *See also* Langley v. FDIC, 484 U.S. 86 (1987). Although decided under § 1823(e), *Langley* held that neither fraud in the inducement nor the FDIC's knowledge of the agreement bars section 1823(e)'s applicability. *Id.* at 94-95.
26. Taylor Trust v. Security Trust Fed. Sav. & Loan Ass'n, 844 F.2d 337, 342 (6th Cir. 1988).
27. Mainland Sav. Ass'n v. Riverfront Ass'n, 872 F.2d 955, 956 (10th Cir.) (per curiam), *cert. denied*, 493 U.S. 890 (1989).
28. Clay v. FDIC, 934 F.2d 69, 72-73 (5th Cir. 1991).
29. *D'Oench* bars most tort claims used either affirmatively or defensively. For a comprehensive listing, see PULLES ET AL., *supra* note 1012, at 256.1-256.4(2).
30. Authorities conflict on whether § 1823(e) represents a parallel authority to the *D'Oench* doctrine, a codification of the doctrine, or a partial codification of the doctrine. PULLES ET AL., *supra* note 10, at 256.
31. 12 U.S.C. § 1823(e)(1988 & Supp. IV 1993).
32. *See, e.g.*, Langley v. FDIC, 484 U.S. 86, 94 (1987) (using section 1823(e) to bar defense of fraudulent inducement). It is uncertain whether or not section 1823(e), like *D'Oench*, bars defenses based on failure of consideration. The Sixth Circuit, at least, finds that it does not. FDIC v. Leach, 772 F.2d 1262, 1266 (6th Cir. 1985) (failure of consideration is not barred by § 1823(e), since the statutory bar applies only to unwritten agreements, and the defense was based on the lack of any enforceable agreement).
33. *See Langley*, 484 U.S. at 92-93 (recognizing possible exception for fraud in the factum as there would be no agreement to enforce in the first place).
34. *See* FDIC v. Turner, 869 F.2d 270 (6th Cir. 1989) (discussing a material alteration).

bilateral obligations where the payee's obligation clearly appears in the bank's loan files.[35] A few courts recognize the "wholly innocent maker" defense as an additional exception to *D'Oench* estoppel.[36] Courts generally cite *FDIC v. Meo*[37] as establishing this defense. In *Meo*, the Ninth Circuit held that *D'Oench* did not estop a debtor from asserting a defense where he was "neither a party to any deceptive scheme involving, nor negligent with respect to, circumstances giving rise to the claimed defense."[38] The exception is not uniformly recognized; some courts have characterized it as an outdated understanding of the *D'Oench* doctrine.[39]

D'Oench and § 1823(e) contribute towards FIRREA's overriding goal of maintaining confidence and stability in the banking system by ensuring the accuracy of the records of federally insured financial institutions under the FDIC's regulation.[40] The FDIC must be able to determine quickly which institutions are failing and how best to protect depositors once the institution has failed.[41] To this end, the FDIC must have accurate information regarding the financial condition of the institution.[42] "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions."[43]

The *D'Oench* doctrine and its statutory codification have expanded considerably in their application. Commentators have criticized the broad scope of both *D'Oench* and section 1823(e) as allowing the FDIC to impose draconian measures against unwary debtors who naively trust oral agreements made with lending institutions.[44]

1. Tenth Circuit Decision: *Oklahoma Radio Associates v. FOIL*[45]

The Comptroller of Currency closed Citizens Bank ("Citizens") and appointed the FDIC as receiver in August of 1986.[46] When the FDIC chose to liquidate the bank, it demanded payment of a $175,000 loan Citi-

35. Howell v. Continental Credit Corp., 655 F.2d 743, 746-47 (7th Cir. 1981).

36. *See, e.g.*, Oklahoma Radio Assoc. v. FDIC, 987 F.2d 685, 693-94 (10th Cir. 1993); Agri-Export Coop. v. Universal Sav. Ass'n, 767 F. Supp. 824, 832 (S.D. Tex. 1991).

37. 505 F.2d 790, 793 (9th Cir. 1974).

38. *Meo*, 505 F.2d at 793. The defendant had executed a promissory note to a bank in exchange for 1000 shares of the bank's stock. The bank issued 1000 voting trust certificates rather than stock. *Id.* at 791. The court found the defendant not negligent in failing to discover the misexecution of his order and wholly unaware of the failure of consideration until the FDIC, as receiver for the bank, filed suit to collect the note. *Id.* at 792.

39. FDIC v. Payne, 973 F.2d 403, 407 (5th Cir. 1992); Capital Bank & Trust v. 604 Columbus Ave. Realty Trust (*In re* Columbus Ave. Realty Trust), 968 F.2d 1332, 1347-48 (1st Cir. 1992); FSLIC v. Gordy, 928 F.2d 1558, 1567 n.14 (11th Cir. 1991).

40. Additionally, bars from statutory and common law safeguard federal insurance funds from depletion by preventing debtors from pleading participation in a deceptive scheme as a defense to their obligation to a failed financial institution. Hogg, *supra* note 7, at 57-60.

41. *Id.* at 59.

42. "One purpose of § 1823(e) is to allow federal . . . bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." Langley v. FDIC, 484 U.S. 86, 91 (1987).

43. *Id.* at 91-92.

44. *See supra* note 13 and accompanying text.

45. 987 F.2d 685 (10th Cir. 1993).

46. *Id.* at 688.

zens had made to Oklahoma Radio Associates ("ORA") which had come due.[47] ORA brought suit against the FDIC claiming that the FDIC's demand for repayment in full breached Citizens' agreement to renew that note over five years with a series of one-year notes.[48] As evidence of the agreement, ORA introduced a letter from Citizens' vice president confirming the terms of the agreement.[49] These terms mirrored those stated in ORA's loan application.[50] ORA countered the assertion that the renewal agreement constituted a secret side agreement by introducing an affidavit from Citizens' vice president indicating that he had ordered both the confirmation letter and the loan application to be placed in the bank's files.[51]

The FDIC counterclaimed for payment of the loan.[52] The FDIC argued that, under the *D'Oench* doctrine, ORA could not assert its secret side agreement with Citizens and avoid its obligation under a facially unqualified note.[53] As to ORA's contention that the confirmation letter was in Citizens' files at the time of failure, the FDIC presented evidence that its examiner had located ORA's loan application, but no qualifying letter, in the bank's loan files.[54]

The district court found the *D'Oench* doctrine applicable to ORA's defense.[55] The court emphasized that the promissory note, on which the FDIC relied, clearly indicated the instrument's maturity date.[56] The confirmation letter represented "[a]t best a secret agreement that Citizens would not enforce the note on its express maturity date."[57] The court held that *D'Oench* applied directly to these facts because such an agreement would tend to indicate deceptively to bank examiners that Citizens had committed its assets for one year while it had, in reality, committed them for five years.[58]

On appeal, ORA challenged the district court's ruling on two grounds. First, ORA asserted that the FDIC failed to establish that the renewal agreement was deceptive or would tend to deceive.[59] Second, ORA argued that the FDIC failed to establish in the record that ORA's conduct was even slightly culpable.[60]

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47. *Id.*

48. *Id.* at 688-89.

49. *Id.* at 689. The letter confirmed that upon the original note's 90 day maturity "the note [would] be renewed on a 60 month basis with a series of one year notes." *Id.*

50. *Id.*

51. *Id.* at 688.

52. *Id.* at 689. There were actually two promissory notes relating to the loan in question. The first note carried a maturity date of October 15, 1985. Citizens later renewed ORA's note with a new one carrying a stated maturity date of no later than August 15, 1986. *Id.* at 688. The FDIC relied on the new note in its counterclaim against ORA. *Id.* at 689.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 692.

60. *Id.* at 693.

The Tenth Circuit agreed with ORA's first argument because the presence or absence of the confirmation letter in Citizens' files remained a disputed issue.[61] Establishing the letter's existence in Citizens' files would prevent the FDIC from asserting *D'Oench*, since the manifestation of both parties' obligations in the records would protect banking authorities from deception.[62]

The court also endorsed ORA's second challenge. While agreeing that the *D'Oench* doctrine did not require an intent to deceive, the Tenth Circuit observed that it did not bar all defenses to attempts to collect on promissory notes.[63] The court endorsed *Meo*'s "wholly innocent maker" rationale and found summary judgement based on *D'Oench* erroneous where the record failed to indicate any culpability on the part of the obligor.[64]

The Tenth Circuit dealt with one final issue in *Oklahoma Radio Associates*: whether to afford retroactive effect to FIRREA's extension of 12 U.S.C. § 1823(e). Throughout the district court proceedings, § 1823(e) covered the FDIC in its corporate capacity but not in its capacity as receiver.[65] While the case awaited appeal, FIRREA extended section 1823(e)'s protection to the FDIC as receiver.[66] FDIC argued that the court should give retroactive effect to FIRREA's extension of § 1823(e) and bar ORA's assertion of the alleged renewal agreement.[67] According to the FDIC, the renewal agreement's failure to comply with § 1823(e)'s strict requirements, prevented ORA from using the agreement as a defense to the FDIC's counterclaim.[68] Noting that its recent opinions refused to give retroactive effect to statutes and Supreme Court principles alike, the court declined to retroactively apply FIRREA's extension of § 1823(e).[69]

2. Analysis

Oklahoma Radio Associates is noteworthy for its adoption of the complete innocence exception to the *D'Oench* doctrine. As noted earlier, courts do not uniformly endorse this exception.[70] Recognition that *D'Oench* requires some showing of culpable conduct on the obligor's part narrows the doctrine's scope. Unfortunately, the Tenth Circuit provided little guidance for applying its precedent. The court furnished no indica-

61. *Id.* Both sides introduced conflicting evidence on this point. *See supra* notes 48, 49, and 51, and accompanying text.

62. *Oklahoma Radio Assocs.*, 987 F.2d at 692-93. The decision itself merely held that if ORA can establish that the renewal agreement was manifest in Citizens' records, *D'Oench* will not apply. *Id.* at 693. The court explained the basis for its holding while exploring defenses not barred by *D'Oench*. *Id.* at 691-92 (citing Howell v. Continental Credit Corp., 655 F.2d 743, 746 (7th Cir. 1981)).

63. *Oklahoma Radio Assocs.*, 987 F.2d at 693.

64. *Id.* at 694.

65. *Id.* at 695.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 695-96.

70. *See supra* note 39 and accompanying text.

tion of what type or degree of culpability would foreclose the complete innocence exception and invoke the *D'Oench* bar.

3. Tenth Circuit Decision: *Castleglen, Inc. v. RTC*[71]

The Tenth Circuit also addressed the scope of the *D'Oench* Doctrine and § 1823(e) of FIRREA in *Castleglen.* In that case, the court extended both doctrines' reach beyond contract defenses to preclude those based on affirmative tort claims.[72]

Castleglen, Inc. ("Castleglen") brought action against Commonwealth Savings ("Commonwealth") based on numerous affirmative state law tort claims.[73] These claims arose from Commonwealth's alleged misrepresentations regarding the profitability of an apartment project purchased by Castleglen. During the pendency of that action, Commonwealth was declared insolvent and the RTC, as conservator, was substituted as defendant.[74] The district court granted summary judgment in favor of the RTC, holding that both FIRREA § 1823(e) and *D'Oench* estoppel barred Castleglen's claims.[75]

On appeal, Castleglen challenged the district court's finding that both *D'Oench* and § 1823(e) barred affirmative tort claims.[76] Castleglen relied on the Tenth Circuit's holding in *Grubb v. FDIC*[77] in arguing that *D'Oench* prohibits contract claims based on misleading agreements, not affirmative claims of fraud.[78]

Because defenses sounding in tort have the same practical effect as those sounding in contract, the Tenth Circuit agreed with the district

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71. 984 F.2d 1571 (10th Cir. 1993).

72. *Id.* at 1577. The Tenth Circuit's decision in *Castleglen* also dealt with several other issues. Among the most important, to the scope of § 1823(e) and *D'Oench*, the court struck down Castleglen's attempt to take the case beyond the reach of the common law and the statutory doctrines by characterizing the transaction as a "credit enhancement transaction" rather than a loan. *Id.* at 1581. Regardless of appellation, *D'Oench* and § 1823(e) bar any oral agreement which contradicts what the bank has told banking authorities, or which forms any part of an effort to mislead banking authorities as to the bank's financial condition. *Id.*

73. Castleglen v. Commonwealth Sav. Ass'n, 728 F.Supp. 656 (D. Utah 1989). Castleglenn's state law tort claims included: fraud, misrepresentation, negligent misrepresentation, negligence, breach of fiduciary duty, and breach of an implied covenant of good faith and fair dealing. *Id.* at 659-60.

74. The events unfolded as follows. The Federal Home Loan Bank Board ("FHLBB") declared Commonwealth insolvent and appointed the FSLIC as conservator. *Id.* at 660. FHLBB then replaced the FSLIC as conservator with the FSLIC as receiver. *Id.* FSLIC chartered a new institution, Commonwealth Federal Savings ("Commonwealth Federal"), which it placed under its conservatorship. The FSLIC then caused Commonwealth Federal to purchase Commonwealth's assets. *Id.* The passage of FIRREA abolished the FSLIC and replaced it with the RTC. *Id.* at 660-61. Thus, the RTC as conservator for Commonwealth Federal was substituted as a defendant in this action for the insolvent Commonwealth. *Id.* at 661.

75. *Id.* at 678.

76. *Castleglen,* 984 F.2d at 1575.

77. 868 F.2d 1151 (10th Cir. 1989).

78. *Castleglen,* 984 F.2d at 1577. While *Grubb* did involve an affirmative fraud claim, the court in *Castleglen* denied that *Grubb* subjects the RTC (or FDIC) to such claims. *Id.* at 1578. Rather, the misrepresentation claim in *Grubb* resulted in a judgment invalidating notes held by the bank before the FDIC took over. *Id.* Hence, the invalidated notes failed to constitute FDIC assets in the first place. *Id.*

court that the *D'Oench* doctrine barred tort claims as well as contract defenses.[79] "If the *D'Oench* doctrine is to have any force, courts cannot permit debtors to evade its prohibitions simply by recasting their contract defenses as affirmative tort claims."[80]

Moreover, the court noted that while fraud in the factum provides a defense not subject to either *D'Oench* or § 1823(e), fraud in the inducement does not.[81] Castleglen's claim that Commonwealth's misrepresentation of the venture's profitability induced Castleglen to enter the agreement sounded in fraud in the inducement, as the misrepresentation did not prevent Castleglen from understanding the nature of the agreement.[82] The court concluded that in either a contract defense or an affirmative tort claim, *D'Oench* bars the obligator from asserting fraud in the inducement.[83]

Castleglen next argued that the district court drew improper inferences against it in granting summary judgment.[84] Castleglen pointed to several documents in Commonwealth's official records which supported an inference that a written agreement existed which guaranteed the venture's profitability.[85] With such an agreement allegedly manifested in Commonwealth's records, both parties' obligations would be apparent and banking authorities would not be deceived.[86] Absent deception, Castleglen concluded that it should prevail irrespective of whether *D'Oench* and § 1823(e) bar affirmative tort claims.[87]

While acknowledging that the evidence could suggest that Commonwealth expressed a certain belief regarding the venture's profitability, the court concluded that such evidence did not amount to a valid written agreement.[88] Noting that § 1823(e) and *D'Oench* serve to promote certainty in bank records, the court found that "[s]cattered evidence in corporate records from which one could infer the existence of an agreement" fails to promote certainty.[89]

4. Analysis

Unlike *Oklahoma Radio Associates*, which restrained *D'Oench* through a strict construction of the doctrine, *Castleglen* reflects an expansion of both *D'Oench* and § 1823(e). While *Oklahoma Radio Associates* indicates that

79. *See id.* at 1578.
80. *Id.* at 1577.
81. *Id.* at 1577-78.
> [V]oid contracts are not "assets" at all and so do not fall under the scope of § 1823(e)'s prohibition against side agreements "which tend to diminish or defeat the interest of the Corporation in any asset," while voidable contracts are true agreements and as such invoke the full force of the statute.

Id. at 1577.
82. *Id.* at 1578.
83. *Id.*
84. *Id.*
85. *Id.* at 1578-79 & 1578 n.4.
86. *See id.* at 1578.
87. *Id.*
88. *Id.* at 1579.
89. *Id.*

D'Oench requires some proof of culpability, *Castleglen* counters that the level of culpability need rise no further than allowing oneself to be fraudulently induced into an agreement. This result is consistent with the Supreme Court's decisions in *D'Oench* and *Langley*. An obligor "can be very ignorant and ill-informed of the character of the transaction"[90] and yet be precluded from using that ignorance to defeat the FDIC's or RTC's claim. Where an obligor fails to comprehend the terms of an agreement through no negligence on his part, however, neither an agreement nor an asset exists for *D'Oench* to shield.

Oklahoma Radio Associates also indicates that where a bilateral agreement may be shown to exist in a bank's records, a court cannot grant summary judgment to the FDIC based on *D'Oench* estoppel. *Castleglen* cautions that the written documents in a bank's files must unambiguously show the agreement rather than merely infer one. These holdings are consistent with the *Langley* and *D'Oench* purposes of upholding the reliability and certainty of financial institution records.

5. Conclusion

The Tenth Circuit's decisions in *Oklahoma Radio Associates* and *Castleglen* reflect the pro-regulatory bias inherent in both *D'Oench* and its statutory counterpart. That bias appears most vividly when prohibiting affirmative tort claims under the legal fiction that they represent agreements tending to deceive regulatory officials or to diminish assets in which either the FDIC or RTC has an interest. Only that rare debtor who qualifies as "wholly innocent" appears capable of eluding the *D'Oench* bar.

II. CORPORATE LAW

Despite the Supreme Court's broad proclamation in *Erie Railroad v. Tompkins*[91] that "there is no federal general common law,"[92] a growing body of federal common law governs piercing the corporate veil ("PCV") in areas of federal preeminence.[93] During the survey period, the Tenth Circuit addressed piercing through the alter ego doctrine in a case involving federal labor law issues. *NLRB v. Greater Kansas City Roofing*[94] adds to the quantity of federal PCV precedent in the circuit but does not appreciably alter the state of the law.

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90. Oklahoma Radio Assocs. v. FDIC, 987 F.2d 685, 693 (quoting D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 458-59 (1942)).

91. 304 U.S. 64 (1938).

92. *Id.* at 78.

93. *E.g.*, United Elec., Radio & Mach. Workers v. 163 Pleasant Street Corp., 960 F.2d 1080 (1st Cir. 1992) (ERISA); NLRB. v. Fullerton Transfer & Storage Ltd., 910 F.2d 331 (6th Cir. 1990) (federal labor dispute); Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105 (9th Cir. 1979) (suit to enforce labor contract under federal labor statute). *See generally* 1 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.90 (perm. ed. rev. vol. 1990) (discussing federal common law).

94. 2 F.3d 1047 (10th Cir. 1993).

A. *Federal Common Law of Piercing the Corporate Veil and the Alter Ego Doctrine:* NLRB v. Greater Kansas City Roofing[95]

A corporation is a legal entity, separate from its shareholders.[96] Among other things, this separateness—a fundamental principle of American corporate law—permits the limitation of shareholder liability to the amount of their investment in the corporation and consequently encourages individual investment in enterprise where it would otherwise fail for risk.[97] When use of this corporate form is sufficiently improper, however, the court may pierce the corporate veil to hold individual shareholders personally liable for the corporation's obligations.[98] Federal common law governs when a PCV issue arises in association with an area of federal preeminence.[99] State law may be used for guidance but does not control the outcome.[100]

The alter ego doctrine provides one formulation for piercing the corporate veil.[101] The term alter ego generally signifies that a corporation is merely an indistinguishable conduit for the shareholder's affairs.[102] Most federal courts agree that the alter ego doctrine permits piercing where: (1) there is such unity of ownership and interest among the shareholder and the corporation that the corporation no longer has a separate existence[103] and (2) recognition of the corporation's separate existence would sanction fraud or otherwise promote injustice.[104] Some circuits divide this last element into two parts, requiring proof of both fraud and injustice.[105]

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95. *Id.*

96. 18 C.J.S. *Corporations* § 8 (1990); 1 FLETCHER, *supra* note 91, § 41.

97. Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENV. U. L. REV. 1, 1-2 (1978).

98. 1 FLETCHER, *supra* note 93, § 41.

99. *See* NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 335 (6th Cir. 1990).

100. *Id.*

101. While it is uncertain whether the alter ego doctrine forms part of PCV law or exists as an independent ground for holding a shareholder personally liable, numerous commentators and courts have considered the doctrine in the context of PCV law and this survey shall follow the same convention. *See, e.g.*, Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

102. *Greater Kansas City*, 2 F.3d 1047, 1052 (10th Cir. 1993); 18 C.J.S. *Corporations* § 12 (1990).

103. The rationale behind this element is that if the shareholder disregards the separate identity of the corporation, the law likewise disregards the corporation's separateness to the extent necessary to protect the corporation's creditors. Faithfulness to corporate formalities "is the price paid for the corporate fiction, a relatively small price to pay for limited liability." Labadie Coal Co. v. Black, 672 F.2d 92, 97 (D.C. Cir. 1982).

104. *See, e.g., Greater Kansas City*, 2 F.3d at 1052; Pepsi-Cola Metropolitan Bottling Co., 754 F.2d 10, 16 (1st Cir. 1985); John Mohr & Sons v. Apex Terminal Warehouses, Inc., 422 F.2d 638, 642 (7th Cir. 1970); *see also* 1 FLETCHER, *supra* note 91, § 41.10. One author attacks this standard as a mere rehash of state law and suggests a particularized test for cases involving federal law. Note, *supra* note 101, at 865-66.

105. United Elec., Radio and Mach. Workers v. 163 Pleasant Street, 960 F.2d 1080, 1093 (1st Cir. 1992); United Steel Workers v. Conners Steel Co., 855 F.2d 1499, 1507 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989).

1. Tenth Circuit Decision: *NLRB v. Greater Kansas City Roofing*[106]

The Greater Kansas City Roofing Company ("GKC") operated as a sole proprietorship until November of 1985.[107] Labor law violations and financial difficulties contributed to the business' eventual demise. In 1983, the National Labor Relations Board ("NLRB") found GKC guilty of unfair labor practices and entered a monetary judgement of $133,742.47 against GKC.[108] Adding to its predicament, GKC had borrowed a significant amount from the proprietor's sister in law, Tina Clarke, to cope with its monetary troubles.[109]

Convinced that GKC would fail, Tina Clarke accepted business assets in lieu of foreclosure.[110] In October of 1985, she incorporated The New Greater Kansas City Roofing Company ("New GKC") in order to continue the business operations of GKC.[111] At the time she formed New GKC, Tina Clark did not know that GKC had committed unfair labor practices,[112] nor did she know that the NLRB had an outstanding judgment against GKC.[113] GKC's unfair labor practices came to haunt Tina Clark when New GKC substantially continued GKC's business and when she failed to adhere to corporate formalities in operating New GKC.[114]

In 1988, the NLRB General Counsel attempted to collect on the judgment from New GKC and its sole shareholder, Tina Clarke. An administrative law judge (ALJ) found that New GKC, as the alter ego of its predecessor, should assume GKC's obligations but refused to pierce New GKC's veil to hold Tina Clarke personally liable.[115] The NLRB General Counsel filed exceptions, and a three-member NLRB panel overturned the ALJ's refusal to pierce New GKC's veil.[116] Declaring itself not "limited to piercing the corporate veil only in cases where the corporate status is used to perpetrate fraud,"[117] the NLRB based its decision to pierce on Tina Clark's intermingling of her affairs with those of New GKC[118] and her failure to follow corporate formalities.[119]

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106. 2 F.3d 1047 (10th Cir. 1993).
107. *Id.* at 1049.
108. *Id.* at 1049 & n.3.
109. *Id.* at 1050. At one point, GKC had borrowed $48,000 from Tina Clark. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* The ALJ saw no justification for piercing New GKC's veil as he concluded that Tina Clarke did not sufficiently intermingle her affairs with those of New GKC and did not use New GKC's corporate form " 'to perpetrate fraud, evade existing obligations, or circumvent a statute.' " *Id.* (quoting the ALJ without citation).
116. *Id.* at 1051.
117. *Id.* (citing Supplemental Decision & Order, at 3).
118. For example, Tina Clarke paid the corporate payroll using personal funds, without making a formal loan agreement, and received corporate funds in repayment of that informal loan. *Id.* at 1050. Moreover, she intermingled the business affairs of New GKC with her escort service, Affaire d'Amour. *Id.*
119. New GKC apparently had no bylaws, accounts, stock, or corporate records and held no meetings. *Id.* The NLRB based its decision on its precedent in NLRB v. Concrete Mfg. Co., 262 N.L.R.B. 727, 729 (1982). While that case cited intermingling of affairs to the point

The case came before the Tenth Circuit on application for enforcement of the NLRB order.[120] After noting that federal law governed the issue,[121] the court overruled the NLRB decision.[122]

Piercing the veil under the alter ego doctrine required proof of two elements. The first element considered was whether there existed "such unity of interest and lack of respect given to the separate identity of the corporation that the personalities and assets of the corporation by its shareholders and the individual are indistinct."[123] The second element inquires if "adherence to the corporate fiction [would] sanction a fraud, promote injustice, or lead to an evasion of legal obligations."[124]

After announcing the appropriate test, the court provided instructions for its application. The court broke the first element down into two further considerations: (1) the degree to which shareholders have observed corporate formalities and (2) the degree to which shareholders have commingled their assets and affairs with those of the corporation.[125]

Regarding the second prong, the court explained that the requisite showing of inequity must "flow from the misuse of the corporate form."[126] Moreover, the individual sought to be held personally liable "must have shared in the moral culpability or injustice that is found to satisfy the second prong of the test."[127]

Applying the test to the facts of the case, the court found the evidence insufficient to establish the second element and on that basis alone refused to enforce the NLRB order.[128] While Tina Clarke may have failed to observe corporate formalities, her failure neither constituted fraud nor created injustice. Since she formed New GKC long after the unfair labor practices had occurred, the court found "no link between Tina Clarke's sloppy manner of conducting business under New GKC and any fraud, injury or injustice to the former employees of GKC . . . with regard to the unfair labor practices that gave rise to this back-pay order."[129]

2. Analysis

The Tenth Circuit's decision in *Greater Kansas City* does not depart from precedent. As noted in the decision, prior Tenth Circuit decisions

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of inseparableness as one instance in which the Board would disregard the corporate form, it listed numerous other instances involving fraud or injustice as well. The case turned on the defendants knowingly siphoning off corporate assets to avoid satisfying a back-pay judgement. *Id.*

120. *Greater Kansas City*, 2 F.3d at 1049.

121. *Id.* at 1051 (citing NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 335 (6th Cir. 1990)).

122. *Id.* at 1051.

123. *Id.* at 1052.

124. *Id.*

125. *Id.*

126. *Id.* at 1053.

127. *Id.*

128. *See id.* at 1055 & n.4.

129. *Id.* at 1055.

have utilized the two-part test for piercing the corporate veil under the federal common law alter ego doctrine.[130]

Greater Kansas City is notable for its emphasis of the test's second element. In support of its two prong test, *Greater Kansas City* cites *United States v. VanDiviner*[131] and *Milgro Electronics v. United Business Communications.*[132] These decisions provide detailed tests for determining "separateness" and make specific findings under those tests.[133] Neither decision, however, provides a similar test for evaluating fraud, unfairness, or evasion of a legal obligation.[134] Moreover, while *VanDiviner* makes specific findings regarding injustice,[135] *Milgro Electronics* holds that proof of fraud is unnecessary to establish injustice.[136]

Thus, *Greater Kansas City*'s reliance on the absence of fraud, injustice, or evasion of a legal obligation in refusing to pierce[137] emphasizes that these elements must be present in a successful cause of action under the federal common law alter ego doctrine. It also specifies the that the requisite showing under the second prong must prove a nexus between the improper use of the corporate form, the resultant injustice, the party sought to be charged, and the injured party.

CONCLUSION

Past commercial law Surveys have noted the Tenth Circuit's tendency to broadly construe federal banking regulators' authority in order to enhance their ability to remedy the savings and loan debacle.[138] While *Castleglen* continues this tradition, *Oklahoma Radio Associates* may signal a

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130. *See, e.g.*, Anderson v. Deere & Co., 852 F.2d 1244, 1247 (10th Cir. 1988); United States v. VanDiviner, 822 F.2d 960, 964 (10th Cir. 1987); Milgro Elec. Corp. v. United Business Communications, Inc., 623 F.2d 645, 659 (10th Cir. 1980), *cert. denied*, 449 U.S. 1066 (1980).

131. 822 F.2d 960 (10th Cir. 1987).

132. 623 F.2d 645 (10th Cir. 1980), *cert. denied*, 449 U.S. 1066 (1980).

133. *VanDiviner*, which addresses the application of the alter ego doctrine to a closely held corporation, provides an eight factor test for analyzing "separateness." *VanDiviner*, 822 F.2d at 965. These factors include:

> (1) whether the corporation is operated as a separate entity; (2) commingling of funds and other assets; (3)failure to maintain adequate corporate records or minutes; (4) the nature of the corporation's ownership and control; (5) absence of corporate assets and undercapitalization; (6) use of a corporation as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and (8) diversion of the corporation's funds or assets to non-corporate uses.

Id.

Milgro Electronics provides a similar test for application to parent-subsidiary relationships. *Milgro*, 623 F.2d at 660 (citing Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940)).

134. *VanDiviner*, 822 F.2d at 964-65; *Milgro Electronics*, 623 F.2d at 658-62.

135. *VanDiviner*, 822 F.2d at 965. No evidence supported finding that the defendant "misused or abused the corporate form in a way that would threaten injustice to the government." *Id.*

136. *See Milgro Electronics*, 623 F.2d at 662.

137. *See supra* notes 128-30 and accompanying text.

138. Timothy K. Jordan, Survey, Commercial Law, 70 DENV. U. L. REV. 685 (1993); Michelle Rabouin & Anthony M. Leo, Survey, Corporate and Commercial Law, 69 DENV. U. L. REV. 907 (1992).

restrictive trend. The Tenth Circuit's willingness to limit the FDIC's and RTC's enforcement powers, however, should not be overstated. Although *Oklahoma Radio Associates* endorsed the complete innocence exception to *D'Oench* estoppel, this exception applies to an extremely narrow category of debtors.

In the area of corporate law, the Tenth Circuit examined piercing the corporate veil under the alter ego doctrine. *Greater Kansas City* faithfully adhered to established precedent. The decision's primary contribution lies in its detailed instructions for applying the alter ego doctrine to PCV issues.

Suzanne C. Pysher

CONSTITUTIONAL LAW SURVEY

INTRODUCTION

During the survey period, the Court of Appeals for the Tenth Circuit handed down three important constitutional decisions. *Adolph Coors Co. v. Bentsen*[1] and *Cannon v. City and County of Denver*[2] gave the Tenth Circuit an opportunity to better define its approach to freedom of speech under the First Amendment. The *Coors* case addressed whether a federal ban on beer labels that announced alcohol content violated commercial speech rights.[3] In *Cannon*, abortion protestors arrested for carrying signs that read "The Killing Place" claimed the arrests violated their speech rights.[4] The case presented the Tenth Circuit with its first opportunity to apply and define the 'fighting words' doctrine. The third case involved the nascent constitutional right of familial association. In *Griffin v. Strong*,[5] the Tenth Circuit grounded the right in the Fourteenth Amendment and consequently altered the analytical approach on which it had relied in earlier cases.[6]

I. COMMERCIAL SPEECH: *ADOLPH COORS CO. V. BENTSEN*[7]

A. *Background*

In 1942, the Supreme Court in *Valentine v. Chrestensen*[8] refused to recognize constitutional limitations on government's ability to prohibit speech of a "purely commercial" nature.[9] In spite of its categorical disposal of the issue, the Court spent the next thirty-five years retreating from this holding. During this period, the Court published a series of decisions suggesting that speech made for commercial purposes should receive some protection.[10]

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1. 2 F.3d 355 (10th Cir. 1993). This case reached the Tenth Circuit first as Adolph Coors Co. v. Brady, 944 F.2d 1543 (10th Cir. 1991), in which the court remanded for further factual findings. References to this earlier case are *Coors I*. References to Adolph Coors v. Bentsen, 2 F.3d 355 (10th Cir. 1993) are *Coors II*.

2. 998 F.2d 867 (10th Cir. 1993).

3. *Coors II*, 2 F.3d at 356.

4. *Cannon*, 998 F.2d at 869.

5. 983 F.2d 1544 (10th Cir. 1993).

6. *Id.* at 1547.

7. 2 F.3d 355 (10th Cir. 1993).

8. 316 U.S. 52 (1942). In *Valentine*, an entrepreneur brought suit to enjoin the New York City Police from enforcing a law which prohibited distribution of "commercial . . . advertising matter" in public places. *Id.* at 53 n.1.

9. *Id.* at 54. Oddly, the brief opinion (less than three pages) offered no supporting precedential authority. For further discussion of the Court's cursory handling of *Valentine*, see Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 754-58 (1993). Among other peculiarities, Kozinski and Banner note that *Valentine* ranks among the most quickly decided cases in the Court's history. *Id.* at 757 (opinion released 13 days after oral arguments and only 9 days after conference).

10. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (giving newspaper right to publish advertisement for abortion referral service); New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (upholding right of newspaper to publish paid political advertisement);

The Court's retreat from *Valentine* culminated in the 1976 decision, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[11] in which the Court found unconstitutional a state law that prohibited pharmacists from advertising the prices of their drugs.[12] The Court balanced the governmental and private interests but stopped short of articulating an actual test for determining when government action violated commercial speech rights.[13] In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[14] the Court resumed where it had left off in *Virginia Citizens* by articulating a four-part test for determining when a challenged commercial speech regulation is constitutional. First, the speech must "concern lawful activity and not be misleading."[15] Second, the government must be asserting a "substantial" interest.[16] If these two threshold tests are met, then the court must, third, "determine whether the regulation directly advances the governmental interest asserted," and fourth, "whether it is not more extensive than is necessary to serve that interest."[17]

In a 1986 decision, the Court created some confusion with its treatment of *Central Hudson*'s third prong. In *Posadas de Puerto Rico Associates. v. Tourism Co.*,[18] the Court found that a ban on casino gambling advertisements satisfied *Central Hudson*'s third prong because the Puerto Rico Legislature *reasonably believed* that the ban would directly advance its asserted interest.[19] To some commentators, the Court's reliance on the reasonable

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Commarano v. United States, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring) (asserting the holding in *Valentine* had not "survived reflection"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (recognizing that motion pictures are protected by the First Amendment); Martin v. City of Struthers, 319 U.S. 141, 148-49 (1943) (invalidating city ordinance that prohibited door-to-door solicitation for the purpose of distributing handbills as applied to advertisements for a religious meeting). The Court distinguished most of these types of cases from *Valentine* based on the additional presence of other clearly protectable interests. *See, e.g.*, Jamison v. State, 318 U.S. 413, 417 (1943) (distinguishing distribution of commercial handbills from *Valentine* because challenged handbills invited the purchase of religious literature).

11. 425 U.S. 748 (1976). *Virginia Citizens* put squarely before the Court the issue of "whether speech which does no more than propose a commercial transaction . . . lacks all [constitutional] protection." *Id.* at 762 (quotation marks and citations omitted).

12. *Id.* at 770. For a discussion of the Court's retreat from *Valentine* leading up to its decision in *Virginia Citizens*, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 890-92 (2d ed. 1988). *See also* EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 41-49 (1985).

13. *Virginia Citizens*, 425 U.S. at 762-70 (1976). The Court strongly suggested, however, that commercial speech deserved less constitutional protections than other varieties. *Id.* at 770-73. For example, the Court said that false or misleading commercial speech would not be protected. *Id.* at 771. For some of the policy concerns underlying the Court's insistence on treating commercial speech differently than other types, see Ohralik v. Ohio State Bar Ass'n, 436 U.S 447, 456 (1978) (fear that giving equal protection to commercial speech would ultimately dilute the traditional protections afforded non-commercial speech).

14. 447 U.S. 557 (1980). In *Central Hudson*, a public utility company challenged a regulation that prohibited it from advertising to promote the use of electricity. *Id.* at 558-61.

15. *Id.* at 566.

16. *Id.*

17. *Id.*

18. 478 U.S. 328 (1986).

19. *Id.* at 341-42. The ban in question only affected advertising aimed at residents of Puerto Rico, not tourists. *Id.* at 330. The Court found that the Puerto Rico Legislature's asserted interest of protecting its citizens from the harmful effects of gambling was substantial, thus satisfying the second prong of the *Central Hudson* test. *Id.* at 341.

belief standard signalled the beginning of a more deferential approach toward government limitations on commercial speech.[20]

Recently, the Court indicated that *Central Hudson*'s third prong still provided significant constitutional protection to commercial speech. In *Edenfield v. Fane*,[21] the Court held that to satisfy the third prong of *Central Hudson* the government must show that a challenged restriction "will in fact alleviate [the recited harms] to a material degree."[22] The Court emphasized that challenged legislation could not be based on mere legislative "speculation."[23] The *Edenfield* decision directly contradicted *Posadas* with respect to *Central Hudson*'s third prong, but the Court made no effort to reconcile the two decisions.

B. Adolph Coors Co. v. Bentsen:[24] *The Tenth Circuit Gives Strong Protection to Commercial Speech*

In 1987, Adolph Coors Company ("Coors") made a request to the Bureau of Alcohol, Tobacco and Firearms ("BATF") seeking approval to incorporate the alcohol content of its beer into advertisements and labeling.[25] Pursuant to 27 U.S.C. § 205(e)(2) and (f)(2) (1988), the BATF refused to grant the approval.[26] Congress enacted the challenged bans to prevent malt beverage brewers from engaging in "strength wars" over the alcohol content of their beers.[27] Coors sued, claiming unconstitutional infringement of its speech in violation of the First Amendment.[28]

Coors's case against the BATF came before the Tenth Circuit Court of Appeals for the first time as *Adolph Coors Co. v. Brady*.[29] The court of appeals remanded the case to the district court because genuine issues of material fact existed as to whether the challenged regulation "directly ad-

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20. *See* Terrence Leahy, *A Game of Chance: Commercial Speech After Posadas*, A.B.A. J., Sept. 1, 1988, at 58, 60. More recently, the fourth prong of the *Central Hudson* test has come under undoubted revisionary weakening. In the 1989 case, Board of Trustees v. Fox, 492 U.S. 469 (1989), the Supreme Court held that the fourth prong of the test only requires that there be a reasonable "fit" between the legislative means and its asserted goal. *Id.* at 480. The Court rejected the idea that *Central Hudson* requires that the challenged regulation be "the least restrictive means" available. *Id.*; *see Central Hudson*, 447 U.S. at 564 ("[i]f the governmental interest could be served as well by a more limited restriction . . ., the excessive restrictions cannot survive"). One critic has argued that, taken together, the decisions in *Posadas* and *Fox* effectively lower the standard of review in commercial speech cases from intermediate scrutiny to a rational basis review. *See* Albert P. Mauro Jr., *Commercial Speech After Posadas and Fox: A Rational Basis Wolf in Intermediate Sheep's Clothing*, 66 TUL. L. REV. 1931, 1951-54 (1992).

21. 113 S. Ct. 1792 (1993).

22. *Id.* at 1800.

23. *Id.*

24. 2 F.3d 355 (10th Cir. 1993) (*Coors II*).

25. *Id.* at 356. Coors's request to make public the alcohol content of its beer stemmed from its desire to end its reputation as a brewer of weak beer. Adolph Coors Co. v. Brady, 944 F.2d 1543, 1549 (10th Cir. 1991) (*Coors I*), *appeal after remand*, 2 F.3d 355 (1993).

26. *Coors II*, 2 F.3d at 356. Section 205(e)(2) prohibits malt beverage brewers from including in their labeling "statements of, or statements likely to be considered statements of, alcohol content of malt beverages." 27 U.S.C. § 205(e)(2) (1988). Section 205(f)(2) proscribes the same statements from inclusion in advertising. 27 U.S.C. § 205(f)(2) (1988).

27. *Coors II*, 2 F.3d at 356.

28. *Id.*

29. 944 F.2d 1543 (10th Cir. 1991) (*Coors I*), *appeal after remand*, 2 F.3d 355 (1993).

vance[d] the government's asserted interest . . . and whether the complete prohibition of such advertising result[ed] in a 'reasonable fit' between the legislature's goal and the means chosen to reach it."[30] On remand, the district court found the ban constitutional with respect to advertising but unconstitutional in its prohibition against including statements of alcohol content in labeling.[31] The trial court concluded that the labeling ban failed the third and fourth prongs of *Central Hudson* in that it neither directly advanced nor reasonably fit the legitimate government goal of preventing strength wars.[32] The Government appealed.

The Government placed the Supreme Court's holding in *Posadas*[33] at the heart of its appeal. The Government argued that as long as Congress *reasonably believed* the labeling ban would help prevent strength wars, the ban satisfied *Central Hudson*'s third prong.[34] After the Government filed its appellate brief, the Supreme Court handed down its decision in *Edenfield v. Fane*.[35] This development gave the Tenth Circuit the opportunity to determine unequivocally the degree to which it would protect commercial speech.[36]

The court of appeals did not hesitate in asserting its preference for the decision in *Edenfield* over the one in *Posadas*. After noting with approval the Supreme Court's decision in *Edenfield*, the court said that the Government had the burden of showing that the labeling ban "in fact alleviate[s]" the harm of strength wars "to a material degree."[37]

The court of appeals went on to discuss why the labeling ban did not directly advance the legitimate government goal of preventing strength wars. The court noted that Coors only requested permission to publish purely factual information, as opposed to the kinds of descriptive labeling devices that would arguably lead to strength wars.[38]

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30. *Id.* at 1554. In other words, the court of appeals found that issues of fact remained with respect to the third and fourth prongs of the *Central Hudson* test.

31. *Coors II*, 2 F.3d at 357.

32. *Id.* The district court held that the ban failed to satisfy the first and second prongs of the *Central Hudson* test.

33. 478 U.S. 328 (1986).

34. *Coors II*, 2 F.3d at 358.

35. 113 S. Ct. 1792 (1993).

36. In *Coors I*, the Court of Appeals for the Tenth Circuit's language strongly suggested that it favored a more stringent reading of *Central Hudson*'s third prong than the Supreme Court had adopted in *Posadas*. Focusing on the Supreme Court's original articulation in *Central Hudson*, the court asserted that "[t]here must be an 'immediate connection' between the prohibition and the government's asserted end." *Coors I*, 944 F.2d at 1549 (quoting *Central Hudson*, 447 U.S. at 569). However, until *Edenfield*, *Posadas* was the Supreme Court's most recent interpretation of *Central Hudson*'s third prong. Under *Posadas*, the government's argument appeared sound.

37. *Coors II*, 2 F.3d at 357 (quoting *Edenfield*, 113 S. Ct. at 1800).

38. *Id.* at 358-59. Part of the Government's argument relied on its experiences in the relatively small malt liquor industry. *See id.* at 358 n.4 (malt liquors represent three percent of total market). Malt liquor is a generic description used to designate those malt beverages with the highest alcohol content. *Id.* It has been the BATF's experience that consumers of malt liquor favor it precisely because of this attribute. Accordingly, brewers have often tried illegally to advertise and label their malt liquors in a manner that is strongly suggestive of high alcohol content. *Id.* at 358 (citing use of descriptions such as "power," "dynamite," and "bull").

The court then pointed to three reasons why the Government's ban on purely factual labeling would not achieve its asserted goal. First, evidence elicited at trial suggested that strength wars did not pose a problem in states or other countries that required alcohol content labeling.[39] Second, according to undisputed evidence, American brewers had no intention of increasing the alcohol content of their beers, because increased alcohol detracts from taste and increases calories, both of which concern American consumers.[40] The court based its third reason on the fact Coors' request to publish the alcohol content of its beers was motivated by its reputation as a brewer of weak beers.[41] The court of appeals reasoned that if the BATF permitted Coors to publish this information on its labels, any incentive Coors might have to strengthen its beers would disappear.[42]

In light of these weaknesses, the court of appeals found the Government's assertion that the labeling was necessary to prevent strength wars "based on mere speculation and conjecture."[43] Continuing in the language of *Edenfield*, the court said the Government had failed "to show that the prohibition advances the Government's interest in a direct and material way."[44] The court of appeals concluded that the challenged ban did not satisfy the third prong of *Central Hudson* and therefore unconstitutionally infringed on Coors' First Amendment rights.[45]

C. *Analysis*

One of the most pervasive themes in the debate over how much protection commercial speech should receive has been the tension between government's role as a protector of its citizens and the opposing notion that consumers in a free market economy should be able to make their own decisions as to what is in their best interest.[46] The test devised by the

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39. *Id.* at 358. Section 205(e)(2) makes an exception for when alcohol content labeling is required by state law. *See* 27 U.S.C. § 205(e)(2) (1988).

40. *Coors II*, 2 F.3d at 359.

41. *Id.*

42. *Id.*

43. *Id.*; *see supra* note 27 and accompanying text.

44. *Coors II*, 2 F.3d at 359 (footnote omitted).

45. *Id.* at 359 n.6.

46. Nowhere in commercial speech commentary is this theme more evident than in the debate over restrictions on cigarette advertising. *See, e.g.*, Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988) (arguing that cigarette advertising can and should be constitutionally banned); *Remarks by Michael Gartner*, 56 U. CIN. L. REV. 1173, 1178-79 (1988) (arguing that there should be no limitations on commercial speech, including cigarette advertising). Collateral to the paternalism/consumer choice theme is the issue of whether commercial speech is the type of speech the authors of the First Amendment intended to protect. The Supreme Court tackled this issue in *Virginia Citizens* with the following reasoning:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public

Supreme Court in *Central Hudson* provided a balanced approach to this tension. Since *Central Hudson*, the Supreme Court has allowed this balance to slip in favor of government regulation.[47]

In recognizing that commercial speech is entitled to First Amendment protection, the Supreme Court did not hold that commercial speech "is wholly undifferentiable from other forms."[48] Despite its emphasis on the public's interest in being well informed, the Court asserted that commercial speech should not be entitled to the same protections as non-commercial varieties.[49] The justifications for this distinction were well-founded. Even though consumers may be seen as the end beneficiaries of commercial speech protection,[50] the demand for this protection is primarily driven by corporate profit motives. This characteristic, combined with consumer reliance on offered information, creates a serious threat of harm if the government is not able to regulate commercial speech. Part of the government's role in this respect is to keep the commercial information given to consumers from becoming disinformation. As the Supreme Court asserted in *Central Hudson*,[51]

> [t]he First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.[52]

The paternalistic role of government, however, is tempered by the libertarian notion that citizens of a democratic society should be free to make enlightened decisions as "to their own best interests."[53] A foundational principle captured by the Court's rationale in *Virginia Citizens* is that consumers are the ultimate profiteers from commercial speech protection. It should be noted that the plaintiffs in *Virginia Citizens* were consum-

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> decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Virginia State Bd. of Pharmacy v. Virginia Citizens, 425 U.S. 748, 765 (1976)(citations omitted).

47. *See* Bd. of Trustees v. Fox, 492 U.S. 469 (1989); Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986); *see also* Mauro, *supra* note 20.

48. *Virginia Citizens*, 425 U.S. at 771 n.24.

49. *Id.* Distinguishing between speech that is commercial and other varieties is a complete issue in itself. The Court in *Virginia Citizens* said that the difference is a matter of "commonsense," *id.*, a means of distinction on which the Court continued to rely. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978). For a brief discussion of this issue, see TRIBE, *supra* note 12, at 894.

50. *See infra* notes 54-56 and accompanying text.

51. 447 U.S. 557 (1980).

52. *Id.* at 563 (citations omitted). The Supreme Court has also shown a concern for the diluent effect that might occur from treating commercial and non-commercial speech equally.

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection. . . .

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

53. *Virginia Citizens*, 425 U.S. at 770.

ers of prescription drugs, not sellers.[54] These consumers claimed "they would greatly benefit if the prohibition were lifted and advertising freely allowed."[55] The Court emphasized that a "particular consumer's interest in the free flow of commercial information" is often greater "than his interest in the day's most urgent political debate."[56] When the Supreme Court articulated the test in *Central Hudson*, it recognized that government's ability to regulate commercial speech should be carefully restricted to insure that consumers' interest in self-determination is protected.[57] The third prong of the *Central Hudson* test now acts as the primary repository of this protection.[58] According to the Court's decision in *Central Hudson*, this third prong requires direct advancement of the substantial government interest.[59]

When the Court of Appeals for the Tenth Circuit decided *Adolph Coors Co. v. Bentsen*,[60] the opposing parties presented conflicting Supreme Court precedent in support of their arguments. The government argued *Posadas de Puerto Rico Associates v. Tourism Co.*,[61] a decision that offered a weakened version of *Central Hudson*'s third prong. Coors countered by arguing that the more recent *Edenfield v. Fane*[62] decision reinvigorated the *Central Hudson* test. Unfortunately, the Supreme Court made no efforts to distinguish its decision in *Edenfield* from the irreconcilable position in *Posadas*. The Tenth Circuit had a choice between two interpretations of the law. It rightfully chose to follow the Supreme Court's lead in *Edenfield*, and consequently gave commercial speech the protection that consumers deserve.

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54. *Id.* at 753. The consumers challenged the validity of a state law forbidding licensed pharmacists from advertising the prices of prescription drugs. *Id.* at 749-50.

55. *Id.*

56. *Id.* at 763.

57. *See Central Hudson*, 447 U.S. at 561-66.

58. Since the Court's decision in Board of Trustees v. Fox, 492 U.S. 469 (1989), which held that *Central Hudson*'s fourth prong requires only a reasonable "fit" between the legislative means and the asserted goal, the third prong of the test is arguably left as the only significant check on government regulation of commercial speech. Most commentators agree that *Fox* severely weakened the fourth prong. *See* Mauro, *supra* note 20, at 1951-54; Todd J. Locher, Comment, Board of Trustees of the State University of New York v. Fox: *Cutting Back on Commercial Speech Standards*, 75 IOWA L. REV. 1335 (1990); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 378-80 (1990); David Rownd, Comment, *Muting the Commercial Speech Doctrine:* Board of Trustees of the State University of New York v. Fox, 38 WASH. U. J. URB. & CONTEMP. L. 275 (1990).

59. *Central Hudson*, 447 U.S. at 566.

60. 2 F.3d 355 (10th Cir. 1993).

61. 478 U.S. 328 (1986).

62. 113 S. Ct. 1729 (1993).

II. THE FIGHTING WORDS DOCTRINE: *CANNON V. CITY AND COUNTY OF DENVER*[63]

A. *Background*

A fundamental and settled principle of constitutional law declares that government cannot limit speech because of its content.[64] This principle, however, is not absolute. There are circumstances in which the Supreme Court has given its approval to content-based limitations on speech.[65] In its 1940 decision *Cantwell v. Connecticut*,[66] the Supreme Court set the foundation for such an exception when it said that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under [the Constitution]."[67]

In *Chaplinsky v. New Hampshire*,[68] the Supreme Court borrowed this language from *Cantwell* to support its decision denying Constitutional protection to words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[69] The Court termed such utterances "fighting words."[70] The Court reasoned, "[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

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63. 998 F.2d 867 (10th Cir. 1993).

64. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

65. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (untruthful or misleading commercial speech not protected); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity not constitutionally protected); Beauharnais v. Illinois, 343 U.S. 250, 263 (1952) (upholding state stature that prohibited libel); Feiner v. New York, 340 U.S. 315, 321 (1951) (speech that is an "incitement to riot" not constitutionally protected).

66. 310 U.S. 296 (1940).

67. *Id.* at 309-10. In *Cantwell*, a man was convicted for a breach of the peace for his solicitation of people on a public street to listen to a phonograph that contained strong verbal attacks on Catholicism, the religion of the listeners. *Id.* at 308-09. The phonograph provoked the listeners to near-violent reactions. *Id.* In reversing the defendant's conviction, the Court found that the defendant's conduct involved:

> no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

Id. at 310.

68. 315 U.S. 568 (1942).

69. *Id.* at 572 (footnote omitted). In *Chaplinsky*, the Court upheld the conviction of a man who called a police officer "a God damned racketeer" and a "damned Fascist." *Id.* at 569.

The quoted statement of the law has been interpreted as articulating a two-part disjunctive test. *See* TRIBE, *supra* note 12, § 12-8, at 837-39. The Court based its decision in *Chaplinsky* on the tendency of the arrested speaker's words to "cause a breach of the peace." *Chaplinsky*, 315 U.S. at 574. The part of the test that denies protection to those words "which by their very utterance inflict injury" has never been the basis of a Supreme Court decision to validate speech suppression. Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1137 (1993).

70. *Chaplinsky*, 315 U.S. at 572.

derived from them is clearly outweighed by the social interest in order and morality."[71]

The Court's decision in *Chaplinsky* established what is known as the "fighting words doctrine."[72] Prior to this survey period, the United States Court of Appeals for the Tenth Circuit had not taken an opportunity to apply this exception to content-based limitations on speech.[73]

B. Cannon v. City and County of Denver:[74] *The Tenth Circuit Definitively Applies the Fighting Words Doctrine*

The issues in *Cannon* arose when police arrested two abortion protestors for carrying signs that read "The Killing Place" on the sidewalk in front of an abortion clinic.[75] The man and woman arrested sued the two arresting officers under § 1983 claiming that the arrests violated their First Amendment right to free speech.[76] The officers based their defense on qualified immunity, claiming that the plaintiffs' First Amendment rights were not clearly established at the time of the arrests.[77] They argued that signs reading "The Killing Place" constituted fighting words and were, therefore, not entitled to First Amendment protection.[78]

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71. *Id.* (citing ZECHARIA CHAFEE., FREE SPEECH IN THE UNITED STATES 150 (5th prtg. 1941)).

72. *See* Beth C. Boswell-Odum, Note, *The Fighting Words Doctrine and Racial Speech on Campus*, 33 S. TEX. L. REV. 261 (1992).

73. The Tenth Circuit has mentioned fighting words in three cases prior to the survey period, but in all three the court discussed the doctrine briefly and only in passing. *See* United States v. Rising, 867 F.2d 1255, 1258 (1989); Jones v. Wilkinson, 800 F.2d 989, 994 (1986), *aff'd*, 480 U.S. 926 (1987); Fisher v. Walker, 464 F.2d 1147, 1160 (1972).

74. 998 F.2d 867 (10th Cir. 1993).

75. *Id.* at 869. The officers charged the plaintiffs with disturbing the peace, and the city later dismissed the charges. *Id.* The day of the arrests was only one of many in an ongoing protest against the abortion services of the Rocky Mountain Planned Parenthood clinic at the corner of East 20th Avenue and Vine Street in Denver. *Id.*; Ann Carnahan, *Protestors, Denver Settle*, ROCKY MTN. NEWS, Sept. 29, 1993, at 4A. Police had arrested one of the plaintiffs several months before for assaulting a patient. *Cannon*, 998 F.2d at 869. Officer Ryan-Fairchild, one of the defendants, was an off-duty police officer whom the clinic had hired as a private security guard. *Id.* On the day of the arrests, Officer Ryan-Fairchild had to restrain a man who became incensed by the plaintiffs' signs. *Id.* The other officer, Officer Baca, was on duty and became involved in the arrest when he stopped to monitor the situation. *Id.* It is not clear from the court's presentation of the facts if the signs in question had always been part of the protests, but their content clearly provoked the arrests. *Id.* at 871 ("the activity which the police found objectionable was not the picketing itself but the specific content of the protestors' signs").

76. *Cannon*, 998 F.2d at 869. Section 1983 provides a federal tort remedy when persons acting under color of state law deprive a plaintiff of a federally protected right. 42 U.S.C. § 1983 (1988); Parrat v. Taylor, 451 U.S. 527, 535 (1981).

77. *Cannon*, 998 F.2d at 871. A government official who is performing a discretionary duty is exempt from liability for civil damages under § 1983 so long as her conduct "does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

78. *Cannon*, 998 F.2d at 872. The police officers arrested the plaintiffs with the understanding that Denver County Judge Soja had ruled that words such as "killer" would be considered "fighting words." *Id.* at 869. Officer Ryan-Fairchild heard of this supposed ruling from another officer, Officer Yates, who had spoken with Judge Soja about abortion protestors and their legal rights. *Id.* at 869, 875 n.8. In fact, Judge Soja made no such ruling. *Id.* at 875 n.8. In the conversation on which Officer Ryan-Fairchild relied, Judge Soja was not speaking in his official judicial capacity but merely giving some informal advice to Officer

The federal district court granted the defendants qualified immunity.[79] The plaintiffs' appealed the issue of whether they had a clearly established constitutional right to carry signs reading "The Killing Place" at the time of their arrests.[80] A finding that the plaintiffs did have a clearly established right would remove the defendants' qualified immunity.[81] Resolving this issue required the court of appeals to determine whether the plaintiffs' signs fell within the definition of fighting words. If the defendant officers could make "a showing sufficient to establish the fighting words defense,"[82] then the plaintiffs' rights would be judged as not clearly established and the grant of qualified immunity would be upheld.

The court of appeals first turned its attention to the Supreme Court cases in an effort to synthesize the prior holdings into its own cogent statement of the law. The court looked for guidance from its *Chaplinsky v. New Hampshire*[83] decision and three subsequent Supreme Court decisions.[84] From *Chaplinsky* the court of appeals found the idea that fighting words "are no essential part of any exposition of ideas."[85] Looking at *Cohen*, the court emphasized that the alleged fighting words must be "directed to the person of the hearer."[86] From *Terminiello* and *Feiner* the court of appeals borrowed the notion that it is not enough for the suspect speech to arouse "some people to anger."[87] The speaker must exceed the "bounds of argument or persuasion" and undertake an "incitement."[88] The Tenth Circuit concluded that "[f]ighting words are thus epithets (1) directed at the person of the hearer, (2) inherently likely to cause a violent reaction, and (3) playing no role in the expression of ideas."[89]

Yates, who then relayed the conversation to Officer Ryan-Fairchild. *Id.* at 869, 875 n.8. Judge Soja told Officer Yates that there may be times when protestors' expressions could rise to the level of 'fighting words,' but his informal comments fell short of a ruling. *See id.* at 875 n.8.

Officers Ryan-Fairchild and Baca raised a second defense based on their good faith reliance on "a legal ruling or advice." *Id.* at 871; *see* V-1 Oil Co. v. Wyoming Dept. of Envt'l Quality, 902 F.2d 1482, 1488 (10th Cir. 1990) (good faith reliance on legal advice can create an "extraordinary circumstance" under which a defendant "should not be imputed with knowledge of an admittedly clearly established right") (quotation marks and citations omitted), *cert. denied*, 498 U.S. 920 (1990). This aspect of *Cannon* did not involve a constitutional issue and is not addressed by this survey.

79. *Cannon*, 998 F.2d at 870. The district court granted summary judgment on the federal claims. It then used its discretionary power to dismiss without prejudice the plaintiffs's collateral state tort claims. *Id.*

80. *See id.* at 870.

81. *See id.* at 870-71; *see also supra* note 77 (statement of law on qualified immunity).

82. *Cannon*, 998 F.2d at 872.

83. 315 U.S. 568 (1942).

84. *See* Cohen v. California, 403 U.S. 15 (1971) (reversing the conviction of a man arrested for wearing a jacket that read "Fuck the Draft" in a county courthouse); Feiner v. New York, 340 U.S. 315 (1951) (upholding conviction of man who encouraged violent uprising in support of civil rights); Terminiello v. Chicago, 337 U.S. 1, 5 (1949) (reversing conviction of man under city ordinance which allowed conviction for speech which "stirred people to anger, invited public dispute, or brought about a condition of unrest").

85. *Cannon*, 998 F.2d at 873 (quoting *Chaplinsky*, 315 U.S. at 572).

86. *Id.* (quoting *Cohen*, 403 U.S. at 20).

87. *Id.*

88. *Id.*

89. *Id.* (footnote omitted)

The court of appeals applied each leg of this tri-partite test to the facts in *Cannon* and accordingly found that the plaintiffs' signs did not rise to the level of fighting words. First, the court found that the plaintiffs did not focus their signs on a particular person, but instead aimed their protests at the activities of everyone involved in the abortion process.[90] Second, the court declared that although the signs tended to be offensive to people entering the clinic, they were not "inherently likely to cause an immediate breach of the peace."[91] Finally, the court found the signs served a role in the dialogue of ideas, because they asserted one of the anti-abortion movement's fundamental principles—that abortion is murder.[92]

Based on this analysis, the court of appeals found the plaintiffs had a clearly established constitutional right to employ signs that read "The Killing Place" in their lawful picketing of the abortion clinic.[93] The court reversed summary judgment in favor of the defendants and remanded the case back to the district court.[94]

C. *Analysis*

Cannon v. City and County of Denver[95] presented the Tenth Circuit Court of Appeals with its first attempt to apply the fighting words doctrine.[96] Alleged fighting words most often arise in extremely controversial situations, and the facts in *Cannon* held true to this stereotype. The abortion debate has become one of the most divisive issues in American society.[97] Clinic protests serve as the front lines of this debate, and these protests often become the sources of the most acrimonious exchanges between abortion rights opponents and advocates.[98]

In *Cannon*, one of the court's unarticulated tasks required it to take a disinterested approach to the political controversy underlying the issues[99] before it. The court rose to this task[100] and articulated a narrowly tailored test in order to avoid placing unnecessary restrictions on the important role of controversial speech in American society.

According to the Tenth Circuit, fighting words are "epithets (1) directed at the person of the hearer, (2) inherently likely to cause a violent

90. *See id.*
91. *Id.*
92. *See id.*
93. *See id.* at 874.
94. *Id.* at 879.
95. 998 F.2d 867 (10th Cir. 1993).
96. *See supra* note 73 and accompanying text.
97. *See generally* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990) (discussing two centuries of the abortion debate).
98. *See generally Clinic Blockades: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm'n on the Judiciary*, 102d Cong., 2d Sess. (1992) (taking testimony on who prevails when competing constitutional rights are asserted in the abortion debate).
99. The Court focused on the issues of fighting words, immunity, and the standards for summary judgment. *Cannon*, 998 F.2d at 867.
100. Throughout its opinion, the court avoided any comment on the propriety of the plaintiffs' conduct. Neither did it indulge in any language indicative of its stance on the abortion issue.

reaction, and (3) playing no role in the expression of ideas."[101] Taken individually, none of these three elements added anything new to the fighting words doctrine.[102] Never before, however, had the Supreme Court combined all three requirements into a precise conjunctive test.[103]

The result of the Tenth Circuit's holding is that only a very narrow type of public expression is left unprotected by the First Amendment. While each prong of the test plays a part in protecting speech, the requirement that the challenged speech play "no role in the expression of ideas" is clearly the farthest reaching. The potential of words, even obscene and offensive words, to contribute toward the expression of ideas is immense. Such contributions can be achieved even when a word's literal meaning adds little to the exposition of ideas. Aside from a detached definitional meaning, words can also convey an emotional quality that "may often be the more important element of the overall message."[104]

A twist on the facts in *Cannon* shows the value of emotion-laden words. For example, suppose the defendants arrested the plaintiffs, not for carrying signs, but for telling a prospective clinic client, "You're a damned murderer!" In this instance, the plaintiffs' conduct is undoubtedly "directed at the person of the hearer,"[105] as set forth in the *Cannon* fighting words test. Assume, arguendo, that the statement is inherently violence provoking, thus satisfying the second prong of the court of appeals' test. The question then becomes whether the epithet still plays a role in the expression of ideas. The statement undeniably makes a passionate and "forceful presentation of the anti-abortion viewpoint."[106] The words are raw and crude, but they convey an emotive element that would be difficult to achieve with niceties, an emotive element to which speech is entitled.

Controversial speech, while it may be provocative, serves important functions in our society. As the Supreme Court noted in *Terminiello v. Chicago*, speech often "invite[s] dispute"[107] and "stirs people to anger."[108] This is especially true if the speech relates to a politically controversial issue, but these results should not be thwarted. By giving broad protection to controversial speech, despite creating strong reactions in listeners,

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101. *Cannon*, 998 F.2d at 873.

102. *See supra* notes 83-89 and accompanying text.

103. Although the Supreme Court's articulation of the fighting words doctrine has never been as precise as that used by the Tenth Circuit in *Cannon*, the Court has consistently used a very narrow definition of fighting words. Boswell-Odum, *supra* note 72, at 270-75. In the half century since the Court decided Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), it has not upheld another conviction under the fighting words doctrine. Boswell-Odum, *supra* note 72, at 274. In fact, some commentators suggest the fighting words doctrine exists in the present only as a historical remnant that is no longer employed except perhaps in a constitutionally impermissive manner. *See* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH U. L.Q. 531, 580 (1980); Thomas F. Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 KY. L.J. 1, 1-2 (1975).

104. Cohen v. California, 403 U.S. 15, 26 (1971).

105. *Cannon*, 998 F.2d at 873.

106. *Id.*

107. *Terminiello*, 337 U.S. at 4.

108. *Id.*

courts ensure that political dialogue is a true exchange of views. A democratic form of government requires leaving the public forum open to all ideas, no matter how controversial or how offensive.[109] As the Tenth Circuit implicitly recognized in *Cannon*, the continued health of the American democratic system is inextricably bound to the ability of American citizens to vent their frustrations, their dislikes, and their disagreements. The court of appeal's narrow interpretation of the fighting words doctrine helps protect speech that often makes the most poignant contribution to the highly-valued exchange of ideas.

III. THE RIGHT OF FAMILIAL ASSOCIATION: *GRIFFIN V. STRONG*[110]

A. *Background*

The right of familial association is relatively new to constitutional jurisprudence.[111] This new constitutional right has several distinguishing hallmarks. First, the right is virtually always asserted in the context of a § 1983[112] action.[113] Second, and most importantly, a cause of action is created in a person who is not the primary target of state conduct.[114] Typically, a plaintiff asserts that a state actor's conduct toward her family member impermissibly interfered with her relationship with that family member.[115] The right of familial association is similar to the common law tort claim of loss of consortium, because the plaintiff is related to the primary victim.[116]

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109. Alexander Meiklejohn, one of the founders of this position, makes the point more eloquently than I:

> When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 27 (1979).

110. 983 F.2d 1544 (10th Cir. 1993).

111. *See* Wrigley v. Greanias, 842 F.2d 955, 957 n.3 (7th Cir.) (noting that most familial association cases were decided since 1980), *cert. denied*, 488 U.S. 850 (1988).

112. 42 U.S.C. § 1983 (1988).

113. *See* Michael S. Bogren, *The Constitutionalization of Consortium Claims*, 68 U. DET. L. REV. 479, 479 (1991). There do not appear to be any published decisions involving the right of familial association that arose outside of the § 1983 context.

114. *Id.*

115. *See, e.g.*, Manarite v. City of Springfield, 957 F.2d 953 (1st Cir.), (upholding grant of summary judgment against daughter who sued police chief for failing to prevent the suicide of her father while he was in protective custody), *cert. denied*, 113 S. Ct. 113 (1992). Different types of fact patterns have given rise to familial association claims. *See, e.g.*, Hameetman v. City of Chicago, 776 F.2d 636, 642-43 (7th Cir. 1985) (dismissing fireman's claim that city ordinance requiring him to live within city limits interfered with his filial relationship with his hyperkinetic son whose well-being required that he stay in a familiar environment).

116. *See* Bogren, *supra* note 112, at 479.

The circuits are split over the recognition of the right of familial association. The Seventh, Ninth, and Tenth Circuits are the leading proponents of the right,[117] while the First Circuit is its most steadfast opponent.[118]

In 1984, the United States Supreme Court upheld the application of a state law requiring the United States Jaycees to accept women as regular members.[119] In distinguishing the rights asserted by the Jaycees from those relationships protected under the Constitution, the Court emphasized that "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[120]

A year later, in *Trujillo v. Board of County Commissioners*,[121] the Tenth Circuit used the Court's reasoning in *Roberts*[122] as a springboard for its decision to recognize the constitutionally protected right of "familial association."[123]

In *Trujillo*, a woman and her daughter sought relief under § 1983,[124] claiming that the wrongful death of their son and brother, Richard Trujillo, while in custody at the Santa Fe County jail, deprived them of their constitutional right of familial association.[125] The plaintiffs claimed that this right existed under the First and Fourteenth Amendments.[126] After holding that the plaintiffs had standing to assert this claim,[127] the court of appeals declared that the Trujillos "had constitutionally protected interests in their relationship with their son and brother."[128]

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117. *See, e.g.*, Trujillo v. Bd. of County Comm'rs, 768 F.2d 1186, 1188-89 (10th Cir. 1985); Kelson v. City of Springfield, 767 F.2d 651, 653-55 (9th Cir. 1985); Bell v. City of Milwaukee, 746 F.2d 1205, 1243-50 (7th Cir. 1984).

118. *See, e.g.*, *Manarite*, 957 F.2d at 960; Pittsley v. Warish, 927 F.2d 3, 7-9 (1st Cir.), *cert. denied*, 112 S. Ct. 226 (1991); Valdivieso Ortiz v. Burgos, 807 F.2d 6, 7-10 (1st Cir. 1986).

119. *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984). In *Roberts*, the Jaycees argued that the application of the act denied its members the freedom of association protected by the First and Fourteenth Amendments. *See id.* at 617-18.

120. *Id.* at 619-20. The Jaycees raised two separate constitutional claims: freedom of association as a personal liberty under the Fourteenth Amendment and freedom to associate, as a guarantee of the rights to speech, assembly, and religion, under the First Amendment. *See id.* at 617-18. The Court analyzed these claims individually. *Id.* at 618-29.

121. 768 F.2d 1186 (10th Cir. 1985).

122. 468 U.S. 609 (1984).

123. *Trujillo*, 768 F.2d at 1188. The language and reasoning that the court of appeals borrowed in *Trujillo* comes from the section in *Roberts* in which the Supreme Court analyzed the Fourteenth Amendment claim, freedom of association, as a personal liberty interest. *See id.* at n.4.

124. 42 U.S.C. § 1983 (1988).

125. *Trujillo*, 768 F.2d at 1187.

126. *Id.* The Trujillos' complaint apparently relied upon the First Amendment for its substantive foundation and the Fourteenth Amendment to apply this claim to the state action. *Id.* at 1188 n.4. Importantly, the court of appeals liberally read the complaint "as an assertion of the [Fourteenth Amendment] liberty interest discussed in Roberts v. United States Jaycees." *Id.*

127. *Id.* at 1187-88.

128. *Id.* at 1189. The court of appeals cited to a number of decisions in support of this declaration. *See id.* at 1188-89. One of the sub-issues presented by these cases was whether a liberty interest in familial association should be extended beyond the parental relationship to

The court of appeals then turned to the issue of what conduct would constitute a deprivation of this right. Having recognized a nascent right, the court found itself without a test for when this right had been violated. The court opted to look to other well established constitutional protections for some guidance.[129] It found a satisfactory analytical analogy in the freedom of expressive association protected by the First Amendment.[130] Based on this analogy, the court of appeals concluded that for a plaintiff to establish a deprivation of the right of familial association, a showing must be made that the defendant had the "intent to interfere with a particular relationship."[131]

Because the plaintiffs in *Trujillo* failed to allege intent in the complaint, the court affirmed the district court's decision to dismiss the claims.[132] The court refined its holding by stating that any intent which the defendants might have had with respect to the harms done to the victim could not be transferred to establish the intent to deprive the plaintiffs of their constitutional rights.[133] In the court's words, "[t]he alleged conduct by the State, however improper or unconstitutional with respect to the son, will work an unconstitutional deprivation of the freedom of intimate association only if the conduct was directed at that right."[134]

Until the survey period, the Tenth Circuit Court of Appeals followed *Trujillo* faithfully. It continued to insist that the defendant's conduct be intentionally directed at the plaintiff.[135] In the process, the court of appeals failed to address an important issue left open by its decision in *Trujillo*, where it categorized the plaintiffs' claim as a Fourteenth Amendment liberty interest,[136] while formulating a test borrowed from First Amendment jurisprudence.[137] This dichotomous treatment created an unanswered question: what is the constitutional source for the right of familial association?[138] The importance of this question is not merely academic.

