

The Federal Lawyer

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BY ALLAN I. MENDELSON

Since Judge Learned Hand's 1945 decision in the "Alcoa" case, it has become well-established law that the Sherman Antitrust Act—legislation that was adopted over 100 years ago—applies to and prohibits conduct in foreign countries if that conduct has an illegal "effect" in the United States. But to what extent does the Sherman Act and other U.S. legislation apply to conduct in foreign countries? Recent U.S. Supreme Court decisions do not clearly define the exact reach and limits of U.S. jurisdiction on the international scene. In the United States, this jurisdiction is now known as the "jurisdiction to prescribe"—in contrast to the jurisdiction that we all know as the jurisdiction to adjudicate.



The Federal Bar Association | Mission Statement

The mission of the Association is to strengthen the federal legal system and administration of justice by serving the interests and the needs of the Federal practitioner, both public and private, the federal judiciary and the public they serve.

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President's Message

JUANITA SALES LEE

On Sections and Divisions

ON SEPT. 20, 2008, at the FBA Annual Meeting and Convention held in Huntsville, Ala., I was installed as the president of the Federal Bar Association. I want to thank the North Alabama Chapter; the chapter's president, Margaret Simmons; the 2008 Annual Meeting and Convention Planning Committee; Judge U.W. Clemon,

honorary chair of the planning committee; and all the speakers for their time and effort in making this a wonderful event for the FBA and a very special time for me.

I appreciate the opportunity you have given me to serve as the association's president for 2008–2009. In any given year, the president of the FBA may come face to face with only 10 percent of the membership. So to get us off on the right foot, allow me to tell you a little about me: I am a native Alabamian. I graduated from the University of Alabama with degrees in social work and law. I am employed by the U.S. Army in Huntsville and have been a federal employee for more than 25 years. My area of practice is mainly labor and employment law.

I first became active in the association through my local chapter, the North Alabama Chapter, where I took my first step on the leadership ladder in 1991. The chapter celebrates its 50th anniversary this year.

Fifty years ago, Francis Buckley, chief counsel of the U.S. Army Missile Command's Legal Office (and others) organized the North Alabama Chapter. His goal was to instill professionalism among the attorneys in his office and to provide service to the legal community of Huntsville. Mr. Buckley also encouraged attorneys to play an active role in the FBA, and his tradition lives to this day.

The chapter membership consists of attorneys from federal organizations in Huntsville and members of the downtown bar association. This year's officers hail from the Army Corps of Engineers, the Army Aviation and Missile Command, Marshall Space Flight Center/NASA, the Army Space and Missile Defense Command, and the Missile Defense Agency.

I loved my first stint in the chapter's leadership so much that I took a second tour. Soon thereafter, leaders in the national organization noticed my zeal, and Alan Harnisch, FBA president at the time, appointed me to the Chapter Activity Fund Committee. Subsequently, I became a vice president for the 11th circuit—an elected national office. In 2002, with a leap of faith and hard work on the part of many, I was

elected deputy secretary of the FBA under the old governance structure.

And now, 17 years after my first FBA leadership position, I am beginning my term as national president. If you are looking for an organization that serves the legal community and offers opportunities for meaningful leadership, I urge you to become actively involved in the Federal Bar Association.

Let me clear up some misconceptions that may be inhibiting some federal employees. Some federal employees think that being active in a nonfederal professional organization is prohibited by the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR 2635, and supplemental guidance issued by one's agency. This is not the case; the Standards and many agencies' supplemental guidance allow federal employees to participate in professional associations. The Standards prohibit the misuse of government property, but the Standards—and my agency's supplemental guidance, the Joint Ethics Regulation issued by the Department of Defense (DOD)—provide for the authorized use of government property. For example, an attorney may be permitted to use the office's word processor and the agency's photocopying equipment to prepare a paper to be presented at a conference sponsored by a professional association of which the employee is a member. 5 CFR 2635.704 and DoD 5500.7-R, Section 3-300b. This same section of the Joint Ethics Regulation also gives supervisors the authority to permit excused absences for reasonable periods of time so that their DOD employees can voluntarily participate in the activities of nonprofit professional associations like the FBA as well as learned societies.

I emphasize these authorities as a way to encourage federal employees to become involved in the FBA's activities. The many areas in which you can participate can be found on the FBA Web site, www.fedbar.org. One route is participation in chap-



MESSAGE *continued on page 4*

ter activities—the route I chose. Another avenue is through the association’s sections and divisions.

Our time is a commodity that we all value. We have to distribute our time carefully among many responsibilities: work, family, church, community activities, membership in associations, and ourselves. Nevertheless, at the end of the day (sometimes literally), we find time for everything that is so important to all of us. In my case, I am committed to giving FBA members the time that is necessary to have a president who will listen, ask for input, and seriously consider ideas that will help guide the FBA and its Board of Directors in its governance and decision-making on behalf of the membership.

A very important step in establishing communication from the “members up” will be a membership survey, which will be conducted during the first part of 2009. Watch for the survey and plan now to spend the time needed to give us your input and ideas. In the meantime, I would be delighted to hear from you at president@fedbar.org. **TFL**

Juanita Sales Lee

Please join the Indian Law Section of the Federal Bar Association, the National Native American Bar Association, and the Native American Bar Association of Washington, D.C., for the

**10th Annual
D.C. INDIAN LAW CONFERENCE**
OCTOBER 17, 2008 • WASHINGTON, D.C.

Sessions include:

- ◊ Creative Strategies for Budget Politics: Meeting the Financial Needs of Indian Country in an Era of Shrinking Budgets
- ◊ Winning Over the Roberts Court in Indian Law Cases: A Continuing Dialogue.
- ◊ Luncheon Presentation from an Honorable Member of the Senate Committee on Indian Affairs (TBA) Existing Disparities and New Opportunities: The Role of Tax Policy in Native American Economic Development
- ◊ Advocating Effectively Under New Lobbying and Ethics Rules

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Statement of Ownership, Management, and Circulation of *The Federal Lawyer*

This statement of ownership, management, and circulation as filed Oct. 1, 2008, is required by an act of August 12, 1970: Section 3685, Title 39, United States Code. *The Federal Lawyer* (ISSN: 1080-675X) is published by the Federal Bar Association (FBA); in calendar year 2008, *The Federal Lawyer* was published monthly with the exception of two bi-monthly issues in March/April and November/December. The annual nonmember subscription price is \$35 (\$14 FBA member subscription included in member dues).

