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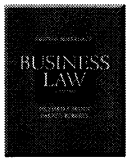

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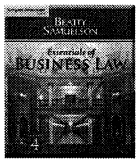

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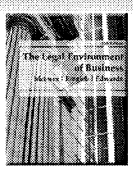

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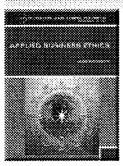

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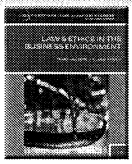

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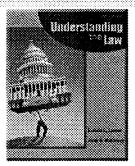

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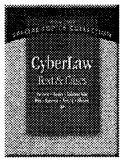

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NORTH EAST JOURNAL OF LEGAL STUDIES

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ARTICLES

PEDAGOGY

WARNING TO BUYER—NEVER PAY TOO MUCH TO ELECT A JUDGE *(CAPERTON v. A.T. MASSEY COAL COMPANY, INC., ET AL.)*

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J.L. Yranski Nasuti, J.D., LL.M.*

In John Grisham's novel, *The Appeal,* a Mississippi jury awarded a $41 million dollar verdict against a chemical company that was found to have dumped toxic waste into a town's water supply. The company's C.E.O. responded to the verdict by instructing his attorneys to initiate an aggressive appeal and by covertly contributing over $8 million to an effort to unseat a state supreme court justice who would most likely rule in favor of the plaintiff. The main qualification of the opposing candidate was his ability to be manipulated, marketed, and elected primarily for the purpose of eventually ruling in favor of the chemical company. The story is a good read—with a somewhat unexpected ending. It is also based, in part, on a real case that began in West Virginia and found its way to the U.S. Supreme Court) In that case, a $50 million jury award against the mining companies, was vacated by the West Virginia State Supreme Court in a 3-to-2 decision (with the deciding vote being cast by a justice who had received substantial campaign contributions from a powerful local businessman who also happened to be the chairman of the board and C.E.O. of the defendant mining companies). By the time the case of *Caperton et al. v. A. T Massey Coal Company,*

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Inc., et al.[2] reached the U.S. Supreme Court, the sole issue to be addressed was whether the plaintiffs' due process rights under the Fourteenth Amendment had been violated when the justice who had received the extraordinary campaign contributions refused to recuse himself from the case.

I.

The original dispute between Hugh Caperton and A.T. Massey Coal Company, Inc. is, from a literary point of view, far less dramatic than the one presented in *The Appeal.* A.T. Massey Coal Company, Inc. is one of the largest coal mining companies in the United States. During the 1990s, LTV Steel rejected Massey's repeated offers to sell it coal. LTV, instead, continued to use the services of an intermediary, Wellmore Corporation, to purchase a higher quality metallurgical coal that was produced by Harman Mine. Harmon Mine was a smaller Virginia company, which had been purchased, in 1993, by Harman Development Corporation, a company formed by Hugh Caperton.[3] In 1997, Massey bought the parent company of Wellmore—with the sole intention of finally selling its coal to LTV through Wellmore. Massey's plans were frustrated when LTV not only continued to reject offers to purchase Massey's coal but also terminated its relationship with Wellmore. Massey responded by directing Wellmore to invoke a *force majeure* clause, in the long-term contract that Wellmore had with Harman Mine, in order to substantially reduce the amount of coal that Wellmore would have to purchase from Harman Mine.[4] The drastic reduction in the order was a serious financial blow to Harman Mine since it occurred too late in the year for company to find another buyer for its coal. To make matters worse, Massey, which had been negotiating a deal to purchase Harman Mine from Caperton, backed away from those negotiations in a manner that increased the financial

distress of the Harman companies[s] and also utilized the confidential information obtained in the course of the process to make the Hannan Mine unattractive to others and to decrease its value. Hugh Caperton and the Harman companies eventually had no choice but to file for Chapter 11 protection in the U.S. Bankruptcy Court in Virginia.6

In May 1998, Harman Mining, Inc. and Sovereign Coal Sales, Inc. (two of the companies that originally owned Harman Mines when it entered into the long-term sales agreement with Wellmore) brought an action against Wellmore in the Virginia state court alleging breach of contract and breach of covenant of good faith and fair dealing.[7] A jury found in favor of the plaintiffs on their breach of contract claim and awarded $6 million in damage.

In the fall of 1998, Hugh Caperton and the Harman Companies (hereinafter referred to as Caperton) filed a lawsuit, this time in a West Virginia state court, against A.T. Massey Coal Company, Inc. and five of its subsidiaries (Elk Run Coal Company, Inc., Independence Coal Company, Inc., Marfork Coal Company, Inc., Perfoi_ ance Coal Company, and Massey Coal Sales Company) (hereinafter referred to collectively as "Massey").[8] In their amended complaint, the plaintiffs alleged claims of tortuous interference with existing contractual relations, tortuous interference with prospective contractual relations, fraudulent misrepresentations, civil conspiracy, negligent misrepresentation, and punitive damages. During the pretrial stage of the West Virginia case, the defendants filed an unsuccessful motion to dismiss based on a claim that the longterm coal supply contract, which was at the heart of the case, contained a forum selection clause that required the case to be heard in Buchanan County, Virginia. The defendants also filed an unsuccessful motion for summary judgment based on the claim that the action was barred under the legal principal of *res*

judicata. In 2002, a jury returned a $50 million verdict in favor of the plaintiffs. The defendants immediately filed a motion seeking judgment as a matter of law, a new trial, or, in the alternative, *remittitur.* Two and a half years later, the motion was denied by the Circuit Court[9] and the defendants appealed the decision to the West Virginia Supreme Court of Appeals. It was at this point that the legal issues in the case began to turn from those primarily relating to a breached contract to something completely different.

After the jury verdict was delivered but before the filing of an appeal in the West Virginia Supreme Court, Don Blankenship, chairman, chief executive officer, and president of the Massey Energy Company, took a very personal, and not inexpensive, interest in the composition of the state appellate court that would decide the outcome of the Massey case. The voters in 39 states elect some, if not all, of their state court judges.[th] West Virginia is one of the few states were all judicial positions are filled through partisan elections. In 2004, Justice Warren McGraw, a Democrat, was seeking reelection to the West Virginia Supreme Court. His opponent, Brent Benjamin, was a Republican with no prior judicial experience. Benjamin, however, had something much more valuable than experience. He had a wealthy supporter, Don Blankenship. Blankenship had contributed to judicial campaigns in the past—but always in amounts not exceeding a few thousand dollars. His donations to unseat McGraw and elect Benjamin exceeded $3 million. Blankenship contributed $1,000 (the statutory maximum) to Benjamin's campaign committee; $2.5 million to "And for the Sake of The Kids," a political organization, which was established under 26 U.S.C. § 527 and which supported Benjamin; and over $500,000 on independent expenditures such as direct mailings, solicitation letters, and media advertisements "to support . . . Brent Benjamin.'[1] Blankenship's total contributions exceeded the

amount spent by Benjamin's other supporters and was treble the amount spent by Benjamin's own committee. He also donated $1 million more than the combined amounts spent by the campaign committees for Benjamin and McGraw.[12] The outcome of the election was a win for Benjamin who received 53.3% of the votes cast.

In the fall of 2005, Caperton filed a motion to disqualify Justice Benjamin from participating in any future appeal involving the trial court's decision against Massey. Caperton argued that under the due process clause of the Fourteenth Amendment and the West Virginia Code of Judicial Conduct, Justice Benjamin had to recuse himself based on the conflict resulting from the campaign contributions that he had received from Blankenship. Under West Virginia law, the only party who can rule on such a motion is the judge to whom the disqualification request is directed. Benjamin denied the motion noting that he could find "no objective information .. . to show that this Justice has a bias for or against any litigant, that this Justice has prejudiced the matters which comprise this litigation, or that this Justice will be anything but fair and impartial."[13] When the West Virginia Supreme Court subsequently granted Massey's petition for appeal, it did so with the participation of Benjamin.

In 2007, West Virginia Supreme Court reversed the $50 million verdict against Massey on two grounds. The first was that the forum-selection clause in the contract (to which Massey was not a party) barred suit in West Virginia. The second was that the principle of *res judicata* barred the West Virginia suit since there had already been an out-of-state judgment (to which Massey had not been a party.) The 3-to-2 decision was supported by then-Chef Justice Davis and Justices Benjamin and Maynard and opposed by Justices Starcher and Albright.

Caperton successfully moved for a rehearing of the case. This time both sides filed motions to disqualify three of the five justices who had been involved in the original appeal. Massey challenged the impartiality of Justice Starcher based on critical comments that he had made about Blankenship's involvement in the 2004 elections.'[4] Caperton, in turn, requested the recusal of Justice Maynard after photos surfaced of him vacationing with Blankenship on the French Riviera at the same time that the appeal was pending. Both Starcher and Maynard agreed to disqualify themselves from participating in the rehearing. Justice Benjamin, on the other hand, once again denied Caperton's recusal motion which was based on the same grounds raised in the 2005 motion.[15] By the time the case was set for its rehearing, Benjamin was the acting chief justice. That gave him the responsibility of selecting Judges Cookman and Fox to replace the recused justices. It also precipitated Caperton's third unsuccessful recusal request of Benjamin.

The outcome of the second hearing was the same as the first. In a 3-to-2 decision, the West Virginia Supreme Court once again reversed the jury verdict. This time Justices Davis, writing a modified version of his prior majority decision, was joined by acting-Chief Justice Benjamin and Judge Fox. Judge Cookman joined Justice Albright in a dissenting opinion that concluded that the majority's opinion was fundamentally unfair and that the acting-chief justice's refusal to recuse himself had genuine due process implications. Caperton filed a writ of certiorari with the U.S. Supreme Court. One month later Benjamin issued his concurring opinion that addressed both the merits of the majority decision as well as the minority's criticism of his own decision not to recuse himself.16

II.

The sole issue presented to the U.S. Supreme Court, in the case of *Caperton, et al.* v. *A.T. Massey, et al.,*[17] was whether a plaintiff's due process guarantees were violated when a justice, who had received extraordinary campaign contributions from and through the efforts of the chairman of the board and C.E.O. of the defendant, denied the plaintiff's recusal motion. In a 5-to-4 decision, which was delivered by Justice Anthony Kennedy and joined by Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer, the Court reversed the decision of the West Virginia Supreme Court and remanded the case for further proceedings. Two dissenting opinions were filed in the case. The first was written by Chief Justice John Roberts and joined by Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. The second was a short solo dissent by Justice Scalia.

A. Majority Opinion

The majority opinion began with a brief review of the different approaches taken by the common law, legislation and judicial codes, and case law with regard to the issue of judicial recusals. Under the common law, judges were expected to recuse themselves where they have a direct substantial pecuniary interest in a case.[18] The rationale for such a rule was explained by James Madison in *The Federalist Papers* when he wrote "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably, corrupt his integrity."[19] Legislation and judicial codes were later enacted to supplement the common law rules--especially in those instances where a judge demonstrated personal bias and prejudice absent a direct substantial pecuniary interest in a case. Finally, case law identified a variety of situations where, as an objective matter, the

probability of the judge's actual bias was too high to be constitutionally tolerable. Of particular interest to the majority, were its own precedents in two kinds due process cases. The first involved judges who had the kind of personal and direct financial interests in the outcome of a case which were not covered by the common law rule and the second concerned judges who had charged defendants with criminal contempt and then refused to recuse themselves from presiding over the subsequent contempt proceedings.

The majority identified three cases, *Tumey v. Ohio,* [20] *Ward v. Monroeville,*[21] and *Aetna Life Insurance Co. v Lavoie et al.,*[22] in which the U.S. Supreme Court had addressed the issue of whether a judge should be disqualified from hearing a case if the judge had a personal and financial interest that would not necessitate recusal under the common law. In each instance, the Court concluded that due process violations occurred when the judges refused to recuse themselves.

In *Tumey,* the mayor of a small town also served as the judge in limited local criminal proceedings involving an Ohio prohibition law. Under the terms of the statute, the mayor was only compensated for his judicial work if he found the defendant to be guilty. The municipality was also entitled to a percentage of the fines that the mayor assessed against the guilty defendants.[23] The unanimous decision, delivered by Chief Justice William Taft, clearly stated that while every question of judicial qualification may not raise a constitutional issue (especially matters of kinship, personal bias, state policy, and remoteness of interest which are generally left to legislative discretion),[24] "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against

him in his case."[25] The Court concluded that in this instance the mayor, acting as judge, had both a direct pecuniary interest in the outcome (in so far as a guilty verdict increased his personal income) as well as an official motive (in so far as that same finding would augment his village's revenues).

The mayor in the *Monroeville* case also sat as a judge on cases involving ordinance violations and traffic offenses. Although the mayor received no additional compensation for his judicial work, his village received a major portion of its revenue from the fines, forfeitures, costs, and fees that were generated by the mayor's court. As in the *Tumey* case, the primary issue was "whether the mayor's situation [was] one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.""26 Justice William Brennan, in a 7-2 decision, concluded that a due process violation had occurred since the mayor's executive responsibilities for the village's finances exposed him to the "possible temptation" of rendering partisan decisions in order to fill the village coffers.

The recusal motion in the *Lavoie* case was primarily directed at a member of the Alabama Supreme Court who refused to disqualify himself from case involving an insurance company's bad-faith failure to pay a claim. Although the justice was not a party in that particular action, he was the lead plaintiff in a pending class action suit with a nearly identical claim against a different insurance company. The plaintiffs in that action included all state workers (including other members of the Alabama court) who were insured under the state's group medical plan. Both cases were based on an area of law that, at the time, was unsettled in the state. When the challenged justice cast the tie breaking vote in favor of Lavoie

in the state supreme court, he guaranteed that there would be a precedent for recognizing bad-faith failure claims and awarding punitive awards in his own pending action. Even though Chief Justice Warren Burger, writing for the majority, found the justice's interest in the Lavoie appeal to be "direct, personal, substantial, [and] pecuniary,"[27] he saw no need to decide whether the justice had in fact been influenced by his own interests in deciding as he did. The only necessary inquiry was "whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation to the average . .. judge to . . . lead him not to hold the balance nice, clear and true.'"[28] That being the case, the Court held that it was a violation of due process for that one justice to participate in the appeal.29

The majority then analyzed two additional U.S. Supreme Court decisions that dealt with another type of recusal problem that could not be resolved by applying common law norms. The defendants in *In Re Murchison et al.*[30] and *Mayberry v. Pennsylvania*[31] had argued for the reversal of criminal contempt convictions entered by judges who had participated in the defendants' preceding criminal proceedings. In each case, the Court concluded that the due process guarantees had been violated.