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include sibling relationships. *Id.* The Seventh Circuit, although it was among the first circuits to recognize a right of familial association, refuses to extend this right to siblings. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1245-48 (7th Cir. 1984). The Tenth Circuit declined to follow this lead. Refusing to let other intimate relationships go unprotected, the court of appeals in *Trujillo* recognized a right of familial association in Richard Trujillo's sister. *Trujillo*, 786 F.2d at 1189. The court even suggested that the types of intimate relationships falling under this protection would not be limited to familial ones. *Id.* at 1189 n.5. The Eleventh Circuit has gone so far as to recognize a protected liberty interest in dating. *See* Wilson v. Taylor, 733 F.2d 1539, 1542-44 (11th Cir. 1984).

129. *See Trujillo*, 768 F.2d at 1189-90.

130. *Id.* at 1189 (stating "that freedom of expressive association provides the most appropriate analogy for freedom of intimate association").

131. *Id.* at 1190.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See, e.g.*, Archuleta v. McShan, 897 F.2d 495, 499 (10th Cir. 1990).

136. *Trujillo*, 768 F.2d at 1188 n.4.

137. *See supra* notes 129-31 and accompanying text.

138. *See* Griffin v. Strong, 983 F.2d 1544, 1546 (10th Cir. 1993). The Tenth Circuit's failure to resolve this issue created confusion and inconsistency among courts who looked to *Trujillo* for guidance. For example, the Fourth Circuit has cited *Trujillo* for the proposition that the right of familial association arises out of the First Amendment in Rucker v. Harford County, 946 F.2d 278, 282 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1175 (1992), while the

The typical liberty interest test under the Fourteenth Amendment is markedly different than the intent-based test applied by the Tenth Circuit in *Trujillo*. According to the United States Supreme Court, determining whether an individual's Fourteenth Amendment liberty interests have been violated requires balancing the asserted liberty interest against the governmental interests.[139]

B. *Griffin v. Strong*[140]

In 1986, Salt Lake County Deputy Sheriff James Strong arrested Steven Griffin for alleged sexual abuse of a child.[141] Mr. Griffin's wife, Dorothy, filed a § 1983 complaint alleging that Officer Strong violated her constitutional rights by the manner in which he conducted the investigation and arrest of her husband.[142] The jury returned special verdicts in favor of Mrs. Griffin, finding that Officer Strong had violated her rights of familial association.[143] Officer Strong appealed. He argued that the jury's finding was not sufficiently supported by the evidence.[144] His appeal raised important unresolved questions about the right of familial association, one concerning its constitutional foundations and a second concerning the proper test for determining when the right of familial association has been violated.

The court began its analysis by exploring the jurisprudential history of the right of familial association. Judge Ebel, writing for the court, quickly returned to the issue left open by *Trujillo* and refused to continue the court's reliance on the analogy it drew between the First Amendment right of expressive association and the right of familial association. Instead, the court retreated from its reasoning in *Trujillo* and found that "the

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Seventh Circuit contends that *Trujillo* based this same right on the Fourteenth Amendment. *See* Mayo v. Lane, 867 F.2d 374, 375 (7th Cir. 1989). The Tenth Circuit itself has not been immune to this confusion. In Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445 (10th Cir. 1990), the court of appeals perfunctorily suggested that *Trujillo* established a First Amendment right. *Id.* at 1448.

139. Youngberg v. Romeo, 457 U.S. 307, 320-21 (1982).

140. 983 F.2d 1544 (10th Cir. 1993).

141. Griffin v. Strong, 739 F. Supp. 1496, 1497-98 (D. Utah 1990), *rev.'d*, 983 F.2d 1540 (10th Cir. 1993). The jury in the criminal trial convicted Mr. Griffin of two counts of sexual abuse of a child, but two years later the Utah Court of Appeals reversed the conviction and remanded the case for a new trial. *Id.* at 1498 (citing State v. Griffin, 754 P.2d 965 (Utah Ct. App. 1988)). The Utah Court of Appeals found that of two confessions Mr. Griffin gave to Officer Strong, one was given under coercion and the second was given without a valid waiver of his *Miranda* rights. *Id.* (citing *Griffin*, 754 P.2d at 971).

142. *Id.* For the alleged conduct on which Dorothy Griffin based her claim, see *infra* notes 155-59 and accompanying text. Mrs. Griffin also sued a social worker, Dennis Gale, but because the jury found Gale not liable for any of the plaintiff's claims, the Court of Appeals for the Tenth Circuit concerned itself only with the claim against Strong. *See Griffin*, 983 F.2d at 1545 (10th Cir. 1993).

143. *Griffin*, 983 F.2d at 1545. Steven Griffin and the Griffin's daughter, Angie, also brought § 1983 claims. The jury found no violation of Steven's or Angie's constitutional rights, so the only issues before the court on appeal concerned the violation of Dorothy Griffin's rights. *See id.*

144. *Id.* at 1546.

familial right of association is properly based on the 'concept of liberty in the Fourteenth Amendment.' "[145]

The court of appeals characterized the right of familial association as a "subset" of intimate association.[146] It then asserted that to determine whether a violation of this right has occurred requires balancing the "liberty interests against the relevant state interests."[147] The court articulated the necessary weighing in terms of the facts before it.

> [W]e must weigh two factors: the state's interests in investigating reports of child abuse, which is the interest served by Strong's conduct in investigating the claims against Steven Griffin, and Dorothy Griffin's interest in her familial right of association. Initially, we examine these factors objectively, that is, outside of the facts or subjective positions of the parties. Nonetheless . . . [u]ltimately, we must examine the parties' interests in light of the facts of this particular case.[148]

Thus, the court purported to set up a two-part balancing test that evaluated the asserted interests first objectively and then subjectively.

The court of appeals looked first to the state's overarching interest in investigating potential child abuses. Based on the typically covert nature of child abuse and society's well-founded disdain for such crimes, the court placed great importance on the state's "traditional and 'transcendent' investigatory interests" in protecting the welfare of children.[149] The court recognized that "[t]he right to associate with one's family members is a very substantial right."[150] After establishing the individual importance of these rights, however, the court of appeals made no effort to compare their importance relative to each other.[151]

Next, the court of appeals turned to the subjective portion of its test and focused on "the facts surrounding the parties' interests."[152] The court broke this analysis into two parts. First, it looked to *Trujillo* and asserted that for a defendant's behavior to become unconstitutional, it must be directed "at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship."[153] Second, the court indicated that it must "also examine the evidence to determine [1]

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145. *Id.* at 1547 (quoting Mayo v. Lane, 867 F.2d 374, 375 (7th Cir. 1989)).

146. *Id.* (citing Shondell v. McDermott, 775 F.2d 879, 865-66 (7th Cir. 1985)).

147. *Id.* (quoting Youngberg v. Romero, 457 U.S. 307, 321 (1982)) (internal quotation marks omitted). The court called this balancing "classic fourteenth amendment liberty analysis." *Id.*

148. *Id.*

149. *Id.* at 1548 (citing Maryland v. Craig, 497 U.S. 836, 855 (1990)); *see also* New York v. Ferber, 458 U.S. 747, 757 (1982); State v. Jordon, 665 P.2d 1280, 1285 (Utah 1983), *appeal dismissed*, 464 U.S. 910 (1983)).

150. *Griffin*, 983 F.2d at 1548 (citing Mayo v. Lane, 867 F.2d 374, 375 (7th Cir. 1989)).

151. *See id. But see id.* at 1549 (court concludes the infringement of these important rights is slight).

152. *Id.* at 1548.

153. *Id.* (citing *Trujillo*, 768 F.2d at 1190). The court does not indicate why it felt compelled to retain the *Trujillo* First Amendment intent test after spending the first part of the opinion explaining why familial association claims properly derive from the Fourteenth Amendments' substantive due process protections. *See id.* at 1546-47. For further discussion of the issue, see *infra* notes 178-182 and accompanying text.

the severity of the alleged infringement, [2] the need for the defendant's conduct, and [3] any possible alternatives."[154]

The court began by presenting the evidence supporting Dorothy Griffin's allegation that Strong directed his conduct at the spousal relationship with knowledge that his conduct would adversely affect the relationship. First, the defendant lied when he told Dorothy Griffin that her husband had already confessed to child abuse.[155] Second, the defendant doubted Mrs. Griffin's morals when she told him that she did not believe her husband committed child abuse.[156] Third, during an interview in which Steven Griffin finally confessed, the defendant told him that he had not heard from his wife "because you won't confess to what you've done and get the help that you need."[157] Fourth, the defendant encouraged Mrs. Griffin to move to another state and start her life over.[158] Fifth, Mrs. Griffin testified that the defendant used her against her husband when she tried to explain to Steven "she was told to leave him not help him."[159]

The court of appeals next turned to the second half of its subjective test and examined the "severity of the alleged infringement."[160] Noting that both Steven and Dorothy Griffin consensually talked to the defendant, the court said that "consensual interviews are less likely to infringe on familial interviews because the parties can always decline to talk."[161] The court next asserted that Dorothy Griffin presented no evidence indicating that the defendant acted with "physical coercion or conduct that shocks the conscience."[162] The court conceded that Strong's lie to Dorothy Griffin about her husband confessing to child abuse increased the severity of the alleged infringement.[163] Although the court of appeals asserted that additionally it would examine "the need for the defendant's conduct, and any possible alternatives,"[164] these examinations did not make it into the court's opinion.[165]

After this analysis of the facts, the court of appeals concluded, amidst scanty and elusive reasoning, that no reasonable juror could appropriately balance the competing interests and determine that the defendant violated the plaintiff's rights.[166] In support of this conclusion, the court sim-

154. *Griffin*, 983 F.2d at 1548.
155. *Id.* at 1549.
156. *Id.* at 1548.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 1548-49 (citing Pittsley v. Warish, 927 F.2d 3, 6 (1st Cir.), *cert. denied*, 112 S. Ct. 226 (1991)). In its prior familial association decisions, the Tenth Circuit had never indicated that a showing of physical coercion or conduct that shocks the conscience is necessary to a successful claim. *See* Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445 (10th Cir. 1990); Bryson v. City of Edmond, 905 F.2d 1386 (10th Cir. 1990); Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990); Trujillo v. Board of County Comm'rs, 768 F.2d 1186 (10th Cir. 1985).
163. *Griffin*, 983 F.2d at 1549 n.5.
164. *Id.* at 1548.
165. *See id.* at 1548-49.
166. *Id.* at 1549.

ply stated, "on the balance, the infringement of familial rights of association in this case is slight."[167] Based on these findings, the court of appeals remanded the case to the district court with a direction to enter judgment in favor of the defendant, Officer Strong.[168]

C. *Analysis*

While *Griffin v. Strong*[169] might have ended the confusion concerning the right of familial association's constitutional source,[170] the resulting modification of the law left familial association jurisprudence more perplexing than ever.[171] The court of appeals' definitive placement of familial association among the Fourteenth Amendment's substantive due process protections led it to alter its legal analysis.[172] According to the Supreme Court, determining if someone's Fourteenth Amendment liberty rights have been violated requires balancing the claimed "liberty interests against the relevant state interests."[173] After noting that courts have applied this balancing test in intimate association cases,[174] the *Griffin* court

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167. *Id.*

168. *Id.*

169. 983 F.2d 1544 (10th Cir. 1993).

170. *See supra* note 144 and accompanying text (court explicitly placed right of familial association under the Fourteenth Amendment's substantive due process protection).

171. Although Trujillo v. Board of County Commissioners, 768 F.2d 1186 (10th Cir. 1985), created confusion with respect to the constitutional source of the right of familial association, it is worth noting that the court of appeals' statement of the law lent itself to easy application. In the three familial association cases heard by the Tenth Circuit since *Trujillo* and prior to *Griffin*, the court applied the law with appreciable consistency. *See* Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1147 (10th Cir. 1990) (refusing to reverse dismissal of plaintiff's claim because no evidence of defendant's intent to interfere with the plaintiff's protected relationship); Bryson v. City of Edmond, 905 F.2d 1386, 1393-94 (10th Cir. 1990) (upholding judgment for defendant because intent cannot be transferred and no allegation of intent directed at family relationship); Archuleta v. McShan, 897 F.2d 495, 498-99 (10th Cir. 1990) (emphasizing necessity of intent and that plaintiff be "deliberate object" of conduct). Nor did the Tenth Circuit's district courts have much trouble applying the court's *Trujillo* holding. *See* Sollars v. City of Albuquerque, 794 F. Supp. 360, 362 (D.N.M. 1992) (granting motion to dismiss because plaintiff did not allege intent); Beck v. Calvillo, 671 F. Supp. 1555, 1557-58 (D. Kan. 1987) (granting summary judgment because no allegation of intent); White v. Talboys, 635 F. Supp. 505, 507 (D. Colo. 1986) (motion to dismiss denied because plaintiff alleged intent to interfere with particular family relationship); Trejo v. Wattles, 636 F. Supp. 992, 997 (D. Colo. 1985) (denying motion to dismiss because plaintiff alleged intent directed at relationship). *But see* Franz v. Lytle, 791 F. Supp. 827, 832-33 (D. Kan. 1992) (refusing to recognize right of family integrity based on *Trujillo*), *aff'd*, 997 F.2d 784 (10th Cir. 1993).

However, the Tenth Circuit's decision to place definitively the right of familial association among the Fourteenth Amendment's liberty interest was a good one. The First Amendment's protection of associational rights is ancillary to its protection of speech, religion, and assembly. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). These rights do not embrace the relationship shared by family members nearly as well as the right of intimate association that has been recognized under the Fourteenth Amendment's substantive due process protections. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1243-45 (7th Cir. 1984). The court of appeals' decision to position the right of familial association as a subset of the right of intimate association is also consistent with the Seventh Circuit's approach. *See Griffin*, 983 F.2d at 1547.

172. *Griffin*, 983 F.2d at 1547.

173. *Id.* (quoting Youngberg v. Romero, 457 U.S. 307, 321 (1982)) (internal quotation marks omitted).

174. *See id.* at 1547.

articulated its two part balancing test.[175] The first part of the test, which objectively examines the interests represented by each party, poses little difficulty.[176] The problems arise primarily out of the second half of the test, that part which requires courts to examine subjectively "the facts surrounding the parties' interests."[177]

The court of appeals broke this second prong into two stages of analysis. First, it returned to the familiar *Trujillo* test and asserted that "to rise to the level of a constitutional claim, the defendant must *direct* his or her statements or conduct at the intimate relationship with knowledge that the statements or conduct will adversely affect the relationship."[178] Second, the court claimed it would look at three things: the severity of the alleged infringement, the necessity of the defendant's conduct, and any alternatives to the defendant's conduct. The examinations into each of these two prongs presents problems.

After categorically placing familial association among Fourteenth Amendment liberty interests, the court asserted that appropriately it would apply a balancing test.[179] However, the court called upon the *Trujillo* test,[180] an inquiry into the defendant's state of mind that admits to no semblance of balancing. The court listed five allegations supported by the record that taken together easily satisfied *Trujillo*.[181] Oddly, the court offered no explanation as to how the *Trujillo* standard fit into balancing "the facts surrounding the parties interests."[182] In light of the fact the court decided in favor of Officer Strong, it is undeniable that it relied on some counterbalance to *Trujillo*'s satisfaction—intending to balance the *Trujillo* inquiry against its subsequent examination into the severity of the alleged infringement.[183]

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175. *See supra* notes 153-54 and accompanying text.

176. It can be argued the aspect of the test that asks the court to evaluate objectively the interest of the plaintiff is redundant. By recognizing that familial association is a protected liberty interest, the Tenth Circuit is already concluding that in the abstract relationships between family members are important. The court's reason for including this objective threshold test may be out of a felt need for a limitation on the types of familial relationships that are protected. If this is the court's concern, then it should articulate absolute limitations, not leave it up to a discretionary balancing test. For example, the Seventh Circuit has categorically declined to recognize a protected relationship between siblings. *See* Bell v. Milwaukee, 746 F.2d 1205 (7th Cir. 1984).

177. *Griffin*, 983 F.2d at 1548.

178. *Id.*

179. *Id.* at 1547.

180. *Id.* at 1548.

181. *See supra* notes 155-59 and accompanying text. By pulling from the record five separate ways in which the defendant allegedly used Mrs. Griffin against her husband in an attempt to get him to confess, the court all but conceded that Officer Strong's conduct satisfied the *Trujillo* test.

182. *Griffin*, 983 F.2d at 1549.

183. Along with examining the severity of the alleged infringement, the court of appeals also claimed that it would look into the necessity of the defendant's conduct and possible alternatives to the conduct. The court made no attempt at the last two inquiries and offered no explanation for this noticeable failure. *See id.* at 1548-49. Without becoming to speculative, the argument can easily be made that deceptively using a wife against her husband to secure his unwilling confession is not necessary to a child abuse investigation. Furthermore, less egregious alternatives are probably available to the properly trained investigator.

The court of appeals concluded the defendant only slightly infringed on Dorothy Griffin's rights.[184] The court supported this conclusion by looking to two considerations. First, the Griffins talked with officer Strong consensually.[185] Second, no evidence suggested that Strong used "physical coercion or conduct that shocks the conscience."[186] The Tenth Circuit has never indicated that the presence of physical coercion or conscience shocking conduct is an element of a successful familial association claim.[187] The Tenth Circuit borrowed the notion that the defendant's conduct must shock the conscience from *Pittsley v. Warish*,[188] a First Circuit decision.[189] The court's reliance on *Pittsley* is improper.

In *Pittsley*, the First Circuit found that conduct which shocks the conscience is only necessary when a plaintiff is unable to identify a specifically recognized Fourteenth Amendment liberty interest.[190] In *Griffin*, the Tenth Circuit spent an entire section of its opinion explaining that familial association is included within the Fourteenth Amendment's substantive due process protections.[191] The court specifically characterized familial association as a "subset" of intimate association.[192] Inexplicably, the court of appeals held Dorothy Griffin responsible for an evidentiary showing that is appropriate only when the plaintiff is unable to identify a specific liberty interest.

The Tenth Circuit's reliance on *Pittsley* also becomes suspect in light of the fact the First Circuit does not recognize familial association as a protected right. Concerned with the possibility of an unlimited source of claims, the First Circuit held in *Pittsley* that "only the person toward whom the state action was directed, and not those incidentally affected, may maintain a § 1983 claim."[193] There is something amiss when a court denies a plaintiff relief under a recognized claim and then bolsters its hold-

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184. *Id.* at 1549.

185. *Id.*

186. *Id.*

187. *See* Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445 (10th Cir. 1990); Bryson v. City of Edmond, 905 F.2d 1386 (10th Cir. 1990); Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990); Trujillo v. Board of County Commr's, 768 F.2d 1186 (10th Cir. 1985).

188. 927 F.2d 3 (1st Cir.), *cert. denied*, 112 S. Ct. 226 (1991).

189. *Griffin*, 983 F.2d at 1549 (citing *Pittsley*, 927 F.2d at 9). The court does not indicate where it got the idea that the presence of physical coercion is necessary to show a violation of the right to familial association. The *Pittsley* opinion does not discuss physical coercion. *See Pittsley*, 927 F.2d 3 (1st Cir), *cert. denied*, 112 S. Ct. 226 (1991).

190. *Pittsley*, 927 F.2d at 6 (citing Rochin v. California, 342 U.S. 165, 172-73 (1952)). The First Circuit articulated two theories under which a plaintiff could proceed in a substantive due process claim:

> Under the first theory, it is not required that the plaintiffs prove a violation of a specific liberty or property interest; however, the state's conduct must be such that it "shocks the conscience." To succeed under the second theory, a plaintiff must demonstrate a violation of an identified liberty or property interest protected by the due process clause.

Id. (citations omitted).

191. *See Griffin*, 983 F.2d at 1546-47 (section III of the court's opinion).

192. *Id.* at 1547.

193. *Pittsley*, 927 F.2d at 8. The First Circuit seems to define "those incidentally affected" very broadly to mean all those who were not the primary victim of state action. *See id.* at 7-8; Ortiz v. Burgos, 807 F.2d 6, 8 (1st Cir. 1986).

ing with precedent from a court that has refused to recognize that the plaintiff's interest is even entitled to protection.

The Tenth Circuit ultimately held that "no reasonable juror, when confronted with *balancing the interests* on the record before us under *the appropriate standard,* could determine" that Officer Strong unduly violated Dorothy Griffin's right of familial association.[194] This holding does not satisfy because it strikes a sustained chord of injustice. The court's arrival at this holding leaves the appropriate legal analysis nearly unintelligible. Although a clear statement of the law proves elusive, important ideas emerge. Even if a plaintiff satisfies the *Trujillo* test, the Tenth Circuit is likely to approach a defendant's conduct with great deference unless it amounts to physical coercion or is so egregious that it shocks the conscience. Perhaps the most important lesson that can be gleaned from *Griffin* is that the Court of Appeals for the Tenth Circuit does not favor the right of familial association. A plaintiff has never prevailed on a familial association claim at the appellate level in the Tenth Circuit,[195] and the court's jurisprudential gymnastics in *Griffin v. Strong* suggest that this tradition is likely to continue.

CONCLUSION

The Tenth Circuit's decisions in the two speech cases exhibit a laudable recognition of the importance of speech in American society. Thematic to both opinions is the idea that participants in a democratic society can make proper decisions as to what is in their best interest only if they are exposed to the full breadth of ideas. The court's decision in *Griffin v. Strong*[196] suggests that the court of appeals may be having second thoughts about its decision to recognize the right of familial association. The court's confusing modification of the law combined with its opaque reasoning casts a pessimistic cloud over the likelihood of plaintiff success in the future.

J. Bartlett Johnson

194. *Griffin*, 983 F.2d at 1549 (emphasis added). The court of appeals said that the trial judge should have directed a verdict or granted a judgement N.O.V. *Id.* at 1549 n.6.

195. *See* Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1447 (10th Cir. 1990) (refusing to reverse dismissal of plaintiff's claim because no evidence of defendant's intent to interfere with the plaintiff's protected relationship); Bryson v. City of Edmond, 905 F.2d 1386, 1393-94 (10th Cir. 1990) (upholding judgment for defendant because intent cannot be transferred and no allegation of intent directed at family relationship); Archuleta v. McShan, 897 F.2d 495, 498-99 (10th Cir. 1990) (emphasizing necessity of intent and that plaintiff be "deliberate object" of conduct).

196. 983 F.2d 1544 (10th Cir. 1993).

CRIMINAL PROCEDURE SURVEY

INTRODUCTION

This Survey focuses on three issues addressed by the United States Court of Appeals for the Tenth Circuit in 1993. First, whether a blanket policy of strip searching misdemeanants violates the Fourth Amendment's prohibition against unreasonable searches? Second, what is the correct method of determining an appropriate version of a foreign sentence under the Prisoner Transfer Treaty between the United States and Mexico? Third, whether a defendant's interest in access to a child abuse victim's confidential social service records outweighs the state's legitimate interest in preserving the confidentiality of those records?

I. STRIP SEARCHING MISDEMEANANTS

A. *Background*

1. Inspections of the Body

In *United States v. Robinson*,[1] the U.S. Supreme Court held that full body searches incident to custodial arrest are not only an exception to the warrant requirement of the Fourth Amendment,[2] but that such searches are "reasonable" under that Amendment.[3] The Court also held that such searches are constitutional even without probable cause that weapons or evidence may be found.[4] The Court, however, did not hold that all possible searches of a person's body are permissible. In discussing the search in *Robinson*, the Court distinguished the constitutional search in that case from the unconstitutional search conducted in *Rochin v. California*.[5]

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1. 414 U.S. 218 (1973). *See generally*, Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127 (analyzing *Robinson* and suggesting measures to prevent arbitrary exercise of police power); 2 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.3(c) (1978 & Supp. 1986) (discussing search and seizure law). Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989) (arguing that the scope of permissible searches of traffic offenders needed to be limited).

2. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

3. *Robinson*, 414 U.S. at 235.

4. The Court rejected the requirement of probable cause for searches incident to lawful custodial arrest. The Court stated, "[t]he standards traditionally governing a search incident to lawful arrest are not, therefore, commuted to the stricter *Terry* standards [referring to protective frisks for weapons based on reasonable suspicion in *Terry v. Ohio*, 392 U.S. 1 (1968)] by the absence of probable fruits or further evidence of the particular crime for which the arrest is made." *Robinson*, 414 U.S. at 234.

5. 342 U.S. 165 (1952). Under the *Rochin* doctrine, government conduct violates due process when the means used are egregious and "shock the conscience" of the court. *Id.* at 172.

In *Rochin*[6] the police forced an emetic into the defendant's stomach against his will. The emetic caused the defendant to vomit and allowed the police to recover evidence. The *Robinson* Court characterized this type of police conduct as both extreme and abusive and, therefore, in violation of the Due Process Clause of the Fourteenth Amendment.[7] The Court explicitly recognized that some body searches would be unconstitutional due to their character.[8]

In *United States v. Edwards*,[9] the Court reaffirmed the wide latitude given to law enforcement officers to search a person after a lawful custodial arrest. The Court, however, left open the possibility that certain searches "might 'violate the dictates of reason either because of their number or manner of perpetration.' "[10]

2. The *Bell* Balancing Test

In *Bell v. Wolfish*,[11] the Court articulated a test of reasonableness to be used under the Fourth Amendment in analyzing the constitutionality of a search.[12] In *Bell*, the Court derived a balancing test because reasonableness "is not capable of precise definition or mechanical application."[13] The Court fashioned a test which balanced the state's need for a search against the invasion of the searched person's rights.[14] The Court set forth factors to be considered in determining whether a search is reasonable: (1) the scope of the intrusion; (2) how the search is conducted; (3) the justification for initiating it; and (4) the location where the search is conducted.[15] In applying these factors in *Bell*, the Court held that visual body-cavity searches could be conducted with less than probable cause because of the security interests of a detention center.[16]

3. Courts' Approaches To Strip Searching Misdemeanants

Blanket policies of strip searches were first condemned in *Tinetti v. Wittke*.[17] In *Tinetti*, the defendant was arrested for speeding and detained

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6. *Id.*
7. *Robinson*, 414 U.S. at 236.
8. *See infra* notes 11-16 and accompanying text.
9. 415 U.S. 800 (1974).
10. *Id.* at 808 n.9 (citing Charles v. United States, 278 F.2d 386, 389 (9th Cir. 1960)).
11. 441 U.S. 520 (1979). *See generally*, Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. R. 1289 (1981) (discussing the Supreme Court's approach to balancing government police power with privacy rights of individuals); Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313 (1981) (rejecting the concept of reasonable expectations to define the scope of Fourth Amendment protection).
12. *Bell* specifically addressed visual body-cavity strip searches of federal pretrial detainees following contact visits. *Bell*, 441 U.S. at 520. *See also* David C. James, Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033 (1982) (analyzing *Bell* and its consequences).
13. *Bell*, 441 U.S. at 559.
14. *Id.*
15. *Id.*
16. *Id.* at 560.
17. 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980). For a general discussion of circuit court cases see, Robin Lee Fenton, Comment, *The Constitutionality Of*

in the county jail because he was unable to post bail.[18] The defendant was strip searched according to the jail's blanket policy. The court recognized a legitimate interest in discovering weapons or contraband, but concluded:

> Unlike pretrial detainees charged with a criminal offense there is little reason to suspect that traffic violators will conceal contraband or weapons. . . . Defendant's blanket strip search policy cannot be maintained when to do so intrudes into the personal dignity of traffic violators without any relation to the likelihood of his concealment. . . .[19]

In *Mary Beth G. v. Chicago*,[20] the Seventh Circuit addressed a blanket strip search policy for all female detainees in Chicago jails. The defendant was jailed for not paying parking tickets and strip searched while she waited for bail money. The Seventh Circuit rejected extending the *Robinson* rationale.[21] The court, relying on *Bell*, stated that strip searches must be guided by a test of reasonableness and found that the jail's security interests did not outweigh the assault on the defendant's privacy.[22] Additionally, the court distinguished *Mary Beth G.* from *Bell* in three ways: (1) the *Bell* detainees were charged with serious federal offenses while the detainees in *Mary Beth G.* were charged with minor offenses; (2) the *Bell* detainees were confined longer; and (3) the *Bell* detainees were strip searched after contact visits, which could facilitate smuggling of weapons or contraband.[23]

The Tenth Circuit first addressed the strip searching of misdemeanants in *Hill v. Bogans*.[24] In *Hill*, the defendant was arrested for a traffic violation and subsequently strip searched in a lobby with approximately twelve other people present.[25] The Tenth Circuit applied the *Bell* balancing test and balanced the need for the search against the invasion of the defendant's privacy rights.[26] The court found that the offenses involved in *Hill* were not typically associated with the concealment of weapons or contraband in a body cavity. After balancing the state's need for the unusually invasive search with the defendant's privacy interest, the court held that the search was unreasonable and unconstitutional under the circumstances.[27]

Policies Requiring Strip Searches of All Misdemeanant and Minor Traffic Offenders, 54 U. CIN. L. REV. 175 (1985).

18. *Tinetti*, 479 F. Supp. at 486.

19. *Id.* at 491.

20. 723 F.2d 1263 (7th Cir. 1983). *See generally*, Frank C. Lipuma, Casenotes, Mary Beth G. v. City of Chicago: *How "Reasonable" Can A Strip Search Be?*, 18 J. MARSHALL L. REV. 237 (1983).

21. *See supra* notes 1-5 and accompanying text.

22. *Mary Beth G.*, 723 F.2d at 1273.

23. *Id.* at 1272.

24. 735 F.2d 391 (10th Cir. 1984).

25. *Hill*, 735 F.2d at 392-93.

26. *Id.* at 393.

27. *Id.* at 394.

B. *Tenth Circuit Cases in 1993*

In 1993, the Tenth Circuit extended its earlier ruling in *Hill* through two cases: *Chapman v. Nichols*[28] and *Cottrell v. Kaysville City*.[29] In these cases, the court held that if an officer lacks reasonable suspicion that a particular misdemeanant is concealing either weapons or contraband, strip searching is unreasonable under the *Bell* balancing test and violates the Fourth Amendment. The privacy of the search, an important factor in *Hill*, was not determinative for the court in either *Chapman* or *Cottrell*.

1. *Chapman v. Nichols*

Four women were arrested for minor traffic violations and subsequently confined in the Creek County Jail in Sapulpa, Oklahoma.[30] The women were searched pursuant to a blanket strip searching policy of all jail detainees.[31] The jail officials acted without reasonable suspicion to believe that the women were either concealing weapons or contraband on their persons.[32] The plaintiffs brought suit under 42 U.S.C. § 1983[33] against the Sheriff of Creek County, Doug Nichols, both individually and in his official capacity.[34] In district court both sides moved for summary judgment.[35] The district court concluded that the searches were unconstitutional under the established law but that the issue of "whether an 'objectively reasonable' officer could have believed that conducting the search in private comported with the Fourth Amendment is a question which may have to be submitted to the jury."[36] Sheriff Nichols appealed the denial of his qualified immunity claim and the plaintiffs appealed the district court holding that questions of fact regarding the qualified immunity claim needed to go to the jury.[37]

The Tenth Circuit Court of Appeals began its analysis with the reasonableness test articulated by the Supreme Court in *Bell v. Wolfish*.[38] The court noted several undisputed facts: the plaintiffs were arrested for minor

28. 989 F.2d 393 (10th Cir. 1993).

29. 994 F.2d 730 (10th Cir. 1993).

30. *Chapman*, 989 F.2d at 394.

31. A female jail employee strip searched each plaintiff in a small laundry room. One was asked to stand with her hands over her head, one was subjected to a visual inspection of her pubic area, one was required to bend over and grab her ankles and the last one had to bend over and pull her underwear down to her ankles and be searched while the door to the laundry room was open. *Id.*

32. *Id.*

33. "Every person who under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured at law . . . ." 42 U.S.C. § 1983 (1988).

34. *Chapman*, 989 F.2d at 394.

35. The district court denied plaintiff's claim for summary judgment against the sheriff individually but granted summary judgment against the sheriff in his official capacity. *Id.* at 395 n.2.

36. *Id.* at 395

37. *Id.*

38. *See supra* notes 11-16 and accompanying text. This is a balancing test weighing the "need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559.

traffic violations, no reasonable suspicion existed that these individuals were likely to be concealing weapons or drugs, and the plaintiffs were strip searched solely because of the jail's blanket policy.[39] The court then noted that every circuit court, including the Tenth Circuit, has used the *Bell* balancing test and under the same circumstances has found such strip searches unconstitutional.[40]

The court, relying on the analysis in *Mary Beth G.* and *Hill*, stated, "a strip search is an invasion of personal rights of the first magnitude."[41] The sheriff's contention that the private location of the strip searches distinguished this case from previous cases was rejected.[42] The court cited other cases where similar strip searches, found unconstitutional, were conducted in private.[43] The court concluded that it was not objectively reasonable for the sheriff to believe that strip searching minor offense detainees was constitutional merely because the searches were conducted in private and were not extensive.[44]

Next, the court turned to the principles of qualified immunity. Under qualified immunity, an official is protected from personal liability if allegedly unlawful official action was objectively reasonable in light of the legal rules established at the time of the action.[45] The court observed that "no circuit case has upheld the grant of qualified immunity when asserted against a claim based on an across-the-board policy of strip searching minor offense detainees."[46] The court affirmed the district court's ruling that the strip search policy was unconstitutional. The court also held that the law was clearly established at the time of the illegal searches and that the sheriff's belief that the policy was constitutional was not objectively reasonable as a matter of law.[47]

2. *Cottrell v. Kaysville City*[48]

The plaintiff, Lisa Cottrell, brought an action pursuant to 42 U.S.C. § 1983 to recover damages for alleged constitutional violations that oc-

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It should be noted that *Bell* did not involve a search incident to arrest, rather it dealt with strip searches of pretrial detainees. However, the *Bell* balancing test provides guidance to courts on the reasonableness of searches. As the *Bell* court stated, a balancing test is necessary because reasonableness as a standard "is not capable of precise definition or mechanical application." *Id.*

39. *Chapman*, 989 F.2d at 395.

40. *Id.*

41. *Id.*

42. The sheriff's position was that because the searches were conducted in private and did not involve visual body cavity inspections, the unlawfulness of the county's policy was not apparent. The Court rejected these arguments. *Id.* at 397-98.

43. *See, e.g.*, Watt v. City of Richardson Police Dep't, 849 F.2d 195, 196 (5th Cir. 1988); Weber v. Dell, 804 F.2d 796, 799 (2d Cir. 1986); Jones v. Edwards, 770 F.2d 739, 742 (8th Cir. 1985); Giles v. Ackerman, 746 F.2d 614, 616 (9th Cir. 1984).

44. *Chapman*, 989 F.2d at 398.

45. Anderson v. Creighton, 483 U.S. 635, 639 (1987).

46. *Chapman*, 989 F.2d at 398.

47. By characterizing the Sheriff's belief that the policy was constitutional as unreasonable *per se*, the Tenth Circuit removed it from the jury's purview. This holding effectively resolved the plaintiffs cross-appeal that the issue should not have gone to the jury. *Id.* at 399.

48. 994 F.2d 730 (10th Cir. 1993).

curred when she was arrested for driving under the influence and strip searched preceding confinement.[49] Police officers had received information that an individual was operating a vehicle while under the influence.[50] The officers were dispatched and stopped Cottrell.[51] The police asked her to perform roadside tests and the results of those tests were disputed; the police maintained that she had not performed them satisfactorily and the plaintiff maintained that she had.[52] The officers arrested the plaintiff and she allowed them to take a blood sample to prove she was not intoxicated.[53] She was strip searched and confined until her parents posted bond.[54] The blood test subsequently revealed that the plaintiff had not been under the influence of alcohol or drugs, except for legal amounts of the plaintiff's prescription medicine.[55]

The district court concluded that under Federal Rules of Civil Procedure 56(c)[56] the defendants were entitled to judgment as a matter of law because no genuine issues of material fact were in dispute.[57] The district court analyzed all of the plaintiff's claims from the single issue of "whether or not the strip search of the plaintiff violated her Constitutional rights."[58]

On appeal, the court noted that the district court's approach did not deal with each of the plaintiff's claims separately, but dealt with them all under the strip search analysis.[59] The appellate court first addressed the § 1983 claims, starting with wrongful arrest.[60] The court found that the district court's holding for summary judgment was error because the record contained factual disputes requiring credibility determinations. The court refused to conclude that the arresting officer had probable cause as a matter of law to arrest Cottrell.[61]

The court next addressed the illegal search claim.[62] The court started by quoting the language of *Chapman v. Nichols*[63] that "[t]here can be no doubt that a strip search is an invasion of personal rights of the first

49. *Id.* at 731.
50. *Id.* at 731-32.
51. *Id.* at 732.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. "The judgment sought shall be rendered forthwith if the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c).
57. *Cottrell*, 994 F.2d at 733.
58. *Id.* (citing Cottrell v. Kaysville City, 801 F. Supp 572, 574 (D. Utah 1992)).
59. The plaintiff raised numerous claims under § 1983 including wrongful arrest, wrongful search and seizure, and deliberate indifference to her constitutional rights because of the city's failure to train the officers. Additional separate claims included false imprisonment, assault and battery, malicious prosecution, abuse of process, intentional infliction of emotional distress, defamation, and invasion of privacy. *Id.*
60. *Id.*
61. *Id.* at 734.
62. *Id.*
63. 989 F.2d 393 (10th Cir. 1993).

magnitude."[64] The court acknowledged that consistent with *Bell*,[65] some searches incident to lawful arrest may violate Fourth Amendment rights. The court further supported this view by citing *Hill*,[66] a case factually similar to *Cottrell*.

The court noted that the officer did not have any reasonable suspicion that Cottrell had drugs, did not conduct a 'pat down search' because there was no indication that she was carrying any weapons, and did not believe that Cottrell was a danger to him.[67] The court found that these admissions raised serious doubts about the justification for the strip search.[68] Additional factors which supported the conclusion that the search was unconstitutional were that Cottrell was not placed with the general jail population[69] and that she wore light summer clothes when arrested.[70] The court concluded that the district court's granting summary judgment and its assumption that the search actually took place were both in error.[71]

C. *Analysis of Chapman and Cottrell*

Chapman and *Cottrell* represent an extension, rather than a change, in existing policy in the Tenth Circuit. The cases stand for the proposition that the nature, character and circumstances of a strip search are irrelevant if the threshold requirement of reasonable suspicion is not found for a particular detainee prior to the search. An across the board policy of strip searching all misdemeanants evades the necessity of finding reasonable suspicion that a particular individual is concealing contraband or weapons. The necessity of finding reasonable suspicion before the police can conduct a strip search protects both the arrested misdemeanant and the jail. The arrested misdemeanant, for whom no reasonable suspicion exists, is protected from the unnecessary degradation that a blanket strip search policy entails. However, if the jail personnel have articulable reasons why a particular misdemeanant might be concealing contraband or weapons, the reasonable suspicion standard is not unduly burdensome to meet. The abrogation of blanket policies simply means that reasonable suspicion must be developed on a case-by-case basis. This requirement means additional work for the police but that additional burden is reasonable when balanced with the rights of the individual that are protected.

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64. *Id.* at 395.

65. *Cottrell*, 994 F.2d at 734 (citing Bell v. Wolfish, 441 U.S. 520, 558-59 (1979)).

66. *Cottrell*, 989 F.2d at 734 (citing Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984)). *See also supra* notes 24-27 and accompanying text.

67. *Cottrell*, 989 F.2d at 734-35 (citing Appellant's Brief at 119, 130).

68. *Cottrell*, 989 F.2d at 734-35 (citing Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992) (security and concealed contraband are main reasons for conducting strip searches).

69. "Courts have consistently recognized a distinction between detainees awaiting bail and those entering the jail population when evaluating the necessity of a strip search under constitutional standards." *Cottrell*, 989 F.2d at 734-35 (citing Fuller v. M.G. Jewelry, 950 F.2d 1437, 1448 (9th Cir. 1991); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981)).

70. *Cottrell* 989 F.2d at 734-35 (citing *Hill*, 735 F.2d at 394 (procedure was unnecessary because a pat down search would have been sufficient under the circumstances)).

71. *Cottrell*, 989 F.2d at 735.

The Tenth Circuit refused to abide the evasion of the reasonable suspicion requirement and through these cases has indicated that such policies will be unconstitutional.

In *Chapman v. Nichols*,[72] the court made clear that blanket policies of strip searches for traffic offense misdemeanants will be abrogated. In addition, the court held that it is unreasonable for law enforcement officers to believe that such policies might be legal. This ruling strips officials of qualified immunity and subjects them both personally and officially to liability under 42 U.S.C. § 1983 for perpetuating blanket strip search policies. The court's decision focused on the undisputed fact that the police searched the plaintiffs without individualized reasonable suspicion. The only articulable reason for strip searching these particular people was the jail's blanket policy based on security grounds. The court held that the security rationale was unpersuasive when balanced against the minor offense detainee's privacy rights under the Fourth Amendment. The court reasoned that minimum security concerns could be met by a less intrusive pat-down search. The court also held that it was not objectively reasonable for the sheriff to believe that the blanket policy was lawful because the strip searches were conducted in private. Indeed, the court noted that the lack of published cases on this issue is probably due to the fact that other authorities have sensibly abandoned or declined to establish such polices.[73]

In *Cottrell v. Kaysville City*,[74] the Tenth Circuit clearly stated that civil rights suits by strip searched traffic misdemeanants[75] will not be subjected to summary judgments favoring the malfeasant officials. These strip searches, absent particularized reasonable suspicion, will be deemed per se unconstitutional. In *Cottrell*, the court focused on factors similar to those that were relevant in *Chapman*. The court noted that in a deposition the officer who directed the strip search said he did not suspect that Cottrell had concealed drugs on her person and that he did not conduct a pat-down search because there was no indication that she had weapons or was a danger to him.[76] Additionally, the court found that considerations of overall jail security were not applicable because Cottrell was never placed with the general jail population—she was only waiting for bail.[77] The court also held that less intrusive alternatives to a strip search were available (namely the pat-down search) and that because Cottrell was wearing light summer clothes, the pat-down search would have been sufficient to discover any contraband.

With the decisions in *Chapman* and *Cottrell* the Tenth Circuit has effectively ended any dispute on the issue of blanket strip searches of all traffic offense misdemeanants. These two cases are in accord with the other cir-

72. *Chapman*, 989 F.2d at 393.
73. *Id.* at 399 (citing Weber v. Dell, 804 F.2d 796, 804 (2d Cir. 1986)).
74. *Cottrell*, 994 F.2d at 730.
75. *Cottrell* occurred in Utah where driving under the influence of alcohol is either a class A or B misdemeanor. *See* UTAH CODE ANN § 41-6-44(3)(a)(i),(ii) (1993).
76. *Cottrell*, 994 F.2d at 734-35.
77. *Id.* at 735.

cuits' decisions on the same issue. They effectively end a demeaning practice that was once widespread and possibly even constitutional under *Robinson's* vague directives.[78]

II. Analysis Of Sentencing Under The Prisoner Transfer Treaty

A. *Background*

On November 25, 1976, the United States and Mexico entered into a bilateral treaty which provided for the transfer of penal sentences.[79] Under this agreement, Mexicans convicted in the United States can be transferred to prisons in their home states.[80] Reciprocally, United States citizens convicted in Mexico can be transferred to federal prisons in the United States.[81] The explicit goal of this treaty is to "render mutual assistance in combating crime . . . and to provide better administration of justice by adopting methods furthering the offender's social rehabilitation. . . ."[82] However, it is generally agreed that another unmentioned reason was congressional concern over the condition of American prisoners in the Mexican Penal System.[83] Many American prisoners have alleged that Mexican prison officials tortured them and engaged in extortion.[84]

Although the treaty has improved prisoner treatment abroad, some officials and scholars have questioned whether such transfers are constitutional.[85] The primary reason for concern over prisoner transfer treaties is that they allow the transferring state to retain jurisdiction over any collateral attacks on the foreign sentence.[86] The United States effectively defers to the foreign judgment on its citizen. Implicit to the transfer is the belief that the foreign system has due process similar to American requirements, a premise that some reject.[87] The state receiving the prisoner is bound to honor the judgment and sentence of the transferring state. Therefore, a United States citizen convicted in Mexico and transferred to the United States can challenge imprisonment, but is estopped by the treaty provisions from challenging the conviction.[88]

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78. *See supra* notes 1-8 and accompanying text.

79. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, U.S.-Mex, 28 U.S.T. 7399, T.I.A.S. No. 8718 (entered into force on Nov. 30, 1977)[hereinafter Transfer Treaty].

80. *See* Abraham Abramovsky, *Transfer of Penal Sanctions Treaties: An Endangered Species?*, 24 Vand. J. Transnat'l L. 449, 456 (1991).

81. *Id.*

82. Transfer Treaty, *supra* note 79, at 7401.

83. *See* Abramovsky, *supra* note 80. *See also* Ronald M. Emanuel, Note, *Intervention of Constitutional Powers: The Prisoner Transfer Treaties*, 2 Fla. J. Int'l L. 203 (1986); Robert D. Steele, *The Impact of* Rosada v. Civiletti *on U.S. Prisoner Transfer Treaties*, 21 Va. J. Int'l L. 131-32 (1980).

84. Abramovsky, *supra* note 80 at 454-55. *See also U.S. Citizens Imprisoned in Mexico: Hearings before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations*, 94th Cong., 1st and 2d Sess. at 11-34 and 47-88 (describing the abuse of U.S. citizens imprisoned in Mexico).

85. Emanuel, *supra* note 83 at 205.

86. Transfer Treaty, *supra* note 79, Art. VI, at 7406.

87. Emanuel, *supra* note 83, at 207-08.

88. Transfer Treaty, *supra* note 79, Art. VI, at 7406.

B. *Trevino-Casares v. U.S. Parole Commission*[89]

1. Facts

Mr. Trevino-Casares, a United States citizen, was arrested on drug charges in Mexico on January 13, 1989.[90] He was convicted in Mexico and sentenced to nine years.[91] Pursuant to the Prisoner Transfer Treaty,[92] he was transferred to the United States on January 31, 1991.[93] The United States Parole Commission determined that Mr. Trevino-Casares would serve seventy-one months imprisonment and thirty-seven months of supervised release.[94] Because of the manner in which the United States Parole Commission characterized their determination, Trevino-Casares asserted that he was denied a substantial amount of earned and anticipated service credits due under 18 U.S.C. § 4105.[95]

Mr. Trevino-Casares appealed the Commission's determination directly to the United States Court of Appeals for the Tenth Circuit. He asserted that the Commission erred in two ways: (1) by imposing a sentence longer than the term of imprisonment imposed by Mexico in violation of 18 U.S.C. § 4106A(b)(1)(C);[96] and (2) by denying credit accumulated against his sentence in violation of 18 U.S.C. § 4105(c)(1).[97]

2. The Tenth Circuit's Opinion

The crux of the court's decision is that the Commission, by translating a foreign sentence into one for domestic enforcement, is in effect acting as a district court.[98] The court noted that translating the sentence is the Commission's duty under 18 U.S.C. § 4106A(b)(1)(A) which states:

> The United States Parole Commission shall, without unnecessary delay, determine a release date and a period and conditions of supervised release for an offender transferred to the United States to serve a sentence of imprisonment, as though the offender were convicted in a United States district court of a similar offense.[99]

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89. 992 F.2d 1068 (10th Cir. 1993).
90. *Id.* at 1069.
91. *Id.*
92. Transfer Treaty, *supra* note 79.
93. *Trevino-Casares*, 992 F.2d at 1069.
94. *Id.*
95. *Id.*
96. "The combined periods of imprisonment and supervised release that result from such determination [referring to the determination of a release date by the U.S. Parole Commission] shall not exceed the term of imprisonment imposed by the foreign court on the offender." 18 U.S.C. § 4106A(b)(1)(C)(1990).
97. "The transferred offender shall be entitled to all credits for good time, for labor, or any other credit toward the service of the sentence which had been given by the transferring country for time served as of the time of the transfer." *Id.* § 4105(c)(1) (1990).
98. The Court noted that its jurisdiction was limited as to the plaintiff's claims, but because the two claims had analytical overlap, jurisdiction exited. It rejected the Commissions contention that the appeal was procedurally inappropriate. *Trevino-Casares*, 992 F.2d at 1069.
99. 18 U.S.C. § 4106A(b)(1)(A) (1988).

The court held that the Commission's translation was, in procedure, substance, and effect, equivalent to the imposition of a federal sentence by a district court, and therefore should be treated as such.[100] In support of its holding, the court noted that 18 U.S.C. § 4106A(b)(2)(A)[101] expressly makes the Commission's determination directly appealable to the circuit level.[102] The court exercised its appellate jurisdiction through holding that the Commission's determination was equivalent to a sentence by a district court. This crucial holding allowed the court to hear Mr. Trevino-Casares's first claim—that his sentence was in violation of the law.[103] Additionally, the court's review of the sentencing process was de novo.[104]

Mr. Trevino-Casares' second claim involved the administration of service credits, which was not part of the Commission's duty. Instead, credit is calculated by the Bureau of Prisons.[105] Because the calculation of credit involved the execution, rather than the imposition of a sentence, habeas corpus review was the appropriate remedy for the second claim.[106] This issue created a problem for the court because circuit courts of appeal do not have original jurisdiction to consider habeas corpus petitions.[107] The court stated that although it did not have jurisdiction to decide the dispute over the award of credit, the issue did overlap with the sentencing which was properly within the court's jurisdiction.[108]

The next matter the court discussed was how to arrive at a proper sentence for the petitioner. The proper length of the sentence was determined by the Commission to be one hundred eight months, commensurate with the Mexican sentence of nine years.[109] The Commission did reduce the petitioner's imprisonment to seventy-one months, followed by thirty-seven months of supervised release, because he suffered permanent physical damage due to abuse while in Mexican custody.[110]

After determining that one hundred eight months was the appropriate sentence, the court examined how the Commission characterized its sentence and what effect that characterization had on the Bureau of Prisons calculation of credit. The court found that the "Commission, evidently with the full agreement of the Bureau of Prisons, denies its § 4106A

100. *Trevino-Casares*, 992 F.2d at 1069.

101. This section states, "The court of appeals shall decide and dispose of the appeal in accordance with section 3742 of this title [referring to 18 U.S.C. § 3742] as though the determination appealed had been a sentence imposed by a United States district court." 18 U.S.C. § 4106A(b)(2)(B) (1990).

102. *Trevino-Casares*, 992 F.2d at 1070.

103. The Court's jurisdiction is derived from 18 U.S.C. § 3742(a)(1) (1988) which authorizes appeal of sentences imposed in violation of the law.

104. United States v. Banashefski, 928 F.2d 349, 351 (10th Cir. 1991) (legal conclusions in sentencing reviewed de novo, with due deference accorded application of law to underlying facts).

105. 18 U.S.C. § 3624 (1988 & Supp. IV 1992).

106. *Trevino-Casares*, 992 F.2d at 1070.

107. Noriega-Sandoval v. U.S. I.N.S., 911 F.2d 258, 261 (9th Cir. 1990).

108. *Trevino-Casares*, 992 F.2d at 1070.

109. The sentencing guidelines, as applied by the Commission, would yield a result of 121-151 months for this offense, but pursuant to U.S.S.G. § 5G1.1 the maximum 108 month Mexican sentence was adopted. *Trevino-Casares*, 992 F.2d at 1070.

110. *Id.* at 1071.

determination the status of a sentence for purposes of § 4105, leaving the Bureau of Prisons nothing but the effectively superseded foreign sentence to subtract the offender's service credits from."[111]

The court determined that the Commission's interpretation was erroneous and held, instead, that the service credits should be subtracted from the Commission's determination of time that the prisoner must remain imprisoned in the United States.[112] In support of this view, the court noted that two express congressional commands were incorporated into the statute.[113] The first command was that the domestic sentence, including both confinement and supervised release, may not exceed the length of imprisonment imposed by the foreign state.[114] The second was that transferred prisoners must receive the same treatment as other inmates with respect to their domestic confinement.[115]

The court concluded its opinion with an explanation of why its interpretation was proper even in light of the deferential standard accorded to administrative review. First, the statutes leave almost no ambiguity on the issue of treatment of transferred prisoners. Second, even if ambiguity exists, the court has a duty to decide whether the Commission had advanced a permissible construction of the statutes. In regard to the second issue, the court stated that "the Commission's construction is both internally inconsistent and impermissibly at odds with the evident intent of the statutory scheme."[116]

The court affirmed the Commission's determination of the length and composition of petitioner's sentence and modified the legal status of the Commission's determination of the sentence. This modification necessitated the application of service credits by the Bureau of Prisons; credits which had previously been barred. The case was then ordered transferred to the district court for a determination of the proper application of credit pursuant to a habeas corpus review.[117]

3. Analysis

In *Trevino-Casares v. U.S. Parole Commission*,[118] the Tenth Circuit was primarily involved in statutory construction and interpretation of congressional intent. The court's interpretation of the Prisoner Transfer Treaty between the U.S. and Mexico also played a large role in the decision-making process.

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111. *Id.*
112. *Id.* at 1071-72.
113. *Id.*
114. 18 U.S.C. § 4106A(b)(1)(C) (1988). *See also* Transfer Treaty, *supra* note 79, Art. V(3) at 7406.
115. "[A] [transferred] offender . . . shall remain in the custody of the Attorney General under the same conditions and for the same period of time as an offender who had been committed to the custody of the Attorney General by a court of the United States. . . . " 18 U.S.C. § 4105(a) (1988).
116. *Trevino-Casares*, 992 F.2d at 1073.
117. The circuit court did not have original jurisdiction to determine the application of credit which was properly a habeas issue. *Id.* at 1070 n.4.
118. *Id.*

The first difficult issue was whether jurisdiction existed for the court to hear the claim. The court wisely decided, after considering the statutory context, to treat the Commission's sentencing conversion as the legal equivalent of a domestic sentence imposed by a district court. This interpretation of the Commission's role was augmented by 18 U.S.C. § 4106A(b)(2)(A), which makes the Commission's determination directly appealable to the circuit level. Therefore, the court's treatment of the foreign sentence conversion as a domestic sentence issued by a district court is logical and consistent with the express statutory language.

Some critics may argue that the court overstepped its authority in not reviewing the administrative agency's decision under the normally deferential arbitrary and capricious standard. However, in apparent anticipation of this point, the court noted that the statutory framework left almost no ambiguity on the treatment of transferred prisoners. In essence, the Commission had very little to interpret on its own initiative—Congress expressly set out its mandate. The court also noted that, even when ambiguity does exist, courts have the authority to decide whether the administrative agency has advanced a permissible construction of the statutes. In answering the later question, the court characterized the Commission's construction as inconsistent and contrary to Congress's express intent.

Through this case, the court struck down the U.S. Parole Commission's convoluted interpretation of their statutory mandate to translate foreign sentences into domestic sentences. Prior to *Trevino*, transferred prisoners in the Tenth Circuit were denied earned service credits when their foreign sentence was converted into a domestic sentence by the Commission. Because the Commission refused to acknowledge that their translation was a "sentence," the Bureau of Prisons had nothing to subtract the prisoners acquired service credits from. The court replaced the Commission's practice with a cogent interpretation of the relevant statutes and treaty that accords well with the congressional intent, as revealed through the statutory language.

The court's interpretation reconciles the treaty and statutes.[119] More importantly, the interpretation formulated by the Tenth Circuit treats both prisoners sentenced domestically and by Mexican authorities the same in regard to the application of service credits. Because of *Trevino*, the Commission's translations will now be considered a sentence to which the Bureau of Prisons must apply earned service credits. This decision is more equitable than what existed under the Commission's prior interpretation, where foreign sentenced prisoners were denied earned service

119. An alternate construction of the statutes and treaty was propounded recently by the Fifth Circuit. *See* Cannon v. United States Dep't. of Justice Parole Comm'n, 961 F.2d 82 (5th Cir. 1992) (imposition of shorter sentences is also precluded because only the transferring state has jurisdiction to modify sentences of its courts). *See also* Thorpe v. United States Parole Comm'n, 902 F.2d 291 (5th Cir. 1990) (Commission does not impose a sentence, it merely sets a release date).

credits and effectively had to serve more time than their domestic counterparts.

III. *EXLINE V. GUNTER*[120] IN CAMERA REVIEW OF SOCIAL SERVICE RECORDS REQUIRED IN ACCORD WITH *PENNSYLVANIA V. RITCHIE*.[121]

A. *Background*

In prosecutions for sexual assaults on children, one of the most critical issues is the reliability of the victim—the child witness. Information on the child's reliability is extremely important to the defendant's case; however, access to crucial social service agency records may be hampered by state confidentiality laws.[122]

Pennsylvania v. Ritchie,[123] decided by the U.S. Supreme Court in 1987, is the seminal case on defendants' rights of access to records protected by state confidentiality laws. In *Ritchie*, a state agency, the Pennsylvania Children and Youth Services ("CYS"), had investigated children on an anonymous report of abuse. The files on this investigation were kept confidential pursuant to Pennsylvania's statutory scheme.[124] After the investigation, George Ritchie, the father of the children, was prosecuted for rape, incest, and other sexual offenses against his twelve year old daughter.[125]

Ritchie attempted to subpoena the CYS file to help his defense. He believed that the file might contain medical records, inconsistent statements by his daughter or other exculpatory information.[126] CYS refused to allow him access to the file, citing the Pennsylvania confidentiality statute.[127] The trial court refused to grant Ritchie access to the records in dispute and Ritchie was subsequently convicted.[128] On appeal, however,

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120. 985 F.2d 487 (10th Cir. 1993).

121. 480 U.S. 39 (1987).

122. For information on the reliability and credibility of child witnesses see Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927 (1993); Steven Penrod et al., *Special Issue on Child Sexual Abuse: Children as Observers and Witnesses: The Empirical Data*, 23 FAM. L.Q. 411 (1989); Therese L. Fitzpatrick, Note, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175 (1991); Robin W. Morey, Comment, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?* 40 U. MIAMI L. REV. 245 (1985).

123. 480 U.S. at 39. For a general discussion of the impact of the Supreme Court's decision see Chris Hutton, *Confrontation, Cross-examination and Discovery: A Bright Line Appears after* Pennsylvania v. Ritchie, 33 S.D. L. REV. 437 (1988); Note, *The Supreme Court, 1986 Term Leading Cases*, 101 HARV. L. REV. 119 (1987). For a discussion of the Pennsylvania Supreme Court opinion see Penny J. Rezet, Note, *Criminal Procedure-Balancing Sixth Amendment Rights with the Victim's Right to Confidentiality*-Commonwealth v. Ritchie, 59 TEMP. L.Q. 715 (1986).

124. *See* PA. STAT. ANN. tit. II § 2215(a)(5) (Purdon Supp. 1987), providing that CYS files are confidential and access is permissible only to courts "of competent jurisdiction pursuant to a court order" (recodified at PA. STAT. ANN. tit. XXIII § 6340 (a)(5) (Purdon 1991)).

125. The prosecution stemmed from events unconnected with the initial CYS investigation. *See* Commonwealth v. Ritchie, 502 A.2d 148, 159 (Pa. 1985).

126. *Ritchie*, 480 U.S. at 44.

127. *Id.* at 43.

128. *Id.* at 44.

the Pennsylvania Superior Court overturned the conviction[129] and the Pennsylvania Supreme Court later affirmed.[130] The Pennsylvania Supreme Court held that the confrontation clause of the Sixth Amendment required allowing Ritchie's attorney access to the confidential child abuse records compiled by CYS.[131]

The U.S. Supreme Court reversed the Pennsylvania Supreme Court's order requiring full disclosure to Ritchie's attorney. In a plurality opinion, the Court held that the right of confrontation secured by the Sixth Amendment was only a trial right.[132] The right of confrontation did not allow pretrial discovery of confidential documents because discovery was not part of the "trial."[133] The plurality held that the Sixth Amendment's confrontation clause merely guaranteed "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent, the defense might wish."[134]

The Court used a due process analysis under the Fourteenth Amendment instead of relying on the Sixth Amendment. It held that evidence which was important to the defense could not be suppressed without violation of the Fourteenth Amendment.[135] The plurality decision further held that an appropriate remedy would be for the trial court to review the files in camera.[136] If, after review, the trial court concluded there was a reasonable probability that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different, then a new trial should be granted with all material evidence released to the defendant.[137]

In *Ritchie*, the Court balanced the state of Pennsylvania's interest in maintaining the confidentiality of CYS files with defendants' rights to have access to evidence material to their defense.[138] Had the Court rested its decision on the Sixth Amendment's confrontation clause, a broad discovery right would have been created. The right to access under the Sixth Amendment would have been unfettered and would have subsumed the state's confidentiality interest.[139] Through its reliance on the Fourteenth Amendment's Due Process Clause, the Court crafted a more narrowly tailored remedy. The trial judge would conduct the in camera review and determine what information was to be released. The Court decided this

129. Commonwealth v. Ritchie, 472 A.2d 220 (Pa. Super. Ct. 1984).

130. Commonwealth v. Ritchie, 502 A.2d 148, 149 (Pa. 1985).

131. *Id.* at 153 (citing U.S. CONST. amend. VI.).

132. *Ritchie*, 480 U.S. at 52.

133. *Id.* at 53.

134. *Id.*

135. *Id.* at 56.

136. *Id.* at 60.

137. *Id.* at 57 (citing U.S. v. Bagley, 473 U.S. 667, 682 (1985)).

138. *Ritchie*, 480 U.S. at 60-61.

139. "To allow full disclosure to defense counsel . . . would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information. . . . Neither precedent nor common sense require such a result." *Id.* at 60-61.

mechanism would properly balance the confidentiality interests with the right to access.[140]

B. *Exline v. Gunter*[141]

1. Facts

Larry Exline was convicted in October 1986 in the El Paso County District Court of one count of sexual assault on a child.[142] On appeal, Exline argued that the trial court erred in refusing to allow discovery of the victim's social service child abuse records.[143] The Colorado Court of Appeals ruled that Exline had failed to make the required offer of proof for the records and that the denial did not violate his constitutional right of confrontation.[144] The court of appeals affirmed the conviction[145] and the Colorado Supreme Court denied certiorari.[146]

After the denial of certiorari by the Colorado Supreme Court, Exline filed a habeas corpus petition in federal district court.[147] Exline claimed that the trial court should have reviewed the social service records in camera, and that its refusal to do so violated his rights under the due process and confrontation clauses.[148]

The federal district court agreed with Exline and held that Exline's right to due process was violated. The court then ordered the El Paso County District Court to conduct an in camera review of the social service records to determine whether they contained information that may have been necessary to Exline's defense.[149]

On October 10, 1991 the state court issued its certificate of compliance, as required by the federal district court.[150] In the certificate, the state court asserted that it had provided Exline with access to a juvenile dependency and neglect file. The state court found that Exline had failed to examine this file and make the required showing of "particularized need" for the social service records at issue.[151] The court also found, after conducting the in camera review, that four documents in the social service records may have been necessary to the defense.[152] However, the state court further held that Exline's failure to show particularized need obviated the need for any remedial action in his favor by the court.[153]

The federal district court, after reviewing the certificate of compliance, ordered the state court to conduct an in camera review of the

140. *Id.* at 60.
141. 985 F.2d 487 (10th Cir. 1993).
142. *Id.* at 488.
143. *Id.*
144. *Id.*
145. *Id.* at 488 (citing People v. Exline, 775 P.2d 48 (Colo. Ct. App. 1988)).
146. *Exline*, 985 F.2d at 488.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

records and determine whether any documents "probably would have changed the outcome of Exline's trial," and, if so, he was to be granted a new trial.[154] However, if the nondisclosure of the information was harmless beyond a reasonable doubt then the state court was not required to take any further action.[155] The federal district court relied on the holding in *Pennsylvania v. Ritchie*[156] to fashion its remedy for the due process violation. The State of Colorado appealed the federal district court's ruling to the Tenth Circuit.

2. The Tenth Circuit's Opinion

The Tenth Circuit's decision adhered closely to the U.S. Supreme Court's holding in *Pennsylvania v. Ritchie*.[157] The court upheld both the federal district court's ruling that Exline's due process rights had been violated and the federal district court's *Ritchie*-derived remedy. In arriving at its decision, the court made a variety of comparisons between *Ritchie* and *Exline*. First, the court explained that the facts of *Ritchie* were similar to the instant case because both defendants were charged with similar offenses. In both *Ritchie* and *Exline*, the defendants made offers of proof that the social service child abuse records were relevant and necessary to their defense.[158] In *Ritchie*, the defendant argued that he should have access to the records because they might contain the names of favorable witnesses or other exculpatory evidence.[159]

The court agreed with the federal district court's finding that Exline's offer of proof was equally as strong as the one in *Ritchie*, if not more specific.[160] Exline's offer of proof stated: "[A]nything in those . . . reports relating to credibility . . . would be crucial to the defense . . . they should be produced to the Court and then let the court decide . . . which ones we would be entitled to."[161]

The Tenth Circuit also reviewed the applicable Colorado law that allows access by a court to otherwise confidential child abuse records. After reviewing Colorado Revised Statutes § 19-10-115(1)(a), (2)(a), (2)(f),[162]

154. *Id.* at 488-89.
155. *Ritchie*, 480 U.S. at 58.
156. *Exline*, 985 F.2d at 488.
157. *Ritchie*, 480 U.S. at 39.
158. *Exline*, 985 F.2d at 489.
159. *Id.* (citing Pennsylvania v. Ritchie, 480 U.S. 39, 44 (1987)).
160. *Exline*, 985 F.2d at 490.
161. *Id.*
162. COLO. REV. STAT. § 19-10-115(1)(a)(1986) states that records of child abuse in Colorado, "[e]xcept as provided in this section . . . shall be confidential and shall not be public information."

COLO. REV. STAT. § 19-10-115(2)(1986) details the agencies which can gain access to confidential child abuse records. Subsection (a) provides that law enforcement agencies and prosecutors investigating abuse reports may have access. Most important to the Tenth Circuit were the provisions of subsection (2)(f) allowing access:

> A court, upon its finding that access to such records [referring to confidential child abuse records, as defined in section (1)(a)] may be necessary for determination of an issue before such court, but such access shall be limited to *in camera inspections* unless the court determines that public disclosure of the information contained therein is necessary for the resolution of an issue then pending before it. . . .

the court concluded that the statutes explicitly provided that the state district court could conduct in camera reviews of such records if necessary. In furtherance of the view that the *Ritchie* and *Exline* cases were not distinguishable on statutory grounds, the court commented that the Colorado statute which governed Exline's request was similar to the Pennsylvania statute involved in *Ritchie.*[163]

As additional support the court cited *Hopkinson v. Shillinger,*[164] in which the Tenth Circuit had previously held that "although a defendant could not point to specific exculpatory information in records he had never seen, he was entitled to an in camera inspection of those records under *Ritchie.*"[165]

In concluding its opinion, the Tenth Circuit used language that disparaged the state district court's recalcitrant behavior towards the federal district court's orders.[166] The court sternly stated that after the case was returned to the state court for the in camera review, "the state court was not asked to determine whether it should or should not review the social service record, and it was not asked to re-interpret what had occurred at the time of the original hearing .... [T]he state court has yet to make the findings required by *Pennsylvania v. Ritchie.*"[167]

3. Analysis

The court closely compared the facts of *Exline* to *Ritchie.* The court compared the offenses, the statutory schemes and the offers of proof made in both cases and concluded that the cases were not distinguishable on any of these substantive grounds.

The State of Colorado, however, argued that Exline's habeas corpus petition should have been dismissed because he failed to show particularized need for the social service records. The Tenth Circuit could have used this narrow interpretation of "need" to deny Exline's habeas relief. Instead, the court found that Exline's offer of proof was more particularized than that offered in *Ritchie.* The court took an expansive view of the rights propounded in *Ritchie* and granted Exline relief, refusing to reverse this case on irrelevant nuances and cosmetic differences.

The federal district court had held that Exline's due process rights under the Fourteenth Amendment were violated by the state trial court's refusal to conduct the in camera review required by *Ritchie.* Specifically, Exline was denied the right of access to documents under the control of the state's social service agency. Exline had a right to social service documents that could have had a material impact on his defense, even those protected by a confidentiality statute. Under the remedy created by *Ritchie,* it was the trial court's duty to conduct an in camera review and

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COLO. REV. STAT. § 19-10-115(2)(f) (1986).

163. *Exline,* 985 F.2d at 490.

164. 866 F.2d 1185 (10th Cir. 1989).

165. *Exline,* 985 F.2d at 490-91.

166. *Id.* at 491.

167. *Id.*

determine whether any of the documents in question were material. The state trial court's refusal to review the documents, and later its obstinate refusal to rule whether its nondisclosure was harmless beyond a reasonable doubt, initially denied Exline this crucial access and later denied him a new trial with access to the material documents.

The U.S. Supreme Court crafted the proper remedy in *Ritchie*. The Tenth Circuit correctly applied that remedy in *Exline*. The Tenth Circuit directed the state district court to determine whether the records contained information that likely would have changed the outcome of Exline's trial. If the state trial court had found that the outcome would have been the same, or that the nondisclosure was harmless beyond a reasonable doubt, then no further remedial action on Exline's behalf was necessary. If the state trial court held otherwise, Exline deserved a new trial. For the Tenth Circuit to have ordered the trial court to do otherwise, would have amounted to a subversion of *Ritchie*—a temptation which the court wisely resisted.

CONCLUSION

During 1993, the Tenth Circuit brought its law on blanket strip search policies into conformity with the majority of the other circuits. *Chapman* and *Cottrell* removed any ambiguity about the unconstitutionality of these blanket policies. *Trevino-Casares* was used by the Tenth Circuit as a vehicle for reforming the calculations made by the United States Parole Commission and the Bureau of Prisons in translating foreign sentences into domestic sentences. The Tenth Circuit construed ambiguous statutory and treaty provisions and created a feasible framework for sentencing translation. This framework, drawn from discordant statutory and treaty language, is cogent and seems to fit the discernible legislative goals. In *Exline*, the circuit closely followed the U.S. Supreme Court case of *Ritchie* and relied on a due process analysis as the basis for access to confidential social service child abuse records.

One commonality among these cases was the Tenth Circuit's guarded view of governmental power. First, the circuit curtailed the ability of police to conduct strip searches of misdemeanants. Second, the circuit interpreted the Prisoner Transfer Treaty and benefitted transferred prisoners who had previously been denied credit against their domestic sentences. Finally, the circuit limited the ability of state governments to maintain the absolute confidentiality of child abuse records.

Jeffrey C. Fleischner

CRIMINAL PROCEDURE SURVEY: SEARCH AND SEIZURE

INTRODUCTION

In criminal procedure jurisprudence during the 1993 term, the Tenth Circuit brought its search and seizure law in line with precedent from other circuits and went beyond its own precedent. In *United States v. Brown*[1] the court formally adopted the warrant severability doctrine. Under this doctrine, already the law in eight other circuits, reviewing courts can sever search warrants which have both constitutional and unconstitutional provisions. The Tenth Circuit, however, provided no apparent standards to govern lower courts' application of the doctrine. In *United States v. Butler*[2] the Tenth Circuit court substantially confused settled precedent and trivialized the exigent circumstances exception to the warrant requirement. In *Butler*, the court upheld a plain view seizure where the officer was not legally present under any prior theory. This broadening of arresting officers' ability to immediately enter the home, and presumably other areas, owned by an arrested individual cannot be squared with any existing law under the Fourth Amendment.

This Survey discusses the warrant severability doctrine and the Tenth Circuit's adoption of the doctrine in *United States v. Brown*, concluding that this case provides no meaningful direction to the trial courts in applying the doctrine. Part II analyzes *United States v. Butler* in the context of the exigent circumstances exception to the warrant requirement, finding that the case substantially broadens and trivializes the exception.