The publisher’s general office is: 1220 North Fillmore Street, Suite 444, Arlington, VA 22201. The Federal Bar Association, Publisher; Craig Gargotta, Editor in Chief; Stacy King, Managing Editor: 1220 North Fillmore Street, Suite 444, Arlington, VA 22201. Owned and managed by the Federal Bar Association, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201. Stockholders owning or holding 1 percent or more of total amount of stock: none. Bondholders, mortgage, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages, or other securities: none. The purpose, function, and nonprofit status of the Federal Bar Association has not changed during the preceding 12 months.

Extent and Nature of Circulation	Avg. No. Copies of Each Issue During Preceding 12 months	Actual No. Copies of Single Issue Published Nearest to Filing Date (September 2008)
A. Total No. Copies Printed	17,435	17,723
B. Paid Circulation		
1. Sales through dealers, etc.	N/A	N/A
2. Mail subscription	15,873	15,938
C. Total Paid Circulation	15,892	15,964
D. Total Free Distribution	1,193	1,222
E. Total Distribution	17,085	17,186
F. Copies Not Distributed		
1. Office use, leftover, etc.	350	537
2. Returns from news agents	N/A	N/A
G. Total	17,435	17,723

FIRST CIRCUIT

Massachusetts

The Massachusetts Chapter recently elected new officers. The following officers took office on Oct. 1: President Eve Piemonte Stacey, President-elect Christopher A. Kenney, Vice President Gina M. McCreadie, Secretary Helen Litsas, Treasurer Matthew Moschella, National Delegate Daniel B. Winslow, and Immediate Past President Susan M. Weise.

SECOND CIRCUIT

Southern District of New York

On July 21, the Southern District of New York Chapter organized a swearing-in ceremony for its new officers. Hon. Paul A. Crotty of the Southern District of New York swore in the new officers and a wine and cheese reception followed. The 2008–2009 officers include President Amy Nussbaum Gell, President-elect Simeon H. Baum, Vice President David J. Lender, Secretary

Gareth de Santiago-Keene, Treasurer John G. McCarthy, National Delegate William F. Dahill, and Network of Bar Leaders Delegate John D. Lenoir.

FOURTH CIRCUIT

Tidewater

As part of its informal lunch series, the Tidewater Chapter held a luncheon on Aug. 19 in Norfolk, Va.,

EXCHANGE *continued on page 6*



Chicago Chapter: At the swearing-in of new chapter officers during the 2008 installation luncheon—(left photo, l to r) George Jackson III, treasurer; Charles L. Nesbit, immediate past president; Paul E. Freehling, president and vice president for the Seventh Circuit; Maria Z. Vathis, second vice president; and James D. Wascher, secretary (Scott Mendeloff was sworn in as first vice president but is not pictured); (right photo, l to r) Hon. Joel M. Flaum, U.S. Court of Appeals for the Seventh Circuit; Louis R. Hegeman, past chapter president; Gordon B. Nash Jr., past president of the Chicago Bar Association.



Southern District of New York Chapter: At the July 21 swearing-in of new officers—(l to r) M. Barry Levy, past president; John Lenoir, vice president for the Second Circuit; Simeon Baum, president-elect; Amy Gell, president; Hon. Paul A. Crotty, U.S. District Court for the Southern District of New York; Ray Dowd, immediate past president; John McCarthy, treasurer; Gareth de Santiago-Keene, secretary; and Bill Dahill, national delegate.

Tidewater Chapter: At the August informal lunch series—(l to r) Jim Richardson, FBA president; Alex Turner, special agent in charge of the FBI's Norfolk Division; and Michael Katchmark, chapter president.

at which Alex J. Turner, the special agent in charge of the FBI's Norfolk Division, spoke on how the FBI and the federal bar can work together. Other special guests included then-FBA President Jim Richardson and his wife Kathy, Judge Mark S. Davis, and Magistrate Judges Tommy Miller and Brad Stillman of the Eastern District of Virginia.

NINTH CIRCUIT

Idaho

The Idaho Chapter hosted a lively reception, dubbed "The Party," to recognize and celebrate four outstanding individuals: two new magistrate judges, Hon. Candy W. Dale and Hon. Ronald E. Bush, as well as two mag-

istrate judges who elected to go on recall status and retire, Hon. Larry M. Boyle and Hon. Mikel H. Williams. The reception, which was held on April 3 in Boise, attracted 500 "party-goers," who enjoyed music performed by a live band after a short program to recognize each judge. Then-FBA President Jim Richardson attended, along with chapter leaders and members, members of the state and federal judiciary, and guests. The reception was held the night before the investiture of Idaho's first female magistrate judge, Hon. Candy W. Dale.

ELEVENTH CIRCUIT

Atlanta

On Aug. 18, the Atlanta Chapter

hosted its inaugural reception with the Georgia congressional delegation. The purpose of the event was to bring judges and lawyers from the Northern District of Georgia together with the federal legislators whose decisions have a direct impact on the judiciary. Both Georgia senators, Saxby Chambliss and Johnny Isakson, as well as Congressman Tom Price attended the successful event. Each of the legislators made a presentation and took questions from the audience, which included numerous federal judges. Tom Lacy, member of the chapter's Executive Committee, and Jeff Berhold, president-elect of the chapter, co-chaired the reception, which was hosted by member Robert Khayat at the law firm of King & Spalding.



Idaho Chapter: At the judicial reception in Boise—(above left, l to r) 2008 FBA President Jim Richardson and Hon. Mary M. Schroeder, former chief judge of the U.S. Court of Appeals for the Ninth Circuit; (above right photo) Hon. Terry L. Myers, chief bankruptcy judge; (below left photo, l to r): Donna Tolman; Hon. Larry M. Boyle, chief U.S. magistrate judge; Steve Tolman; and Phil Oberrecht; (bottom right photo, l to r) Wendy Olson, assistant U.S. attorney and incoming chapter president, and U.S. Magistrate Judge Candy W. Dale, Idaho's first female judge.