At the time of the *Murchison* case, judges in Michigan state courts of record had the authority to conduct a "one-man grand jury." Judges could compel witnesses to appear before them in secret hearings for the purpose of testifying about suspected crimes. Any witness held in contempt during one of these proceedings was entitled to an impartial public contempt hearing. In *Murchison,* the only issue that the Court considered was whether it was possible for a witness to receive an impartial hearing if the judge who issued the original contempt charge during the "one-man grand jury" proceeding was the

same judge who would preside over the contempt hearing. Justice Hugo Black, writing for the majority, ruled that a fair trial "requires not only the absence of actual bias" but also the prevention of "even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[32] Black went on to acknowledge that such an interest could not be defined with precision and that it rested instead on an examination of the circumstances and relationships. In this particular case, "[h]aving been part of [the one-man grand jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused."33 That was because, "as a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session."34

The *Mayberry* case involved three criminal defendants who chose to represent themselves in court. During the course of the jury trial, the defendants subjected the judge to repeated verbal abuse—much of a personal nature. It was, however, not until after the jury had returned a guilty verdict and just before the judge imposed his judgment on that verdict that the judge also pronounced one of the defendants guilty of numerous counts of criminal contempt which would result in significant jail time. The defendant argued on appeal that the trial judge's finding of criminal contempt was a violation of due process. Justice William 0. Douglas, who delivered the decision of the Court, agreed. While acknowledging that the actions by the defendant constituted "brazen efforts to denounce, insult, and slander the court and to paralyze the trial,"[3'] the majority questioned the trial judge's failure, during the course of the trial, to maintain order in the courtroom by acting instantly, with propriety, holding the defendant in contempt, or excluding him from the courtroom, or, in some other way, insulating his vulgarity.[36] Vicious attacks should not, by themselves, drive a

judge from proceeding with a case. "Where, however, [the judge] does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place."37

Since there were no due process precedents that specifically addressed the issue of whether elected judges must recuse themselves from cases involving campaign supporters, the majority relied for guidance on the principles established in *Tuniey, Monroeville, Lavoie, Murchison,* and *Mayberry.* In those cases, a finding of actual bias was not required to establish a due process violation. As a consequence, there was no need to question Justice Benjamin's own subjective findings of impartiality and propriety or to pursue an independent inquiry into the matter. The majority chose instead to adapt Benjamin Cardozo's premise that it is not easy for a judge to describe the actual process by which he or she arrives at a judicial decision[38] and observed that it is similarly difficult for a judge to conclude through, self-examination alone, that actual bias had not contributed to that judicial decision. It was for these reasons that there needed to be objective rules to guarantee "adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding [a] case."39

There was no suggestion in the *Caperton* that every elected judge is at risk of probable bias just because he or she has received campaign contributions either from a party to a lawsuit or that party's attorney. Nonetheless, in "exceptional" cases, "there is a serious risk of harm—based on objective and reasonable perceptions—when a person with a personal sake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was

pending or imminent." [40] After considering a number of factors: the relative size of Blankenship's contributions to the campaign in comparison to the combined contributions of other donors; the total amount spent on the election; and the apparent impact of those contributions to the outcome of the election, the majority concluded that "Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case."""

Massey and Benjamin argued that the people of West Virginia that had elected Benjamin to the bench based on factors that were independent of Blankenship's influence. Every major newspaper, but one, had endorsed Benjamin and his opponent had seemingly sabotaged himself in a much publicized and ill-fated campaign speech. The Court's response was to point out that while these kinds of arguments might help to answer the subjective question of the impact of Blankenship's campaign contributions on the Benjamin's victory, they did not contribute to the objective due process inquiry of "whether the contributor's influence on the election under all the circumstances "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.""[42] On the other hand, a consideration of the comparative largess of Massey's contributions and "the temporal relationship between the campaign contributions, the justice's election, and the pendency of the case"[43] were much more critical to the objective inquiry.

Blankenship made his "extraordinary" $3 million contribution to Benjamin's campaign during the same period of time that his company was preparing to file a challenge to the jury award in the West Virginia Supreme Court. Blankenship knew that it was reasonably foreseeable that the winner of the judicial race would participate in the outcome of that case. Under the circumstances, it was clear that Blankenship had a

vested interest in the outcome of the election. Expanding on the common law rule that no man should be a judge in his own case because of fears of bias, the Court concluded that similar fears can occur "when--without the consent of the other parties—a man chooses the judge in his own case."[44] It then applied the expanded principle to the judicial election process and held that "there was a serious, objective risk of actual bias that required Justice Benjamin's recusal."45

The majority never suggested that Justice Benjamin had exhibited any actual bias in favor of Massey. A finding of actual bias was, in fact, irrelevant since due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."[46] On the other hand, the Court had to objectively review the facts (Blankenship's significant and disproportionate contributions to Justice Benjamin's campaign and the temporal framework of the election and the pending case) to determine whether they seemed to "offer a possible temptation to the average ... judge to . . . lead him not to hold the balance nice, clear and true."' The majority concluded that in light of the "extreme facts" of this case, Justice Benjamin's refusal to recuse himself suggested "the probability of actual bias that rises to an unconstitutional level."48

Massey (and Chief Justice Roberts and Justice Scalia in their minority decisions) had predicted that the recognition of a due process violation in this case would result in a flood of *Caperton* recusal motions and an unnecessary interference in state judicial elections. The majority refuted this claim by once again emphasizing that *Caperton* addressed "an extraordinary situation" involving facts that were "extreme by any measure."[49] As in the earlier recusal cases cited by the Court, it was the extreme nature of the facts that "created an

unconscionable probability of bias that "cannot be defined with precision"[50]--and that cannot be allowed to interfere with a person's basic right to a fair trial in a fair tribunal. Since those cases had not generated a flood of *Monroeville* or *Murchison* motions, the Court hoped for a similar result with regard to future *Caperton* motions.

The opinion concluded by reiterating the Court's belief that "the Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today."51 Since states have implemented codes of judicial conduct that provide greater protection than the due process clause requires, most recusal cases would not involve a Constitutional issue.

B. Minority Opinions

1. Dissenting Opinion (Roberts)

Chief Justice Roberts disagreed with the majority's extended application of the due process clause to recusal cases other than those in which the judge had a particular financial interest in the outcome of a case or those in which the judge presiding at the contempt hearing was the same judge who had issued the contempt charge in a prior proceeding. I-fis primary objections to the majority opinion were the difficulties that judges would have in applying the "probability of bias" standard, the amount of groundless litigation that would be generated by the holding, and his belief that the application of such a standard would contribute to the erosion of public confidence in judicial impartiality.

His first objection to the majority's "objective" standard was that it "fails to provide clear, workable guidance for future cases."[52] Roberts included a list of 40 questions to demonstrate

how difficult it will be for judges to apply the new "probability of bias" standard.[53] The questions raised a variety of issues including: how much money was too much money,[54] whether it mattered that the litigant had contributed to other candidates or made large expenditures in connection with other elections,[55] whether the "objective" test was determined through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge,[6] and what kinds of cases were implicated by the doctrine—cases pending at the time of the election, cases reasonably likely to be brought, or important but unanticipated cases that were filed shortly after the election.57 In trying to decide why a candidate won an election, whether the financial support was disproportionate, and whether a likely debt of gratitude existed, judges would be asked to "simultaneously act as political scientists . . . , economists . . . , and psychologists."58

Roberts then went on to scoff at the Court's repeated declaration that its new rule only applied to the "extreme," "exceptional," and "extraordinary" case and, therefore, would not generate a rash of *Caperton* motions. The fact that most cases would have little chance of success did not mean that they would not be filed. The proliferation of the *Caperton* motions, with claims of judicial bias or the probable bias, would, instead, further contribute to "bringing the judge and the judicial system into disrepute."59

The dissenting opinion concluded by questioning whether the facts in the case really were so extreme as to justify a finding of probable bias. The total amount of direct contributions to Justice Benjamin's campaign from Blankenship had been a mere $1,000 (the statutory limit). The rest of the $3 million were not even contributions but "independent expenditures" over which Benjamin had no control.[6o] The fact that "And for the Sake of the Kids," a

independent group, received two-thirds of its funding from Blankenship and spent over $3,623,500 to support Benjamin's campaign was also seen as nothing more than business as usual. "Consumers for Justice," an independent group receiving large independent expenditure from the plaintiffs' bar, had also spent approximately $2 million on behalf of Benjamin's opponent. The fact that Blankenship had previously contributed large amounts of money on behalf other West Virginia candidates reassured the minority. That seemed to imply that Blankenship was not spending his money just to influence the outcome of a particular pending case—he was instead seeking to change everything.[61] Roberts further suggested that after evaluating the performance of the candidates and checking out the newspaper endorsements, it was just possible that Benjamin won, not because Blankenship had "cho[sen] him to be the judge in his own cause" but because the voters thought he would be a better judge.[62]

2. Dissenting Opinion (Scalia)

Justice Scalia, who had himself been the object of a very public recusal motion,[63] delivered a brief dissenting opinion. He began by criticizing the majority's opinion for "creat[ing] a vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 states that elect their judges.,[64] He found it particularly ironic that the new rule, which was meant to preserve the public's confidence in the judicial system, would have the opposite effect. Scalia expressed a concern for the "eroding public confidence in the Nation's judicial system" and placed the blame squarely on the shoulders of lawyers who make litigation look like a game "that the party with the most resourceful lawyer can play . . . to win."[65] "Adding [the *Caperton]* claim to the vast arsenal of lawyerly gambits"[66] would only reinforce that perception.

The remarkable accomplishment of the *Caperton* decision is that the Court, for the first time, turned to the due process clause of the Fourteenth Amendment to monitor the use of money in a state judicial election. It certainly did not outlaw the use of money. (That would have been too much for Justice Kennedy, who less than one year later, would also write the majority decision in *Citizens United v. Federal Election Commission.* [67]) It did, however, hold that an elected judge was disqualified from participating in any case where an interested party's contribution to the judge's election efforts was large enough to create "the probability of actual bias." A due process review does not require a determination of actual bias on the part of the judge or a finding that the interested party's campaign contribution was a necessary and sufficient cause of the judge's victory. The only thing that matters is whether the interested party's spending had a "disproportionate influence" on a pending or imminent case.

Both the majority and minority opinions worry that the public's confidence in the judicial system is eroding. The majority places some of the blame for that on the public's perception that the right to a fair trial is jeopardized when elected judges are influenced by campaign contributors.[68] The Court's solution is to disqualify elected judges from hearing cases where the campaign contributions of a party to a lawsuit are large enough to suggest "the probability of actual bias." The minority judges, on the other hand, see the cause of the problem to be with the attorneys _____ and not with the judges. As Justice Scalia wrote, the public has no confidence in a system that looks more that a game with victory going to the side that employs the most tricks. To create a new due process grounds for disqualifying judges (who have not even been accused with actual bias) is to hand the trial lawyers yet another tool in their

arsenal of tricks. The fear of the minority is that misuse of the new *Caperton* motion will bring judges and the judicial system into further disrepute.

How unfortunate that the one issue (the elephant in the room) that was not addressed by any of the justices was the overall impact of the massive amounts of money that are now being spent to elect judges.[69] One can only wonder how retired Justice Sandra Day O'Connor, the only living U.S. Supreme Court justice who has also served as an elected state court judge and who is a strong advocate of ending judicial elections, would have ruled in this case.

ENDNOTES

In an interview on *The Today Show,* Matt Lauer asked Grisham whether the plot line involving the stacking of an appellant court was plausible. Grisham's response was that lilt's already happened. It happened a few years ago in West Virginia. A guy who owned a coal company got tired of getting sued. He elected his guy to the Supreme Court, and now he doesn't worry about getting sued." *Caperton* v. *Massey: What a Long Strange Case It's Been* (West Virginia Public Broadcasting report by Scott Finn, June 9, 2009), http://www.wvpubcast.org/newsarticle.aspx?id+9955.

2 129 S. Ct. 2252; 173 L.Ed. 2d 1208; 2009 U.S. LEXIS 4157, June 8, 2009.

3 Prior to1993, the Harman Mining was owned by Inspiration Coal Corporation through three subsidiaries: Harman Mining Corp., Sovereign Coal Sales, Inc. and Southern Kentucky Energy Company. In 1992, Sovereign and Southern Kentucky entered into the ten year agreement with Weilmore in which it was agreed that Wel!more would purchase a certain amount of coal each year from Harman Mining.

The original contractual commitment to purchase a minimum of 573,000 tons of coal in 1997 was unilaterally reduced to a purchase of only 205,707 tons of coal.

[5] The Harman companies (which were all owned by Caperton) included Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc.

[6] *Caperton, et al. v. A.T. Massey, et al,* 223 Va. 624, 634; 679 S. E. 2d 223; 2008 W. Va. LEXIS 22 (W. Va., April 3, 2008)

[7] *Id.* at 634.

[a] No. 98-C-192 (Cir. Ct. of Boone County, W.Va.).

[9] No. 98-C-192 (Appeal from the Cir. Ct. of Boone County, W.Va), Order of Jay M. Hoke, (March 17, 2005).

[1o] The nine states that have no elected judges include: Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont. In the District of Columbia, the president's appointment of judges is subject to confirmation by the senate. In Virginia, legislative elections are used for judicial appointments. *Methods of Judicial Selection,* American Judicial Society, http://www.judicialselection.us/judicial selection/methods/selection of jud. aes cfm2state=.

[11] *Supra,* note 2, at 2257.

[12] *Id.* at 2257, (quoting Brief for Petitioners 28).

[13] *Id.* at 2258, (quoting App. 336a-337a).

[14] Among other things, Starcher referred to Blankenship as "a clown" and accused him of using his money to buy a seat on the court. *Supra,* note 1.

[15] Benjamin also rejected a suggestion by Starcher in his recusal memorandum that Benjamin recuse himself based on the observation that "Blankenship's bestowal of his personal wealth, political tactics, and "friendship" created a cancer in the affairs of this Court." *Supra,* note 2, at 2258, (quoting App. at 459a-460a).

[16] *Supra,* note 6, at 686.

[17] Supra, note 2.

[13] The common law rule stems from the ancient maxim of *aliquis non debet esse judex in propria causa—no* man shall be a judge in his own case.

[19] *Id.* at 2259, (quoting *The Federalist,* No. 10, p.59 (J. Cooke ed. 1961) (J. Madison)).

[20] 273 U.S. 510; 47 S. Ct. 437; 71 L. Ed. 749; 1927 U.S. LEXIS 708 (1927).

[21] 409 U.S. 57; 93 S. Ct. 80; 34 L. Ed. 2d 267 (1972).

[22] 475 U.S. 813; 106 S. Ct. 1580; 89 L. Ed. 2d 823; 1986 U.S. LEXIS 101 (1986).

[23] *Supra,* note 20, at 533. The fines could range between $100 and $1,000 for a first offense and $300 to $2,000 for second offenses.

[24] *Id.* at 532, (citing *Wheeling v. Black,* 25 W. Va. 266, 270).

[25] *Id* at 523.

[26] *Supra,* note 21, at 60, (quoting *Tumey, supra,* note 20, at 532).

[27] *Supra,* note 22, at 824 (quoting *Ward, id.* at 60 and *Tumey, supra,* note 20, at 532.)

[28] *Id.* at 825, (quoting *Ward, supra,* note 21, at 60 and *Tumey, supra,* note 20, at 532.)

[29] Aetna Insurance had originally asked all of the justices named in the class action case to recuse themselves from the appeal. Warren denied that request distinguishing the direct, personal, substantial, and pecuniary interests of the lead plaintiff from the slight pecuniary interest of the other justices who may not even have had any knowledge of the class action before the court issued its decision on the merits. *Id.* at 825-826.

[30] 349 U.S. 133; 75 S. Ct. 623; 99 L. Ed. 942; 1955 U. S. LEXIS 807 (1955).