I. ADOPTION OF THE WARRANT SEVERABILITY DOCTRINE

A. *Background*

The Fourth Amendment requires that search warrants describe with particularity both the place to be searched and the items to be seized.[3] This requirement leaves little discretion in the hands of the officer executing the warrant.[4] The Tenth Circuit elaborated on this specificity requirement by stating that the search must be "confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause."[5] Prior to the adoption of the warrant severability doctrine, if any part of a warrant did not conform to the Fourth Amend-

1. 984 F.2d 1074 (10th Cir.), *cert. denied*, 114 S. Ct. 204 (1993).
2. 980 F.2d 619 (10th Cir. 1992).
3. The Fourth Amendment provides "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (particularity requirement prevents a "general, exploratory rummaging in a person's belongings").
4. *See* Marron v. United States, 275 U.S. 192, 196 (1927).
5. Voss v. Bergsgaard, 774 F.2d 402, 404 (10th Cir. 1985).

ment mandate, the entire warrant was invalid. Any evidence seized under the warrant's authority was inadmissible at trial.[6]

The warrant severability doctrine avoids the exclusion of evidence obtained under a valid warrant provision. The doctrine allows the court to sever the unconstitutional portion of the warrant from the constitutional portion and suppress only that evidence which officers seize under the unconstitutional provisions.[7] The doctrine is consistent with the purpose of the exclusionary rule.[8] The rule deters officers from illegally obtaining evidence by excluding that evidence from trial, thereby ensuring that officers do not profit from constitutional violations.[9] The doctrine, however, still allows consideration of evidence which officers constitutionally obtain.[10]

When a court is considering severing a warrant, the foremost question is whether the court may sever the warrant at all. Because the Fourth Amendment prohibits general warrants, a court must decide either that it can sever the constitutional portions of the warrant or that the unconstitutional portions so dominate the warrant that the court must consider the warrant as general and therefore unseverable.[11] The Supreme Court addressed such a situation in *Lo-Ji Sales, Inc. v. New York*.[12] In *Lo-Ji Sales*, a warrant authorized the police to search an adult bookstore and to seize two adult films and " '[t]he following items that the Court independently [on examination] has determined to be possessed in violation of Article 235 of the Penal Law . . . .' "[13] There were no items listed. The Town Justice accompanied the police to the bookstore in order to determine which items violated the code. At the bookstore, an investigator wrote into

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6. Rosemarie A. Lynskey, Note, *A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Redaction Doctrine with* United States v. Leon, 41 VAND. L. REV. 811, 813 (1988). Some commentators criticized the severity of invalidating the entire warrant for minor errors. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.6(f), at 258 (2d ed. 1987).

7. Prior to the 1993 Tenth Circuit term, eight circuits had adopted some version of the severability doctrine. *See* United States v. George, 975 F.2d 72, 79 (2d Cir. 1992); United States v. Blakeney, 942 F.2d 1001, 1027 (6th Cir.), *cert. denied*, 112 S. Ct. 646 (1991), *and cert. denied*, 112 S. Ct. 881 (1992); United States v. Gomez-Soto, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984); United States v. Fitzgerald, 724 F.2d 633, 636-37 (8th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 950 (1984); United States v. Riggs, 690 F.2d 298, 300 (1st Cir. 1982); United States v. Christine, 687 F.2d 749, 754 (3d Cir. 1982); In re Search Warrant Dated July 4, 1977, 667 F.2d 117, 130 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); United States v. Cook, 657 F.2d 730, 735 (5th Cir. 1981). The Seventh Circuit, while not specifically addressing the warrant severability issue, construes warrants more narrowly than the warrants' language requires in order to avoid finding the warrants overbroad. Donovan v. Fall River Foundry Co., 712 F.2d 1103, 1111 (7th Cir. 1983). The Fourth Circuit has not addressed the issue of warrant severability. For an example of the Tenth Circuit's approach to this problem prior to *Brown*, *see infra* notes 31-32 and accompanying text.

8. John W. Kastelic, Project, *The Exclusionary Rule, Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-1984*, 73 GEO. L.J. 385, 397 n.830 (1984).

9. *Id.*

10. *Id.*

11. Charles L. Cantrell, *Search Warrants: A View of the Process*, 14 OKLA. CITY. U. L. REV. 1, 67-68 (1989). *See also* Kastelic, *supra* note 8, at 397 n.832.

12. 442 U.S. 319 (1979).

13. *Id.* at 321-23.

the warrant the titles of the films, magazines and coin-operated film projectors which the Town Justice found obscene after viewing.[14]

The Court held that the warrant was similar to the general warrants the Fourth Amendment sought to prohibit.[15] Beyond the two films listed, the warrant allowed the officials conducting the search total discretionary power in determining what they should seize. Of key importance to the Court's invalidation of the entire warrant was the fact that "the search began and progressed pursuant to the sweeping open-ended authorization in the warrant."[16] The search was not initially limited to a search for the specific items listed; rather, the discovery of additional "illegal" items increased the scope of the search.[17]

In reaching its decision in *Brown*, the Tenth Circuit majority relied heavily on *United States v. George*[18] and *United States v. LeBron*.[19] In *George*, the Second Circuit held severance possible for a warrant which provided for the search and seizure of a number of specific items[20] and "any other evidence relating to the commission of a crime."[21] The officers seized, under the plain view doctrine,[22] a loaded firearm which the defendant, a convicted felon, could not legally possess.[23]

The court held that the warrant's "any other evidence" provision was overbroad.[24] On remand, the court directed the trial court to consider whether severance of the warrant was appropriate.[25] If severance was available, the evidence seized under the plain view doctrine was admissible.[26] The court cautioned, however, that the doctrine was inapplicable if (1) the warrant was devoid of sufficiently particular language; (2) the warrant was not meaningfully severable; or (3) the constitutional portions made up an "insignificant or tangential" portion of the warrant.[27]

In *United States v. LeBron*, the Eighth Circuit majority held severable a warrant which described three stolen items with particularity but in addition authorized the search and seizure of "any other property, description

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14. *Id.* at 323.
15. *Id.* at 325.
16. *Id.* at 326.
17. *Id.*
18. 975 F.2d 72 (2d Cir. 1992).
19. 729 F.2d 533 (8th Cir. 1984).
20. The list included "1 [b]urgundy purse, 1 burgundy shoulder bag, credit cards, personal papers, and ID of Dawn Wood. Misc. photos, keys to Honda motorcycle, dark attache case containing McDonalds management material, McDonalds uniform Handgun, workboot of similar design to plaster cast . . . ." *George*, 975 F.2d at 74.
21. *Id.*
22. In order for evidence to be admissible under the plain view doctrine, there are two requirements: first, that the officer was lawfully present when he observed the evidence; and second, that the officer immediately upon viewing the evidence had probable cause to believe that it was incriminating. For a more complete description of the plain view doctrine, see *infra* notes 90-93 and accompanying text.
23. *George*, 975 F.2d at 75.
24. *Id.*
25. *Id.* at 80.
26. *Id.* at 79.
27. *Id.* at 79-80.

unknown, for which there exists probable cause to believe it stolen."[28] The court found this clause unconstitutional.[29] The police seized all three items described in the valid portion of the warrant. Weapons the officials later seized were not admissible under the plain view doctrine because the officers were no longer legally present under the warrant.[30]

Prior to *Brown*, the Tenth Circuit indicated a general approval of the warrant severability doctrine, even though the court never explicitly adopted it. In *United States v. Leary*,[31] for example, the Tenth Circuit noted in dictum that the severability doctrine was a possible remedy to retain valid portions of a warrant.[32]

B. *Tenth Circuit Opinion:* United States v. Brown[33]

On January 29, 1991, a detective obtained a search warrant (Warrant I) based on his affidavit which stated two primary grounds for probable cause.[34] First, two people at the defendant's house had told an informant they stole and sold vehicles and they had offered to sell the informant other goods well below their fair value.[35] Second, the detective himself observed an individual at the defendant's house working on a dismantled truck with a cutting torch.[36] The detective also observed a second truck which the informant had stated was stolen.[37]

Warrant I, a state warrant, authorized a search for a large number of specific vehicle parts and other items,[38] but included a final sentence authorizing the seizure of "[a]ny other item which the Officers determine or have reasonable belief is stolen while executing this search warrant."[39] The warrant authorized a maximum time of sixteen hours but the search actually lasted fifty-one hours. On February 7, 1991, after the detective and other officers had executed Warrant I, the detective applied for a sec-

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28. 729 F.2d at 535-36.
29. *Id.* at 537.
30. *Id.* at 538-39.
31. 846 F.2d 592 (10th Cir. 1988).
32. *Id.* at 606, n.25.
33. 984 F.2d 1074 (10th Cir. 1993).
34. *Id.* at 1075.
35. *Id.* at 1075-76.
36. *Id.* at 1076.
37. *Id.*
38. The enumerated items included:
Vehicle parts to include the following, but not limited to: Bumpers, grills, fenders, hoods, cabs, dashes, truck beds, engines, transmissions, drive shafts, frames, rear ends, springs, steering parts, seats and other interior parts, VIN plates, titles, vehicle registrations, blank registration forms, bills of sale, blank titles, drive-out stickers, broadcast sheets, EPA stickers, windows, doors, tires, rims and truck bed toolboxes. Tools or toolboxes which are stolen or contain tools that can be used to disassemble or reassemble any vehicle, welders and cutting torches, air compressors, computers, computer components, photocopy machines, firearms, protective devices, carpeting which also may be stolen.
Id.
39. *Id.* For an explanation of why this language is not merely an authorization of plain view seizures, see *infra* note 57 and accompanying text. *See also Brown*, 984 F.2d at 1080 (Seth, J., dissenting).

ond state search warrant (Warrant II).[40] The detective listed items officers observed while executing Warrant I which were not specifically described in the warrant.[41] Warrant II authorized the seizure of specific property,[42] but also included a catch-all authorization to seize "any other item which the Officers have determined or have reason to believe is stolen, while executing this warrant."[43]

While executing Warrant II, the officers smelled methamphetamine in the house and, in fact, found a laboratory in the garage.[44] Based on that information, the officers obtained a federal search warrant (Warrant III) and executed it on the same day.[45] The evidence secured under Warrant III led to the defendant's conviction for conspiracy to manufacture methamphetamine.[46]

The defendant appealed, challenging the district court's denial of his motion to suppress all evidence the officers seized under the warrants.[47] The defendant claimed that Warrants I and II were overbroad. Since the officers' observations while executing Warrants I and II formed the sole probable cause basis for Warrant III, the evidence seized under Warrant III was also inadmissible as the "fruit" of the unconstitutionally broad first two warrants.[48] The Tenth Circuit affirmed the conviction, holding that the unconstitutionally broad final sentences of Warrants I and II were severable from the sufficiently particular list of items. Therefore, the evidence seized under Warrant III was not the fruit of illegal warrants.[49]

1. Majority Opinion

Judge Paul J. Kelly, writing for the majority, began by addressing whether the warrants in question were sufficiently particular to satisfy the Fourth Amendment. The majority noted that both Warrants I and II specifically described a number of objects to be seized,[50] but assumed *arguendo* that the final sentences under those warrants were not descriptive, did not adequately limit the officers' discretion, and were therefore unconstitutional.[51]

The majority held that the final sentences of Warrants I and II were severable from the constitutionally adequate portions of those warrants.[52]

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40. *Id.* at 1076.
41. *Id.*
42. Warrant II provided for the seizure of, "a Quasar Microwave . . . A brown Cedar chest that is faded on the top lid and has a tray on the inside, approximately 3' wide and 4' in length and approximately 2 1/2' to 3' in depth." *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court held that evidence obtained by exploitation of a constitutional violation was tainted "fruit of the poisonous tree" and was inadmissible. *Id.* at 488.
49. *Brown*, 984 F.2d at 1078.
50. *See supra* notes 38 and 42.
51. *Brown*, 984 F.2d at 1077 n.1.
52. *Id.* at 1078.

The majority further held that the severed warrants provided a lawful basis for the officers' presence in the defendant's home; therefore, the officers' observations while on the premises provided the probable cause for the additional warrants.[53] Under the severed Warrant I, the state officers were legally present in the defendant's home when they observed the stolen items described in Warrant II. Similarly, they were legally in the defendant's home under the severed Warrant II when they smelled the methamphetamine. Warrant III, which was based on the smell of methamphetamine, was therefore valid.[54]

2. Dissenting Opinion

Judge Seth's dissent acknowledged that warrant severance is a proper remedy, but argued that in this case the overbroad language "so tainted the entire warrant that severance is not justified."[55] Because Warrant I was "so tainted," the officers were not lawfully on the defendant's property while executing that warrant. Warrants II and III were therefore illegal as the fruit of the invalid Warrant I.[56]

Much of the dissent focused on the overbroad language of Warrant I. The dissent asserted that the court could not construe the overbroad language as authorizing plain view seizures,[57] nor could the court argue that the officers were lawfully on the premises under the "good faith" exception[58] in order to validate any of the warrants.[59] The dissent pointed out that while Warrant I authorized a search on January 29, 1991, between 6:00 a.m. and 10:00 p.m., the actual search lasted at least fifty-one hours and did not end until January 31, 1991.[60] In addition, officers invited many townspeople, whose property had been stolen, onto the defendant's property in order to identify and claim their property.[61]

As a result of the overbroad scope and extraordinary duration of the search, the dissent argued that Warrant I more closely resembled a general warrant than a warrant with both constitutional and overbroad por-

53. *Id.*
54. *Id.*
55. *Brown*, 984 F.2d at 1078 (Seth, J., dissenting).
56. *See id.*
57. *Id.* at 1079. The plain view doctrine requires that the officer have probable cause to believe the item is stolen in order to seize it, whereas the warrant authorized seizure where the officer had only a "reason to believe" the item was stolen. *Id. See also* Horton v. California, 496 U.S. 128 (1990) (discussing the requirements necessary to apply the plain view doctrine).
58. *See* United States v. Leon, 468 U.S. 897 (holding that, under the "good faith exception," evidence obtained by officers acting in reasonable reliance on a search warrant ultimately found invalid is admissible).
59. *Brown*, 984 F.2d at 1080-81. The dissent noted that Warrant I was so "facially and grossly overbroad" that no officer could have understood it to give guidelines as to what that officer could seize. Since there could be no reasonable reliance on such a facially defective warrant, the good faith exception from *United States v. Leon* could not apply in this case. *Id.* at 1080.
60. *Id.* In addition to the large number of tools and auto parts seized, the officers also took a fishing reel, turquoise stones, Christmas wreaths, Christmas lights and a bug sprayer. *Id.*
61. *Id.* at 1079.

tions.[62] The dissent stated that Warrant I was indistinguishable from the general warrant in *Lo-Ji Sales*[63] which the Supreme Court held unconstitutional. Warrants II and III were therefore tainted[64] by the unconstitutionality of Warrant I, and were not valid under any other grounds.[65]

C. *Analysis*

The court's adoption of the warrant severability doctrine was a prudent decision which brought Tenth Circuit jurisprudence in line with all circuits that have specifically considered this point of law.[66] The doctrine is a useful tool which, when correctly applied, avoids suppression of legally-obtained evidence when the warrant is defective due to technical oversight or overbroad, unjustified authorizations to search. When considering whether a warrant should be severed, however, it is important to remember the Fourth Amendment's prohibition against general warrants. While the language of Warrant I in *Brown* resembled the language of warrants which other courts of appeals have severed and held valid,[67] the remarkable duration of the search in *Brown* makes it a troublesome case for the adoption of the severability doctrine. Trial courts will have little guidance in determining how excessive a search's duration must be before that execution renders a warrant unseverable.

As the majority correctly noted, the language of Warrant I was similar to many other warrants which courts have severed. In fact, the list of specific items in Warrant I was more extensive than the lists in many of the warrants which led to the adoption of the severability doctrine in other circuits.[68] While Warrant I certainly contained overbroad language, it was not so facially deficient as to appear general in nature when compared with other warrants which courts have held severable.

The execution of the warrant, however, makes its severance more problematic. As the dissent noted, the search under Warrant I was to last for no more than sixteen hours.[69] That figure represented the magistrate's determination of a reasonable time allotment to search not only for the enumerated items, but also for the additional "stolen" items the majority in *Brown* found the officers could not constitutionally seize.[70] Because the actual search lasted more than three times the stated time limit, the officers involved were operating largely under the authority of the overbroad portion of the warrant.

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62. *Id.* at 1082.

63. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

64. *Brown*, 984 F.2d at 1082. *See supra* note 48 and accompanying text for a discussion of the exclusion of tainted evidence.

65. *See id.* at 1081.

66. *See* cases cited *supra* note 7.

67. *See supra* text accompanying notes 18-27.

68. *See supra* notes 20 and 28 and accompanying text.

69. *Brown*, 984 F.2d at 1080.

70. *Id.*

The search in *Brown* somewhat parallels the search in *Lo-Ji Sales, Inc. v. New York*,[71] where the sufficiently particular portion of the warrant comprised a negligible portion of the scope of the total warrant.[72] That is, the sufficiently particular portion of Warrant I in *Brown* authorized a relatively small portion of the duration of the search.[73] The search in *Brown* differed from that of *Lo-Ji Sales* which was merely an effort directed at seizing whatever material the Town Justice deemed as violative of the penal code.[74] The *Lo-Ji* warrant, as the search demonstrated, never had any legitimate, particularized aspect.[75] Under Warrant I in *Brown*, however, the officers devoted substantial time to the discovery of the particular enumerated items. They did not search exclusively under the overbroad language.[76] Thus, at least a portion of Warrant I, both on its face and in its execution, fell within constitutional requirements, and *Lo-Ji Sales* is inapposite.

United States v. George[77] is more useful in this context. The warrant in *George* was more facially vague than the Warrant I in *Brown*. While the court in *George* did not decide whether to sever the warrant at issue, it noted that severance might not be appropriate in a case where the sufficiently particular portions of a warrant composed only an "insignificant or tangential" portion of the warrant.[78] Warrant I in *Brown* appears to be a warrant where, in light of the search's duration, the enumerated items bordered on being insignificant.

In addition, *United States v. LeBron*[79] specifically held that while searching under an overbroad portion of a severable warrant, the police are not legally present for the purpose of the plain view or other doctrines.[80] The correct question in evaluating *Brown* is, at what point did the officers complete the search for sufficiently particularized items under Warrant I? The majority did not ask that question, nor did it explain why the excessive duration of the search did not render the warrant unseverable.

The problem with the result in *Brown* is not that it adopted the warrant severability doctrine; the doctrine itself is useful when correctly applied. The main problem is that the *Brown* majority did not examine the execution of Warrant I. Rather, the majority based its holding purely on the language of the warrant.[81] The majority therefore did not address the proper limits of the warrant severability doctrine. As a result, trial courts will lack sufficient guidance in determining whether they may properly

71. 442 U.S. at 325.
72. *Id.*
73. *Brown*, 984 F.2d at 1082 (Seth, J., dissenting).
74. *See supra* text accompanying notes 12-17.
75. *Lo-Ji Sales*, 442 U.S. at 326 (the search began and progressed pursuant to the sweeping, open-ended authorization in the warrant).
76. *See Brown*, 984 F.2d at 1076.
77. 975 F.2d 72 (2d Cir. 1992).
78. *Id.* at 79-80.
79. 729 F.2d 533 (8th Cir. 1984).
80. *Id.* at 537-38. *See also infra* notes 90-93 and accompanying text.
81. *Brown*, 984 F.2d at 1077-78.

sever a warrant.[82] With *Brown* as a guide, trial courts will rarely look beyond the language of a warrant to determine whether the warrant was properly executed.

II. THE TRIVIALIZATION OF THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT

A. *Background*

Under the Fourth Amendment, warrantless searches and seizures inside a home are presumptively unreasonable.[83] Absent consent[84] or exigent circumstances, a state officer may not enter a person's house unless the officer possesses a warrant.[85] In the absence of a warrant or exigent circumstances, any evidence seized as a result of the illegal entry is inadmissible at trial.[86]

The Supreme Court has grouped exigent circumstances into several categories: officers responding to an emergency,[87] officers in hot pursuit of a fleeing felon,[88] or officers acting to prevent destruction or removal of evidence.[89] These exigent circumstances represent exceptions to the warrant requirement and should be as narrowly construed as possible.[90]

An officer who is in a person's home without a warrant, but whose presence is supported by an exception to the warrant requirement, for example, an exigent circumstance, may seize some evidence. Such evidence must be in plain view from the officer's lawful position and the officer must immediately have probable cause to believe the evidence is incriminating.[91] Thus, the officer must be lawfully present, by warrant or

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82. This lack of guidance for lower courts concerning which warrants are severable is a prevalent problem among jurisdictions which have adopted the severability doctrine. *See* Mark S. Halpern, Comment, *Redaction—the Alternative to the Total Suppression of Evidence Seized Pursuant to a Partially Invalid Search Warrant*, 57 TEMP. L.Q. 77, 79, 91-92 (1984).

83. Payton v. New York, 445 U.S. 573, 586 (1980). The Court further stated "[t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms . . . ." *Id.* at 589.

84. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Consent must be voluntary, but the consenting party does not have to know that he can refuse to consent. *Id.* at 248-49.

85. *Payton*, 445 U.S. at 590.

86. Weeks v. United States, 232 U.S. 383, 393, 398 (1914). The Supreme Court held that the exclusionary rule applies to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

87. *See* Arizona v. Hicks, 480 U.S. 321, 326 (1987).

88. Warden v. Hayden, 387 U.S. 294, 298-299 (1967).

89. Schmerber v. California, 384 U.S. 757, 770-71 (1966).

90. *See* Katz v. United States, 389 U.S. 347, 357 (1967). The burden of demonstrating that exigent circumstances exist is on the prosecution. Chimel v. California, 395 U.S. 752, 762 (1969); *see generally* Steven D. Allison, Project, *Exigent Circumstances, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 GEO. L.J. 853, 902-10 (1993) (discussing the limits of exigent circumstances).

91. Horton v. California, 496 U.S. 128, 136-37 (1990).

otherwise,[92] in order to invoke the plain view doctrine to legitimize a seizure.[93]

The Supreme Court ostensibly created a new exception to the warrant requirement in *Washington v. Chrisman*.[94] In *Chrisman* a campus police officer stopped the defendant's roommate and asked to see the roommate's identification.[95] The roommate was drinking and the officer suspected that he was underage. The roommate had no identification and asked that the officer allow him to return to his room to obtain it.[96] The officer accompanied the roommate to the room and, while waiting in the threshold of the room, observed marijuana seeds in the room.[97] He entered the room and seized the marijuana.[98]

The Court held that an officer has the right to monitor the movements of an arrested person in order "to ensure his *own* [the officer's] safety."[99] Under those circumstances, there was no requirement of exigent circumstances for the officer to enter the room without a warrant. Thus, the officer's presence in the room, and therefore the plain view seizure of the marijuana, were legal.[100]

Courts generally have interpreted *Chrisman* to stand for the proposition that after a lawful arrest, an arrestee who invites the arresting officer to accompany him to his home or requests to enter his home grants the officer a lawful presence in the home.[101] Without the arrestee's invitation or request that he be allowed to enter his home, the officer must demonstrate either exigent circumstances or a valid warrant in order to be lawfully in the home.[102]

Prior to *Chrisman*, the Tenth Circuit had addressed the limits of exigent circumstances in *United States v. Anthon*.[103] In *Anthon* the defendant was arrested outside his hotel room when he was wearing only swimming

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92. In Maryland v. Buie, 494 U.S. 325 (1990), the Court held that officers may conduct a protective sweep incident to an in-home arrest provided they have a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 337. The protective sweep is not a full search. *Id.* at 335.

93. *See* Steven G. Davison, *Warrantless Investigative Seizures of Real and Tangible Personal Property by Law Enforcement Officers*, 25 AM. CRIM. L. REV. 577, 604-605 (1988).

94. 455 U.S. 1 (1982).

95. *Id.* at 3.

96. *Id.*

97. *Id.* at 3-4.

98. *Id.* at 4.

99. *Id.* at 7 (emphasis added). The Court also noted that an officer may monitor the arrestee's movements in order to prevent the arrestee's escape. *Id.*

100. *Id.* at 8.

101. *See, e.g.*, United States v. Morgan, 743 F.2d 1158, 1164 (6th Cir. 1984) (The two significant elements of the holding in *Chrisman* were that the arrestee requested to return to his room and that there was a lawful arrest prior to the officer entering the room.), *cert. denied*, 471 U.S. 1061 (1985).

102. *Chrisman* itself represented a departure from prior Supreme Court decisions in its apparent abandonment of the exigent circumstances requirement for warrantless entry. *See* Ira D. Wincott, Comment, *Constitutional Law—Fourth Amendment—Plain View Exception to the Warrant Requirement—Exigent Circumstances*—Washington V. Chrisman, 29 N.Y.L. SCH. L. REV. 125, 147-48 (1984).

103. 648 F.2d 669 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).

trunks. The arresting officers returned the defendant to his room, without his consent or request, in order to procure clothing for him.[104] While the officers were in the defendant's hotel room, they discovered cocaine and marijuana. The court held that the defendant did not consent to the police presence, and that no exigent circumstances existed which could justify the officers' entry without a warrant.[105]

B. *Tenth Circuit Opinion:* United States v. Butler[106]

On April 30, 1991, two Deputy United States Marshals and two county sheriff's officers arrived at Butler's trailer in rural Oklahoma in order to serve Butler with an arrest warrant.[107] The ground surrounding the trailer was covered with broken glass, hundreds of beer cans, and parts from several dismantled cars.[108] Butler's trailer-mate Willis Bruce met the officers, and one marshal told Bruce that he had a warrant to arrest Butler. Butler, who was not wearing shoes, then came out of the trailer and was arrested.[109]

There was no way to avoid the debris surrounding the trailer in conveying Butler to the officers' cars.[110] A marshal asked Butler if he had any shoes to protect his feet. Butler stated that he had shoes, but that they were in the trailer.[111] Bruce asked his girlfriend to retrieve the shoes, but the marshal stated " 'Well, let's go on in and get them.' "[112] While retrieving the shoes, the marshal observed a loaded shotgun in Butler's room which, as a convicted felon, Butler could not legally possess.[113] The marshal seized the firearm.[114]

At trial, Butler moved to suppress the shotgun. The trial court relied heavily on *Chrisman* in denying Butler's motion, and Butler was ultimately convicted.[115] Butler appealed the trial court's denial of his motion to suppress the shotgun.[116] The Tenth Circuit affirmed the trial court's ruling, holding that *Chrisman* supported the characterization of the marshal's presence as lawful, and the shotgun seizure as valid under the plain view doctrine.[117]

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104. *Id.* at 674-75.

105. *Id.* at 675. In addition, the court held that the arrest outside of the room would not permit the characterization of the search inside the room as a search incident to a lawful arrest, because that search is allowed only for the purposes of discovering and removing weapons or preventing the destruction of evidence. Its scope is limited to areas within the arrestee's immediate control. *Id.* (citing Chimel v. California, 395 U.S. 752, 762-63 (1969)).

106. 980 F.2d 619 (10th Cir. 1992).

107. *Id.* at 620.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *See* 18 U.S.C. § 922(g)(1) (1988).

114. *Butler*, 980 F.2d at 621.

115. *Id.* at 620-21.

116. *Id.* at 620.

117. *Id.* at 621-22.

1. Majority Opinion[118]

The court initially discussed *Chrisman*, acknowledging that the defendant in *Chrisman* had invited the officer into his dorm room. In *Butler*, the marshal instigated the intrusion and Butler protested the marshal's entry.[119] Ignoring that distinction, the court proceeded to argue that the marshal's intrusion was based on a genuine concern for Butler's welfare and was not pretextual; that is, the marshal's intrusion was not made in "bad faith."[120] Further, the court argued that even without an invitation, as in *Chrisman*, police may "conduct a limited entry into an area for the purpose of protecting the health or safety of an arrestee."[121] The court relied primarily on two cases from the Second Circuit, *United States v. Titus*[122] and *United States v. Di Stefano*[123], for its holding that police can legally accompany an arrestee into his home in order to obtain clothing.[124]

Finally, the court distinguished *Anthon* by arguing that in that case there existed no "legitimate and significant" threat to Anthon's health which required that the police enter his hotel room.[125] In the instant case, however, the marshal had a good faith belief that a significant threat to Butler's safety existed. The threat to Butler's safety was an exigent circumstance which allowed the marshal to enter Butler's trailer.[126]

2. Dissenting Opinion

In her dissent, Judge Seymour stressed that the invasion of the privacy of a person's home is the primary evil against which the Fourth Amendment is directed.[127] The dissent disagreed with the majority's characterization that Butler's lack of footwear constituted an exigent circumstance because he was in danger of being injured.[128] The dissent noted that the majority ignored the fact that Butler and his companions had just walked back and forth across the debris in order to bathe in the river. In addition, Butler neither evinced apprehension that he would injure his feet on the walk to the officers' cars, nor requested that he be provided with shoes.[129]

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118. The majority opinion was authored by Patrick F. Kelly, District Judge, sitting by designation.

119. *Butler*, 980 F.2d at 621.

120. *Id.*

121. *Id.*

122. 445 F.2d 577 (2d Cir.) (holding that officers lawfully in defendant's house for arrest purposes could seize items in plain view), *cert. denied*, 404 U.S. 957 (1971).

123. 555 F.2d 1094 (2d Cir. 1977) (holding that an officer could lawfully accompany the defendant into her room so that she could change her clothes after she was arrested).

124. *Butler*, 980 F.2d at 621.

125. *Id.* at 622. *See also* text accompanying notes 103-05.

126. *Id.*

127. *Butler*, 980 F.2d at 622 (Seymour, J., dissenting).

128. *Id.* at 623.

129. *Id.*

The dissent also argued that the instant case was significantly different from *Chrisman*.[130] The dissent stated that *Chrisman* stood for the proposition that a police officer could accompany an arrested defendant into his home at the defendant's request. *Chrisman* did not represent that an officer could take an arrestee into the arrestee's house without his consent; the arrestee's request was the linchpin to the *Chrisman* holding.[131] Since Butler did not request permission to enter his house or consent to the marshal's entry, the seizure effected in the instant case did not fall under *Chrisman*. The marshal was not legally in Butler's house when he observed the shotgun.[132] Therefore, the plain view doctrine would not validate the shotgun seizure.[133]

The dissent further argued that *Anthon* was indistinguishable from the case at bar.[134] The holding in *Anthon* was derived from facts in which there were no exigent circumstances, the defendant did not request to return to his room, and the defendant did not offer consent for the officers to enter his room.[135] Butler, like Anthon, was not in danger, did not request to enter his house, and did not consent to the marshal's entry.[136]

Finally, the dissent argued that the holding in *Titus* was based on an exigent circumstance, namely, the prevention of the defendant's escape.[137] The instant case was distinguishable from *Titus* in that there was no exigent circumstance to legalize the warrantless entry into Butler's home.[138] The majority's view that an exigency existed therefore eroded the protection of the Fourth Amendment by trivializing the exigency requirement.

C. *Analysis*

The majority in this case allowed an officer to intrude into the defendant's trailer without any of the justifications which the Supreme Court and the Tenth Circuit specifically require for such an action. The marshal did not have a warrant authorizing his entry into the defendant's trailer. The arrest took place outside the trailer; therefore, a protective sweep, which likely would not justify the marshal's actions in any case, does not apply. The only possible justifications, as the majority recognized, were

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130. *Id.* at 622.
131. *Id.* at 623.
132. *Id.*
133. *Id.*
134. *Id. See also* text accompanying notes 125-26.
135. *Id.* (citing United States v. Anthon, 648 F.2d 669, 675 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982)).
136. *Butler*, 980 F.2d at 623 (Seymour, J., dissenting).
137. *Id.* at 624.
138. *Id.* In distinguishing *Titus* the dissent stated "[t]he warrantless entry of a home to prevent the escape of a defendant the police have probable cause to arrest is not analogous to an entry to obtain shoes for a barefoot arrestee who does not request them." *Id.* The dissent also noted that the holding in *Di Stefano* offered no additional support for the majority's position since that case was from the same circuit as *Titus* and merely followed *Titus* as precedent. *Id.*

either that exigent circumstances existed, authorizing the marshal's entry, or that the *Chrisman* rationale allowed the marshal to take Butler into his own trailer, even absent a request from Butler.

Under the former rationale, there were no exigent circumstances which could have justified the marshal's entering the trailer. As traditionally defined,[139] none of the exigent circumstance categories applied to the situation in *Butler.* The only category which possibly could have applied is the emergency situation, which the Supreme Court has narrowly construed.[140] In order to argue that the emergency situation legalized the marshal's entry to obtain Butler's shoes, the majority would have to argue that the emergency situation made the marshal's entry imperative.[141]

In this case, the danger was that of the defendant cutting his feet. Not only is this type of danger relatively minor when compared with what the Supreme Court has defined as an emergency situation,[142] but in fact there existed no danger at all to the marshal or to Butler.[143] Butler did not request the entry into his trailer to obtain shoes, and he evinced no concern that he would injure his feet.[144] The majority based its holding partially on the marshal's good faith attempt to protect Butler's feet.[145] The majority, however, cited no authority for the proposition that a good faith attempt to protect a minor safety interest allows an officer to enter an arrestee's home. Considering the low safety interest the marshal believed he was protecting and its unlikely classification under any exigent circumstance category, the marshal's presence in Butler's trailer cannot be justified under an exigent circumstance exception to the warrant requirement.

The majority's reliance on *Chrisman* also is misplaced. The *Chrisman* holding does not represent that an officer may return an arrestee to his room and accompany the arrestee into his room for any reason. Rather, the arrestee must somehow indicate that he desires to return to his room. In that situation, the officer may accompany the arrestee for security purposes. Other United States Courts of Appeals have interpreted *Chrisman* in such a manner.[146]

Moreover, the Court in *Chrisman* specifically authorized the officer's presence in the dorm room to monitor the arrestee and to protect the officer himself.[147] Nowhere did the *Chrisman* Court imply that the protection of an *arrestee* would authorize an officer to force the arrestee to enter his own home and allow the officer to enter as well. In *Butler,* there was no indication that Butler requested or desired to enter his home to obtain

139. *See supra* notes 87-90 and accompanying text.
140. *See supra* note 90 and accompanying text.
141. McDonald v. United States, 335 U.S. 451, 456 (1948).
142. *E.g.,* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (holding that officers were acting under exigent circumstances when they entered a dwelling to search for an armed robbery suspect and weapons and where a delay in action would have endangered lives of officers and citizens).
143. *Butler,* 980 F.2d at 623 (Seymour, J., dissenting).
144. *Id.*
145. *Id.* at 621.
146. *See supra* notes 101-02.
147. Washington v. Chrisman, 455 U.S. 1, 7 (1982).

shoes. The majority's misinterpretation of *Chrisman* led to a holding which is both unprecedented and unjustified based on Supreme Court and Tenth Circuit cases.

Finally, the court in *Butler* failed to distinguish *Anthon* in any meaningful way. The majority's attempt to separate *Anthon* hinged on its statement that there was in *Butler* "a legitimate and significant threat" to Butler's safety whereas in *Anthon* there was no such threat.[148] However, as the dissent correctly noted, there was no legitimate threat because the defendant had just safely crossed the very area with which the marshal was concerned.[149] In addition, walking across glass and beer cans is hardly a "significant threat."[150] The holding that the danger of minor cuts qualifies as a significant threat allows the exigent circumstances exception to swallow up the warrant requirement. The holding in *Butler* disregards Tenth Circuit precedent and the precedent of other courts.

CONCLUSION

During the survey period, the Tenth Circuit brought its precedent in line with other circuits in the area of warrant severability in the *Brown* case, but unfortunately did not provide any meaningful direction to the trial courts in determining when the doctrine should be applied. The Tenth Circuit departed significantly from established precedent in the area of warrantless entry in the *Butler* case, but offered no support for its trivialization of the exigent circumstances exception to the warrant requirement. Hopefully, the Supreme Court will address the difficult issues these cases raise in order to avoid the confusion which the Tenth Circuit's decisions will create in this area.

Paul Faraci

148. *Butler*, 980 F.2d at 622.

149. The dissent stated that "[t]aking an arrestee in bare feet across a littered yard he has just traversed safely presents no greater exigency than taking an arrestee to the police station in his bathing suit." *Id.* at 624 (Seymour, J., dissenting) (referring to *Anthon*).

150. *See supra* note 142 and accompanying text.

EMPLOYMENT LAW SURVEY

INTRODUCTION

Many of the Tenth Circuit's employment decisions in the survey year[1] specifically addressed the method by which a plaintiff may prove discrimination with indirect evidence under Title VII of the Civil Rights Act of 1964[2] or the Age Discrimination in Employment Act.[3] Initially, this Survey outlines the allocation and burden of proof in an indirect evidence intentional discrimination case. An analysis of the Tenth Circuit's decisions demonstrates that although the court continued to lighten the plaintiff's burden in making out a prima facie case,[4] the court departed from precedent and significantly increased the plaintiff's burden at the pretext stage.[5]

In interpreting the prima facie requirement, the Tenth Circuit adhered to the Supreme Court's warning that the prima facie case was "never intended to be rigid, mechanized, or ritualistic."[6] Accordingly, the court continued to treat the plaintiff's burden as flexible and minimally demanding. Most importantly, in *Hooks v. Diamond Crystal Specialty Foods, Inc.*,[7] the court concluded that a plaintiff need not prove equal or better qualifications than the person selected to satisfy the prima facie case.[8] Additionally, in *Whalen v. Unit Rig, Inc.*,[9] the court decided that the plaintiff's failure to apply formally for the position at issue did not defeat the prima facie case.[10] After *Whalen*, a showing that the employer had notice of the plaintiff's status as one who might reasonably be interested in the job, or of the fact that the plaintiff sought employment, will serve to satisfy the prima facie case.[11]

These court decisions addressing the requirements of the prima facie case must be contrasted with the court's decisions that imposed a more stringent pretext burden on the plaintiff. The court confronted the pre-

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1. The survey year covers decisions handed down between September 1, 1992 and December 31, 1993.

2. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

3. 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992). The methodologies for proving intentional discrimination discussed in this survey are also used in proving intentional discrimination under 42 U.S.C. § 1981 (1988) and 42 U.S.C. § 1983 (1988). *See* Drake v. City of Fort Collins, 927 F.2d 1156, 1163 (10th Cir. 1991).

4. *See infra* parts I.A., II.A.

5. *See infra* parts I., II.B. Once the employer has rebutted plaintiff's prima facie case, a finding of intentional discrimination depends on plaintiff's success in showing pretext. A finding of pretext indicates that the reasons offered by the employer were not the real reasons for the employment decision, but an attempt to mask the consideration of impermissible factors.

6. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

7. 997 F.2d 793 (10th Cir. 1993).

8. *Id.* at 797.

9. 974 F.2d 1248 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1417 (1993).

10. *Id.* at 1251.

11. *See id.*

text issue in an indirect intentional discrimination case in *EEOC v. Flasher Co.*,[12] and held that a mere finding of disparate treatment,[13] without a showing that it was the result of intentional discrimination based on protected class characteristics, does not prove a violation of Title VII.[14] The Tenth Circuit's ruling in *Sanchez v. Philip Morris Inc.*,[15] reinforced the heavy pretext burden articulated in *Flasher* and detailed the nature of the more stringent "pretext-plus" requirement for plaintiffs.[16]

By tracing the evolution and clarification of the *McDonnell Douglas* framework,[17] this Survey criticizes both the court's inconsistent interpretation of the framework and the court's movement towards increased burdens on plaintiffs at the pretext stage. The Tenth Circuit's pretext decisions will be discussed in light of the Supreme Court's recent clarification of the indirect evidence framework in *St. Mary's Honor Center v. Hicks*.[18] The Survey concludes that the heightened burdens imposed by the Tenth Circuit render the *McDonnell Douglas* framework useless, since indirect evidence alone, without the anticipation and defeat of all other possible reasons for the employer's decision, will not support an inference of intentional discrimination.

I. THE INDIRECT EVIDENCE INTENTIONAL DISCRIMINATION CASE: BACKGROUND

The purpose of Title VII of the Civil Rights Act of 1964[19] is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[20] Although Title VII does not guarantee a job to each person, it requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[21] Congress emphasized that other civil rights guaranteed in the Act mean little without the right "to gain the economic wherewithal to enjoy or properly utilize them."[22] Specifically, Title VII

12. 986 F.2d 1312 (10th Cir. 1992).

13. *See infra* note 24.

14. *Flasher*, 986 F.2d at 1314.

15. 992 F.2d 244 (10th Cir. 1993).

16. *See infra* note 44.

17. The Supreme Court established the indirect evidence framework for Title VII claims in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

18. 113 S. Ct. 2742 (1993).

19. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

20. *McDonnell Douglas*, 411 U.S. at 800.

21. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

22. H.R. REP. No. 914, 88th Cong., 2d Sess., pt. 2, 29 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2516. The House Report went on to state that "[a]side from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable." *Id.* at 30.

prohibits discrimination on the basis of an individual's race, color, religion, sex, or national origin.[23]

To prove intentional discrimination under Title VII, the plaintiff must show disparate treatment.[24] A plaintiff may prove disparate treatment by offering express,[25] direct,[26] or indirect[27] evidence of intentional discrimination.

A. *The* McDonnell Douglas *Framework*

In *McDonnell Douglas Corp. v. Green*,[28] the Court, in an effort to clarify the appropriate inquiry in an indirect evidence intentional employment discrimination case, allocated the burden of production and established an order for the presentation of proof. Under the *McDonnell Douglas* framework, the plaintiff in a Title VII case carries the initial burden of establishing a prima facie case of discrimination.[29] To establish a prima facie case, the plaintiff must show that: (1) she is a member of a racial minority, (2) she was qualified and applied for an available position, (3)

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23. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1988).

Congress delegated the primary responsibility of preventing and eliminating unlawful employment practices to the Equal Employment Opportunity Commission ("EEOC"). *Id.* §§ 2000e-4(a), 5(a).

24. Disparate treatment is one of two methods recognized by the Supreme Court for proving individual discrimination under Title VII. Disparate treatment exists where the "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). "[D]isparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Id.*

The other method of proof, disparate impact, "involve[s] employment practices that are facially neutral in their treatment of different groups but . . . fall more harshly on one group than another and cannot be justified by business necessity." *Id.*

25. Express evidence of employment discrimination would be an explicit statement by an employer indicating discriminatory intent (i.e. "I will not hire you *because* you are a woman"). *See* Roberto L. Corrada, St. Mary's Honor Center v. Hicks: *Much Ado About Nothing?* 1 (1993) (unpublished manuscript, on file with the *University of Denver Law Review*).

26. Consistent statements made by an employer to his employees that he dislikes African Americans, coupled with the fact that an African American has never received a promotion in the respective workplace, is an example of direct evidence of discrimination. The phrase "smoking gun" is also used to characterize direct evidence. *See* Gilbert M. Roman, *Proving Intentional Discrimination in Employment Cases Through Indirect Evidence: The Supreme Court Clarifies the Rules*, 42 TRIAL TALK 6 (1993).

The mixed-motive case, in which a plaintiff shows that an employer considered both an impermissible factor and a legitimate factor in making the employment decision, is a direct evidence case properly analyzed under the framework established in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

27. Indirect evidence is best understood as circumstantial evidence. *See* 2 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 50.19, at 10-6 (1993).

28. 411 U.S. 792 (1973). "[T]he Court deliberately used this case as the occasion and the vehicle for the promulgation of a general rule designed to bring order out of a chaotic situation that had developed within the lower courts." LARSON & LARSON, *supra* note 27, § 50.10, at 10-4.

29. *McDonnell Douglas*, 411 U.S. at 802.

she was rejected for the position, and (4) the position remained open.[30] If the plaintiff succeeds in proving the prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[31]

If the employer carries its burden, the plaintiff then has an opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by the employer were only a pretext for discrimination.[32] Relevant to showing pretext is evidence regarding the employer's treatment of the individual employee during the term of employment, the employer's reaction to lawful civil rights activities, the employer's general policy regarding minority employment, and a statistical showing of a pattern of discrimination by the employer.[33]

B. *Refining the Framework*

In *Texas Department of Community Affairs v. Burdine*,[34] the Court clarified the *McDonnell Douglas* framework by detailing the relevant burdens.[35] In confronting the plaintiff's initial burden, the Court stressed the importance of a prima facie showing, which creates an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[36] The prima facie case establishes a mandatory, rebuttable presumption[37] that shifts the burden of production, not persuasion, to the defendant.[38] The nature of the defendant's burden must be "understood

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30. *Id.* Although the Court stated the requirements for a prima facie case in a refusal to hire context, the Court explicitly stated that "[t]he facts necessarily will vary in Title VII . . . and the specification above . . . is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

Accordingly, the federal courts have since adapted the prima facie case to accommodate a number of employment contexts. *See, e.g.*, Purrington v. University of Utah, 996 F.2d 1025 (10th Cir. 1993) (retaliation); Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988) (discharge and age discrimination claim); McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988) (discharge); Foster v. MCI Telecommunications Corp., 773 F.2d 1116, (10th Cir. 1985) (layoff); Mohammed v. Callaway, 698 F.2d 395 (10th Cir. 1983) (failure to promote); Worthy v. United States Steel Corp., 616 F.2d 698 (3d Cir. 1980) (discipline); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974) (denial of training); Lanegan-Grimm v. Library Ass'n, 560 F. Supp. 486 (D. Or. 1983) (compensation); Chapman v. Pacific Tel. & Tel. Co., 456 F. Supp. 65 (N.D. Cal. 1978) (transfer).

31. *McDonnell Douglas*, 411 U.S. at 802.

32. *Id.* at 804.

33. *Id.* at 804-05.

34. 450 U.S. 248 (1981).

35. For a more detailed discussion of the individual burdens in a disparate treatment case, see Mack A. Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984).

36. *Burdine*, 450 U.S. at 254 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)). The prima facie case also serves to eliminate the two most common nondiscriminatory reasons for the plaintiff's rejection: (1) no available positions, and (2) plaintiff is unqualified for an available position. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

37. *Burdine*, 450 U.S. at 254 n.7.

38. *Id.* at 254-55. Prior to *Burdine*, the nature of the defendant's burden remained undefined by the Court. LARSON & LARSON, *supra* note 27, § 50.32(a), at 10-38 to 10-44.

in light of the plaintiff's ultimate and intermediate burdens."[39] To rebut the prima facie case, the defendant need not persuade the court of its nondiscriminatory reasons, but must produce enough evidence to raise a genuine issue of fact as to the plaintiff's claim of discrimination.[40] If the defendant remains silent in the face of the presumption, however, the court must enter judgment for the plaintiff.[41]

In discussing the burden shift back to the plaintiff, the Court noted that if the defendant meets the burden of production, "the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity."[42] To meet the final burden of persuasion, the plaintiff must prove that the proffered reason was not the true reason for the defendant's action. The plaintiff may succeed in proving intentional discrimination "either directly by persuading the court that a discriminatory reason more than likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[43] The proposition that a plaintiff may prove pretext solely by discrediting the defendant's proffered reasons proved to be the most controversial aspect of the *Burdine* decision.[44]

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39. *Burdine*, 450 U.S. at 253. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

40. *Id.* at 254-55. The purpose of the defendant's burden of production is both to present a "legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.* at 255-56.

41. *Id.* at 254. It is particularly important that the Court addressed the weight of articulations not admitted into evidence and concluded that such an articulation will *not* meet the defendant's burden. *Id.* at 255 n.9.

42. *Id.* at 255.

43. *Id.* at 256. Although *Burdine*'s two-prong test uses the terms "indirectly" or "directly," the plaintiff still uses indirect, circumstantial evidence to prove intentional discrimination. When employing the "more likely motivated" prong, the plaintiff directly (affirmatively) proves discrimination through the use of circumstantial evidence. When employing the "unworthy of credence" prong, the plaintiff proves discrimination without an affirmative showing that the defendant more likely was motivated by impermissible factors. Marina C. Szteinbok, Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 COLUM. L. REV. 1114, 1118 n.34 (1988).

44. Following *Burdine*, the circuit courts adopted one of two interpretations: (1) the "pretext only" rule which embraced the "unworthy of credence" prong, and (2) the "pretext-plus" rule which prohibited a plaintiff from establishing pretext with a mere showing that the employer is lying. The "pretext-plus" courts require a showing of pretext, plus proof that no other legitimate factor was responsible for the employment decision. For a detailed discussion of the differences between the two approaches, see Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

Although several circuit courts were slow in interpreting *Burdine*'s "unworthy of credence" prong, the "pretext only" rule eventually emerged in eight different circuits. *See* Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988); MacDissi v. Valmont Indus., 856 F.2d 1054, 1059 (8th Cir. 1988); Furr v. AT & T Technologies, Inc., 824 F.2d 1537, 1549 (10th Cir. 1987); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir.), *cert. dismissed*, 483 U.S. 1052 (1987); Tye v. Board of Educ., 811 F.2d 315, 319-20 (6th Cir.), *cert. denied*, 484 U.S. 924 (1987); Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986); Lowe v. City of Monrovia, 775 F.2d 998, 1005 (9th Cir. 1985), *modified*, 784 F.2d 1407 (9th Cir. 1986); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 647 (5th Cir. 1985).

The "pretext-plus" rule was articulated by four circuit courts. *See* Spencer v. General Elec. Co., 894 F.2d 651, 659 (4th Cir. 1990); Benzies v. Illinois Dep't of Mental Health &

C. St. Mary's Honor Center v. Hicks: *Clarifying* Burdine

In light of the controversy in the circuit courts regarding the "unworthy of credence" prong of *Burdine*, the Supreme Court granted certiorari to hear *St. Mary's Honor Center v. Hicks*.[45] Justice Scalia, writing for the majority, held that the trier of fact's rejection of the defendant's proffered reasons does not compel a judgment for the plaintiff as a matter of law.[46] Reversing the Eighth Circuit's decision,[47] the majority noted that while discrediting the employer's proffered reasons may prove pretext, it does not, by itself, prove that the employer's actions were a "pretext *for discrimination*."[48] Justice Scalia admitted that the decision directly contradicted the "unworthy of credence" language in *Burdine*, but concluded that the *Burdine* Court's suggestion that a mere showing of unworthiness could suffice to prove pretext was an "inadvertence" on the part of the Court.[49]

The Court's rejection of *Burdine*'s "unworthy of credence" prong indicates that plaintiffs must not only prove their own case, but must also convince the trier of fact that no other possible reasons for the employment action exist.[50] In his dissent, Justice Souter warned that the imposition of such a severe burden would cause a "scouring the record" problem as the trier of fact may look beyond the presented evidence in search of unarticulated, although completely legitimate, nondiscriminatory reasons for the employment action.[51]

Arguably, *St. Mary's* essentially gutted both the rationale and the effect of *Burdine*.[52] By eliminating *Burdine*'s "unworthy of credence" prong, the *McDonnell Douglas* framework no longer "permits the plaintiff meriting

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Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987); White v. Vathally, 732 F.2d 1037, 1042-43 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983).

Although the Sixth Circuit originally adhered to the "pretext only" rule, the court recently shifted to a "pretext-plus" notion. *See* Galbraith v. Northern Telecom, Inc., 944 F.2d 275, 283 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1497 (1992).

45. 113 S. Ct. 954 (1993).

46. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993).

47. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993). The Eighth Circuit had concluded that once the plaintiff discredited each of the employer's proffered reasons, a judgment for the plaintiff was compelled as a matter of law. *Id.* at 492.

48. *St. Mary's*, 113 S. Ct. at 2752. The Court stressed that while discrediting the employer's reasons does not compel a finding of discrimination, such a showing, accompanied by a strong prima facie case, may allow an inference of intentional discrimination. *Id.* at 2749.

49. *Id.* at 2752-53.

50. The Court stated that Title VII only awards damages against those employers who are proven to have taken the adverse action based on impermissible factors. *Id.* at 2756. Furthermore, "[t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." *Id.*

51. *Id.* at 2761-63 (Souter, J., dissenting). Although the majority downplayed this possibility by noting the *Burdine* requirement that the defendant's articulation must be admitted into evidence, the Court failed to address adequately the issue of the unarticulated reason. *Id.* at 2755.

52. *See supra* notes 34-44 and accompanying text.

relief to demonstrate intentional discrimination" through indirect evidence.[53]

II. TENTH CIRCUIT CASE LAW

A. *The Prima Facie Case*

Following the *McDonnell Douglas* decision, the Tenth Circuit consistently has adhered to the notion that the plaintiff's "burden of establishing a prima facie case of disparate treatment is not onerous."[54] As articulated in *McDonnell Douglas*, to establish a prima facie case the plaintiff must show that: (1) she is a member of a protected class, (2) she applied and was qualified for an available position, (3) she was rejected, and (4) the position remained open following her rejection.[55] During the survey year, the court confronted the most challenging aspect of the prima facie case, the application/qualification requirement,[56] and continued to lighten the burden on plaintiffs at that stage.[57]

1. *Hooks v. Diamond Crystal Specialty Foods, Inc.*[58]

In *Hooks*, the plaintiff, an African American, brought suit against his employer alleging discriminatory failure to promote.[59] In accordance with a company-wide reduction in force, Diamond eliminated the converting coordinator position, a position occupied by the plaintiff.[60] Hooks expressed interest in the position of production supervisor, but was reassigned to assistant production supervisor. The production supervisor position went to a white male, and several months later Hooks' position was eliminated.[61] The district court, relying on *Allen v. Denver Public School Board*,[62] concluded that Hooks failed to prove a prima facie case of discrimination and granted summary judgment for the defendant.[63] Concluding that the trial court applied the wrong standard for a prima facie case, the Tenth Circuit stated that "the best approach is to remain consistent with the prima facie elements laid out in *McDonnell Douglas* and *Bur-*

53. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

54. *Id.* at 253.

55. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

56. "The question whether a particular plaintiff . . . fulfills the qualification requirement or not is often the central issue in cases involving the *McDonnell Douglas* prima facie formula." LARSON & LARSON, *supra* note 27, § 50.31(c), at 10-25 to 10-26.

57. While the cases offered expected clarification of the prima facie case, the court's treatment of the prima facie case offers an interesting comparison with the court's treatment of the plaintiff's burden at the pretext stage. *See infra* part II.B.

58. 997 F.2d 793 (10th Cir. 1993).

59. Although not relevant to this discussion, the plaintiff also alleged constructive discharge and failure to contract on a nondiscriminatory basis in violation of 42 U.S.C. § 1981 (1988). *Hooks*, 997 F.2d at 796. The court also briefly addressed the plaintiff's claim of discriminatory demotion. *Id.* at 799-800.

60. *Id.* at 795.

61. *Id.* Hooks subsequently accepted Diamond's offer of early retirement. *Id.* at 795-96.

62. 928 F.2d 978 (10th Cir. 1991).

63. *Hooks*, 997 F.2d at 796-97.

dine."[64] Thus, in establishing a prima facie case, the plaintiff "need not show that he or she is equally or better qualified than the person selected for the position."[65] On the contrary, in order to shift the burden of production to the defendant, the plaintiff need only show that he or she is qualified for the position.[66]

The court, in addressing the importance of the plaintiff's qualifications, stressed that the investigation properly occurs at the pretext stage, where the relative qualifications of the applicants serve to illuminate the employer's reasons for the decision.[67] Since the trial court inappropriately considered Hooks' relative qualifications at the prima facie stage, the court reversed the trial court's conclusion that Hooks failed to make out a prima facie case.[68] Because Hooks failed to prove pretext,[69] however, the court affirmed the trial court's grant of summary judgment.[70]

2. *Whalen v. Unit Rig, Inc.*

In *Whalen v. Unit Rig, Inc.*,[71] the court confirmed that the prima facie application requirement merely requires a constructive showing of application. In that case, the plaintiff, a sixty-three year old man, brought suit alleging age discrimination.[72] Following a restructuring of the defendant corporation, John Whalen, an employee of eleven years, was fired. Subsequently, the corporation hired a twenty-nine year old man to replace Whalen. On the basis of indirect evidence,[73] the jury found for the plaintiff.

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64. *Id.* at 797. In *Allen*, the court held that a plaintiff must show that she was "equally or better qualified than those employees actually promoted" to establish a prima facie case. *Allen*, 928 F.2d at 984 (quoting Clark v. Atchison, Topeka & Santa Fe Ry., 731 F.2d 698 (10th Cir. 1984)). Although not explicitly overturning *Allen*, the court cautioned that the case must "not be read to increase the prima facie burden established in *McDonnell Douglas*." *Hooks*, 997 F.2d at 797.

65. *Hooks*, 997 F.2d at 797.

66. *Id.* If the plaintiff, however, shows that the person actually hired was significantly less qualified, this will be of great assistance both in showing that the plaintiff's own qualifications met the minimum requirements for the job and in offering evidence of pretext. LARSON & LARSON, *supra* note 27, § 50.31(c), at 10-28.

67. *See Hooks*, 997 F.2d at 797. The term "qualification" consists of two distinct notions: (1) absolute qualification suggests that the plaintiff possesses the minimum requirements for the job and is facially qualified; and (2) relative qualification refers to the individual's qualifications compared with those of the other applicants for the position. *See generally* Alisa D. Shudofsky, Note, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553 (1982).

68. *See Hooks*, 997 F.2d at 797.

69. *Id.* at 798. The record failed to indicate that Hooks was the better candidate for the position. The promoted individual possessed a similar amount of supervisory experience. *Id.*

70. *Id.* at 799-800.

71. 974 F.2d 1248 (10th Cir. 1992).

72. Age discrimination claims are brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992). Although not a Title VII claim, the *McDonnell Douglas* framework has been adapted to this context. *See* EEOC v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988).

73. *See Whalen*, 974 F.2d at 1250. Evidence produced at trial indicated that, prior to the acquisition, a list of employees was generated in declining order of age and delivered to the vice president of the company. One witness testified that the president had expressed his intent to hire a young controller. *Id.*

Affirming the trial court's denial of the defendant's motion for summary judgment and judgment notwithstanding the verdict, the court found the jury's conclusion that Whalen established a prima facie case to be plausible.[74] "Employment discrimination law does not require that a plaintiff formally apply for the job in question."[75] Instead, the plaintiff can meet that requirement one of two ways: if formal hiring procedures are used, the plaintiff must show that the employer received specific notice that the plaintiff was seeking employment; or if informal hiring procedures are used, the plaintiff need only show that he or she was in the group of people who might be reasonably interested in the position at issue.[76]

3. Prima Facie Analysis

The *Hooks* decision suggests that while the relative qualifications[77] of the plaintiff are important in a Title VII case, they are best addressed at the pretext stage. Accordingly, the plaintiff's absolute qualifications[78] are the *only* factors at issue in the qualification prong of a prima facie case of intentional discrimination.[79]

The *Whalen* court's "constructive notice" articulation of the application requirement offers plaintiffs two new methods of meeting that prong of the prima facie case. The effect of such a broad standard may be to encourage individuals who otherwise would not meet the application requirement to pursue employment discrimination claims. Specifically, the *Whalen* "constructive notice" standard addresses instances in which an applicant expresses an interest in the position, is met by an unfavorable employer reaction, and as a result, ultimately does not submit a formal application. Application of the *Whalen* reasoning in such circumstances will prevent employers from engaging in the subtle discouragement and suppression of interested potential applicants.[80]

The Tenth Circuit's commitment to offering plaintiffs a fair opportunity to prove a prima facie case is strong, although not particularly surpris-

74. *Id.* at 1252.
75. *Id.* at 1251.
76. *Id.*
77. *See supra* note 67.
78. *See supra* note 67.
79. The court's decision in Kenworthy v. Conoco, Inc., 979 F.2d 1462 (10th Cir. 1992), supports the above analysis. In *Kenworthy*, the court ruled that a plaintiff, in making out a prima facie case, could show that she was qualified even when the employer disputed such qualifications. *Id.* at 1470. The court properly noted that the employer's reasons for the employment decision cannot be used to defeat the plaintiff's prima facie case. *Id.* (citing MacDonald v. Eastern Wyo. Mental Health Ctr., 941 F.2d 1115, 1120 (10th Cir. 1991)).
80. Such a case would arise in the following hypothetical situation. An Asian American woman seeks employment in a traditionally white male workplace. Before formally applying for a position, she travels to the workplace to get a general sense of the environment. Upon arrival, she is ignored, perhaps ridiculed, and discovers a noticeable absence of women employees. She speaks with the employer, expresses an interest in the available position, but is told that she probably would not enjoy working for this company because of the stress and time commitment involved.

Provided she was qualified for the position, the constructive notice standard approach arguably would allow her to make out a prima facie case of sex and/or race discrimination.

ing. The prima facie case still serves its function of screening out unsupported claims while providing easy access into the heart of the intentional discrimination claim.

B. *Proving Pretext*

The court's initial response to *Burdine*'s "unworthy of credence" prong is best characterized as one of indifference. With one notable exception,[81] the court did not employ the "unworthy of credence" prong until 1987, in *Furr v. AT & T Technologies, Inc.*[82] Between 1987 and 1992, the court consistently followed *Furr* and ruled that the plaintiff could prove pretext merely by discrediting the employer's proffered reasons.[83] The court's decision in *EEOC v. Flasher Co.*[84] marked a clear departure from *Furr* and parallels the Court's abandonment of *Burdine* in *St. Mary's.*

1. *EEOC v. Flasher Co.*

In *Flasher,* Edward Perez, a Hispanic male, was fired by the defendant after an altercation with another employee. The EEOC brought suit on behalf of Perez, alleging that Perez was fired in violation of Title VII because he was Hispanic.[85] The employer rebutted the plaintiff's prima facie case[86] by claiming that Perez was fired for violating company rules. Although Perez demonstrated significant disparities in the company's disciplinary treatment of Perez and non-minorities,[87] the trial court concluded that the plaintiff had not sustained his burden in showing pretext.

In a somewhat tortured approach, the Tenth Circuit affirmed the trial court.[88] Perhaps the most startling aspects of the case come from the internal inconsistencies in Judge Ebel's reasoning. Initially, Judge Ebel

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81. *See* Beck v. Quiktrip Corp., 708 F.2d 532 (10th Cir. 1983). After citing the "unworthy of credence" language of *Burdine,* the court concluded that the duty of the trial court is to "decide which party's explanation of the employer's motivation it believes." *Id.* at 535 (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)).

82. 824 F.2d 1537 (10th Cir. 1987). The court narrowed the pretext inquiry by stating that "[t]he critical question for the jury is whether it believes the defendant's proffered reasons for the employment decision, rather than the plaintiff's assertion of impermissible discrimination." *Id.* at 1549.

83. *See* Bell v. AT & T, 946 F.2d 1507, 1512 (10th Cir. 1991) (suggesting that the plaintiff *must* focus on the defendant's proffered reasons when proving pretext); Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1421-22 (10th Cir. 1991) (stating that one of the ways a plaintiff may prove intentional age discrimination is by discrediting the employer's reason for the employment decision); Krause v. Dresser Indus., 910 F.2d 674, 677 (10th Cir. 1990) (concluding that the plaintiff need only show that the employer's reason is unworthy of credence to prove pretext).

84. 986 F.2d 1312 (10th Cir. 1992).

85. *Id.* at 1315.

86. The appropriate prima facie showing in a claim relating to termination for violation of a work rule is established if the plaintiff shows that: (1) the plaintiff is a member of a protected class, (2) he was terminated for violation of a company rule, and (3) non-minority employees who are similarly situated were treated differently. *Id.* at 1316 (citing McAlester v. United Air Lines, 851 F.2d 1249, 1260 (10th Cir. 1988)).

87. *See id.* at 1316. Perez presented five separate instances where non-minorities received only verbal reprimands, suspensions, or demotions following company rule violations. *Id.* at 1315.

88. *See id.* at 1316.

seemed to follow Tenth Circuit precedent when he stated that the defendant's burden of production

> defines the parameters of the trial, as the plaintiff then knows the precise reason that he or she may try to show is only a pretext for an illegal discriminatory motive. By articulating the reasons for the plaintiff's termination, the defendant eliminates a myriad of possible reasons that would otherwise have to be addressed.[89]

Indeed, this language reinforces the notion that the defendant must articulate the reasons for the decision and that the plaintiff *must* respond to those reasons in order to prove pretext.[90]

An important distinction for Judge Ebel was the difference between the reason for the decision and the reason for the disparity in treatment.[91] This distinction allowed Judge Ebel to conclude that the employer need not explain the differential treatment of minorities and non-minorities in terms of rational business policies. Even irrational or accidental differences of treatment may *not* compel a finding of intentional discrimination.[92] Such a rationale accounted for the holding of the case: "a mere finding of disparate treatment, without a finding that the disparate treatment was the result of intentional discrimination based upon protected class characteristics, does not prove a claim under Title VII."[93]

Judge Ebel's unprecedented dissection and reformation of the disparate treatment claim was enhanced by his dilution of the "unworthy of credence" prong. After failing to cite *any* of the Tenth Circuit precedent that followed *Burdine* literally,[94] the court concluded that a finding that the defendant's reasons are pretextual does not compel a finding of discrimination unless shown to be a "pretext for discrimination against a protected class."[95] To support such a conclusion, the court relied on the rationale that "[p]roffered reasons may be a pretext for a host of motives, both proper and improper, that do not give rise to liability under Title VII."[96] In light of the above, the Tenth Circuit concluded that the trial

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89. *Id.* at 1318. Judge Ebel stressed that "there is no limit to the potential number of reasons that could be raised at trial." *Id.* The defendant is required to enunciate the reasons for the employment decision to prevent "needlessly confused and delayed" litigation of discrimination claims. *Id.*

90. *See* Bell v. AT & T, 946 F.2d 1507 (10th Cir. 1991). It is interesting to note that Judge Ebel served on the panel that decided *Bell.*

91. Judge Ebel clarified that the defendant must only address the reason for the decision against the plaintiff in step two of the *McDonnell Douglas* framework, while the reason for the disparity between the plaintiff's treatment and that of other employees is appropriately addressed by the plaintiff in stage three. *See Flasher*, 986 F.2d at 1319 & n.7.

92. *Id.* at 1320.

93. *Id.* at 1314.

94. *See supra* notes 81-83 and accompanying text. Instead of relying on Tenth Circuit precedent, Judge Ebel cited cases from the "pretext-plus" courts of the Fourth, Sixth, and Seventh Circuits. *Flasher*, 986 F.2d at 1321.

95. *Flasher*, 986 F.2d at 1321. This is essentially the same holding reached by the Supreme Court in *St. Mary's. See supra* part I.C.

96. *Flasher*, 986 F.2d at 1321. To justify such a conclusion, Judge Ebel initially commented on the inherent complexities of human relationships. *See id.* at 1319. He noted the error in assuming "that differential treatment between a minority and a non-minority employee that is not explained by the employer in terms of a rational, predetermined business policy *must* be based on illegal discrimination" in violation of Title VII. *Id.* at 1319-20. On

court was not compelled to enter judgment for the plaintiff upon a showing of unexplained differential treatment.[97]

The opinion suggests that the trier of fact may need to scour the record to locate some of these acceptable reasons in case the employer fails to articulate the "real" reason for the decision due to the sensitivity of the issue.[98] Such sensitive non-articulations may include personal animus, favoritism, grudges, random conduct, or procedural errors.[99]

a. *Comparison:* Flasher *and* St. Mary's

As the decision in *Flasher* preceded the Supreme Court's decision in *St. Mary's*, Judge Ebel's opinion may have influenced Justice Scalia's opinion. Judge Ebel struggled with the "pretext" verses "pretext for discrimination" distinction made in *Burdine* and concluded that the latter constituted the proper showing.[100] Justice Scalia reached the same result after an extended discussion of what the Court really "intended" to convey in *Burdine*.[101] The scouring the record problem clearly presented itself in *Flasher*[102] and was a key issue in Justice Souter's dissenting opinion in *St. Mary's*.[103] Judge Ebel's articulation of improper verses proper motives,[104]

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the contrary, apparently irrational differential treatment that cannot be explained on the basis of clearly articulated company policies may be explained by a number of factors: (1) the discipline was administered by different supervisors; (2) the events occurred at different times when the company's attitudes were different; (3) the individualized circumstances offered mitigation for the infractions less severely punished; (4) the less severely sanctioned employee was more valuable to the company for legitimate, nondiscriminatory reasons; or (5) "the inevitability that human relationships cannot be structured with mathematical precision." *Id.* at 1320.

97. *See id.* at 1322.

98. *See id.* at 1321 (citing Benzies v. Illinois Dep't of Mental Health & Developmental Disabilities, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987)).

This conclusion must be compared to contrary statements in Bell v. AT & T, 946 F.2d 1507, 1514 (10th Cir. 1991). In reversing the trial court, the *Bell* court faulted the lower court's reliance on an unarticulated reason to support a finding for the defendant. "[W]hen the trial court relies on what it considers to be a legitimate reason not articulated by the employer to rebut the plaintiff's prima facie case . . . a plaintiff does not have a full and fair opportunity to demonstrate pretext . . . ." *Id.* The *Bell* court's conclusion clearly forbids the fact finder from straying out of the *McDonnell Douglas/Burdine* framework. By relying on unarticulated reasons, the trial court in *Bell* effectively denied the plaintiff the right to mount a formidable challenge at the pretext stage. *See supra* note 41 for similar reasoning by the *Burdine* Court.

99. *See Flasher*, 986 F.2d at 1321 (citing *Benzies*, 810 F.2d at 148).

100. *See id.*

101. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2752 (1993). Justice Scalia concluded that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* In light of that two-part necessity, Justice Scalia noted that where the *Burdine* Court merely stated the word "pretext," one must reasonably understand such language to refer to "pretext for discrimination." *See id.*

102. *See supra* notes 95-99 and accompanying text.

103. *See St. Mary's*, 113 S. Ct. at 2762 (Souter, J., dissenting). Justice Souter stated that:

> under the majority's scheme, a victim of discrimination . . . will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record.

Id.

104. *See supra* note 96 and accompanying text.

although not confronted by Justice Scalia in detail, was also reflected in the *St. Mary's* decision.[105]

That is not to suggest that the two opinions do not differ in important aspects. Judge Ebel failed to acknowledge that his opinion disturbed prior Tenth Circuit acceptance of *Burdine*'s "unworthy of credence" prong. The first half of Judge Ebel's opinion seemed to suggest a continued acceptance of *Burdine*.[106] His ultimate betrayal of the "unworthy of credence" prong seemed misplaced, as he directly contradicted earlier statements. Indeed, one wonders if Judge Ebel even realized the true importance of the opinion or understood the inherent contradictions in his rationale.

Justice Scalia, on the other hand, realized the need to confront *Burdine* head on and devoted much of his opinion to showing that the "unworthy of credence" prong was merely inadvertence on the part of the *Burdine* Court.[107] Yet, instead of overturning *Burdine*, the *St. Mary's* Court merely discredited the opinion. Such a backhanded approach may lead to an abandonment of *Burdine*'s overwhelming acceptance in the circuit courts.[108]

2. *Sanchez v. Philip Morris Inc.*

Although in retrospect, the language in *Flasher* proved to be a significant blow to the ability of claimants to prove pretext, the effect of the opinion was accentuated by the court's ruling in *Sanchez v. Philip Morris, Inc.*[109] In *Sanchez*, the court reversed the district court's finding of reverse and national origin discrimination. The plaintiff, a Hispanic male, brought suit under Title VII after he was refused employment in the defendant's company on three different occasions.[110] After noting that Raul Sanchez made out a prima facie case,[111] and that the defendant successfully rebutted the presumption,[112] the court concluded that the district court erred in finding that the plaintiff proved pretext.[113]

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105. *See St. Mary's*, 113 S. Ct. at 2751 n.5. The Court stated that it would be "a mockery of justice to say that if the jury believes the reason [the employer] set forth is probably not the 'true' one, all the other utterly compelling evidence that discrimination was *not* the reason will then be excluded from the jury's consideration." *Id.*

For a critical analysis of Justice Scalia's reasoning, see Corrada, *supra* note 25.

106. *See supra* note 89 and accompanying text.

107. *See St. Mary's*, 113 S. Ct. at 2751-55.

108. *See* Corrada, *supra* note 25, at 18-19 (criticizing Justice Scalia's treatment of *Burdine* and predicting future credibility problems for the Court's decisions).

109. 992 F.2d 244 (10th Cir. 1993).

110. Sanchez applied for an entry level sales position three times with Philip Morris. It was undisputed that he met the minimum requirements for the position—that the applicant be twenty-one years old and possess a valid driver's license. *Id.* at 245. In each of the three instances, Caucasians were hired for the positions. *Id.*

111. Sanchez established a prima facie case in the failure to hire context by showing that he was a member of a protected class, was qualified for an available position, and was rejected for a position that was ultimately filled. *Id.*

112. The employer merely articulated that Sanchez was not the "best qualified for any of the three positions." *Id.* at 246.

113. The trial court erroneously concluded that the individual hired for the third position was less qualified than Sanchez. The circuit court criticized that conclusion because the difference in the two applicants' qualifications was due to different individual work experiences. *See id.* at 247.