Gainesville–North Central Florida

On Sept. 3, the Gainesville Area Chapter hosted a reception for local federal judges and practitioners as well as law students in the area. Approximately 70 FBA members and guests enjoyed fine wine and hors d'oeuvres at Ti Amo! Restaurant and Bar in downtown Gainesville.

During the reception, the chapter recognized three local federal judges for significant milestone anniversaries they each celebrated over the past few years: Senior U.S. District Judge William Terrell Hodges, recognized for 35 years of service on the bench; Senior U.S. District Judge Maurice M. Paul, recognized for 25 years of service on the bench; and U.S. District Judge Stephan P. Mickle, recognized for 10 years of service on the bench.

The chapter held its annual meeting in conjunction with the reception and installed the chapter's new officers and board members: Stephanie M. Marchman, president; John B. Fuller, president-elect; Peg O'Connor, secretary; Rebekah M. Kurdziel, treasurer; Elizabeth Schule McKillop, membership chair; and Hon. Gary R. Jones, Elizabeth A. Waratuke, Philip R. Lammens, and Terry N. Silverman, members of the chapter's board of directors.

The newly elected board of directors approved the chapter's name change from the Gainesville Area Chapter to the North Central Florida Chapter. The change was proposed as a way to ensure that the chapter's name accurately reflects the broad geographic area that the chapter represents, including Alachua, Dixie, Gilchrist, Lafayette, Levy, and Marion Counties as well as many cities in those counties. **TFL**

Chapter Exchange is compiled by Melissa Stevenson, FBA manager of chapters and circuits. Send your chapter information and photos to mstevenson@fedbar.org or Chapter Exchange, Federal Bar Association, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201.



Atlanta Chapter: At the inaugural reception with Georgia's congressional delegation—(l to r) Kevin Maxim, chapter vice president; Kevin Weimer, chapter president; Sen. Johnny Isakson; Sen. Saxby Chambliss; Rep. Tom Price; Tom Lacy, member of the chapter's Executive Committee; and Robert Khayat, chapter member and host of the event.



Gainesville–North Central Florida Chapter: At the judicial reception and installation of officers—(top photo, l to r) new and former officers and members of the board of directors: Peg O'Connor, Rebekah Kurdziel, Rob Griscti, Elizabeth Waratuke, Stephanie Marchman, U.S. Magistrate Judge Gary Jones, John Fuller, and Terry Silverman; (bottom photo, l to r) U.S. District Judge Stephan P. Mickle is presented with a plaque in recognition of his 10 years of service on the federal bench by Larry Turner, chapter member and colleague of Judge Mickle from Levin College of Law, University of Florida. Photos by Alison Blakeslee.

Passing the Baton

THIS SUMMER IN Beijing, the U.S. men’s and the women’s teams for the 400-meter relay races dropped the baton. Despite years of training by tremendously gifted and dedicated athletes, both teams went home without even reaching the finals because of a missed transition. Unfortunately, like many transitions, the passing of the baton is more notable in its failure than in its performance: What gets noticed is when the baton is dropped, not when it is passed smoothly.

Our goal for *The Federal Lawyer* is to make the transition from one year’s editorial board to the next year’s board as seamless as possible. That means this upcoming year is a challenge, because we have some very large shoes to fill, with Judge Craig Gargotta stepping down from position as editor in chief of the magazine. On behalf of the board, I want to extend a very warm thank you to Judge Gargotta for his compassionate leadership of the editorial board and for the many years of service he has extended and continues to devote to the Federal Bar Association. We look forward to his valued participation for many years to come.

The Federal Lawyer is also privileged to enjoy another year of service from several members of the magazine’s editorial board, including, Kelle Acock, Nathan Brooks, Julie China, Henry Cohen, Thomas Donovan, Ray Dowd, Kim Koratsky, David Lender, Jeffrey McDermott, Michael Newman, Jonathan Redgrave, Becky Thorson, Michael Tonsing, Vern Winters, and welcomes new members including Juanita Sales Lee, current president of the FBA, R. Johan Conrad Jr., Héctor Ramos, and Daniel Winslow. This team works together with the managing editor, Stacy King, to provide relevant, timely, and insightful material for each issue.

After two U.S. Olympic teams dropped or bobbed the baton in this year’s Olympic games, Doug Logan, the chief executive officer of the USA Track & Field Federation, said the organization would conduct a “comprehensive review” of the way it trains and coaches its teams. Whether the baton is passed, bobbed, or dropped, transitions are always a good opportunity to review, critique, and plan for the next stage. For example, in this 2008 presiden-

tial election year, both presidential candidates have been preparing their transition teams for months—despite the fact that the polls will not open for several weeks yet. Transitions are so important that Congress has legislated the process: the Presidential Transition Act of 1963, as amended, establishes the incoming President’s transition team as a federal entity to provide for the orderly transfer of power between administrations:

The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign. Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people. Accordingly, it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize any disruption. See 3 U.S.C. § 102 notes.

The Federal Lawyer is neither an Olympic team nor a presidential hopeful, but as the magazine finishes one lap and begins the next, we want to take this opportunity to review where we’ve been, where we want to go, and how we’re going to get there. *The Federal Lawyer* has a history of remarkable runs.

Where Have We Been?

The Federal Lawyer, in its current format, has been published since 1995 and is the only professional magazine dedicated solely to the interests of the federal legal practitioner. (*Federal Bar News & Journal*, *Federal Bar News*, and *Federal Bar Journal*, TFL’s predecessors were first published in 1981, 1953, and 1931, respectively.) *The Federal Lawyer* has covered topics from civil procedure and rule changes to closing arguments, from e-discovery to computer forensics, from military commissions to sentencing for terrorism, and from corporate fraud to Medicare. Contributions by more than 1,000 authors have been published in the magazine, and more than 500 books have been reviewed in its pages. *The Federal Lawyer* is delivered 10 times a year to every FBA member and to more than 1,300 Article I and Article III judges.

For the last two years, the magazine has partnered with the Legal Information Institute at Cornell Law School to bring readers previews of upcoming arguments before the U.S. Supreme Court. Regular columns that appear in the magazine include “Washington Watch” by Bruce Moyer, “The Federal Lawyer in Cyberia” by Michael Tonsing, “Labor and Employment Corner” by Michael Newman and Faith Isenhath, and “Language for Lawyers” by Gertrude Block.