[31] 400 U.S. 455; 91 S. Ct. 499; 27 L. Ed. 2d 532; 1971 U.S. LEXIS 89 (1970).

[32] *Supra,* note 30, at 136.

[33] *Id* at 137.

[34] *Id.* at 138. The majority noted that there was a difference between the single-judge grand jury (for which a Constitutional requirement for recusal existed) and the ordinary lay grand jury (which is "more a part of the accusatory process ... Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they refer." *Id.* at 138, (citing *Queen v. London County Council,* [1892] 1 Q. B. 190).

[35] *Supra,* note 31, at 462.

[36] *Id.* at 463.

[37] *Id.* at 463-464.

[38] *Supra,* note 2, at 2263. "This work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he has followed a thousand times and more. Nothing can be further from the truth." B. CARDOZO, THE NATURE OF JUDICAL PROCESS, 6 (1921).

[39] *Id.* at 2263.

[40] *Id.* at 2264.

[41] *Id.* at 2264.

[42] *Id.* at 2264, (quoting *Tzttney, supra,* note 20, at 532.)

[43] *Id.* at 2264.

[44] at 2265.

[45] *Id.* at 2265.

[46] *Id.* at 2265, (quoting *Murchison, supra,* note 30, at 136).

[47] *Id.* at 2265, (quoting *Lavoie, supra,* note 22, at 825 (quoting *Monroeville, supra,* note 21, at 60, in turn quoting *Tumey, supra,* note 20, at 532.)

[48] *Id.* at 2265.

[49] *Id.* at 2265. Neither party was able to identify any other case in which contributions to a judicial campaign presented the same potential for bias.

[50] *Id.* at 2265, (quoting *Lavoie, supra,* note 22, at 825-826; in turn quoting *Murchison, supra,* note 30, at 136.

[51] *Id.* at 2267, (quoting *Lavoie, supra,* note 22, at 828.

[52] *Id.* at 2269.

[53] One scholar has suggested that most of Roberts' questions can be into divided into five categories that relate to: the nature of the contributor; the nature and procedural posture of the case and the issues of cause and effect; the amount and type of contribution; the judge, judicial selection method, and judicial decision; and the nature of the procedural process for challenging a state judge. Penny J. White, *The Supreme Court, 2008 Term: Comment: Relinquished Responsibilities,* 123 HARV. L. REV. 120, 142-147 (2009).

[54] *Supra,* note 2, at 2269, (question 1).

[55] *Id.* at 2269, (question 4).

[56] *Id* at 2270, (question 24).

[57] *Id.* at 2271, (question 28).

[58] *Id.* at 2272.

[59] *Id.* at 2272.

[60] *Id.* at 2273. Roberts (citing *Buckley v. Valeo,* 424 U.S. 1, 47, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)) suggested that the additional $3,000,000 that was expended by Blankenship could just as easily been used to distort Benjamin's precise campaign messages and strategies rather than assist it.

[61] In 2006, the *New York Times* reported that Blankenship had "promised to spend "whatever it takes" to help win a majority in the [West Virginia] State Legislature for the long beleagued Republican Party." Between 2003 and 2004 Blankenship spent more than $6 million on a variety of political initiatives and local races (including over $3 million to successfully elect Brent Benjamin to the West Virginia Supreme Court and $650,000 to defeat Governor Joe Manchin, III's proposal to use bonds to shore up the state's employee pension plan). Ian Urbina, *Wealthy Coal Executive Hopes to Turn Democratic West Virginia Republican,* N.Y. TIMES, Oct. 22, 2006, http://www.nyti m es. com/2006/10/22/us/22blankenship. htm I.

[62] *Supra,* note 2, at 2274.

[63] In *Cheney, Vice President of the United States, et al.* v. *U.S. District Court for the District of Columbia, et al.,* 541 U.S. 913: 124 S. Ct. 1391; 158 L.Ed. 2d 225; 2004 U.S. LEXIS 2008 (2004), Scalia was asked to recuse himself after it was revealed that he had gone on a private hunting trip with Vice President Cheney, one of the litigants in the pending action. The motion did not question whether his ability to be fair and impartial was compromised ___but rather whether the trip created an appearance of judicial favoritism.

[64] *Id.* at 2274.

[65] *Id.* at 2274.

[66] *Id.* at 2274.

[67] 558 U.S. __ (2010).

[68] A recent USA TODAY/Gallup Poll found that: 89% of the 1,027 adults surveyed thought that the influence of campaign contributions on judges' rulings is a problem; 59% thought it was a major problem; and 90% thought that judges should be removed from cases involving parties who contributed to the judges' election campaigns. Joan Biskupic, *At the Supreme Court, a case with the feel of a best seller; Like a Grisham novel, W. dispute examines conduct of elected judges,* USA TODAY, Feb. 17, 2009, http://www. lexi snexi s. com/us/Inacadeinic/frame. do?reloadEntirePaer=true &rand-127135.

[69] Justice at Stake, a Washington, D.C. organization opposed to campaign spending for judicial races, has reported that between 1999 and 2008, over $200 million were raised nationally on behalf of state supreme court candidates. That represented more than a 100% increase over the amount raised in the previous nine years. Nathan Koppel, *Ruling on 'Probable Bias' Spotlights Political Reality,* THE WALL STREET JOURNAL, June 10, 2009, at A5.

HAZING ON COLLEGE CAMPUSES: WHO IS LIABLE?

by
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I. INTRODUCTION

An individual has the right to be free from harmful or offensive contact by another, including intentional contact anticipated to cause physical harm and emotional distress. The common law recognizes this right to be free from unpermitted contact, as well as the corresponding duty to conduct oneself in a manner that prevents unreasonable risks to others. When dealing with hazing on college campuses, the law differs from state to state. Currently forty-four states have anti-hazing statutes.[1] These statutes play an important role in setting forth the proper public policy on this issue.

In the past hazing was seen as a legitimate rite of passage, and young people who succumbed to the pressures of classmates where believed to be getting what they deserved. Now, in addition to civil liability, wrongdoers are facing criminal prosecution for their actions.[2]

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II. ANTI-HAZING STATUTES

Typically state statutes that outlaw hazing prohibit any willful act that recklessly or intentionally endangers the physical health of a student. Only Alabama, Ohio, Oklahoma, and Rhode Island recognize the mental as well as the physical aspects of hazing (see Figure 1).[3] Although a particular state may not have enacted a hazing statute, often actions that constitute hazing may be prosecuted under other criminal statutes, such as the state's assault or reckless endangerment laws. In most states, hazing is considered a misdemeanor, with fines ranging from $100 to $5,000.[4] However, in Illinois, Indiana, Missouri, Texas, Virginia, and Wisconsin, hazing that results in death or "great bodily harm" is categorized as a felony (see Figure 2).[5] The New Hampshire law is also particularly aggressive, stating that in addition to the individual wrongdoers, institutions may also be charged with a misdemeanor for "knowingly condoning hazing or negligently failing to take adequate measures to prevent student hazing".[6]

Figure 1: Hazing Statutes

Type	Number	Name
Physical Hazing Only	40	AZ, AR, CA, CO, CT, DE, FL, GA, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, NE, NV, NH, NJ, NY, NC, ND, OR, PA, SC, TN, TX, UT, VT, VA, WA, WV, WI
Mental and Physical Hazing	4	AL, OH, OK, RI
None	6	AK, HI, MT, NM, SD, WY

Figure 2: Criminal Charges by State for Hazing		
Type	**No.**	**List**
Felony	8	IL, IN, MO, TX, UT, VA, WV, WI
Misdemeanor	23	AL, AZ, AR, CA, CO, DE, FL, GA, ID, IA, KS, MD, NE, NV,NH, NY, NC, ND, OH, PA, RI, SC, WA
Fine	7	CT, LA, MA, MS, OK, OR, VT
Other	6	KY, ME, MI, MN, NJ, TN
None	6	AK, HI, MT, NM, SD, WY

Many state statutes contain stipulations outlining stiff punishment for those aiding or assisting in hazing activities. It is evident that lawmakers acknowledge the significance of the peer pressure and coercion components of hazing. In the vast majority of states, criminal statutes include a provision that bars the wrongdoers from defending their conduct on the basis of the alleged consent by the pledge or new member to the hazing activities.[7]

III. CIVIL LIABILITY

In addition to criminal sanctions, wrongdoers face civil liability. Unlike the criminal courts, most civil courts allow those involved in hazing activities to defend their actions based on the plaintiff's purported consent, and courts are holding hazed students responsible for decisions made with informed consent. This issue, however, is more complex than it seems. Often hazing involves circumstances where the victim never truly consents to the hazing or where the consent is obtained by the forced consumption of alcohol, threats, or extreme group pressure. Ultimately, many of these students withhold their consent to hazing, but only after they have suffered serious harm.[8]

When injury or death occurs as a result of hazing there is no question that the individual parties involved in the incident are subject to liability. Many lawsuits also focus on the fact that the fraternity or university did not take sufficient action to protect the injured party. Whether these institutions can also be sued depends on the specific facts of the case.

IV. THE FRATERNITY

The national fraternity is often the hardest to reach in a lawsuit. Many fraternities are set up to shield the national organization from liability arising out of the misconduct of its members and local chapters. They are frequently formed as unincorporated associations. This is a unique legal form that is not required to be registered with the state. In a further attempt to avoid litigation, the national organizations often structure their corporate documents to "affirmatively disavow any obligation to supervise or control conduct of chapters or members."[9] These corporate documents establish the national fraternity as merely a clearinghouse for information and ideas, as well as a general resource for local chapters. The documents further indicate that the national fraternity will have no responsibility for certain types of misconduct by the chapter or its members, including hazing.[10]

Even when a fraternity is established using this type of structure, the national fraternity can still be liable if it is found to supervise and have a measure of control over its local chapters. For example, many of the national organizations hire "leadership consultants" who are former members of the fraternity that have recently graduated. These individuals are responsible for traveling to universities to make sure individual chapters are following the laws and rules, and to provide training in alcohol and related matters. They often have the power to take away the chapter's charter if rules are not being

obeyed.[11] This indicates that, despite what the corporate documents say, the national fraternity oversees and manages its local chapters. What if the contact between the national and local entities is minimal? The national organization may have contact with a local chapter only two times per year, and could have 300 to 400 chapters at various universities nationwide. Does the national fraternity have sufficient control over the local chapters to be held liable?

Under common law agency principles it is the degree of control that the national fraternity has over the local chapters that determines whether the national fraternity can be sued. Defense attorneys will argue that the national fraternity has no intent to control the day-to-day activities of a local chapter. They merely give the local fraternity a license to use their name and symbol, and offer some guidelines. Nevertheless if the national fraternity is in the position to change the behavior of its members, a plaintiff can sue the national fraternity, and win.[12] In many cases there is no such thing as membership solely in the local chapter. Also the chapter pays dues to the national fraternity. Therefore members carrying out initiation activities at the local level are doing so under the authority of the national fraternity and directly for its benefit. Through the authority conveyed upon the chapter by the fraternity's organizational documents, the national organization has, in fact, established the membership intake process. Therefore it has the authority to either modify the process or prevent the conducting of initiations altogether.[13]

Most fraternities have strong anti-hazing and anti-underage drinking policies that stem from the national organization. These policies are detailed in manuals, and representatives from the fraternity go to various college campuses to give talks about these issues. By establishing these policies the national fraternity is attempting to exercise

control over the chapters. However, it can be argued that this is not enough to render the national fraternity liable. The policy statements can be seen as nothing more than the fraternity's mission statement, especially if there is no penalty attached for violating the policy.[14]

V. THE UNIVERSITY

Universities may also face liability for student injury or death as a result of hazing. Historically, colleges and universities were looked upon as "parental supervisors", and courts did not question the authority of universities over their students.[15] This line of reasoning, the *in loco parentis* doctrine, saw its demise with the Third Circuit's ruling in *Bradshaw v. Rawlings*.[16] In *Bradshaw v. Rawlings* two students attended a picnic sponsored by the school at which alcohol was served. Rawlings became intoxicated. While driving back to campus Rawlings lost control of his car and struck a parked vehicle. Bradshaw, a passenger in Rawlings' car, was rendered a quadriplegic. Bradshaw later sued the college, among others, claiming that it had breached its duty to protect him from unreasonable risk of harm.[17] The Third Circuit determined that since the students were no longer minors, there was no special relationship existing between the college and the students. Therefore the college had no duty to control a student's conduct to prevent him from harming another.[18]

The *Bradshaw* decision clearly establishes a "no-duty" model, allowing courts to conclude that a "custodial, supervisory relationship between a university and its students [is] inconsistent with modern educational objectives".[19] *Rabel v. Illinois Wesleyan University*[20] is another example of this "no duty" movement.

In *Rabel* a student, Cherie Rabel, suffered a skull fracture and concussion after being forcibly grabbed, picked up, and accidentally dropped on the ground by a member of Phi Gamma Delta fraternity. Rabel filed a complaint against the university claiming, in part, that the university's "policies, regulations, and handbook created a special relationship with its students and a corresponding duty to protect its students against the alleged misconduct of a fellow student."[21] In its decision the Appellate Court stated:

..... we do not believe that the university, by its handbook, regulations, or policies voluntarily assumed or placed itself in a custodial relationship with its students, for purposes of imposing a duty to protect its students from the injury occasioned here. The university's responsibility to its students, as an institution of higher education, is to properly educate them. It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others. Imposing such a duty of protection would place the university in the position of an insurer of the safety of its students.[22]

After the *Bradshaw* and *Rabel* decisions, courts were unlikely to hold universities legally responsible for the actions and injuries of their students. However subsequent case law established that, under certain circumstances, universities assume a duty of care.

In *Furek v. University of Delaware*[23] the court demonstrated that it was willing to depart from the strict "no duty" standard and impose liability on universities under certain factual circumstances. In *Furek* a fraternity pledge suffered first- and second-degree burns after a fraternity member poured oven cleaner over his head and back as part of

Hell night high jinks. Attendance at the secret Hell night ceremony was mandatory for pledges in order to be accepted into the Sigma Phi Epsilon fraternity. The events took place in the chapter house, which was leased from the University of Delaware by the fraternity. The university had an established policy prohibiting hazing.[24]

The Delaware Supreme Court determined that the university's effort to regulate hazing exposed it to liability for hazing-related injuries. The university not only had a duty to protect its students from the dangers of hazing, it had an obligation to exercise appropriate restraint over the conduct of fraternity members. Even though the university did not control the day-to-day activities of the chapter, it had an obligation to promote general campus safety and security.[25] Recent case law indicates that the *Bradshaw* line of reasoning is still a frequent and justifiable defense, but the *Furek* decision is a landmark example of how the "no duty" principle is not applicable in every situation, particularly when hazing-related injuries are involved.[26]

The *Furek* decision has left colleges and universities in a dilemma. If they exercise strict control over fraternities they have an implied duty of care that can expose them to liability if breached. Conversely, exercising no control is not the answer. Many states now have laws that require universities to adopt anti-hazing policies, and failure to do so can result in liability.