The court initially emphasized that "the plaintiff in a Title VII case must prove that intent to discriminate based upon plaintiff's protected class characteristics was the *determining* factor for the allegedly illegal employment decision."[114] The court then concluded that after a plaintiff successfully proves that the defendant's reasons are unworthy of belief, "the plaintiff must still prove that the true motive for the employment decision violates Title VII."[115] After finding that the plaintiff failed to prove that the employer's decision was not motivated merely by a mistake, favoritism, or any other possible reason, the court reversed the district court's imposition of liability.[116]

3. Pretext Analysis

As both *Flasher* and *Sanchez* demonstrate, the Tenth Circuit has elevated the burden on the plaintiff during the pretext stage from a "pretext only" burden to a "pretext-plus" burden.[117] It is no longer enough to disprove and/or discredit the defendant's articulated reasons for the employment decision. Instead, the plaintiff must prove that perhaps the only, and certainly the determining, factor leading to the decision was the employer's reliance on an impermissible discriminatory reason. Such a standard exceeds even Justice Scalia's articulation in *St. Mary's*,[118] and in fact, encourages factfinders to search the record to make sure no other reasons exist that would justify the defendant's decision. Essentially, such a standard eliminates the need for the defendant to meet the burden of production in good faith.[119] Arguably, it makes no difference what sort of

114. *Id.* at 246-47 (emphasis added) (citing EEOC v. Flasher Co., 986 F.2d 1312 (10th Cir. 1992)).

115. *Id.* at 247. "Because the prima facie case only creates an inference of unlawful discrimination, some evidence that the articulated legitimate business reason for the decision was pretextual does not compel the conclusion that the employer intentionally discriminated." *Id.* (citing *Flasher*, 986 F.2d at 1321).

The Tenth Circuit reached the same conclusion in Kendall v. Watkins, 998 F.2d 848 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1075 (1994). In *Kendall*, the court affirmed the district court's entry of summary judgment against the plaintiff's Title VII claim. *Id.* at 849. The court used the pretext requirement articulated in *Sanchez* to conclude that the plaintiff failed to show that sex discrimination was the true motive for the defendant's employment decision. *See id.*

116. *Sanchez*, 992 F.2d at 248. The court rested its conclusion on the basis of the trial court's failure to equate the differences in qualifications with discrimination. Instead, the trial court considered the differences in qualifications, standing alone, to be sufficient to support a judgment for the plaintiff. *See id.* at 247-48.

117. *See supra* note 44.

118. As *St. Mary's* offers a less harsh pretext standard than *Flasher*, plaintiffs' attorneys will attempt to use the limited holding of *St. Mary's* to argue that an "unworthy of credence" demonstration still allows an inference of intentional discrimination. Such an approach, although reasonable, may be met with mixed success in the Tenth Circuit. Most likely, the Court will remain extremely hesitant to infer, or uphold an inference of, discrimination based only on the establishment of the prima facie case and disproof of the employer's articulated reasons.

119. Justice Souter, in his *St. Mary's* dissent, addressed the new incentive employers would have to lie in meeting the burden of production. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2764 (1993) (Souter, J., dissenting). If a defendant remains silent at the production stage, judgment for the plaintiff is compelled as a matter of law. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Thus, employers who fail to articulate a nondiscriminatory reason for the employment decision "not only will benefit from lying, but

evidence the defendant offers if the factfinder[120] is allowed, even instructed, to scan the record.

C. *Assessment of Plaintiff's Overall Burden*

The Tenth Circuit's conclusion that the plaintiff's initial burden is minimal seems somewhat obvious and expected. The court's stringent pretext requirement, however, serves to minimize any advantage gained by the plaintiff at the prima facie stage. Initially, by recognizing the factfinder's prerogative to search for any nondiscriminatory reason for the employment decision, whether articulated by the defendant or not, the court has effectively erased the defendant's burden. The burden of production fails to define the scope of the inquiry, and arguably, no longer serves a useful purpose. Moreover, the plaintiff must now anticipate all reasons that *may be* articulated by the employer and the unarticulated reasons that the factfinder *may* rely upon after scouring the record.

The elimination of *Burdine*'s "unworthy of credence" prong compounds the severe burden. Proof that the employer lied in its justifications for the employment action fails to establish that those reasons were merely a pretext for discrimination. Instead, the plaintiff must prove that the employer's consideration of an impermissible factor was the only reason for the decision. Such a severe standard of proof will discourage future employment discrimination claims for a number of reasons. The need to disprove both the employer's articulated and unarticulated defenses will result in a significant increase in discovery expense. Additionally, plaintiffs will not succeed unless exceptionally strong circumstantial evidence substantiates their claims. As a result, attorneys may hesitate in representing the plaintiff with a legitimate complaint but only minimal proof.

Arguably, this "pretext-plus" burden shatters the *McDonnell Douglas* framework and seems to beg the indirect evidence question. Plaintiffs, after progressing through the *McDonnell Douglas* framework designed to help them prove intentional discrimination indirectly, must still essentially prove direct intentional discrimination. Indeed, for practical purposes, the *McDonnell Douglas* framework as clarified by *Burdine* has lost all meaning in the Tenth Circuit.

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must lie to defend successfully against a disparate treatment action." *St. Mary's*, 113 S. Ct. at 2764 (Souter, J., dissenting). By offering false evidence, the employer meets the prima facie case and can hope that the factfinder will search the record for an unarticulated reason that may offer a nondiscriminatory explanation for the decision. *Id.*

120. In future cases, the "factfinder" will likely be a jury. The Civil Rights Act of 1991 allows either party in an intentional discrimination case under Title VII to demand a jury trial. *See* Civil Rights Act of 1991, § 102(c)(1), 42 U.S.C. § 1981A(c)(1) (Supp. III 1991). The Supreme Court recently concluded, however, that the Act does not apply retroactively. Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1513 (1994).

CONCLUSION

The Tenth Circuit has witnessed dramatic changes in the application of the *McDonnell Douglas* framework since the *Burdine* clarification. Although the plaintiff's prima facie burden continued to lighten during the survey year, the court developed a more stringent pretext standard in *Flasher*. The court also embraced that standard in *Sanchez*, thus ensuring the Tenth Circuit's commitment to the *Flasher* rationale. Plaintiffs in the Tenth Circuit now face one of the harshest pretext burdens in the nation. Subsequent Tenth Circuit opinions are unlikely to deviate from *Flasher*, particularly since the Supreme Court decided *St. Mary's* soon thereafter. As a result, in order to support an inference of intentional discrimination, attorneys must maneuver through the "new improved" *McDonnell Douglas* framework to prove, *directly*, through the use of indirect evidence, that impermissible factors motivated the employer's decision.

Charlotte N. Sweeney

ENVIRONMENTAL LAW SURVEY

INTRODUCTION

Since its enactment, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[1] has accounted for a major portion of United States environmental law litigation. One of the country's most important environmental policies, CERCLA was designed to provide funding and enforcement authority for cleaning up thousands of existing hazardous waste sites and responding to hazardous substance spills.[2] While the tenets and substance of both environmental law and CERCLA litigation shift and settle into place, the Tenth Circuit Court of Appeals continues to help shape and direct the law in these developing areas. In 1993, the Tenth Circuit remained one of the leading appellate courts in the country to interpret CERCLA, and this Survey discusses three cases decided by that court.

In *United States v. Colorado*,[3] the court determined the effect of CERCLA on the ability of a state to enforce its own environmental regulation at a federal facility. In *New Mexico Environment Department v. Foulston*,[4] the court examined an attempt by a bankruptcy trustee to avoid CERCLA liability by abandoning property that had been contaminated by hazardous waste. In *United States v. Hardage*,[5] the court considered the effect of indemnification agreements between a generator and a transporter of hazardous waste on their CERCLA liability.

I. CERCLA V. RCRA - THE ROLE OF THE STATES IN ENVIRONMENTAL LAW: *UNITED STATES V. COLORADO*[6]

A. *Background*

Congress established CERCLA in 1980 to deal with thousands of inactive and abandoned hazardous waste sites in the United States.[7] In enacting CERCLA, Congress created a mechanism to guarantee available funding for the cleanup of seriously contaminated sites.[8] CERCLA directs the Environmental Protection Agency ("EPA") to identify sites at which hazardous substances that threaten the public health and safety may have been released, identify the parties potentially responsible for the site or

1. Pub. L. No. 96-510, 94 Stat. 2767, *amended by* the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991)).

2. *See* Major William D. Turkula, *Determining Cleanup Standards for Hazardous Waste Sites*, 135 MIL. L. REV. 167, 173 (1992).

3. 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

4. 4 F.3d 887 (10th Cir. 1993), *petition for cert. filed*, (U.S. Feb. 1, 1994) (No. 93-1268).

5. 985 F.2d 1427 (10th Cir. 1993).

6. 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

7. *See* H.R. REP. No. 96-1016, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119.

8. *See id.*

the releases, and ensure that these responsible parties pay for the cleanup of the sites.[9] When responsible parties cannot be identified or pay the amount of cleanup costs, CERCLA's "Superfund" provision is triggered, and established government and industry funds are tapped in order to achieve cleanup.[10]

The Resource Conservation and Recovery Act of 1976 ("RCRA")[11] was created as a cradle-to-grave regulatory program for hazardous wastes.[12] Like CERCLA, RCRA specifies methods of hazardous waste cleanup and provides for corrective or remedial action once a hazardous release has occurred due to improper waste management.[13] RCRA employs a nationwide permit program to enforce government standards for acceptable levels of specific contaminants.[14]

Congress saw the need for states to have primary regulatory authority over hazardous waste activities so they could protect their own territories.[15] RCRA allows any state to administer an independent, EPA-approved hazardous waste program within state boundaries, provided that the program is at least as stringent as RCRA.[16] More than 40 states presently participate in such programs.[17] At issue in *United States v. Colorado* was whether a state which had been authorized to carry out such a hazardous waste program under RCRA could be precluded from doing so at a hazardous waste facility owned and operated by the federal government where a CERCLA response action was already underway.[18]

B. *Facts*

Since 1942, the United States Department of the Army has owned and operated a chemical munitions facility outside Denver, Colorado known as the Rocky Mountain Arsenal ("Arsenal").[19] In 1947, the Army began leasing portions of this 27 square-mile site to private corporations, primarily Shell Oil Company, that used the facility to develop, test, manufacture,

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9. CERCLA § 104, 42 U.S.C. § 9604 (1988).

10. *See* Comment, *Superfund at Square One: Promising Statutory Framework Requires Forceful EPA Implementation*, 11 ENVTL. L. RPTR. 10101, 10102 (1981).

11. Pub. L. No. 94-580, 90 Stat. 2795, *amended by* the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6992 (1988 & Supp. III 1991)).

12. H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

13. *See* Donald A. Brown, *EPA's Resolution on the Conflict Between Cleanup Costs and the Law in Setting Cleanup Standards Under Superfund*, 15 COLUM. J. ENVTL. L. 241, 273 (1990).

14. RCRA § 3005, 42 U.S.C. § 6925 (1988) (authorizing the EPA to promulgate regulations requiring permits for treatment, storage or disposal of hazardous waste).

15. *See* J.B. Wolverton, Note, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes*, 15 HARV. ENVTL. L. REV. 565, 598 (1991).

16. RCRA § 3006(b), 42 U.S.C. § 6926(b) (1988).

17. David W. Steuber et al., *Toxic and Environmental Coverage Litigation, in* 455 PLI LITIG. & ADMIN. PRACTICE COURSE HANDBOOK 223, *available in* WESTLAW, Environmental Database (ENV-TP), *2-3.

18. United States v. Colorado, 990 F.2d at 1572-74. Also at issue was whether the state was precluded from initiating its own hazardous waste program at a site that the EPA had placed on the National Priorities List (NPL). *Id.*

19. United States v. Shell Oil Co., 605 F. Supp. 1064, 1067 (D. Colo. 1985).

and package pesticides, herbicides, and other chemicals.[20] The Army built a common sanitary sewer system and waste disposal system to handle the daily wastes produced by its own production of chemical agents as well as those of the corporate lessees.[21]

The Army and Shell proceeded to discharge millions of gallons of liquid waste into unlined natural ground depressions.[22] In addition, they buried solid waste and munitions in unlined pits, ultimately causing severe damage to neighboring farmland and livestock via Arsenal-contaminated well water.[23] To ameliorate this problem, the Army, in 1956, commenced construction and operation of Basin F, an asphalt-lined surface impoundment, to store and dispose of chemical manufacturing by-products.[24] The ultimate failure of Basin F, along with the Arsenal's entire waste disposal system, created what may be one of the worst hazardous and toxic waste sites in America.[25]

In 1975, the Colorado Department of Health ("CDH") issued three cease and desist orders mandating that the Army and Shell clean up all sources of designated chemicals, undertake a ground water monitoring program, and cease certain chemical discharges.[26] In 1982, CDH, the Army, Shell, and the EPA reached an agreement regarding removal, remediation, and other response actions to meet requirements under both CERCLA and RCRA.[27]

In 1984, the EPA authorized Colorado to implement the Colorado Hazardous Waste Management Act ("CHWMA") in lieu of the federal RCRA program.[28] In 1986, the CDH issued its own Basin F closure plan, after rejecting an Army closure plan as inadequate.[29] The state then sued the Army as operator of Basin F under the CHWMA, citing violations of ground water protection regulations.[30]

In 1986, the Army stopped complying with RCRA, claiming that CERCLA's comprehensive scheme precluded additional application of state RCRA programs at federal facilities.[31] Declaring that the site would be cleaned up pursuant to CERCLA requirements, the Army subsequently ignored the CHWMA's Basin F closure plan.[32] Colorado then amended its complaint to seek enforcement of its closure plan.[33]

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20. *Id.*
21. *Id.*
22. *See* Vicky L. Peters et al., *Can States Enforce RCRA at Superfund Sites? The Rocky Mountain Arsenal Decision*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10419, 10419 (Aug., 1993).
23. *Id.*
24. Colorado v. United States Dep't of the Army, 707 F. Supp. 1562, 1563 (D. Colo. 1989).
25. *See* Daigle v. Shell Oil Co., 972 F.2d 1527, 1531 (10th Cir. 1992).
26. *Shell Oil Co.*, 605 F. Supp. at 1067.
27. *Id.* at 1068.
28. 49 Fed. Reg. 41,036 (1984).
29. *Army*, 707 F. Supp. at 1564.
30. *Id.*
31. *Id.* at 1565.
32. *Id.* at 1564-65.
33. *Id.* at 1564.

In *Colorado v. United States Dep't of the Army*,[34] the federal district court denied the Army's motion to dismiss Colorado's enforcement suit, claiming that CERCLA and RCRA were meant to operate individually, and reasoned that neither one should be granted more weight than the other in enforcement actions.[35] In its decision, the court relied primarily on CERCLA § 120(a)(4), which permits application of state laws concerning removal and remedial action at federal facilities that are not listed on CERCLA's National Priorities List ("NPL").[36]

Shortly after this decision, Basin F was added to the NPL by the EPA.[37] The Army continued to ignore Colorado's authority, presumably based on the assumption that the NPL listing precluded compliance with the court's order. This resulted in the state issuing a compliance order citing the Army for a variety of additional violations at Basin F and demanding submission of a closure plan for state approval.[38]

The United States, in an ensuing district court case, sought an order declaring that Colorado's requests be suspended on the grounds that the state had no authority to enforce the CHWMA at a CERCLA site.[39] The United States argued that CERCLA § 113(h) banned pre-enforcement review.[40] The court agreed that any attempt by Colorado to enforce CHWMA at the Arsenal would require the court to review the Army's CERCLA action prior to its completion and that § 113(h) indeed barred such review.[41] The court subsequently granted summary judgment in favor of the United States and enjoined Colorado from enforcing the CHWMA at Basin F.[42]

C. *Tenth Circuit Decision*

The Tenth Circuit Court of Appeals reversed the district court's order granting summary judgment for the United States[43] and found that § 113(h) only bars federal courts from reviewing "challenges" to CERCLA response actions.[44] Relying on a plain interpretation of statutory construction, the court held that Colorado's RCRA-authorized enforcement action did not constitute a "challenge" to the Army's CERCLA response action.[45] The Tenth Circuit stated that courts must construe seemingly conflicting statutes harmoniously to give meaning to every provision, and that to do otherwise in this particular instance would contravene Congress' express

34. 707 F. Supp. 1562 (D. Colo. 1989).
35. *Id.* at 1569-70.
36. CERCLA § 120(a)(4), 42 U.S.C. § 9620(a)(4) (1988).
37. 54 Fed. Reg. 10,512 (1989).
38. CDH Compliance Order No. 89-05-2301.
39. United States v. Colorado, No. CIV.A.89-C-1646, 1991 WL 193519 (D. Colo. Aug. 14, 1991).
40. *Id.* at *3.
41. *Id.* at *4.
42. *Id.* at *5.
43. *United States v. Colorado*, 990 F.2d at 1584.
44. *Id.* at 1575.
45. *Id.*

intentions of having CERCLA and RCRA work simultaneously and independently.[46]

CERCLA's "savings provision" in § 302(d) provides that "[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."[47]

Similarly, CERCLA § 114(a) provides that "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."[48]

Relying heavily on these CERCLA provisions, the Tenth Circuit held that the district court's interpretation of CERCLA § 113(h) was contrary to the plain meaning of §§ 114(a) and 302(d) because it decreased the Army's required compliance and liability under CHWMA as well as preempted the state's right to impose additional requirements on the Army.[49] The court accordingly disposed of the United States' reliance on § 113(h) as a preclusive tool and held that Congress clearly expressed its intent that CERCLA should interact with other federal and state hazardous waste laws.[50] The court then found that the Arsenal, as a federal facility, was subject to regulation under RCRA.[51] Moreover, the EPA delegation of RCRA authority to Colorado subjected the Arsenal to regulation under CHWMA.[52]

The court also held that the district court's interpretation of § 113(h) was inconsistent with RCRA's citizen suit provision.[53] That section provides citizens, defined to include states, with the power to enforce RCRA provisions.[54] The court found that because RCRA does not prohibit citizen enforcement suits with respect to hazardous waste sites, Congress clearly intended that such suits could be allowed even at a site where a CERCLA response action was underway.[55]

The court also dismissed the United States' claim that CERCLA § 120(a)(4) precludes any state enforcement action due to the EPA's placement of Basin F on the NPL.[56] The court held that placement on

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46. *Id.*
47. CERCLA § 302(d), 42 U.S.C. § 9652(d) (1988).
48. CERCLA § 114(a), 42 U.S.C. § 9614(a) (1988).
49. United States v. Colorado, 990 F.2d at 1575-76.
50. *Id.* at 1575.
51. *Id.* at 1576.
52. *Id.* (citing Parola v. Weinberger, 848 F.2d 956, 960 (9th Cir. 1988)) (holding that 42 U.S.C. § 6961 "unambiguously subjects federal instrumentalities to state and local regulation").
53. *United States v. Colorado*, 990 F.2d at 1577.
54. RCRA § 7002, 42 U.S.C. § 6972 (1988).
55. *United States v. Colorado*, 990 F.2d at 1578.
56. *Id.* at 1580. CERCLA § 120(a)(4) states that "[s]tate laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List." 42 U.S.C. § 9620(a)(4) (1988).

the NPL has no bearing on a federal facility's obligation to comply with state hazardous waste laws established through an EPA delegation of RCRA authority.[57] The court relied, in part, on CERCLA § 120(i)[58] which states that nothing in § 120 "shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement" of any RCRA requirements, including those consisting of corrective action.[59]

D. *Analysis*

The Tenth Circuit's unanimous decision in *United States v. Colorado* serves as strong precedent for the rest of the country. In undertaking the task of interpreting two of Congress' main environmental statutes, the Tenth Circuit has unleashed a crucial and viable solution to hazardous waste cleanup and regulation.

By recognizing that a state may invoke its EPA-authorized RCRA enforcement power to compel hazardous waste cleanups, regardless of the extent or type of federal involvement, the Tenth Circuit established that the states are authoritatively equivalent to the federal government in overseeing and regulating hazardous waste sites. Such a result is a great relief considering the overall poor track record of the federal government in cleaning up hazardous waste sites, especially its own.

Despite Congressional directives, EPA implementation of federal hazardous waste statutes has been extremely inept. The Superfund program, in particular, has been heavily criticized for not achieving more rapid and efficient cleanups.[60] Considering the overall number of contaminated sites in the United States, Superfund has accomplished very few cleanups in its regulatory lifetime. For example, of the approximately 1,200 sites on or proposed for the NPL in 1989, cleanups have been initiated at only 204 of those sites and completed at only 41 sites.[61]

A study by Clean Sites concluded that the slow progress of the Superfund cleanup program is related to the EPA's failure to aggressively use its potent enforcement authority.[62] Also, nearsighted EPA implementation of the Superfund program has resulted in utilizing Superfund assets exclusively to clean up hazardous waste sites rather than attempting to reach broader CERCLA goals, such as garnering cleanup commitments from responsible parties.[63]

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57. *United States v. Colorado*, 990 F.2d at 1580.

58. *Id.*

59. CERCLA § 120(i), 42 U.S.C. § 9620(i) (1988).

60. *See, e.g.*, CLEAN SITES, MAKING THE SUPERFUND WORK: RECOMMENDATIONS TO IMPROVE PROGRAM IMPLEMENTATION 1 (1989). Clean Sites is an organization developed to help responsible parties in Superfund cases reach settlements.

61. *Oversight of the Environmental Protection Agency's Management Review of the Superfund Program: Hearing Before the Subcomm. on Superfund, Ocean, and Water Protection of the Senate Comm. on Env't and Public Works*, 101st Cong., 1st Sess. 3 (1989) [hereinafter *Hearings*] (statement of Richard L. Hembra, Director of Environmental Protection Issues, Resources, Community, and Economic Development Division, GAO).

62. CLEAN SITES, *supra* note 60, at 7.

63. *Id.* at 7-8.

Part of this failure by the EPA to aggressively enforce hazardous waste cleanup is merely a result of bureaucratic red tape.[64] In order for the EPA to issue administrative orders to another federal agency, it must first get acceptance from the Department of Justice.[65] This requirement leads to prolonged negotiations, which in turn result in enormously slow responses to CERCLA by polluters, including federal facilities.[66]

CERCLA's past failures to delegate enforcement responsibilities directly to states, the inability of states to settle cleanup cases with responsible parties, the EPA's myopic application of Superfund assets, and the limited enforcement resources available to the EPA all result in a weak cleanup enforcement system riddled with deficiencies.[67]

The Tenth Circuit's decision helps to address these problems as it provides the EPA with a vehicle to more effectively and immediately combat hazardous waste contamination: individual states. By delegating more cleanup authority to states, hazardous waste management becomes a more conspicuous, local responsibility and is ultimately addressed with a greater degree of concern and diligence.

The Tenth Circuit's lead and Colorado's perseverance in this case should serve as a model for the development of cooperative and effective environmental cleanup programs nationwide. The fact that twenty-one states filed an amicus brief supporting Colorado's position[68] illustrates the widespread concern, and hopefully the willingness, states have in directly overseeing hazardous waste cleanup. Allowing states to assume a greater enforcement role may be the only way to effectively enforce cleanup of the thousands of hazardous waste sites that presently exist throughout the United States.

II. IMMUNITY TO ABANDON CONTAMINATED PROPERTIES UNDER THE BANKRUPTCY CODE: *NEW MEXICO ENVIRONMENT DEPARTMENT V. FOULSTON*[69]

A. *Background*

The Bankruptcy Code of 1978[70] allows a trustee in bankruptcy, after notice and a hearing, to abandon property that is "burdensome" or of "inconsequential value" to the estate.[71] This ability to free an estate of property permits trustees to efficiently convert debtors' property to money

64. *See* Alana Bissonnette, Comment, *Clean Up Your Federal Mess in My State: Colorado Has a State RCRA-Voice at the Rocky Mountain Arsenal*, 71 DENV. U. L. REV. 257, 264-65 (1994).

65. *Id.* at 265 n.83.

66. *Id.* at 265.

67. *See, e.g., Hearings, supra* note 61 *passim.*

68. The states that filed the amicus curiae brief included Alaska, Arkansas, Connecticut, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Utah and Wyoming. Amicus Curiae Brief, United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993) (No. 91-1360).

69. 4 F.3d 887 (10th Cir. 1993), *petition for cert. filed*, (U.S. Feb. 1, 1994) (No. 93-1268).

70. Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)).

71. 11 U.S.C. § 554(a) (1988).

in order to pay off creditors and satisfies Congressional intent to provide debtors with a "fresh start."[72] A conflict arises, however, when debtors attempt to abandon, as "burdensome," polluted property to avoid liability for the cleanup of the property.

One purpose of CERCLA is to clean up existing environmental contamination by imposing joint and several liability upon any or all parties responsible for the cleanup.[73] Cost recovery from responsible parties is one of CERCLA's major features, and it attempts to accomplish Congress' explicit goal of making private polluters bear the full costs of their pollution.[74] Yet, the critical cost recovery structure of CERCLA is compromised when polluters use the Bankruptcy Code to avoid responsibility for such cleanup.

The complexity of CERCLA regulation, the severe liability for noncompliance with such regulation, and the staggering expenses related to compliance make attempts to abandon contaminated properties by trustees and debtors in bankruptcy common.[75] If abandonment is allowed, a debtor is then only required to pay for environmental compliance to the extent the debtor owns assets separate from the bankruptcy estate.[76] If the debtor does not have assets separate from the estate to pay the cost of cleanup, the contaminated property sits idle until the taxpayers are forced to pay for the necessary remediation.[77]

Therefore, a major conflict arises when a trustee legitimately invokes the power to abandon an asset when that asset is contaminated property that poses a risk to public health and safety. In such a situation, should federal or state environmental statutes restrict a trustee's abandonment power? Further, if abandonment of contaminated properties should be restricted, what thresholds of contamination must be met? The Tenth Circuit addressed these questions in *New Mexico Environment Department v. Foulston.*[78]

Under the Bankruptcy Code, a trustee's ability to abandon property where state environmental violations exist was eliminated in most circumstances by the Supreme Court's holding in *Midlantic National Bank v. New Jersey Department of Environmental Protection.*[79] In a 5-4 decision, the Court determined that under § 554(a) of the Bankruptcy Code, the trustee could not abandon a hazardous waste facility that is burdensome to the

72. *See* 11 U.S.C. § 727 (1988).

73. *See* CERCLA § 107(a), 42 U.S.C § 9607(a) (1988).

74. *See id.*

75. *See In re* FCX, Inc., 96 B.R. 49, 54 (Bankr. E.D.N.C. 1989).

76. *See* Thomas G. Gruenert, *Environmental Claims in Bankruptcy: Policy Conflicts, Procedural Pitfalls and Problematic Precedent,* 32 S. TEX. L. REV. 399, 439 (1991).

77. *See, e.g.*, City of New York v. Quanta Resources Corp. (*In re* Quanta Resources Corp.), 739 F.2d 912, 921 (3d Cir. 1984), (holding that "[i]f trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default"), *aff'd,* 474 U.S. 494 (1986).

78. 4 F.3d 887 (10th Cir. 1993), *petition for cert. filed,* (U.S. Feb. 1, 1994) (No. 93-1268).

79. 474 U.S. 494 (1986).

estate "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."[80]

The Court's decision in *Midlantic* demanded that a trustee use estate funds to clean up environmentally hazardous property as the property cannot be removed from the estate.[81] The decision limits a trustee's abandonment power by forcing the trustee to complete all the debtor's cleanup responsibilities before the estate can be liquidated.[82] Through the *Midlantic* denial of abandonment, estate funds became the economic source for cleaning up contaminated estate property or paying the EPA or a state entity to do so, with the same result as if CERCLA or state liability had been levied against the estate.

Ironically, the seemingly strong pro-environmental decision in *Midlantic* also created a loophole for abandonment actions. The Court left a small window open to interpretation by holding that unless the environmental laws or regulations in question were designed to "protect the public health or safety from imminent and identifiable harm," the power to abandon would be allowed.[83] Interpreting this phrase in *Midlantic*, courts around the country have reached a multitude of different rulings on the issue of abandonment.[84]

B. *Facts*

Three gas stations, formerly belonging to L.F. Jennings Oil Company, were contaminated with hazardous substances.[85] These sites were known as the Carrizozo Mart ("Carrizozo"), the Midtown Mart 1 ("Midtown"), and the Capitan Mart ("Capitan"). Jennings filed for bankruptcy protection under Chapter 7, at which time the trustee of the estate, Foulston, attempted to sell the three contaminated sites.[86] Foulston, who conducted tests at the sites, found contamination in excess of 100 parts per million ("ppm") on each site and reported the findings pursuant to state law to the New Mexico Environment Department ("NMED") prior to the attempted sales.[87]

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80. *Id.* at 507.

81. *See* Kristy Kutz, Note, *Who Is Going to Pay: CERCLA v. Bankruptcy*, 31 WASHBURN L.J. 573, 600 (1992).

82. *See id.* The Court stressed the importance of Bankruptcy Code § 959(b), which establishes that a trustee in bankruptcy must "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State." *Id.* at 505.

83. *Id.* at 507 n.9.

84. A number of courts have permitted abandonment of contaminated properties not meeting the "imminent and identifiable harm" threshold. *See* Borden, Inc. v. Wells-Fargo Business Credit (*In re* Smith-Douglass, Inc.), 856 F.2d 12 (4th Cir. 1988); *In re* Oklahoma Ref. Co., 63 B.R. 562 (Bankr. W.D. Okla. 1986). Other courts have strictly refused to permit abandonment and have made the estate fund the entire expense of remediation based on possible public harm. *See In re* Peerless Plating Co., 70 B.R. 943 (Bankr. W.D. Mich. 1987); *In re* Stevens, 68 B.R. 774 (Bankr. D. Me. 1987).

85. *Foulston*, 4 F.3d at 888.

86. *Id.*

87. *Id.*

Foulston later determined that the properties should be abandoned pursuant to § 554(a) of the Bankruptcy Code.[88] The NMED, although having notice of the contaminated sites, failed to enter an appearance in the bankruptcy proceedings and failed to make a timely objection to the abandonment motions.[89] The bankruptcy court allowed the trustee to exercise his abandonment power after concluding that the properties posed no immediate threat to public health or safety.[90] The court denied the NMED's later motion for reconsideration.[91]

The NMED then appealed the decision to the district court which affirmed the bankruptcy court's decision denying reconsideration of the abandonment order.[92] The district court also denied the trustee's motion to dismiss the appeal as moot for two of the properties that had been deeded to third-parties by the time the appeal was finally heard.[93]

C. *Tenth Circuit Decision*

On appeal, the NMED claimed that the abandonment power granted to Foulston violated both the state's environmental laws and the Supreme Court's ruling in *Midlantic*.[94] The Tenth Circuit first ruled that the state's appeal was indeed moot as to two of the three properties, Carrizozo and Midtown, because they had already been conveyed to other parties.[95] While the Tenth Circuit acknowledged that *Midlantic* precluded a bankruptcy trustee from abandoning property in contravention of laws that protect public health and safety, the court ultimately based its decision on the narrow "imminent and identifiable harm" exception created in *Midlantic*.[96] The Tenth Circuit held that the Capitan site did not meet this threshold and therefore the bankruptcy court's order allowing abandonment was correct.[97]

The court claimed that it was "abundantly clear" from the record that at the time of abandonment, the Capitan site was not an immediate threat to public health or safety.[98] The court stated that the record showed that: 1) the Capitan site was not listed on the state's list of contaminated sites indicating the NMED was not considering further testing or investigation of the site; 2) there was insufficient data for the NMED's expert to say the property presented an immediate threat; and 3) the bankruptcy trustee's only violation of state law at the time of the abandonment was failure to file reports.[99]

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 888-89. Since the parties continued to raise issues applicable to all three properties at the appellate level, the court agreed to discuss all three. *Id.* at 888 n.2.
96. *Id.* at 890.
97. *Id.*
98. *Id.*
99. *Id.*

The NMED failed to adequately address the problems existing at the Jennings properties. The NMED did not enter an appearance in Jennings' bankruptcy proceeding even though it had notice of the sites' contamination and of Jennings' bankruptcy.[100] Although the NMED filed a motion for reconsideration, the bankruptcy court ruled that the objection was not made in a timely manner and concluded that abandonment was allowable.[101] The NMED subsequently appealed the decision but failed to seek a stay,[102] a questionable error and an action that the Tenth Circuit found to indicate that the state did not find the properties to be substantially contaminated.[103]

D. *Analysis*

Congress should amend the Bankruptcy Code and specifically grant priority to environmental cleanup over abandonment. In the interim, the courts should take a more active and responsible role in enforcing environmental policies in this area. The impairment of environmental cleanup by abandonment actions compromises the entire national cleanup effort by diminishing the Superfund and essentially putting environmental law policies on the same level as regular debt policies. The cleanup goals of environmental regulation should not take a back seat to the abandonment provisions of the Bankruptcy Code or be jeopardized by varied interpretations of the *Midlantic* exception.

Further, the Tenth Circuit's presumption that state agency inaction implied the existence of no substantial public health or safety threat is frivolous. In *Borden, Inc. v. Wells-Fargo Business Credit* (*In re Smith-Douglass, Inc.*),[104] a bankrupt Illinois company owned a fertilizer plant in violation of a variety of state water pollution and hazardous waste laws. As the bankruptcy proceedings began, the state agency monitoring the plant had not yet pursued any enforcement action against the owner.[105] As a result of this state inaction, the Fourth Circuit Court of Appeals ruled that the site posed no serious health risk as the hazards therein were "speculative."[106]

The dangerous presumption that state agency inaction sufficiently gauges the public health threat posed by a contaminated site emerged in *Borden*. The Tenth Circuit's decision in *Foulston* also established this link, perpetuating a disturbing trend. State agency inactivity regarding existing environmental law violations should be only one of many factors considered when determining the immediate threat to public health or safety.

The *Foulston* court held that the Capitan site posed no "immediate" threat to public health and safety, and as a result did not meet the "no abandonment" threshold established by the Supreme Court in *Midlan-*

100. *Id.* at 888.
101. *Id.*
102. *Id.*
103. *See id.* at 890.
104. 856 F.2d 12 (4th Cir. 1988).
105. *Id.* at 14-15.
106. *Id.* at 16.

tic.[107] Yet, the *Midlantic* holding calls for a finding of "imminent and identifiable" harm, not "immediate" harm.[108] Imminent and immediate are not synonymous, and the outcome of a case may well turn on how a court characterizes the threat.[109] The Court in *Midlantic* explicitly held that Congress' intent behind CERCLA was to prevent *imminent* endangerment.[110] Courts have warned that any attempt to limit "imminent danger" to "immediate danger" amounts to "gambling with human lives."[111]

While the Capitan site might not have presented an apparent "immediate" threat to public health or safety, the site did pose an "imminent" threat.[112] While the contaminated soil of the site might not "instantly"[113] affect anyone's health or safety, future harm due to the untreated contamination certainly remains "impending" and "likely to occur."[114] Such a distinction should be instilled in a court ruling on abandonment cases as property abandoned through such actions in most cases winds up in the hands of unsuspecting, good-faith purchasers.

Although the "contamination" in excess of 100 ppm at each of the three *Foulston* sites was not described specifically, it is commonly known that gasoline contains many hazardous elements. The EPA has recognized that gasoline lead, through its presence in air, dirt, and dust, is the leading cause of lead poisoning.[115] Besides lead, gasoline also contains benzene, a known carcinogen.[116] Epidemiological and animal studies indicate that exposure to benzene results in high rates of leukemia, kidney cancer, and liver cancer.[117] Exposure to concentrations of benzene as low as 250-500 ppm result in nausea, breathlessness, and vertigo while constant exposure to low concentrations results in non-functioning bone marrow and defi-

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107. *Foulston*, 4 F.3d at 890.

108. *Midlantic*, 474 U.S. at 507 n.9.

109. *See* Rick M. Reznicsek, Note, *International Environmental Bankruptcy: An Overview of Environmental Bankruptcy Law, Including a State's Claims Against the Multinational Polluter*, 23 VAND. J. TRANSNAT'L L. 345, 362 (1990).

110. *Id.* at 506 (citing CERCLA § 106, 42 U.S.C. § 9606).

111. *See, e.g.*, Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals, 504 F.2d 741, 744 (7th Cir. 1974).

112. *See, e.g.*, Dague v. City of Burlington, 935 F.2d 1343, 1356 (2nd Cir. 1991) (concluding that an activity that presents imminent endangerment does not require a finding of immediate or even threatened actual harm), *rev'd in part*, 112 S. Ct. 2638 (1992); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1394 (D. N.H. 1985) (holding that "imminency" does not require a finding that actual harm will occur immediately so long as risk of threatened harm exists); Ethyl Corp. v. EPA, 541 F.2d 1, 13 (D.C. Cir.) (en banc) (holding that "[c]ase law and dictionary definition agree that endanger means something less than actual harm"), *cert. denied*, 426 U.S. 941 (1976); Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528, 535 (D.C. Cir. 1972) (approving of the EPA's conclusion that the final anticipated injury need not occur prior to a determination that an 'imminent hazard' exists).

113. *Immediate*: following without the lapse of appreciable time; done or occurring at once; instant. FUNK & WAGNALLS NEW "STANDARD" DICTIONARY OF THE ENGLISH LANGUAGE 1230 (1961).

114. *Imminent*: threatening to happen at once, as some calamity; dangerous and close at hand; impending. *Id.*

115. *See* Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F.2d 506, 528-29 (D.C. Cir. 1983).

116. Natural Resources Defense Council v. Reilly, 983 F.2d 259, 261 n.3 (D.C. Cir. 1993) (citing 52 Fed. Reg. 31,162, 31,168 (1987)).

117. *Id.*

ciencies in the elements of the blood.[118] Therefore, if these abandoned properties are eventually used for any type of high-traffic use, such as residential or commercial development, public health and welfare may become unnecessarily and irresponsibly imperiled.

In allowing abandonment of the Capitan site based on a finding that the site posed no "immediate" threat to public health and safety, the bankruptcy court, the district court, and the Tenth Circuit Court of Appeals all misapplied the *Midlantic* "imminent and identifiable" exception. Considering the precedential value of the Tenth Circuit decision, such an error in interpretation could lead to unremediated environmental contamination. Had the proper test been applied, the court would have had no choice but to conclude that the accumulated contamination exceeded safe exposure levels and at least constituted "imminently" dangerous conditions. The Tenth Circuit should have been able to reach this conclusion without first requiring such a finding by a state agency.

While the Tenth Circuit's view of the Supreme Court's "imminent and identifiable" exception efficiently promotes the Bankruptcy Code's "fresh start" policy, the interpretation also undermines CERCLA's policy of placing the responsibility for environmental cleanup costs on those who caused the contamination. While *Midlantic* dealt with state statutes and regulations and not CERCLA, CERCLA clearly is "reasonably calculated to protect the public health or safety" from harm and should be allowed to limit the power of abandonment and trump weaker and insufficient state laws when they fail to ensure environmental protection. Until Congress specifically prioritizes a specific objective, courts will follow the lead of *Foulston* and continue to uphold abandonment at the expense of crucial environmental policies.

III. INDEMNIFICATION AGREEMENTS BETWEEN CERCLA RESPONSIBLE PARTIES FOR CLEANUP LIABILITY: *UNITED STATES V. HARDAGE*[119]

A. *Background*

When the EPA incurs response costs in cleaning up hazardous waste, it may bring actions to recover the costs against any or all potentially responsible parties ("PRPs").[120] CERCLA § 107(a) defines four classes of PRPs: present owners or operators of facilities contaminated by or containing hazardous substances, past owners or operators of such facilities, persons who arrange for disposal or treatment of hazardous substances, and persons who accept for transportation hazardous substances and select the disposal facility.[121]

PRPs often enter into indemnification or hold harmless agreements in order to transfer liability for any cleanup responsibility they may incur

118. American Petroleum Inst. v. OSHA, 581 F.2d 493, 498 (5th Cir. 1978), *aff'd*, 448 U.S. 607 (1980).

119. 985 F.2d 1427 (10th Cir. 1993).

120. CERCLA §§ 104(a), 107(a), 42 U.S.C. §§ 9604(a), 9607(a) (1988).

121. CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (1988).

under CERCLA.[122] PRPs attach great importance to these agreements as the financial consequences arising out of CERCLA's strict liability for cleanup are usually very burdensome. Very few PRPs today enter into contracts without considering or bargaining for the inclusion of some kind of indemnification clause.[123]

Notwithstanding these facts, it remains uncertain whether CERCLA allows allocation of liability between PRPs. CERCLA § 107(e)(1) states:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.[124]

The seemingly contradictory language of these two sentences has divided courts considering whether CERCLA allows the contractual allocation of financial responsibility for hazardous waste cleanup.[125] The Tenth Circuit addressed the issue in *United States v. Hardage.*

B. *Facts*

From 1973 to 1979, United States Pollution Control, Inc. ("USPCI") transported waste products produced by various parties to the Royal N. Hardage Industrial Waste Site (Hardage Site) near Criner, Oklahoma.[126] One of the hazardous waste producers was the McDonnell-Douglas Corporation ("MDC") with whom USPCI had contracted to transport 250,000 gallons of waste to the Hardage site.[127] The contracts specified that USPCI would hold McDonnell-Douglas harmless from any claim of loss resulting from the transport of the waste as well as any liability, obligations, or costs possibly created by USPCI.[128]

Environmental officials eventually identified hazardous wastes at the Hardage site and named both USPCI and MDC as PRPs, whereupon each sought indemnification from the other.[129] USPCI claimed that it had protected itself by including indemnification clauses on its standard-form

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122. *See, e.g.*, Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49, 50-51 (2nd Cir. 1993); Jones-Hamilton Co. v. Kop-Coat, Inc., 750 F. Supp. 1022, 1023 (N.D. Cal. 1990), *aff'd in part, rev'd in part*, 973 F.2d 688 (9th Cir. 1992).

123. Lisl E. Miller, Comment, *Indemnification Agreements Under CERCLA*, 23 ENVTL. L. 333, 348 (1993).

124. CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1) (1988).

125. The majority of courts have interpreted § 107(e) to allow indemnification agreements. *See, e.g.*, Niecko v. Emro Mktg. Co., 973 F.2d 1296, 1300-01 (6th Cir. 1992); Jones-Hamilton Co. v. Beazer Materials & Servs., 959 F.2d 126, 129 (9th Cir. 1992), *superseded by*, 973 F.2d 688 (9th Cir. 1992). Yet a minority of courts have found that § 107(e) precludes independent indemnification contracts. *See, e.g.*, AM Int'l, Inc. v. International Forging Equip., 743 F. Supp. 525, 528-30 (N.D. Ohio 1990).

126. *Hardage*, 985 F.2d at 1431-32.

127. *Id.* at 1433.

128. *Id.* at 1434.

129. *Id.* at 1432.

shipping tickets. The tickets stated that MDC and the government agreed to indemnify USPCI against all liability which MDC or the government might cause or create.[130]

The district court granted summary judgment for MDC against USPCI on the indemnification provisions contained in the contracts, holding that USPCI's shipping ticket indemnification language was inapplicable.[131] On appeal, the Tenth Circuit affirmed the district court's decision, concluding that liability had been legitimately transferred to USPCI as a result of broad language favoring MDC found in the parties' various indemnification clauses.[132]

C. *Tenth Circuit Decision*

In affirming the district court's decision, the Tenth Circuit found the plain meaning of § 107(e)(1) prevented PRPs from altogether transferring their liability, but gave them the right to obtain indemnification for that liability.[133] In other words, there can be no transfer of liability to the government or to anyone else, but financial responsibility can be transferred. As the Tenth Circuit did not delve into a detailed analysis of § 107(e)(1), it is important to note the cases the court relied upon to validate indemnification agreements.

The court cited *Mardan Corp. v. C.G.C. Music, Ltd.*,[134] a Ninth Circuit case holding that section 107(e)(1) "expressly preserves agreements . . . to indemnify a party held liable under 107(a)."[135] The *Mardan* court explained that "[b]y preserving such agreements, Congress seems to have expressed an intent to preserve the associated body of state law under which agreements between private parties would normally be interpreted."[136]

The court also cited *Purolator Products Corp. v. Allied-Signal, Inc.*,[137] in which a federal district court held that liable parties under CERCLA can contractually shift responsibility for their response costs among each other, but can in no way escape their liability to the government or a third party.[138] The *Purolator* court held that allowing indemnification agreements did not hamper CERCLA's goal of recovering moneys for cleanup because the government could still recover from a responsible party.[139]

Relying on Oklahoma law, the *Hardage* court found that while an indemnification agreement must "clearly and unequivocally express an intent to exculpate," it need not refer to specific acts that will invoke the clause.[140] The court explained that "such an intent may be found where

130. *Id.* at 1434.
131. *Id.* at 1432.
132. *Id.* at 1436.
133. *Id.* at 1433.
134. 804 F.2d 1454 (9th Cir. 1986).
135. *Id.* at 1458.
136. *Id.*
137. 772 F. Supp. 124 (W.D.N.Y. 1991).
138. *Id.* at 129.
139. *Id.* at 129-30.
140. *Hardage*, 985 F.2d at 1434.

the language of the indemnification is so broad and all-inclusive that it necessarily sweeps all events—including those occurring because of the indemnitee's actions—into its coverage."[141]

The court found that MDC was entitled to indemnification from USPCI based on an indemnification clause found in two transport and disposal contracts that indemnified all losses "resulting from" the transportation or disposal of MDC's hazardous waste.[142] The court held that the term "resulting from" was the type of "all-inclusive and unambiguous language" sufficient to relieve MDC from its CERCLA-imposed strict liability.[143] In contrast, the court concluded that the "caused or created" language used in USPCI's shipping tickets failed to create any indemnification because such language lacked the required breadth found in MDC's language.[144]

After contracting to use the Hardage Site for hazardous waste disposal, USPCI then approached various "customers" including MDC, and proposed the Hardage Site as a feasible hazardous waste dump site.[145] Upholding the district court's ruling, the Tenth Circuit stated that CERCLA § 107(a)(4) establishes transporter liability if site selection is chosen by the transporter, who may in turn not claim indemnification from the liability.[146]

D. *Analysis*

Although courts have differed over the ambiguous language of CERCLA § 107(e), it is clear that allowing for indemnification contracts between PRPs is the correct course for courts to take if hazardous waste problems are to be aggressively and potently remediated. By allowing for indemnification agreements between the PRPs in *Hardage*, the Tenth Circuit effectively supported the aims of CERCLA by assuring that polluters pay for their mess regardless of how payment is accomplished.

While a PRP remains fully liable to the government regardless of any indemnification contracts entered into,[147] such agreements allow a PRP the opportunity to contractually transfer financial responsibility arising out of such liability. Therefore, a party indemnified by another liable party is vested with the incentive to voluntarily clean up hazardous substances or wastes on its site as it can recover response costs directly from the other liable party.

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141. *Id.* at 1434-35.
142. *Id.* at 1434.
143. *Id.* at 1435.
144. *Id.* at 1435-36.
145. *Id.* at 1435 n.6.
146. *Id.* While USPCI averred that MDC "cause or created" USPCI's liability, it was USPCI's actions as a transporter and selector of the disposal facility that in essence "caused or created" their liability.
147. *See, e.g.*, Olin Corp. v. Consolidated Aluminum Corp., 807 F. Supp. 1133, 1140 (S.D.N.Y. 1992) (stating that indemnity agreements have "no impact on the central goal of CERCLA—to hold PRPs, rather than taxpayers, liable for the cost of environmental clean-up" because the parties remain jointly and severally liable to the government), *aff'd in part, vacated in part*, 5 F.3d 10 (2d Cir. 1993).

The minority of courts that have prohibited indemnification agreements between PRPs have done so in contravention of the primary CERCLA goals of promoting voluntary cleanup of hazardous waste sites[148] and placing the costs of cleanup on the parties responsible for the contamination.[149] Without indemnification agreements, PRPs who pollute have less incentive to clean up the contamination since any cleanup costs incurred would be unreimbursed. In such circumstances, the parties might be content to sit on their pollution, hoping to escape CERCLA scrutiny and never pay a penny in remediation costs. Prohibiting indemnification agreements also causes polluters to seek out indemnity or insurance agreements with parties not liable under CERCLA, thus leaving response costs to be paid by non-polluting, non-culpable parties.

While the Tenth Circuit's decision in *Hardage* upheld crucial CERCLA objectives, it also helped bolster the critical public policies propounded in *Mardan* and *Purolator.* The freedom to contract was implicitly referred to in *Mardan* and stands as a personal right fundamental to the efficiency of the American legal system.[150] The *Purolator* court found that Congress left parties free to allocate liability contractually among themselves, and noted that such a public policy helped in the ultimate equitable application of CERCLA liability.[151]

While the majority of courts remain in favor of the transfer of CERCLA financial responsibility through indemnification agreements, a minority currently exists which is striking down such agreements. Such action is impinging upon the fundamental right of freedom to contract, a right which CERCLA expressly reserves.[152] Any major shift towards the minority view would harm environmental regulation because diminishment in the freedom to contract would undermine the Congressional intent of equitably allocating hazardous waste cleanup costs to the greatest number of parties.

While the legislative history behind CERCLA § 107(e) is enigmatic, it tends to support indemnification agreements. The primary purpose of § 107(e) initially was to prevent adhesion contracts and to protect parties from nondisclosure, purposes that have become unnecessary due to adaptation and amendment of the law in those fields.[153] Since preclusion of indemnification agreements is no longer necessary for the reasons Con-

148. *See* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, HAZARDOUS WASTE CONTAINMENT ACT OF 1980, H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.

149. *See* SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. No. 848, 96th Cong., 2d Sess. 12-13 (1980).

150. Article I, § 10 of the United States Constitution provides that "[n]o state . . . shall pass any law impairing the obligation of contracts. . . ." U.S. CONST. art. I, § 10, cl. 1.

151. *Purolator,* 772 F. Supp. at 134.

152. *See, e.g.,* Hatco Corp. v. W.R. Grace & Co—Conn., 801 F. Supp. 1309, 1317 (D.N.J. 1992) (stating that "CERCLA allows parties to privately allocate by contract the risk of loss for liabilities under [CERCLA]"); Rodenbeck v. Marathon Petroleum Co., 742 F. Supp. 1448, 1456 (N.D. Ind. 1990) (stating that "CERCLA expressly preserves the right of private parties to contractually transfer to or release another from the financial responsibility arising out of CERCLA liability").

153. *See* Miller, *supra* note 123, at 351.

gress originally intended, legislative history can not act to invalidate such agreements.[154] Yet, as long as debate over § 107(e)'s legislative history remains alive, courts will continue to use it as leverage for striking down indemnification agreements. Congress should take steps to amend CERCLA and specifically allow for indemnification agreements between PRPs.

In its delegation of indemnification liability in *Hardage*, the Tenth Circuit relied on a very literal interpretation of the language used by the parties in their indemnification attachments. This emphasis on plain meaning in *Hardage* should compel individual parties crafting indemnification agreements to tailor the language carefully. Using ambiguous, boilerplate language for contractual allocation of risk may create unintended consequences, with neither party receiving bargained-for benefits.[155] Furthermore, parties should expressly incorporate specific state law into their agreements to ensure that the language of the agreements will actually protect them.

CONCLUSION

Relying on a plain meaning interpretation of CERCLA, the Tenth Circuit in *United States v. Colorado* vested states with the potent ability to regulate federal facilities under state RCRA authority. The decision breathes life back into the EPA's fettered delegation system and adds a much needed review and enforcement weapon to the nation's environmental regulation arsenal. The court's decision in *United States v. Hardage*, recognizing the validity of indemnification agreements between CERCLA responsible parties, also relied on a plain meaning interpretation of CERCLA. *Hardage* follows the majority trend across the country and upholds the fundamental freedom to contract as well as crucial CERCLA policies, including promoting voluntary cleanup of hazardous waste sites and placing the cost of remediation on those responsible for the pollution.

While the Tenth Circuit's decisions in *United States v. Colorado* and *Hardage* succeeded in upholding Congressional goals of protecting public health and safety through strict environmental regulation, the court did not follow that trend in *New Mexico Environment Department v. Foulston*, where environmental regulation took a back seat to Bankruptcy Code policies.

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154. For a related view, compare Schalk v. Reilly, 900 F.2d 1091, 1096 n.4 (7th Cir.) (noting that the disagreement among members of Congress regarding the meaning of certain CERCLA provisions indicates that courts should be reluctant to rely on legislative history), *cert. denied*, 498 U.S. 981 (1990). For examples of cases where indemnification agreements have been granted without reliance on legislative history, see Armotek Indus., Inc. v. Freedman, 790 F. Supp. 383, 386-87 (D. Conn. 1992); Hemingway Transp., Inc. v. Kahn (*In re* Hemingway Transp., Inc.), 126 B.R. 650, 653 (D. Mass. 1991), *aff'd*, 954 F.2d 1 (1st Cir. 1992). *But see* AM Int'l v. International Forging Equip., 743 F. Supp. 525, 528 (N.D. Ohio 1990) (prohibiting indemnification agreements under § 107(e), finding that the Senate, in final debates before the passing of CERCLA, "disfavored releases [from liability] except under strict conditions").

155. Penny L. Parker & John Slavich, *Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?*, 44 Sw. L.J. 1349, 1381 (1992).

Congress should specifically grant environmental policies supremacy over bankruptcy policies. However, in the face of Congressional inaction, the courts must act as efficient guardians of the environment themselves and liberally interpret environmental regulations. The *Foulston* court's decision rests on a flawed application of Supreme Court precedent and effectively thwarts the environmental goals established in CERCLA.

Shane Justin Harvey

HEALTH LAW SURVEY

INTRODUCTION

The nation's health care system has recently undergone unprecedented scrutiny. Politicians from the White House to Capitol Hill, health care professionals and experts, policymakers, and the general public agree that at some level the present health care system needs to change. Of course, determining the extent of such a change prompts a highly political, ideological, and even emotional debate. Court decisions that interpret and apply health laws expose important health care issues and problems. Consequently, these decisions facilitate reform by guiding law and policymakers to problem areas within the health care system. Therefore, current health law cases warrant investigation.

Over the past year, the Tenth Circuit ruled on numerous health-related issues. Several of these rulings undoubtedly will impact the health care system. This Survey discusses three notable Tenth Circuit cases concerning issues in health law arising under the Emergency Medical Treatment and Active Labor Act (EMTALA),[1] the Medicare Act,[2] and § 510 of the Employee Retirement Income Security Act (ERISA).[3] Part I considers the issues of patient stabilization and physician liability under EMTALA.[4] Part II analyzes the issue of "Sole Community Hospital" status under the Medicare Act.[5] Finally, part III discusses the issue of health benefit discrimination under ERISA.[6]

I. EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT: *DELANEY V. CADE*[7]

A. *Background*

1. Stabilization of an Emergency Medical Condition

EMTALA primarily functions to prevent private hospital emergency rooms from transferring and denying available medical care to patients who cannot afford to pay for treatment, a phenomenon known as "patient dumping."[8] Participating Medicare hospitals with emergency rooms must sufficiently examine the patient to determine whether an "emergency

1. 42 U.S.C. § 1395dd (1988 & Supp. III 1991).
2. 42 U.S.C. § 1395 (1988 & Supp. III 1991).
3. 29 U.S.C. § 1140 (1988).
4. *See infra* part I discussing Delaney v. Cade, 986 F.2d 387 (10th Cir. 1993).
5. *See infra* part II discussing Community Hosp. v. Sullivan, 986 F.2d 357 (10th Cir. 1993).
6. *See infra* part III discussing Phelps v. Field Real Estate Co., 991 F.2d 645 (10th Cir. 1993).
7. *Delaney*, 986 F.2d at 387.
8. Diana K. Falstrom, Comment, *Decisions Under the Emergency Medical Treatment and Active Labor Act: A Judicial Cure for Patient Dumping*, 19 N. KY. L. REV. 365, 365 (1992); John P. Halfpenny, Comment, *Taking Aim at Hospital "Dumping" of Emergency Department Patients: The COBRA Strikes Back*, 31 SANTA CLARA L. REV. 693, 693-94 (1991).

medical condition"[9] exists.[10] If such an emergency situation does exist, then the hospital is obligated under the act to either provide treatment or to transfer the patient.[11] Transfer is permitted only if the patient has requested transfer after being fully informed of the risks, the physician has certified in writing (either directly or by countersignature) that the benefits of transfer outweigh the risks, or the patient has stabilized.[12] One issue addressed in *Delaney v. Cade* concerned whether the plaintiff's condition was indeed stabilized prior to her transfer.[13]

Several courts have addressed the issue of a patient's stabilization under EMTALA. The Tenth Circuit found the following cases relevant to *Delaney*: *Deberry v. Sherman Hospital Ass'n*,[14] *Burditt v. United States Department of Health & Human Services*,[15] and *Cleland v. Bronson Health Care Group*.[16] In *Deberry*, the plaintiff claimed that her daughter had not been properly stabilized before being discharged from the defendant hospital.[17] Denying the defendant's motion to dismiss,[18] the district court noted that hospital violations of EMTALA occur in one of two ways.[19] First, *if* an emergency medical condition *does* exist, the hospital can violate the act by failing to determine "the nature of the [patient's] emergency condition."[20] Second, *if* the nature of the emergency condition *is discovered*, the hospital can violate the act by transferring or releasing the patient without stabilizing the patient's condition.[21] The court concluded that an inquiry into the occurrence of either violation requires a factual determination, thereby rendering dismissal inappropriate.[22]

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9. 42 U.S.C. § 1395dd(e)(1) (Supp. III 1991).

"Emergency medical condition" is defined as:

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in—
  (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
  (ii) serious impairment to bodily functions, or
  (iii) serious dysfunction of any bodily organ or part; or
(B) with respect to a pregnant women [sic] who is having contractions—
  (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
  (ii) that transfer may pose a threat to the health or safety of the woman of the unborn child.

Id.

10. Falstrom, *supra* note 8, at 369-70.

11. *Id.*

12. *Id.* at 370-72. "The term 'stabilized' means, with respect to an emergency medical condition . . . that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or . . . that the woman has delivered . . . ." *Id.* (citing 42 U.S.C. § 1395dd(e)(3)(B) (Supp. III 1989-1992)).

13. *See Delaney*, 986 F.2d at 391-93.

14. 741 F. Supp. 1302 (N.D. Ill. 1990).

15. 934 F.2d 1362 (5th Cir. 1991).

16. 917 F.2d 266 (6th Cir. 1990).

17. *Deberry*, 741 F. Supp. at 1303.

18. *Id.* at 1307.

19. *Id.* at 1305.

20. *Id.*

21. *Id.*

22. *Id.* at 1305.

In *Burditt*, the defendant doctor appealed the imposition of civil monetary penalties against him for failing, among other things, to properly stabilize a patient before her transfer.[23] The Fifth Circuit held that Dr. Burditt failed to properly stabilize the patient because he did not provide the treatment that medical experts would normally provide to prevent the potentially adverse consequences to the patient.[24] As in *Deberry*, the *Burditt* court determined the question of patient stabilization by considering facts.

In *Cleland*, the plaintiffs appealed the dismissal of their claim that the defendants failed to stabilize the patient's condition.[25] Upholding the dismissal, the Sixth Circuit found that the patient could be considered stabilized within the meaning of EMTALA because the patient was not acutely distressed and neither the doctors, the patient's parents, nor the patient himself indicated a deteriorating condition.[26] In other words, the doctors had no occasion to detect the patient's state of emergency.[27] Hence, the court reconciled its decision with *Deberry* by stating, "[i]f the emergency nature of the condition is not detected, the hospital cannot be charged with failure to stabilize a known emergency condition."[28]

2. Enforcement Against Hospitals and Physicians

EMTALA also provides three enforcement mechanisms:[29] (1) civil monetary penalties against hospitals or doctors who negligently violate the act;[30] (2) private civil suits against hospitals whose violations directly cause personal injury;[31] and, (3) suspension or revocation of a hospital's Medicare provider agreement.[32] Contrary to the language of § 1395dd(d)(1) imposing civil monetary penalties, § 1395dd(d)(2)(A) allowing for private civil suits only specifies the participating hospital as the object of the suit.[33] Nevertheless, the issue of a doctor's civil suit liability under the act

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23. *Burditt*, 934 F.2d at 1366, 1368-69.
24. *Id.* at 1369.
25. *Cleland*, 917 F.2d at 269.
26. *Id.* at 271.
27. *See id.*
28. *Id.*
29. *See* Halfpenny, *supra* note 8, at 704-05.
30. 42 U.S.C. § 1395dd(d)(1) (Supp. III 1991) provides:
(A) A participating hospital that negligently violates a requirement of this section is subject to a civil monetary penalty of not more than $50,000 . . . for each such violation.
(B) Subject to subparagraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates . . . this section, . . . is subject to a civil monetary penalty of not more than $50,000 for each such violation . . . .
31. *Id.* § 1395dd(d)(2)(A) (emphasis added) provides:
Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the *participating hospital*, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.
32. *Id.* § 1395dd(d)(2)(A) (violating physicians may be excluded from Medicare and state health care programs).
33. Falstrom, *supra* note 8, at 378; *see also* Case Comment, 50 WASH. & LEE L. REV. 355, 356 (1993) (EMTALA creates a private cause of action against hospitals but not against doctors). *Compare* 42 U.S.C. § 1395dd(d)(1) (Supp. III 1991) *with* § 1395dd(d)(2)(A).

has been the source of litigation.[34] The Tenth Circuit considered this issue in *Delaney*.[35]

The leading case on this issue is *Baber v. Hospital Corp. of America*.[36] In *Baber*, the plaintiff sued the physicians for allegedly violating EMTALA by inadequately addressing his sister's emergency medical condition.[37] The district court granted summary judgment in favor of the defendant physicians.[38] The Fourth Circuit affirmed, holding that EMTALA does not provide for private civil suits against physicians.[39] The Fourth Circuit further explained that only the Department of Health and Human Services can bring an action against a physician to impose administrative civil monetary penalties and/or to prohibit the physician's involvement in Medicare programs.[40] The court based its decision on its failure to find contrary congressional intent in EMTALA's legislative history.[41]

The plaintiff argued against summary judgment based on *Burditt*[42] and *Sorrells v. Babcock*.[43] Yet, the Fourth Circuit found neither case persuasive.[44] *Burditt* involved a doctor's appeal from the assessment of administrative civil monetary penalties by the Department of Health and Human Services, not a private civil suit against a physician.[45] The court in *Sorrells* merely held that the federal courts have jurisdiction over EMTALA actions against emergency room physicians.[46] While the *Sorrells* court questioned Congress' intent behind allowing the Secretary to recover monetary penalties in cases where a patient brought the suit,[47] the Fourth Circuit considered the *Sorrells* analysis to be mere dictum, and illustrative of the court's confusion of the issues.[48]

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34. *See* Falstrom, *supra* note 8, at 384; *see also* Robert A. Bitterman, Note, *A Critical Analysis of the Federal COBRA Hospital "Antidumping Law": Ramifications for Hospitals, Physicians, and Effects on Access to Healthcare*, 70 U. DET. MERCY L. REV. 125, 172-73 (1992) (discussing cases that have addressed the civil liability of physicians under EMTALA).

35. *See Delaney*, 986 F.2d at 393-94.

36. 977 F.2d 872 (4th Cir. 1992).

37. *Id.* at 874.

38. *Id.*

39. *Id.* at 876-77. Several federal district courts agree on this issue. *See* Jones v. Wake County Hosp. Sys., Inc., 786 F. Supp. 538, 545 (E.D.N.C. 1991) (COBRA does not provide a private cause of action against a physician); Lavignette v. West Jefferson Medical Ctr., No. CIV.A.89-5495, 1990 WL 178708, at *2 (E.D. La. Nov. 7, 1990) (holding the express language and legislative history of EMTALA indicate it was not intended to provide a private cause of action against physicians); Verhagen v. Olarte, No. 89CIV.0300(CSH), 1989 WL 146265, at *6 (S.D.N.Y. Nov. 21, 1989) (construing EMTALA as excluding a federal private claim against a physician).

40. *Baber*, 977 F.2d at 877.

41. *See id.*; H.R. REP. No. 241, 99th Cong., 2d Sess., pt. 3, at 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 726, 728.

42. 934 F.2d 1362 (5th Cir. 1991).

43. 733 F. Supp. 1189 (N.D. Ill. 1990).

44. *See Baber*, 977 F.2d at 877; *see also* Case Comment, *supra* note 33, at 358 (explaining the *Baber* court's distinction of *Burditt* and *Sorrells*).

45. *Id.* at 877-78; *see Burditt*, 934 F.2d at 1366.

46. *Baber*, at 878; *see Sorrells*, 733 F.Supp at 1195.

47. *Baber*, 977 F.2d at 878; *see Sorrells*, 733 F. Supp. at 1194.

48. *See Baber*, 977 F.2d at 878. *But see* Bitterman, *supra* note 35, at 172 (citing *Sorrells* as authority for holding physicians liable in private civil suits); Falstrom, *supra* note 8, at 384.

B. *Tenth Circuit Decision:* Delaney v. Cade[49]

1. Facts

The plaintiff, Ms. Delaney, sustained serious injuries in an automobile accident.[50] Her injuries included a transected aorta, face and knee lacerations, arm and neck fractures, and a broken nose.[51] The emergency room at St. Joseph Memorial Hospital (St. Joseph) received Ms. Delaney immediately following the accident.[52] While at St. Joseph, the defendant, Dr. Cade, treated only her knee injuries; he neither ordered x-rays nor performed a physical examination.[53] At that time, Ms. Delaney still had feeling in her legs and she complained of chest pains.[54] Two hours after her arrival at St. Joseph, Dr. Cade transferred her to Central Kansas Medical Center (Central).[55] By the time she arrived at Central, the feeling in her legs had disappeared.[56] Ms. Delaney received further medical treatment at Central before being transferred again to the University of Kansas Medical Center (K.U.).[57] At K.U., doctors discovered Ms. Delaney's clotted transected aorta.[58] They performed surgery, but Ms. Delaney remained permanently paralyzed.[59]

Ms. Delaney sued Dr. Cade, St. Joseph, and Central under § 1395dd of EMTALA for failing to stabilize her condition prior to her transfer.[60] The district court concluded that the facts alleged did not support a claim against either hospital and thus granted those defendants full summary judgment.[61] The district court also found that EMTALA does not allow private civil suits against physicians; therefore, the court granted Dr. Cade partial summary judgment on that issue.[62] Ms. Delaney appealed these judgments.[63] The Tenth Circuit reversed in part, holding that the evidence may support a claim against the hospitals under § 1395dd, but affirmed the lower court's grant of partial summary judgment for Dr. Cade.[64]

2. Opinion

The Tenth Circuit first addressed whether Ms. Delaney's condition had been stabilized before she was moved to Central. The court cited

49. 986 F.2d 387 (10th Cir. 1993).
50. *Id.* at 388.
51. *Id.* at 388 n.1.
52. *Id.* at 388.
53. *Id.*
54. *Id.* at 388-89.
55. *Id.* at 388-89.
56. *Id.* at 389.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 388.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

Deberry v. Sherman Hospital Ass'n[65] for the rule that hospitals can violate § 1395dd of EMTALA by failing to stabilize a patient's emergency medical condition before the patient is released or transferred.[66] The court held, based on *Deberry*, that *all* expert testimony introduced on the summary judgment issue must be considered to determine whether a material deterioration of the plaintiff's condition was likely during the transfer (that is, whether the defendant hospitals properly stabilized Ms. Delaney).[67] Ms. Delaney disputed the district court's finding that she had conceded the stabilization issue.[68] Furthermore, Ms. Delaney alleged that the feeling she had in her legs before transfer had dissipated by the time she arrived at Central—a material deterioration of her condition during the transfer.[69] Considering these allegations, the court found that the evidence offered by Ms. Delaney presented a genuine issue of material fact concerning the stabilization of her condition.[70] The court then reversed the summary judgment for the hospitals on that issue.[71]

The Tenth Circuit next considered the issue of a physician's civil liability under § 1395dd of EMTALA.[72] The court followed *Baber* and the statute's language in holding that § 1395dd does not allow individuals to bring civil suits against physicians who allegedly violate the act, but that individuals can bring civil suits against an offending hospital.[73] Thus, the Tenth Circuit affirmed the district court's summary judgment for the defendant doctor.[74]

C. *Analysis*

The Tenth Circuit properly followed other decisions that applied a fact-based analysis to the issue of patient stabilization.[75] The definition of "stabilized" is sufficiently vague to require significant fact-finding and weighing of evidence.[76] Congress may have intended to be unspecific in its definition. However, more specificity and clarity in the definition of "stabilized" would provide a useful guide for the fact-finding process. Given the present definition and the circumstances of Ms. Delaney's case, the Tenth Circuit correctly left the question open for an adversarial consideration of the alleged facts. Ruling one way or the other as a matter of

65. 741 F. Supp. 1302 (N.D. Ill. 1990).
66. *Delaney*, 986 F.2d at 391-92.
67. *Id.* at 392. For definition of "stabilized" see *supra* note 12.
68. *Delaney*, 986 F.2d at 392-93.
69. *See id.* at 393.
70. *Id.*
71. *Id.*
72. *See id.*
73. *Delaney*, 986 F.2d at 393-94.
74. *Id.* at 394.
75. *See, e.g.*, Burditt v. United States Dep't of Health and Human Serv.'s, 934 F.2d 1362, 1369 (5th Cir. 1991) (stabilization question depended upon testimony by medical experts); Cleland v. Bronson Health Care Group, 917 F.2d 266, 271 (6th Cir. 1990) (held to be stabilized because no facts indicating otherwise); Deberry v. Sherman Hosp. Ass'n, 741 F. Supp. 1302, 1305 (N.D. Ill. 1990) (definition of "to stabilize" is obviously factual question). *See supra* notes 13-27 and accompanying text (discussing these cases more fully).
76. *See* definition of "stabilized" *supra* note 12.

law on this issue when an actual factual dispute exists would accomplish nothing. The Tenth Circuit's decision may influence other courts to resist ruling on similar issues before trial.

On the issue of a physician's civil liability under EMTALA, the court properly held that no such liability exists based on the actual language of the statute and on other court decisions.[77] It does seem anomalous, however, that both negligent hospitals and negligent doctors may incur administrative monetary penalties, but only negligent participating hospitals may be sued by private individuals.[78] Even though a hospital may be appropriately considered vicariously liable for the negligent acts of its physicians, it is usually an individual physician who makes the medical decisions, examines or fails to examine the patient, and provides or fails to provide the treatment.

The legislative history fails to directly address the reason for immunizing physicians from private civil liability, but the Judiciary Committee expressed its concern that overly severe penalties might defeat the goal of the act to increase availability of emergency care, thereby leading some hospitals to close their emergency rooms to avoid penalty risks.[79] In addition, the committee expressed concern that more severe penalties might exacerbate the medical malpractice crisis.[80] The Judiciary Committee believed the present penalties constituted a sufficient deterrent against emergency room abuses.[81] Perhaps the committee also felt that creating a private cause of action against physicians under the act would be superfluous in light of common law malpractice suits.

To make the act's penalty provisions more consistent, Congress could allow for limited physician civil liability. For example, Congress could cap the amount of available damages. Congress could also require the aggrieved patient to choose between suing the physician under the act, or suing the physician under a common law action. While congressional concerns about the potentially adverse effects of imposing overly harsh penalties are certainly understandable, allowing an injured patient some level of personal redress through the act, even if limited, should accomplish the goals of the act, yet dodge adverse repercussions.

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77. *See, e.g.*, Jones v. Wake County Hosp. Sys., Inc., 786 F. Supp. 538, 545 (E.D.N.C. 1991) (COBRA does not provide a private cause of action against a physician); Lavignette v. West Jefferson Medical Ctr., No. CIV.A.89-5495, 1990 WL 178708, at *2 (E.D. La. Nov. 7, 1990) (holding the express language and legislative history of EMTALA indicate it was not intended to provide a private cause of action against physicians); Verhagen v. Olarte, No. 89CIV.0300(CSH), 1989 WL 146265, at *6 (S.D.N.Y. Nov. 21, 1989) (construing EMTALA as excluding a federal private claim against a physician).

78. *See supra* part I.A.2.

79. *See* H.R. REP. No. 241, 99th Cong., 2d Sess., pt. 3, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 726, 728.