Where Do We Want To Go?

First and foremost, we want to continue the trajectory established already: to be the foremost publication that prints quality articles, information, and commentaries tailored to the needs and interests of the federal practitioner. But as with all good things, there is always room for improvement. Some of the goals for the next year include—

- creation of an online database of the profiles of federal judges, so that federal practitioners can search and review profiles of hundreds of sitting federal judges;
- expansion of the “Chapter Exchange” section, so that chapters will have event information that would allow them to replicate other chapters’ successful events;
- continued focus on theme issues, so that we can bring relevant, timely matters to the attention of federal practitioners;
- increase in funding for the magazine through advertisers and sponsors; and
- greater diversity in the subject of the articles and the authors published in the magazine.

How Do We Get There?

In addition to the continuity provided by a great editorial board, we will succeed in this next lap of the race by involving more authors, more chapters, and more FBA leaders. *The Federal Lawyer* should be the national showcase for the best contributions by the best authors in individual chapters as well as a compilation of original articles submitted solely for this unique federal forum. We will be reaching out to the editorial boards of chapter newsletters to offer local authors a national forum for appropriate material. We also will be soliciting original material from new and varied sources—from administrative agencies to federal officers, private practitioners, and law school professors and students. Perhaps most important, we want to be responsive to the requests and needs of federal legal practitioners and the readership of *The Federal Lawyer*. What do you want to see in your association’s magazine next month or next year? As a reader of *The Federal Lawyer*, you have a voice in its direction, and we welcome your comments and suggestions. Send in a letter to the editor, submit an article or a commentary, or suggest

a theme issue for 2009.

Thank you for your dedication to the Federal Bar Association and for reading *The Federal Lawyer*. We look forward to running a good race with you! **TFL**

René Harrod serves as editor in chief of The Federal Lawyer and a member of the FBA Board of Directors, and president of the Broward County Chapter. She is a shareholder on the Dispute Resolution team of Berger Singerman in Ft. Lauderdale, Fla.

Editorial Policy


The Federal Lawyer is the magazine of the Federal Bar Association. It serves the needs of the association and its members, as well as those of the legal profession as a whole and the public.

The Federal Lawyer is edited by members of its editorial board, who are all members of the Federal Bar Association. Editorial and publication decisions are based on the board’s judgment.

The views expressed in *The Federal Lawyer* are those of the authors and do not necessarily reflect the views of the association or of the editorial board. Articles and letters to the editor in response are welcome.

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is pleased to announce our newest Professional



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BRUCE MOYER

Congress Declines to Give DOJ Watchdog More Teeth

Congress, in the closing days before adjournment in late September, stepped back from giving the inspector general at the Department of Justice (DOJ) expanded authority to investigate allegations of misconduct brought against attorneys in the department. This proposal, first reported here in the May 2008 issue, would have disrupted the exclusive authority held by an internal affairs unit within the department—the Office of Professional Responsibility (OPR)—to investigate wrongdoing by DOJ attorneys. Because OPR has done an admirable job of carrying out that responsibility and for other reasons, the Federal Bar Association urged Congress to refrain from conferring duplicative review authority on the DOJ inspector general (IG).



Late last year, the House of Representatives approved legislation (H.R. 928) expanding the investigatory power of the DOJ inspector general as part of a comprehensive bill instituting reforms in how IGs throughout the federal government perform their work. Senators opposed

to the expansion of the authority of the DOJ's inspector general blocked the provisions from being included in the Senate version (S. 2324) of the IG reform bill, which was passed earlier this spring. Under the House bill, the DOJ inspector general would have the right to take on any misconduct allegation involving DOJ lawyers, including its 5,500 federal prosecutors.

In final action on Sept. 27, the House agreed to drop the DOJ inspector general provision from a final compromise version of the inspector general reform legislation, passed several days earlier by the Senate.

Since the OPR was created in 1975 in the wake of Watergate, the office—consisting of 22 lawyers and nine other employees with a \$5.5 million budget—has enjoyed exclusive jurisdiction over misconduct allegations involving the department's lawyers. The office of inspector general (OIG) within DOJ, with a much larger staff and significantly larger budget, has the authority to investigate charges of waste, fraud, and abuse and to recommend criminal charges. The DOJ inspector general typically concentrates on audits and alleged violations of criminal laws and administrative procedures as well as misconduct charges against DOJ employees who are not lawyers.

Even though inspectors general in other federal departments and agencies possess the authority to investigate the misconduct of their respective employees and attorneys, the litigation responsibilities of DOJ attorneys and the bar malpractice implications of misconduct have justified the existence of OPR and the

limitation of the investigatory authority of DOJ's OIG.

The Office of Professional Responsibility is a unique institution in that no other federal department or agency has an office assigned exclusively to handle the investigation of allegations of misconduct by its attorneys. At the same time, no other department or agency has an attorney workforce the size of DOJ's, which has 10,000 attorneys. At times in the past, the OPR has fought for the preservation of its existence. In 1994, then Attorney General Janet Reno proposed merging OPR and DOJ's OIG, but she relented when the Republican-controlled Senate threatened to reject the Clinton administration's nominee to the DOJ's OIG post.

The House-approved bill had contained an amendment proposed by John Conyers (D-Mich.), chairman of the House Judiciary Committee, that would have struck limitations in the current law that require the DOJ's OIG to refer the investigation of allegations of misconduct by DOJ attorneys to the OPR. Striking the referral requirement would have opened the door for the DOJ's office of inspector general to conduct investigations relating to allegations of misconduct by DOJ attorneys—matters that heretofore were the exclusive province of the OPR.

In a Sept. 3 letter to congressional lawmakers, FBA President James S. Richardson Sr. wrote, "A considerable number of our 16,000 members are career-level federal attorneys, including many employed by the Department of Justice. They believe that current federal law and the underlying processes for the investigation of alleged wrongdoing by Department of Justice attorneys, through the involvement of the department's Office of Professional Responsibility, works well and should not be altered. Current investigatory procedures by the Office of Professional Responsibility assure the vigorous pursuit of wrongdoing and guarantee adequate due process for DOJ attorneys under investigation."