VI. STATISTICAL ANALYSIS

In our statistical analysis we studied 43 colleges in New York State that have Greek Life on campus and 41 colleges that do not have Greek Life. Our data was retrieved from the websites "mynextcollege.com" and "collegeprowler.com". Our goal was to determine what factors may influence the

absence or presence of Greek Life. The first factors studied were geographical location of the college, the cost of going to that college, and average undergraduate size for the college. As Figure 3 clearly indicates, only undergraduate size differs significantly. College campuses with Greek Life have an average undergraduate population approximately 2.25 times larger than colleges without Greek Life.

Figure 3: Comparing Campus Life in New York Colleges

	Greek Life	Without Greek Life
Number in Suburban Areas	18	20
Number in Rural Areas	12	8
Number in Urban Areas	13	13
Ave Cost of Tuition	20,123	19,995
Ave Cost of Room and Board	8,965	8,714
Ave Undergraduate Size	6,374	2,852
Ave Percent of On Campus Housing	55	56

The reason it appears that Greek Life prevails on larger campuses is because 21% of colleges with Greek Life have undergraduate populations in excess of 10,000 students, and 71% of colleges without Greek Life have less than 3,000 students. However Greek Life exists on both large and small college campuses. For example Hartwick College, one of the smallest colleges, (under 2,000 students) and New York

University, one of the largest colleges, (over 20,000 students) both have Greek Life.

Next, we determined how many males and females participated in Greek Life and found the average number of Fraternities and Sororities on college campuses (See Figure 4).

Figure 4: Facts About Greek Life in New York Colleges	
Ave. Percentage of Males in Fraternities	8%
Ave. Percentage of Females in Sororities	7%
Ave. Number of Fraternities on Campus	10
Ave. Number of Sororities on Campus	8

Roughly 15% of students on college campuses participate in Greek Life. Since the average undergraduate size is 6,374 students, approximately 956 students on a typical New York campus belong to a Greek Organization. Therefore each Fraternity or Sorority on campus has approximately 53 members.

Figure 5: Type of Governance for Greek Life	
Type of Council	**Colleges With (Out of 43)**
Dean of Greek Life	38
Panhellenic Council	27
Interfraternity Council	21
Greek Council	26
Other	7

It was important to our study to determine whether New York colleges with Greek Life–have a Dean or Director of

Greek Life, and whether any governance councils exist on these New York campuses. Figure 5 above summarizes the type of governance that colleges have in place.

The following definitions are helpful in understanding Figure 5:

The Interfraternity Council (IFC) is a council formed by members of all the fraternities on campus. The IFC, as defined by Cornell University, is a "form of common governing council, in which the member chapters collectively assemble and discuss issues affecting the Fraternity and Greek System as a whole". [27] The Cornell website goes on to mention that "The council's primary concern is the safety, security, and advancement of each member fraternity house". [28]

The Panhellenic Council is a council formed by members of all the sororities on campus. The Panhellenic Council, as defined by Columbia University, is "an umbrella organization to promote mutual collaboration among individual chapters of the Greek system". [29] The Columbia University website further states: "in order to achieve its goals [the association] implements programming that foster the universal sorority ideals of leadership, integrity, and scholarship among its members". [30]

Figure 5 makes it clear that colleges are putting safeguards in place to govern Greek Life. Over 88% of New York colleges that have Greek Life also have a Dean to oversee their Greek organizations. It appears that these colleges have assumed a duty of care for their students. Nevertheless eleven deaths have occurred due to some type of hazing on nine New York campuses since 1970. [31] In other words, approximately 21% of the colleges in New York State that have Greek Life have had a death due to hazing. The most recent were Kevin

Lawless at Iona in 1999, Jonathan Marconi at SUNY Cortland in 2001, Ben Klein at Alfred University in 2002, Jerry Hopkins at Rochester Institute of Technology in 2003, Walter Dean Jennings at SUNY Plattsburgh in 2003, and Arman Partamian at SUNY Geneseo in 2009.

It should be noted that the deaths of Walter Jennings, Arman Partamian, and Jonathan Marconi were all associated with unrecognized Greek Organizations. These deaths, along with injuries suffered by Bryan Parslow at SUNY Brockport in 2009, have prompted some colleges to list unrecognized Greek Organizations on their college website and warn that they will not support a student's choice in joining these organizations. The University at Buffalo's website states: "The University at Buffalo does not advise nor control the actions of these off-campus groups. Typically, the instances of hazing are high for these groups as well. Affiliation with these groups is a violation of the UB Student Code of Conduct and puts students at risk for suspension and/or expulsion from the University. University policy.....in accordance with SUNY policy changes mandates a permanent transcript notation for students who are found to be responsible for hazing incidents that involve the injury of another person."[32]

It is clear that the SUNY college system is taking a stand against unrecognized chapters. The website of SUNY Oneonta goes into detail of what it is like to be a member of one of these organizations and the effects it has on the community. It states: "Being a member of an unrecognized Greek organization is likely to be an unrewarding experience, regardless of what they may tell the student. Many of these organizations pledge until very close to the end of the semester and then their dues go towards parties, shirts, and alcohol. This is where the phrase 'You pay for your friends' comes from in regards to joining a Greek organization because the dues

money is going towards nothing productive to society. These organizations are just social groups. Unrecognized organizations give a bad reputation to all Greek organizations in the city of Oneonta, which makes it harder for recognized organizations to keep their reputations positive. Unrecognized organizations are often a nuisance to society: causing fights, large amounts of noise ordinance violations, unpleasant living environments, destruction to off-campus housing, etc. Unrecognized fraternities are banned from living in many apartments, which is stated in many leases, along with fraternity and sorority hazing activities. Landlords are aware of the problem but there is only so much they can do."[33]

What can colleges do in addition to making students aware of the risks of joining these organizations? Alfred University, after the death of a pledge in 2002, started an investigation into the hazing practices of the Greek Organizations on its campus. This investigation resulted in the trustees of the university eliminating all Greek Life on campus. In a similar manner Ithaca College banned all Greek Life in the 1980's due to a hazing incident. However banning Greek Life from campus will not entirely solve the problem of hazing, since unrecognized fraternities will continue to exist.

VII. CONCLUSION

Fraternity hazing has resulted in at least one death every year since 1970.[34] Yet the practice continues despite the deaths, the enactment of anti-hazing statutes and the increasing number of lawsuits. The states' adoption of anti-hazing legislation reflects the shift in society's view of hazing. While legislation has improved greatly during the last decade to combat hazing, it is evident that more progress needs to be made. The mental as well as physical aspects of hazing should

be recognized, and heavier punishments must be imposed for hazing offenses.

In civil lawsuits plaintiffs frequently use a negligence theory to recover for hazing-related injuries. When suing the national fraternity or university, the focal point of the litigation is whether a duty of care exists. In seeking to establish a duty, students will typically claim that fraternities and universities assume a duty when they attempt to regulate or control chapter conduct or activities. This puts the organizations in the awkward position of deciding whether to limit their liability by exercising very strict control, or by exercising no control whatsoever.

END NOTES

[1] Fierberg, Douglas (2004) "Protect Your Rights", www.hazinglaw.com/rights.htm. The following states do not currently have hazing laws: Alaska, Hawaii, Montana, New Mexico, South Dakota and Wyoming.

[2] Id.

[3] http://www.thegreekshop.com/hazing.html.

[4] Manley, Burke, Lipton, & Cook (2000). Hazing: Know the consequences of your actions. The FRMT Risk Management Newsletter, 7, 1-3.

[5] http://www.thegreekshop.com/hazing.html.

[6] Id.

[7] Id.

[8] Fierberg, Douglas (2004). "Protect Your Rights", www.hazinglaw.com/rights.htm.

[9] Gertner, Reni (2005). *Fraternity Lawsuits Becoming More Common—What to Evaluate in Suing a Fraternity.* Lawyers Weekly USA, 1-2.

[10] Id. at 2.

[11] Id. at 4.

[12] Id. at 3.

[13] Id. at 4.

[14] Id.

[15] MacLachlan, J. (2000). *Dangerous Traditions: Hazing Rituals on Campus and University Liability,* Journal of College and University Law, 26(3), 514.

[16] *Bradshaw v. Rawlings*, 612 F.2d 135 (3rd Cir. 1979).

[17] Id. at 136.

[18] Id. at 143.

[19] MacLachlan, J. (2000). *Dangerou Ttraditions: Hazing Rituals on Campus and University Liability,* Journal of College and University Law, 26(3), 521.

[20] *Rabel v. Illinois Wesleyan University*, 161 Ill. App. 3d 348 (1987).

[21] Id. at 356.

[22] Id. at 361.

[23] *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991).

[24] Id. at 508.

[25] Id. at 514.

[26] Gertner, Reni (2005). *Fraternity Lawsuits Becoming More Common—What to Evaluate in Suing a Fraternity.* Lawyers Weekly USA, 5.

[27] http://cornellifc.com/about-the-ifc

[28] Id.

[29] http://www.columbia.edu/cu/panhel/aboutus.htm

[30] Id.

[31] http://hazing.hanknuwer.com/

[32] http://www.student-affairs.buffalo.edu/greeklife/grigc.php

[33] http://www.oneonta.edu/development/huntunion/igc/recunrec.html

[34] Fierberg, Douglas (2004) "Protect Your Rights", www.hazinglaw.com/rights.htm.

BROKEN PROMISES – RECOVERY OF EMOTIONAL DISTRESS FOR BREACH OF WEDDING RELATED CONTRACTS

By

*Patricia M. Sheridan

IINITRODUCTION

Damages for emotional distress are not usually recoverable in breach of contract actions. The Restatement (Second) of Contracts Section 353 provides:

> Recovery for emotional disturbance will be excluded unless the bread, also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely resift'

Where a breach results in physical injury, a tort action may be more appropriate. Tinder the second exception, the official comment to the Restatement gives examples of contract breaches that satisfy the "particularly likely" test as contracts of carriers and innkeepers with passengers or guests, contracts for the transport or proper disposition of dead bodies and contracts for the delivery of messages concerning death.2

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The Appellate Court stated that in order to establish a claim of negligent infliction of emotional distress, the plaintiff needed to prove that the defendant's actions created an unreasonable risk of causing emotional distress. Noting that a contract for wedding services creates a rigorous expectation for contractual performance:[1] the court concluded that the manor's conduct in giving her wedding date to another couple would undoubtedly cause any bride emotional distress. The court stated:

> A wedding is generally considered one of the most important days in one's life. h is also widely known that such a ceremonious event requires extensive planning and preparation... The manor is in the business of hosting weddings and receptions. It is in a position to see how clients react to a myriad of wedding related mishaps.12

The court determined that an award of $2000 in economic damages for breach of contract and $15,000 in compensatory damages for the negligent infliction of emotional distress was fair and reasonable.13

In another Connecticut case where a wedding photographer breached an agreement to take wedding photos, a bride sued both for breach of contract and the intentional imposition of emotional distress. In *Baillargeon* v. *Za71711(1170,14* the bride alleged that she contacted defendant photographer several times about retaining his services to photograph her wedding. When the bride appeared at his studio to pay for the photos and albums, the photographer made her leave and denied having any knowledge of the bride or her wedding date.

She was unable to obtain a substitute photographer on such short notice, and asked a friend to attempt to take some photos at the wedding. She was left with only a handful of inferior small size color prints. The bride claimed that she became extremely distraught following defendant's refusal to perform the services. The court stated:

> The emotional impact of this episode on this 21 year old woman preparing for her first marriage, in the midst of other wedding plans and preparations, is not hard to imagine. The Court concludes that this callous, cruel, and unethical behavior of the defendant not only deprived her of a major part of her wedding day pleasure and its tangible reminder, she also suffered extreme emotional anguish because of the intentional, willful and wanton behavior of the defendant."

The court awarded $4500 for the breach of contract and the intentional infliction of emotional distress.

In these cases, plaintiffs sought emotional distress damages under a mixture of tort and contract theories. The facts in both cases essentially involved a breach of contract, but the courts found the manner of breach sufficiently objectionable so as to constitute an independent wrong. The emotional distress damages were awarded primarily to compensate for the wrongful conduct and not as reimbursement for contractual losses. While the cases do not specifically exclude emotional distress damages in a breach of contract action, the decisions seem to indicate that these claims are more properly asserted in a tort. The cases provide limited

guidance as to whether emotional distress damages should be available where the action is exclusively for breach of a wedding-related contract.

2. *Emotional Distress Damages Not Permitted Unless Breach Causes Physical Infuty*

Several jurisdictions strictly adhere only to the first exception set forth in the Restatement, namely, that damages for emotional distress are excluded unless the breach also caused bodily harm.[16] The official comment to the Restatement Second (Contracts) Section 353 provides:

> Damages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish and to measure. There are, however, two exceptional situations where such damages are recoverable. In the first, the disturbance accompanies a bodily injury. In such cases the action may nearly always be regarded as one in tort, although most jurisdictions do not require the plaintiff to specify the nature of the wrong on which his action is based and award damages without classifying the wrong, [17]

Oklahoma courts are committed to the rule that no recovery can be had for mental pain and anguish, which is not produced by, connected with, or the result of, some physical suffering or injury, to the person enduring the mental anguish.[18] In other words, Oklahoma law does not compensate for mental anguish or disturbance alone - it must be a part of the physical suffering and inseparable therefrom, as where the mental anguish is superinduced by physical hunger pains.19

The requirement of physical injury prevented the bride in *Seidenbach'•, Inc.* v. *Williains*[2°] from recovering damages for mental pain and anguish caused by the nondelivery of her wedding dress. The bride sought $716.61 in actual damages caused by defendant department store's failure to deliver her wedding gown and veil in time for her wedding. The bride also sought $10,000 in special damages as a result of the wanton, negligent and willful acts of defendant, claiming that her "formal wedding was shattered and laid to ruin from the absence of the gown and veil, causing her to suffer great mental anguish, humiliation and em.barrassment"[2i] because she was forced to be married in her honeymoon trip suit. Noting that a substantial portion of the bride's recovery was for mental anguish, and also that she neither alleged nor proved that defendant's failure to deliver her gown and veil caused her any physical injury, the Supreme Court held that an award for mental anguish was improper.22

There can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of breach of a contract under Florida law. [23] In *Floyd* v. *Video Barn, Inc.*,[24] the plaintiffs entered into a contract with the Video Barn for the videotaping of their daughter's wedding. On the day of the wedding, a Video Barn employee mistakenly videotaped another wedding taking place at a nearby church. The bride's parents sued for breach of contract and included a claim for mental and emotional pain because they did not have a videotape to memorialize their daughter's wedding. The bride's mother claimed that she was looking forward to being able to view her daughter's wedding ceremony for years to come and that she was terribly upset and disappointed when

she realized that she would not have the opportunity to do so. The Court of Appeals of Florida denied the claim for mental and emotional pain resulting from Video Barn's taping the wrong wedding and stated, "Where the gravamen of the proceeding is breach of contract, even if such breach be willful and flagrant, there can be no recovery for mental pain and anguish resulting from the breach."2)

Mental suffering is not a proper element of damages for breach of contract under Pennsylvania law except where the breach was wanton or reckless and caused bodily harm. In *Carpel* v. *Saget Studios, Ine.,*[26] a newly married couple sued defendant photography studio for failure to deliver their wedding photographs. The couple had contracted with the photography studio to take black and white photographs of their wedding, but received only ten color photographs taken during the service. In rejecting plaintiffs claim for emotional distress damages, the District Court held, "In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm."27

Requiring that physical or bodily injury accompany the contract breach imposes a special condition for recovery of emotional distress damages not required for any other type of consequential contract damages. When bodily injury occurs in connection with a contract breach, emotional distress damages compensate mainly for the physical pain and suffering caused and not the harm to plaintiff's emotional well-being. In the context of wedding-related contracts, denying recovery for emotional distress absent physical impact may lead to the

overly harsh result of excluding emotional distress damages in nearly all such cases. The requirement of bodily injury or physical impact imposes an unnecessary restriction on the availability of emotional distress damages in breach of contract actions.