80. *Id.*

81. *Id.* at 7, *reprinted in* 1986 U.S.C.C.A.N. 726, 729.

II. "SOLE COMMUNITY HOSPITAL" UNDER THE MEDICARE ACT: *COMMUNITY HOSPITAL V. SULLIVAN*[82]

A. *Background*

Originally, the Medicare Act provided reimbursement to participating hospitals for the "reasonable cost" of care given to Medicare recipients.[83] In 1983, Congress changed the system by replacing the "reasonable cost" system with the "prospective payment system" (PPS).[84] The PPS paid set amounts to hospitals based on the diagnoses of patients.[85] Congress hoped this new system would encourage hospital efficiency by rewarding cost-efficient services.[86] However, because smaller rural hospitals are often less efficient than larger urban medical centers, these rural hospitals received disproportionately fewer Medicare reimbursements than their urban counterparts.[87] In response to this adverse effect, Congress allowed certain rural hospitals, those defined as "sole community hospitals" (SCHs), to receive more Medicare funds.[88]

Congress originally defined SCH in fairly general terms.[89] In 1989 Congress narrowed the definition by requiring, among other things, that SCHs be more than 35 miles from other hospitals or that SCHs be the only source of hospital services due to a lack of "other like hospitals."[90] The phrase "like hospitals" did not exist in the former definition.[91]

Pursuant to the authority granted in the statute, the Secretary of Health and Human Services promulgated corresponding administrative regulations concerning SCH status.[92] The regulations define "like hospital" as one providing "short-term acute care."[93] In addition, the regulations state that hospitals with SCH status under the original system would

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82. 986 F.2d 357 (10th Cir. 1993).

83. 42 U.S.C. § 1395ww (1982)(amended 1983); *see id.* at 358;.

84. 42 U.S.C. § 1395ww(d) (1988)(amended 1989); *see Community Hosp.*, 986 F.2d at 358;

85. 42 U.S.C. § 1395ww(d) (1988); *see Community Hosp.*, 986 F.2d at 358.

86. H.R. REP. NO. 25, 98th Cong., 1st Sess. 132 (1983), *reprinted in* 1983 U.S.C.C.A.N. 219, 351; *see Community Hosp.*, 986 F.2d at 358.

87. Robin E. Margolis, *Healthtrends*, HEALTHSPAN, May 1992, at 21.

88. 42 U.S.C. § 1395ww(d)(5)(c)(ii) (1988); *see id.*

89. 42 U.S.C. § 1395ww(d)(5)(C)(ii) (1988)(amended 1989) provided:
[T]he term "sole community hospital" means a hospital that, by reason of factors such as isolated location, weather conditions, travel conditions, or absence of other hospitals (as determined by the Secretary), is the sole source of inpatient hospital services reasonably available to individuals in a geographical area who are entitled to benefits under part A of this subchapter.

90. 42 U.S.C. § 1395ww(d)(5)(D)(iii) (Supp. III 1991) (emphasis added) provides:
[An SCH is] any hospital(I) that the Secretary determines is located more than 35 road miles from another hospital, (II) that, by reason of factors such as the time required for an individual to travel to the nearest alternative source of appropriate inpatient care . . ., location, weather conditions, travel conditions, or absence of other *like hospitals* (as determined by the Secretary), is the sole source of inpatient hospital services reasonably available to individuals in a geographic area who are entitled to benefits under part A of this subchapter, or (III) that is designated by the Secretary as an essential access community hospital . . . .

91. *See* 42 U.S.C. § 1395ww(d)(5)(C)(ii) (1988)(amended 1989).

92. 42 C.F.R. § 412.92 (1990).

93. *Id.* § 412.92(c)(2).

not be required to meet the new standards,[94] and SCH status would not be revoked unless the conditions surrounding the conferral of the status changed.[95]

In *St. Mary's Hospital & Medical Center v. Heckler* (*St. Mary's*),[96] the district court found that St. Mary's Hospital qualified as a SCH because nearby Community Hospital, unlike St. Mary's Hospital, provided limited *osteopathic*[97] care; St. Mary's Hospital provided more extensive *allopathic*[98] care.[99] This difference in treatment methodologies distinguished the two hospitals sufficiently enough to permit SCH status for St. Mary's Hospital.[100] Based on the reasoning of the *St. Mary's* case, Community Hospital also applied for SCH status, resulting in the recent Tenth Circuit decision.[101]

B. *Tenth Circuit Decision*: Community Hospital v. Sullivan

1. Facts

Community Hospital v. Sullivan involved the same two hospitals as in *St. Mary's Hospital & Medical Center v. Heckler*.[102] Community Hospital (Community) provides short-term, acute osteopathic[103] care in Grand Junction, Colorado.[104] The nearest osteopathic hospital is located 500 miles away in Albuquerque, New Mexico.[105] However, St. Mary's Health Center (St. Mary's), a short-term, acute allopathic[106] care hospital, is located only a few blocks away from Community.[107] In addition, St. Mary's has SCH status under an obsolete statutory and regulatory procedure.[108] The basis

94. *Id.* § 412.92(b)(5) provides:

> A hospital that has been granted an exemption from the hospital cost limits under § 413.30(e)(1) of this chapter before October 1, 1983, or whose request for the exemption was received by the appropriate intermediary before October 1, 1983, and was subsequently approved, will be automatically classified as a [SCH] unless that classification has been canceled under paragraph (b)(3) of this section, or there is a change in the circumstances under which the classification was approved.

95. *Id.* § 412.92(b)(3) provides, "An approved classification as a [SCH] will remain in effect without need for reapproval unless there is a change in the circumstances under which the classification was approved."

96. No. CIV.84-Z-1474, 1985 WL 56559 (D. Colo. Feb. 7, 1985).

97. Osteopathy is "[a] school of medicine based upon the idea that the normal body when in 'correct adjustment' is a vital machine capable of making its own remedies against infections and other toxic conditions. Practitioners use the diagnostic and therapeutic measures of ordinary medicine in addition to manipulative measures." STEDMAN'S MEDICAL DICTIONARY 1004 (5th unabr. lawyer's ed. 1982). Practitioners are doctors of medicine. Community Hosp. v. Sullivan, 986 F.2d 357, 362 n.2 (10th Cir. 1993).

98. Allopathy is "substitutive therapy; a therapeutic system in which a disease is treated by producing a second condition that is incompatible with or antagonistic to the first." *Id.* at 44.

99. *St. Mary's*, 1985 WL 56559 at *1; *see Community Hosp.*, 986 F.2d at 359.

100. *St Mary's*, 1985 WL 56559 at *1-2.

101. *See Community Hosp.*, 986 F.2d at 359.

102. *Id.*

103. *See supra* note 97 (definition of osteopathic).

104. *Community Hosp.*, 986 F.2d at 359.

105. *Id.*

106. *See supra* note 98 (definition of allopathic).

107. *Community Hosp.*, 986 F.2d at 359.

108. *See id.*; St. Mary's Hosp. & Medical Ctr. v. Heckler, No. CIV.84-Z-1474, 1985 WL 56559 at *1. The *St. Mary's* case was decided before the current statutes and regulations went

for St. Mary's SCH status arose from the fact that Community provided only osteopathic care with limited services, (that is, no intensive care, therapeutic radiology, or emergency department), while St. Mary's provided allopathic care.[109]

Relying on the *St. Mary's* decision and the 500-mile distance between Community and the nearest osteopathic hospital, Community applied for SCH status in 1990.[110] The Secretary of Health and Human Services refused to grant SCH status to Community on the grounds that Community and St. Mary's fit the definition of "like hospitals."[111] On appeal, the district court relied on the *St. Mary's* decision, reversed the Secretary's ruling, and ordered the Secretary to grant Community SCH status.[112] The Secretary appealed to the Tenth Circuit.[113]

2. Opinion

The Tenth Circuit reversed the district court's decision.[114] The court applied a standard of review deferential to the Secretary's findings and quickly dispensed with Community's first two arguments: collateral estoppel and inappropriate deference to the Secretary's interpretation.[115] The court held that the Secretary was not collaterally estopped from raising the "like hospitals" issue because the facts and law had significantly changed from those existing at the time of the *St. Mary's* decision.[116] Specifically, Community's services had changed, as had the statutory and regulatory procedure.[117] On the issue of inappropriate deference to the Secretary's interpretation, the court ruled that deference to the Secretary was appropriate for two reasons: (1) Congress explicitly granted the Secretary the authority to administer the statute, and (2) the Secretary reasonably interpreted it.[118]

The third and primary substantive issue in the case involved the proper interpretation of the regulatory definition of "like hospitals."[119] Community first argued that the Secretary's interpretation of the phrase conflicted with congressional intent by creating an unfair economic imbalance between the two fundamentally different hospitals.[120] Community further argued that the administrative regulations permitting the Secretary to revoke the SCH status of grandfathered hospitals due to changed circumstances[121] conflicted with the "like hospitals" regulation.[122] Specifi-

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into effect. *See Community Hosp.*, 986 F.2d at 360. *See also supra* notes 88-94 and accompanying text.

109. *Community Hosp.*, 986 F.2d at 359; *see St. Mary's*, 1985 WL 56559 at *1.
110. *Community Hosp.*, 986 F.2d at 359.
111. *Id.*
112. *Id.*
113. *Id.* at 358.
114. *Id.* at 360.
115. *Id.* at 360.
116. *Id. See supra* notes 95-100 and accompanying text (discussing the *St. Mary's* decision).
117. *Community Hosp.*, 986 F.2d at 360.
118. *Id.*
119. *See id.* at 361; 42 C.F.R § 412.92(c)(2) (1990).
120. *See Community Hosp.*, 986 F.2d at 361.
121. *See* 42 C.F.R. § 412.92(b)(3), (5) (1990); *supra* notes 93-94 and accompanying text.

cally, Community asked how the Secretary could deny Community SCH status on the basis of changed circumstances while simultaneously allowing St. Mary's' SCH status to continue despite the changed circumstances.[123] Finally, Community argued that the allopathic and osteopathic distinction made the two hospitals different by nature.[124]

The court first held that because the statute clearly seeks to reimburse rural hospitals that are the only available means of *standard* medical care, and not those hospitals in the same rural area that provide *specialty* care, the need to analyze the statute's legislative history was eliminated.[125] Second, the court held that the grandfather regulation[126] requiring SCH applicants such as Community to meet the present statutory and regulatory scheme, while exempting those with prior SCH status such as St. Mary's, did not invalidate the "like hospitals" regulation merely because a different regulatory mechanism applied to the grandfathered hospitals.[127] Finally, the court held that the district court incorrectly applied the *St. Mary's* decision to Community's case.[128] The court found the osteopathic/allopathic distinction irrelevant under the present regulations.[129] "Like hospitals," as used in the statute and defined in the regulation, include those hospitals located within 35 miles of each other that provide short-term, acute care regardless of the type of care otherwise provided.[130] The court applied this definition and found that both hospitals provided short-term, acute care within 35 miles of each other, and thus concluded that Community did not qualify for SCH status.[131]

C. *Analysis*

The Tenth Circuit's decision turns on the definition of "like hospitals" as defined in title 42 § 412.92 of the 1990 Code of Federal Regulations.[132] Because a like hospital, St. Mary's, was within 35 miles of Community, Community did not meet the requirements of the statute and could not receive SCH status.[133] This decision seems logical and appropriate. It requires a strict application of a relatively clear statute and regulation to the facts. The court's decision does not sidestep the issue, convolute the meaning of the statute, or boldly override the controlling legislation. The court found the statute and definitions to be clear and

122. *Community Hosp.*, 986 F.2d at 361.
123. *Id.*
124. *Id.* at 362.
125. *Id.* at 361 (citing *Public Hosp. Dist. No. 1 v. Sullivan*, 806 F. Supp. 1478, 1485 (E.D. Wash. 1992)). "There is no indication in the language of the statute that Congress intended that the government subsidize specialty hospitals located in the same rural community." *Id.*
126. *See* 42 C.F.R. § 412.92(b)(5) (1990); *supra* note 89 and accompanying text.
127. *Community Hosp.*, 986 F.2d at 361-62.
128. *Id.* at 362.
129. *See id.*
130. *Id.*
131. *Id.* at 363.
132. 42 C.F.R. § 412.92 (1990). *See supra* text accompanying note 93.
133. *Community Hosp.*, 986 F.2d at 363.

applied the law to Community's case. When the requirements for SCH status were not met, the court properly denied Community that status.

Nevertheless, the result is troublesome. Because Community is an osteopathic hospital and St. Mary's is an allopathic hospital, the two hospitals provide fundamentally different *approaches* to acute medical care, not different *specialties.*[134] Therefore, patients who prefer one approach over the other are limited to one such hospital within a 35-mile radius. The Tenth Circuit's decision sets a precedent that two hospitals are "like hospitals" regardless of the fact that they provide two completely different types of acute care. Because the court's decision turned primarily on the definition of "like hospitals," that definition should be narrowed to prevent "unlike" hospitals from being considered "like." This would permit patients to chose the *type* of short term acute care they desire. A narrower definition is also consistent with Congress' goal in granting SHC status to prevent additional charges from being passed on to the patients who have no opportunity to use a less expensive hospital if only one hospital is in the community and if Medicare reimbursement is limited.[135] Patients in Grand Junction, Colorado who wish to undergo osteopathic care are denied this opportunity to shop around.

Furthermore, this decision leaves Community economically disadvantaged compared to St. Mary's. With the SCH reimbursements, St. Mary's may be more cost competitive than Community and ultimately cause Community's closure. Such a result conforms neither to Congress' apparent intent (to reimburse less efficient rural hospitals so they can remain open) nor to the needs of rural communities (availabilty of medical care).

Even though the court's decision seems unfair, the court may have had little choice. Given the clear statutory and regulatory definitions, the decision for Community may have set a snowballing precedent. Most rural hospitals, if not all, would be able to ride on the coattails of grandfathered hospitals and gain SCH status,[136] effectively rendering the new regulations useless. Moreover, as Community implicitly argued, the changes in Community's medical services and the changes in the law itself strongly suggest that St. Mary's' SCH status should be revoked.[137] Therefore, to avoid similar inequitable results in the future, either the statute and regulations need to be further amended or the agency responsible for determining SCH status should do its job and revoke unnecessary grants.

134. For definitions of osteopathy and allopathy, see *supra* notes 97-98; *see also Community Hosp.*, 986 F.2d at 362 n.2 (distinguishing the practices of osteopathic and allopathic medicine).

135. *Community Hosp.*, 986 F.2d at 361.

136. *See Community Hosp.*, 986 F.2d at 361.

137. *See id.* at 361.

III. SECTION 510 OF ERISA AND INTERFERENCE WITH EMPLOYEE HEALTH BENEFITS: *PHELPS V. FIELD REAL ESTATE CO.*[138]

A. *Background*

Congress enacted ERISA[139] as a means of uniformly regulating private employee benefit programs.[140] ERISA applies to both pension and welfare or health benefit plans.[141] This statute serves as a guide for private, self-insured employers to determine their employees' benefits.[142] Section 510 of ERISA forbids both employer discrimination against, or discharge of, employees who rightfully file benefit claims, and further forbids employer interference with employees' rights to receive benefits under a benefit plan.[143] In other words, the statute prohibits discrimination or discharge not only for actually filing a benefit claim, but also for the probability or possibility of filing a claim.[144]

As suggested above, ERISA cases usually follow one of two scenarios: (1) the employer discharges the employee, supposedly for a legitimate reason, but the employee alleges that the employee's effect, or expected effect, on benefit costs actually motivated the discharge; or (2) the employee claims that the employer changed or stopped the employee's benefit plan to conserve costs.[145] *Phelps* involved the first of these scenarios.[146]

In discharge cases, the employee must generally show three elements: (1) the employer engaged in prohibited conduct; (2) to interfere, (3) with the employee's right to receive benefits.[147] If the employer masks the motive with a legitimate reason for the discharge, however, the employee's burden of proof becomes extremely difficult.[148] In *Gavalik v. Continental Can Co.*, the Third Circuit Court of Appeals held that ERISA cases require proof of a specific intent to discriminate or interfere with a benefit right.[149] The court added that circumstantial evidence may be used to

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138. 991 F.2d 645 (10th Cir. 1993).

139. 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992).

140. Carl A. Greci, Note, *Use It and Lose It: The Employer's Absolute Right Under ERISA Section 510 to Engage in Post-Claim Modifications of Employee Welfare Benefit Plans*, 68 IND. L.J. 177, 179 (1992). ERISA applies to benefit plans financed through the employer's own assets (self-insured benefits), not to commercial insurance benefits. *See id.* at 177-78.

141. *Id.* at 179, 181; *see* 29 U.S.C. § 1002(1)-(2) (1988).

142. Arthur S. Leonard, *Ethical Challenges of HIV Infection in the Workplace*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 53, 63 (1990).

143. Joan Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024, 1041-42 (1987). ERISA § 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140 (1988).

144. *See* Vogel, *supra* note 143, at 1042.

145. Greci, *supra* note 140, at 184-85.

146. *See* Phelps v. Field Real Estate Co., 991 F.2d 645, 645 (10th Cir. 1993).

147. Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987); Greci, *supra* note 140, at 185.

148. Vogel, *supra* note 143, at 1042.

149. *Gavalik*, 812 F.2d at 851-52.

show specific intent.[150] In *Conkwright v. Westinghouse Electric Corp.*,[151] the court ruled that an employee claiming discriminatory discharge on the basis of his age must prove that his age more probably than not motivated the employer's decision to discharge.[152]

Phelps involved allegations of such unlawful discharge based on the employee's development of Acquired Immune Deficiency Syndrome (AIDS).[153] AIDS costs both money and lives. The enormous health care costs associated with AIDS invite employers to target and discriminate against employees or potential employees who either have AIDS, have tested positive for human immunodeficiency virus (HIV)[154] infection, or present a high risk of contracting the virus.[155] Before *Phelps*, no case law existed directly addressing ERISA's protection against discriminatory discharge of an employee with AIDS.[156] Courts have granted relief under ERISA, however, to employees discharged for other illnesses.[157]

B. *Tenth Circuit Opinion:* Phelps v. Field Real Estate Co.

1. Facts

Field Real Estate Company (Field) hired John Phelps as vice-president of commercial real estate in 1985.[158] Almost two years later, Phelps tested positive for HIV; however, he exhibited no symptoms or illness.[159] Because his HIV status did not affect his ability to work, Phelps decided not to disclose his condition.[160]

The chief executive officer of Field, Douglas Poole, evaluated Phelps' performance annually.[161] On a scale of one to five, Phelps received primarily threes on his 1986 evaluation.[162] In 1987, Phelps was promoted to senior vice-president, and in his 1987 performance evaluation, he received primarily fours.[163]

In 1988, Poole received an anonymous note stating that Phelps had a fatal blood disease, and asking that he be transferred.[164] When con-

150. *Id.*; *see also* Dister v. Continental Group, Inc., 859 F.2d 1108, 1112 (2d Cir. 1988) (stating that specific intent in ERISA claims can rarely be shown by direct evidence).
151. 933 F.2d 231 (4th Cir. 1991).
152. *Id.* at 235.
153. *Phelps*, 991 F.2d 645.
154. HIV is the virus that causes AIDS. THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 497 (1992 Supp.).
155. *See* Vogel, *supra* note 143, at 1031, 1061.
156. *See* Leonard, *supra* note 142, at 65. *Cf.* McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991) (affirming an employer's absolute right to significantly reduce the maximum lifetime benefit for AIDS-related claims).
157. *See* Arthur S. Leonard, *AIDS, Employment and Unemployment*, 49 OHIO ST. L.J. 929, 950-52 (1989); *see, e.g.*, Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984) (awarding equitable relief under ERISA to an employee fired after revealing that he had multiple sclerosis).
158. Phelps v. Field Real Estate Co., 991 F.2d 645, 646-47 (10th Cir. 1993).
159. *Id.* at 647.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 647.
164. *Id.*

fronted, Phelps admitted that his condition was fatal and that he kept it confidential for fear of losing his job and health insurance.[165] Poole reassured Phelps; however, Poole expressed concern about the effects of Phelps' condition on corporate liability and the acquisition of "key man" insurance for Phelps if Field were sold.[166] At Poole's request, Phelps produced a letter signed by a physician stating that Phelps' condition could adversely affect his insurability but that his condition did not presently affect his job performance.[167] Phelps still did not reveal the true nature of his condition.[168] Phelps gave the letter to Poole, who expressed confidence in Phelps' working capabilities.[169]

Later in 1988, Poole advertised for a commercial real estate division manager, describing a position similar to Phelps' job.[170] In early 1989, Phelps received all fours on his evaluation, but a performance comment stated that commercial sales growth had been poor.[171] Phelps responded that outside factors including a poor economy stunted the division's growth.[172]

In August 1989, a memo leaked regarding changes in the commercial division and the hiring of a new general manager of sales and leasing.[173] Two days later, Field discharged Phelps; the reasons given were the division's poor performance and the company's reorganization.[174] At that time, Phelps revealed that he had AIDS and that discharging him would terminate his health insurance benefits.[175] Poole stated that he was not aware Phelps had AIDS and offered him a position as a real estate agent with the option of continuing his health insurance at his own expense.[176] Phelps rejected the offer and filed suit against Field, claiming violations under § 510 of ERISA.[177]

The district court found that Poole did know the true nature of Phelps' illness but that Phelps failed to prove a discriminatory motive.[178] Phelps' personal representative appealed,[179] and the Tenth Circuit affirmed.[180]

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165. *Id.*

166. *Id.*

167. *Id.* at 647-48.

168. *Id.* at 648 n.4.

169. *Id.* at 648.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Phelps*, 991 F.2d at 648.

174. *Id.* at 649.

175. *Id.*

176. *Id.*

177. *Id.* at 646. This survey does not discuss Phelps' second claim alleging discrimination against employees with handicaps under COLO. REV. STAT. § 24-34-402(1)(a) (1988). *See Phelps*, 991 F.2d at 650.

178. *Phelps*, 991 F.2d at 649-50.

179. *Id.* at 646 n.1. John Phelps died in 1992 before his case was heard on appeal. *Id.*

180. *Id.* at 651.

2. Opinion

Phelps' ERISA claim required the Tenth Circuit to determine whether the evidence suggested that Field based any part of its decision to discharge Phelps on saving expected benefit costs.[181] The court applied the rule from *Conkwright v. Westinghouse Electric Corp.*,[182] requiring Phelps to show that his medical condition, more probably than not, motivated his employer to fire him.[183] The court also applied the rules from *Gavalik v. Continental Can Co.*,[184] and *Dister v. Continental Group, Inc.*,[185] stating that Phelps could prove his claim by using circumstantial evidence because direct evidence of an improper motive is rare.[186] After briefly analyzing the district court's findings of fact; the court found that Phelps failed to show any prohibited intent on the part of his employer.[187] The court based its decision on the following facts: (1) Field discharged Phelps fourteen months after he revealed his illness; (2) the commercial sales division under Phelps did not meet growth expectations; (3) Field completely reorganized its commercial sales and leasing division; (4) at the time of Phelps' discharge, Field warned another employee who headed the commercial leasing division that his job was limited; and (5) the other employee left the company soon after the reorganization.[188]

C. *Analysis*

Phelps exposes a variety of troubling contemporary ethical and legal issues. The court's decision itself is disturbing. The Tenth Circuit applied the conventional rules concerning discriminatory discharge under § 510 of ERISA but engaged in a rather dubious factual analysis. The court seemed to slide by some very important facts in reaching its decision that strongly suggested improper motive. First, the court agreed that evidence existed to show the possible adverse effect an employee with AIDS might have on health benefits.[189] The district court found and the Tenth Circuit accepted the fact that Poole, Phelps' supervisor, knew or at least suspected that Phelps had AIDS, even though the facts also showed that Poole expressed surprise when Phelps revealed his true illness.[190] The facts show that Poole expressed concern about the effects of Phelps' illness on corporate liability and securing "key man" insurance.[191] Phelps' performance evaluations continually improved; in fact, his last evaluation contained all fours, yet Field discharged Phelps for his past performance.[192] Field fired

181. *See id.* at 649.
182. 933 F.2d 231 (4th Cir. 1991).
183. *See id.* at 235.
184. 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987).
185. 859 F.2d 1108 (2d Cir. 1988).
186. *See Phelps*, 991 F.2d at 645; *Dister*, 859 F.2d at 1112; *Gavalik*, 812 F.2d at 852.
187. *See Phelps*, 991 F.2d at 650.
188. *See id.*
189. *See id.*
190. *Id.* at 649; *see* Phelps v. Field Real Estate Co., 793 F. Supp. 1535, 1540-41 (D. Colo. 1991).
191. *Phelps*, 991 F.2d at 647.
192. *See id.* at 647-49.

Phelps without warning and without instituting a probationary employment period.[193] In light of the fact that Phelps' coworker received a warning,[194] the preceding fact becomes even more relevant. Finally, when Phelps revealed his illness, his employer offered him a demotion so that he could continue his health insurance *at his own expense.*[195] The last fact strongly suggests that Phelps' employer had considered the potential effects that Phelps' illness would have on the benefit program. Hence, circumstantial evidence of the employer's improper motive abounds.

The court should have weighted the above facts more heavily, especially given that an employer can rebut the accusation by merely presenting a legitimate reason for the discharge.[196] Apparently the division under Phelps really did experience sluggish growth. However, evidence of contributing economic factors also existed. Because AIDS not only generates costly medical expenses but also carries one of the worst stigmas of modern times, it seems highly possible, if not probable, that Phelps would not have lost his job if his employer had not known Phelps had AIDS.

Unfortunately, the AIDS epidemic continues with no certain cure or treatment in sight. Because of early detection tests and medications that delay symptoms, people known to have HIV infection live and function longer with the disease.[197] Therefore, infected persons without symptoms or illness will continue to appear in the workplace. The high costs of medical care, the availability of early detection, and perhaps lingering prejudices provide incentives to the employer to identify infected employees or potential employees. This invites discrimination.[198]

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193. *See id.* at 649.

194. *See id.*

195. *See id.*

196. *See id.* at 650. Motive may be masked by a legitimate discharge reason. *See* Vogel, *supra* note 143, at 1031, 1061.

197. *See* Leonard, *supra* note 142, at 53-54.

198. Although Colorado's amendment to its constitution (popularly known as Amendment 2), COLO. CONST. art. II, § 30(b) (Supp. 1993), is beyond the scope of this article, it does merit some attention. Amendment 2 prevents the State of Colorado and any of its cities or towns from passing laws that prohibit discrimination based on sexual orientation. Amendment 2 provides:

> No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance, or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. This type of constitutional provision simply exacerbates the problem. If such laws and ordinances are prohibited, then employers may skip the step of trying to determine whether a person has AIDS and eliminate homosexuals as a class because they (specifically homosexual males) represent a high-risk group. *See* Leonard, *supra* note 157, at 956-57.

In December 1993, the Denver District Court ruled that Amendment 2 is unconstitutional. Evans v. Romer, CIV.A. No. 92 CV 7223, 1993 WL 518586, at *9 (Colo. Dist. Ct. Dec. 14, 1993). However, this decision will probably be appealed, perhaps as high as the United States Supreme Court. Thaddeus Herrick, *Both Sides in Gay Rights Fight Claim Victory*, ROCKY MTN. NEWS, Dec. 15, 1993, at 8A. Until a final ruling of unconstitutionality is made by a higher court, the specter of other similar laws and constitutional provisions looms ominously.

High health care costs constitute the primary cause of health benefit-based discrimination. If expensive medical care costs are merely an unavoidable fact of life, however, then employers who provide health benefits should expect, prepare, and provide for employees who get sick. Furthermore, the law should strictly enforce antidiscrimination laws to diminish the incentive to discriminate against ill or potentially ill employees. Otherwise, the newly proposed national health insurance program will be the only other solution.[199] If soaring health care costs are contained, and if everyone is guaranteed some level of health care by widely distributing costs, then employers will have no reason to treat unhealthy employees differently.

CONCLUSION

The three cases discussed in this Survey involve two larger issues: (1) the right to quality health care and (2) the problem of high health care costs. *Delaney v. Cade*[200] and EMTALA[201] concern a patient's right to receive the best available emergency medical treatment and the liability of those who violate that right.[202] *Community Hospital v. Sullivan*[203] and the Medicare Act[204] involve the financial protection of smaller, more rural hospitals that may be the sole providers of medical care to their surrounding communities. Insuring quality health care to rural residents is the ultimate concern behind the protection of rural hospitals. In addition, the situation in *Community Hospital* arises out of high hospital costs and the inability of many patients to pay.[205] Finally, *Phelps v. Field Real Estate Co.*[206] and § 510 of ERISA[207] concern employees' rights to obtain quality health care through employer-provided health benefits. *Phelps* also exhibits the problems associated with high health care costs, and employees who require or potentially require extensive medical care.[208]

The Tenth Circuit's decisions further shape and define citizens' legal rights and obligations under the nation's health care system. The extent to which these decisions will impact health law remains to be seen, especially considering the proposed national health insurance system. Even if Congress eventually implements a new and radically different health care system, court decisions such as those surveyed here expose current health law issues and serve as guides to questions that will have to be addressed in any reformation process.

A. Mark Isley

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199. *See* Greci, *supra* note 140, at 201-02; Leonard, *supra* note 157, at 963.
200. 986 F.2d 387 (10th Cir. 1993).
201. 42 U.S.C. § 1395dd (1988 & Supp. III 1991).
202. *See supra* part I.
203. 986 F.2d 357 (10th Cir. 1993).
204. 42 U.S.C. § 1395 (1988 & Supp. III 1991).
205. *See supra* part II.
206. 991 F.2d 645 (10th Cir. 1993).
207. 29 U.S.C. § 1140 (1988).
208. *See supra* part III.

INTELLECTUAL PROPERTY SURVEY

INTRODUCTION

During 1993, the Tenth Circuit's attention in the intellectual property arena focused on copyright protection of computer software programs. In *Autoskill v. National Educational Support Systems*,[1] the court affirmed the New Mexico District Court's preliminary injunction against Autoskill, whose computer software program designed to teach reading skills copied the protectable elements of National Educational Support System's competing copyrighted program.[2] Most notably, the court held that a three-step analysis combining abstraction, filtration, and comparison was a permissible method for determining "substantial similarity" in computer software programs.[3] Although the court found it unnecessary to indicate what method of analysis it would employ upon review of a final copyright infringement judgment, the opportunity to clarify its position came in *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*,[4] whereby the court expressly adopted the three-step approach articulated in *Autoskill*.[5] Additionally, the *Gates* court provided further guidance concerning the role of the abstractions step in substantial similarity analysis as well as suggesting district courts engage in a preliminary "holistic" comparison of the programs at issue prior to undertaking separation of the protectable expression from non-protectable elements of the allegedly infringed program.[6]

The Tenth Circuit Court of Appeals vacated the Colorado District Court's order in *Gates* that found copyright infringement of a computer program designed to determine the size of industrial machine belts.[7] The court concluded the district court failed to identify certain protectable elements of the program, and also extended copyright protection to certain unprotected elements.[8]

Although the Tenth Circuit's decision to adopt this three-step method of substantial similarity analysis will likely lead to narrower copyright protection for computer software programs, it does provide a long overdue framework for Tenth Circuit district courts struggling to determine copyright protection for computer software programs.

This Survey examines the *Autoskill* and *Gates* decisions in light of the adoption of yet another "substantial similarity" test, together with its likely impact in future copyright infringement actions.

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1. 994 F.2d 1476 (10th Cir.), *cert. denied*, 114 S. Ct. 307 (1993).
2. *Id.* at 1481.
3. *Id.* at 1490-91.
4. 9 F.3d 823 (10th Cir. 1993).
5. *Id.* at 834.
6. *Id.* at 841.
7. *Id.* at 849.
8. *Id.* at 830.

I. BACKGROUND

A. *Scope of Copyright Protection for Computer Programs*

Copyright law protects original, creative expression against copying, but does not protect ideas, processes, or methods of operation.[9] This is because the constitutional purpose of copyright law is to "promote the Progress of Science and the useful Arts" by granting protection to works of authorship, but not to any underlying idea.[10] Therefore, copyright encourages people to build freely on the ideas of others, while secondarily protecting the rights of authors in the original expression of their ideas.[11]

Congress, in passing the Copyright Act of 1976[12] ("Act"), suggested the applicability of copyright law to computer programs.[13] In 1980, Congress further amended the Act to more clearly cover computer programs in the general definition section.[14] Thus, while computer programs are generally the subject of copyright protection,[15] the ideas embodied in a computer program are no more protectable than the ideas embodied in any other copyrighted work.[16]

Recent cases addressing the scope of copyright protection for computer programs conclude that copyright protects not only the literal text of the program code (both human readable and machine readable), but, as in the case of any other "literary work," extends to its non-literal elements.[17] Non-literal elements of a program encompass its "look and feel" and include so much of its structure, sequence or organization, and visual

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9. 17 U.S.C. § 102(b) (1988) ("[I]n no case does copyright protection for an original work of authorship extend to any idea . . . ."); H.R. REP. NO. 1476, 94th Cong., 2d Sess. at 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670 (17 U.S.C. § 102(b) intended actual processes or methods embodied in the computer program not to be within the scope of copyright law); 17 U.S.C. § 102(a) (1988 & Supp. IV 1992) ("[C]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, . . . from which they can be perceived, reproduced, or otherwise communicated . . . ."); Computer Assocs. Int'l v. Altai, 982 F.2d 693, 703 (2nd Cir. 1992). *See* Baker v. Selden, 101 U.S. 99, 102 (1879) (system of accounting described in book is not protected by copyright—only written expression used to describe the system is protected).

10. U.S. CONST. art. I, § 8, cl. 8.

11. Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991).

12. 17 U.S.C. §§ 101-1010 (1988 & Supp. IV 1993).

13. *See, e.g.*, Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 49 (D. Mass. 1990) (computer programs are copyrightable); H.R. REP. NO. 1476, 94th Cong., 2d Sess. at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (17 U.S.C. § 102(b) applies to computer programs).

14. Act of Dec. 12, 1980, Pub. L. No. 96-517 § 10, 94 Stat. 3015, 3028.

15. Johnson Controls v. Phoenix Control Sys., 886 F.2d 1173, 1175 (9th Cir. 1989); Williams Elecs. v. Artic Int'l, 685 F.2d 870, 875 (3d Cir. 1982).

16. Apple Computer v. Franklin Computer Corp., 714 F.2d 1240, 1252-53 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984).

17. Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir.), *cert. denied*, 113 S. Ct. 198 (1992) (copyright protection applies to the user interface, or overall structure and organization of a computer program, including its audiovisual displays, or screen "look and feel"); *see also Johnson Controls*, 886 F.2d at 1175 ("non-literal components of a program, including the structure, sequence, and organization and user interface" are copyrightable); *see generally*, Apple Computer v. Formula Int'l, 725 F.2d 521 (9th Cir. 1984) (computer programs subject to copyright protection whether in source or object code and regardless of the form of embodiment).

display as to effectively constitute expression.[18] Courts will not, however, protect non-literal elements that contain ideas or expression merged with ideas.[19]

Because of these limitations, "[t]he breadth of copyright protection a court extends to a computer program is directly related to where that court draws the line between idea and expression."[20] This distinction frustrates courts' efforts to compare or reconcile claims of substantial similarity, an issue that constitutes the cornerstone of copyright infringement actions.[21]

B. *Substantial Similarity*

As a practical matter, copyright infringement turns on whether the accused work is "substantially similar" to protected elements of the copyrighted work.[22] Although an infringement plaintiff must prove ownership of a valid copyright,[23] and establish access by the defendant to the copyrighted and allegedly infringed program,[24] validity may be presumptively shown by a certificate of copyright registration,[25] and access is often either conceded or easily proven.[26] Thus, substantial similarity is often disposi-

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18. *See, e.g.*, Whelan Assocs. v. Jaslow Dental Lab., 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). Using a novel as an analogy, the written words would be the code and the organization of the chapters, characters, and story would be the non-literal elements. *Id.* at 1234.

19. *See also Brown Bag Software*, 960 F.2d at 1475-77 (recognizing unprotectable expression); Data East USA v. Epyx, Inc., 862 F.2d 204, 208 (9th Cir. 1988); *Lotus*, 740 F. Supp. at 58 (stating that expression is not copyrightable if it merely embodies elements of the idea).

20. Dennis M. McCarthy, *Copyright Infringement—Redefining the Scope of Protection Copyright Affords the Non-Literal Elements of a Computer Program*—Computer Associates International, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992), 66 TEMP. L. REV. 273 (1993).

21. *See, e.g.*, Soft Computer Consultants v. Lalehzarzadeh, 1989 Copyright L. Dec. (CCH) ¶ 22,403 at 22,538 (E.D.N.Y. 1988) (stating that the "general standard for establishing copying is the substantial similarity test"); *see also* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL, AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 13.03[B][2][a] (1993) [hereinafter NIMMER] (discussing the idea-expression dichotomy as it relates to substantial similarity analysis); *see infra* text accompanying note 35.

22. *See* Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1472 (1992) (absent evidence of direct copying, unauthorized copying is proven by demonstrating substantial similarity).

23. Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (copyright infringement is proven by: (1) ownership of a valid copyright, and (2) copying of constituent elements of the original work).

24. Access may be established by showing that the defendant had a "reasonable opportunity to view" or "opportunity to copy" the allegedly infringed work. NIMMER, *supra* note 21, § 13.02[A] at 13-17.

25. 17 U.S.C. § 410(c) (1988) (certificate of registration of a copyright shall constitute prima facie evidence of a valid copyright.) *See* Frybarger v. Int'l Business Machs., 812 F.2d 525, 529 (9th Cir. 1987).

26. *See* Whelan Assocs. v. Jaslow Dental Lab., 797 F.2d 1222, 1232 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (noting defendant's access was uncontested because the program was used in his laboratory, and he acted as a sales representative for plaintiff); Broderbund Software, Inc. v. Unison World, Inc., 648 F. Supp. 1127, 1136 (N.D. Cal. 1986) (noting that plaintiff gave defendant "several commercially-available copies" of the program); NIMMER, *supra* note 21, § 13.02.

tive.[27] However, even if substantial similarities are found, courts must determine whether the similarities relate to protected elements of expression or instead to unprotected expression or ideas for which no liability attaches.

Several approaches for determining what constitutes protected non-literal elements of computer programs for copyright infringement purposes have been explored by many courts. These multiple and fractured approaches have created the present chaotic status of substantial similarity analysis. With the *Autoskill* and *Gates* decisions, the Tenth Circuit begins participating in the difficult task of refining the analysis.

1. Whelan Associates - The Functional Approach

The Third Circuit Court of Appeals articulated the most expansive protection for non-literal elements of computer programs in *Whelan Associates v. Jaslow Dental Laboratory*,[28] whereby the court held the purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of the idea.[29] Some courts have adopted this reasoning,[30] while others have rejected it.[31] The primary criticism of this approach is of its assumption that a computer program has only one idea.[32]

2. The "Total Concept and Feel" Approach

Another broad approach was recently taken in *Lotus Development Corp. v. Paperback Software International*.[33] The court rejected dissection of every element of the allegedly infringed work, opting instead for first determining whether its elements are copyrightable and then identifying whether those elements, considered as a whole, were impermissibly copied.[34] This test has also been criticized for its sweeping protection and lack of detailed analysis.[35]

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27. John W.L. Ogilvie, Note, *Defining Computer Program Parts Under Learned Hand's Abstractions Test in Software Copyright Infringement Cases*, 91 MICH. L. REV. 526, 527 (1992).

28. 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

29. *Id.* at 1238; Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 65 (D. Mass. 1990).

30. *See, e.g., Broderbund Software*, 648 F. Supp. at 1133.

31. *See* Plains Cotton Co-op Ass'n v. Goodpasture Computer Serv., 807 F.2d 1256, 1262 (5th Cir.), *cert. denied*, 484 U.S. 821 (1987); Gates Rubber Co. v. Bando Am., Inc., 798 F. Supp. 1499, 1513 (D. Colo. 1992) (adopting two-prong analysis), *aff'd in part and vacated in part*, 9 F.3d 823 (1993); *cf.* Synercom Technology v. University Computing Co., 462 F. Supp. 1003, 1014 (N.D. Tex. 1978).

32. Richard A. Gollhofer, *Copyright Protection of Computer Software: What Is It and How Did We Get It?*, 5 SOFTWARE L.J. 695 (1992).

33. 740 F. Supp. 37 (D. Mass. 1990).

34. *Id.* at 67; *see* Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157, 1167 (9th Cir. 1977); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109-10 (9th Cir. 1970). *See generally* NIMMER, *supra* note 21, § 13.03[A][1][c] (discussing the history of the total concept and feel test).

35. "[T]he addition of 'feel' to the judicial inquiry, being a wholly amorphous referent, merely invites an abdication of analysis." NIMMER, supra note 21, § 13.03[A] at 13-37.

3. Levels of Abstractions Approach

Judge Learned Hand's famous "patterns of abstractions" analysis articulated in *Nichols v. Universal Pictures Corp.*[36] was first applied to plays and screenplays. Under this analysis, a court must determine the patterns or components of the protected work on a continuum from the most general to the most specific and then identify which of these are no more than a formulation of the idea.[37] Although this method of analysis is both unpredictable and ad hoc,[38] courts appear to be prepared to adapt these principles[39] with some modifications for cases involving computer software.[40]

4. The Three-Step Approach

In response to the broad protection afforded to non-literal elements of computer programs under *Whelan*[41] and *Lotus*,[42] the Court of Appeals for the Second Circuit crafted a narrower three-part approach for establishing "substantial similarity" of computer software. In *Computer Associates International v. Altai*,[43] the court begins its analysis by borrowing from Learned Hand's abstractions formula, dissecting the allegedly infringed program's structure and isolating it into its various levels of abstraction.[44]

Once the program has been dissected into its various levels of abstraction, the court undertakes the second step, filtration.[45] In the filtration process, the court eliminates unprotectable elements consisting of ideas, elements subject to external factors,[46] and material in

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36. 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

37. "Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out." *Id.* at 121.

38. Judge Learned Hand wrote of the line between expression and idea that "[n]obody has ever been able to fix that boundary, and nobody ever can." *Id.* He echoed this view in a later opinion, stating that "[o]bviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*." Peter Pan Fabrics v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

39. Ogilvie, *supra* note 27, at 528-29 (arguing that although Judge Hand's test is not a panacea for all the current ills of software copyright law, it provides courts with a framework that should increase the consistency of decisions).

40. *See supra* text accompanying note 31.

41. 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

42. 740 F. Supp. 37 (D. Mass. 1990).

43. 982 F.2d 693 (2d Cir. 1992).

44. *Id.* at 707.

45. *Id.*

46. External factors include:

> (1) the mechanical specifications of the computer on which a program is intended to run; (2) compatibility requirements of other programs with which a program is designed to operate in conjunction; (3) computer manufacturer's design standards; (4) demands of the industry being serviced; and (5) widely accepted programming practices within the computer industry.

Id. at 709-10 (citations omitted); *see also* Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 361-64 (1991) (if the only unauthorized copying is of those elements that are not protectable, then the resulting copy will not constitute an infringement); NIMMER, *supra* note 21, § 13.03[8][2].

the public domain or subject to the doctrines of merger and *scènes à faire*.[47]

The final step involves an actual comparison of the remaining non-literal program elements.[48] Once all non-protectable elements are filtered out, courts will apply an "extrinsic" test to determine whether substantial similarity exists between the two programs.[49] This is accomplished primarily through the use of experts.[50] If similarity is found, some courts may also employ an "intrinsic" test that measures substantial similarity according to the response of the ordinary lay observer.[51] While some courts endorse the lay observer test[52] in computer program cases, others reject it due to the inherent technical expertise required.[53]

In *Autoskill*, the Tenth Circuit found this narrower three-step approach a permissible method for determining substantial similarity of computer software programs[54] and then formally adopted it in the *Gates* decision.[55]

II. THE *AUTOSKILL* DECISION

A. *Facts and Procedural History*

Autoskill, Inc. ("Autoskill"), a Canadian corporation, developed a computer software program for use in teaching reading skills to students with reading disabilities entitled "Autoskill: Component Reading and Subskills Testing and Training Program."[56] Autoskill obtained a United States Certificate of Registration of the copyright on the software program ("Autoskill Program").[57]

National Educational Support Systems, Inc. ("NESS"), is a New Mexico corporation. One of the principals in NESS, Ron Neil, was familiar with the Autoskill Program, and unsuccessfully attempted to obtain a license to market it.[58] Neil then entered into an agreement with a computer programming firm, Automation Consultants, Inc. (ACI), to develop

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47. *Computer Assocs.*, 982 F.2d at 710 (courts must filter out all unoriginal elements of a program, including those elements that are found in the public domain or subject to the doctrines of merger and *scènes à faire*); *see infra* notes 86-87.

48. *Computer Assocs.*, 982 F.2d at 710.

49. *See, e.g.*, Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990); *see also* Whelan Assocs. v. Jaslow Dental Lab., 797 F.2d 1222, 1232 (1986), *cert. denied*, 479 U.S. 1031 (1987).

50. *Sid & Marty Krofft Television Prod. v. McDonald's Corp.*, 562 F.2d 1159, 1164 (1977).

51. *See, e.g.*, Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1475, *cert. denied*, 113 S. Ct. 198 (1992); Arnstein v. Porter, 154 F.2d 464, 468-69 (2d Cir. 1946).

52. *Whelan*, 797 F.2d at 1233; *see also* Autoskill v. Nat'l Educ. Support Sys., 793 F. Supp. 1557, 1569 (1992), *aff'd*, 994 F.2d 1476 (10th Cir.), *and cert. denied*, 114 S. Ct. 307 (1993) (noting the appropriateness of examining lay evidence and exhibits presented by the parties to determine substantial similarities).

53. Dawson v. Hinshaw Music, 905 F.2d 731, 732-37 (4th Cir.), *cert. denied*, 498 U.S. 981 (1990) (holding that lay observer test not practical in the context of computer programs).

54. *Autoskill*, 994 F.2d at 1490-91.

55. *Gates*, 9 F.3d at 834.

56. *Autoskill*, 994 F.2d at 1481.

57. *Id.*

58. *Id.* at 1481-82 (Neil's familiarity and use of the Autoskill Program was sufficient to meet the access requirement). *Id.* at 1559.

software "to be like" the Autoskill Program.[59] ACI's program for NESS was called "Nessi: Reading and Language Development Program" (Nessi).[60] NESS's distributor received a letter from Autoskill's attorney shortly after it began marketing Nessi indicating it could be named in a copyright infringement action.[61]

NESS filed suit in the District of New Mexico seeking a declaratory judgment that it did not infringe the Autoskill copyright.[62] Autoskill responded by suing NESS for copyright infringement, and sought a preliminary inunction to prevent continued infringement.[63] Autoskill claimed NESS's program infringed upon the non-literal elements of Autoskill's Program.[64] The cases were consolidated.

B. *District Court Holding*

The district court granted Autoskill a preliminary injunction prohibiting NESS from impinging upon the "protectable elements" of the Autoskill Program.[65] It employed a three-step method of analysis, combining abstraction, filtration, and comparison to determine the "substantial similarity" of the programs.[66] The court rejected the functional approach espoused in *Whelan*[67] as a "temptingly simplistic bright line test"[68] that could not account for the reality that many ideas may exist in a given work, and also rejected the "total concept and feel" test, as being more appropriate when evaluating "simplistic works."[69] Rather, the court opted for an analysis similar to the one recently employed by the Second Circuit in *Computer Associates*.[70]

The court concluded that the identification and use of three subtypes of students with reading difficulties were not protectable, because these subtypes were identified and discussed in literature available to the public.[71] The "idea" of teaching reading, based on these subtypes, was also not protectable; however, Autoskill's "manner" of teaching and the way it communicates those ideas to students and teachers amounts to protectable "expression."[72] Thus, the court emphasized pedagogical similarity,

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59. *Id.* at 1481.
60. *Id.* at 1482.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Autoskill*, 793 F. Supp. at 1565.
67. See *supra* notes 28-32 and accompanying text discussing Whelan Assocs. v. Jaslow Dental Lab., 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).
68. *Autoskill*, 793 F. Supp. at 1566.
69. *Id.* at 1515-70.
70. See *supra* notes 43-47 discussing Computer Assocs. Int'l. v. Altai, 982 F.2d 693, 710 (2d Cir. 1992).
71. *Autoskill*, 793 F. Supp. at 1566. The program is designed to test or diagnose and train three distinct subtypes. Type O is the oral reading subtype, Type A is the intermodal-associative deficit subtype, and Type S is the sequential deficit subtype. *Id.* at 1559.
72. *Id.* at 1566.

rather than the logical flow of the program. NESS appealed, raising a number of procedural[73] and substantive issues.[74]

C. *The Tenth Circuit Opinion*

In *Autoskill*, the Tenth Circuit began its substantial similarity analysis by first examining the district court's factual findings concerning the overall similarities between the Autoskill and Nessi Programs.[75] In general, the Autoskill Program is designed to improve a student's rapid automatic response to training stimuli.[76] It tests students for oral reading, audio-visual matching, visual matching, and visual scanning according to thirteen categories of word-form types that are based on different combinations of vowels and consonants.[77] The tests use words and non-words while recording the student's accuracy and response speed.[78] Based on the testing results, the students are assigned a training program that corresponds to their subtypes.[79]

The district court determined that NESS's program had merely changed the names and sequence of the tests with minor format changes.[80] The three main sections of each program consisting of testing or diagnosis, profile analysis, and training utilized similar criteria and performed substantially similar functions.[81]

Satisfied with the district court's findings that both programs were substantially similar, the court undertook a review of the three-step approach used for identifying which non-literal elements of Autoskill's Program were protected from infringement.[82]

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73. The Tenth Circuit rejected Autoskill's arguments that NESS's notice of appeal was untimely pursuant to 11 U.S.C. § 362, which prevented NESS from appealing the preliminary injunction due to an automatic bankruptcy stay and, further, that NESS filed its notice of appeal outside the 30 days allowed by Rule (4)(a) of the Federal Rules of Appellate Procedure. *Autoskill*, 994 F.2d at 1483. The court held that the filing of a bankruptcy petition by NESS extended the time for filing a notice of appeal. *Id.* Additionally, the bankruptcy rules authorized NESS to prosecute its appeal from a grant of a preliminary injunction in a copyright infringement action without authorization from the bankruptcy court. *See id.* at 1486.

74. The Tenth Circuit rejected the trial court's reasoning concerning its refusal to retroactively apply the U.S. Supreme Court's 1989 holding in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), distinguishing "employees" from "independent contractors" for purposes of copyright ownership of "works made for hire." *Id.* at 1488.

75. *Id.* at 1490.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* See *supra* part II.B.2. discussing the district court's findings.

81. *Autoskill*, 994 F.2d at 1490.

82. "Infringement is shown by a substantial similarity of protectable expression, not just an overall similarity between the works." NIMMER & NIMMER, *supra* note 21, § 13.03[F] at 13-82.

1. The Levels of Abstraction Step

The court concluded that although the district court did not precisely use the abstractions analysis outlined in *Computer Associates*,[83] its ruling should not be reversed simply because of a lack of any particular detail.[84] Further, the court found an ample factual basis for the district judge's analysis on the levels of abstraction and his conclusions as to which were idea levels not entitled to protection, and those possibly eligible for protection after the filtration analysis which were in the expression area.[85]

2. The Filtration Step

The court again agreed with the district court's application of the filtration step whereby it filtered out portions of the Autoskill Program's expression not entitled to copyright protection, employing the copyright doctrines of merger[86] and *scènes à faire*.[87] Specifically, the thirteen categories of vowel and consonant combinations as well as the silent sentence and silent paragraph components were excluded from copyright protection.[88] However, the court upheld copyright protection of the "keying procedure," finding the procedure reflected at least a minimal degree of creativity and did not constitute a "method of operation" or "process" precluded from copyright protection.[89] The court reasoned that NESS failed to produce any evidence that the procedure was common practice and should therefore, be filtered out of the analysis.[90]

3. The Comparison Step

Substantial similarity analysis concludes with a comparison of portions of the alleged infringer's works with the portions of the complaining

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83. See *supra* notes 43-48 and accompanying text discussing Computer Assocs. Int'l v. Altai, 982 F.2d 693 (2d Cir. 1992).

84. NESS claimed the trial court erred when it examined the similarities in the functions performed as the highest level of abstraction, rather than from the code level up to the program's function. *Autoskill*, 994 F.2d at 1492.

85. *Id.*

86. *Id.* at 1494. *See* Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991). Where a particular expression is common to the treatment of a specific idea, process, or discovery, it lacks the originality for copyright protection. *See, e.g.*, Toro Co. v. R & R Prods. Co., 787 F.2d 1208, 1211 (8th Cir. 1986) (under copyright merger doctrine, copyright protection will be denied even to some expressions of ideas if idea behind expression is such that it can be expressed only in very limited number of ways). The merger doctrine excludes expression from copyright protection if it is "merged" inseparably with an idea. NIMMER, *supra* note 21, § 13.03[B][3] at 13-74.

87. The *"scènes à faire"* doctrine generally excludes from copyright protection, material that is "standard," "stock," or "common" to a particular topic or that "necessarily follow from a common theme or setting." NIMMER, *supra* note 21, § 13.03[B][4] at 13-70.

88. *Autoskill*, 994 F.2d at 1494.

89. *Id.* at 1495 n.23. *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 214 (1954) (originality denotes only enough definite expression so that one may distinguish authorship); *compare Toro Co.*, 787 F.2d at 1208 (lawn care matching part numbering system not original) *with* Hutchinson Tel. Co. v. Frontier Directory Co., 770 F.2d 128 (8th Cir. 1985) (telephone white pages directory original work).

90. *Autoskill*, 994 F.2d at 1495.

party's work determined to be legally protectable under the Act.[91] The court again agreed with the district court's assessment of substantial similarity based upon a comparison of the two programs' structure, sequence, and organization and rejected NESS's argument that no protectable elements of the Autoskill Program remained upon completion of the filtration step.[92] Additionally, the district court's use of expert testimony throughout its analysis was not erroneous.[93]

III. THE *GATES* DECISION

A. *Facts and Procedural History*

Gates Rubber Co. ("Gates") is a Colorado corporation manufacturing rubber belts for use in industrial machinery.[94] Gates developed a computer software program entitled Design Flex 4.0 ("Gates Program"), which calculates the proper Gates belt for a specified machine.[95] The program utilizes published formulas in conjunction with certain mathematical constants developed by Gates for determining belt size.[96] Gates obtained a Certificate of copyright registration on the Gates Program.[97]

Bando American (Bando) is a division of a Japanese corporation that competes with Gates in the manufacture and sale of industrial belts.[98] Numerous Bando employees were former Gates employees, including Steven Piderit, who had access to the components and the design of the Gates Program.[99] In 1990, Bando made available its "Chauffeur" Program, a program similar to the Gates Program.[100]

In 1992, Gates filed suit in the U.S. District Court for the District of Colorado alleging copyright infringement, unfair competition, misappropriation of trade secrets, as well as breach of contract.[101]

B. *District Court Holding*

The district court held that the Chauffeur Program infringed the Gates's copyright[102] and that Bando had misappropriated Gates's trade secrets.[103] Specifically, it found that Bando had misappropriated ten pro-

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91. *Id.* at 1496. *See Computer Assocs.*, 982 F.2d at 710 ("The analysis at this point poses essentially a value judgment, involving an assessment of the importance of the material that was copied."). *See* NIMMER, *supra* note 21, § 13.03[F] at 13-146.

92. *Autoskill*, 994 F.2d at 1496.

93. *Id.* at 1497-98 ("We are satisfied the judge's crediting of the Autoskill witness testimony over that of NESS's, was not clearly erroneous or an abuse of discretion.").

94. Gates Rubber Co. v. Bando American, 9 F.3d 823, 830 (10th Cir. 1993).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* (there was evidence Piderit pirated a copy of the Gates Program and brought it with him to Bando).

100. *Id.* at 831.

101. *Id.*

102. *Id.*

103. *Id.* The District court concluded that Bando had misappropriated trade secrets belonging to Gates, ordered their return, and enjoined Bando from any further use. *Id.* The Tenth Circuit affirmed. *Id.* at 830. It rejected Bando's argument that Gates's claims were

tected elements of the Gates Program, including its menus, constants, sorting criteria, control flow, data flow, the engineering calculation module, the design module, common errors, fundamental tasks, and install files.[104]

Bando appealed, claiming the district court erred when it extended copyright protection for what it characterized as facts and ideas in the Gates Program.[105] Bando further appealed the district court's granting of trade secret protection to Gates's program constants.[106]

C. *Tenth Circuit's Opinion*

The Tenth Circuit began by acknowledging that the proper test for determining substantial similarity had not been previously addressed in this circuit and, consequently, that its opinion was intended to bring clarity to district courts struggling with copyright protection of computer software programs.[107] The court adopted in substantial part the abstraction, filtration, and comparison test set forth in *Autoskill* and by the Second Circuit in *Computer Associates*, finding it an effective test formed from constitutional and statutory constraints and guided by existing case law.[108]

Specifically, the courts should first dissect the program according to its varying levels of generality as provided in the abstractions test.[109] Next, courts should examine each level of abstraction in order to filter out those elements of the programs that are unprotectable, eliminating from comparison the unprotectable elements of ideas, processes, facts, public domain information, merger material, *scènes à faire* material, and other unprotectable elements suggested by the particular facts of the program under examination.[110] Finally, courts should then compare the remaining protectable elements with the allegedly infringing program to determine whether there has been a misappropriation of substantial elements of the protected program.[111]

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preempted by federal law and specifically found that because Gates's trade secret misappropriation claim under the Colorado Uniform Trade Secrets Act requires proof of a breach of trust or confidence, an element not required under the Copyright Act, Gates' state claims were not preempted by federal law. *Id.* at 846-48. Further, the constants constituted trade secrets and although they were disclosed during the permanent injunction hearing, Gates' post-hearing measures to protect the confidentiality of the constants maintained their status as trade secrets. *Id.* at 848-49.

104. *Id.* at 842-46.

105. *Id.* at 830.

106. *Id.*

107. *Id.* The court was aided in its analysis of the copyright law concerning computer programs by briefs submitted by amicus curiae: the American Committee for Interoperable Systems; Computer and Business Equipment Manufacturers Association; the International Anticounterfeiting Coalition, Inc.; Adobe Systems, Inc.; Apple Computer, Inc.; Computer Associates International, Inc.; Digital Equipment Corporation, Inc.; International Business Machines Corporation; Lotus Development Corporation; Wordperfect Corporation; and Xerox Corporation. *Id.* at 831 n.3.

108. *Id.* at 834; *see also Computer Assocs.*, 982 F.2d at 701-14; *Lotus*, 740 F. Supp. at 37.

109. *Gates*, 9 F.3d at 834. See *supra* notes 41-44, 83-85, and accompanying text discussing the abstractions step.

110. *Gates*, 9 F.3d at 834. See *supra* notes 45-47, 86-90, and accompanying text discussing the filtering step.

111. *Gates*, 9 F.3d at 834. See *supra* notes 48-52, 91-93, and accompanying text discussing the comparison step.

The court suggested, however, that prior to undertaking these steps, it would be helpful for courts to make an initial determination of whether the defendant copied portions of the allegedly infringed program before determining whether the copying involved protectable elements.[112] Here, the court concluded that both programs were substantially similar, as a whole,[113] prior to proceeding with its analysis under the three-step approach.

1. Levels of Abstraction

The court was careful to note that application of the abstractions test will necessarily vary from case-to-case and program-to-program, due to the "complex and ever-changing nature" of computer technology.[114] Thus, it declined to establish any strict methodology for the abstraction of computer programs.[115]

In this instance, the court utilized a method whereby computer programs are parsed into six levels of generally declining levels of abstraction.[116] These levels of abstraction include: the main purpose of the program,[117] the program structure or architecture,[118] modules,[119] algorithms and data structures,[120] source code,[121] and object code.[122]

Under this analysis, the main purpose or function of a program will always be an unprotected idea.[123] Similarly, basic functions of a module will likely be unprotectable.[124] However, the program's literal elements,

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112. *Gates*, 9 F.3d at 833.

113. The district court found that Bando had access to the Gates Program and that the Bando Program was copied from the Gates Program. *Gates*, 798 F. Supp. at 1516. On appeal, Bando did not dispute those findings. *Gates*, 9 F.3d at 833 n.10.

114. *Gates*, 9 F.3d at 834.

115. *Id.* The court stated that it foresees, in most cases, the use of experts to provide substantial guidance to courts in applying an abstractions test. *Id.* at 834-35.

116. *Id.* at 835. Ogilvie, *supra* note 27, at 528.

117. *Gates*, 9 F.3d at 835. The main purpose of a program is a description of the program's function or what it is intended to do. Ogilvie, *supra* note 27, at 534.

118. *Gates*, 9 F.3d at 835. Program architecture or structure "is a description of how the program operates in terms of its various functions, which are performed by discrete modules, and how each of these modules interact with each other." *Id.*

119. *Id.* "A module typically consists of two components: operations and data types. An operation identifies a particular result or set of actions that may be performed. . . . A data type defines the type of item that an operator acts upon such as a student record or a daily balance." *Id.*; *see* Ogilvie, *supra* note 27, at 536.

120. *Gates*, 9 F.3d at 835.

> An algorithm is a specific series of steps that accomplish a particular operation. Data structure is a precise representation or specification of a data type that consists of: (i) basic data type groupings such as integers or characters, (ii) values, (iii) variables, (iv) arrays or groupings of the same data type, (v) records or groupings of different data types, and (vi) pointers or connections between records that set aside space to hold the record's values.

Ogilvie, *supra* note 27, at 536-40; *see Whelan*, 797 F.2d at 1230.

121. *Gates*, 9 F.3d at 835. Source code is the literal text of a computer program. *Whelan*, 797 F.2d at 1230.

122. *Gates*, 9 F.3d at 835. Object code is the literal text of a computer program written in binary language through which the computer directly receives its instructions. Computer Assocs. v. Altai, 982 F.2d 693, 698 (2nd Cir. 1992).

123. *Gates*, 9 F.3d at 836.

124. *Id.*

structure or architecture, and perhaps its algorithms and data structures may contain protectable expression.[125] The court did not dispute the district court's abstractions analysis, and conceded that these generalized levels of abstraction are not necessarily applicable to all computer codes, but may facilitate the critical second step of filtering out unprotectable elements of the program.[126]

2. Filtration

The filtration step requires that courts filter out those elements of the program that are not protected by copyright, requiring review of the idea-expression dichotomy,[127] process-expression dichotomy,[128] as well as application of the doctrines of merger[129] and *scènes à faire*.[130]

The court concluded that the district court failed to undertake a proper filtration analysis.[131] Specifically, the Gates Program constants (program results) constituted facts not subject to copyright protection.[132] Further, the district court failed to adequately analyze the Gates Program menus and sorting criteria,[133] control and data flow,[134] modules,[135] common errors,[136] fundamental tasks,[137] and install files.[138] Accordingly, the court remanded these issues for further determination of copyright protection.

3. Comparison

Due to the district court's inadequate analysis at the filtration stage, the court did not undertake a comparison of the protectable portions of the Gates Program with the Bando Program.

IV. ANALYSIS

After *Autoskill* and *Gates*, parties claiming copyright infringement of their computer software programs will likely be subject to a narrower three-step approach to substantial similarity, rather than a *Whelan* or *Lotus* type of approach. Although the *Autoskill* court failed to endorse any one

125. *See id.*
126. *Id.* at 835-36 (the organization of a program into abstraction levels is a tool).
127. *See supra* text accompanying note 9.
128. *Gates*, 9 F.3d at 836.
129. *Id.*; *see supra* text accompanying note 86.
130. *Gates*, 9 F.3d at 836; *see supra* text accompanying note 87.
131. *Gates*, 9 F.3d at 830.
132. *Id.* at 842-43.
133. *Id.* at 843-44. "The district court failed to clarify whether it was referring to the visual screen displays or some other aspect of the program when it discussed the menus and sorting criteria . . . ." *Id.*
134. *Id.* at 844. "The district court failed to define exactly what it meant by control flow and data flow . . . ." *Id.*
135. *Id.* at 845 (district court erroneously suggested that algorithms constitute processes, protected only by patent law).
136. *Id.* (district court erroneously analyzed protection of program errors).
137. *Id.* at 846 (district court was unclear on what it meant by "fundamental tasks").
138. *Id.* (district court failed to make adequate findings concerning the install files).

approach over another,[139] the *Gates* court did so, and clarified the Tenth Circuit's position on substantial similarity by adopting a substantial part of the "Abstraction-Filtration-Comparison" method of analysis.[140]

Additionally, the *Gates* court suggested a preliminary indirect method of proving copying by examining the similarities as a whole, regardless of the fact that even if the programs are copied verbatim, this is not a basis for liability.[141] As the court correctly noted, district courts may otherwise be deprived of the "use of probative, and potentially essential, information on the factual issue of copying" if it only extracts all protectable elements prior to its comparison.[142] The court acknowledges factual similarity may create an unfair inference of misappropriation; however, evidence of independent creation may rebut this inference.[143]

Finally, the court attempted to add guidance to the levels of abstraction test. Commentators have criticized the *Autoskill* district court for the manner in which the abstractions step was employed.[144] In an obvious attempt to respond to these criticisms, the *Gates* court identified six generally declining abstraction levels for guidance.[145] However, the court was quick to qualify application of the abstraction test to a case-by-case and program-by-program basis generally requiring the aid of expert testimony.[146] Thus, the court left the door open for future discordant applications.[147]

Expert testimony may also create problems for courts as evident in the *Autoskill* decision. NESS challenged the district court's reliance on Autoskill's substantial similarity expert.[148] The court rejected these arguments after little inquiry.[149] Autoskill's expert, Dr. Olson, was admittedly not a computer programmer.[150] His qualifications included a Ph.D. in psychology[151] and a strong background in reading education and the use

139. *Autoskill*, 994 F.2d at 1492. ("[W]e feel that the judge used a permissible method of analysis and reached reasonable conclusions, although we are not deciding which precise method of analysis should be followed in a final copyright decision.").

140. *Gates*, 9 F.3d at 834.

141. *Id.* at 832 n.7 ("[C]opying of even unprotected elements can have a probative value in determining whether the defendant copied the plaintiff's work" because "it may be more likely that protected elements were copied if there is evidence of copying among the unprotected elements of the program.").

142. *Id.*

143. *Id.* at 833 n.8.

144. William T. Rintala, *Copyright Update—Cases*, Practicing Law Institute, PLI/Corp 725, Jan. 1993 (unclear the Autoskill court applied these doctrines in any disciplined way). Ogilvie, *supra* note 27, at 530 (court apparently recognizes "skill levels" in educational software as a "level of abstraction").

145. *See supra* notes 116-22 and accompanying text.

146. *Gates*, 9 F.3d at 834-35.

147. *Id.* at 834 n.12 ("[W]e note that the appropriate test to be applied and the order in which its various components are to be applied in any particular case may vary depending on the claims involved, the procedural posture of the suit, and the nature of the computer programs at issue.").

148. *Autoskill*, 994 F.2d at 1493 n.19.

149. *Id.* at 1492-93.

150. *Id.* at 1493 n.19.

151. *Id.*

of software in reading education.[152] He had also reviewed cases and the Nimmer treatise on copyright infringement prior to trial.[153] On the one hand, the district court found this computer program "complex,"[154] yet a Ph.D. in psychology qualified Olson to dissect the program's constituent parts for purposes of a copyright infringement action.[155] Both the district and the Tenth Circuit courts' reliance on Dr. Olson's testimony appears misplaced in light of his apparent lack of training and background necessary in an area requiring very specialized expertise.

Finally, although not directly an issue in *Gates*, the court addressed concerns surrounding copyright protection extending "to the methodology or processes adopted by the computer programmer, rather than merely to the 'writing' expressing his ideas."[156] Processes or methods of operation themselves are not copyrightable; however, "an author's description of that process, so long as it incorporates some originality, may be protectable."[157]

The *Autoskill* court addressed this issue directly, but with little clarity. Specifically, the district court rejected NESS's argument that the keying procedure employed by the Autoskill Program's audio visual matching test was a "method" and therefore, not subject to copyright protection.[158] Autoskill's witnesses testified that the Autoskill Program did not simply involve touching key 1, 2, or 3, but required the student to look at the word on the screen and respond with his or her hands on the keyboard.[159] Further, this system took considerable investigation, research, statistician, and programming efforts.[160]

The Tenth Circuit concluded that this testimony reflected that the Autoskill Program was unique[161] and demonstrated at least a minimal degree of creativity for purposes of a preliminary injunction.[162] Moreover, NESS failed to produce evidence that this procedure was common practice[163] or that it was dictated by efficiency considerations requiring exclusion at the filtration stage.[164] Although the Tenth Circuit found that NESS failed to show the keying procedure was common practice, Autoskill's own witness, Dr. Olson, testified that though not a standard procedure, it is present in other programs.[165]

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152. *Id.*

153. *Id.* at 1561.

154. *Id.* at 1570.

155. *Id.* at 1561. Dr. Olson considered the programs as a whole to reach his conclusions regarding substantial similarity. *Id.*

156. *Gates*, 9 F.3d at 836.

157. *Id.* at 837.

158. *Autoskill*, 994 F.2d at 1495 n.23. Copyright protection does not extend to any "process" or "method of operation." 17 U.S.C. § 102(b).

159. *Autoskill*, 994 F.2d at 1495.

160. *Id.*

161. *Id.*

162. *Id.* at 1495 n.23.

163. *Id.* (Autoskill Program was not drawn from prior Doehring research).

164. *Autoskill*, 994 F.2d at 1495 n.23.

165. *Autoskill*, 793 F. Supp. at 1569.

The test for determining whether a work contains original copyrightable subject matter rests on whether it is an "original work of authorship."[166] If so, the second requirement is that it "be fixed in any tangible medium of expression, now known or later developed, from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[167] In this instance, the keying procedure appears to meet the fixation requirement as it employs read-communication together with keyboard response. However, it is less clear that it satisfied the originality requirement. The court does not expressly state the keying procedure is original to Autoskill, but only that it was not copied from a particular prior public domain study.[168] Perhaps this finding is intended to imply Autoskill's independent creation. However, the court finds only that it contained the requisite degree of creativity.[169] Moreover, the level or amount of an author's labor has no bearing on whether it constitutes an original work. Although the district court acknowledged the inapplicability of the "sweat of the brow" doctrine,[170] the Tenth Circuit appeared to provide weight to Autoskill's labor and effort in developing the program.[171] Even if the court viewed the keying procedure as a compilation[172] for purposes of copyright protection, compilations must meet the not-so-stringent original work of authorship test.[173] Thus, the Tenth Circuit failed to make clear whether the Autoskill Program's keying procedure was an original work of authorship entitled to copyright protection.

Despite the gaps remaining in the court's analysis in *Autoskill*, the *Gates* decision provides a clearer framework upon which to determine substantial similarity.

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166. Original, for purposes of copyright, "means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity." Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

167. 17 U.S.C. § 102(a) (1988 & Supp. IV 1992).

168. *Autoskill*, 994 F.2d at 1496.

169. *Id.* at 1495 n.23.

170. *Autoskill*, 793 F. Supp. at 1571 ("An analysis of originality can only be based upon the protectable elements of the program[s]" and this opinion is not based in any way upon evidence of the time and effort it put into developing the Autoskill Program.).

171. *Autoskill*, 994 F.2d at 1495 & n.23.

> Autoskill system did not simply involve touching keys 1, 2, or 3, but involved looking at the word on the screen and responding with hands on the keyboard, a system that took considerable investigation and research staff work, and also that of statisticians and programmers. This testimony shows that the Autoskill program was unique and was not drawn directly from the Doehring research.

Id. at 1495 (citation omitted). This proof also disposes of a related argument regarding NESS's contention that this is a "method" not protected by copyright. *Id.* at 1495 n.23.

172. A "compilation" is the selection and arrangement of uncopyrightable facts into a format that is copyrightable. *See Feist*, 499 U.S. at 349.

173. *Id.* at 349 (even if the work contains absolutely no protectable expression, only facts, it meets the constitutional minimum for copyright protection if it features an original selection and arrangement).