The House bill would not have abolished the OPR but certainly would have reduced its authority and influence. The DOJ inspector general had indicated that his office would have been inclined to refer such ethics and misconduct complaints to the OPR, although there was no guarantee that this practice would have continued under his or a successor's leadership, absent a statutory requirement. The Conyers amendment came at the height of the controversy over DOJ's handling of misconduct complaints as part of the scandal over U.S. attorneys and the charges of politicization of the department. **TFL**

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The Federal Lawyer In Cyberia

MICHAEL J. TONSING

New Techniques to Extract Evidence from Cellular Phones Create Dilemma for Courts, Prosecutors, and Criminal Defense Lawyers

As I was perusing the *San Francisco Chronicle* this morning, I spotted a story that prompted me to quickly get in touch via e-mail with the bylined staff reporter, Tom Abate, to see what else I could learn to pass along to you. It seemed to me he was on the trail of something many of you should be following, along with me.

The reporter was quite cordial and helpful. This morning's column drew heavily on his research and writing as well as on the leads he graciously gave me. His story (which can be found at www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/09/08/BUPA12OC2V.DTL&type=printable) revealed that a special detail in the San Francisco Police Department is working with what Abate calls a "new genre of cell phone extraction devices" in the department's efforts to solve crimes and gain convictions. In his article, Abate quoted a sergeant in San Francisco Police Department, Wayne



Hom—one of those involved in what Abate dramatically describes as a lab "deep in the bowels of San Francisco's Hall of Justice"—who states that information recovered from cell phones has been instrumental (no pun intended) in obtaining convictions in at least three recent cases, two robberies and one murder.

According to Abate's newspaper story, when conditions are right, police forensic investigators can now extract text messages, photos, and videos from cellular phones taken from suspects following an arrest. Given young people's tendency to use text messaging as a frequent substitute for a voice message, recovering such messages could have major implications for law enforcement.

Even ring tones can sometimes be recovered, and they can be of probative value. If a victim was present when the suspect received a phone call at the crime scene and the witness can identify the ring tone's "melody" with particularity, the tone could add significantly to the quantum of evidence. A ring tone could implicate or exculpate a suspect.

In his article, Abate reports an observation made by Robert Morgester, a California deputy attorney general and expert on the topic: since cell phone extraction devices became available in the past couple of years,

they have quickly become vital tools in solving crimes. Abate quoted Morgester as saying, "The reason why the cell phone is important is that you are carrying around a personal diary of who you talk to and often what you talked about. ... Youth today communicate through MySpace and texting."

Cell phone forensic extraction is a relatively new technology that grew out of a problem faced by consumers who switch cell phone carriers and want to load their old data into their new device, said Adi Ofrat, chief executive of Cellebrite,™ in speaking with Abate. (Cellebrite has offices in Israel and New Jersey and is apparently one of the vendors the San Francisco Police Department uses.) Ofrat claims that, since 2000, his 70-person company has sold more than 50,000 office-based cell phone data conversion systems to mobile phone carriers worldwide. "About one-and-a-half years ago we were approached by certain government agencies that said, 'We would like for you to provide us with XYZ,'" Ofrat said in a telephone interview with Abate.

In the *Chronicle* article, Sergeant Hom said that the law enforcement version of the cell phone extraction devices differs from commercial technology in one important regard: to protect the integrity of the evidence, the device used by the police can only read data and cannot write back to the cell phone.

Integrity of evidence aside, these developments set off a loud gong in every lawyer's head about the Fourth Amendment. Apparently, thus far, court decisions involving this new technology have not very often required search warrants before subjecting confiscated cell phones to forensic analysis. However, the decisions vary in their results and in their analyses.

As every first-year law student (and every "jailhouse lawyer") knows, the Fourth Amendment protects individuals against unreasonable searches and seizures. Thus, it has been repeatedly held that a search conducted without a warrant is "per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." See, for example, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). However, a "search incident to arrest" is an exception to the general rule against warrantless searches. See, for example, *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996).



The justification courts most often use for permitting a warrantless search is law enforcement officers' need to seize weapons or other items that might be used to assault the officers or to effect an escape. Courts also cite the need to prevent the loss or destruction of evidence. Accordingly, as in *Hudson*, the government's success in securing a ruling that the search was within the exception hinges on the proximity in time between the search and the arrest.

However, in *United States v. Edwards*, 415 U.S. 800 (1974), the U.S. Supreme Court recognized an exception to the contemporaneity requirement and accepted the validity of the warrantless search of a suspect's clothes that had occurred at the police station 10 hours after the suspect was arrested. The police had taken the arrestee's clothes to examine them for evidence of a crime, and the Court noted that the police had had probable cause to believe the defendant's clothing was evidence. Therefore, the Court held that taking such evidence "was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention."

United States v. Chadwick, 433 U.S. 1 (1977) stands in direct contrast to *Edwards*. In the *Chadwick* case, officers had seized a locked footlocker at the time of an arrest and searched the locker just an hour later. Apparently, because it was a locked footlocker, the search was held to have violated the suspect's Fourth Amendment rights. The *Chadwick* Court distinguished this case from the *Edwards* ruling as follows: "Unlike searches of the person, *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Edwards*, 415 U.S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." (The *Robinson* ruling had upheld the warrantless search of a cigarette case found on an arrestee.)

So, where does all this search and seizure law leave us with respect to cell phones that are confiscated from suspects at the time of their arrest? Apparently, it leaves us in a judicial quandary at the moment. In a case heard in the Northern District of California in May 2007, *United States v. Park* (for which only a Westlaw™ citation is currently available (2007 WL 1521573 (N.D. Cal.)), the court granted a motion to suppress evidence, ruling as follows:

[T]his Court finds ... that for purposes of Fourth Amendment analysis cellular phones should be considered "possessions within an arrestee's immediate control" and not part of "the person." *Chadwick*, 433 U.S. at 16 n. 10. This is so because modern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls,

and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.

In effect, the *Park* court found a cell phone to be more analogous to a footlocker than to a pair of trousers. The court also found that the argument that the search was justified because of the need to protect the safety of the arresting officers to be unpersuasive. See also *United States v. Lasalle*, 2007 WL 1390820 (D. Hawaii May 9, 2007).