3. *Emotional Distress Damages Permitted If Foreseeable*

As already indicated above, courts have permitted contract recoveries for cases involving services to be rendered upon one's physical person or services which relate to matters of highly charged emotional or sentimental nature, such as weddings, illness, death or burial.[28] The rationale is that in contracts dealing with particularly personal or sensitive matters, it is foreseeable that a subsequent breach will cause mental distress.[29] The common bond among such contracts is that they are all of a highly personal nature and deal with peace of mind.[36] Jurisdictions that award emotional distress damages for breach of wedding-related contracts recognize the unique circumstances which make emotional distress a highly foreseeable effect of a breach, and essentially apply the "particularly likely" test contained in the Restatement.

Louisiana courts have long been sympathetic to the plight of brides and grooms who suffer mishaps on their wedding day. In 1903, the bride in *Lewis v. Holmes*[31] sued to recover damages for breach of contract resulting from defendant millinery's failure to sew and deliver four dresses for her wedding trousseau. The Supreme Court of Louisiana ruled that the bride's disappointment, and her humiliation in going to

her husband without a suitable trousseau, was within the contemplation of the parties. The court stated:

> In computing the damages, the allowance must be restricted to what may reasonably be held to have been within the contemplation of the parties in entering into the contract. The contract was to furnish the dresses in time for the wedding on the 19th. D.H. Holmes must be held to have known that, if the dresses were not furnished by that day, the bride would be keenly disappointed. Also that the bride would need the dresses for the festivities incident to her wedding and immediately following, for which it is customary for brides to provide themselves with a trousseau. In gauging this disappointment of the bride the surrounding circumstances, must, as a matter of course, be considered. And one of these is the fact that entertainments were planned, and that for want of the dresses these entertainments would have to be given up: and another is her humiliation in going to her husband unprovided with a suitable trousseau.32

In light of these unusual circumstances, the court awarded the bride $575 in special damages caused by the failure to make and deliver the dresses.33

In *Mitchell v. Shreveport Laundries, Inc.,*[34] the groom left his wedding suit with a laundry to be cleaned and pressed, telling the laundry that he wanted to wear the suit at his wedding eight days later. Despite repeated assurances by the laundry, on the day of the wedding the groom learned that his

suit was lost. The groom, of unusual size and physique, was unable to find another suit to fit him in time for the ceremony. He was forced to be married in the only other good suit of clothes he owned, a light colored suit that he had been wearing for several weeks which was noticeably soiled and unkempt in appearance_ Further, he had to travel on his honeymoon with only the soiled suit "and that he was humiliated and embarrassed by being subject to ridicule of the guests of the hotel and the general public."[35] The groom sued the laundry for the cost of the suit and sought damages for embarrassment and humiliation. The Court of Appeal of Louisiana held that damages for mental anguish, mortification and embarrassment were appropriate because such damages must have been foreseen at the time of making the contract.36

In *Grather v. ',ripely Studios, The.,*[37] a married couple sought damages for mental anguish and embarrassment for the unprofessional manner in which a photographer took pictures of their wedding. The couple claimed that the photographer was impatient and careless when taking their wedding photos, resulting in photographs with poor positioning and unsatisfactory backgrounds including exit signs and dirty dinner dishes. The Louisiana Court of Appeal stated that "A bride and groom who desire nonamateur photographs and employ a professional photographer are seeking 'the gratification of some intellectual enjoyment' ... When the photographs are of less than professional quality, the bride and groom are deprived of the full enjoyment, which they can rightfully expect, of pictures commemorating their wedding and reception."[38] Plaintiffs were entitled to compensation for

this loss of enjoyment and the court awarded damages for mental anguish and humiliation.39

Ohio state law does not usually permit compensation for emotional distress resulting from a breach of contract, but recognizes an exception for cases involving marriage where ordinary contract remedies are clearly inadequate.[4°] In *Deiisch* v. *The Music* Co.,[41] the newlyweds sued defendant music company when a four-piece band failed to arrive and play at their wedding reception. The couple made several attempts to contact defendant from the reception hall, but were unsuccessful. "After much wailing and gnashing of teeth, plaintiffs were able to send a friend to obtain some stereo equipment to provide music."[42] In determining the correct measure and amount of damages for the breach, the court found that the simple return of the deposit would not adequately compensate plaintiffs. "Certainly, it must be in the contemplation of the parties that the damages caused by a breach by defendant would be greater than the return of the deposit that would be no damages at all."[43] The court held that in a case of this type, the out-of-pocket loss, which would be the security deposit, or even perhaps the value of the band's services, where another band could not readily be obtained at the last minute, would not be sufficient to compensate plaintiffs. The court awarded damages for the couple's distress, inconvenience, and the diminution in value of their reception, as well as the refund of their security deposit.[44]

In *Browning* v. *Fies,* [45] the Court of Appeals of Alabama stated that "Injury to the feelings - mental harassment

- is an element of actual damages. Wounding a man's feelings

is as much an element of actual damages as breaking his limb."[46] In *Browning,* the defendant livery service contracted with plaintiff bridegroom to provide a carriage and team for transportation of the wedding party on plaintiff's wedding day. The defendant failed to send a carriage and the groom and his family were forced to board a public street car and walk along the streets in their wedding apparel. The wedding ceremony was delayed because the groom did not reach the church on time. The groom sought damages for the actual financial loss arising out of the breach and damages for mental suffering, physical pain, humiliation and mortification. The lower court refused to allow damages for mental suffering. The Court of Appeals of Alabama, however, reversed and held:

> In this particular case, considering the subject-matter of the contract, the special purpose and exceptional use to which plaintiff intended to put the carriage, which was communicated and well known to the defendants ... it would seem that it was in the reasonable contemplation of the parties when the contract was entered into under the known circumstances, that the immediate effect and proximate result ensuing from a breach of the contract by the defendants would cause the plaintiff inconvenience, annoyance, mental harassment, or distress .. as well as mental pain in consequence thereof Certainly it is but common knowledge that some distress of mind must be the natural and proximate consequence of being delayed and not having proper conveyance to meet an appointment of such delicate nature.47

These jurisdictions permit recovery of emotional distress damages for breach of wedding-related contracts due to the sensitive, personal nature of such agreements. A wedding is universally considered to be one of the most significant events in one's lifetime, and the contracts made in connection with the wedding festivities inevitably include heightened expectations of perfect or near perfect contractual performance. Those businesses involved in the wedding industry have reason to know how clients react to wedding mishaps. Given this emotionally charged contractual setting, the parties must certainly foresee that any defective performance will cause severe anxiety and mental distress for the bride and groom. While the above cases do not specifically reference the Restatement rule, the courts essentially consider the unique circumstances surrounding the contract formation and conclude that it is "particularly likely" that any breach of a wedding-related contract will lead to severe anxiety and mental distress for the bride and groom.

CONCLUSION: EMOTIONAL DISTRESS DAMAGES ARE JUSTIFIED FOR BREACH OF WEDDING-RELATED CONTRACTS

The "particularly likely" test set forth in Restatement Section 353 offers the most reasonable and logical approach for determining when damages for emotional distress are properly awarded in a breach of contract action. Applying this test imposes a sensible tightening of the basic requirement that contract damages be foreseeable. To justify emotional distress damages, the breach must be of such a kind that emotional

disturbance was a particularly likely result, not merely an incidental consequence of the breach.

As stated in the landmark case *Hadley* v. *Baxendale,48* contract damages are limited to "such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."[49] The Restatement (Second) of Contracts Section 351 further provides:

> Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made. Loss may be foreseeable as a probable result of a breach because it follows from the breach...as a result of special circumstances, beyond the ordinary course of events, that the party in question had reason to know.5°

The "particularly likely" test goes further than mere foreseeability and limits claims to those situations where the emotional distress was unquestionably anticipated by both parties as a consequence of a breach in light of special circumstances known to both parties at the time of contracting. When making contractual arrangements for a wedding, peace of mind is clearly a priority for the bride and groom. The provider of wedding goods or services knowingly undertakes more than typical business obligations; emotional well-being

becomes part of the subject matter.[51] A contract breach that

causes a wedding day mishap leads to predictable emotional distress for the bride and groom and this anxiety should come as no surprise to a business person dealing with these contracts every day. As Professor Douglas Whaley states:

> Most contract breaches do not cause significant amounts of mental anguish. But for the sorts of contracts where human emotions are very much at issue: weddings, ... etc., peace of mind and freedom from worry are part of the bargain as the defendant very well knew, and if the defendant breaches these sorts of contracts, the defendant should pay for the agony suffered as an obvious consequence. There is no surprise here; the issue of foreseeability takes care of that. Nor is the rule unfair to the defendant. If defendant is going to traffic in the kind of contract that risks emotional distress when breached, let the defendant bear that risk.52

The risks associated with the wedding industry are balanced by the potential for high profit. According to one survey conducted in 2009,[53] the average wedding budget in the U.S. was $28,385 (not including the honeymoon) with New York City and Long Island having the highest national average of $56,999 and $55, 877 respectively.[54] As one New York judge observed:

> Weddings are a special time for celebration and happiness filled with special moments that mark the beginning of a new family and a life together. Weddings are unique and, hopefully, once in a lifetime

> events. Weddings have endured the passage of time which is why they are still celebrated today. Brides, grooms and parents spend extraordinary sums and expect the wedding and reception to be magical and memorable in every respect. Generally, the courts agree.[55]

In light of the lavish spending and fairytale image associated with weddings, compensation for emotional distress due to a wedding day mishap is clearly appropriate.

Many jurisdictions permit emotional distress damages for breach of wedding- related contracts, and the remaining jurisdictions should uniformly follow suit. Such awards are consistent with traditional rules limiting contract damages to those that are foreseeable and within the contemplation of both parties at the time of contracting. In addition, a breach of any promise to provide wedding goods or services is "particularly likely" to cause severe emotional distress for the disappointed bride and groom. Businesses that provide wedding goods and services are keenly aware of the emotional significance of the contracts they make, and often exploit the "dream wedding" scenario to their own financial advantage. A bride and groom who experience a wedding day disaster are entitled to compensation for the understandable anxiety (and tears) that flow from the breach.

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[1] Restatement (Second) of Contracts §353 (2008).

[2] *Id.* §353 comment a.

[3] *Id.*

[37] *Grather* v. *Tipery Studios, Inc.,* 334 So.2d 758 (La. Ct. App. 1976).

[38] 'id

[39] *Id.*

10 *international Union ofAutomobile Workers v.Park-Ohio Industries,* 687 F.Supp. 338, 342 (iN.D. Ohio 1987).

[41] *Deitsch v. The Music Co.,* 6 Ohio Misc.2d 6, 453 N.E.2d 1302 (1983).

[2] *id.* at 7, 453 N.E.2d at 1303. [43]1d. at 8, 453 N.E.2d at 1304.

Id., See also Pullman Company v , 72 Ohio St. 690, 76 N.E. 1131 (1905).

Browning v. *Pies,* 4 Ala. App. 580, 58 So. 931 (1912).

Id. at 587, 58 So. at 933 *(quoting Birmingham Water Works Co.* V. *Martini,* 2 Ala. App. 652, 657, 56 So. 830, 832 (1911)).

[47] *Id.* at 589, 58 So. 934.

[46] 9 Exch. 341 (1854).

[49] *Id.* at 354.

[sc)] Restatement (Second) of Contracts §351 (2008).

[31] ./Ia(field, 100 Idaho at 848, 606 P.2d at 952.

[52] Whaley, supra note 7 at 953.

[53] The Knot Inc., littp://www.marketwatch.com/story/the-knot-unveils-2009-real-weddings-survey-results-2010-02-17.

[54]1d.

[55] *Griffin-Amiel* v. *Frank Terris Orchestras, 178 Misc. 2d 71, 74, 677 N.Y.S2d 908, 910(1998).*

UNAUTHORIZED PRACTICE OF LAW IN THE U.S.: A SURVEY AND BRIEF ANALYSIS OF THE LAW

by

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INTRODUCTION

The practice of law is limited in the United States in every jurisdiction to attorneys who are admitted to practice and are in good standing with the state bar. To date, attacks on the validity of the general prohibition against the unauthorized practice of law (UPL) by individuals found guilty of unauthorized practice have been found to be without merit.' "The purpose of prohibiting the unauthorized practice of law is to protect the public from incompetence in the preparation of legal documents and prevent harm resulting from inaccurate legal advice."[2] It is doubtless true as one court noted that the "amateur at law is as dangerous to the community as an amateur surgeon would be."[3] Some critics, however, observe that the prohibition against UPL has more to do with protecting the profession from competition than with protecting the public.[4] The same holds true for other professions that require licensure. The medical profession is an obvious example. But we do not generally consider it a

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criminal offense for an unlicensed person to give an aspirin to a friend with a headache, or treat a child's scraped knee with an over the counter antibiotic cream and a band aid. When it comes to the practice of law, however, the general rule is zero tolerance for every instance that qualifies as unauthorized practice, including the giving of advice to a friend free of charge (even if the advice is accurate and no harm is done).

H. CONDUCT THAT CONSTITUTES UNAUTHORIZED PRACTICE OF LAW

Every state permits an individual to act as his or her own legal representative without running afoul of restrictions against UPL. One may generally appear *pro se* before federal and state courts and agencies, conduct legal research and interpret the law for one's own use, execute binding documents and agreements across a wide range of areas. No one, however, other than a member of the bar in good standing in any state may engage in activities that constitute the practice of law for anyone other than him or herself with enumerated exceptions provided by statute or by the common law in each state.[5] Comprehensive, consistent definition of the types of activities that constitute UPL is not available in all states. Moreover, finding the permissible exceptions to the general UPL prohibition in each state is not a simple matter for the average lay person.

The practice of law includes "the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages . . .but in a larger sense it includes legal advice and counsel . . ."[6] Representing an individual or a corporation in court constitutes the practice of law, as does the "the preparation of pleadings and other papers incident to actions and special proceedings and the

management of such actions and proceedings on behalf of clients before judges and courts."[7] The definition of UPL is broad enough to embrace "all advice to clients and all action taken for them in matters connected with the lai,v."[8] It "includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved."[9] As a result, absent a state statute or case law to the contrary, every time that an individual represents another in court, provides guidance to another as to the law, helps with the preparation of contracts or other instruments that convey legal rights, the unauthorized license of law is involved with sanctions that may include significant fines and jail time. That a fee is not charged or that the advice given is accurate will not exempt liability for UPL under state statutes. Although current data on national and regional average hourly rates charged by lawyers is hard to come by, one recent survey of 250 national firms found the average rate charged by these firms was $372 per hour.[10] And while legal representation is provided by the state to criminal defendants who cannot afford to hire legal counsel, legal advice in civil matters with potentially grave consequences is generally unavailable, leaving persons in need of such assistance in the unenviable situation of having to find legal counsel willing to represent them *pro bono* or having to represent themselves.