CONCLUSION

The need for coherent computer software copyright law is evidenced by the varied and inharmonious substantial similarity tests currently applied among the Circuits.[174] Although some of the resulting chaos is undoubtedly due to the youth of software copyright law, it is not known whether the Tenth Circuit's use of yet another method of analysis will serve to magnify this confusion, or reduce it. Certainly, the *Autoskill*[175] and *Gates*[176] decisions shed some light on the future direction the Tenth Circuit will take concerning substantial similarity analysis. District courts struggling to determine copyright infringement of computer software programs now have at least a framework for their analysis. Most notably, these opinions espouse a narrower three-step approach, combining abstraction, filtration, and comparison, together with a preliminary indirect comparison of the programs. This method constitutes the preferable method of analysis for Tenth Circuit district courts in determining substantial similarity of computer software programs.

Wendy J. Pifher

174. "[C]ase law and commentators in the area of copyright protection seem woefully ill-equipped to provide a systematic means for analyzing copyright issues as they arise in the context of computer software." *Gates*, 798 F. Supp. at 1502.

175. 994 F.2d 1476 (10th Cir.), *cert. denied*, 114 S. Ct. 307 (1993).

176. 9 F.3d 823 (10th Cir. 1993).

LAND AND NATURAL RESOURCES SURVEY

INTRODUCTION

This Survey focuses on recent cases affecting oil and gas and public lands. Part I demonstrates how contractual agreements govern relationships in the oil and gas arena. This section explores how courts may either take an active role in interpreting such agreements by ignoring the express language to reach an equitable result, or the courts may allow the contracting parties to allocate risk and define the nature of the agreement. In *Amoco Rocmount Co. v. Anschutz Corp.*,[1] the United States Court of Appeals for the Tenth Circuit unconvincingly determined that a gas market sharing provision in a unit operating agreement was ambiguous, thereby enabling the court to equitably distribute proceeds from the sale of production. In *Reese Exploration, Inc. v. Williams Natural Gas Co.*,[2] the Tenth Circuit relied on the language in the assignment agreements to determine whether a gas owner was negligent for damage caused by escaping gas. In *Reese*, the court allowed the oil and gas parties entering a contractual agreement to define their relationship, while in *Amoco* the court took an active role in establishing the parties' relationship.

Part II focuses on public lands. This section discusses public participation in Bureau of Land Management (BLM) planning pursuant to the Federal Land Policy and Management Act of 1976.[3] In *National Parks & Conservation Ass'n v. Federal Aviation Administration*,[4] the Tenth Circuit correctly held that the Bureau of Land Management failed to meet its statutory obligation of providing adequate public notice prior to conveying lands that had been previously designated by the BLM as Areas of Critical Environmental Concern. Although the court sent a powerful message to the BLM regarding the necessity of public participation, its ruling had little effect on the situation at hand because the court had previously ignored a request for an injunction preventing the conveyance.

I. OIL AND GAS

A. *Interpreting "Ambiguous" Agreements to Equitably Balance Gas Proceeds:* Amoco Rocmount Co. v. Anschutz Corp.[5]

1. Background

In oil and gas production, unitization refers to combining leases and wells in order to maintain pressure or to aid secondary or tertiary recovery

1. 7 F.3d 909 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1507 (1994).
2. 983 F.2d 1514 (10th Cir. 1993).
3. 43 U.S.C. §§ 1701-1784 (1988).
4. 998 F.2d 1523 (10th Cir. 1993).
5. 7 F.3d 909 (10th Cir. 1993).

operations.[6] The unitized development of reservoirs has been advocated since the early 1900's.[7] Prior to unitization, production attempts centered around maximizing the amount of drilling occurring within a given field.[8] However, dissipation of the natural pressure in reservoirs caused by overdrilling left large amounts of oil in the formation.[9] The concepts of communitization, pooling, and unitization arose, in part, to remedy this problem.[10] Although the effect of these concepts is similar,[11] unitization is "the most satisfactory cooperative plan from the standpoint of maximizing a yield from an entire producing formation."[12]

A plan of unitization is generally effectuated by two separate instruments: the unit agreement and the unit operating agreement.[13] A unit agreement is defined as an agreement "of development and operation for the recovery of oil and gas . . . as a single consolidated unit without regard to separate ownerships and for the allocation of costs and benefits on a basis as defined in the agreement or plan."[14] More specifically, the unit agreement defines the areal limits, creates the unit, designates the unit operator, and determines the participation formula to distribute produc-

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6. JOHN S. LOWE, OIL AND GAS LAW, 220-21 (1983). Secondary recovery is a method of recovery in which extraneous energy sources, such as liquids or gas, are employed to move the hydrocarbons through the reservoir or to extract the product. HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS TERMS 798 (6th ed. 1984) [*hereinafter* TERMS].

Tertiary recovery is an enhanced method of recovery of crude oil or natural gas in which chemicals or energy are employed to assist in the recovery process. *Id.* at 900.

7. Bruce M. Kramer, "Unit Agreements - Historical Perspective and Theoretical Underpinnings," *Federal Onshore Oil and Gas Pooling and Unitization II*, Paper No. 4, 4-2 (Rocky Mtn. Min. L. Fdn. 1990).

8. *See* Philip G. Dufford, "Summary of Comments Relative to an Introduction to Pooling and Unitization," *Institute on Pooling and Unitization of Oil and Gas Interests*, Paper No. 1, 1-7 to 1-8 (Rocky Mtn. Min. L. Fdn. 1980). The desire to maximize production and its subsequent negative effects were largely caused by the early adoption of the rule of capture. *See* 1 BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 2.02 (3d ed. 1992). The rule of capture created substantial problems for efficient development of oil and gas. Kramer, *supra* note 7, at 4-3. *See also infra* part II.

9. Dufford, *supra* note 8, at 1-8. *See also* KRAMER & MARTIN, *supra* note 8, § 2.03 ("the amount of hydrocarbons that are left underground as the result of primary production techniques may be substantial").

10. Dufford, *supra* note 8, at 1-9 to 1-10. Communitization, or the communitized lease, allows owners of small tracts of land to execute a common lease with the understanding that a well drilled anywhere within the area will benefit all the owners proportionally to the amount of land contributed. *See id.* Pooling also refers to the combining of ownerships, but applies to lessees as well as lessors. *Id.* at 1-10. Pooling developed to maximize the spacing of wells to most efficiently drain an area. *Id. Cf.* TERMS, *supra* note 6, at 140, 652 (indicating that communitization and pooling are synonyms). The terms unitization and pooling are used synonymously. LOWE, *supra* note 6, at 220.

11. *Compare* Kramer, *supra* note 7, at 4-6 to 4-7 (*unitization* eliminates the internal property lines within the unit area so that the wells can be drilled where they most effectively drain the reservoir) *with* Dufford, *supra* note 8, at 1-10 (*pooling* maximizes the spacing of wells to most effectively drain a given area).

12. Dufford, *supra* note 8, at 1-10. There are two primary types of unitized operations: developmental and operational. Kramer, *supra* note 7, at 4-2. The developmental unit is formed to permit rapid and systematic field development. TERMS, *supra* note 6, at 218. The operational unit deals with a mature field or reservoir, typically created in order to implement secondary or tertiary recovery. Kramer, *supra* note 7, at 4-2.

13. Kramer, *supra* note 7, at 4-1.

14. TERMS, *supra* note 6, at 936.

tion.[15] The unit agreement typically includes all interest owners: mineral, leasehold, and royalty.[16]

Although some of its functions overlap, the unit operating agreement is generally more limited in its focus than the unit agreement in that it defines the relationships among the working interest owners. In other words, a unit operating agreement is concerned with the "parties sharing the costs of unit development, typically the leasehold and unleased mineral owners."[17] The unit operating agreement also governs the allocations of funds derived from the sale of the production.[18]

Although standard forms of these agreements are available,[19] every unitization is unique. Therefore, the parties must exercise "substantial care . . . in the drafting of provisions appropriate for the particular situation."[20] Unit agreements and unit operating agreements are exceedingly complex because of the high possibility of unforeseeable future conflicts.[21] The parties must adequately address various issues in the agreement to avoid future problems, including:[22] the allocation of production among the premises included in the unit;[23] the allocation of drilling and other costs;[24] payment of shut-in royalties to lessors;[25] problems arising from the creation of units applicable only to specified minerals or strata;[26]

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15. Kramer, *supra* note 7, at 4-1.

16. *Id.*

17. *Id.* Although an instrument may be termed an "operating agreement," it may not be limited to controlling the actual operation of producing wells. The agreement may encompass the exploration and exploitation as well as the production and abandonment phases. Thomas P. Schroedter & Lewis G. Mosburg, Jr., "An Introduction to the AAPL Model Form Operating Agreement," *The Oil and Gas Joint Operating Agreement*, Paper No. 1, 1-1 (Rocky Mtn. Min. L. Fdn. 1990).

18. Amoco Rocmount Co. v. Anschutz Corp., No. C86-0172-B, at 2 (D. Wyo. July 30, 1990) (findings of fact and conclusions of law).

19. For a sample unit agreement, see 7 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 920.1-2 (1993). For a sample unit operating agreement, see *Federal Onshore Oil and Gas Pooling and Unitization II*, 195-a (Rocky Mtn. Min. L. Fdn. 1990); 3 KRAMER & MARTIN, *supra* note 8, § 29.02.

See also Joe O. Young, "Non-Federal Operating Agreements," *Institute on Pooling and Unitization of Oil and Gas Interests*, Paper No. 9, 9-1 to 9-4 (Rocky Mtn. Min. L. Fdn. 1980) (describing the intended and preferred uses for various forms of unit operating agreements, mining joint operating agreements, and offshore operating agreements).

20. 6 WILLIAMS & MEYERS, *supra* note 19, § 920. *See also id.* at §§ 921 - 921.19 (discussing customary provisions of pooling and unitization agreements).

21. The risk of potential conflicts is reduced by the fact that the parties generally engage in protracted negotiations in creating unitization agreements. *See id.* § 924 (describing the various stages occurring in agreement negotiations).

22. It is beyond the scope of this article to discuss all of the issues and problems that should be addressed in unit and unit operating agreements. Agreement negotiations may take years. *Id. See also* Young, *supra* note 19, at 9-7 to 9-13 (discussing problems either created or not resolved by the A.A.P.L. form 610-Model Form Operating Agreement).

23. 6 WILLIAMS & MEYERS, *supra* note 19, § 970.

24. *Id.* § 972.

25. *See id.* § 982. A shut-in royalty clause in an oil and gas lease allows the lessee to make payments to the lessor to keep the lease alive when a well has been drilled which is capable of producing "in paying quantities," but the gas is not being marketed. *See* TERMS, *supra* note 6, at 818.

26. 6 Williams & Meyers, *supra* note 19, §§ 973 - 974.4.

description problems;[27] alteration in unit boundaries;[28] and the fiduciary duties of the unit operator and other parties.[29]

In addition, parties to a unit operating agreement may attempt to predict future gas balancing[30] problems or inequities in gas sales by including a gas balancing agreement or other provisions within the unit operating agreement that address possible future gas inequities.[31] The inclusion of such provisions make the unit operating agreement (and the task of negotiating it) much more complex.[32] Generally, gas balancing problems arise when working interest owners fail to take gas in proportion to their ownership interest, thereby leaving parties either over or underproduced.[33] Gas balancing problems may also arise when one party enters a gas sales contract and the other parties do not.[34]

The reasons for disproportionate gas production or sales are as numerous as the situations in which they occur.[35] The methods by which parties choose to balance also vary greatly.[36] Therefore, provisions ad-

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27. *Id.* § 980.3.

28. *Id.* § 980.2.

29. *Id.* § 991.

30. Gas balancing is "[t]he process by which persons having an interest in production from a well, unit or reservoir adjust their take therefrom to ensure that each such person receives his proportionate part of production." TERMS, *supra* note 6, at 62.

31. *See* Ernest E. Smith, "Relationships Between Co-Owners in Marketing Natural Gas," *Institute on Natural Gas Marketing*, Paper No. 11, 11-1 (Rocky Mtn. Min. L. Fdn. 1987) ("The operating agreement may, or may not, contain a gas balancing agreement as an attachment, and either its presence or its absence may create problems of interpretation relative to the producer's right to sell the gas.").

See also Bert L. Campbell, "Gas Balancing Agreements," *Institute on Oil and Gas Agreements*, Paper No. 9, 9-4 (Rocky Mtn. Min. L. Fdn. 1983) (noting that balancing was accomplished for years without written agreements). Working interest owners have elected to proceed without gas balancing agreements due to uncertainty in meaning or result. *Id.* at 9-5.

32. "The difficulty experienced in negotiating balancing agreements is evidenced by the fact that many oil balancing agreements provide that the parties agree to agree on a balancing agreement for gas if and when commercial production of gas is obtained, thus postponing to a later day the complex negotiating process." 8 WILLIAMS & MEYERS, OIL AND GAS TERMS 85 (citing Pogo Producing Co. v. Shell Offshore, Inc., 898 F.2d 1064, 1065 (5th Cir. 1990)).

33. Ezekiel J. Williams, *Land and Natural Resources Survey*, 70 DENV. U. L. REV. 811, 812 (1993). A party is "underproduced" if it does not sell its share of production. *Id.* Conversely, overproduced parties have taken more than their share. *Id.*

34. *See* KRAMER & MARTIN, *supra* note 8, § 19.05. The question then becomes whether the party with the sales contract must account to the other parties for their proportionate share of production. *Id.* This was the question put to the court in *Amoco*. *See infra* part I.B.

35. *See* Campbell, *supra* note 31, at 9-1 to 9-3 (providing extensive examples of situations in which gas balancing disputes may arise).

36. Courts recognize three methods for balancing: (1) *balancing in kind* requires the underproduced party to take a percentage of the overproduced party's gas until the imbalance has been made up; (2) *periodic cash balancing* requires that the underproduced party receive cash from the overproducer, curing the imbalance immediately; (3) *cash balancing upon reservoir depletion* occurs when balancing in kind is unavailable because the reservoir has been depleted; therefore, the overproduced party compensates the underproduced party with cash. Beren v. Harper Oil Co., 546 P.2d 1356, 1359 (Okla. Ct. App. 1975).

Absent an agreement on the method of balancing, courts generally prefer balancing "in kind" to remedy gas balancing problems. *See, e.g., Pogo Producing Co.*, 898 F.2d at 1065-66 (explaining that industry usage and custom require balancing in kind to remedy underproduction); Doheny v. Wexpro Co., 974 F.2d 130, 133-34 (10th Cir. 1992) (holding that unless conditions suggest otherwise, balancing in kind is the preferred remedy to correct gas pro-

dressing gas production or sales inequities in unit operating agreements cannot address all of the issues and resolve all of the conflicts that may arise among co-owners as a result of natural gas production and sales.

2. *Amoco Rocmount Co. v. Anschutz Corp.*

In *Amoco Rocmount Co. v. Anschutz Corp.*,[37] the Tenth Circuit held that an ambiguous gas market sharing provision in a unit operating agreement required a party to the agreement to share with the other working interest owners its proceeds from gas sales and its settlement of a take-or-pay contract dispute with a gas purchaser.

a. *Facts*

The Anschutz Corporation (Anschutz) appealed the district court's judgment[38] ordering it to pay over $29 million to Amoco Rocmount Company (Amoco)[39] and other working interest owners (collectively WIOs),[40] for breaching a unit operating agreement.[41] The controversy underlying the litigation stemmed from the 1979 discovery of a reservoir known as the Anschutz Ranch East Unit (AREU).[42] The WIOs of the AREU negotiated a unit operating agreement (UOA) for the field. The UOA contained the controverted provision regarding future gas sales. Section 5.11 of the UOA, entitled Inability to Market All Gas, read in part:

> If at any time a Party's share of the gas available for sale exceeds the quantity of gas such Party's gas purchaser will take (excess gas), then every other Party, if requested to do so by the Party owning such excess gas, shall be obligated to share its market for gas with the Party owning such excess.[43]

Prior to 1979, Anschutz entered into a long-term, take-or-pay natural gas sales contract[44] with Natural Gas Pipeline Company of America (NGPL), which encompassed the area in which AREU was subsequently

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duction imbalances in the absence of a formal gas balancing agreement); Williams, *supra* note 33, at 816 (discussing the types of balancing available and providing an analysis of the *Doheny* ruling).

37. 7 F.3d 909 (10th Cir. 1993).

38. Amoco Rocmount Co. v. Anschutz Corp., No. C86-0172-B (D. Wyo. July 30, 1990).

39. Amoco also appealed the district court's judgment awarding damages to Anschutz for $4,940,585.03 for indemnifaction of attorney's fees for the Anschutz-NGPL suit and for breaching its duty as unit operator to notify the working interest owners prior to making substantial changes in the basic method of operation. *Amoco Rocmount*, 7 F.3d at 913, 920.

40. A working interest is "[t]he operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land." TERMS, *supra* note 6, at 979. The WIOs of a unitized area are entitled to pro rata shares in the oil and gas produced from the field. *See Amoco Rocmount*, No. C86-0172-B, at 2 (findings of fact and conclusions of law).

See also LOWE, *supra* note 6, at 388 (a working interest is "[t]he rights to the mineral interest granted by an oil and gas lease, so-called because the lessee acquires the right to work on the leased property to search, develop and produce oil and gas." The right is coupled with an obligation to pay all costs).

41. *Amoco Rocmount*, 7 F.3d at 913.

42. *Id.*

43. *Id.*

44. In a take-or-pay contract, the "purchaser agrees to take a minimum quantity of . . . gas over a specified term at a fixed price . . . or to make minimum periodic payments to the

discovered.[45] Anschutz assigned one-half of its interest in the AREU to Mobil Rocky Mountain, Inc. (Mobil), including a share of the contract with NGPL. In 1985, however, NGPL curtailed its AREU gas purchases and filed suit against Anschutz and Mobil to relieve itself of its obligations under the take-or-pay contract because natural gas prices were plummeting.[46] These disputes were settled out of court.[47]

Amoco and the other WIOs did not enter into long-term gas sales contracts during this period; however, all the WIO's had gas sales contracts, and all but one sold some gas. The gas Anschutz sold to NGPL equaled only its working interest owner's share of gas available for sale.[48]

In 1986, Amoco and the other WIOs (collectively Amoco) sued Anschutz, claiming that according to section 5.11 of the UOA, Anschutz was obligated to share the proceeds of its sales to NGPL.[49] Amoco also claimed that under section 5.11, it was entitled to a share of the settlement money Anschutz received from NGPL for breaching the take-or-pay contract.[50] In addition, because Mobil had purchased an interest in the AREU and part of the NGPL contract from Anschutz, Amoco sued Mobil for the same market sharing benefits from its gas sales to NGPL.[51] Amoco and Mobil settled the dispute. Although Mobil was uncertain about the meaning or application of section 5.11, the amount on which the parties settled was consistent with Amoco's interpretation of the section.[52]

Anschutz argued that section 5.11 was not applicable because Amoco did not have the requisite gas purchaser and did not make the required request. According to Anschutz, section 5.11 provided a method for short-term cash balancing that would take effect only when one party's purchaser was unable to take all of that party's gas.[53]

b. *District Court*

The district court held that section 5.11 required Anschutz to share the proceeds of its natural gas sales with the other WIOs.[54] In reaching its conclusion, the court determined that the term "excess gas" was ambigu-

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producer even though (the) . . . gas is not being delivered to the purchaser." TERMS, *supra* note 6, at 883.

45. *Amoco Rocmount*, 7 F.3d at 914.

46. *Id.* In 1980, the average wellhead gas price in Wyoming and Utah was $1.78 per one thousand cubic feet (mcf). In 1981, it was $2.47 per mcf; $3.19 in 1982; and $3.41 in early 1984. Upon deregulation, the prices fell in 1985. By 1986, prices were down to $2.59 per mcf. *Amoco Rocmount*, No. C86-0172-B at 6.

See also David W. Wilson, "What is Happening to our Natural Gas Markets?" *Natural Gas Marketing*, Paper No. 13 (Rocky Mtn. Min. L. Fdn. 1987) (explaining that the deteriorating natural gas market was caused, in part, by a drop in demand, competition from an overbuilt electrical generating capacity, and a non-responsive regulatory structure).

47. *Amoco Rocmount*, 7 F.3d at 914.

48. *Amoco Rocmount*, No. C86-0172-B at 8-9.

49. Amoco Rocmount v. Anschutz Corp., No. C86-0172-B (D. Wyo. July 30, 1990).

50. *Amoco Rocmount*, 7 F.3d at 914.

51. *Id.* at 919.

52. *Id.* at 920.

53. *Amoco Rocmount*, No. C86-0172-B at 4.

54. *Id.* at 28.

ous.[55] Therefore, the court admitted extrinsic evidence regarding the parties' intent. The evidence included testimony and memoranda from representatives of the WIOs, the parties' post-agreement conduct, and the settlement between Amoco and Mobil.

The court agreed with Anschutz that the section provided for cash balancing, but disagreed when it took effect. The court observed that although in kind balancing is the preferred remedy, equity or special circumstances may compel a court to cash balance.[56] A court must also allow cash balancing if the agreement between the parties provides for cash balancing. The court concluded that "the agreement here, although ambiguous, clearly provides for cash balancing."[57] The court explained that the WIOs rejected in kind balancing because the gas recovery process required nitrogen injection which would decrease the quality of the gas and increase the cost of processing the gas, thus making balancing in kind inequitable.[58]

The court also found that the parties' post-agreement conduct "overwhelmingly" indicated that all parties intended the section to be a market sharing provision without a gas purchaser prerequisite.[59] The specific conduct the court relied on included the following facts: Amoco paid annual royalties and taxes on the revenue it expected from the NGPL sales;[60] a 1985 letter from Anschutz's vice president proposed to make payments to Amoco for distribution among the WIO as "a resolution to the WIO's differences";[61] reports prepared for Anschutz by Scientific Software Corporation prior to 1985 referred to the "gas contract sharing agreement" and thereafter referred to the "gas contract sharing agreement which has now been discontinued";[62] and a complaint Anschutz filed against NGPL that stated that it had obtained an interest in and expected in the future to obtain interests in natural gas not taken from the Unit by the other WIOs.[63] In addition, several of the WIOs were marketing for one another and sharing sales revenues.[64]

Finally, the court held that Anschutz's interpretation was unreasonable. The court could find "no reasonable explanation for why the parties

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55. "Excess gas," the court reasoned, could mean any gas left after a purchaser had taken some or any amount of gas unsold. *Id.* at 10.

56. *Id.* at 21-24. The cases on which the court based its gas balancing discussion included: Pogo Producing Co. v. Shell Offshored, Inc., 898 F.2d 1064 (5th Cir. 1990); Chevron v. Belco Petroleum Corp., 755 F.2d 1151 (5th Cir. 1985); United Petroleum Exploration v. Premier Resources, 511 F. Supp. 127 (W.D. Okla. 1980); Shell Offshore, Inc. v. Marr, No. 89-0846 (E.D. La. Jan. 5, 1990).

57. *Amoco Rocmount*, No. C86-0172-B at 24.

58. *Id.*

59. *Id.* at 25.

60. *Id.* at 26. Amoco's income projections, however, did not mention market sharing revenues. *Id.* at 12.

61. *Id.* at 26. The court assumed that this "proposal could not have been made if Anschutz had not recognized an obligation to share its market under § 5.11." *Id.* at 13.

62. *Id.* at 26. The information used by Scientific Software was provided entirely by Anschutz. *Id.* at 14.

63. *Id.* at 14, 26.

64. *See id.* at 12-13.

would have intended to require a gas purchaser before the market sharing provisions would go into effect."[65]

On appeal, Anschutz argued that the district court incorrectly: 1) determined that 5.11 was ambiguous; 2) held that 5.11 did not require a gas purchaser; and 3) admitted evidence regarding the settlement between Mobil and Amoco.[66]

c. *Tenth Circuit Opinion*

After assuming jurisdiction,[67] the Tenth Circuit upheld the district court's interpretation of section 5.11 requiring Anschutz to share its gas market and settlement proceeds with Amoco and the other WIOs. The Tenth Circuit explained that the district court had correctly found section 5.11 to be ambiguous[68] and that the district court's extensive findings of fact regarding the parties' intent were not clearly erroneous. Therefore, the Tenth Circuit could not overturn the district court's holding regarding the meaning of the section.[69] In addition, the Tenth Circuit held that the trial court's admission of the settlement agreement between Mobil and Amoco was not an abuse of discretion due to the low threshold for relevancy.[70]

3. Analysis

Given the complex nature of gas balancing and unit operating agreements, it is unlikely that parties will foresee and adequately address all potential problems. The parties' failure in *Amoco* to clearly define section 5.11 of the unit operating agreement resulted in a difficult, $29 million

65. *Id.* at 26.

66. *Amoco Rocmount*, 7 F.3d at 917. Anschutz argued in the alternative that if section 5.11 did require them to share, they were only required to do so for one year. The court found that the one year limitation was included in the section so that the market sharing would not result in the unit being taxed as a corporation. *Id.* at 919. *See also* Young, *supra* note 19, at 9-11 to 9-12 (explaining difficulties with express provisions in operating agreements that attempt to affect state and federal taxation).

67. The court asserted its jurisdiction under 28 U.S.C. § 1332(c)(1) (diversity) despite Anschutz' challenge. Anschutz argued: 1) that its principal place of business as well as Amoco's was in Colorado, therefore no diversity existed between them; and 2) Amoco violated the 28 U.S.C. § 1359 prohibition against the collusive manufacture of federal jurisdiction by agreeing with the other WIOs that they would not join the suit against Anschutz so as not to destroy diversity. *Amoco Rocmount*, 7 F.3d at 914.

In rejecting the first jurisdictional challenge, the court explicitly adopted the "total activity" test to determine that Amoco's principal place of business was not Colorado while Anschutz' was. *Id.* at 915-16. The court then determined that a litigation agreement between Amoco and the other WIOs limiting the involvement of the later in the suit against Anschutz did not constitute improper collusion under 28 U.S.C. § 1359. Amoco, as the unit operator, would normally conduct business, including litigation, on behalf of and for the benefit of the WIO's. *Id.* at 916.

68. *Id.* at 918.

69. *Id.* at 919. Under Colorado law, findings of fact must be accepted by the appellate court unless they are clearly erroneous. *Id.* at 918. The Tenth Circuit did admit that ascertaining the parties' intent was a difficult task in this case: "we cannot find clearly erroneous the district court's conclusion that the intent of the parties, *to the extent it can be ascertained at all*, was that they were not required to have a gas purchaser before invoking the market sharing provisions of § 5.11." *Id.* at 919 (emphasis added).

70. *Id.* at 919-20.

judicial decision. In adopting Amoco's interpretation of section 5.11, the district court and the Tenth Circuit managed to ensure an equitable distribution of the gas production proceeds. However, to achieve this end, the district court unconvincingly determined that the section was ambiguous, thereby allowing the court to examine extrinsic evidence regarding the parties' intent.

A court may only investigate the parties' intent through extrinsic evidence if the language of the agreement or provision is ambiguous. To support its conclusion that the section was ambiguous, the Tenth Circuit asserted well-known axioms of contractual interpretation: "[t]he meaning of a contract is found by examination of the entire instrument and not by viewing clauses or phrases in isolation"; "[e]ach word is to be given meaning if at all possible";[71] and "[t]o ascertain whether a provision is ambiguous, the court must examine and construe the language in harmony with the plain, popular, and generally accepted meaning of the words employed and with reference to all provisions of the document."[72] Although the court asserted these propositions, it did not apply them.

a. *The "Ambiguous" Word Defined*

First, the lower court held, and the Tenth Circuit agreed, that the term "excess gas" was ambiguous. The trial court explained that it could mean either the quantity of gas remaining after a purchaser had taken some gas or any quantity of unsold gas.[73] This is a reasonable explanation only if the term is analyzed separately from the provision in which it is found. However, section 5.11 solves the dilemma of the meaning of the term by explicitly defining "excess gas" as a quantity of gas that exceeds the quantity such party's purchaser will take.

b. *Each Word Given Meaning*

The courts' interpretation of section 5.11 rendered the term "gas purchaser" meaningless. The Tenth Circuit pointed out that "[n]owhere else in the contract is a requirement for a gas purchaser mentioned," thereby leaving the court without another reference to the term to examine.[74] It is unlikely that the parties intended to ignore the term. Because "gas purchaser" is mentioned only in section 5.11, the Tenth Circuit *should* have given it import.

c. *Examination of the Entire Instrument*

An examination of the entire instrument shows that the two provisions of the UOA directly preceding section 5.11 are concerned with tak-

71. *Id.* at 917 (quoting United States Fidelity & Guar. Co. v. Budget Rent-A-Car Sys., Inc., 842 P.2d 208, 213 (Colo. 1992) (emphasis in original)).

72. *Id.* (quoting Wota v. Blue Cross & Blue Shield, 831 P.2d 1307, 1309 (Colo. 1992)).

73. *Amoco Rocmount*, No. C86-0172-B at 10.

74. *Amoco Rocmount*, 7 F.3d at 919.

ing in kind.[75] Section 5.9, entitled "Taking in Kind," sets forth a general proposition that "[e]ach party shall currently, as produced, take in kind or separately dispose of its share of Allocable United Substances. . . . Except as otherwise provided in Section 5.10 or 5.11 each Party shall be entitled to receive directly all proceeds from the sale of its share of United Substances sold."[76]

Apparently, section 5.10 acts as the first exception to section 5.9. Section 5.10, entitled "Failure to Take in Kind," contemplates the situation in which a party may "fail to take in kind or separately dispose of its share" of production.[77] Under such circumstances, a party may purchase the share or shares not taken.[78] The second exception to 5.9, the controverted 5.11, contemplates a situation in which a party's gas purchaser will not take all of that party's gas. Under this isolated situation, the parties agreed on balancing in cash.[79] The district court, however, found that the "agreement" rejected balancing in kind and intended to balance in cash.[80] This statement, however, is inaccurate if the document is viewed in its entirety and if any meaning is to be given to the immediately preceding sections. Section 5.9 clearly provides for balancing in kind as the parties' desired remedy for imbalances.[81]

Although the district court used a questionable method in reaching its holding, the Tenth Circuit was not compelled to overturn the ruling because the result was equitable. Under the unit and unit operating agreements, each party contributes to the costs of extracting the production, and therefore should reap rewards in proportion to contribution. The operating agreement embodies the WIOs' commitment to work together toward a common goal of production profit. A "partnership" is formed in which, at a minimum, fair dealing is owed one another. "A sort of team spirit or esprit de corps permeates the operating agreement by the fashion in which the parties put their trust in one another to carry out the

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75. Brief for Appellant, Amoco Rocmount v. Anschutz Corp., No. C86-0172-B (D. Wyo. July 30, 1990) (Appendix: Unit Operating Agreement for the Anschutz Ranch East Unit Area).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See text accompanying notes 56-58.

81. Arguably, none of these provisions addressed the situation at hand, in which a party was without a gas purchaser and wished to share another WIO's market for gas.

An unattractive effect of the court's decision was to reward Amoco's risky business decision to wait to sell until prices were higher and punish Anschutz for diligently marketing its share of production. In retrospect, Amoco was able to "hold out" at no risk.

Interpreting § 5.11 as the court did also provides incentive for WIOs without purchasers to rely on proceeds from parties with purchasers rather than to secure or attempt to secure purchasers of their own. Parties to the agreement may avoid this result by including a statement requiring all parties to put forth a good faith effort to obtain purchasers, unless such requirement is implicitly imposed upon the parties.

In some jurisdictions, a lessee has an implied duty to diligently search for a market in which to sell produced gas. Tucker v. Hugoton Energy Corp., 855 P.2d 929, 936 (Kan. 1993) (explaining that the payment of shut-in gas royalties does not excuse the lessee from its duty to search for a market). It may be argued that a similar duty is imposed on a WIO.

goals of the agreement."[82] As members of the "joint venture," WIOs reasonably expect to share the fruits of the labor as well as the costs.

B. *Private Agreements Governing Common Law Negligence:* Reese Exploration, Inc. v. Williams Natural Gas Co.[83]

1. Background

Generally, minerals are considered real property and therefore subject to the rules of real estate law. The law governing oil and gas ownership, however, differs substantially from the law governing solid mineral ownership because of the peculiar nature of oil and gas.[84] In the early stages of the development of oil and natural gas law, courts understandably analogized these minerals to wild animals (ferae naturae) because of their migratory propensities and a limited scientific knowledge regarding the nature of the minerals.[85] As a result, the law of capture,[86] which governed ownership of wild animals, was applied to oil and gas.[87]

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82. Milam Randolph Pharo, "Duties and Obligations Revisited — Who Bears What Risk of Loss?," *The Oil and Gas Joint Operating Agreement*, Paper No. 4, 4-2 (Rocky Mtn. Min. L. Fdn. 1990).

83. 983 F.2d 1514 (10th Cir. 1993). During the Survey period, the Tenth Circuit decided several other oil and gas cases: Octagon Gas Sys. v. Rimmer, 995 F.2d 948 (10th Cir. 1993) (holding that the owner of a "perpetual overriding royalty interest" in proceeds from the sale of natural gas through Chapter 11 had an enforceable interest in debtor's gas sale proceeds, that the owner's interest constituted an "account" subject to Article 9 of the UCC, and that the account was an estate property despite prior assignment of the account); Northwest Pipeline Corp. v. FERC, 986 F.2d 1330 (10th Cir. 1993) (holding that a suit brought by a gas pipeline owner to review FERC's order requiring the owner to amend downward a take-or-pay surcharge to customers was not ripe for judicial review); Lone Mountain Production Co. v. Natural Gas Pipeline Co. of Am., 984 F.2d 1551 (10th Cir. 1992) (holding that a pipeline company was estopped from demanding strict compliance with the assignment provision of a gas purchase contract and damages awarded to the well operator were properly based on estimates of preflow production); Howell Petroleum Corp. v. Leben Oil Corp., 976 F.2d 614 (10th Cir. 1992) (holding that a working interest owner's action for accounting was time barred and that the interest holder did not produce the requisite evidence of a balance due as required to obtain an accounting).

84. 1 EUGENE KUNTZ, OIL AND GAS § 2.2 (1987). The law pertaining to oil and gas is generally the same. The gaseous character of natural gas, however, necessitates methods of handling different from those used in oil production. *Id.* § 1.19.

85. Gas, usually present with oil, has the capacity to expand when the pressure within the formation is reduced. Phillip Wm. Lear, "Conservation Principles and Federal Onshore Pooling and Unitization: An Overview," *Federal Onshore Oil and Gas Pooling and Unitization II*, Paper No. 1, 3 (Rocky Mtn. Min. L. Fnd. 1990) (quoting Professor Philip Dufford on the physical characteristics of petroleum).

The rapidity and facility with which the migration of oil takes place depends upon: the hydrostatic pressure, character of the formation, dip of the strata, and nature of the oil. KUNTZ, *supra* note 84, § 1.21.

86. The "law of capture" is used interchangeably with the "rule of capture." It also has been referred to as the "law of piracy" or the "law of the jungle." Robert E. Hardwicke, *The Rule of Capture and its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 392 (1935) (deemed as such because it authorizes the taking of another person's property).

87. *See, e.g.*, Bezzi v. Hocker, 370 F.2d 533 (10th Cir. 1966); Anderson v. Beech Aircraft Corp., 699 P.2d 1023 (Kan. 1985); Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. 1934). *Cf.* Ellis v. Arkansas Louisiana Gas Co., 450 F.Supp. 412 (E.D. Okla. 1978), *aff'd*, 609 F.2d 436 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980); White v. New York State Natural Gas Corp., 190 F. Supp. 342 (W.D. Pa. 1960); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex. Civ. App. 1962).

The law of capture embodies a simple concept of ownership; whoever captures it owns it, regardless of where it was located.[88] Furthermore, if it escapes it is no longer owned and therefore obtainable by anyone.[89] Although the underlying concept of this rule is simple, many problems resulted from its application to oil and gas. In oil production, the law of capture promotes overdrilling which causes dissipation of reservoir energy and results in substantial waste through nonrecovery.[90] The doctrine was also unsuccessful when applied to natural gas, particularly when gas storage became a necessity.[91]

The primary problems resulting from the application of the law of capture to natural gas centered around determining ownership and liability for damage. Strict adherence to the law of capture meant gas injectors would not retain title to the natural gas that they stored in underground formations, and other parties, such as mineral owners or adjacent land owners, were able to obtain ownership.[92] Furthermore, if the injectors did not retain title to natural gas injected into formations for storage, it was not clear who was liable to the mineral or surface owners for damage caused by the gas.[93]

For an excellent critique on the evolution and application of the rule of capture and the hardships it created for the oil and gas industry see Hardwicke, *supra* note 86. In 1935, when Hardwicke's article was published, all states recognized the rule of capture. *Id.* at 403.

88. Under traditional oil and gas jurisprudence the Rule of Capture determines the owner of the oil and gas. In simple terms the Rule assigns ownership to a party who captures or controls the hydrocarbons by bringing it to the surface, regardless of where the hydrocarbons may have been located underground.

Kramer, *supra* note 7, at 4-6.

89. *See* Mullett v. Bradley, 53 N.Y.S. 781, 782 (N.Y. App. Div. 1898) (noting that the owner loses the property interest in an animal that returns to the wild).

90. Lear, *supra* note 85, at 1-7.

91. The nation's demand for natural gas increased during the past twenty years due to a change in social concerns regarding energy consumption. However, an inefficient gas transport system that provided more gas than needed in the summer months and less than needed in winter months gave rise to the need for an efficient method for storing gas. Fred McGaha, Symposium, *Underground Gas Storage: Opposing Rights and Interest*, 46 LA. L. REV. 871, 871 (1986). The surplus gas is often transported into underground storage reservoirs. *Id.*

92. *Id.* at 879. *Cf.* Octagon Gas Systems v. Rimmer, 995 F.2d 948, 954 (10th Cir. 1993) (once extracted, natural gas becomes personal property in Oklahoma). The inequity of the rule's result is obvious, considering that the gas owner likely paid for the right to extract the gas and for its production or purchased the gas from a producer and then purchased the storage rights.

93. *See* Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. App. 1934) (holding that injected gas becomes ferae naturae and is no longer owned by the injector, therefore the injector is not required to pay a landowner for use of the subsurface strata when the gas strays into it). *Cf.* Ellis v. Arkansas Louisiana Gas Co., 450 F. Supp. 412 (E.D. Okla. 1978), *aff'd*, 609 F.2d 436 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980) (ownership of injected gas is not lost upon injection when it does not mix with native gas and the boundaries of the reservoir are capable of determination); White v. New York State Natural Gas Corp., 190 F. Supp. 342 (E.D. Pa. 1960) (gas storage company could recover from those producing their injected gas from a neighboring well under the theory of conversion upon proving that it was their gas being produced); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex. Civ. App. 1962) (ownership of injected gas is not lost).

Problems such as these, resulting from the rule of capture, greatly curtailed the rule's application to oil and gas.[94] Several states have explicitly precluded application of the rule to stored gas.[95] It is now generally accepted that the ownership of gas is not lost upon injection.[96] However, this does not necessarily mean that the injectors will be held responsible for damages caused by storing the gas and its subsequent movement or escape.[97]

2. *Reese Exploration, Inc. v. Williams Natural Gas Co*

In *Reese Exploration, Inc. v. Williams Natural Gas Co.*,[98] the Tenth Circuit looked to the language in the assignment of mineral interests to determine whether a gas owner was liable to an oil producer for damages caused by escaping gas. In doing so, the Court refused to apply Kansas's vestige of the rule of capture.

a. *Facts*

The controversy in *Reese* arose out of a conflict between two oil and gas lease owners in Colony-Welda Field in Anderson County, Kansas. Williams Natural Gas Company (WNG) obtained[99] gas storage rights in the

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94. *See* Lear, *supra* note 85, at 1-8. Waste in oil production due to non-recovery has also been curtailed by the evolution of communitization and unitization as well as secondary and tertiary recovery techniques. *See supra* part I.A.

95. *See* LA. REV. STAT. ANN. § 30:22(D) (1985); OKLA. STAT. ANN., tit. 52, § 36.6 (1992 & Supp. 1994); TEX. NAT. RES. CODE ANN. § 91.182 (West 1993). *See also* BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 2.02 (3d ed. 1989 & Supp. 1992).

96. McGaha, *supra* note 91, at 883 (excepting when the gas can no longer be identified). *Cf.* Anderson v. Beech Aircraft Corp., 699 P.2d 1023 (Kan. 1985) (holding that ownership rights were lost when gas was reinjected, but limiting the holding to situations where natural gas public utilities are not involved, and the injector did not obtain permission from the authorized commission or from the adjoining land owner). Also, parties may still argue that the doctrine, in certain circumstances, applies or should apply to natural gas stored or escaping from the underground reservoirs. *See* Reese v. Williams Natural Gas, 983 F.2d 1514, 1517 (10th Cir. 1993) (petitioner arguing that escaped natural gas was common property under Kansas law).

97. The theory that substances with migrating propensities may be injected into a formation even if the injection results in the displacement of more valuable substances is known as the "negative" rule of capture. According to this theory, the injector will not be liable for damages if pursued as part of a reasonable program of development and without injury to the producing formation. 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 204.5 (1993). *Cf.* Young v. Ethyl Corp., 521 F.2d 771 (8th Cir. 1975), *cert. denied*, 439 U.S. 1089 (1979) (allowing recovery under a theory of nuisance for damages caused by the injection of salt water); Jameson v. Ethyl Corp., 609 S.W.2d 346 (Ark. 1980) (holding injector liable when secondary recovery processes depletes minerals from or causes special damage to adjoining lands).

Note that the "negative rule of capture" is generally not applied to the injection of gas for storage purposes. McGaha, *supra* note 91, at 883-84.

98. *Reese*, 983 F.2d 1514 (10th Cir. 1993).

99. The leases at issue in this case were assigned to W.S. Fees in 1936 and 1937 and entitled Fees to oil, gas, and gas storage rights on the land. Fees conveyed all "the gas and gas rights . . . and all gas storage rights" to Cities Service Gas which was WNG's predecessor in interest. Cities Service Gas began injecting and storing gas in the field in the late 1930's. *Id.* at 1517.

field up to a depth of 1,050 feet.[100] WNG was injecting gas into and withdrawing it from the Bartlesville formation, located at 900 feet in depth.[101]

Reese Exploration Incorporated (Reese) owned the right to produce oil from the same land that WNG was using to store gas.[102] Specifically, Reese was attempting to recover oil from the Squirrel formation located at 800 feet, just above the Bartlesville formation.

Reese alleged that WNG was negligently permitting its injected gas to escape and enter the Squirrel sand formation, thereby inhibiting Reese's oil recovery operations. Reese sought compensatory damages and injunctive relief ordering WNG to lower its storage zone pressure.[103] Reese also argued that the escaped gas was common property under Kansas law.[104] Therefore, Reese requested declaratory relief recognizing its ownership of the migrated gas.[105]

WNG responded that its lease conferred the right to store gas up to 1,050 feet below the surface and that Reese's oil rights were subject to WNG's gas storage rights; therefore, it did not owe Reese a duty.[106]

b. *District Court*

The district court found that WNG's storage rights were limited to the Bartlesville formation.[107] Thus, WNG was liable for the damage caused to Reese by the escaping gas.[108] The court reasoned that the parties had "coexisting rights to produce oil and store gas," neither of which was superior, so neither party should interfere with the other's exercise of its rights

100. *Id.* Fees was both the surface and mineral owner at the time he conveyed gas storage rights to WNG's predecessor. *See* McGaha, *supra* note 91, at 872-73. (discussing which interest owner may lease or assign storage rights).

101. *Reese*, 983 F.2d at 1516.

102. In 1979, Fees' trustee assigned all Fees' remaining rights to Charles Hardesty who assigned them to We-Kan Resources, Inc., who in turn assigned them to Reese. *Id.* at 1517.

103. *Id.* Changing pressures from the storage and escape of gas in and from the Bartlesville formation affected activity in the Squirrel formation because the two formations were in "pressure communication." *Id.* High pressure created by WNG's gas storage inhibited oil production and created safety hazards. Phillip E. DeLaTorre, *Survey of Kansas Oil and Gas Law* (1988-1992), 41 KAN. L. REV. 691, 719 n.203 (1993). WNG's gas rendered nine out of ten of Reese's wells non-producing. *Reese*, 983 F.2d at 1517.

WNG attempted to mitigate the damage loss of gas with a compressor which captured the gas in the Squirrel formation and returned it to the Bartlesville formation. On one occasion, the compressor failed and caused Reese's lead line to "blow out." As a result, twenty acres were soaked with oil and salt water. *Id.*

104. A recent case decided by the Kansas Supreme Court applied the rule of capture to gas storage. *Anderson v. Beech Aircraft Corp.*, 699 P.2d 1023 (Kan. 1985). The *Anderson* court held that an owner of natural gas lost its title when it injected non-native gas into the underground area and the gas was then produced from the common reservoir (limiting the holding to situations where the landowner is not a public utility and has stored natural gas under the property of an adjoining land owner without permission). *Id. See also* Tanya J. Treadway, Note, *Oil & Gas Law: The Rule of Capture Applied to the Underground Storage of Natural Gas* - Anderson v. Beech Aircraft Corp., 34 KAN. L. REV. 801 (1986) (arguing that the *Anderson* court should have based its decision on a theory of trespass rather than quiet title).

105. *Reese*, 983 F.2d at 1517.

106. *Id.*

107. Reese Exploration, Inc. v. Williams Natural Gas Co., 768 F. Supp. 1416, 1425 (D. Kan. 1991).

108. *Id.*

under its respective lease.[109] Furthermore, because WNG had elected to utilize only the Bartlesville formation for storage, it could not now enlarge its storage rights to other formations.[110] However, the court ruled against Reese's claim for ownership finding that although gas had escaped, WNG never lost ownership.[111]

c. *Tenth Circuit Opinion*

The Tenth Circuit affirmed the lower court holding that WNG retained title to the non-native gas produced by Reese from the Squirrel formation,[112] but it reversed the lower court on the negligence issue, holding that WNG was not responsible to Reese for the damage caused by the escaping gas.[113]

In finding that the escaped gas was not subject to the law of capture under Kansas law, the Tenth Circuit distinguished the Kansas' Supreme Court's holding in *Anderson*.[114] According to the court, the situation in *Reese* was easily distinguishable from *Anderson* because: 1) in the present case the gas migrated vertically, whereas in Anderson, the gas migrated horizontally through the same formation to different lands;[115] 2) WNG had a contractual authorization to store gas in the Squirrel formation;[116] and 3) WNG was a natural gas public utility permitted by FERC.[117]

The Tenth Circuit reversed the lower court's holding that WNG was negligent. The court explained that negligence can be found only if a corresponding duty is imposed on the allegedly negligent party. The issue in *Reese* was whether a duty was imposed on WNG in the assignment of its storage rights not to interfere with Reese's oil production.[118] The court resolved this issue by interpreting the express language of the parties' assignment contracts. The grant to WNG's predecessor conveyed the right to store gas in all underground formations above 1,050 feet without any reservations. Meanwhile, the assignment to Reese's predecessor was ex-

109. *Id.* at 1423.

110. *Id.* at 1424. The court analogized WNG's rights to an easement in which a party's actions define the scope and location of the easement. In other words, because WNG had only utilized the Bartlesville formation for storage, its rights to store were now limited to that area. *Id.*

111. *Id.* at 1427.

112. Reese Exploration, Inc. v. Williams Natural Gas Co., 983 F.2d 1514, 1523 (10th Cir. 1993).

113. *Id.* at 1522.

114. *Id.* at 1523. For a description of the *Anderson* holding, see *supra* note 104.

115. The situation in *Reese* was unusual because the two interest owners' tracts were located on top of one another and the gas migrated vertically. Typically, the applicability of the law of capture arises when the parties' tracts are adjacent and the migration is horizontal. The district court reasoned, without sufficient explanation, that the direction of the migration assisted in distinguishing *Reese* from *Anderson*. *Reese*, 768 F. Supp. at 1427. The Tenth Circuit merely adopted the lower court's distinction. *Reese*, 983 F.2d at 1523. *See* DeLaTorre, *supra* note 103, at 720 (criticizing the lower court's distinction of horizontal and vertical movement in determining whether or not to apply the rule because Kansas "recognizes horizontal, as well as vertical, severance of rights").

116. *Reese*, 983 F.2d at 1523.

117. *Id.*

118. *See id.* at 1521.

plicitly made subject to the gas storage rights assigned to WNG.[119] The Tenth Circuit concluded that Reese owed a duty not to interfere with WNG's gas storage activities, but the duty was not reciprocal.[120]

3. Analysis

Several different causes of action may give rise to a capture analysis. Attempts to store gas which migrates to adjoining land owners' property may result in trespass actions by the land owner.[121] If the court adheres to the law of capture, the gas owner is not liable for trespass because the gas owner is deemed to have lost title upon injection or migration.

Rather than sue for damages under trespass, adjoining surface or mineral owners may seek a declaratory judgment that the injector lost possession of or title to the stored gas.[122] Applying the law of capture here would result in a transfer of ownership. Likewise, the gas injector would lose the rights to the gas and the extractor would become the new owner. Finally, gas injected may cause damage to a neighboring interest owner, causing the affected party to sue for negligence.

Reese sued for ownership and negligence. Theoretically, under the law of capture, ownership is either lost upon injection or upon escape from the storage formation; therefore, the previous owner cannot be held liable for damage caused by the gas.[123] For example, if the Tenth Circuit had applied the law of capture in *Reese*, WNG would have been deemed to have lost title to the gas and therefore may not have been liable for damages suffered by Reese. However, Reese would have gained or had the opportunity to gain possession of the gas. On the other hand, without the law of capture, WNG retained ownership, thereby subjecting itself to possible liability for the damage caused by the gas.

A negligence claim against WNG failed because the conveyances of the respective interests designated Reese's interest as servient or subject to WNG's. Therefore, the Tenth Circuit rejected Reese's negligence claim. This demonstrates that contract rights may define duties which control common law negligence. In other words, private agreements, such as leases and assignments of mineral interests, can determine whether common law tort actions apply. Even though Reese suffered damage from the presence of WNG's gas, Reese could find no remedy in court.[124] In creating and purchasing leases and assignments, parties should be aware of such agreements impact on the common law, particularly negligence.

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119. *Id.* at 1521-22.

120. *Id.* at 1522.

121. *See, e.g.*, Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. 1934).

122. *See, e.g.*, Bezzi v. Hocker, 370 F.2d 533 (10th Cir. 1966).

123. This is not to say that one cannot be negligent in attempting to store or recover the gas.

124. The court noted that WNG's conduct may have been limited by the doctrine of implied covenants or by KAN. STAT. ANN. § 55-1203 (1983), which allows the appropriation of subsurface formations for gas storage, but requires that the appropriation be without prejudice to other rights or interests. The Tenth Circuit, however, did not decide these issues because they were not raised by the parties. *Reese*, 983. F.2d at 1523, n.8.

Although Reese's case engenders sympathy, Reese knew gas was being injected at the location when it took the assignment. Reese's best option now is to enter into a contractual relationship with WNG to remedy or mitigate the situation if it is economically prudent to continue production.[125]

II. PUBLIC LANDS

A. *Public Participation in the Bureau of Land Management's Planning and Land Transfer Procedures:* National Parks and Conservation Ass'n v. Federal Aviation Administration[126]

1. Background

In the Federal Land Policy and Management Act of 1976 (FLPMA),[127] Congress directed the Bureau of Land Management (BLM)[128] to undertake formal, comprehensive planning for the 448 million acres of land within its jurisdiction.[129] Although many of FLPMA's directives are vague and ambiguous,[130] the provisions regarding protec-

125. As a result of the court's ruling, WNG now possesses superior negotiating leverage. Reese would likely have to pay great consideration to convince WNG to alter its conduct.

126. 998 F.2d 1523 (10th Cir. 1993).

127. 43 U.S.C. §§ 1701-1784 (1988). FLPMA covers areas of public land administration that fall beyond the scope of this article. This section will focus on subchapter I of FLPMA (General Provisions) and parts of subchapter II (Land Use Planning and Land Acquisition and Disposition). Subchapter III specifically addresses administration; subchapter IV authorizes the Secretary of Interior to issue permits and leases for domestic livestock grazing; subchapter V provides for the grants of rights-of-way; and subchapter VI discusses reviewing particular tracts for designation as wilderness areas. *See* Robert L. Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 6-7 (1984).

128. The BLM is an agency of the Department of the Interior. For purposes of this article, "public land(s)" refer only to the lands governed by the BLM.

In total, the federal government owns about one-third of the country's on-shore surface land, totaling 730 million out of 2.3 billion acres which comprise the United States. JAN G. LAITOS & JOSEPH P. TOMAIN, ENERGY AND NATURAL RESOURCES LAW 64 (1992). *See also* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 14 (3d ed. 1993) [hereinafter COGGINS ET. AL] (indicating how much land in each state is owned by the federal government).

129. Prior to FLPMA, the BLM had commenced formal land planning pursuant to the 1964 Classification and Multiple Use Act (CMUA). 43 U.S.C. §§ 1411-1418 (expired 1970).

130. FLPMA is widely criticized for its vagueness and generalities. *See* George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307, 319 (1990) [hereinafter Coggins] (although § 1712 mandates planning, it otherwise is open-ended; "it specifies neither schedules, procedures, nor content of land use plans, leaving most methods and details to secretarial discretion"); *id.* at 308 ("Congress neglected to spell out anything except vague generalities to guide the BLM"); Lisa J. Hudson, *Judicial Review of Bureau of Land Management's Land Use Plans Under the Federal Rangeland Statutes*, 8 PUB. LAND L. REV. 185, 189 (1987) ("Congress failed to resolve adequately basic management conflicts or translate underlying principles into binding commands" and "failed to ensure that the planning process would be implemented fully and neglected to define precise standards").

In addition to ambiguities within the statute, Coggins attributes BLM's inconsistent planning to budget constraints and other statutes imposing ad hoc planning requirements on the BLM. Coggins, *supra* note 130, at 316-17.

tion for designated areas of critical environmental concern (ACEC)[131] and public participation in the planning process are particularly clear.

Generally, FLPMA embodies the basic philosophies of land use planning, multiple use, and sustained yield.[132] FLPMA grants the agency flexibility in allocating resources rather than forcing the BLM to devote any particular tract of public land to a specific use.[133]

Planning under FLPMA begins with an inventory of all public lands, their resources, and values.[134] FLPMA § 1712(a)[135] commands the BLM to create formal land use plans, based in part on the inventories taken.[136] These plans are legally binding on the BLM,[137] and agency decisions regarding the management of public lands must be "in accordance" with such plans.[138] Therefore, the BLM is theoretically committed to a rational, coordinated management scheme.[139]

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131. An Area of Critical Environmental Concern (ACEC) is an area within the public lands where special management attention is required to "protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards." 43 U.S.C. § 1702(a) (1988). The corresponding regulation uses the same definition of ACEC, except it adds that the identification of a potential ACEC "shall not, of itself, change or prevent change of the management or use of public lands." 43 C.F.R. § 1601.0-5(a) (1993).

ACECs are supposed to be unique areas of national significance deserving protection in their natural state. The ACEC designation is not intended to halt all development. Gail L. Achterman et al., "NFMA and FLPMA: Fifteen Years of Planning," *Public Land Law*, Paper No. 5, 5-27 (Rocky Mtn. Min. L. Fdn. 1992) (citing S. Rep. No. 94-583, 94th Cong., 1st Sess. at 43 (1976)).

132. 43 U.S.C. §§ 1701(a)(7) & 1712(c)(1) (1988). These philosophies, along with much of the language in FLPMA, were borrowed from the 1960 Multiple Use, Sustained-Yield Act (MUSYA). 16 U.S.C. §§ 528-531 (1988). *See* Hudson, *supra* note 130, at 188-89 (explaining that while much of the language in FLPMA was borrowed from the MUSYA applicable to the Forest Service's management of the national forests, the two statutes are different in that the management directives in FLPMA are couched in mandatory language). *See also* COGGINS ET AL., *supra* note 128, at 622-23 (providing a summary of MUSYA).

133. *See generally* Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 ECOLOGY L.Q. 43 (1991). See also COGGINS ET AL., supra note 128, at 14 (noting that the basic public land legal conflicts are over use of public resources).

134. *See* 43 U.S.C. § 1711(a) (1988). The section includes identifiable values but does not limit them to outdoor recreation and scenic values. Additionally, the inventory is to be kept current to reflect changes in conditions and to identify new and emerging resource and other values. *Id.*

135. "The Secretary shall, with public involvement . . . develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." 42 U.S.C. § 1712(a) (1988).

136. *See* 43 U.S.C. § 1712 (c)(4) (1988). The command to plan embodied in the section is unspecific so as to leave room for agency discretion. *See* Coggins, *supra* note 130, at 319. "It is not realistic to expect or require that plans be so specific that they eliminate managerial discretion." On the other hand, under a broad mandate such as this, the agency may "promulgate plans so general as to be meaningless as limitations on or guidelines for subsequent management decisions." *Id.* at 309.

137. *See* Coggins, *supra* note 130, at 309.

138. 43 U.S.C. § 1732(a) (1988).

139. Hudson, *supra* note 130, at 188. Realistically, BLM planning has been hampered by a chronic shortage of resources, personnel, and expertise and by changes in policy direction. Coggins, *supra* note 130, at 318 & n.104. In addition, BLM maintains a low planning budget. *Id.* at 320. As a result, BLM's planning efforts are "criticized as tardy, inconsistent, and generally inadequate." *Id.* at 318.

FLPMA sets forth substantive criteria that the BLM must consider in the development and revision of land use plans.[140] The BLM shall: observe the principles of multiple use and sustained yield; give priority in protection to Areas of Critical Environmental Concern; rely on the inventory of the lands; consider present and potential uses; consider the scarcity of values and the availability of alternatives; weigh the long-term against the short-term benefits; provide for compliance with applicable pollution control laws; and coordinate with other states and other agencies.[141]

In addition to ACECs' role as substantive criteria for the adoption of land use plans,[142] ACECs are mentioned in § 1711(a) of FLPMA, regarding the BLM's land inventories.[143] Section 1711(a) by itself does not change management standards for land designated as an ACEC.[144] Section 1712, however, specifies that the resource inventory required under § 1711(a) including ACEC identification, serves as the foundation for the land use plan.[145] The two sections read together indicate that Congress intended more than cursory consideration of ACECs.[146]

Although FLPMA contains few procedural requirements,[147] it clearly reflects congressional sentiment regarding the importance of including the public in land use decisions. FLPMA was enacted largely in response to a shift in public sentiment regarding public land use from favoring disposition to favoring conservation.[148] Congress recognized the public's growing discontent and resolved to retain the remaining public domain in federal ownership[149] and to manage the lands to avoid "unnecessary or

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140. 43 U.S.C. § 1712(c) (1988).

141. 43 U.S.C. § 1712(c) (1),(3)-(9) (1988). Coggins notes that "[e]ven though Congress phrased each mandatorily, the criteria are remarkable for their lack of specificity." Only the mandates requiring designation and protection of ACECs and compliance with applicable pollution control laws are definite, applicable standards. Coggins, *supra* note 130, at 321.

142. Section 1712(c)(3) provides that in the development and revision of land use plans, "the Secretary shall . . . give priority to the designation and protection of areas of critical environmental concern."

143. Section 1711 (a) provides that "the Secretary shall prepare and maintain . . . an inventory of all public lands . . . giving priority to areas of critical environmental concern."

144. Coggins, *supra* note 130, at 319.

145. *See* 43 U.S.C. § 1712(c)(4) (1988).

146. *See* Coggins, *supra* note 130, at 321-22 (predicting that any challenges to a plan based on the Secretary's statutory requirements to give priority to ACEC designations would "face uphill battles").

147. Coggins points out that FLPMA specifies only two mandatory procedural requirements: public participation and the use of a "systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." *Id.* at 320 (quoting 43 U.S.C. § 1712 (c)(2) (1988)).

148. Achterman et al., *supra* note 131, at 5-2. FLPMA also sought to remedy wide-spread over-grazing on public lands, among other problems. LAITOS & TOMAIN, *supra* note 128, at 95.

Because FLPMA embodies the multiple use philosophy, the BLM must also consider and fulfill "demands for recreation, minerals, forage, timber, and other resources and activities" in addition to considering conservation interests. Marla E. Mansfield, *The "Public" in Public Land Appeals: A Case Study in "Reformed" Administrative Law and Proposal for Orderly Participation,* 12 HARV. ENVTL. L. REV. 465 (1988) (examining BLM procedural rules to discuss public participation in public land management).

149. 43 U.S.C. § 1701(a)(1) (1988).

undue degradation."[150] ACEC designation and public participation are two tools enabling FLPMA to achieve its objectives.

FLPMA and the BLM's FLPMA regulations embrace the public participation concept.[151] FLPMA provides for public participation twice within § 1712 regarding the development of land use plans. First, "public involvement" is required in developing, maintaining and revising land use plans.[152] Second, FLPMA requires the Secretary to adopt procedures, including public hearings, to act as a vehicle for public participation.[153]

The BLM regulations also contain numerous provisions regarding public participation. The regulations require public involvement in planning at the beginning of the process,[154] throughout a plan's development, and during its adoption, revision, or amendment.[155] Despite the pervasive existence of mandatory public participation provisions in both FLPMA and the regulations, the BLM has attempted to plan without the public.[156]

2. Tenth Circuit Opinion

In *National Parks and Conservation Ass'n v. Federal Aviation Administration*,[157] the Tenth Circuit recognized the public's right to participate in actions affecting public lands. The court held that the BLM neglected to meet its statutorily prescribed duty to provide adequate notice prior to amending a land plan and transferring land within its jurisdiction.[158]

a. *Facts*

The Federal Aviation Administration (FAA) approved and provided funding for construction of an airport in San Juan County, Utah.[159] The

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150. 43 U.S.C. § 1732(b) (1988); 43 C.F.R. § 1601.0-8 (1993).

151. Public involvement is generally defined as "the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings at locations near the affected lands, or advisory mechanisms, or other such procedures as may be required in particular instances. 43 U.S.C. § 1702(d) (1988).

152. 43 U.S.C. § 1712(a) (1988).

153. 43 U.S.C. § 1712(f) (1988):

> The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

154. 43 C.F.R. §§ 1610.2 (c), (f)(1); 1610.4-1 (1993).

155. *See* 43 C.F.R. §§ 1610.2 (a), (c), (f)(2-5); 1610.5-5 (1993) (requiring participation in amending a plan); *Id.* § 1610.4-2 (in reviewing the proposed planning criteria); *Id.* § 1610.5-1(b) (in publication of the proposed resource management plan and proposed and final environmental impact statement (EIS) and in any significant change made to the plan as a result of action on protest).

156. *See* Coggins, *supra* note 130, at 320 & n.119 (citing National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C.Cir. 1987), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *cert. granted sub nom.*, Lujan v. National Wildlife Fed'n, 110 S. Ct. 834 (1990); Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985)).

157. 998 F.2d 1523 (10th Cir. 1993).

158. *Id.* at 1531.

159. *Id.* at 1526.

site FAA selected encompassed public land administered by the BLM[160] pursuant to FLPMA.[161] The BLM had designated a portion of the land as an ACEC by a 1989 Proposed Resource Management Plan (RMP).[162] The proposed RMP provided ACEC protection for corridors on both sides of Utah Highway U-276, which subsequently included the airport site.[163] The RMP also contained a ban on the transfer of federal ownership of the land.[164]

In order to convey the tract, the BLM had to amend the RMP, which according to the court, required compliance with the National Environmental Policy Act of 1969 (NEPA).[165] The FAA issued a draft environmental impact statement (DEIS) on January 17, 1990 in which the final airport site was identified for the first time. This was also the first form of notice to the public indicating that the BLM was transferring the land rather than moving forward with the proposed RMP.[166] Although the BLM and the FAA had been discussing the transfer for some time prior to the issuance of the DEIS, the public believed that the BLM intended to protect the area.[167] The National Parks & Conservation Association (NPCA) requested a stay of the construction and sought review of the BLM's decision to amend the land plan to convey public land to the FAA for construction of the airport. Specifically, NPCA argued that the BLM violated FLPMA by failing to give notice of the land plan amendment and by not providing a rational assessment of the effect of the conveyance on the existing land plans. Furthermore, NPCA alleged that the BLM's rever-

160. *Id.* at 1525.

161. 43 U.S.C. §§ 1701 to 1784 (1988).

162. *See generally* 43 C.F.R. §§ 1610.1 - 1610.8 (1993). A Resource Management Plan is a land use plan as described by FLPMA. 43 C.F.R. § 1601.0-5(k) (1993). It should establish: land areas for exclusive or limited use (including ACEC designation); allowable resource uses and levels of production to be maintained; resource condition goals; program constraints and necessary management practices; areas to be covered by more specific plans; support action; implementation sequences; and standards for monitoring and evaluating the plan. *See* 43 C.F.R. § 1601.0-5 (k)(1)-(8); *National Parks*, 998 F.2d at 1525 n.7.

The BLM also governed the site according to the 1973 Management Framework Plan (MFP). *Id.* at 1525. MFPs differ in both procedure and content from RMPs prepared under FLPMA. Coggins, *supra* note 130, at 317. A MFP provides step-by-step instructions as to the management of a particular public land resource area. Each individual management decision is listed along with the action required to achieve the decision and the supporting rationale. *National Parks*, 998 F.2d at 1525-26 n.8. The MFPs remain in force until superseded by RMPs, but the BLM has been slow to make the transition and to promulgate RMPs. *See* Coggins, *supra* note 130, at 317 & n.93.

163. *National Parks*, 998 F.2d at 1525-26.

164. *Id.* at 1529.

165. 42 U.S.C. §§ 4321 to 4370a (1988). NEPA requires an EIS for all "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(C) (1988).

An EIS enables federal administrators to consider the consequences of their actions before acting. In an EIS, adequate consideration must be given to reasonable alternatives to the proposed action. The statute, however, does not impose an obligation on the agency to follow any course of action. EISs have been controversial due to the additional transaction costs incurred in developing them and the litigation they have spurred. *See* COGGINS ET AL., *supra* note 128, at 335.

166. *National Parks*, 998 F.2d at 1530-31.

167. 998 F.2d at 1530. In fact, in April 1989, the BLM reissued the proposed RMP with the ACEC designation and ban on transfer still included. *Id.*

sal of its position with respect to the Scenic Corridor ACEC was arbitrary and capricious.[168]

The BLM[169] responded that the EIS conducted by the FAA sufficiently met the BLM's requirements under FLPMA and that because the 1989 RMP was only a proposal, the change in designation of land was not an arbitrary and capricious action.[170]

3. Holding

The Tenth Circuit denied NPCA's request for a stay of the construction of the airport,[171] but the court held that the BLM violated the specific requirements of NEPA and FLPMA. The BLM failed to provide the public with notice of its actions so that public participation could take place.[172] Based on the chronology of events leading to the transfer of BLM land, it was apparent to the court that the notice given was "far from adequate."[173] Specifically, the BLM violated its own regulation that notice be provided at the "outset of the planning process."[174] The court reversed and remanded because it was unclear whether the BLM would have reached the same decision if public involvement had been present from the beginning of the process.[175]

4. Analysis

In *National Parks*, the Tenth Circuit applied the brakes to the BLM's fast and loose rulemaking by holding that the BLM's public notice of the plan amendment and land transfer was inadequate. Given the complexity of the BLM's job in developing plans for vast amounts of land and its tight budget, the joint effort between the BLM and the FAA in providing a DEIS was reasonable.[176] The BLM's reliance on other agencies to provide notice of its own actions, however, was not acceptable.

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168. *Id.* at 1526. The NPCA also sought review of the FAA's determination that the noise impact of the airport would have "no significant impact" on the adjacent Glen Canyon National Recreation Area. The NPCA specifically alleged that the FAA ignored relevant studies on noise impact and failed to consider relevant factors in determining noise impacts. *Id.*

The court agreed, concluding that the FAA's approval of the airport project, based on a finding of "no significant impact," was arbitrary and capricious. It explained that the decision to reverse and remand FAA's finding of no significant impact would not be meaningless even though the airport had already been built. On remand, the FAA may determine that it must make use of studies not utilized in the EIS. If the agency then finds a "significant impact," it would be required to mitigate the damage. *Id.* at 1533-34.

169. Other respondents included the FAA, the Department of Transportation, and the Department of the Interior. *Id.* at 1523.

170. *Id.* at 1526.

171. *Id.* at 1525 n.3.

172. *Id.* at 1531.

173. *Id.*

174. 43 C.F.R. § 1610.4-1 (1993).

175. *National Parks*, 998 F.2d at 1533. The court remanded to determine whether the land should be retained under BLM control and management or transferred to the FAA. *Id.*

176. The court did not address whether the BLM was required to furnish its own EIS for amending the plan. Agencies may be exempt from NEPA obligations when there is a direct statutory conflict with the agency's enabling legislation, if the agency action pursuant to an environmental statute is the functional equivalent of NEPA review, or if the agency's statutory duties further NEPA's purposes. LAITOS & TOMAIN, *supra* note 128, at 242-43.

Public participation is obviously thwarted by inadequate notice. FLPMA clearly announces Congress' intent that the public stay abreast of the BLM's planning activities. Similar sentiment was reflected in the BLM's own regulations. Due to the pervasiveness of concern for public involvement embodied in the statute, it is unlikely the courts will overlook omissions by the BLM in this area.

Although the Tenth Circuit prevented the BLM from disregarding FLPMA mandates by supporting an important procedural aspect of the statute, the court failed to give FLPMA substantive meaning regarding ACECs.[177] As noted earlier in this survey, many of FLPMA's substantive provisions are vague.[178] The provision regarding ACEC designation, however, is not. Congress intended that ACEC designation attach if the land is nationally significant and deserving of protection in its natural condition. It is unlikely that Congress intended ACEC designation to be disregarded by the BLM upon receiving an offer to purchase. Judicial enforcement of ACECs and other substantive FLPMA provisions would give the BLM incentive to provide coherent and consistent land plans. The Tenth Circuit had the opportunity in *National Parks,* but failed to give import to the BLM's ACEC designation.

Furthermore, the Tenth Circuit unwisely denied NPCA's request for a stay of the construction of the airport, which was completed prior to the issuance of this decision.[179] Although the court held that the BLM did not follow FLPMA's procedural mandates regarding public involvement, the holding merely provided a post hoc reprimand of the BLM's conduct. Because public involvement is an essential procedural element of FLPMA, an injunction would not have been an unreasonable remedy.[180]

In actions alleging NEPA violations, courts may grant plaintiffs preliminary injunctions against projects in their early stages.[181] Under such circumstances, the agency generally is required to remedy procedural deficiencies by either preparing an EIS or correcting an inadequate one before resuming work on the project.[182] Similarly, the court could have halted construction of the airport to allow the BLM to correct its omission and comply with the statute.

The court explained that even though the airport had been built, the remand was not meaningless because mitigation measures could still be

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The BLM attempted to eschew NEPA in early planning efforts. *See* National Resources Defense Council v. Morton, 388 F. Supp. 829, 841-42 (D. D.C. 1974), *aff'd per curiam,* 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied,* 427 U.S. 913 (1976) (rejecting the BLM's argument that a programmatic environmental impact statement would suffice to assess all BLM grazing programs and ordering the agency to prepare 145 district-specific EISs by 1988).

177. Courts have historically avoided substantive FLPMA review. *See* Coggins, *supra* note 130, at 326.

178. *See supra* part III.A.

179. *National Parks,* 998 F.2d at 1525 n.3.

180. The court noted the seriousness of the BLM's failure to notify the public when it pointed out that the agency may not have made the same decision to convey the land to the FAA "if active public involvement [were] present from the beginning of the process." *Id.* at 1533.

181. *See* Steubing v. Brinegar, 511 F.2d 489, 495-96 (2d Cir. 1975).

182. JAN G. LAITOS, NATURAL RESOURCES LAW 112 (1985).

implemented. Regardless of public sentiment regarding the use of the land, this provides little consolation for the court's disregard of the public's statutory right to participate in the BLM's use designation of the "public" land.