In *United States v. Curry*, a case heard in the District of Maine (for which only a Westlaw™ citation is currently available (2008 WL 219966 (D. Me.)), the magistrate judge who heard the motion to suppress seemed influenced heavily by the fact that the cell phone search in that case had occurred within less than a half-hour after the suspect's arrest (as opposed to three hours and 45 minutes after the arrest in *Park*) and concluded that, footlockers and clothing aside, the search was incidental to the arrest and therefore lawful.

In the only appellate case yet reported, the Fifth Circuit upheld the search of a cell phone that had been seized by police at a traffic stop, where the examination of the phone's contents took place at the home of a co-defendant to which the defendant was transported following his arrest. See *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

Conclusion

The lines are even now becoming more clearly drawn in the Cyberian world of cellular phones, and one day it is probable that the U.S. Supreme Court will need to weigh in on the issue. The *Finley* court analogized seized cell phones to personal effects (like clothing and wallets); whereas the *Park* and *Lasalle* courts saw cell phones as more like possessions within a suspect's custody and control (such as closed containers and luggage), which could be searched without a warrant only if the search was "substantially contemporaneous" with the arrest.

Meanwhile, deep in the bowels of police departments everywhere, the tools to extract evidence from cell phones continue to change the game. Thus, the war between good and evil—and the war between freedom and repression—rages on. **TFL**

Michael J. Tonsing practices law in San Francisco. He is a member of the FBA editorial board and has served on the Executive Committee of Law Practice Management and Technology Section of the State Bar of California. He also mentors less-experienced litigators by serving as a "second chair" to their trials (www.Your-Second-Chair.com). He can be reached at mtonsing@lawyer.com.

Form Contracts in an Online World: The Enforceability of Click-wrap and Browse-wrap Agreements

As computers and the Internet continue to play a more prevalent role in commerce, electronic form contracting has become more common. Most people have encountered some type of electronic form contract involving the purchase of software or other goods and services over the Internet. Notwithstanding their widespread use, electronic form contracts continue to be controversial because of the generally accepted fact that most people who purchase goods or services over the Internet do not actually read electronic form contracts.¹ Furthermore, such form contracts do not provide the offeree the opportunity to bargain with the offeror in an effort to change any of the terms of the agreement; therefore, there is an increased risk that the agreement might contain onerous terms.² Despite these drawbacks, form contracting provides an efficient means of handling repeated transactions and has been recognized as a useful part of a functioning economy,³ and courts continue to grapple with the issue of clearly identifying the circumstances under which electronic form contracts are enforceable.

Electronic form contracts generally take one of two forms that have been coined “click-wrap” and “browse-wrap” agreements. The typical click-wrap agreement found on many Web sites provides the user with the terms and conditions of the agreement up front, then requires the user to indicate his or her assent to the terms of the online agreement by means of a physical act, such as clicking an “I agree” button, before allowing the user to gain access to materials on the site, or to complete a purchase, or to download or install software on the user’s hard drive.⁴

The other form that electronic form contracts take is the browse-wrap agreement, which is typically made a part of the Web site but does not require any physical act by the user indicating acceptance of the terms and conditions of the agreement before viewing or using the Web site or downloading or accessing material from the site.⁵ Generally, a Web site using

a browse-wrap form agreement requires the user to browse the Web site—often by clicking on a hyperlink that will take the user to another Web page on the Web site—to find the terms and conditions governing the use of the Web site. Such an agreement then states that by using or browsing the Web site the user is assenting to such terms and conditions.⁶

In determining whether these electronic form agreements are enforceable contracts, courts focus on the basic contract principle of mutual assent by the parties to the terms of the agreement. Most courts that have addressed click-wrap agreements have upheld such agreements based on a finding that the user assented to the terms of the agreement as long as there is conspicuous notice of the terms of the agreement and there is sufficient evidence that the user performed the physical act of clicking the “I agree” button or proceeded in a manner that would have been impossible had he or she not clicked the “I agree” button.⁷ However, many courts deciding click-wrap cases have not focused on the way the terms of the agreement were presented, as long as there is sufficient evidence of assent through a physical act of assent to such terms.⁸ When courts have refused to enforce the terms of click-wrap agreements, they have either generally relied on a lack of evidence of whether the user had clicked the “I agree” button or found that the terms were void because of other traditional contract principles, such as unconscionability.⁹

In contrast, courts that have addressed the enforceability of browse-wrap agreements have generally focused on whether the user had sufficient notice of the terms of the agreement.¹⁰ Although the courts in some of these cases have commented on the location of the terms of the agreement on the Web site and the conspicuousness of the hyperlink, to date the courts have not established clear criteria for what constitutes sufficient notice to an offeree of the terms and conditions of a browse-wrap agreement to make such an agreement enforceable.¹¹

The two predominant cases in this area—*Specht v. Netscape Communications Corp.* and *Register.com Inc. v. Verio Inc.*¹²—were both decided by the Second Circuit, but they appear to conflict with regard to whether an unambiguous act of assent is a necessary requirement for the formation of an online contract.¹³ In *Specht*, the court set forth a general rule that in order for browse-wrap agreements to be enforceable there must be conspicuous notice of the existence of



the terms of the agreement and there must be a clear manifestation of the user's assent to the terms.¹⁴ The court rejected Netscape's arguments that downloading the software constituted assent to the license terms, finding that "a consumer's clicking the download button does not communicate assent to contractual terms offered if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms."¹⁵ However, in *Register.com*, the court seems to have dispensed with the requirement that there be a clear manifestation of assent and imputed assent to the defendant, which was a business competitor of Register.com that repeatedly visited Register.com's Web site for nefarious purposes and was automatically provided with terms of the agreement each time it accessed the site. Other cases that have enforced browse-wrap agreements have similar fact patterns and it appears that courts are more likely to enforce such agreements against businesses than against individual consumers.¹⁶

Although the *Specht* court based its holding on the fact that there was no manifestation of assent to the terms of the browse-wrap agreement, the court also noted that there was no constructive notice of the terms of the agreement because the user had to scroll down the page to the next screen before coming to the invitation to review the full terms available by hyperlink and such notice of the terms of the agreement were not reasonably conspicuous to the average user.¹⁷ Courts have also indicated that the font, color, and location of the hyperlink to the terms of the browse-wrap agreement may be factors in the sufficiency of notice of the terms of the agreement, suggesting that there are some criteria that would make notice of the terms reasonable and conspicuous enough for the browse-wrap agreement to be enforced.¹⁸ However, no court has provided clear guidance as to what constitutes reasonably conspicuous notice.