The problem is exacerbated when as is often the case a jurisdiction makes no effort to define actions that constitute the practice of law, which leaves the broadest possible prohibition on not only representing others before tribunals or agencies, something anyone would understand to be the practice of law, but also the giving of legal advice or counsel on any matter that involves the interpretation or application of the law. That is by no means something that the average citizen would understand to constitute UPL. When a state

attempts to clarify and codify acts that constitute unauthorized practice, citizens are given notice as to what specific conduct is prohibited. The Texas UPL statute provides a good example. Texas punishes as a crime the unauthorized practice of law for personal gain[11] (e.g., if some benefit is derived by the person engaging in UPL) and then only under specific instances enumerated in the statute, including contracting to represent that person with regard to personal causes of action for property damages or personal injury, advising anyone as to the person's rights and the advisability of making claims for personal injuries or property damages, or as to accepting offered settlement of claims for personal injuries or property damages, entering into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action, or entering into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.'[12] Texas courts would still presumably be able to issue injunctions to prevent even the gratuitous engagement in these activities. In states other than Texas, however, that punish UPL as crimes or by civil penalties whether or not a benefit is derived by the person engaged in the UPL, any of the foregoing activities would be punishable whether or not a fee is charged or the person engaging in the UPL derives any other benefit.

Unfortunately, Texas is the exception and not the rule and most states offer little specific guidance as to the nature of conduct that is punishable as UPL. The giving of legal advice and interpretation of the law are reserved to members of the bar in good standing in all jurisdictions, though the punishment for those who violate the rule varies widely across the United States. Activities that would not necessarily

be understood by the average person to constitute UPL abound across the United States, while others that would appear to be clear instances of UPL are perfectly permissible. Thus, in New York "providing information documents and overview documents to debtors also constitutes the unauthorized practice of law because the documents serve to simplify the bankruptcy process which leads to the preparer exercising his or her judgment as to how best to accomplish that result and gives potential debtors guidance and advice on how to fill out the fonns."[13] But tax preparers who use their own judgment on what tax forms to use and what deductions clients are entitled to base on information provided for them by the clients and on their interpretation of the federal and state tax laws are not generally guilty of UPL.[14] On a similar vein, self-help products including form books and computer software intended to allow consumers to produce their own legally binding documents are exempt from UPL charges in many states[15] at least as long as such products are generic and not specifically tailored to the needs of a specific person.16 Thus, providing fill in the blank forms for customers is fine in most states, but problems arise if, for example, an online or software package makes decisions for a customer based on an artificial intelligence or decision tree system based on answers to specific questions. This, of course, is precisely how tax preparation programs work. A similar model for, say, will preparation package where a user is prompted for information and the program then decides what type of will is appropriate and what tailored clauses to add depending on input from the "client" would probably constitute UPL. In effect, providing forms and allowing the client to fill in the blanks themselves is fine, but explaining the law or giving advice as to which forms to use to assist the customer in filling the forms probably constitutes UPL. And what about document preparation services such as LegalZoom.com? The service states on its home page that it was "developed by

expert attorneys with experience at the most prestigious law firms in the country" and features a photograph of Robert Shapiro, one of its co-founders.[17] Shapiro has also appeared regularly on television commercials for the service. The service also makes available an Education Center that "allows you to access the information you need to research your legal questions and make informed decisions. With our education center, you have access to Legal Topics, Frequently Asked Questions, Glossary Terms and Non-Legal Resources.[18] It certainly looks and sounds as though consumers may be getting legal advice while using this service. However, the information provided, while specific, is not tailored to the individual user, and the service provides a disclaimer that states in part, "The information provided in this site is not legal advice, but general information on legal issues commonly encountered. LegalZoom's Legal Document Service is not a law firm and is not a substitute for an attorney or law firm. LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction."[19] A link to a more extensive disclaimer[20] is also provided from the services home page. Although this is a for-profit service that offers assistance with both simple matters, such as the filing of a DBA certificate and highly complex ones, like patent filings, LegalZoom and similar services have thus far largely escaped significant scrutiny or UPL sanction even though their services are accessible in every state.2/

III. SANCTIONS AGAINST THE UNAUT °RIMED PRACTICE OF LAW IN U.S. JU ISDICTIONS

This paper will now turn to a brief examination of the specific sanctions against the unauthorized practice of law in the various U.S. jurisdictions. The following table provides a brief overview of the sanctions provided by the various

jurisdictions in the United States as a means of preventing and punishing unauthorized practice (See Table I). The table clearly illustrates the lack of uniformity in punishing UPL in the various jurisdictions which ranges from civil damages punishable only by a fine in Arizona, Ohio and Utah through felony classification for certain instances of UPL in Arkansas, Florida, Louisiana, Mississippi, Nevada, Rhode Island, Texas and Washington State.22

Table I: Unauthorized Practice of Law Sanctions by Jurisdiction

Jurisdiction	Offense
Alaska	Class A misdemeanor
Alabama	Misdemeanor [24]
Arkansas	Misdemeanor, [25] if a first offense, and a Class D felony if the defendant has been previously convicted of the offense of unauthorized practice of law.26
Arizona	No criminal sanctions.- Provides civil sanctions only.28
California	Misdemeanor "punishable by up to one year in a county jail or by a fine of up to one thousand dollars ($1,000), or by both a fine and imprisonment.29
Colorado	Contempt of court.[ra-]
Connecticut	Misdemeanor that can result in a fine of "not more than two hundred and fifty dollars or imprisoned not more than two months or both."31
Washington D.C.	Contempt of court.32
Delaware	Cease and desist orders may be issued by the Board on the Unauthorized Practice of Law.33 Persons found guilty of unauthorized practice of law can be assessed the costs of the investigation by the Board.34
Florida	Third degree felony.[35] A third-degree felony in Florida is punishable by imprisonment not to exceed five years.36

Georgia	Misdeme
Guam	Contempt of court.38
Hawaii	Misdemeanor.39
Iowa	Injunction.40
Idaho	Misdemeanor.
Illinois	Contempt of court.42
Indiana	Class B misdemeanor.`
Kansas	Contempt of court.44
Kentucky	Contempt of court.45
Louisiana	Felony. (The maximum penalty for unauthorized practice is a $1,000 fine and/or imprisonment for up to two years.)46
Maine	Misdemeanor.47
Massachusetts	Contempt of court.48
Maryland	Misdemeanor.49
Michigan	Contempt of courts°
Minnesota	Misdemeanors'
Mississippi	Misdemeanor for a first offense or a felony for second and subsequent offenses.52
Montana	Contempt of court.53
North Carolina	Misdemeanor.54
North Dakota	Misdemeanor.55
Nebraska	Misdemeanor.56
New Hampshire	Injunction.57
New Jersey	Misdemeanor.58-
New Mexico	Misdemeanor.59
Nevada	Misdemeanor, gross misdemeanor or felony.60
New York	Ivlisdemeanor.6/
Ohio	Civil penalties up to --1.6-,(-----(2)00.)
Oklahoma	Contempt of court. '-
Oregon	Injunction.64-
Pennsylvania	Misdemeanor."
Puerto Rico	Misdemeanor. 6 7 -
Rhode Island	Misdemeanor for first offense, felony for subsequent offenses.°
South Carolina	Contempt of court.68
South Dakota	Permanent injunction.69
Tennessee	Class A misdemeanor.7°
Texas	Class A misdemeanor or Third Degree felony.7r-
Utah	Civil penalties.72

Virginia	Class I misdemeanor.73
Virgin Islands	Injunctive relief, fine.
Vermont	Injunctive relief, fine, misdemeanor.75
Washington	Gross misdemeanor or class C felony.76-
Wisconsin	Misdemeanor.77
West Virginia	Misdemeanor.7
Wyoming	Criminal contempt.79-

The American Bar Association's Standing Committee on Client Protection sent out a survey in 2009 to unauthorized practice of law committees in all jurisdictions in an attempt to compile data on the various jurisdictions' laws and enforcement efforts in the area of UPL.[80] The results of that survey were released in May 2009[81] with the following findings:

- 39 jurisdictions responded while 12 (Georgia, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Rhode Island, South Carolina and Vermont) did not respond;82
- The majority of responding jurisdictions have definitions for both the "practice of law" and the "unauthorized practice of law." "Practice of law" definitions are established by court rule, by statute, through case law, and through advisory opinions, with some jurisdictions having definitions in more than one resource;83
- Twenty-nine jurisdictions actively enforce UPL regulations, although some jurisdictions indicate that insufficient funding makes enforcement difficult. Six jurisdictions stated that enforcement is inactive or non-existent;84
- Enforcement in most jurisdictions is funded through Bar Association dues, and only four states, Florida,

> Ohio, Tennessee, and Texas, provide significant funding for UPL enforcement (Florida provides the most funding at approximately S1.6 million annuall y.);8'
>
> Twelve jurisdictions responded that they expect changes in UPL in the coming year, including adopting additional rules, participating in undercover "sting" operations to investigate complaints, more active enforcement, an increased budget for enforcement, changes in the procedures for enforcement, adoption of specific rules to define non-lawyer practice areas (WA) and increasing penalties for UPL.86

The lack of clear standards in defining or punishing UPL in state statutes coupled with the uneven enforcement of these statutes make it difficult for average citizens and professionals to know what unauthorized practice of law is or to predict what consequences, if any, will befall those who violate the UPL restrictions. This is the case even regarding conduct that professionals may, with some justification, believe to be safe, such as a CPA's tax practice.[87] The American Law Institute (ALI) has not defined UPL, perhaps because it cannot furnish one restatement of its definition given many state courts' vague applications of UPL statutes, and ALI has also noted that "definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory."" This confusion regarding what constitutes UPL is one of the major obstacles to effective enforcement of the rule against UPL.89

IV. ARE CURRENT SANCTIONS AND THEIR ENFORCEMENT EQUITABLE?

Under our common law system, the lack of uniformity

among the various jurisdictions in regard to UPL is not something that of itself should raise concern. States are, after all, in the best position to decide in the exercise of their broad police powers what sanctions to apply to protect their citizens from the danger posed by those who practice law without a license. The offense need not be treated equally in all states any more than is any other conduct deemed to be harmful to the health, safety or general welfare of citizens in any given jurisdiction. The wide variance in the severity of sanctions among the jurisdictions, however, does raise questions of fairness, as does the disparity in enforcement of UPL restrictions among the states.

If there is any truth to the old saying that lawyers who represent themselves have fools for clients, what hope is there for the average person left to learn the procedural and substantive law necessary to competently represent themselves even with regard to routine legal matters such as the purchase or sale of a home, the drafting of a will or the filing of an uncontested divorce? Protecting the public from unlicensed practitioners who misrepresent themselves as attorneys is clearly in the public interest, as is the prevention of even competent representation from those who are unlicensed and illegally charge clients fees for legal advice or representation that only members in good standing of the bar are qualified to provide. If experienced lawyers can find it challenging to avoid charges of UPL when advising clients on legal issues outside of jurisdictions in which they are admitted to practice, how can the average lay person be expected to know the limits of permissible conduct in giving their opinion on legal matters to others or in helping others create legally binding documents?

V. CONCLUSION

The striking differences among the various U.S. jurisdictions regarding the definition of UPL, the criminal and civil sanctions available to protect the public from those who practice law without a license and the wide disparity in enforcement of UPI, violations among the states all help to provide an environment that can only breed confusion and raise serious issues of basic fairness that should be addressed at a national level. At the very least, consensus should be reached as to what constitutes the practice of law and on what are appropriate sanctions to protect the public against those who would prey upon them by practicing law without having met the education, competence or ethical standards that are the prerequisites to bar admission. How unauthorized practice is defined has a direct impact on the availability and cost of legal services.[90] In 2002, the Task Force on the Model Definition of the Practice of Law of the American Bar Association proposed a Draft Definition of the Practice of Law that states can use as a model.[91] Other groups, such as the National Conference of Commissioners on Uniform State Laws (NCCUSL), could also study the feasibility of creating a uniform definition of unauthorized practice of law that the various jurisdictions could consider for adoption. As technology continues to advance and information about the law (both reliable and unreliable) becomes ever more accessible to the average person, and as increasingly powerful computer hardware and sophisticated artificial intelligence systems can easily be adapted to assist users to practical application of the law well beyond mere document preparation, having a clear definition of UPL in every state will become even more crucial.

Unsuccessful arguments include violation of First Amendment rights *(People* v. *Shell,* 148 P.3d 162; 2006 Colo. LEXIS 980, (Colo. 2006)), and alleged violation of federal antitrust laws, due process or equal protection *(Lawline* v. *American Bar Association,* 956 F.2d 1378; 1992

U.S. App. LEXIS 2642 (7[6] Cir.1992).

[2] *Franklin* v. *Chavis,* 371 S.C. 527, 532 (S.C. 2007).

[3] *In re: Baker,* 8 N.J. 321, 338, 85 A.2d 505 (N.J. 1951).

[4] See, e.g., Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Problems, 34 Stan. L. Rev. 1 (1981); Barlow F. Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors--or Even Good Sense?, 1980 Am. B. Found. Res. J. 159 (1980).

[5] Alabama law, for example, provides that:

> Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which

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> acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or

> corporation in support of its title policies, to be retained in its files and not to be recorded. Code of Ala. § 34-3-6 (c) (2010). Similar provisions are included is many states' UPL statutes, with additional specific provisions also commonly provided in separate statutes that delineate the types of activities that certain professionals may legally engage in without violating UPL provisions. O.C.G.A. § 15-19-53 (2009), for example, allows person, corporation, or voluntary association in Georgia to examine the record of titles to real property, and to prepare and issue abstracts of title from such examination and certify the correctness of the same without violating UPL provisions but permits only attorney at law to express, render, or issue any legal opinion as to the status of the title to real or personal property. And Texas excludes from the definition of unauthorized practice of law "the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. "(Tex. Gov't Code § 81.101 (c) (2009)).

[6] *Fink et al. v. Peden,* 214 Ind. 584, 589, 17 N.E.2d 95, 96 (IN 1938).

[7] *Richland County Bar Association v. Clapp,* 84 Ohio St. 3d 276, 278; 703 N.E.2d 771, 772.

8 *Brown v. Unauthorized Practice of Law Comm.,* 742 S.W.2d 34, 41 (Tex. App.--Dallas 1987).

[9] *Land Title Abstract & Trust Co. v. Dworken,* 129 Ohio St. 23, 28, 1 Ohio Op. 313, 315, 193 N.E. 650, 652 (OH 1934); *Akron Bar Assn. v. Miller,* 80 Ohio St. 3d 6, 7, 684 N.E.2d 288, 290 (OH 1997).

[10] *2009 Law Firm Billing Survey,* The National Law Journal, December 7, 2009 available at http://www.law.comlj sp/n1j/PubArticleN LI .j sp?id=1202436068099 &slret um-1&hbxlogin-1 (Last visited November 14, 2010).

[11] See *infra* at note 71.

[12] id.

[13] Adams v. Giordano *(In Re Clarke),* U.S. Bankr. Ct. East. Dist. N.Y., 2009 Bankr. LEXIS 1363, at "22 (2009).