CONCLUSION

A substantial number of oil and gas cases are resolved by judicial interpretation of the underlying agreements. In *Amoco*, the Tenth Circuit interpreted a gas marketing clause in a unit operating agreement to allow the working interest owners to share the proceeds of gas sales. In *Reese*, the Tenth Circuit found that the underlying assignments controlled the parties respective duties and held the owner of escaping gas was not liable for damage it caused. Together, *Amoco* and *Reese* demonstrate an inconsistency in the court's degree of judicial activism in interpreting private oil and gas agreements. Finally, in the area of public lands, in *National Parks*, the Tenth Circuit ruled in favor of public participation in the BLM's planning process. Although the court could have prevented the BLM from conveying public land without public involvement by granting an injunction, the *National Parks* decision nonetheless, sent a powerful message to the agency regarding the importance of public participation.

Cristyn Eddy

REAL PROPERTY SURVEY

INTRODUCTION

During 1993, the Tenth Circuit considered few traditional real property issues.[1] This Survey addresses three divergent cases, *Buzzard v. Oklahoma Tax Commission*, *Honce v. Vigil*, and *Board of County Commissioners for Garfield County v. W.H.I., Inc.* In *Buzzard v. Oklahoma Tax Commission*,[2] the Tenth Circuit addressed the ongoing problem of defining the limits of state taxing authority of Indian tribes and their activities. *Honce v. Vigil*[3] defined the proper standards for sexual harassment in the context of a claim under the Fair Housing Act.[4] *Board of County Commissioners for Garfield County v. W.H.I., Inc.*,[5] a traditional property case, involved determining when a statute of limitations begins to run in circumstances where the public claims ownership of a road by adverse possession.

I. LIMITING THE MEANING OF "INDIAN COUNTRY"[6] IN STATE TAX CASES

The limits of a state's power to tax Indian tribes and their activities is an issue that has faced the courts for some time because there has never been a set policy controlling state taxation of Indians.[7] The rules vary depending on who is taxed, what is taxed, and where the taxed property is located. This section discusses the sovereignty and taxation of Indian tribes.

A. *Background*

1. Sovereignty of Indian Tribes

The law applicable to Indians is a specialized area of law with principles generally irrelevant to the core of property law.[8] At the same time, some principles of Indian law, such as sovereignty, apply to property law. Sovereignty, in the sense it is used to mean the power to rule one's own

1. Perhaps the most interesting case decided by the Tenth Circuit during the survey period impacting property was United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994). The court held that Colorado could enforce its law independent of the federal government's enforcement of a CERCLA action. For a detailed commentary on this case see Alana Bissonnette, Comment, *Clean Up Your Federal Mess in My State: Colorado Has a State RCRA-Voice at the Rocky Mountain Arsenal*, 71 DENV. U. L. REV. 257 (1994).

2. 992 F.2d 1073 (10th Cir.), *cert. denied*, 114 S. Ct. 555 (1993).

3. 1 F.3d 1085 (10th Cir. 1993).

4. 42 U.S.C. §§ 3601-3619 (1988 & Supp. IV 1992).

5. 992 F.2d 1061 (10th Cir. 1993).

6. The author realizes that the term "Indian country" may be considered insensitive and, thus, offensive by some. However, since "Indian country" is the term that is, and has been, used in statutes, case law, and articles on the subject, it will be used throughout this Survey for consistency.

7. Keith E. Whitson, Note, *State Jurisdiction to Tax Indian Reservation Land and Activities*, 44 WASH. U. J. URB. & CONTEMP. L. 99, 122 (1993).

8. *See* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 51 (1991).

property, is one of the biggest of the "sticks in the bundle" that make up traditional property rights.

The general rule of tribal sovereignty is that tribes remain subject to the superior sovereignty of the United States government.[9] In practice, tribes enjoy the right to self-governance,[10] subject to limitations that may be set by Congress.[11]

Tribal sovereignty does not extend outside the boundaries of tribal lands but is divested to the extent that it involves external relations.[12] Tribal sovereignty may also be divested in relation to lands within the boundaries of a reservation owned by an individual in fee simple. A tribe may, however, have regulatory power over a fee owner if he threatens the political integrity, economic security, or health and welfare of the tribe.[13] The tribe's regulatory power extends only to circumstances that impinge on the political integrity, economic security, or health and welfare of the tribe.[14] It must also be shown that the activity regulated has a serious impact on the tribe's interests.[15]

Congress muddied the waters of Indian sovereignty with the Indian General Allotment Act of 1887 ("Dawes Act")[16] and the Indian Reorganization Act of 1934.[17] The Dawes Act was intended to assimilate the Indians into society by splitting up the reservations and allotting the land to individual Indians.[18] The federal government was to hold the land allotted to individual Indians in trust for twenty-five years to ensure that the Indians were not disadvantaged.[19] The Indian Reorganization Act ended the process by stating that after June 18, 1934, no land from an Indian reservation could be allotted to any Indian.[20] The allotment process ended when the government realized that the goal of assimilating tribal members into society was not being reached.[21] The Indian Reorganization Act also extended the duration of the trusts created by the Dawes Act until such time as Congress directed that the trusts be discontinued.[22] By

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9. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 245 (Rennard Strickland et al., eds., 1982).

10. Janice Brandt, Note, *Indian Sovereignty—Beyond the "Well Pleaded Complaint Rule,"* 15 T. MARSHALL L. REV. 169, 178 (1989-90).

11. Stacy L. Cook, Comment, *Indian Sovereignty: State Tax Collection on Indian Sales to Nontribal Members—States Have a Right Without a Remedy* [Oklahoma Tax Commission v. Citizen Band Potawatome Indian Tribe of Oklahoma, 111 S. Ct. 905 (1991)], 31 WASHBURN L. J. 130, 132 (1991).

12. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 425-26 (1989).

13. *Id.* at 428.

14. *Id.* at 429.

15. *Id.* at 431.

16. Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1988 & Supp. IV 1992)).

17. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1988 & Supp. IV 1992)).

18. Singer, *supra* note 8, at 9.

19. 25 U.S.C. § 348.

20. 25 U.S.C. § 461.

21. J. Bart Wright, Note, *Tribes v. States: Zoning Indian Reservations*, 32 NAT. RESOURCES J. 195, 198 (1992).

22. 25 U.S.C. § 462.

the time the Indian Reorganization Act of 1934 was enacted, almost two-thirds of the reservation land in the United States had been allotted to individuals.[23]

Because of the Dawes Act and the Indian Reorganization Act of 1934, land that was once part of Indian reservations is now held in a variety of ways. First, various Indian tribes still own reservation land. Second, individual Indians own some land that is held in trust for them by the government. Third, individuals—both Indians and non-Indians—own land in fee simple within the boundaries of reservations. These varied forms of land ownership within Indian reservations create a checkerboard ownership of land—the crux of many problems in determining Indian sovereignty.[24] The difficulty of determining which sovereign power has authority over the various types of land occurs in many cases that involve Indians, and is often the determinative factor in a given case.[25]

2. Indian Country

The benchmark for allocating authority over Indians and Indian land is whether the land has been classified as "Indian country."[26] Although the concept of Indian country was originally used to determine jurisdiction in the criminal context,[27] courts have also used the concept to determine jurisdiction in civil matters including taxation.[28]

Though the definition of Indian country seems fairly clear, courts have extended the determination of Indian country beyond the words of the statute. The Tenth Circuit Court of Appeals has given further direction on what test to use to determine whether a given piece of property is Indian country. The bottom-line test is whether the land has been validly set aside by the federal government for the use of Indians under the super-

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23. Singer, *supra* note 8, at 9.

24. *Id.*

25. *See, e.g.*, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). *Brendale* was a zoning case involving whether the tribe or the county had the power to zone specific lands. The different rulings depended on where on the reservation the land was located. The case involved two parcels of land. One was within the "closed" area of the reservation, which is closed to the general public. The Court held that the tribe, not the county, had the authority to zone this land. The other parcel was within the "open" area of the reservation. The Court held that this land could be zoned by the county. *Id.*

26. Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

27. 18 U.S.C. § 1151 (1988). The statute reads:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id.

28. *Indian Country, U.S.A.*, 829 F.2d at 973.

intendence of the government.[29] The Tenth Circuit held that a formal designation of land as a "reservation" is not required for the land to be Indian country.[30] Nor is patented fee title ownership an obstacle to finding a given piece of land to be Indian country, regardless of whether the fee is owned by an Indian, the tribe, or a non-Indian.[31]

Despite some direction provided by the courts, problems still arise in determining what land is Indian country. Issues include whether the property is either a "dependent Indian community," or not Indian country at all. The Tenth Circuit held that to determine whether a given property is a dependent Indian community, the court must look at the nature of the area in question, the relationship of the inhabitants of the area to the Indian tribe and to the federal government, and the established practice of government agencies toward the area.[32] The Tenth Circuit left some room to the lower courts by holding that they could look at other relevant factors to determine whether a given property is a dependent Indian community but did not elaborate on what those other factors might be.[33] The court also held that a group of Indians present in one community does not, by itself, establish that area as a dependent Indian community.[34]

3. The Tax Cases

In an effort to develop consistent standards, courts have experimented with varied tests for resolving the inherent tension between shielding Indians from excessive interference and reserving some amount of regulatory control for the state. The three most common tests include: (1) the federal instrumentality test; (2) the infringement on sovereignty test; and (3) preemption analysis.[35]

The federal instrumentality test is based on a simple premise that because Indian tribes are instrumentalities of the federal government, they, like the government, are exempt from state taxation without express authority.[36] The infringement on sovereignty test balances the state's authority to tax Indians against infringement on the Indians' right to self-governance.[37] Under preemption analysis, Indians are exempt from state

29. Citizen Band Potawatome Indian Tribe of Okla. v. Oklahoma Tax Comm'n, 888 F.2d 1303, 1305-06 (10th Cir. 1989) (citing United States v. Pelican, 232 U.S. 442, 449 (1914)), *aff'd in part and rev'd in part*, 498 U.S. 505 (1991).

30. *Indian Country, U.S.A.*, 829 F.2d at 973.

31. *Id.* at 975. *See also* Hilderbrand v. Taylor, 327 F.2d 205, 207 (10th Cir. 1964) (holding that the words "notwithstanding the issue of any patent" in § 1151 refer to any patent, regardless of to whom it was issued).

32. United States v. Martinez, 442 F.2d 1022, 1023 (10th Cir. 1971) (citing Sandoval and United States v. Joseph, 94 U.S. 614 (1876)).

33. *Id.* at 1024.

34. *Id.*

35. Whitson, *supra* note 7, at 105-19.

36. *Id.* at 105.

37. *Id.* at 106-07. This test provided more authority to the states to govern off-reservation activities than the "instrumentality" test, but this test was soon abandoned by the Court. *Id.*

taxation only when Congress has clearly stated such an intent.[38] The general rule of construction used by courts is that statutory ambiguities should be construed in favor of the Indians.[39] Courts continue to use variations of these tests.[40]

There are two presumptions made about state taxation of tribal activities. First, state taxation of tribal activities on reservations is invalid.[41] The second presumption is the converse: state taxation of tribal activities off the reservation is presumably valid.[42] The analysis of a given tax is not as simple as determining whether it taxes an on- or off-reservation activity, because the federal government has plenary authority over Indian affairs and may authorize state taxation on both tribes and individual Indians.[43] The United States Supreme Court recently held that without express congressional authority, a state cannot tax activities that are in Indian country.[44] This is because the aforementioned presumption applies not only to formal reservations, but to all Indian country.

There are some clear rules in the context of state taxation of Indian activities. A state can tax nontribal members with whom the tribe does business as long as the tax falls on the nonmember rather than on the tribe.[45] The state can also tax residents of the reservation who are not members of the tribe.[46] Regardless of whether the tribe also imposes a tax, there is no effect on, or preemption of, valid state taxation on nonmembers of the tribe.[47]

In the context of cigarette shops on reservations, the Supreme Court held that states cannot tax sales to tribal members.[48] Although the state can tax sales of cigarettes made by tribal smokeshops to nontribal members, states may encounter difficulties with tax revenue collection. The Court previously held that states may put minimal burdens on tribes to collect the taxes from nontribal members.[49] Despite the fact that individual tribe members have no specific immunity from lawsuit by the state, Indian tribes have immunity, and states cannot use their courts to collect such taxes.[50] The Court instead provided a list of alternative means of

38. *Id.* at 108. Preemption analysis was a creation of the Burger Court, now replaced by the infringement on sovereignty test.

39. *Id.*

40. *See, e.g.*, Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967 (10th Cir. 1987) (using both preemption analysis and the infringement on sovereignty tests to invalidate a state tax on Indian activities), *cert. denied*, 487 U.S. 1218 (1988).

41. Tunica-Biloxi Tribe v. Louisiana, 964 F.2d 1536, 1538 (5th Cir. 1992).

42. *Id.*

43. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985).

44. Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1992 (1993).

45. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989).

46. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980).

47. *Id.* at 158.

48. *Id.* at 160.

49. Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 483 (1976).

50. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991).

collection the state may use.[51] Controversy is the natural by-product of granting a right without a remedy.[52]

B. *Buzzard v. Oklahoma Tax Commission*[53]

1. Facts

In *Buzzard*, the State of Oklahoma taxed the sales of smokeshops owned and operated by the United Keetoowah Band of Cherokee Indians ("UKB").[54] The smokeshops were located on land purchased and owned in fee simple by the tribe. The land was subject to a restriction on alienation because the tribal charter prevented the tribe from conveying the land without the approval of the Secretary of the Interior.[55] The tribe sought an injunction to prohibit the state from enforcing its state tobacco taxing statute against the tribe.[56] Upholding the application of the statute, the trial court held that the restriction against alienation did not make the land involved fit within the definition of Indian country.[57]

2. Opinion

The court began its opinion by discussing the statute that originally defined Indian country.[58] The court then distinguished *United States v. McGowan*,[59] which found land to be an Indian colony because it had been set aside by the government for the use of Indians and because the government purchased the land for needy Indians.[60] This was not the case in *Buzzard*. The next step in the *Buzzard* court's analysis was a discussion of trust land. The court determined that when the government holds land in trust it holds title to the land and has thus acted to show its intent to exert jurisdiction over the land.[61] Although the government must act in order for UKB to sell the land in question, that fact does not, by itself, indicate that the government intended the land to be set aside for the tribe.

The court next considered the effects of holding the land to be Indian country.[62] The court stated that if the land were Indian country, it

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51. *Id.* The suggested alternatives include: collection of the tax from cigarette wholesalers, seizing unstamped cigarettes off the reservation, and entering into agreements with the tribe to adopt a system for collecting the tax. *Id.*

52. *See* Cook, *supra* note 11.

53. 992 F.2d 1073 (10th Cir.), *cert. denied*, 114 S. Ct. 555 (1993).

54. *Id.* at 1075.

55. *Id.* The tribe also claimed that 25 U.S.C. § 177 (1988 & Supp. IV 1992) restricted the sale of their land without prior government approval. 25 U.S.C. § 177 prevents any conveyance of land from the Indians from being valid in the absence of a treaty. There is case law holding that the statute applies to all Indian land regardless of whether it is classified as Indian country. *See* Mohegan Tribe v. Connecticut, 638 F.2d 612, 621 (2d Cir.), *cert. denied*, 452 U.S. 968 (1981). The court in *Buzzard* did not reach this issue because of its disposition of the other issues in the case. *Buzzard*, 992 F.2d at 1077.

56. *Buzzard*, 992 F.2d at 1075.

57. *Id.*

58. 18 U.S.C. § 1151. For text of statute see *supra* note 27.

59. 302 U.S. 535 (1938).

60. *Buzzard*, 992 F.2d at 1076.

61. *Id.*

62. *Id.*

would mean that any land UKB purchased would be Indian country, forcing the federal government to assert criminal and civil jurisdiction over that land. The court further held that nothing in the case law allowed Indian tribes the unilateral power to create Indian country.[63] The court concluded that the land in question was not Indian country despite the restraint on alienation.[64] By finding that the land was not Indian country, the court upheld Oklahoma's power to tax the smokeshops.

C. *Analysis*

The analysis of whether property is Indian country is fact specific and should take into account the current climate and situation of Indian tribes.[65] Courts should consider the purposes behind reserving jurisdiction over Indian country to the tribes or the federal government. One purpose beneficial to the tribes is preservation of important tribal attributes, including domestic relations, economic development, and tribal customs.[66]

Important issues arise when states tax the activities of Indian tribes. State taxation may impinge on the tribe's sovereignty. Additionally, tribal economies may depend on tax exemptions. Federal impingement on tribal sovereignty may violate the federal policy of fostering Indian development. Adding state taxation to an existing federal taxation scheme leads to double taxation where both the tribe and the state tax the same sale.[67]

Prohibiting state taxation of Indian tribes may grant an unfair competitive advantage to Indians.[68] Refusing states the right to tax Indians denies the states valuable revenues,[69] and discriminates in that it treats one group of United States citizens differently due to their heritage.[70]

Given that the tax levied in *Buzzard* did not impinge the integrity of the tribe, the Tenth Circuit correctly held that the land was not Indian country and was, therefore, subject to taxation by the state. The land simply did not fit any of the defined types of property considered Indian country.[71]

The effect of *Buzzard* is that a tribe cannot expand its tax-exempt boundaries by purchasing land in fee simple and adding it to Indian country. The ruling does not affect the tax-exempt status of property within the definition of Indian country. Any sales made to tribal members on those lands are not subject to state taxation. Since it is not the policy of federal Indian law to authorize Indian tribes to market tax exemptions,[72]

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63. *Id.* at 1077.
64. *Id.*
65. *McGowan*, 302 U.S. at 537-38.
66. Wright, *supra* note 21, at 199.
67. Whitson, *supra* note 7, at 125-26.
68. *Id.* at 127-28.
69. *Id.* at 129.
70. *Id.* at 129-30.
71. *See supra* notes 26-34 and accompanying text.
72. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980).

but to foster development, allowing the tax does not contradict federal policy.

Additionally, this decision does not directly impact the economic development of the tribes. If the land purchased by the tribe is considered Indian country, the effect would be that all sales except those to tribal members would be taxable. The only difference is that, due to this decision, the state may tax sales to members of the tribe.

Because the Tenth Circuit did not recognize the land at issue as Indian Country, the tribe may not tax activities on the land. Thus, if the tribe's economy depends on tax revenues generated on land obtained by purchase, there will be a negative impact. The *Buzzard* decision does not offend Indian development policy because the tribe may locate the store on land considered Indian country, thereby exempting tribal members from taxes.

It should also be noted that the state supports the land that the Indians purchased in fee simple, just as it does any other landowner's land, by providing services such as road maintenance. It would be unfair to deny the state the ability to collect revenues to pay for the support of Indian-owned land. Further, a holding contrary to *Buzzard* would be discriminatory by allowing the Indians a benefit not given to others when their land is no different than that of any other landowner.

D. *Conclusion*

The Tenth Circuit's decision in *Buzzard* comports with prior case law on Indian country and does not substantially detriment the Indians. While the United States should foster economic development by Indian tribes, it should not do so by discriminating in favor of the tribes at the expense of the states.

II. USING EMPLOYMENT LAW PRINCIPLES IN HOUSING

In *Honce v. Vigil*,[73] the Tenth Circuit Court of Appeals applied employment law principles to find that a landlord did not sexually harass a tenant.[74] In doing so, the Tenth Circuit joined relatively few courts in creating specific rules for sexual harassment in the field of housing law.[75] This section discusses the law applicable to sexual harassment in the fields of employment law and housing law, as well as the liability of the harasser's employer or the owner of the property.

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73. 1 F.3d 1085 (10th Cir. 1993).

74. *Id.* at 1090.

75. *See infra* notes 106-21 and accompanying text.

A. *Background*

1. Employment Cases

There is no longer any question that sexual harassment is actionable sexual discrimination.[76] There are two types of sexual harassment cases, "quid pro quo" and "hostile environment."[77] Problems arise when attempting to define what conduct rises to the level of sexual harassment.

As a threshold matter, to constitute harassment, the conduct must be that which would not occur but for the sex of the employee.[78] In a hostile environment claim, the conduct must also be sufficiently severe so as to alter the conditions of employment and create an abusive work environment.[79] To determine whether an illegal condition has been created, courts examine the "totality of the circumstances."[80] It is not enough to show casual or isolated manifestations of discrimination.[81]

Whether a hostile environment exists is very fact specific. The United States Supreme Court recently provided a list of factors to determine whether an environment is hostile.[82] The factors include: "the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[83] The alleged harm that the conduct has on an employee's psychological state is one relevant factor, but is not dispositive in determining whether a hostile environment exists.[84]

Two other general rules are important in sexual harassment claims in employment cases. First, in hostile environment cases, the concern is with the general work atmosphere and, therefore, conduct directed at another person that affects the atmosphere is relevant to the case.[85] Second, for either type of sexual harassment claim, it is not necessary to show an economic or tangible injury in order to recover.[86] The harm that must be shown is that a reasonable person perceives the environment as hostile.[87]

In *Henson v. City of Dundee*,[88] the Eleventh Circuit found a valid sexual harassment cause of action based on a hostile work environment when the plaintiff was subjected to demeaning sexual inquiries and vulgarities during her employment, as well as to repeated requests from a supervisor to engage in sexual activities.[89] The supervisor also engaged in other activi-

76. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

77. 29 C.F.R. § 1604.11 (1993). For further explanation of hostile environment claims see *infra* text accompanying notes 78-88. For further explanation of quid pro quo cases see *infra* text accompanying notes 92-100.

78. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987).

79. *Meritor*, 477 U.S. at 67.

80. *Hicks*, 833 F.2d at 1413.

81. *Id.* at 1414.

82. Harris v. Forklift Sys., 114 S. Ct. 367, 371 (1993).

83. *Id.*

84. *Id.*

85. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987).

86. *Meritor*, 477 U.S. at 64.

87. *Harris*, 114 S. Ct. at 370.

88. 682 F.2d 897 (11th Cir. 1982).

89. *Id.* at 899.

ties such as following the employee to the rest room, exposing himself, fondling the employee in front of other employees, and even sexually assaulting the employee.[90] The Supreme Court, in *Meritor Savings Bank, FSB v. Vinson*,[91] found a valid claim of sexual harassment based on a hostile environment when the employee voluntarily engaged in sexual relations with a supervisor because she feared losing her job.

In addition to claims of sexual harassment based on the creation of a hostile environment, there are also claims based on a quid pro quo request. Quid pro quo involves an employer asking an employee to engage in sexual activity in exchange for certain benefits of employment, such as obtaining a job or a promotion, or in exchange for the continuation of benefits.[92] The test for whether a sexual request to an employee is discriminatory is whether the request was unwelcome to the employee, not whether the employee voluntarily engaged in sexual activity.[93]

a. *Proof Elements*

In a sexual harassment case based on hostile environment, the plaintiff must allege and prove three elements.[94] The first element requires the plaintiff to be a member of a protected class. This simply requires a stipulation that the employee is a man or a woman.[95] The second element is that the employee was subjected to unwelcome conduct constituting sexual harassment.[96] The third element is that the harassment was based upon sex.[97] The harassment cannot be directed at both women and men because in such a case, the harassment is not based upon gender.[98]

The elements necessary to prove a quid pro quo sexual harassment claim are similar to those for hostile environment claims. The difference is the addition of a fourth element: the acceptance or rejection of the harassment must be an express or implied condition to the receipt of a job benefit, or the cause of a denial of a job benefit.[99]

b. *Procedure*

The procedure in a sexual harassment case is somewhat confusing. The plaintiff carries the initial burden of establishing a prima facie discrimination case.[100] If the plaintiff successfully establishes a prima facie case, the burden moves to the defendant to articulate some legitimate, nondiscriminatory reason for the alleged discriminatory act.[101] The plain-

90. *Id.*
91. 447 U.S. 57, 60 (1986).
92. *Cf.* 29 C.F.R. § 1604.11 (1993).
93. *Meritor*, 447 U.S. at 68.
94. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 904.
99. *Id.* at 909.
100. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
101. *Id.*

tiff may attempt to prove that the defendant's articulated reasons are a cover up, or pretext, for a discriminatory reason.[102] Confusion arises over the court's role after the defendant has offered explanatory reasons. At that point, the court must determine whether the action was discriminatory, not whether the defendant's given reason is truthful.[103] The Supreme Court held it is not enough to disbelieve the defendant. The existence of discrimination is a question of fact like any other. To find that sexual harassment occurred, the plaintiff's explanation of intentional discrimination must be more credible than the employer's explanation.[104]

2. Housing Cases

Attention to sexual harassment in the context of housing is relatively recent.[105] The Fair Housing Act[106] prohibits discrimination in housing based on sex.[107] The text of the Fair Housing Act is similar to the Equal Employment Opportunity Act of 1972.[108]

Very few courts have ruled on the issue of sexual harassment in housing. This is unfortunate in light of the pervasiveness of such conduct.[109] The few cases, however, ruling on this issue offer guidance for defining sexual harassment in the housing context.

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102. *Id.* at 805.

103. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2753 (1993) (5-4 decision) (Souter, J., dissenting). The dissent argued that the majority increased the breadth of the evidence needed by a plaintiff. By requiring the plaintiff to be believed in order to prevail, the dissent believed that the majority was requiring plaintiffs to disprove reasons for the firing never articulated by the defendant. Before this decision, a plaintiff could prevail based solely on a prima facie case coupled with disbelief of the defendant's articulated reasons for firing the plaintiff. *Id.* at 2753.

104. *Id.* at 2754.

105. Regina Cahan, Comment, *Home Is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061 (providing a survey of the limited case law in the area and a statistical analysis of the incidence of sexual harassment in housing).

106. Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1988 & Supp. IV 1992). This Act is also referred to as Title VIII of the Civil Rights Act of 1968.

107. *Id.* § 3604. The Fair Housing Act, in relevant part, reads:

> [I]t shall be unlawful
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . sex . . . .
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . sex . . . .

Id. It is further prohibited to:

> [C]oerce, intimidate, threaten, or interfere with any person in the exercise or enjoyments of, or on account of his having exercised or enjoyed, . . . any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

Id. § 3617.

108. 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. IV 1992). The act makes it unlawful to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." *Id.* The Equal Employment Opportunity Act of 1972 is part of Title VII of the Civil Rights Act of 1968 as amended.

109. *See* Cahan, *supra* note 105, at 1066. Of 87 housing centers that gave complete answers to Cahan's survey, 57 centers (65%) reported that they received complaints of sexual harassment. *Id.*

In *New York v. Merlino*,[110] the court implied that sexual harassment is actionable under the Fair Housing Act.[111] The court relied on *Meritor Savings Bank, FSB v. Vinson*,[112] but did not explicitly adopt employment sexual harassment law to govern sexual harassment in the housing context because there was a question of whether the statute of limitations barred the claim.[113]

Shellhammer v. Lewallen was the first case to apply sexual harassment concepts in the housing context.[114] The United States District Court for the Western District of Ohio held that the sexual harassment doctrine developed in employment law applies to housing claims.[115] *Shellhammer* recognized both hostile environment and quid pro quo (conditioned tenancy) claims. The court held that a hostile environment claim requires the plaintiff to show "pervasive and persistent" offensive conduct by the landlord.[116] If the plaintiff establishes persistent conduct, its effect, according to the court, should be examined under a subjective standard.[117] The court reasoned that liability should not be defeated solely because a reasonable person might have reacted differently to the landlord's conduct than did the plaintiff.[118]

In *Grieger v. Sheets*,[119] the court recognized both hostile environment claims and quid pro quo claims as actionable sexual harassment under the Fair Housing Act. As in employment cases, a sexual harassment claim under the Fair Housing Act does not have to include a tangible injury. Additionally, there need not be a loss of housing in order to support such a claim.[120]

To support a sexual harassment claim based on hostile environment, the plaintiff must show extensive sexual harassment that made his or her tenancy burdensome and significantly less desirable than it would have been in the absence of the harassment.[121] Furthermore, conduct that is not of a strictly sexual nature can support a sexual harassment claim if the conduct would not have occurred but for the gender of the harassee.[122]

To establish a quid pro quo or conditioned tenancy claim, a plaintiff must show either: (1) that the landlord conditioned the terms, conditions,

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110. 694 F. Supp. 1101 (S.D.N.Y. 1988). The plaintiffs alleged that Merlino had a pattern of sexual harassment, unwanted touching, and propositions directed toward female customers for housing.

111. *Id.* at 1104.

112. 477 U.S. 57, 64 (1986). *See also supra* text accompanying notes 76-79.

113. *Merlino*, 694 F. Supp. at 1102.

114. 1 Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,472 (W.D. Ohio, Nov. 22, 1983).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. No. 87-C-6567, 1989 WL 38707, at *2 (N.D. Ill. 1989). In *Grieger* the landlord stopped making needed repairs to the property because his sexual advances were rejected. *Id.* at *1.

120. *Merlino*, 694 F. Supp. at 1104.

121. *Grieger*, 1989 WL 38707 at *2.

122. *Id.* at *3.

or privileges of housing on the plaintiff's submission to sexual requests;[123] or, (2) that the landlord deprived the plaintiff of terms, conditions, or privileges of tenancy because the plaintiff did not submit to sexual requests.[124] The plaintiff need not show that repeated sexual requests occurred.[125] It is explicitly illegal to condition the granting of housing services based on whether the person submits to sexual requests.[126]

Courts have adopted many sexual harassment principles from employment law and applied them in the housing context. Due to the similarity between Title VI (the Equal Employment Opportunity Act), and Title VIII (the Fair Housing Act) of the Civil Rights Act of 1968, this is logical. Not only is the language very similar,[127] but the two statutes share the same purpose: ending discrimination.[128]

3. Third Party Liability

The liability of third parties in sexual harassment claims in the employment context is uncertain. It is clear, however, that employers are not strictly liable for acts of sexual harassment committed by their employees.[129] Rather, courts apply agency principles to determine the liability of employers.[130] The problem with applying agency principles is that agency cases are very fact specific and consequently no clear rule addressing this issue emerges.

Courts have also applied agency law to determine liability in the housing context.[131] However, in the housing context, the principal is, in most cases, liable for discriminatory treatment of customers by his agent because the agent is usually within the scope of his or her employment during the time the agent has contact with the harassed person.[132] While situations may exist in the housing context where the agent acts outside of the scope of employment, it appears that they tend to occur less frequently than in the employment context.

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123. *Id.*

124. *Id.*

125. Shellhammer v. Lewallen, 1 Fair Hous.-Fair Lending Rep. ¶ 15,472 (W.D. Ohio, Nov. 22, 1983).

126. 24 C.F.R. § 100.65(b)(5) (1993). The relevant part of the regulation reads: "Prohibited actions under this section include, but are not limited to: . . . (5) Denying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors." *Id.*

127. *See supra* notes 106-08.

128. *See, e.g., Merlino*, 694 F. Supp. at 1104 (recognizing that the two statutes are "part of a coordinated scheme" to end discrimination).

129. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417 (10th Cir. 1987) (citing *Meritor*, 477 U.S. at 72).

130. *Meritor*, 477 U.S. at 72.

131. Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974) (FHA case based on racial discrimination).

132. *Id.* at 741.

B. *Honce v. Vigil*[133]

1. Facts

In August 1990, Ms. Honce arranged to rent a lot in a mobile home park owned and operated by Mr. Vigil. Before Ms. Honce took possession of the lot Mr. Vigil asked her out socially on three occasions.[134] Mr. Vigil asked her to accompany him to a religious seminar, the state fair, and to visit some property. Each time Ms. Honce refused.[135] Before Ms. Honce moved in, Mr. Vigil asked when she would go out with him. Ms. Honce replied that she did not wish to go out with him at all. Both parties agreed that Mr. Vigil never used profanity or made sexual advances or requests.[136]

After Ms. Honce moved her trailer to the lot, she and Mr. Vigil had several disputes. One dispute involved a plumbing problem for which Mr. Vigil refused to pay because the problem was not in his sewer line.[137] Another confrontation involved paving stones that Mr. Vigil supplied to all the tenants, and which Ms. Honce did not want to use.[138]

The principal dispute between Mr. Vigil and Ms. Honce involved a fence that Ms. Honce was building around a dog run. Mr. Vigil came upon workmen building the fence and using concrete. Mr. Vigil had a policy that forbade the use of concrete, and he preferred that his tenants use fencing materials supplied by him.[139] The fence incident led to a shouting match between Ms. Honce and Mr. Vigil during which he threatened to evict her. Immediately thereafter, Ms. Honce went to the sheriff for advice and left the trailer park the next day.[140]

Ms. Honce brought an action against Mr. Vigil, claiming violations of the Fair Housing Act based on sexual harassment and breach of the covenant of quiet enjoyment.[141] At trial, other people from the trailer park testified that they had similar problems with Mr. Vigil. One couple testified that they also had problems involving a dog run and an argument over paving stones. Additionally, they testified that Mr. Vigil yelled at them because they did not attend a Bible study class with him. These tenants also moved out.[142]

After the presentation of her case, the United States District Court for the District of New Mexico granted judgment as a matter of law for Mr. Vigil on all claims. Ms. Honce appealed.[143]

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133. 1 F.3d 1085 (10th Cir. 1993).
134. *Id.* at 1087.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1088.
143. *Id.* at 1087.

2. Majority Opinion

The Tenth Circuit began its opinion by expressly adopting the principles of employment discrimination in order to decide the housing claim.[144] Citing *St. Mary's Honor Center v. Hicks*,[145] the court held that Ms. Honce failed to prove a prima facie case of disparate treatment because she did not prove that Mr. Vigil treated women differently than men.[146]

The court then addressed the issue of quid pro quo sexual harassment. The court found that Ms. Honce did not have a quid pro quo claim because Mr. Vigil never made any threat based upon sexual favors. Although Ms. Honce contended that the threat was implicit, she did not provide any evidence of a connection between Mr. Vigil's actions and her rejection of his social advances.[147]

The court next turned to Ms. Honce's claim of sexual harassment based on a hostile housing environment. The court used the *Meritor* standards for hostile environment[148] to determine what constitutes a hostile environment in the housing context.[149] The court determined that Ms. Honce did not have a sexual harassment claim based on a hostile housing environment because the offensive behavior did not include sexual remarks, requests for sexual favors, physical touching, or threats of violence. Additionally, the court found that Mr. Vigil treated tenants of both sexes alike.[150] In affirming the district court's dismissal, the Tenth Circuit concluded that Ms. Honce did not state claims sufficient to allow a reasonable jury to find for her.[151]

3. Dissenting Opinion

Judge Seymour dissented from the majority's findings, disagreeing with the majority's holding that Ms. Honce did not offer sufficient evidence to raise a jury question on her claims.[152] Although she agreed that employment discrimination principles should be used to assess a discrimination claim under the Fair Housing Act, she argued the majority misapplied the law.[153]

Judge Seymour based her dissent on an underlying characterization of the facts that differed from the majority's. On the disparate treatment claim, she found that the evidence on the treatment of Ms. Honce's neighbors, as well as Mr. Vigil's assertion that he was the victim of a conspiracy by women, justified trying the claim.[154] As to the quid pro quo claim,

144. *Id.* at 1088.
145. 113 S. Ct. 2742 (1993).
146. *Honce*, 1 F.3d at 1089.
147. *Id.*
148. *Meritor*, 477 U.S. at 67-70.
149. *Honce*, 1 F.3d at 1090.
150. *Id.*
151. *Id.* at 1091. The court also addressed Ms. Honce's breach of the covenant of quiet enjoyment claim, which is not discussed here. *See id.* at 1090-91.
152. *Id.* at 1092 (Seymour, J., dissenting).
153. *Id.*
154. *Id.* at 1092-93.

Judge Seymour held that the timing of Mr. Vigil's actions in asking for a date raised a triable claim. Because Ms. Honce testified that Mr. Vigil's treatment of her changed after she refused his requests for a date, Judge Seymour argued that there was a valid jury question as to whether Mr. Vigil's eviction threat was in retaliation for Ms. Honce's refusal to accept his invitations.[155]

Judge Seymour's strongest criticism involved the claim of a hostile housing environment. Citing *Hicks v. Gates Rubber Co.*,[156] she suggested that the harassment itself need not be sexual in nature. Rather, the test is whether it would have occurred regardless of the sex of the harassee. Judge Seymour reasoned that Mr. Vigil's conspiracy belief and the testimony of the neighbors were evidence that the harassment might not have occurred if Ms. Honce were male. In Judge Seymour's opinion, this gave rise to a valid claim to be submitted to the jury.

C. *Analysis*

Sexual harassment in housing disproportionately affects poor women who cannot escape the harassment.[157] Courts should treat sexual harassment as seriously as other forms of discrimination. In the employment context there may be an opportunity to escape the harassment, perhaps by requesting a transfer. In the housing context, however, escape may be more difficult, especially for the poor, due to the inherent problems of finding a new place to live.

The use of employment law principles to address sexual harassment in housing is sound because employment law provides proven standards and rules. Additionally, employment and housing law share similar statutory schemes. Differences, however, exist between the housing and employment environments, including the relative ease of escaping an offensive situation and the ability to use a formal complaint process to stop the harassment. Courts should consider these characteristics when developing the law of sexual harassment in housing. Simple application of employment law doctrines to housing law will not result in the best law. Courts should apply reasonable doctrines in the housing context, and develop new standards where employment law offers none.

There are two basic difficulties in defining sexual harassment. First, a behavior might be sexual harassment or socially acceptable behavior depending on the circumstances. Second, there is a divergence between male and female perceptions (and between different members of the same gender) as to what constitutes sexual harassment.[158] Since the United States Supreme Court recently suggested that the reasonable per-

155. *Id.* at 1094.

156. 833 F.2d 1406 (10th Cir. 1987).

157. Cahan, *supra* note 105, at 1067. Obstacles include the costs of finding new housing and the possibility of being blacklisted from housing that they can afford.

158. *See* Nancy Brown, Note, Meritor Savings Bank v. Vinson: *Clarifying the Standards of Hostile Working Environment Sexual Harassment*, 25 HOUS. L. REV. 441, 449 (1988).

son standard is correct to determine whether conduct is harassment,[159] what is reasonable in an employment context may not be reasonable in the housing context.

Unlike typical employee complaint procedures, no grievance procedure exists in the housing context. A large number of harassers could be unintentionally and unknowingly harassing people and still be held liable for that harassment, without a chance to modify their behavior. While this is not a concern in egregious cases, it does neither the law nor society any good to have the courts serve as the first source of relief. Legislatures should develop procedures whereby a victim could deal with the supervisor of an alleged harasser to solve the problem outside of the court system. If this is not possible, for example, if the harasser owns the property, or the process fails, then the victim could resort to the courts.

The other major concern with adopting employment principles to housing involves the use of agency principles to create vicarious liability. Under the Restatement (Second) of Agency, a renter or seller of real estate is almost always within the definition of scope of employment.[160] The principal is subject to liability for the agent's behavior.[161] The problem occurs when the renter or seller works for a company and not for the owner of the property. In that case, liability could pass to the owner when the rental agent is not within the owner's control, but is controlled by another party, who is in turn controlled by the owners.

D. *Conclusion*

The use of the sexual harassment employment law principles in housing law is valid. Courts and regulatory agencies should further develop the law in this area. Problems unique in the housing context should be scrutinized.

III. Adverse Possession of Roads by the Government

In *Board of County Commissioners for Garfield County v. W.H.I., Inc.*,[162] the Tenth Circuit held that the statute of limitations for adverse possession of a road began to run when the road was incorrectly declared public. The holding allowed the federal government to successfully claim the road as a public highway. This section examines adverse possession and the Tenth Circuit's decision, and suggests a separate doctrine of law that would have allowed the road to be obtained for public use without waiting twenty years.

A. *Background*

This section discusses the Colorado law of adverse position at issue in *W.H.I.* Colorado statutory law provides that a road over private land may

159. Harris v. Forklift Sys., 114 S. Ct. 367, 370 (1993).
160. Restatement (Second) of Agency § 228 (1958).
161. *Id.* § 219.
162. 992 F.2d 1061 (10th Cir. 1993).

be adversely possessed by the public.[163] Colorado case law further refines the doctrine of adverse possession as it applies to roads.

The general rule is that when a property owner constructs a passage over his property at his own expense, the use of the passage by people other than the owner is presumed permissive.[164] A permissive use continues to be permissive until the use is changed, with the knowledge of the owner, to an adverse use.[165] If the use remains permissive, the lapse of time does not confer title by adverse possession to the user.[166]

In order to prove adverse possession, the use must be actual, adverse to the interests of the owner, hostile, and under a claim of right.[167] The use also must be open, notorious, and exclusive, and must continue for the statutory period.[168] The statutory period does not begin to run until the adverse claimant creates an exclusive right in herself by a clear, positive, and unequivocal act.[169] The adverse possessor may also fatally end her adverse possession claim by acknowledging the title of the owner during the adverse possession period.[170]

The case law interpreting Colorado Revised Statute § 43-2-201(1)(c) retains the common law requirements of an adverse use, claim of right, and a use continuing for the statutory period.[171] The case law, however, adds a requirement that the landowner had actual or implied knowledge of the public's use of the road during the statutory period, and the owner could not have objected to that use.[172] A party relying on section 43-2-201(1)(c) to prove adverse possession is aided by a presumption that the use is adverse when the party shows that the use was for the prescribed period of time.[173] However, the placement of a gate across the road to obstruct free travel ordinarily makes the public use permissive.[174] The permissiveness is not conclusive, however, and is fact specific.[175]

Recent case law has added a few variables to the adverse possession equation. An unexplained use of an owner-constructed easement for the statutory period is presumed to be under a claim of right and, therefore,

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163. COLO. REV. STAT. § 43-2-201(1)(c) (1993). The statute provides:

> (1) The following are declared to be public highways:
>
> (c) All roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years; . . .

Id.

164. Allen v. First Nat'l Bank of Arvada, 208 P.2d 935, 940 (Colo. 1949).

165. *Id.*

166. Segelke v. Atkins, 357 P.2d 636, 638 (Colo. 1960).

167. *Id.* at 637.

168. *Id.* In Colorado the statutory period for road easements is twenty years. COLO. REV. STAT. § 43-2-201(1)(c) (1993).

169. Lovejoy v. School Dist. No. 46 of Sedgwick County, 269 P.2d 1067, 1069 (Colo. 1954).

170. *Segelke*, 357 P.2d at 638.

171. Board of County Comm'rs of the County of Saguache v. Flickinger, 687 P.2d 975, 980 (Colo. 1984).

172. *Id.*

173. *Id.*

174. *Id.* at 981.

175. *Id.*

adverse.[176] This rule does not apply when the land at issue is vacant, unenclosed, and unoccupied.[177]

B. *Board of County Commissioners for Garfield County v. W.H.I., Inc.*[178]

1. Facts

Garfield County claimed that the public held a right of way established by adverse possession over the company's land. The road in question crossed land owned by private landowners and the United States.[179] The county originally brought suit in the Garfield County District Court seeking declaratory and injunctive relief.[180] As a landowner, the United States was originally a defendant in this action. However, the United States believed that its interests were the same as those of the county and removed the case to the federal courts, realigning itself as a plaintiff.[181] The United States and Garfield County, as co-plaintiffs, sought a declaration that the road was a public highway and requested an injunction to restrain the private landowners from obstructing the road.[182] The United States District Court for the District of Colorado dismissed the suit, holding that the United States and Garfield County failed to show a right to relief. The United States appealed.[183]

In 1929, the then owners of the defendant's land tried to have the county declare the road in question a public road. The landowners at that time petitioned the county for that purpose but did not correctly fill out the petition.[184] Disregarding the deficiency, the county passed a resolution, without objection by the owners, declaring the road a public highway with the width extending twenty feet to either side of an unknown center line.[185]

In 1959, the then owner of the land in question, Buster Brown, requested that the county abandon the road. This request was refused and Brown erected a gate across the roadway. The owners of the land have obstructed the road since that time.[186]

At trial, the county presented evidence that the road was used by the public to access potato cellars, hike, hunt and fish, and collect mistletoe. There was also testimony that the road had historically been a logging

176. Durbin v. Bonanza Corp., 716 P.2d 1124, 1129 (Colo. Ct. App. 1986).
177. *Id.*
178. 992 F.2d 1061 (10th Cir. 1993).
179. *Id.* at 1062.
180. *Id.*
181. *Id.* at 1063. The United States had the same interest as the county because the road led to national forest service land. As a result the United States removed the case to federal court and realigned as a plaintiff, which made standing an issue. The appellate court held that the United States had standing because the public would suffer injury if the road were determined to be private. *Id.* at 1062-64.
182. *Id.* at 1063.
183. *Id.*
184. *Id.* at 1065.
185. *Id.*
186. *Id.*

road.[187] One witness, Mr. Jordan, testified that the land was not vacant because there were homesteaders and a sawmill in the area. Mr. Jordan also thought that there might have been fences in the area, but could not be sure because, "they weren't important to me."[188]

2. Opinion

The court cited section 43-2-201(1)(c) of the Colorado Revised Statutes, and found there was evidence that the public used the roadway from the time it was built through the date of the obstruction.[189] The landowners claimed the land was vacant, and thus the use was permissive, not adverse. The court rejected that claim on the basis that the resolution by the Board of County Commissioners in 1929 put the owners on notice of the adverse claim; thus, the statutory period started in 1929.[190] The court so held despite the fact that the petition asking for the resolution was incomplete and did not show the course of the roadway.[191] The court also noted that there was evidence that the land was not vacant during the twenty-year period.[192]

Next, the court addressed the fact that the exact path of the road is not definite. The court stated that the road generally followed a wagon road depicted in a 1893 plat. Further, the court held that the path of a road may be altered without destroying the right of way. Additionally, the landowners acquiesced in the use by the public even though the road changed course.[193] The court concluded by holding that the public use may have been adverse and remanded the case for a full hearing, directing the district court to order the United States to undertake a survey to determine its exact path.

C. *Analysis*

The court correctly held that the use of the road by the public may have been adverse, since all of the elements of adverse possession were met.[194] The conclusion is further bolstered by the finding in *Board of County Commissioners of the County of Saguache v. Flickinger.*[195] In *Flickinger,* the Colorado Supreme Court held that the county initially asserted the public character of a road at the time it incorporated the road into the county road system and that the statutory period for adverse possession began to run at that time.[196] Further, it was not necessary for the court to address the issue of the gate since the statutory period had run by the time the gate was erected.

187. *Id.*
188. *Id.* at 1066.
189. *Id.* at 1065.
190. *Id.* at 1066.
191. *Id.* at 1065.
192. *Id.* at 1066.
193. *Id.* at 1067.
194. *See supra* notes 162-77 and accompanying text.
195. 687 P.2d 975, 980 (Colo. 1984).
196. *Id.*

The owners of the land that the road crossed were not unfairly hurt by the decision reached by the court because the statute requires the owner to prohibit public use in order to maintain private use.[197] The state has the power to condition ownership of land on the owner undertaking such a minimal responsibility.[198] In addition, the owners had constructive knowledge of the public use even though the recording document was defective.

Although the doctrine of adverse possession allowed the county to prevail in its claim, it only succeeded by virtue of the passage of at least twenty years. There is another doctrine, the doctrine of dedication, that could have been applied to keep the roadway public without the passage of time.[199] Basically, a dedication involves the landowner voluntarily allowing her land to be used by the public. The doctrine of dedication could have been used successfully in *W.H.I.*, but was not pleaded. The doctrine of dedication would have permitted the county to prevail without waiting twenty years. Usually, courts have used the doctrine of dedication when the dedicated land involved commerce.[200] The reasoning is that dedication involves land becoming public and commerce is the most public activity.[201] In *W.H.I.*, the logging use was commerce, as well as hunting, fishing, and access to the potato cellar if done commercially.[202]

Dedication is the correct doctrine to apply to highways, although courts have historically applied prescription (adverse possession).[203] The advantage of dedication, in a context similar to *W.H.I.*, is that it does not depend on the passage of time.[204] Dedication may be applied when it is satisfactorily proven that the owner of the land intended to set it aside for public use and the public has accepted the land.[205] To have a dedication, a clear manifestation of the landowner's intent to dedicate the land must be shown.[206] When the dedication is to the public, it does not depend on the existence of a specific grantee; the public suffices, and actual acceptance is not required but may be implied.[207] After a dedication, the grantor is precluded from asserting an exclusive right over the land for as long as it remains in public use.[208]

In *W.H.I.* there was a dedication because the court found that the landowners intended to set the road aside for the public use in 1929. The dedication was complete even though the petition making the dedication

197. *Id.* at 982.
198. *Id.* at 984.
199. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 724 (1986).
200. *Id.* at 772.
201. *Id.* at 774.
202. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385 (1948) (some forms of commercial fishing given the protection of the commerce clause).
203. *See* JOSEPH K. ANGELL & THOMAS DURFEE, A TREATISE ON THE LAW OF HIGHWAYS § 131 (3d ed.) (1886).
204. Starr v. People, 30 P. 64, 66 (Colo. 1892).
205. *Id.* at 65.
206. ANGELL & DURFEE, *supra* note 203, § 142.
207. President of Cincinnati v. Lessee of White, 31 U.S. 431, 436 (1832).
208. *Id.*

was flawed. Because it was a dedication to the public it did not matter that there was not a grantee. If dedication had been used, the issue of when the statute of limitations began could have been avoided, allowing the county to avoid a substantial hurdle at trial. Furthermore, because a grantor who dedicated land to the public has no right over that land as long as it is used by the public, the roadway could have been used in perpetuity.

D. *Conclusion*

While the doctrine of adverse possession was applied correctly in *W.H.I.*, there was a better doctrine available that was not used. By using the doctrine of dedication, the government could have avoided addressing when the statute of limitations began to run. This would have given the public the use of the road and prevented any possibility of not having that use.

CONCLUSION

During the survey period the Tenth Circuit addressed a variety of issues that impact on real property. In *Buzzard v. Oklahoma Tax Commission*,[209] the court added to their long line of cases defining when a state can tax the activities of Indian tribes. In *Honce v. Vigil*,[210] the court took an important step toward defining discrimination based on sex in the context of housing. Hopefully, future precedent will take into account developed law from the employment context and considerations unique to housing. In *Board of County Commissioners for Garfield County v. W.H.I., Inc.*,[211] the court correctly applied doctrine from state law to find that a road was obtained by the public using adverse possession. Although the doctrine of dedication would have provided a quicker, surer way to accomplish the same result, the parties failed to plead the doctrine.

David G. Thatcher

209. 992 F.2d 1073 (10th Cir.), *cert. denied*, 114 S. Ct. 555 (1993).
210. 1 F.3d 1085 (10th Cir. 1993).
211. 992 F.2d 1061 (10th Cir. 1993).

TAXATION SURVEY

JAMES SERVEN*

INTRODUCTION

This Survey begins with a discussion of *United States v. McDermott.*[1] In *McDermott,* the Supreme Court reversed the Tenth Circuit Court of Appeals by allowing a federal tax lien priority over a judgment creditor's previously recorded lien on after-acquired property.

The Survey continues with detailed examinations of selected 1993 opinions of the Tenth Circuit Court of Appeals involving matters of federal tax law. In *Colorado National Bankshares, Inc. v. Commissioner,*[2] the court determined that a bank that purchases another bank may take amortization deductions for the cost allocable to the core deposit intangibles of the acquired bank. In *Denbo v. United States*[3] and *Muck v. United States,*[4] the court explored the applicability of the 100% penalty rule to employers who fail to pay over withholding taxes to the Internal Revenue Service. In *Litwin v. United States,*[5] the court explored the ability of a corporate shareholder-employee to take bad debt deductions for loans made to the corporation that subsequently become worthless.

The Survey concludes with a summary of other federal taxation decisions issued by the Tenth Circuit Court of Appeals during the survey period and a brief look into the annual host of tax protestor cases.

I. THE SUPREME COURT REVERSES THE TENTH CIRCUIT COURT OF APPEALS—FEDERAL TAX LIEN PRIMES JUDGMENT CREDITOR'S PREVIOUSLY RECORDED LIEN AS TO AFTER-ACQUIRED PROPERTY: *UNITED STATES V. MCDERMOTT*[6]

A. *Background*

The Internal Revenue Code of 1986 grants a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to any person liable to pay any tax who neglects or refuses to pay.[7] The rule under the Code is that the general federal tax

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1. 113 S. Ct. 1526 (1993).
2. 984 F.2d 383 (10th Cir. 1993).
3. 988 F.2d 1029 (10th Cir. 1993).
4. 3 F.3d 1378 (10th Cir. 1993).
5. 983 F.2d 997 (10th Cir. 1993).
6. 113 S. Ct. 1526 (1993).
7. I.R.C. § 6321 (1988). The lien secures the amount of the deficiency, plus any interest, additional amount, addition to tax, assessable penalty, and costs. *Id.*

lien arises at the time the assessment is made[8] and continues until the liability for the amount is satisfied or becomes unenforceable by reason of lapse of time.[9]

The priority afforded competing federal tax liens and state-created liens is a matter of federal law.[10] Secured creditors will generally have priority over the federal tax lien if their state-created liens were fully perfected and choate before the federal tax lien arose.[11] Judgment lien creditors, however, are afforded special treatment under the Code. The Code provides that the general federal tax lien is not valid against any judgment lien creditor until the Internal Revenue Service ("IRS") files a notice meeting the requirements of the Code.[12]

Judgment lien creditors are therefore among certain creditors who may have priority over federal tax liens, if their liens are fully perfected *and* choate prior to the filing of the federal government's Notice of Tax Lien. "The doctrine of choateness is intended to protect the standing of federal liens. 'Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time. . . .' "[13] Whether or not a lien is choate is a federal question.[14] For a prior lien on all of a person's real or personal property to take priority over a federal tax lien, the lien must be "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established."[15] The applicable Treasury Regulation acknowledges the judicially created choateness doctrine in defining the term "judgment lien creditor" for purposes of the Code, and likewise states the aforementioned three-part test.[16]

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8. Assessments are little more than bookkeeping notations entered by the IRS on the taxpayer's account indicating that the amount has been administratively determined to be due and payable.

9. I.R.C. § 6322 (1988).

10. United States v. Equitable Life Assurance Soc'y of the United States, 384 U.S. 323, 328 (1966); Allan v. Diamond T Motor Car Co., 291 F.2d 115, 116 (10th Cir. 1961). The general federal tax lien " 'creates no property rights but merely attaches consequences, federally defined, to rights created under state law.' " Avco Delta Corp. Canada Ltd. v. United States, 459 F.2d 436, 440 (7th Cir. 1972) (quoting United States v. Bess, 357 U.S. 51, 55 (1958)).

11. United States v. City of New Britain, 347 U.S. 81, 85-86 (1954).

12. I.R.C. § 6323(a) (Supp. IV 1992). In Colorado, such notice is deemed to have been provided by the IRS with respect to real property upon the filing of a Notice of Tax Lien with the office of the clerk and recorder for the county in which the real property is located. As to personal property owned by a corporation whose principal office is in Colorado the filing of a Notice of Tax Lien must be made with the Colorado Secretary of State. In most other cases liens against personal property must be filed in the office of the county clerk and recorder of the county where the lienee resides. COLO. REV. STAT. § 38-25-102 (Supp. 1993).

13. McAllen State Bank v. Saenz, 561 F. Supp. 636, 639 (S.D. Tex. 1982) (quoting United States v. City of New Britain, 347 U.S. 81, 86 (1954)).

14. United States v. Security Trust & Sav. Bank, 340 U.S. 47, 49 (1950).

15. United States v. City of New Britain, 347 U.S. 81, 84 (1954).

16. The definition states:

> The term "judgment lien creditor" means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who

McDermott involved an interpleader action centering on the competing claims of a judgment lien creditor and the IRS in certain real property located in Salt Lake County, Utah.[17]

B. *Facts*

On June 22, 1987, Zions First National Bank ("Zions") obtained a judgment in the amount of $67,977.67 against the McDermotts and properly docketed the judgment in Salt Lake County on July 6, 1987.[18] Under Utah law, Zions's lien attached to all of the McDermotts' real property located in the county.[19] The IRS obtained its lien by filing a Notice of Tax Lien on September 9, 1987. As a result of such filing, the IRS's lien attached to all of the McDermotts' owned and after-acquired real and personal property.[20]

On September 23, 1987, the McDermotts took title to certain real property in Salt Lake County for which they already had a purchaser.[21] To obtain title insurance for the property to complete the sale to this new purchaser, the McDermotts were required to obtain releases from Zions and the IRS.[22] The parties entered into an escrow agreement by which Zions and the IRS released their claims to the real property, while reserving their rights to the cash proceeds of the sale. The escrow agreement provided that the priority of the competing claims of Zions and the IRS would remain identical to the priorities they held in the Salt Lake County

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has perfected a lien under the judgment on the property involved. *A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established.* Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved.

Treas. Reg. § 301.6323(h)-1(g) (1976) (emphasis added).

17. McDermott v. Zions First Nat'l Bank, 945 F.2d 1475 (10th Cir. 1991), *rev'd sub nom.* United States v. McDermott, 113 S. Ct. 1526 (1993).

18. *Id.* at 1477.

19. Utah law provides:

From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time *or by him thereafter acquired* during the existence of said lien.

UTAH CODE ANN. § 78-22-1 (1992) (emphasis added).

20. *McDermott*, 945 F.2d at 1477. The general federal tax lien applies to after-acquired property, even though not specifically stated in I.R.C. § 6321. Glass City Bank v. United States, 326 U.S. 265, 268 (1945).

21. *McDermott*, 945 F.2d at 1477. The McDermotts had sold this property to two individuals in 1981, taking back a note and a deed of trust securing the note. The purchasers defaulted and, after some interim struggles and maneuvers, the McDermotts succeeded in getting the trustee to notice a sale of the property at which the McDermotts repurchased the property by submitting a credit bid and assuming an underlying mortgage. *Id.* at 1477-78.

22. *Id.* at 1477.

property.[23] The escrow agreement also required that the McDermotts institute an interpleader action so that a court could determine who was entitled to priority in the proceeds of the sale.[24]

In the interpleader action, the federal district court found that Zions had priority according to the common law "first in time, first in right" doctrine.[25] Although both liens attached simultaneously on September 23, 1987, Zions had filed first. The district court also found that the IRS waived its interest in the McDermotts' sales contract as personalty and the proceeds of that personalty by virtue of the Escrow Agreement.[26] The IRS appealed.

C. *The Tenth Circuit's Opinion*

The issue before the Tenth Circuit[27] was whether Zions's non-contingent lien on all of the McDermotts' real property, perfected prior to the federal tax lien, took priority over the federal lien when the competing lienors were claiming interests in *after-acquired* property. Because Zions's identity as the lienor and the amount of its judgment lien were known, the only question under the relevant three-part test was whether the "property subject to the lien" was sufficiently established.[28]

The IRS argued that because the choateness doctrine requires the property subject to the lien to be established, a judgment lien creditor can only acquire a perfected or choate lien with respect to property owned by the debtor at the time the judgment creditor obtains his lien, and not as to after-acquired property.[29] The theory of the IRS was, therefore, after-acquired property of the debtor would be subject to a superior federal tax lien if that lien was perfected by filing subsequent to the time that the judgment lien creditor obtained his lien, but prior to the time that the debtor obtained ownership of the property to which the competing liens attach. Under this view, Zions's judgment lien did not become choate until September 23, 1987, when the McDermotts acquired title to the real property in question, and therefore the IRS's lien, as perfected by its Notice of Tax Lien filed on September 9, 1987, would prime Zions's lien.

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23. *Id.* The escrow agreement provided in relevant part:

> The respective priorities of the parties to the cash proceeds shall be identical to the priorities of the respective liens of the parties as they existed against the real property as of September 23, 1987, after Bruce J. McDermott successfully bid and purchased the property at the Trustee's Sale, notwithstanding the change in form of the collateral.

Id.

24. *Id.*

25. The interpleader action was originally brought by the McDermotts in state court, but the United States removed to federal court pursuant to 28 U.S.C. § 1442(a)(1) (1988). *McDermott*, 945 F.2d at 1477 n.3.

26. *Id.* at 1478.

27. The three-judge panel consisted of Judge Tacha, Judge Seth, and Howard C. Bratton, Senior District Judge of the United States District Court for the District of New Mexico, sitting by designation. *Id.* at 1477.

28. *See id.* at 1480.

29. *McDermott*, 945 F.2d at 1480.

The Tenth Circuit rejected the position of the IRS, holding that a judgment lien creditor having a choate lien on *all* of a person's real property will take priority over a later-perfected federal tax lien, even when the IRS and the judgment creditor are claiming an interest in after-acquired property.[30]

In support of its decision, the Tenth Circuit relied primarily on *United States v. Vermont*.[31] In *Vermont*, the State of Vermont and the United States held almost identical general tax liens, arising upon assessment, upon all the taxpayer's real and personal property.[32] Vermont's lien arose approximately three and one-half months prior to the federal tax lien, and related to all of the taxpayer's property rather than specifically identified portions of it. Subsequently, Vermont attempted to reach certain portions of that property—a bank account—it had not yet taken steps to attach.[33] The United States argued that a state-created lien had to attach to *specific* property in order for it to take priority; that is, the requirement that the property subject to the lien is not "established" unless there is specific property to which the lien attaches.[34] The Supreme Court held that, even though both liens were general in nature, both were equally perfected as to *all* the taxpayer's property and were choate at the time the liens arose.[35] Therefore, when both governments attempted to satisfy their liens with the same property, Vermont's lien took priority, being the lien that arose first.[36]

The Tenth Circuit concluded that Zions's lien was no less "perfected" than Vermont's in *United States v. Vermont*:

> Zions' lien was not contingent, it was docketed, specific in amount, and fully enforceable against any real property owned by the McDermotts in Salt Lake County during the pendency of the lien. We agree with the cases cited by Zions in interpreting *Vermont* to apply to property acquired by the debtor after perfection of the lien as well as to property owned by the debtor at the time the lien was perfected.[37]

The Tenth Circuit concluded that "Congress has made clear in section 6323(a) . . . that judgment lien creditors who perfect their liens before the filing of a federal tax lien have priority,"[38] even where the property as to which the competing liens are asserted is after-acquired property.

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30. *Id.* at 1482.
31. 377 U.S. 351 (1964).
32. *Id.* at 352.
33. *Id.* at 352-53.
34. *Id.* at 356-57.
35. *Id.* at 358-59.
36. *Vermont*, 377 U.S. at 359.
37. *McDermott*, 945 F.2d at 1481. *See* Wisconsin v. Bar Coat Blacktop, Inc., 640 F. Supp. 407 (W.D. Wis. 1986); McAllen State Bank v. Saenz, 561 F. Supp. 636 (S.D. Tex. 1982); United States v. Fleming, 474 F. Supp. 904 (S.D.N.Y. 1979); *see also* WILLIAM T. PLUMB, JR., FEDERAL TAX LIENS 134-35 (3d ed. 1972) (asserting that "[i]n light of [the *Vermont*] standard, the typical general judgment lien on 'all' the debtor's real property seems safe from later tax liens, at least if the lien is perfected against other third parties acquiring liens") (citations omitted).
38. *McDermott*, 945 F.2d at 1481.

D. *The Supreme Court's Opinion*

In a 6-3 opinion, the Supreme Court reversed the Tenth Circuit Court of Appeals.[39] The majority and dissent both recognized that the matter presented a very close question.

Writing for the majority, Justice Scalia reiterated the *New Britain* three-part test by noting that "our cases deem a competing state lien to be in existence for 'first in time' purposes only when it has been 'perfected' in the sense that 'the identity of the lienor, *the property subject to the lien,* and the amount of the lien are established.' "[40] Justice Scalia equated "established" with "perfected," asserting the question was "whether the Bank's judgement lien was perfected in this sense before the United States filed its tax lien on September 9, 1987. If so, that is the end of the matter; the Bank's lien prevails."[41]

Justice Scalia then addressed the court of appeals' application of the *Vermont* holding to the case at issue. Distinguishing *Vermont* on its facts, Justice Scalia pointed out that *Vermont* did not involve after-acquired property.[42] The bank account in question had in fact been owned by the taxpayer at the time the competing liens arose. In *Vermont,* the IRS had simply argued, unsuccessfully, that a state lien is not perfected for these purposes if it attaches to *all* of the taxpayer's property rather than to specifically identified portions of it. "We did not consider, and the facts as recited did not implicate, the quite different argument made by the United States in the present case: that a lien in *after-acquired* property is not 'perfected' as to property yet to be acquired."[43]

The issue in *McDermott* thus centered on the meaning of the term "perfected" in this context; that is, whether Zions's lien had been "perfected" for these purposes with respect to the subject property, where the property had not yet been acquired by the McDermotts at the time the judgment lien arose but was subsequently acquired after the IRS had filed its Notice of Lien.

Justice Scalia chose to interpret the term "perfected" by equating it with "attachment," and concluded that Zions's judgment lien was not perfected for priority purposes until it actually attached to the subject property.[44] This was determined not to occur until September 23, 1987, when the property was acquired by the McDermotts. "Since that occurred *after* filing of the federal tax lien, the state lien was not first in time."[45]

Justice Scalia concluded, on the other hand, there is no requirement in the Internal Revenue Code that the priority of federal tax liens likewise must be evaluated from the time of actual attachment.[46] To the contrary,

39. United States v. McDermott, 113 S. Ct. 1526 (1993).
40. *Id.* at 1528 (quoting United States v. New Britain, 347 U.S. 81, 84 (1954)).
41. *Id.*
42. *Id.* at 1528-29.
43. *Id.* at 1529 (emphasis added).
44. *McDermott,* 113 S. Ct. at 1529 (1993).
45. *Id.* at 1530.
46. *Id.*

the statute states simply that the IRS's lien is not valid as against a judgment lien creditor until notice of the federal lien is *filed*.[47] Filing of the notice, and not attachment, is all the statute requires when measuring the priority of the federal tax lien. Therefore, "while we would hardly proclaim the statutory meaning we have discerned in this opinion to be 'clear,' it is evident enough for the purpose at hand. The federal tax lien must be given priority."[48]

Writing in dissent, Justice Thomas (joined by Justice Stevens and Justice O'Connor) acknowledged that the issue was a close one, and that "our precedents do not provide the clearest answer to the question of after-acquired property."[49] Justice Thomas, however, characterized the factual distinction drawn by the majority between the present case and *Vermont* as "wooden"[50] and the product of a "parsimonious reading"[51] of *Vermont*. The dissent contended that "the Government's 'specificity' claim rejected in *Vermont* is analytically indistinguishable from the 'attachment' argument the Court accepts today."[52] Justice Thomas viewed the majority's requirement that a judgment lien must attach to property before it can be sufficiently certain for priority purposes as a "rigid criteria"[53] not supported by prior decisions, and would have preferred to apply a "more flexible choateness principle"[54] so as to protect state-created judgment liens. The dissent would have held, as did the Tenth Circuit Court of Appeals, that the bank's lien had already acquired sufficient substance and had become so perfected with respect to the after-acquired property as to defeat the later-filed federal tax lien. According to the dissent, the result reached by the majority subjects a choate judgment lien in after-acquired property to a "secret lien" in favor of the federal government.[55]

E. *Summary*

Seven of the thirteen judges who weighed in on the *McDermott* case would have agreed—as the Tenth Circuit Court of Appeals had held—that Zions's judgment lien trumped the IRS's later-filed tax lien, even as to after-acquired property. The decision of the Supreme Court, however, establishes the priority of filed federal tax liens over state-created judgment liens in after-acquired property. While the filing of a Notice of Tax Lien will not operate to prime a judgment lien otherwise previously established against property in which the taxpayer already has an interest, such a filing will prevail over the judgment lien with respect to property in which the taxpayer subsequently acquires an interest.

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47. I.R.C. § 6323(a) (Supp. IV 1992).
48. *McDermott*, 113 S. Ct. at 1531.
49. *Id.* at 1534 (Scalia, J., dissenting).
50. *Id.* at 1532.
51. *Id.* at 1534.
52. *Id.* at 1532-33.
53. *McDermott*, 113 S. Ct. at 1531.
54. *Id.* at 1534.
55. *Id.* at 1534.

II. BANK ENTITLED TO AMORTIZATION DEDUCTIONS FOR COST OF CORE DEPOSIT INTANGIBLES OF ACQUIRED BANKS: *COLORADO NATIONAL BANKSHARES, INC. V. COMMISSIONER*[56]

A. *Background*

Section 167 of the Internal Revenue Code authorizes taxpayers to claim a deduction for depreciation representing "a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)" of property used in a trade or business or held for the production of income.[57] Applicable Treasury Regulations extend this deduction to the amortization of intangibles, providing that "[i]f an intangible asset is known from experience or other factors to be of use in the business . . . for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance."[58] However, "[n]o deduction for depreciation is allowable with respect to goodwill."[59]

The issue of whether amortization deductions can be claimed with respect to a particular intangible asset generally arises in the context of a purchase by one taxpayer of the going-concern business of another taxpayer. In determining whether a particular intangible asset arising from such a purchase may be subject to amortization deductions, the courts generally apply a two-part test. First, the asset must have an ascertainable value independent of goodwill.[60] That is, the taxpayer must show that the asset is not simply a component part of or otherwise inseparable from goodwill. Second, the asset must have a limited useful life, "the duration of which can be ascertained with reasonable accuracy."[61]

Neither the courts nor the Internal Revenue Code have fashioned a definitive definition of "goodwill." The term has been employed to refer generally to "the expectancy of continued patronage, for whatever reason,"[62] or put differently, the expectation that "the old customers will resort to the old place."[63] As a tax accounting matter, the consideration given by the acquiring taxpayer in an asset purchase transaction is required to be allocated among various classes of the acquired assets under the so-called "residual method," and goodwill is generally the last class of assets to which consideration is allocable, after allocations are made to certain tangible and intangible assets.[64]

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56. 984 F.2d 383 (10th Cir. 1993).
57. I.R.C. § 167(a) (1988).
58. Treas. Reg. § 1.167(a)-3 (as amended in 1960).
59. *Id.*
60. Newark Morning Ledger Co. v. United States, 945 F.2d 555, 562 (3d Cir. 1991) (quoting Houston Chronicle Publishing Co. v. United States, 481 F.2d 1240, 1250 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974)), *rev'd and remanded on other grounds*, 113 S. Ct. 1670 (1993).
61. *Id.* (quoting *Houston Chronicle*, 481 F.2d at 1250).
62. Boe v. Commissioner, 307 F.2d 339, 343 (9th Cir. 1962).
63. Commissioner v. Killian, 314 F.2d 852, 855 (5th Cir. 1963) (quoting Nelson Weaver Realty Co. v. Commissioner, 307 F.2d 897, 901 (5th Cir. 1962)).
64. *See* I.R.C. § 1060 (West Supp. 1993); Treas. Reg. § 1.1060-1T(d) (1988); *see also* I.R.C. § 338(b)(5) (1988); Treas. Reg. § 1.338(b)-2T (as amended in 1986).