Therefore, in most cases, click-wrap agreements are likely to be enforceable as long as the terms are conspicuous and there is evidence of manifestation of assent. But there is still a great deal of uncertainty about what circumstances would make browse-wrap agreements enforceable. Hence, it is not clear what type of notice of the terms of the agreement a court would deem sufficient or whether an actual manifestation of assent of such terms is required. Until courts provide further guidance, businesses and consumers alike should be cautious when conducting business online and relying on browse-wrap agreements for their contracts. **TFL**

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Endnotes

¹Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L. J. 577 (2007).

²*Id.* at 578.

³*Id.* at 579.

⁴*Id.*

⁵*Id.*

⁶*See Cohn v. Truebeginnings, LLC et al.*, No. B190423 (Cal. Ct. App. July 31, 2007), pub.bna.com/eclr/b190423.pdf.

⁷Davis, *supra* note 1, at 583.

⁸Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1320 (Summer 2005),

⁹Davis, *supra* note 1, at 582.

¹⁰Moringiello, *supra* note 8, at 1320.

¹¹*Id.* at 1319.

¹²*Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 592–593 (S.D.N.Y. 2001), *aff'd* 306 F.3d 17 (2d Cir. 2002); *Register.com Inc. v. Verio Inc.*, 356 F.3d 393 (2d Cir. 2004).

¹³Moringiello, *supra* note 8, at 1326.

¹⁴*Id.* at 1327.

¹⁵*Id.*

¹⁶*See Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 200); *Ticketmaster L.L.C. v. RMG Technologies Inc.* 507 F. Supp. 2d 1096 (C.D. Cal. 2007); *Southwest Airlines Co. v. BoardFirst L.L.C.*, Civ. Action No. 3:06-CV-0891-B (N.D. Texas Sept. 12, 2007), www.internetlibrary.com/pdf/Southwest-Airlines-Boardfirst-ND-Tex.pdf.

¹⁷Moringiello, *supra* note 8, at 1327.

¹⁸*See, for example, Pollstar, supra* note 16; *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005).

Mixed Messages for Mixed-Motive Claims: What Standard Should Be Used?

A recent decision by the Sixth Circuit has added to the already diverse collection of summary judgment standards used by the circuit courts for Title VII mixed-motive cases. This column addresses recent case law on how federal courts are applying the mixed-motive standard.

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹ In 1989, the U.S. Supreme Court held that employers could avoid liability by establishing that they would have made the same employment decision even if the protected characteristic had not been taken into account.² In response, Congress passed the Civil Rights Act of 1991 and added § 107, which states:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.³

The language permitting a protected characteristic to be only a “motivating factor” allowed employers to be held liable for a so-called mixed-motive claim, in which both legitimate and illegitimate reasons motivate an employer’s employment decision.⁴ If a defendant-employer can demonstrate that the same decision would have been made in the absence of an impermissible

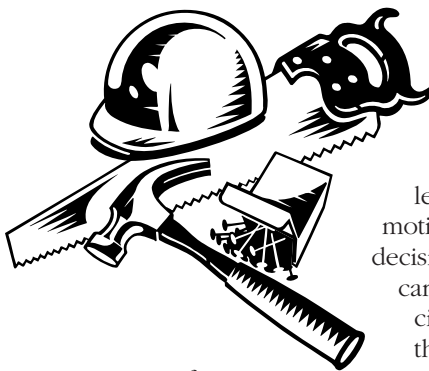
factor, Title VII limits the remedies available to the plaintiff-employee, prohibiting damage awards and, instead, permitting only declaratory or injunctive relief and the award of attorneys’ fees.⁵ Courts have also applied the mixed-motive concept to cases brought under the Age Discrimination in Employment

Act.⁶ When analyzing motions for summary judgment, the U.S. Supreme Court devised a burden-shifting framework for the parties in a single-motive employment discrimination case, which alternates the burdens of proof between the plaintiff and defendant.⁷ However, the Supreme Court previously held that this so-called *McDonnell Douglas/Burdine* burden-shifting framework is inapplicable when direct evidence of discrimination is available.⁸ Initially, after liability for mixed-motive claims emerged, courts permitted plaintiffs to use only direct rather than circumstantial evidence to prove such a claim.⁹ Thus, because of the circuit court’s requirement for direct evidence, courts had no need to consider whether the *McDonnell Douglas/Burdine* burden-shifting framework applied to Title VII mixed-motive cases.

Then, in 2003, the Supreme Court issued a decision that would subsequently create a multifaceted split among the circuit courts. In *Desert Place Inc. v. Costa*, the Supreme Court held that a plaintiff may use either direct or circumstantial evidence to prove a Title VII mixed-motive claim.¹⁰ However, the Supreme Court did not determine whether a court should apply the *McDonnell Douglas/Burdine* framework to a motion for summary judgment in a mixed-motive claim, as courts had used for single-motive claims. Thus, since the *Desert Place* decision, circuit courts have developed their own summary judgment standards for mixed-motive claims, resulting in a stark disparity between the circuits.

The Eighth and Eleventh Circuits

Two circuit courts of appeal continue to apply the *McDonnell Douglas/Burdine* framework in mixed-motive cases. The year after the Supreme Court decided *Desert Place*, the Eighth Circuit issued a decision concluding that *Desert Place* “has no impact on prior Eighth Circuit summary judgment decisions.”¹¹ In *Griffith v. City of Des Moines*, an employee brought suit against his employer for disparate treatment and retaliation based on his race. However, the employee was unable to offer any direct proof of the employer’s disparate treatment. The Eighth Circuit denied Griffith’s request to modify the *McDonnell Douglas/Burdine* framework, instead determining that it would continue to apply the framework as it had in previous Eighth Circuit discrimination summary judgment



decisions.