[14] Tax preparation is a hybrid of accounting and law. Federal regulations permit anyone to be a tax preparer without regard to professional qualifications or professional status (See Treas. Reg. § 301.7701-15(d) (1980)). The states cannot treat routine tax preparation permissible under federal law as UPL. But the issue is by no means settled as to where to draw the line between permissible tax advice and impermissible UPL. (See generally Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption froill State Unauthorized Practice of Law Rules,* 11 Akron Tax J. 47 (1995), Stephen T. Black and Katherine D. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War,* 36 St. Mary's L.J. 1 (2004)).

[15] Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets,* 60 Stan. L. Rev. 1689, 1724 (2008).

[16] *Id.*

[17] http://www.legalzoom.com (Last visited November 14, 2010).

[18] http://www.legalzoom.com/education-center/education-center-index.html (Last visited November 14, 2010).

[19] http://www.legalzoom.com(Last visited November 14, 2010).

[20] http://www.legalzoom.com/disclaimer-popup.html (Last visited November 14, 2010).

[21] As of this writing, there is a case pending in Missouri involving a class action suit against LegalZoom.com. (See *Janson* v. *LegalZoom.corn,* Inc. (No. 10-04018 (W.D. Mo. petition for removal filed February 5, 2010)). A second class action suit is currently also pending in Superior Court of California, LA County, against LegalZoom.com (See *Webster v LegalZoom.com* (No. BC438637. A copy of the complaint is available at http://www.elderlawanswers.com/Resources/Documents/Legal%20Zoom %20Webster%20complaint.pdf).(Last visited November 15, 2010).

[22] In instances where a state does not classify the offense as a felony or misdemeanor, I have used the traditional classification of a felony as any crime that carries a maximum sentence of not less than one year and classified criminal offenses that provide up to one-year incarceration as a maximum penalty as misdemeanors. (See, e.g., Model Penal Code Art. 6., §6.06, American Law Institute (1962).

[23] Alaska Stat. § 08.08.230 (a) (2009).

[24] Code of Ala. § 34-3-7 (2009).

[25] Ark. Code §16-22-501 (c) (2009).

[26] Ark. Code § 16-22-501 (d) (2009).

[27] Arizona defines what conduct constitutes the practice of law [Ariz. Sup. Ct. R. 31 (a)(2)(A) (2009)1, what conduct constitutes unauthorized practice of law [Ariz. Sup. Ct. R. 31 (a) (2)(B)], and limits the practice of law to active members of the state bar [Ariz. Sup. Ct. R. 31 (b) (2009)]. But only civil sanctions are provided for those found to have engaged in the unauthorized practice of law.

[28] Cease and desist orders are available under Ariz. Sup. Ct. R. 76 (h) (2)(2009), as well as injunctions [Ariz. Sup. Ct. R. 76 (b) (3)(2009)]. Contempt of court would be the only punishment available against an individual who violates cease and desist orders or injunctions of the Arizona courts.

[29] Cal Bus & Prof Code § 6126 (a) (2009). A second offense is punishable by a minimum sentence of 90 days in county jail under the same Code section. *Id.*

[30] C.R.S. 12-5-112 (2009).

[31] Conn. Gen. Stat. § 51-88 (b)(2008).

[32] D.C. Ct. App. Rule 49 (e) (2) (2009).

[33] Del. Sup. Ct. R. 86 (c) (6) (2009).

[34] Del. Sup. Ct. R. 86 (c) (5) (2009).

[35] Fla. Stat. § 454.23 (2009).

[36] Fla. Stat. § 775.082 (3) (d) (2009).

[37] O.C.G.A. § 15-19-56 (2009). Acts that are criminalized as the unauthorized practice of law in the State of Georgia are defined in O.C.G.A. § 15-19-51 (2009).

[38] 7 GCA § 9A106 (2009).

[39] HRS § 605-14 (2009) prohibits the unauthorized practice of law and HRS § 605-17 (2009) makes HRS § 605-14 (2009) punishable as a misdemeanor.

[40] Iowa Ct. R. 37.2 (2009).

[41] Idaho Code § 3-420 (2010). The maximum penalty under the statute is a $500 fine and/or six months imprisonment. *Id.*

[42] 705 ILCS 205/1 (2010). Remedies under the statute include equitable relief (e.g., injunctions), a civil penalty not to exceed $5,000 (payable to the Illinois Equal Justice Foundation), and actual damages.

[43] Burns Ind. Code Ann. § 33-43-2-1 (2009).

[44] The Kansas statute defines the unauthorized practice of law as either practicing law in a jurisdiction where doing so violates the regulation

of the legal profession in that jurisdiction or assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. KRPC 5.5 (a) (2009). While the unauthorized practice of law by non-lawyers is not specifically addressed, injunctive relief and contempt of court sanctions would be available as a matter of course to prevent anyone from engaging in the unauthorized practice of law in the state. In addition, holding oneself out to be an attorney is a class B misdemeanor. K.S.A. § 21-3824 (a) (2008). Claiming to be a lawyer when one is not is sufficient for a conviction of false impersonation *(State v. Marino,* 23 Kan. App. 2d 106, 929 P.2d 173 (1996)), as is using letterhead by a suspended attorney that identified him as an "Attorney and Counselor at Law" *(State* v. *Seek,* 274 Kan. 961; 58 P.3d 730; 2002 Kan. LEXIS 773 (2002)).

[45] Ky. SCR Rule 3.460 (1) (2009).

[46] Ky. SCR Rule 3.460 (C) (2009).

[47] 4 M.R.S. § 807 (2) (2009) makes the unauthorized practice of law a Class E crime. 17-A M.R.S. § 1252 (2) (E) (2009) makes Class E crimes punishable by up to six months incarceration (e.g., a misdemeanor). In addition, 17-A M.R.S. § 1301 (1) (E) (2009) allows a maximum fine for Class E crimes to be set at $1,000.

[48] Massachusetts law provides: "No individual, other than a member, in good standing, of the bar of this commonwealth shall practice law, or, by word, sign, letter, advertisement or otherwise, hold himself out as authorized, entitled, competent, qualified or able to practice law; provided, that a member of the bar, in good standing, of any other state may appear, by permission of the court, as attorney or counselor, in any case pending therein, if such other state grants like privileges to members of the bar, in good standing, of this commonwealth." ALM GL ch. 221, § 46A (2009). Although sanctions for violation of this section are not specifically provided in the statute, injunctive relief and contempt of court proceedings would be available as a matter of course for anyone found to be engaging in the unauthorized practice of law in violation of the statute. In addition, holding oneself out as an attorney by a disbarred or suspended attorney or by a non-attorney can result in a misdemeanor conviction with a maximum penalty of $100 or imprisonment of not more than six months for a first offense and a $500 fine or imprisonment for up to one year for subsequent offenses under ALM GL ch. 221, § 41 (2009).

[49] Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Ann. § 10-601 (a) (2009) prohibits the practice of law by anyone not admitted to the bar, and Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Ann. § 10-606 (a) (3) (2009) makes engaging in the practice of law without bar admission a misdemeanor punishable by a maximum fine of $5,000 and/or up to one year imprisonment. Corporations, partnerships or other business associations engaged in the unauthorized practice of law are subject to a maximum fine of $5,000 (Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Aim. § 10-606 (a) (1) (2009)) and any officer, director, partner, trustee, agent, or employee who acts to enable a corporation, partnership, or association to engage in the unauthorized practice of law is also guilty of a misdemeanor and subject to a maximum fine of up to $5,000 and/or imprisonment for up to one year (Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Ann. § 10-606 (a) (2) (2009)).

[50] MCLS § 600.916 (1) (2009).

[51] Minn. Stat. § 481.02 (Subd. 1) (a) (2009).

[52] Miss. Code Atm. § 73-3-55 (2009). Miss. Code Ann. § 97-23-43 (2009) sets the punishment for unauthorized practice of law at a minimum of $100 and maximum of $200 or by imprisonment from three to 12 months for a first offense. A second offense is punishable by a fine of not less than $200 or more than $500 or imprisonment of not less than one year to not more than two years. Subsequent offenses after the second offense will result in fines not to exceed $5,000 or imprisonment of not more than five years.

[53] Mont. Code Anno., § 37-61-210 (2009). The penalty for practicing without a license in Montana is limited to persons who practice "law in any court, except a justice's court or a city court, without having received a license as attorney." (But see *In re Bailey,* 50 M 365, 146 P 1101 (1915) holding that a person who advises clients in legal matters pending or to be brought before a court of record, prepares pleadings or proceedings for use in a court of record, or appears before a court of record, is practicing law in a court of record and, is guilty of contempt of court if he is not licenses to practice law in the state.)

[54] N.C. Gen. Stat. § 84-4 (2009) prohibits the unauthorized practice of law and N.C. Gen. Stat. § 84-8 (2009) makes the violation of N.C. Gen. Stat.

§ 84-4 (2009) a Class 1 misdemeanor.

[55] N.D. Cent. Code, § 27-11-01 (2009) makes engaging in the unauthorized practice of law a Class A misdemeanor.

[56] R.R.S. Neb. § 7-101 (2009) makes the unauthorized practice of law a Class III misdemeanor. (Neb. Ct. R. § 3-1018 (A) (2009) also specifically gives the Supreme Court of Nebraska the power to enjoin the unauthorized practice of law.)

[57] RSA 311:7-a (2009).

[58] N.J. Stat. § 2C:21-22 (a) (2009) makes to knowingly engage in the unauthorized practice of law a "disorderly persons offense" (a misdemeanor). But unauthorized practice of law is a "crime in the fourth degree" (a felony) if a person knowingly engages in the unauthorized practice of law and creates or reinforces the impression that the person is licensed to practice law, derives a benefit, or causes injury to another. (N.J. Stat. § 2C:21-22 (b) (1)-(3) (2009). The maximum sentence for a disorderly persons offense in the state is six months imprisonment (N.J. Stat. § 2C:43-8 (2009)). N.J. Stat. § 2C:43-3 (c) (2009) allows for a maximum fine of $1,000 to be imposed in addition to or instead of imprisonment. The maximum sentence for a crime in the fourth degree is 18 months under N.J. Stat. § 2C:43-6 (a) (4) (2009). N.J. Stat. § 2C:43-6 (b) (2) (2009) provides for a maximum fine of $10,000 in addition to or instead of incarceration.

[59] N.M. Stat. Ann. § 36-2-28 (2009) makes practicing law without a license punishable by a fine or up to $500 and/or imprisonment of up to six months.

[60] Nev. Rev. Stat. Ann. § 7.285 (2) (a) –(c) (2009) classifies the unauthorized practice of law as a misdemeanor for a first offense within the preceding seven years, a gross misdemeanor for a sec.ond offense within the preceding seven years and a Class F felony for a third offense within the preceding seven years. Nev. Rev. Stat. Ann. § 193.130 (2) (E) (2009) makes a Class E felony punishable by not more than four and not less than one year and allows a fine to be levied of up to $5,000. Nev. Rev. Stat. Ann. § 193.150 (1) (2009) makes the maximum punishment for a misdemeanor up to six months incarceration and/or a fine of up to $1,000. Nev. Rev. Stat. Ann. § 193.140 (2009)makes a gross misdemeanor punishable by incarceration of up to one year and/or a fine

of up to $2,000.

[61] NY CLS Jud § 478 (2009) defines and prohibits the unauthorized practice of law and NY CLS Jud § 485 (2009) designates the offense as a misdemeanor.

[62] Ohio Gov. Bar. Rule VII §8 (B) (2009) provides for penalties of up to $10,000 for the unauthorized practice of law.

[63] 5 Oki. St. Chap. 1, Appx. 1, Art. II, Section 7 (a) (2009) prohibits the unauthorized practice of law by any person or entity. Engaging in the unauthorized practice of law is punishable as contempt of court (See, e.g., N.D. Okla. LCvR 83.6 (g) (2009).

[64] ORS § 9.160 (1) (2007) states that only persons who are members of the bar may practice law or represent themselves as qualified to practice law. Persons who violate the statute would be subject to Injunctive relief and contempt of court as a matter of course. A person may, however, represent another in justice court in the state without being admitted to the bar (ORS § 52.060 (2007). See also *Oregon State Bar* v. *Arnold*, 166 Or App 383, 998 P2d 757 (2000) (noting that an injunction against unlicensed practice of law does not apply to representation before justice courts).

[65] 42 Pa.C.S. § 2524 (a) (2009). A first violation of the statute is a misdemeanor of the third degree; a second and subsequent violations are misdemeanors of the first degree. In Pennsylvania, a misdemeanor of the third degree carries a maximum sentence of up to one year imprisonment (18 Pa.C.S. § 1104 (3) (2009)) or a fine not to exceed $2,500 (18 Pa.C.S. § 1101 (6) (2009). A misdemeanor of the first degree carries a maximum sentence of up to five years incarceration (18 Pa.C.S. § 1104 (1) (2009)) or a fine not to exceed $10,000. 18 Pa.C.S. § 1101 (4) (2009).

[66] 4 L.P.R.A. § 740 (2009). The penalty for unauthorized practice of law is a fine of not less than $5,000 and/or incarceration or not more than six months. 4 L.P.R.A. § 782 (2009).

[67] R.I. Gen. Laws § 11-27-5 (2009) restricts the practice of law to members of the bar in good standing. Persons convicted of unauthorized practice of law are subject to punishment by imprisonment of up to one year and/or a fine not to exceed $500 with subsequent convictions resulting in incarceration not to exceed five years and/or fines not to

exceed $5,000; Firms convicted of unauthorized practice of law are punishable by a fine of up to $500 for a first offense and up to $5,000 for any subsequent offenses under the same section. R.I. Gen. Laws § 11-27-14 (2009).

[68] Rule 413, Rule 3, SCACR (g) (2009). Rule 410, SCACR (d) (2009) prohibits anyone from practicing law unless admitted to the South Carolina Bar. S.C. Code Ann. § 40-5-310 (2008) provides that "[n]o person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney. A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both."

[69] S.D. Codified Laws § 16-18-1 (2009).

[70] Tenn. Code Ann. § 23-3-103 (b)(2009). In addition, Tenn. Code Ann. § 23-3-103 (c)(2009) allows the attorney general to bring actions for injunctive relief on behalf of the state and to obtain civil penalties against those who engage in the unauthorized practice of law of up to $10,000 per violation, as well as actions for restitution and for the cost of attorneys fees related costs of investigating and prosecuting unauthorized practice of law violations.

[71] Tex. Penal Code § 38.123 (2009). The criminal penalties for the unauthorized practice of law in the State of Texas attach to instances of unauthorized practice by persons "with intent to obtain an economic benefit for himself or herself' (Tex. Penal Code § 38.123 (a) (2009)) and then only with respect to the following enumerated instances of unauthorized practice:

> (1) contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;
>
> (2) advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;
>
> (3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;

(4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action; or

(5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding. Tex. Penal Code § 38.123 (a) (1)-(5) (2009).