The courts have not necessarily been consistent in determining when intangible assets are to be treated as inseparable from goodwill. In *Houston Chronicle Publishing Co. v. United States*,[65] the Houston Chronicle Publishing Company bought the assets of the Houston Press for $4.5 million when the latter went out of business. Among the assets acquired were subscription lists the Chronicle intended to use to increase its own circulation.[66] Based upon its estimate that forty percent of the Press subscribers would subscribe to the Chronicle, and that the average cost of obtaining a new subscriber was $2.00, the Chronicle allocated $71,200 to subscription lists.[67] The Chronicle then amortized them over a five year period.[68] The IRS challenged the amortization deductions, asserting that the lists were inseparable from goodwill and therefore inherently nondepreciable. Finding the subscription lists to be intangible capital assets that could be depreciated, the Fifth Circuit Court of Appeals held for the Chronicle.[69]

In *Newark Morning Ledger Co. v. United States*,[70] the Third Circuit took a more expansive view of goodwill and found certain intangible assets inseparable from goodwill. In that case, the taxpayer acquired certain newspapers owned by Booth Newspapers, Inc., and allocated $67.8 million of the purchase price to "paid subscribers" of those newspapers.[71] The figure was an estimate of the future revenues anticipated by the taxpayer to be derived from existing subscribers to Booth newspapers, who the taxpayer expected to continue to subscribe after the acquisition.[72] The government contended, as it had in *Houston Chronicle*, that "paid subscribers" represented an asset indistinguishable from goodwill.[73] The Third Circuit agreed.[74] In a 5-4 decision, the United States Supreme Court reversed the Third Circuit, holding the taxpayer had met its burden of proving that "paid subscribers" was an intangible asset with an ascertainable value and a limited useful life.[75]

The issue in *Colorado National Bankshares, Inc. v. Commissioner*[76] involved a taxpayer's attempt to amortize an allocable portion of the acquisition costs it incurred in purchasing the assets of various banks. Specifically, the taxpayer had claimed amortization deductions for the

65. 481 F.2d 1240 (5th Cir. 1973).
66. *Id.* at 1243.
67. *Id.* at 1243-44.
68. *Id.* at 1244.
69. *Id.* at 1251, 1266.
70. 945 F.2d 555 (3d Cir. 1991), *rev'd*, 113 S. Ct. 1670 (1993).
71. *Id.* at 556.
72. *Id.*
73. *Id.* at 556-57.
74. *Id.* at 568. The Third Circuit's basic position was that if goodwill is defined as the "expectancy that old customers will resort to the old place," then "paid subscribers" is the essence of goodwill. *Id.*
75. Newark Morning Ledger Co. v. United States, 113 S.Ct. 1670, 1683 (1993). *See* David G. Jaeger, *Supreme Court Decides* Newark Morning Ledger Co., 1 TAXES 406 (1993); Mark Wertlieb, et al., *The Amortization of Purchased Intangible Assets*, 24 TAX ADVISER 583 (1993). The Supreme Court noted that the burden of proof faced by taxpayers attempting to make the required showing with respect to most intangibles is "substantial" and "often will prove too great to bear." *Id.* at 1681.
76. 984 F.2d 383 (10th Cir. 1993).

portion of the purchase price allocable to so-called "core deposits" held by the acquired banks. The Tax Court has in the past held that core deposits are not, as a matter of law, necessarily an inseparable part of goodwill and may be amortized if the taxpayer can otherwise satisfy the two-part test described above.[77] The IRS has never accepted the view that core deposits are separable from goodwill, and in *Colorado National Bankshares*, again attempted to find a sympathetic judicial ear for its position that any value attributable to such deposits may not be amortized.

B. *Facts*

In 1981 and 1982, the taxpayer, Colorado National Bankshares, Inc., purchased seven banks located on the front range in Colorado. Among the assets acquired were the "core deposits" of the banks, defined by the taxpayer as deposit liabilities on which no or low interest rates are paid.[78] These included funds on deposit from the following types of accounts: (1) interest-free checking accounts; (2) interest-paying checking accounts, known as "NOW accounts"; and (3) savings accounts.[79] Core deposits are highly valued by banks, as they are relatively low cost, reasonably stable, and relatively insensitive to interest rate changes.[80] The profitability of a bank is largely dependant upon its ability to attract such deposits. As a regulatory matter, and in furtherance of generally accepted accounting principles, such core deposits are required to be recorded as assets separate and apart from goodwill.[81]

Prior to acquiring the assets of the seven banks, the taxpayer had conducted detailed and thorough studies estimating the value of the bank's assets. The value of the core deposits and their expected lives were estimated as part of this process.[82] The taxpayer intended to reinvest the core deposit funds, thereby deriving an income stream from the spread between the low interest rates paid on the core deposits and the higher rates at which they would be reinvested.[83] Based upon a report prepared by certified public accountants,[84] the taxpayer characterized the present value of this projected income stream as an asset, and claimed an amortization deduction on its 1982, 1983, and 1984 tax returns related to this asset. The taxpayer amortized the core deposits over useful lives ranging from three to ten years, depending upon the nature of the accounts con-

77. *See* IT & S of Iowa, Inc., v. Commissioner, 97 T.C. 496 (1991); Citizens & Southern Corp. v. Commissioner, 91 T.C. 463 (1988), *aff'd*, 900 F.2d 266 (11th Cir. 1990).

78. *Colorado Nat'l Bankshares*, 984 F.2d at 384.

79. *Id.*

80. Colorado Nat'l Bankshares, Inc., v. Commissioner, 60 T.C.M. (CCH) 771, 772 (1990).

81. *Colorado Nat'l Bankshares*, 984 F.2d at 385.

82. *Id.*

83. *Id.*

84. 60 T.C.M. (CCH) at 775. The methodology—statistical and otherwise—used by the taxpayer's accountants and advisors in determining the value and useful lives of the core deposits is described at length in the opinion of the Tax Court. *Id.* at 775-87. The Tax Court's opinion is instructive in enabling the reader to appreciate the scope and detail of the well-prepared analysis used by the taxpayer to carry its burden of proof.

stituting the core deposits and the identity of the acquired bank to which they related.

The IRS disallowed the claimed deductions on the ground that the core deposit intangibles were an inseparable part of the goodwill of the acquired banks. The Tax Court held for the taxpayer.[85]

C. *The Tenth Circuit's Opinion*

Noting that the "[c]ategorization of core deposit intangibles is admittedly a close question,"[86] the Tenth Circuit Court of Appeals[87] sided with the taxpayer and affirmed the Tax Court.[88]

The court of appeals was greatly influenced by the fact that the taxpayer "presented the Tax Court with substantial evidence, and the Tax Court found, that the core deposit intangibles were separate and distinct from goodwill, and had both an ascertainable value independent of goodwill and a limited useful life."[89] The Tenth Circuit determined that the intangibles were separate from goodwill by relying on various factors, including the necessity of the taxpayer is expending substantial additional time, effort, and expense to produce income from the deposits and the fact that the deposits could have been transferred apart from any goodwill of the selling banks.[90]

In addressing the question of whether the deposits had both an ascertainable value independent of goodwill and a limited useful life, the court of appeals noted that the taxpayer had not claimed the amortization deductions until after consulting with "certified public accountants conversant in the field," who estimated the value and useful life of the core deposits.[91] The court of appeals noted that these estimates need only be "a reasonable approximation of value for purposes of depreciation—absolute certainty is not required."[92] The court found the estimates "to be neither arbitrary nor unrealistic,"[93] and concluded that the "taxpayer has sustained its burden of demonstrating value and a limited useful life for the core deposit intangibles."[94]

D. *Summary*

The opinion of the Tenth Circuit Court of Appeals in *Colorado National Bankshares* is illustrative of the court's willingness to give credence to a taxpayer's determination that a particular intangible asset may be amortized. As to the specific issue raised in the case, however, the import of the

85. *Colorado Nat'l Bankshares*, 60 T.C.M. (CCH) at 771.
86. *Colorado Nat'l Bankshares*, 984 F.2d at 387.
87. The three-judge panel consisted of Chief Judge McKay, Judge McWilliams, and Judge Kelly. *Id.* at 384.
88. *Id.* at 387.
89. *Id.* at 385.
90. *Id.* at 387.
91. *Colorado Nat'l Bankshares*, 984 F.2d at 385.
92. *Id.* at 386.
93. *Id.* at 385.
94. *Id.* at 386.

decision is mitigated by the enactment of I.R.C. § 197 as part of the Revenue Reconciliation Act of 1993.[95] Under the Act, effective for acquisitions after August 10, 1993, so-called "section 197 intangibles" are required to be amortized on a straight-line basis over a period of 15 years.[96] A "section 197 intangible" is defined to include, *inter alia*, goodwill,[97] going-concern value,[98] workforce in place, information base, know-how, customer-based intangibles, supplier-based intangibles, licenses, permits, or other rights granted by a governmental unit or agency, covenants not to complete, and franchises, trademarks, and tradenames.[99] As relevant to the issue in *Colorado National Bankshares*, the term "customer-based intangibles" is specifically defined to include the deposit base and any similar asset of a financial institution.[100] According to the House Committee Report, "similar assets" include items such as checking accounts, savings accounts, and escrow accounts.[101] Core deposit intangibles such as those identified by the taxpayer in *Colorado National Bankshares* will, under these new rules, be required to be amortized ratably over 15 years, and not over the much shorter period used by the taxpayer in that case.

III. THE TENTH CIRCUIT EXPLORES APPLICATION OF 100% PENALTY OF I.R.C. § 6672: *DENBO V. UNITED STATES*[102] AND *MUCK V. UNITED STATES*[103]

A. *Background*

Employers are required under the Internal Revenue Code to pay over to the IRS a variety of taxes imposed in respect of their employees, generally referred to as "employment taxes"[104] and "withholding taxes."[105] Some of these taxes are deducted and withheld from the payroll checks of

95. Title XIII, Chapter 1, of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 416 (to be codified in scattered sections of 26 U.S.C.).

96. I.R.C. § 197(a) (West Supp. 1993). Generally speaking, this new rule applies only to assets acquired by the taxpayer from an unrelated third party, and not to self-created intangibles. *Id.* § 197(c)(2).

97. *Id.* § 197(d)(1)(A). The House Committee Report defines goodwill as "the value of a trade or business that is attributable to the expectancy of continued customer patronage, whether due to the name of a trade or business, the reputation of a trade or business, or any other factor." H.R. REP. No. 111, 103d Cong., 1st Sess. 762 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 993.

98. I.R.C. § 197(d)(1)(A) (West Supp. 1993). Going concern value is defined by the House Committee Report as "the additional element of value of a trade or business that attaches to property by reason of its existence as an integral part of a going concern. Going concern value includes the value that is attributable to the ability of a trade or business to continue to function and generate income without interruption notwithstanding a change in ownership." H.R. REP. No. 111, 103d Cong., 1st Sess. 762 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 993.

99. I.R.C. § 197(d)(1)(C)-(F) (West Supp. 1993).

100. I.R.C. § 197(d)(2)(B) (West Supp. 1993).

101. H.R. REP. No. 111, 103d Cong., 1st Sess. 763 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 994.

102. 988 F.2d 1029 (10th Cir. 1993).

103. 3 F.3d 1378 (10th Cir. 1993).

104. *See* I.R.C. §§ 3101-3128 (1988 & Supp. IV 1992).

105. *See* I.R.C. § 3402 (1988 & Supp. IV 1992).

the employees, and others consist of a "matching portion" that is imposed on the employer.

As part of the Federal Insurance Contributions Act (FICA),[106] a tax is imposed on employees and employers consisting of two parts: old-age, survivor, and disability insurance (OASDI)[107] and Medicare hospital insurance (HI).[108] For wages paid in 1994 to covered employees, the HI tax rate is 1.45% of the employee's wages.[109] The employer is required to withhold the HI tax from the wages of each employee as a payroll deduction and periodically remit the same over to the IRS.[110] In addition, the employer is required to "match" the employee's HI contribution by paying over to the IRS an additional 1.45% of the employee's wages.[111] The OASDI tax rate is 6.2%,[112] and in 1994 is imposed on the first $60,600 of the employee's wages. The OASDI tax is likewise withheld from the employee's wages through payroll deductions, and is also matched by the employer.[113]

Moreover, as part of the Federal Unemployment Tax Act (FUTA),[114] a tax is imposed, on employers only, equal in 1994 to 6% of the wages of each employee,[115] subject to certain credits depending on the level of contributions the employer is required to make into the state unemployment fund under the state's unemployment compensation law.[116]

The foregoing taxes are generally referred to as "employment taxes." In addition to being responsible for withholding and paying over the employee's portion of employment taxes, employers are also obligated under the Internal Revenue Code to withhold federal income taxes from the employee's wages in each payroll period based upon income tax withholding tables published by the IRS.[117] The amounts withheld from an employees' paycheck—including the employee's portion of employment taxes—are sometimes referred to as "withholding taxes."

Employment taxes generally fall into one of two categories, "trust fund" taxes and "non-trust fund" taxes. Amounts withheld by an employer from an employee's wages, such as the employee's withheld income taxes and the employee's share of social security taxes, are considered to be held by the employer in trust for the government pending their payment over to the Internal Revenue Service.[118] Such taxes are generally referred to as the trust fund portion of employment taxes.[119] The employer's

106. I.R.C. §§ 3101-3128 (1988 & Supp. IV 1992).
107. I.R.C. §§ 3101(a), 3111(a) (1988).
108. I.R.C. §§ 3101(b), 3111(b) (1988).
109. *Id.*
110. I.R.C. § 3102(a) (1988).
111. I.R.C. § 3111(b) (1988).
112. I.R.C. § 3101(a) (1988).
113. I.R.C. § 3102(a) (1988).
114. I.R.C. §§ 3301-3311 (1988 & Supp. IV 1992).
115. I.R.C. § 3301 (1988).
116. I.R.C. § 3302 (1988 & Supp. IV 1992).
117. I.R.C. § 3402 (1988 & Supp. IV 1992).
118. I.R.C. § 7501(a) (1988).
119. Slodov v. United States, 436 U.S. 238, 242-43 (1978).

matching share of social security taxes, as well as federal unemployment taxes, constitute the non-trust fund portion.

When a corporation fails to pay its trust fund taxes, the United States Treasury suffers the loss, because the employees from whose wages the amounts were withheld nevertheless are credited in full for the withheld amounts even though they are not paid over to the government. This is especially true where the employer goes out of business.[120] To remedy this situation, I.R.C. § 6672[121] provides that any person required to collect, truthfully account for, and pay over any tax—such as the trust fund portion of employment taxes—*and* who willfully fails to do so, is liable to the government for the full amount of the taxes not collected, accounted for, or paid over. The § 6672 penalty, also known as the "100% penalty,"[122] is frequently asserted by the Service when withheld trust fund taxes are left unpaid by a corporation.[123]

The persons required to collect, truthfully account for, and pay over the subject taxes are referred to as "responsible persons."[124] Generally speaking, the IRS will look to the officers, directors, and shareholders of the employer, plus others with check-signing authority, in attempting to affix "responsible person" status for purposes of imposing the 100% penalty. Due to the conjunctive nature in which the elements of liability are set out in I.R.C. § 6672, a person is not liable for the 100% penalty unless (1) he was a "responsible person" with respect to the unpaid taxes, *and* (2) he acted willfully in failing to see that the taxes were paid.[125]

Liability for the 100% penalty is joint and several.[126] The IRS may impose the penalty, in full, on as many responsible persons as can be identified with respect to a particular trust fund tax liability.[127]

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120. If the employer goes out of business, the government suffers the loss of the non-trust fund taxes as well, which are unlikely ever to be recovered from the employer and cannot be asserted as part of the 100% penalty. "Once the corporation is out of business, the United States can kiss goodbye any non-trust fund taxes owed it but not paid." United States v. Schroeder, 900 F.2d 1144, 1146 n.1 (7th Cir. 1990).

121. I.R.C. § 6672 (1988 & Supp. IV 1992).

122. Although these exactions are frequently termed a penalty, such description "does not alter their essential character as taxes." United States v. Sotelo, 436 U.S. 268, 275 (1978).

123. It has been held that the pendency of a corporate bankruptcy does not prevent the Service from pursuing the principals of the corporate debtor to collect the 100% penalty, as the latter is a "separate and distinct" obligation. United States v. Huckabee Auto Co., 783 F.2d 1546, 1548 (11th Cir. 1986). However, the courts are in disagreement as to whether the Bankruptcy Court has jurisdiction to determine the § 6672 liability of the principals of a corporate debtor when they themselves are not "debtors" in the bankruptcy. *Compare In re* Brandt-Airflex Corp., 843 F.2d 90 (2d Cir. 1988) (no) *with* Quattrone Accountants, Inc., v. I.R.S., 895 F.2d 921 (3d Cir. 1990) (yes). It is settled, however, that the Bankruptcy Court does have the authority to order the government to apply tax payments made by a chapter 11 corporate debtor, first, to the corporation's trust fund tax liability, then to the non-trust fund liability. United States v. Energy Resources Co., 495 U.S. 545 (1990).

124. McCray v. United States, 910 F.2d 1289, 1290 (5th Cir. 1990), *cert. denied*, 499 U.S. 921 (1991). *See* Joseph S. Merrill, IRS HAS BROAD POWER TO FIND PAYROLL TAX RESPONSIBILITY, 20 TAX'N FOR LAWYERS 76 (1991).

125. Howard v. United States, 711 F.2d 729, 733-36 (5th Cir. 1983).

126. *See McCray*, 910 F.2d at 1290; Brown v. United States, 591 F.2d 1136, 1142-43 (5th Cir. 1979).

127. It is the policy of the IRS to collect the 100% penalty in full from *each* responsible person it can identify as to a particular withholding tax delinquency. IRM [57(16)(0)] 723 (1-

Two cases decided in 1993, *Denbo v. United States*[128] and *Muck v. United States*,[129] presented the Tenth Circuit Court of Appeals with the opportunity to explore the factors employed by the courts in determining liability for the 100% penalty.

B. *Facts*

1. *Denbo v. United States*

John Denbo was the secretary-treasurer of Louisiane Restaurants, Inc., an Oklahoma corporation in which he was a fifty percent shareholder. The other fifty percent of the stock of the corporation was held by Robert Allred, the president of the company.[130] Denbo served as a director of the corporation and as its secretary-treasurer. Allred conducted the day-to day affairs of the company, and signed all checks (including payroll checks) written on the corporation's bank account.[131] While Denbo also had check signing authority, he did not actually sign any company checks during the period in question.[132]

The corporation experienced financial difficulties from its inception. Denbo was substantially involved in efforts to keep the company afloat, obtaining various loans which he personally guaranteed and which were secured by pledges of his personal assets.[133] Beginning in September 1986, Denbo became aware that the company was not paying its payroll taxes. Subsequently, in November 1987, Denbo attended a meeting with IRS personnel to discuss a payment plan for bringing the unpaid taxes current.[134] However, Denbo never personally saw to it that the company paid the taxes, relying instead on Allred's assurances that they were being paid.[135] Sometime in 1989, Denbo bought all but ten percent of the remaining stock in the company from Allred, and the two parted ways.[136]

In May 1990, the IRS assessed Denbo over $107,000 in the form of the 100% penalty.[137] After paying a portion of the assessment,[138] Denbo

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14-84). This can result in the IRS collecting the unpaid taxes many times over, although the IRS may suspend collection activities against other responsible persons if it has collected in full from one or more of them. IRM 5638.3 (6-3-91). The practice of the IRS is to hold the funds collected from multiple responsible persons until after the statute of limitations for refund claims has passed as to each of them, and then rebate to the responsible persons any funds collected from them in excess of the trust fund taxes (plus penalties and interest) actually owed. *Id.*

128. 988 F.2d 1029 (10th Cir. 1993).
129. 3 F.3d 1378 (10th Cir. 1993).
130. *Denbo*, 988 F.2d at 1031.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Denbo*, 988 F.2d at 1031.
136. *Id.*
137. *Id.*
138. Withholding taxes are divisible. Flora v. United States, 362 U.S. 145, 171 n.37, 175 n.38 (1960). Therefore, taxpayers may initiate refund proceedings by paying only the unpaid taxes for one employee for one quarter (usually stipulated by the IRS to equal $100), and then filing a claim for refund. The government will then counterclaim for the balance of the assessment. *See* I.R.C. § 6672(b)(1) (1988 & Supp. IV 1992).

filed suit for refund, and the government counterclaimed for the remainder of the assessment.[139] Denbo's case was tried to a jury, which found Denbo liable as a responsible person who willfully failed to pay over the subject taxes.[140] Denbo appealed to the Tenth Circuit Court of Appeals.

2. *Muck v. United States*

Ronald Muck was the president and sole shareholder of Graystone Castle, Ltd., a Colorado corporation that owned and operated a hotel in Thornton, Colorado.[141] The corporation failed to pay over employee withholding taxes for the last quarter of 1988 and the first two quarters of 1989. In response to a notice of intent to levy from the IRS, Muck paid a portion of the claimed taxes and sued for refund, seeking to establish that he was not the "responsible person" liable for the 100% penalty as to these taxes.[142] The government counterclaimed, asserting the 100% penalty against Muck for all unpaid withholding taxes for the three quarters in question.[143] In an unreported decision, the district court granted the government's motion for summary judgment and entered judgment against Muck in the amount of approximately $95,000.[144] Muck appealed to the Tenth Circuit Court of Appeals.

C. *The Tenth Circuit's Opinions*

1. *Denbo v. United States*

On appeal, the Tenth Circuit Court of Appeals[145] affirmed Denbo's liability for the 100% penalty.[146]

The court of appeals first addressed the "responsible person" element of I.R.C. § 6672. Denbo contended that Allred, not Denbo, had exclusive authority over the financial affairs of the corporation, including the hiring and firing of all employees, the signing of all corporate checks, including payroll checks, and the review and signing of payroll tax returns. Denbo claimed that this absolved him of any responsibility for the 100% penalty.[147] The court acknowledged that Allred may in fact have exercised *greater* control over the affairs of the corporation than Denbo, but did not see this possibility as dispositive of whether Denbo also had status as a responsible person. The court noted that the responsible person "gener-

139. *Denbo*, 988 F.2d at 1031.

140. *Id.* at 1032.

141. 3 F.3d 1378, 1380 (10th Cir. 1993).

142. *Id.*

143. *Id.*

144. *Id.*

145. The three-judge panel consisted of Judges Anderson, Barrett, and Tacha. *Denbo*, 988 F.2d at 1030.

146. *Id.* at 1031. A jury verdict will not be overturned unless the appellate court finds that no reasonable jury could have reached such a verdict based on the evidence presented. *E.g.*, Acrey v. American Sheep Indus. Ass'n, 981 F.2d 1569, 1575 (10th Cir. 1992).

147. *Denbo*, 988 F.2d at 1032.

ally is, but need not be, a managing officer or employee, and there may be more than one responsible person."[148]

The court stated that the indicia of responsible person status may include "the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees,"[149] and that the person had " 'significant, though not necessarily exclusive, authority in the general management and fiscal decisionmaking of the corporation.' "[150] The court found ample evidence in the record to support a determination that Denbo was a responsible person in the instant case. The "undisputed facts" as summarized above, "along with Denbo's 50% stock ownership and status as an officer and director of the corporation, demonstrate that he possessed 'significant authority in the . . . fiscal decisionmaking of the corporation.' "[151] In light of Denbo's position and involvement with the company, the court decided that Denbo had the power to direct the company to pay the taxes in question. Noting that " '[a]uthority to pay [in the context of section 6672] means *effective power* to pay,' "[152] the court concluded that Denbo's "financial involvement in the corporation, along with his check-signing authority, gave him the effective power to see to it that the taxes were paid."[153] There was therefore sufficient evidence before the jury from which it could find that Denbo was a responsible person as to the corporation's unpaid payroll taxes.

The court then turned to the second element of liability under I.R.C. § 6672, which requires that the responsible person must have acted willfully in failing to collect, account for, and pay over the payroll taxes.[154] The court noted that "[w]illfulness, in the context of section 6672, means a 'voluntary, conscious and intentional decision to prefer other creditors over the Government.' "[155] While mere negligence will not satisfy this element, reckless conduct will: it is established that " '[t]he willfulness requirement is . . . met if the responsible officer shows a reckless disregard of a known or obvious risk that trust funds may not be remitted to the government.' "[156] Denbo conceded he was aware the trust fund taxes in question were not being paid, but contended his failure to follow up on his knowledge and investigate the status of the taxes in more detail amounted merely to negligent conduct insufficient to establish willfulness.[157] The court disagreed, noting that "[a] responsible person's failure to investigate

148. *Denbo*, 988 F.2d at 1032 (citing Hartman v. United States, 538 F.2d 1336, 1340 (8th Cir. 1976)).

149. *Id.* (citing Thibodeau v. United States, 828 F.2d 1499, 1503 (11th Cir. 1987) and Gebhart v. United States, 818 F.2d 469, 472 (6th Cir. 1987)).

150. *Id.* (quoting Kizzier v. United States, 598 F.2d 1128, 1132 (8th Cir. 1979)).

151. *Id.* (quoting *Kizzier*, 598 F.2d at 1132).

152. *Id.* at 1033 (quoting Howard v. United States, 711 F.2d 729, 734 (5th Cir. 1983)).

153. *Denbo*, 988 F.2d at 1033.

154. *Id.*

155. *Id.* (quoting Burden v. United States, 486 F.2d 302, 304 (10th Cir. 1973), *cert. denied*, 416 U.S. 904 (1974)).

156. *Id.* (quoting Smith v. United States, 894 F.2d 1549, 1554 n.5 (11th Cir. 1990)) (internal quotation marks omitted).

157. *Id.*

or to correct mismanagement after being notified that withholding taxes have not been paid satisfies the § 6672 willfulness requirement."[158] Although Denbo was aware of the problem by September 1986, and subsequently met with the IRS concerning the matter, he continued to rely on Allred's assurances that the taxes were being taken care of and that the matter had been "worked out" with the IRS.[159] The court concluded that Denbo "cannot escape lability by claiming that he relied on the assurances of others."[160] Because Denbo "was aware that the corporation had defaulted in its payment of employment taxes but nevertheless disregarded a known risk by relying on the assurances of Allred instead of doing more," Denbo was held to have willfully failed to pay over the taxes.[161]

Denbo also argued that the rule laid down in *Slodov v. United States*[162] absolved him from liability.[163] In *Slodov*, the Supreme Court held that if new management assumes control of a corporation when a trust fund delinquency already exists but the withheld taxes have already been dissipated by the prior management, the new management's use of after-acquired funds to pay other creditors in preference to the government does not make it liable for the 100% penalty. The Tenth Circuit Court of Appeals easily distinguished *Slodov* from the circumstances in *Denbo*. In *Slodov*, the members of new management were found to be "without personal fault," and where there was no nexus between the after-acquired funds and the trust fund delinquency, imposition of the 100% penalty on the new management was found to be improper.[164] Here, Denbo simply was not "new management." He "was responsible both at the time taxes went unpaid and at the time the government sought to collect them under § 6672."[165] Therefore, the 100% penalty was appropriately imposed.[166]

2. *Muck v. United States*[167]

First addressing the question of whether Muck was a responsible person, the Tenth Circuit Court of Appeals considered Muck's primary con-

158. *Denbo*, 988 F.2d at 1033 (citing Mazo v. United States, 591 F.2d 1151, 1154 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979)).

159. *Id.*

160. *Id.* at 1033-34.

161. *Id.* at 1034.

162. 436 U.S. 238 (1978).

163. Denbo had sought a broad jury instruction that suggested he could not be liable for the 100% penalty. The proposed jury instruction stated that the 100% penalty could not be imposed for a failure to cause funds to be applied against the deficiency when the corporation obtained such funds after the unpaid taxes arose. *See Denbo*, 988 F.2d at 1035 n.4.

164. *Slodov*, 436 U.S. at 254.

165. *Denbo*, 988 F.2d at 1035.

166. *Id.* Denbo also argued as error the failure of the trial judge to issue jury instructions which would have incorporated the Supreme Court's definition of "willfulness" in Cheek v. United States, 498 U.S. 192, 201 (1991). In *Cheek*, the Supreme Court held that a good-faith misunderstanding of the tax laws need not be "objectively reasonable" in order to negate willfulness in criminal tax prosecutions. *Id.* at 203. The Tenth Circuit Court of Appeals agreed with the trial judge, however, that this standard had no application to a provision of the Internal Revenue Code imposing civil liability. *Denbo*, 988 F.2d at 1034.

167. 3 F.3d 1378 (10th Cir. 1993). The three-judge panel consisted of Chief Judge McKay and Judges Barrett and Seth. *Id.* at 1380.

tention that the day-to-day operations of Graystone Castle were performed by a business manager who made all decisions concerning the disbursement of funds and the selection of which creditors were to be paid.[168] Noting that a similar argument had been made in the recently-decided *Denbo* case, the court reiterated the rule that the existence of " 'significant, though not necessarily exclusive, authority in the general management and fiscal decisionmaking of the corporation' "[169] is determinative, "irrespective of whether that authority is actually exercised."[170] The court pointed out that Muck was the sole shareholder of the company, had the authority as president of the corporation to manage the business and affairs of the company, had the power to borrow money on behalf of the corporation, had check signing authority, and had the power to suspend the company's business if payroll taxes were not being paid.[171] "These indicia of authority are sufficient to establish [Muck's] status as a responsible party for § 6672 purposes."[172]

Muck also argued that, even if he was a responsible person with respect to the unpaid payroll taxes, he nevertheless did not act willfully in failing to pay them over to the IRS, and therefore, the second element of liability under I.R.C. § 6672 was not present.[173] In evaluating this element, the court noted that "[w]illfulness is present whenever a responsible person 'acts or fails to act consciously and voluntarily and with knowledge or intent that as a result of his action or inaction trust funds belonging to the government will not be paid over but will be used for other purposes.' "[174] In making his argument that he did not act willfully, Muck, like Denbo, invoked *Slodov*.[175] Muck contended that he did not learn of the unpaid taxes until the latter part of the second quarter of 1989. Therefore, as to the deficiencies for the last quarter of 1988 and the first quarter of 1989, he did not act willfully in failing to pay them over.[176] Just as in *Denbo*, the court had little trouble disposing of this argument.[177] Muck's "decision here to pay creditors of Graystone after he learned that withholding taxes were owing to the government was conscious and intentional."[178]

In his final argument, Muck asserted that the corporation had entered into a payment agreement with the IRS to bring the unpaid with-

168. *Id.* at 1380-81.
169. *Id.* at 1381 (quoting *Denbo*, 988 F.2d at 1032 (quoting *Kizzier*, 598 F.2d at 1132)).
170. *Id.*
171. *Id.*
172. *Muck*, 3 F.3d at 1381.
173. *Id.*
174. *Id.* (quoting Olsen v. United States, 952 F.2d 236, 240 (8th Cir. 1991)).
175. *See id.*
176. *Id.*
177. *Muck*, 3 F.3d at 1381-82. The court noted that " '*Slodov* does not relieve a "responsible person" of the responsibility to reduce *accrued* withholding tax liability with funds acquired after the funds actually withheld have been dissipated so long as the person responsible has been so throughout the period the withholding tax liability accrued and thereafter.' " *Id.* at 1381 (quoting Garsky v. United States, 600 F.2d 86, 91 (7th Cir. 1979) (alteration in original)).
178. *Id.* at 1382.

holding taxes current.[179] Given the presence of the payment agreement, Muck argued that his failure to cause the taxes to be paid could not be willful.[180] The court of appeals rejected this argument, pointing out that "[t]he liability of the corporation is separate and distinct from [Muck's] liability to collect and pay over withholding taxes. . . . Only if [Muck] can establish that the agreement specifically provided that he, individually, would be held harmless can the presence of the agreement relieve him of personal liability."[181]

Muck's liability for the 100% penalty was therefore affirmed.[182]

D. *Summary*

As recognized by the Tenth Circuit Court of Appeals, the operation of the 100% penalty can be "harsh."[183] The court's recent opinions in *Denbo* and *Muck* illustrate the severe consequences that can befall responsible persons if trust fund taxes are not paid over to the IRS by the employer to which the responsible person is linked. The responsible person or persons will be called upon to make good the loss to the government. The fact that an individual may play a comparatively passive role in the operations of the employer is not helpful in shielding that individual from liability for the 100% penalty, even if others are more active in those operations and may bear a higher degree of blame for the nonpayment of the taxes. Personal liability for the 100% penalty is joint and several, and if the individual otherwise stands in the position of a responsible person with respect to the unpaid taxes, he will be liable to the same extent as any other person also determined to be a responsible person as to those taxes.

The Tenth Circuit's opinions in *Denbo* and *Muck* also underscore the limited scope of the Supreme Court's decision in *Slodov*. Simply because a responsible person does not learn of unpaid trust fund taxes until after the taxes were due and payable does not aid the individual in a claim that he could not have acted willfully in failing to see that they were paid. So long as corporate funds are still on hand and have not been dissipated, and so long as the individual in question stood in the position of a responsible person at the time the taxes went unpaid, the individual's failure to discharge the accrued trust fund liability with corporate funds will be seen as willful, and not falling under the special rule in *Slodov*.

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179. *Id.*

180. *Id.* It is unclear from the reported opinion whether the IRS entered its assessment against Muck while the corporation was still timely performing the payment agreement or only after the corporation had defaulted under the agreement.

181. *Id.* (citing *Olsen*, 952 F.2d at 241 and Monday v. United States, 421 F.2d 1210, 1218 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)).

182. *Id.*

183. Denbo v. United States, 988 F.2d 1029, 1035 (1993).

IV. BAD DEBT DEDUCTION PERMITTED FOR LOANS MADE TO CORPORATION BY SHAREHOLDER-EMPLOYEE: *LITWIN V. UNITED STATES*[184]

A. *Background*

Under I.R.C. § 166(a), a creditor holding a debt that becomes wholly worthless may claim a bad debt deduction for the full amount of the debt in the taxable year in which it became worthless.[185] Such a bad debt deduction is allowed to the taxpayer as an ordinary loss, which is deductible in full against the taxpayer's gross income.[186]

On the other hand, I.R.C. § 166(d) provides an exception to this rule, stating that so-called "nonbusiness debts" do not give rise to ordinary loss deductions if they become worthless.[187] Rather, the loss suffered by the holder of the debt is characterized as a short-term capital loss.[188] As such, it may only be offset and "netted" against other capital gains,[189] and to the extent a net capital loss results, may only be deducted by an individual taxpayer to a limit of $3,000,[190] subject to certain carry-backs and carry-forwards.[191]

I.R.C. § 166 therefore relegates bad debt losses in respect to "nonbusiness" debts to short-term capital loss treatment, while all other types of debts, known as "business" bad debts, will qualify for deduction as ordinary losses if they become worthless. For purposes of the bad debt deduction, therefore, the characterization of the debt as either a nonbusiness debt or a business debt is of great importance to the taxpayer suffering the loss.

The Internal Revenue Code defines a nonbusiness debt in the negative, by defining it as any debt *other* than one created or acquired in connection with a trade or business of the taxpayer, or *other* than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.[192] All debts which cannot be characterized as nonbusiness debts will be treated as business debts.

Generally, when a debt becomes worthless and the taxpayer claims a deduction in connection with the loss, the taxpayer will seek to characterize the debt as a business debt so as to achieve ordinary loss treatment. The IRS may challenge the characterization by asserting that the debt was in fact a nonbusiness debt giving rise only to a short-term capital loss upon its worthlessness.[193] Applicable Treasury Regulations provide that in order to meet this challenge and deduct the loss as a business bad debt, the

184. 983 F.2d 997 (10th Cir. 1993).
185. I.R.C. § 166(a)(1) (1988).
186. *See* I.R.C. § 166(a),(d) (1988 & Supp. IV 1992).
187. I.R.C. § 166(d) (1988 & Supp. IV 1992).
188. *See id.*
189. *See* I.R.C. § 1222 (1988 & Supp. IV 1992) for the rules by which long-term capital gains and losses and short-term capital gains and losses are netted against one another to produce a net capital gain or loss.
190. I.R.C. § 1211(b) (1988).
191. *See* I.R.C. § 1212 (1988).
192. I.R.C. § 166(d)(2) (1988).
193. *See* Treas. Reg. § 1.166-5(a)(2) (1980).

taxpayer must show that the bad debt loss was "proximate" to the conduct of a trade or business by the taxpayer, or that the debt was created in the course of a trade or business of the taxpayer.[194]

In *United States v. Generes*,[195] the Supreme Court held that where the taxpayer is both an employee and a shareholder of a corporation which is indebted to the taxpayer, the taxpayer's "dominant motivation" underlying the transaction at issue determines whether the transaction is proximately related to the taxpayer's trade or business.[196] If the dominant motivation in the transaction that created the debt was business-related, the debt will be characterized as a business debt.[197] Such a motivation will be seen to be present where the debt was created in the context of a transaction by which the taxpayer sought to protect his status as an employee of the corporation.[198] On the other hand, where the dominant motivation was investment-related, the debt will be seen to be a nonbusiness debt. Therefore, where the dominant motivation of the taxpayer was to protect his investment, rather than his status as an employee, the debt will be characterized as a nonbusiness debt. This determination is necessarily a question of fact, generally reserved to the trial court.[199]

In *Kelson v. United States*,[200] the Tenth Circuit Court of Appeals held that "objective facts surrounding loans, rather than the [shareholder-employee's] subjective intent, control"[201] in determining the shareholder-employee's dominant motivation in entering into a transaction giving rise to a loan to his corporation. The Tenth Circuit therefore employs an objective test, rather than a subjective test, in classifying debts as business or nonbusiness debts.

Regarding transactions between a corporation and a taxpayer who is one of the corporation's shareholder-employees, the bad debt deduction is not limited to circumstances involving direct loans from the taxpayer to the corporation. The deduction may also arise out of personal guarantees made by the taxpayer in connection with corporate debts.[202] A taxpayer providing a personal guarantee of corporate debts will have a right of subrogation against or contribution from the corporation in respect to amounts the guarantor is required to pay if called upon to perform under the guarantee. If the taxpayer is unable to recover from the corporation or the right to do so is or becomes worthless, the taxpayer may seek to

194. Treas. Reg. § 1.166-5(b) (1980).
195. 405 U.S. 93 (1972).
196. *Id.* at 103.
197. *Id.*
198. That is, the taxpayer will be seen as having entered into the transaction to protect the trade or business of being an employee.
199. Under the "clearly erroneous" standard of review under the Federal Rules of Civil Procedure, the trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." FED. R. CIV. P. 52(a). Thus, the trial court's findings of fact will be upheld unless the appellate court is firmly convinced a mistake has been made. *E.g.*, Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990).
200. 503 F.2d 1291 (10th Cir. 1974).
201. *Id.* at 1293.
202. *See Generes*, 405 U.S. at 98.

claim a bad debt deduction for the amount paid by the taxpayer under the guarantee.[203] The classification of such a deduction as arising from a business debt or a nonbusiness debt will depend upon the dominant motivation of the taxpayer in providing the guarantee.[204] If that motivation was to protect the status of the guarantor as an employee, as opposed to protecting his investment in the corporation, the bad debt will be characterized as a business bad debt, deductible as an ordinary loss under I.R.C. § 166(a).[205]

B. *Facts*

Harry Litwin was a petroleum engineer who had started a number of successful businesses. In 1980, he founded Advanced Fuel Systems ("AFS"), which was engaged in providing and installing alternative fuel systems, such as compressed gas and propane, for motor vehicles.[206] Litwin initially was the principal shareholder of AFS, and throughout its life also served as its chief executive officer and chairman of the board.

The company did not prosper, and in 1983 it filed for Chapter 11 reorganization and then later converted to a Chapter 7 liquidation bankruptcy.[207] During AFS's brief life, Litwin had loaned the company various sums, and had personally guaranteed certain third party loans to the company. In connection with AFS's demise, Litwin incurred several monetary losses, including (1) $150,000 he personally loaned to the company, (2) $350,000 paid to a third party lender to discharge his obligations as a personal guarantor of a company loan, and (3) $118,674.08 representing certain other amounts asserted by Litwin to have been advanced by him on behalf of AFS.[208] Litwin claimed all of the foregoing losses as bad debt deductions—that is, as ordinary losses—under I.R.C. § 166(a).[209] The IRS disallowed certain of the deductions in full and recharacterized the remaining deductions as short term capital losses on the theory that they were nonbusiness losses, rather than business losses.[210]

After paying the deficiency and filing a partially successful refund claim,[211] Litwin initiated a refund suit in district court. Following a bench trial, the district court found for Litwin on his entire claim, holding that the losses were incurred in transactions entered into with a business

203. *See id.* at 99.
204. *Id.* at 103.
205. *See id.* at 104.
206. Litwin v. United States, 983 F.2d 997, 998 (10th Cir. 1993).
207. *Id.* at 998-99.
208. *Id.* at 999. The third figure included $75,097 in legal fees incurred in a suit to collect against other guarantors of AFS debts, $33,577.08 in legal fees incurred in defending a counterclaim asserted by an AFS distributor, and a $10,000 advance made by Litwin to another distributor. Litwin's bad debt deduction in respect to these amounts was based upon his alleged right to collect these amounts back from AFS. *Id.*
209. Litwin also asserted that certain of these expenditures were alternatively deductible under I.R.C. § 162 as ordinary and necessary business expenses. In any event, this issue was not reached by the Tenth Circuit Court of Appeals.
210. *Id.*
211. Litwin was successful in having a portion of his deduction for legal fees, which had been disallowed almost in its entirely, reinstated. *Litwin*, 983 F.2d at 999.

purpose, and therefore gave rise to ordinary loss deductions as business bad debts under I.R.C. § 166(a).[212] The government appealed to the Tenth Circuit Court of Appeals.

C. *The Tenth Circuit's Opinion*

On appeal, the Tenth Circuit Court of Appeals[213] affirmed the decision of the district court.[214] After recognizing that the Tenth Circuit applies an objective, rather than subjective, test in determining a taxpayer's dominant motivation in entering into the transaction giving rise to the bad debt,[215] the court noted that "courts appear to . . . focus[ ] on three objective factors in determining a [shareholder-employee's] dominant motivation: (1) the size of taxpayer's investment, (2) the size of taxpayer's after-tax salary, and (3) other sources of gross income available to the taxpayer."[216] Where a taxpayer's investment in the subject corporation is relatively large, his salary is relatively small, and he has other sources of relatively large income, the courts are more likely to find that the dominant motivation of the taxpayer in extending the debt was nonbusiness, that is, designed to protect the taxpayer's investment in the corporation rather than his status as an employee of the corporation.[217]

Based on these criteria, the Tenth Circuit had no problem in affirming the district court's determination that Litwin's dominant motivation in loaning money to AFS, guaranteeing AFS's debts, and advancing money on its behalf was to protect his status as an employee, rather than his investment in the company.[218] First, the testimony and other evidence indicated that Litwin started the company and sought to keep it afloat in order to remain active as a salaried employee and be useful to society, goals best achieved by someone of Litwin's advanced age by running his own company.[219] Second, Litwin was in fact very active in AFS's day-to-day affairs, and his relationship with the company was not that of a passive investor.[220] Third, although Litwin had deferred his salary for three years, the evidence indicated that he intended to begin drawing it once the company's cash flow problems had eased. Furthermore, his efforts that gave rise to the losses in question were aimed at resolving those problems.[221] In any event, even if Litwin's deferral of his salary could be taken as an indication that his motives were investment-oriented rather than employment-oriented, this one fact is not dispositive. Fourth, Litwin's loans, guarantees, and advances were three times the value of his investment in the

212. *Id.*
213. The three judge panel consisted of Judges Baldock and Seth, and Judge Clarence A. Brimmer, District Judge, United States District Court for the District of Wyoming, sitting by designation. *Id.* at 998.
214. *Id.* at 1001.
215. *Id.* at 1000 (citing Kelson v. United States, 503 F.2d 1291, 1293 (10th Cir. 1974)).
216. *Litwin*, 983 F.2d at 999.
217. *See id.*
218. *Id.* at 1001.
219. *Id.*
220. *Id.*
221. *Id.*

company, indicating his motives to be other that the protection of that investment.[222]

In light of the foregoing evidence, the court of appeals upheld the trial court's conclusion[223] that "Litwin's dominant motivation . . . was business, not investment, related."[224] Therefore, Litwin's various losses could be claimed by him as ordinary bad debt deductions under I.R.C. § 166(a).

D. *Summary*

The opinion of the Tenth Circuit Court of Appeals in *Litwin* did not attempt a definitive exposition of the law concerning the deductibility of bad debts by shareholder-employees. The court did make it clear, however, that it will apply the three-factor objective test recited above in determining the motivation of such a taxpayer in entering into the transaction that gave rise to the claimed loss. If the dominant motivation was to protect the shareholder-employee's trade or business as an employee, the taxpayer will be allowed to deduct the loss as a bad debt under I.R.C. § 166(a). On the other hand, if the dominant motivation of the taxpayer, as determined in accordance with the objective factors, was to protect his investment in the corporation, the bad debt loss can be claimed, if at all, only as a short-term capital loss.

V. Summary of Other Cases Decided by the Tenth Circuit in 1993

A. *Some Decisions of Note*

In *Anthony v. United States*,[225] the taxpayers had been issued a statutory Notice of Deficiency for the tax years 1978, 1979, and 1980, in which the IRS asserted a deficiency in the amount of $32,735.64.[226] Following the filing of a Tax Court petition by the taxpayers, the matter was settled for $15,367.00.[227] The "decision document" evidencing the settlement contained a "finality clause," stating that the settlement agreement constituted "a final civil settlement of taxes due for the years in question."[228] The document was signed by the taxpayers and an authorized IRS representative and entered as a final decision of the Tax Court in early 1987.[229] Subsequently, the IRS instituted activities to collect not only the $15,367.00 figure stipulated, but also interest on the deficiency in an additional amount in excess of $19,000.00.[230] The taxpayers paid the total sought by the IRS, then filed suit for refund in the district court.[231] The district court held that the term "taxes" as used in the decision document in-

222. *Litwin*, 983 F.2d at 1001.
223. In other words, the trial court's finding of fact was not "clearly erroneous." *See supra* note 199.
224. *Litwin*, 983 F.2d at 1001.
225. 987 F.2d 670 (10th Cir. 1993).
226. *Id.* at 672.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Anthony*, 987 F.2d at 672.
231. Anthony v. United States, 765 F. Supp. 656, 656 (D. Colo. 1991).

cluded interest, and entered summary judgment for the taxpayers.[232] The court ordered the IRS not only to refund the interest, but also to pay the taxpayers' reasonable attorney's fees and costs.[233]

In affirming the district court in *Anthony*, the Tenth Circuit Court of Appeals noted that the settlement document did not satisfy the statutory requirements for either a compromise, as asserted by the taxpayers, or a closing agreement, as contended by the IRS.[234] The former would have constituted final payment, including interest, while the latter would not. The document was therefore seen to be open to interpretation. Finding the agreement nevertheless to be a valid stipulation by the parties,[235] the court proceeded to construe the document in the taxpayers' favor.[236] The court noted that the "finality clause" quoted above was added to the document because of the taxpayers' concern that the settlement be final and that it resolve all civil aspects of the case.[237] The evidence reflected that the IRS attorney handling the matter had so assured the taxpayers.[238] Conversely, despite the IRS's claim that it rarely waives interest and that the IRS most likely so informed the taxpayers that interest was a separate element of the settlement, the IRS could produce no specific evidence that the taxpayers were so informed. The court further noted the rule of construction that resolves an ambiguity against the draftsman, and applied it against the IRS.[239] In this regard, the court noted that "where the government enters into an agreement with its citizens, it has a duty to act with at least a 'minimum standard of decency, honor, and reliability.' "[240] The court concluded that this standard was not satisfied in the present case. Finding no material issue of fact, the court upheld the district court's entry of summary judgment.[241] In addition, the appellate court upheld the imposition of litigation costs against the IRS,[242] although it remanded the question of whether the costs imposed by the district court were in fact reasonable.[243]

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232. *Id.* at 657.

233. *Id.*

234. *Anthony*, 987 F.2d at 673. *See* I.R.C. §§ 7121, 7122 (1988).

235. *Anthony*, 987 F.2d at 673. Informal agreements to settle tax disputes are generally held to be invalid, and it is usually necessary for the agreement to satisfy the formal statutory guidelines for compromises, closing agreements, and the like. Uinta Livestock Corp. v. United States, 355 F.2d 761, 765 (10th Cir. 1966).

236. *See Anthony*, 987 F.2d at 674.

237. *Id.* at 673.

238. *Id.*

239. *Id.* at 674.

240. *Id.* at 674 (quoting *Heckler v. Community Health Serv.*, 467 U.S. 51, 61 (1984)).

241. *Id.*

242. *Anthony*, 987 F2d at 674. Such costs may be recovered by the taxpayer against the government if the taxpayer is able to prove that (1) all administrative remedies have been exhausted, (2) the requested award constitutes "reasonable litigation costs," and (3) the taxpayer is the "prevailing party" in the matter. I.R.C. § 7430 (1988 & Supp. IV 1992).

243. *Id.* at 675. Attorney's fees awarded under I.R.C. § 7430 cannot exceed $75 per hour, adjusted for cost of living increases and "special factors." I.R.C. § 7430(c)(1)(B)(iii) (1988). The record before the Court of Appeals was insufficient for it to make a determination on this question. *Anthony*, 987 F.2d at 675.

In *Angle v. Commissioner*,[244] the taxpayer timely filed his 1982 federal income tax return on which he reported a $453,638 tax preference item in the form of excess intangible drilling costs.[245] In 1984, the taxpayer filed a timely refund claim in which he reduced the amount of the tax preference item.[246] In 1986, he again filed a refund claim pertaining to his 1982 taxes, this time based on a net operating loss from 1984, and again recalculated his excess intangible drilling costs.[247] Finally, in 1989, he filed a third refund claim, asserting that in fact he had no excess intangible drilling costs at all in 1982 because his excess percentage depletion[248] should have been added back to his income from oil and gas operations in determining excess intangible drilling costs.[249] The taxpayer had executed various consents to extend the statute of limitations applicable to his 1982 return, to December 31, 1987. This extended the period in which he could claim a refund based on his 1982 return to June 30, 1988.[250] The IRS disallowed the 1989 refund claim on the basis that it was not timely.[251] The taxpayer brought suit for refund in the district court. The district court dismissed the case for lack of subject matter jurisdiction.[252]

On appeal to the Tenth Circuit Court of Appeals, the district court's decision was affirmed.[253] The appellate court noted that a refund suit may not be brought until a timely refund claim has first been filed with the IRS.[254] The refund claim must fully set forth the grounds upon which the refund is said to be owed, and in any subsequent suit for refund, the taxpayer may not rely upon any grounds not reasonably encompassed by those set forth in the timely filed refund claim.[255] The taxpayer in *Angle* argued that his original and 1986 refund claims put the IRS on notice, generally, that the calculation of the correct amount of excess intangible drilling costs was at issue. The taxpayer argued that his 1989 refund claim merely posited a new method for its recalculation and did not advance a

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244. 996 F.2d 252 (10th Cir. 1993).
245. *Id.* at 253; *see* I.R.C. § 57(a)(2)(11) (1988 & Supp. IV 1992).
246. *Angle*, 996 F.2d at 253.
247. *Id.*
248. *See* I.R.C. § 57(a)(1),(8) (1988 & Supp. IV 1992).
249. *Angle*, 996 F.2d at 253.
250. *Id.* at 253 n.2; *see* I.R.C. § 6511(c)(1) (1988).
251. *Angle*, 996 F.2d at 253.
252. *Id.*
253. *Id.* at 256.
254. *Id.* at 253. I.R.C. § 7422(a) (1988) provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the [IRS], according to . . . the regulations of the Secretary [of the Treasury] established in pursuance thereof.

255. *See* Herrington v. United States, 416 F.2d 1029, 1032 (10th Cir. 1969). The applicable Treasury Regulation provides:

> No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.

Treas. Reg. § 301.6402-2(b)(1) (as amended in 1977).

new theory of recovery.[256] The Court of Appeals rejected this argument, noting that the 1989 claim "involve[d] theories different from any that taxpayer put forward in the timely filed claims."[257] Thus, the claim was barred by the applicable statute of limitations.[258]

The importance of properly formalizing tax arrangements was highlighted in *White v. Commissioner*.[259] The taxpayers in *White* had caused a family partnership to be formed in Utah and funded it with personal and business assets of the family.[260] The family also purported to transfer a tract of undeveloped land to the partnership. Other than the execution of an unrecorded and undelivered deed which did not contain a description of the property, however, no action was taken to transfer the tract to the partnership, and it remained titled in the names of individual family members.[261] In 1982, construction of a house began on the tract. The partnership's cash flow provided the bulk of the funds needed for construction, which extended over several years. When financing was necessary from time to time, the family members—not the partnership—borrowed the funds individually and executed deeds of trust to the lender in their individual capacities, giving the lender a security interest in the tract.[262] The IRS issued a Notice of Deficiency, asserting that the moneys applied by the partnership toward construction of the house constituted deemed cash distributions from the partnership to the partners; and to the extent the deemed distributions were in excess of the partners' bases in their respective partnership interests, were taxable as capital gains.[263]

The Tax Court sided with the IRS,[264] and the Tenth Circuit Court of Appeals affirmed.[265] The taxpayers correctly pointed out that under Utah law, property acquired with partnership funds is presumed to be partnership property;[266] and that partnership property can be held in the name of a general partner.[267] The Court of Appeals determined, however, that in fact the partnership simply failed to acquire any property.[268] The partners had owned the property in their individual capacities prior to the formation of the partnership, and therefore could not be viewed as having held the property on behalf of a yet-unformed partnership.[269] The subsequent improvement to the tract, in the form of the house, merely became part of the realty. As such, the home was simply an enhancement to the property interest held by the partners, not a separate property interest

256. *Angle*, 996 F.2d at 254.
257. *Id.*
258. *Id.* at 255.
259. 991 F.2d 657 (10th Cir. 1993).
260. *Id.* at 659.
261. *Id.*
262. *Id.*
263. *Id.* at 660; *see* I.R.C. § 731 (1988 & Supp. IV 1992).
264. White v. Commissioner, 62 T.C.M. (CCH) 1181 (1991).
265. *White*, 991 F.2d at 662.
266. *Id.* at 660; UTAH CODE ANN. § 48-1-5 (1994).
267. *White*, 991 F.2d at 660; UTAH CODE ANN. § 48-1-7 (1994).
268. *White*, 991 F.2d at 660.
269. *Id.*

held by the partnership.[270] The partnership therefore did not acquire any property interest with partnership funds; it merely improved property held individually by the partners. Moreover, the evidence—such as the manner in which financing was obtained and the fact that the deeds of trust were delivered in the individual names of the partners—reflected that the partners treated the tract as owned by them in their individual capacities and not by the partnership.[271] Thus, any amounts expended by the partnership to improve the partners' property constituted deemed cash distributions to the partners.[272]

In *Buckmaster v. United States*,[273] the personal representative of the deceased taxpayer's estate had distributed the estate's income in equal shares to its beneficiaries in each of the two taxable years the estate was open.[274] The estate then claimed deductions on the estate's income tax returns for these distributions under the provision of the Internal Revenue Code that allows a deduction for income either required to be currently distributed by the estate—such as by the express terms of the will—or which is otherwise "properly paid" during the tax year to the beneficiaries of the estate.[275] The decedent's will did not require these distributions to be made. The IRS challenged the deductions on the grounds the distributions were not "properly paid" by the estate because in neither year did the personal representative secure an order from the probate court authorizing the distributions before they were made.[276] When the estate was closed in February 1986, however, the state probate court in Oklahoma had issued an order of final settlement in which it approved all actions taken by the personal representative.[277] The order was a general one and did not reference specifically the distributions, though they were set out in the final accounting filed with the petition for final settlement.[278] The estate paid the deficiency and filed a refund action in district court, which granted the government's motion for summary judgment.[279]

On appeal, the Tenth Circuit Court of Appeals reversed, siding with the estate.[280] The court of appeals noted that a post-distribution approval will render the distribution "properly paid" only if the approval is recognized as valid under the state law governing the estate's administration.[281] Finding no reported decision of the Oklahoma courts on point, the court reviewed decisions emanating from states other than Oklahoma and concluded that "every appellate court that has directly considered the ques-

270. *See id.*
271. *Id.*
272. *Id.* at 661.
273. 984 F.2d 379 (10th Cir. 1993).
274. *Id.* at 380.
275. *Id.*; *see* I.R.C. § 661(a)(2) (1988).
276. *Buckmaster*, 984 F.2d at 381.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* at 383.
281. *Buckmaster*, 984 F.2d at 381.

tion, including the United States Supreme Court," has treated post-distribution approvals as valid.[282] The court of appeals concluded that "the Oklahoma Supreme Court, if presented with the issue, would consider distributions of estate income by an executor or administrator made without prior probate court approval but subsequently ratified by that court to be 'properly paid' " within the meaning of the Internal Revenue Code.[283]

The taxpayer in *Worden v. Commissioner*[284] was an insurance agent. The taxpayer primarily sold casualty and property insurance, but occasionally sold life insurance through Federal Home Life Insurance Company.[285] Apparently as a "loss leader" to maintain goodwill with his clients, and in accordance with written contracts entered into with his clients, the taxpayer sold the life insurance policies "at cost"; that is, the first year premium collected from his clients was equal only to the net amount the taxpayer was obligated to remit to Federal Home Life.[286] Normally, the taxpayer would have been entitled to collect a larger amount from the insured: the net premium payable to the insurer and a commission he would retain for himself.[287] Instead, the taxpayer collected only the net first year premium due to Federal Home Life, which was remitted in full to the insurer. He never collected or paid himself a commission. On the assumption that the taxpayer was in fact paying himself a commission, Federal Home Life filed an informational return indicating that the taxpayer had earned approximately $33,000 in commissions from the sale of its life insurance.[288] The IRS assessed this amount to the taxpayer on the theory the taxpayer had "constructively received" the commissions[289] even though he had never *actually* received them.[290] The Tax Court upheld the assessment.[291]

The taxpayer appealed to the Tenth Circuit Court of Appeals, which reversed.[292] The court noted that the taxpayer's contract with Federal Home Life obligated the taxpayer to remit only the net premium, so there was no question of the arrangement constituting a deemed payment of the larger amount to the insurer with a deemed payment back of the commis-

282. *Id.* at 383.
283. *Id.*
284. 2 F.3d 359 (10th Cir. 1993).
285. *Id.* at 360.
286. *Id.* at 360-61.
287. *Id.* at 361.
288. *See id.* at 360-61.
289. Cash basis taxpayers must report items of income in the year they are "actually or constructively received." Treas. Reg. § 1.451-1(a) (as amended in 1978). A taxpayer is deemed to be in constructive receipt of an item of income "in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it an any time." Treas. Reg. § 1.451-2(a) (as amended in 1979).
290. *Worden*, 2 F.3d at 361. The IRS also determined the waived commissions could not be deducted by the taxpayer because the arrangements constituted illegal kickbacks to the clients, and were therefore nondeductible under I.R.C. § 162(c)(2) (1988). The Tax Court agreed. *Id.* The Tenth Circuit Court of Appeals did not reach this question, having reversed the Tax Court on the question of constructive receipt. *Id.*
291. *Id.*
292. *Id.* at 362.

sion.[293] Federal Home Life never paid any commission to the taxpayer, nor was it obligated to do so.[294] Likewise, the taxpayer's written contract with each client specified that the client was only obligated to pay the net premium, not some higher amount that included a commission.[295] Thus, the taxpayer was not providing a reduction of premium or a kickback, but was merely waiving his right to the commission prior to his having earned it. Under these facts, the court of appeals held that the taxpayer could not be viewed as having constructively received the commissions and reversed the determination of the Tax Court.[296]

B. *Enforcement*

The taxpayers in *Anaya v. Commissioner*,[297] a married couple, were partners in a partnership that kept inadequate financial and tax records from which it was not possible to determine or verify their taxable incomes. The evidence indicated the taxpayers maintained a lavish lifestyle inconsistent with their claim that their joint income never exceeded $15,000 in any of the three tax years in question.[298] A criminal investigation did not yield an indictment, but a civil case against the taxpayers culminated in the IRS issuing a Notice of Deficiency asserting underreported income in excess of $70,000 and proposing a deficiency plus a civil fraud penalty equal to fifty percent of the deficiency.[299] The taxpayers filed a petition with the Tax Court, which upheld the IRS's determination.[300]

To reconstruct the taxpayers' taxable income and generate the Notice of Deficiency, the IRS used the "cash expenditure method."[301] Under this method, the IRS is entitled to rely on the magnitude of funds expended from a taxpayers' checking account in determining taxable income, so long as the IRS can present evidence either that the funds were *likely* derived from taxable sources, or in fact *were* derived from taxable sources (in the latter case, by tracking deposits made to the account).[302] On appeal, the Tenth Circuit Court of Appeals found the taxpayers had produced no credible evidence to overcome the presumption of correctness in the IRS's

293. *See id.*
294. *Id.*
295. *Worden*, 2 F.3d at 362.
296. *Id.*
297. 983 F.2d 186 (10th Cir. 1993).
298. *Id.* at 187. Among other indications of unreported income, the taxpayers' mortgage payments exceeded their claimed monthly income by more than $200. In addition, the taxpayers took numerous vacations, owned a "Corvette with personalized plates," a satellite dish, solar energy equipment, and a large swimming pool. *Id.*
299. *Id.* at 187-88; *see* I.R.C. § 6653(b)(1) (Supp. IV 1992). The fifty percent civil fraud penalty was repealed by the Improved Penalty Administration and Compliance Tax Act, Subtitle G of Title VII of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 388 (codified as amended in scattered sections of 26 U.S.C.). The current penalty scheme is set forth in I.R.C. §§ 6662-6664 (Supp. IV 1992). *See* Dennis R. Schmidt & Thomas C. Pearson, *Civil Penalty Provisions Revampted by IMPACT*, 68 TAXES 187 (1990); Richard C. Stark, *IMPACT Makes Fundamental Changes in Civil Penalties*, 72 J. TAX'N 132 (1990).
300. Anaya v. Commissioner, 61 T.C.M. (CCH) 2040, 2041 (1991).
301. *Anaya*, 983 F.2d at 188.
302. *Id.*

assessment[303] and therefore affirmed the determination of the Tax Court.[304] The court likewise affirmed imposition of the civil fraud penalty.[305]

C. *Bankruptcy*

The issue in *In Re Graham*[306] arose when the Bankruptcy Court for the District of Colorado imposed two awards of attorney's fees against the government in light of the "extraordinarily inept and confusing" manner in which it had handled various aspects of the proceedings in the Bankruptcy Court.[307] The taxpayers had filed for bankruptcy under Chapter 7 of the Bankruptcy Code in 1987. Following a "long history of procedural missteps, neglect, and mismanagement" on the part of the government involving missed pleading deadlines, motions not properly served or filed, hearings not attended, withheld documents, and files inadvertently destroyed,[308] the Bankruptcy Court assessed approximately $4,000 in attorney's fees against the government.[309] The government appealed, arguing that the doctrine of sovereign immunity prevented the imposition of attorney's fees.

The Tenth Circuit Court of Appeals noted that absent "some explicit statutory waiver that will support the bankruptcy court's award,"[310] the fee awards could not stand. The court then examined a series of statutory provisions explicitly waiving sovereign immunity under various circumstances, but found each of them inapplicable.[311] The court therefore reversed the attorney's fee awards.[312]

The issue in *In Re Richards*[313] involved the application of the Bankruptcy Code provision that affords seventh priority status to tax claims assessed within 240 days before the filing of a bankruptcy petition.[314] The debtor had filed a petition in bankruptcy under Chapter 13 of the Bank-

303. The assessment proposed in the Notice of Deficiency is presumed correct, and the taxpayer bears the burden of proof in showing the assessment to be incorrect. Jones v. Commissioner, 903 F.2d 1301, 1303 (10th Cir. 1990).

304. *Anaya*, 983 F.2d at 188.

305. *Id.* at 189

306. 981 F.2d 1135 (10th Cir. 1992).

307. *Id.* at 1137.

308. *Id.*

309. *In re* Graham, 106 B.R. 692, 693 (D. Colo. 1989).

310. *In re* Graham, 981 F.2d at 1139.

311. *Id.* The court analyzed I.R.C. § 7430(c)(4) (1988), the general provision of the Internal Revenue Code for the award of litigation costs. *Id.* The court held that section 7430 did not apply, as sanctions can be imposed against government only if its litigation position was substantially unjustified, and no "position" of the government was implicated here, only administrative incompetence. *Id.* The court also looked at 11 U.S.C. § 105(a) (1988) (Bankruptcy Court's power to sanction a party for contempt does not include an express waiver of sovereign immunity that would authorize a monetary sanction), FED. R. CIV. P. 11 (Bankruptcy Court rules determined to be distinguishable), and 11 U.S.C. § 106 (1988) (provisions that waive sovereign immunity in three categories of cases found inapplicable). *Id.* at 1140-41.

312. *Id.* at 1140.

313. 994 F.2d 763 (10th Cir. 1993).

314. *See* 11 U.S.C. § 507(a)(7)(A) (1988).

ruptcy Code ninety-six days after the IRS had entered an assessment against him for certain long overdue taxes.[315] The IRS filed a proof of claim listing the claim as seventh priority.[316] As such, the claim was required to be paid in full. There was no objection to the IRS's proof of claim, however, 219 days after filing the petition, the debtor voluntarily dismissed the petition.[317] Subsequently, fifty-one days after dismissing his petition and 365 days after the assessment, the debtor filed a second Chapter 13 petition.[318] The IRS again filed a proof of claim listing its claim as seventh priority, to which the debtor objected. The Bankruptcy Court held that the 240-day period was suspended during the pendency of the first bankruptcy petition, such that the total time elapsed between the assessment and the filing of the second petition was reduced to 147 days, well within the 240 days provided in the statute.[319] The district court affirmed.[320]

On appeal, the Tenth Circuit Court of Appeals noted that the Bankruptcy Code contains no explicit authority for the tolling the 240-day period in the case of successive petitions in bankruptcy.[321] The court of appeals nevertheless affirmed the order of the Bankruptcy Court, holding that the Bankruptcy Court's determination to toll the 240-day period was within the power granted it under the Bankruptcy Code to " 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions' of the Bankruptcy Code and to take 'any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.' "[322] According to the court of appeals, an order suspending the 240-day period in this fashion "fulfills and preserves Congress's intent to afford the government certain time periods to pursue collection efforts, and at the same time prevents the debtor from avoiding priority by prolonging the initial bankruptcy proceeding."[323]

D. *Annual Round-up of Tax Protestors*

The annual Tenth Circuit case involving the National Commodity and Barter Association (NCBA) and its "service wing,"[324] the National Commodity Exchange (NCE), is *Aspinall v. United States*.[325] The plaintiffs in *Aspinall* were account holders of the NCE and members of the NCBA. The NCBA has been consistently characterized by the courts as a tax pro-

315. *In re* Richards, 141 B.R. 751, 751 (W.D. Okla. 1992).
316. *Id.*
317. *Id.*
318. *Id.*
319. *See id.* at 752.
320. *Richards*, 141 B.R. at 752.
321. *Richards*, 994 F.2d at 765.
322. *Id.* (quoting 11 U.S.C. § 105(a) (1988)).
323. *Id.*
324. *See* National Commodity & Barter Ass'n v. United States, 951 F.2d 1172, 1173 (10th Cir. 1991).
325. 984 F.2d 355 (10th Cir. 1993).

testor organization,[326] and cases involving the NCBA, the NCE, and their members are a frequent feature of the Tenth Circuit Court of Appeals calendar.[327] In 1985, the United States executed a search warrant at the NCBA/NCE offices and seized a large quantity of precious metals, coins, and currency in furtherance of a jeopardy assessment made against the organization for promoting abusive tax shelters.[328] The seized commodities had been held by the NCE against the account balances of various NCBA members. The NCE, in turn, paid the household and consumer bills of the account holders, cashed checks for the account holders, and otherwise acted to obscure the paper trail normally associated with taxpayers' financial dealings, all in the name of the NCE. Having now seen these commodities seized and their accounts rendered worthless, the plaintiffs filed an action in the district court, claiming an interest in the seized property and asserting that the seizure was improper.[329]

The plaintiffs' action was dismissed, and on appeal, the Tenth Circuit Court of Appeals affirmed.[330] After rejecting a series of meritless procedural objections relating to motions and hearings not granted to the plaintiffs, the court noted that the assets held by NCBA/NCE on behalf of each account holder were commingled with those held on behalf of all other account holders, much as a commercial bank commingles the funds of its depositors.[331] Under Colorado law, when money is deposited in a bank

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326. The National Commodity and Barter Association describes itself as an "organization which espouses dissident views regarding the federal reserve and the IRS and advocates the return to currency backed by gold and/or silver." United States v. National Commodity & Barter Ass'n, 951 F.2d 1172, 1173 (10th Cir. 1991). The NCBA has been described as an organization whose members "advocate dissident political views concerning the tax and monetary policy of the United States Government," Kroll v. United States, 573 F. Supp. 982, 984 (N.D. Ind. 1983), in response to what the organization "perceives to be an unconstitutional and oppressive monetary and taxation system. The leadership of the NCBA advocates and promotes opposition to federal income taxation laws." United States v. Stelten, 867 F.2d 446, 448 (8th Cir.), *cert. denied*, 493 U.S. 828 (1989). The National Commodity Exchange is "operated by NCBA members as a private or warehouse bank" the government views as a vehicle designed, among other things, to obscure the paper trail surrounding the financial affairs of its members. *National Commodity & Barter Ass'n*, 951 F.2d at 1173. In essence, NCE acts as a clearing house for a wide variety of financial transactions entered into by NCBA members by carrying out those transactions on the members' behalf, but in the name of NCE. Each NCBA member on whose behalf a particular transaction was effected would therefore remain anonymous, insuring "a high degree of privacy for the member." *Id.* The only record of these transactions maintained by NCE consisted of the current balance of each NCBA member's account at NCE. *Id.*

327. *See, e.g.*, Aspinall v. United States, 984 F.2d 355 (10th Cir. 1993); Pleasant v. Lovell, 974 F.2d 1272 (10th Cir. 1992); United States v. Parsons, 976 F.2d 452 (10th Cir. 1992); National Commodity and Barter Ass'n v. United States, 951 F.2d 1172 (10th Cir. 1991); National Commodity and Barter Ass'n v. Gibbs, 886 F.2d 1240 (10th Cir. 1989); Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir. 1989).

328. *Aspinall*, 984 F.2d at 356.

329. *Id.* The Internal Revenue Code provides:

> If a levy has been made on property . . . any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States. . . .

I.R.C. § 7426(a)(1) (1988).

330. *Aspinall*, 984 F.2d at 355.

331. *Id.* at 358.

account, title to the money passes to the bank.[332] The account holder then becomes merely a creditor of the bank, and the account represents a chose in action against the bank in the depositor's favor.[333] Such a creditor relationship represents a " 'mere claim of a contractual right to be paid, unsecured by a lien or other specifically enforceable property interest' " and is insufficient to confer standing under I.R.C. § 7426.[334]

The taxpayer in *United States v. Meek*[335] was a member of the Freeman Education Association (FEA), a tax protest organization similar in purpose and operation to the NCBA.[336] The taxpayer received substantial income from a trust that owned a majority interest in a Coca-Cola bottling plant. Acting on the beliefs that led him to membership in the FEA, the taxpayer did not file federal income tax returns for any year subsequent to 1976. In 1987, the taxpayer was convicted of willfully failing to file federal income tax returns for 1981, 1982, and 1983.[337] The taxpayer was sentenced to three years in prison. Tenaciously clinging to his beliefs, the taxpayer while in prison failed to file tax returns for 1987 and 1988, despite continuing to receive income from the trust.[338] As a result, the taxpayer was again tried and convicted for willfully failing to file tax returns as well as willfully attempting to evade income taxes[339] for the tax years 1987 and 1988. On appeal of this conviction, the taxpayer argued that the jury instructions were erroneous.[340]

The Tenth Circuit Court of Appeals disagreed and affirmed the conviction.[341] The court of appeals also affirmed the manner in which the district court applied federal sentencing guidelines in determining the length of the taxpayer's new prison term.[342]

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332. *Id.*

333. *Id.* (citing Jefferson Bank & Trust v. United States, 894 F.2d 1241, 1243-44 (10th Cir. 1990)).

334. *Aspinall*, 984 F.2d at 358 (quoting Valley Fin., Inc., v. United States, 629 F.2d 162, 168 (D.C. Cir. 1980)).

335. 998 F.2d 776 (10th Cir. 1993).

336. The FEA is an organization,

> designed to provide its members with an alternative to the Federal Reserve System. The FEA acts essentially as a warehouse bank, retaining funds deposited by its members until directed to disburse these funds. At the time the defendant became a member of the FEA, all transactions were conducted by means of a numbering system to protect the privacy of FEA members. At trial, a former trustee of the FEA testified that the majority of FEA members were individuals who believed that the income tax laws were either unconstitutional or voluntary and wanted to avoid leaving a paper trail for the IRS.

Meek, 998 F.2d at 778.

337. *Id.*; *see* I.R.C. § 7203 (Supp. IV 1992).

338. While in prison, the taxpayer was paid $126,266.00 in 1987 and $92,565.10 in 1988. *Meek*, 998 F.2d at 778.

339. *Id.*; *see* I.R.C. § 7201 (1988).

340. *Meek*, 998 F.2d at 779.

341. *Id.* The taxpayer argued that the jury instructions did not apprise the jury of the need to find that the defendant must have committed an affirmative act constituting an evasion of taxes. The court of appeals held that the jury instructions, taken as a whole, did in fact put the jury on notice of the need to make such a determination. *Id.*

342. In determining the length of the taxpayer's sentence, the district court considered the taxpayer's unreported income for all the years 1984 through 1991, not just the two years to which the current conviction related. The court of appeals found this to be proper. *Id.* at 782.