Unauthorized practice of law as defined by the statute is punished as either a class A misdemeanor for a first offense or a felony in the third degree for subsequent offenses. (Tex. Penal Code § 38.123 (c)-(d) (2009)) But Tex. Gov't Code § 81.101 (b) (LexisNexis 2009)) states that the judicial branch retains "the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law." Therefore, injunctive relief and contempt of court would also be available as a matter of course for other instances of unauthorized practice that do not rise to the level of criminal offenses. (See, e.g., *Newton v. Delespine*, 2006 Tex. App. LEXIS 10361 (Tex. App. Tyler Dec. 1 2006) (finding that the activities of a "jailhouse lawyer" to be the unauthorized practice of law); *State Bar v. Cortez*, 692 S.W.2d 47, 1985 Tex. LEXIS 922, 28 Tex. Sup. Ct. J. 407 (Tex. 1985) (interviewing clients and preparing immigration forms constitutes the unauthorized practice of law that may be the appropriate subject of injunction); *Davies* v. *Unauthorized Practice Comm.*, 431 S.W.2d 590 1968 Tex. App. LEXIS 2082 (Tex. Civ. App. Tyler 1968). (The giving of legal advice on and preparin[g] trusts. contracts, taxes, and assisting in the formation of a corporation by someone who is not licensed to practice law can appropriately result in a permanent injunction preventing the person from engaging in the unauthorized practice of law.)

[72] Utah Code Ann. § 78A-9-103 (1) (2009) prohibits the unauthorized practice of law and provides for the enforcement of the prohibition enforced "by any civil action or proceedings instituted by the Board of Commissioners of the Utah State Bar." Utah Code Ann. § 78A-9-103 (2) (2009).

[n] Va. Code Ann. § 54.1-3904 (2009).

[74] 4 V.I.C. § 443 (b) (2009) provides for injunctive relief and a fine of up

to $500 for each violation.

[75] 3 V.S.A. § 127 (b) (2009) provides that the unauthorized practice of any regulated profession (not just law) is subject to injunction and civil penalty of up to $1,000. 3 V.S.A. § 127 (c) (2009) also makes the unauthorized practice of a regulated profession a criminal offense subject to criminal prosecution with a maximum penalty of a fine of up to $5,000 and/or imprisonment for up to one year.

[76] Rev. Code Wash. (ARCW) § 2.48.180 (3) (a)-(b) (2009) makes a first offense punishable as a gross misdemeanor and any subsequent offense punishable as a class C felony. Rev. Code Wash. (ARCW) § 9.92.020 (2009) sets the punishment for a gross misdemeanor as a fine not to exceed $5,000 and/or imprisonment for up to one year. Rev. Code Wash. (ARCW) § 9A.20.021 (1) (c) (2009) provides the maximum sentence for conviction of a class C felony as incarceration for up to five years and/or a maximum fine of $10,000.

[77] Wis. Stat. § 757.30 (1) (2009) makes the unauthorized practice of law punishable by a fine of not less than $50 and not more than $500 and/or imprisonment for up to one year and in addition may be punished for contempt.

[78] W. Va. Code § 30-2-4 (2009) makes the unauthorized practice of law a misdemeanor punishable by a fine of up to $1,000. The statute does not provide for incarceration as a punishment but does refer to the offense as a misdemeanor, which makes the unauthorized practice of law a criminal offense.

[79] Wyo. Unauth. Prac. Rule 9 (b) (1). Criminal contempt is punishable by a fine not to exceed $5,000 and/or imprisonment for up to three months. Wyo. Unauth. Prac. Rule 9 (i) (9).

[80] A copy of the survey from is available at http://www.abanet.org/cpr/clientpro/2009-survey.pdf. (Last visited November 15, 2010)

[81] AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON CLIENT PROTECTION, 2009 *SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES* (May 2009) available at hap ://www. abanet. org/cpeclientpro/09-upl-survey.pdf (Last visited November 14, 2010)

[82] *Id.* at 1.

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[83] Id.

[84] *Id.*

[85] *Id.* at 1-2.

[86] Id. at 2.

[87] See e.g., Linda Galler, *Problems in. Defining and Controlling Unauthorized Practice of Law,* 44 Ariz. L. Rev. 773, 777 (2003) (Noting that accountants and accounting firms often engage in UPI, despite federal regulations under Circular 230 that permit CPAs, enrolled agents, and enrolled actuaries to practice before the IRS such as when in transactional planning accountants give an opinion as to probable tax consequences).

[88] Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement,* 20 Geo. J. Legal Ethics 719, 723.

[89] *Id.*

[90] Soha Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law,* 61 Wash & Lee L. Rev. 1903, 1916.

[91] http://www.abanet.org/cpr/model-def/model_def definition.html (Last visited November 14, 2010).

Are Lock-In Contracts for Heating Oil Unconscionable Under the Uniform Commercial Code? A Teaching Exercise in Contract Law

by

Sharlene A. McEvoy*

ABSTRACT

There has been a trend in recent years for heating oil companies to encourage customers to "lock in" a price for a season as a hedge against an increase in oil prices. This paper analyzes the issue in light of the unconscionable contract provision of the Uniform Commercial Code.

INTRODUCTION

In the past few years the cost of home heating oil has increased dramatically as the price of a barrel of oil skyrocketed to nearly $150.00 a barrel during the summer of 2008.'

Because some analysts had predicted that oil might go as high as $200.00 per barrel, many consumers became anxious about their ability to pay for home heating oil during the winter of 2008-2009.

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As a result, some entered into contracts during the summer of 2008 with heating oil companies when the price per gallon was between $3.80 and $4.28 which was the going rate as late as September 2008.2

In the eight weeks before the Presidential election and in the months that followed, the price per barrel of oil fell dramatically which resulted in lower prices for gasoline and heating oil. Those who believed that it was prudent to lock in a price are now dismayed to learn that their neighbors who did not enter such contracts are paying as little as $2.00 - $2.50 per gallon.

For example, Barbara Daley, who is '76 and lives on Long Island, entered into a contract with a heating oil company with whom she has done business for 30-35 years. Her lock-in price was $4.22 per gallon. Ms. Daley regrets entering the contract and would like to modify it. However one proviso of the agreement states that it will cost her $599.00 to terminate the contract, which is approximately the price of a single oil delivery.3

While it is not known how many consumers entered such agreements, estimates are that thousands of homeowners signed contracts during the summer 200 - . Some signed on in July when the price peaked at $4.78 per gallon.4

Others have entered agreements which "cap the maximum price they must pay but permits them to pay less if the price drops.[5] While these consumers are in better shape than those who entered the fixed price deals, the oil companies included provisions in the contracts which allow them to charge ten to twenty cents more than the going rate as a hedge against, any further sharp drop in oil prices.6

Are these contracts unenforceable under the Uniform Commercial Code provision 2-302 which covers the concept of unconscionability? The landmark case on such provisions in adhesion contracts is Jones v. Star Credit Corp.7

Cliffon and Cora Jones, both welfare recipients, agreed to purchase a home freezer from Your Shop at I-Tome Service, Inc. For $900.00 with the addition of such charges as credit life insurance, credit property insurance and sales tax. The total price came to $1439.69. The Jones' paid $619.88 toward the freezer. The defendant claimed that with all the added chares there was a balance due of $819.81.8

At trial evidence showed that the freezer had a maximum retail value of $300.9 The issue in the case was whether this contract would be considered "unconscionable" under 2-302 of the Uniform Commercial Code which provides:

> If the court, as a matter of law, finds the contract or any clause to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.10

The Supreme Court of New York held that contract was unconscionable and ordered the contract reformed so that the $619.88 already paid by the Jones would constitute the entire purchase price."

In his opinion, the judge reviewed the fact that when "caveat emptor" reined, the parties had "unbridled latitude" to make their own contracts, which allowed "exploitive and callous practices which shocked the conscience of the legislature and the courts".'2

The judge cited the importance of preserving the integrity of contracts allowing parties "to deal, trade, bargain, and contract." Another concern, however, is for the

uneducated, illiterate and the poor, .who are the most likely victims of merchants who would prey on them.'3

The judge cited 2-302 of the UCC as enacting "the moral sense of the community into the law of commercial transactions".[4] Section 2-302 allows a court to find that a contract or clause in it "was unconscionable at the time it was made, permitting the court may do one of three things: refuse to enforce the contract, eliminate the offending clause or limit the impact of the clause" to avoid an unconscionable result."16

The Official Comment to 2-302 states that its purpose is to prevent "oppression or unfair suiprise"17

The judge commented that 2-302 covers the price term of a contract. "Indeed, no other provision of an agreement more intimately touches upon the question of unconscionability than does the term regarding price."18

The judge stated that the mathematical disparity between $300, which presumably includes a reasonable profit margin and $900, which is exorbitant on its face, carries the greatest weight."19

The judge cautioned that price disparity is not the only factor governing unconscionability. Other factors include the "limited financial resources" of the buyers which can weigh in the court's decision.20

From the perspective of the heating oil customer, the lock-in contracts would appear to meet the "Jones" test of being unconscionable. Many of these contracts were entered into in the summer of 2008 when oil prices reached their high water mark and when some analysts were predicting that heating oil might go to $6.00 per gallon if the price per barrel of oil soared to over $200-$250. Elderly consumers who live on fixed incomes were fearful that if they did not lock in at the summer price, cold weather in the fall and winter would cause prices to rise even more, thus making their financial situation even more precarious.

By late fall 2008 however, some oil dealers were

selling heating fuel for under $2.50 a gallon. Those who locked in are paying 55% more per gallon in some cases,21

From the oil companies' point of view these agreements are not unreasonable. They argue that they are being blamed for a situation over which they have no control. They believe that large oil refiners and wholesalers set the prices and when customers signed the contracts during the summer 2008, by law in some states dealers had to purchase 80% of the oil from the wholesalers at then prevailing prices to cover the contracts or purchase a surety bond to cover re-buy and fixed price agreement obligations.[22] Therefore, if they were to cut prices in response to the current market, they would lose money and possibly their business because they are already locked into their costs .23

The problem became so acute in November 2008 with consumers clamoring for recission of their contracts, that the Independent Connecticut Petroleum Associates (ICPA) joined with other oil heat associations in the Northeast to ask the Secretary of the Treasury for loans to help buy out the contracts of those who signed on at the high price and exchange them for less expensive agreements.[24] Such an arrangement would permit consumers to get the lower prevailing prices and preserve the profits for the oil dealer who would be reimbursed for the oil they had purchased at the high price.

The saga of the "locked in" heating oil contracts provides an excellent case study to teach students about the principles of contract law as well as the concept of unconscionable agreements under 2-302 of the Uniform Commercial Code. Since many textbooks offer an edited version of Jones v. Star Credit Corp, [25] the case provides an excellent springboard for teaching about unconscionable contracts and individuals who might be particularly

vulnerable.

Among the questions that might be posed to students are:

Is a heating oil contract covered under the UCC or is it a contract for a service i.e. delivery of a commodity?

2. Ask students to compare the facts of Jones with that of Barbara Daley, an elderly woman who lives on a fixed income?
3. Did Daley and others have all the facts when they decided to enter a "lock in" contract? Who does have such information? The oil dealers? Economists? Refiners?
4. If Daley and others were to sue, claiming unconscionability under 2-302, would they be successful and what counter arguments would the defendant dealers make?
5. Are lock-in contracts ethical if neither the consumer nor the dealer has perfect information? Is there an argument for fraud, mutual mistake, or economic duress which would offer the possibility of rescission?
6. Ask the students to apply the judge's reasoning in Jones to the "lock in" cases. Is that decision applicable to this situation?
7. Did state law make the problem worse by forcing dealers to buy oil when contracts were made?

8, The Independent Petroleum Dealers Association appealed to the Secretary of the Treasury to get relief from the rescue package, TARP? Should taxpayer money be allocated to dealers to buy out customers who locked in?

9. Is this the kind of relief Congress intended when it passed the bailout package?

Another possible avenue of relief for disgruntled consumers is to examine their contracts to determine if they

are in compliance with Connecticut law[26] which states:

> "A contract for the retail sale of home heating oil that offers a guaranteed price plan including fixed price contracts and any other similar terms shall be in writing and the terms and conditions of such price plans shall be disclosed. Such disclosure shall be in plain language and shall immediately follow the language concerning the price or service that could be affected and shall be printed in no less than twelve point boldface type of uniform font."

Students can be asked to examine samples of "lock-in" contracts to determine if they are in compliance with this law. (See Appendix) Some of the agreements contain "liquidated damages" provisions. Ask the students to examine these clauses and decide if they are "reasonable". The Office of the Attorney General of Connecticut "encourages customers to contact their fuel oil dealer and discuss the possibility of working out another price with the understanding that the dealer is not obligated to do so.[27] Students can discuss the ethical responsibilities of the oil dealers. Would it be "good business" for the oil company to do so to win customer loyalty even though letting customers rescind will cause the companies to lose profits? Do states have an ethical or legal obligation to step in and lessen the burden on oppressed customers especially when an essential commodity like heating oil is involved? Should the states buy out these contracts?

CONCLUSION

It would seem that the 2-302 would not apply to these oil contracts. In essence, consumers bet on the market, namely,

that the price of oil would go up and that they would be protected. As it happened, that wager did not pay off in 2008. The oil delivery companies did not take advantage of their customers because they had to purchase oil at high prices to fulfill the agreements.

Consumers must realize that a signed contract means business that they are legally bound and can be sued for breach if they back out. Both customers and dealers were victims of a volatile market.

A possible solution would be for legislators to ban oil companies from offering lock-in contracts. Thus, dealers will not be forced to buy oil before customers seek delivery. Customers will not have to worry that they have made a bad bargain that will come back to haunt them. Students can be asked for their opinion on such a law.

The legislature should allow oil companies to offer "capped price" contracts only with reasonable premiums if the price drops. Those who choose this option know that they will not be liable to pay more than a certain price for the heating oil. Students might offer recommendations for a change in the Connecticut statute to avoid problems in the future.

NOTES

[1] Rob Varnen, "Price Drop Now Hurts Oil Dealers," Conn Post, Nov 8, 2008 at Al. (hereinafter "Price Drop Now Hurts Oil Dealers")
[2] Ken Belson, "Some Who Locked in a Price for Heating Oil Now Wish They Hadn't," N.Y. Times, Oct 23, 2008 at A27. (hereinafter "Some Who Locked in a Price")
[3] Id.
[4] Id.
[5] Id.
[6] Id.
[7] 59 Misc 2d 189; 298 N.Y.S. 2d 264; 1969 N.Y. Misc LEXIS 1696; 6 U.C.C. Rep. Serv. (Callaglian)76.

[8] 59 Misc 2d 190.
[9] Id.
10 2-302 (L.1962 ch553 eff Sept 27, 1964)
[11] 59 Misc 2d 193.
[12] Id at 190.
[13] Id at 190-191.
[14] Id at 191.
" Id.
[16] Id.
[17] Id.
[18] Id.
[19] Id. at 192.
[20] Id.
[21] Cara Baruzzi, "Locked In: Heating Oil Contracts Burn Consumers Dealers," N.I-L Register Nov 9, 2008 at C I
[22] Letter from Assistant Attorney General Thomas Saadi, Dec. 4, 2008 at I. (hereinafter Saadi Letter)
[23] Id. See also "Some Who Locked in a Price", supra note 2.
[24] "Price Drop Now Hurts Oil Dealers," supra note 1.
[25] 59 Misc 2d 189, supra note 7.
[26] C.G.S. 16a-23n(a)
[27] Saadi Letter, supra note 22.