The Eleventh Circuit insinuated through two footnotes and an unpublished opinion that it would not modify its use of the *McDonnell Douglas/Burdine* analysis in mixed-motive cases after *Desert Place*.¹² Thus, in both the Eighth and Eleventh Circuits, the courts used the *McDonnell Douglas/Burdine* framework to analyze a motion for summary judgment in both single-motive and mixed-motive claims.

The Fifth Circuit

Rather than continue to apply the *McDonnell Douglas/Burdine* analysis, the Fifth Circuit has created a modified framework in which to analyze mixed-motive cases. As is done when using the traditional *McDonnell Douglas/Burdine* framework, a plaintiff must first prove a prima facie case of employment discrimination; the defendant may then rebut that claim by providing a legitimate, nondiscriminatory reason for the employment decision.¹³ However, the Fifth Circuit then allows the plaintiff to rebut this reason with evidence that the defendant's reason is not true and simply pretextual, or evidence that the defendant's proffered reason, though true, includes not only a nondiscriminatory animus but also a discriminatory one. This reason is considered the "mixed-motive alternative," which allows the plaintiff to demonstrate the "motivating factor" requirement in order to be held liable under § 107, or the "mixed-motive" section, of the Civil Rights Act of 1991.

The Fourth, Ninth, and D.C. Circuits

The Fourth, Ninth, and D.C. Circuits have chosen to add an additional test that makes it possible for a plaintiff to overcome a summary judgment motion rather than continue to use an unaltered or modified version of the *McDonnell Douglas/Burdine* framework. These courts allow a plaintiff to choose to proceed either under the traditional *McDonnell Douglas/Burdine* test or, in the alternative, to present "direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor ... motivated the adverse employment action."¹⁴ With this added factor, a plaintiff can prove a discriminatory employment practice by simply showing that discrimination or retaliation contributed to the motivating or substantial reason for the employment decision.

The Sixth Circuit

Finally, the Sixth Circuit recently addressed this issue and developed a unique standard among the circuit courts.¹⁵ In *White v. Baxter Healthcare Corp.*, an employee brought a claim against his employer, alleging he was denied a promotion and received an unfavorable performance evaluation because of his race.¹⁶ His employer argued that the applicant who received the promotion over the plaintiff possessed better qualifications and that the unfavorable evalua-

tion resulted from the plaintiff's failure to reach a certain sales goal. In recognizing that this case presented a mixed-motive race discrimination claim, the Sixth Circuit noted that it had yet to set forth a proper summary judgment standard for mixed-motive cases.

The court first affirmatively stated that the *McDonnell Douglas/Burdine* framework does not apply to summary judgment motions for mixed-motive cases. Instead, the Sixth Circuit announced a new analysis for such claims, holding that a plaintiff may survive a defendant's motion for summary judgment by simply producing evidence sufficient to convince a jury that "(1) the defendant took an adverse employment action against the plaintiff and (2) race, color, religion, sex, or national origin was a motivating factor for the defendant's adverse employment action."¹⁷

In its decision, the Sixth Circuit admitted that "the burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to jury only where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim."¹⁸ The Sixth Circuit has completely abandoned the tried-and-tested *McDonnell Douglas/Burdine* framework, favoring, instead, to create a new framework that admittedly greatly lowers the plaintiff's burden of evidence needed to proceed to trial.

LABOR continued on page 41

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Enforcement of Export Control Violations on the Rise

RECENTLY, THERE HAS been an increase in the number of companies that are accused of violating U.S. export laws. Assistant Attorney General Wainstein called the criminal prosecution of export control violations the Justice Department's "leading counterintelligence priority." Many of these cases are unnecessarily brought to trial for several reasons: 1) Justice lawyers are not experts in the export and sanctions laws and regulations, and may be prosecuting cases that have no business in the criminal system based on the evidence and the standard of proof required under the law and 2) DOJ prosecutors have been increasingly overzealous and may be working these cases with a political agenda.

For example, a major U.S. defense contractor was recently fined \$100 million for criminal violations of International Traffic in Arms Regulations, and the firm's major business units were barred from exporting munitions items for three years. Another defense firm was convicted for exporting unlicensed ballistic helmets, and yet another firm was indicted for exporting technical drawings related to military helicopters. In addition, a large U.S. food company was fined \$25 million for providing monetary support to a designated terrorist group in South America.

A minimum of three federal departments have regulations that govern exports: the State Department, through its Directorate of Defense Trade Controls (DDTC); the Commerce Department, through its Bureau of Industry and Security (BIS); and the Treasury Department, through its Office of Foreign Asset Control (OFAC). These agencies have compiled numerous lists with attendant regulations and procedures. Some lists identify a wide range of people, countries, and organizations with which trade and other business is prohibited, others list munitions that cannot be exported, and still others identify federal requirements for government sales and list commodity classification numbers for dual-use items.

Most companies do not pay attention to the many

intricacies of these requirements until Immigration and Customs Enforcement (ICE) agents arrive at their businesses with guns and badges and begin removing the company's hard drives for review. Such raids are followed by several years of investigations of possible criminal and civil violations in order to determine whether the business has broken the law. Even if no violation is found, lack of attention to detail will force the raided business to lose copious amounts of time and to incur substantial legal fees for their defense. The best defense, however, is a strong compliance plan.

The DDTC, BIS, and OFAC explicitly agree on the need for a corporate commitment to complying with export regulations. Such plans require a senior-level corporate executive to be responsible for implementing a proactive, companywide program to ensure that the firm's export activities are in compliance with the rules and that compliance issues are routinely considered by the highest levels of the company. The company's compliance program should include several components:

1. *Knowing the rules that apply to the company's product:* The first goal of any compliance program should be to know the rules that apply to the company's product. Commodity jurisdiction and classification issues are the most frequent contributors to strict-liability, regulatory export infractions. Countless cases have involved an exporter's assumption that its product was classified as EAR99 and thus did not need a license, when a review of the technical specifications of a product or service clearly showed that it fell under a specific classification on the Commerce Control List and *did* require a license. Rather than proceeding to export the product or service based on an assumption that is classified as EAR99, companies should determine the controlling authority for their product or service. A commodity jurisdiction decision from the DDTC may be required if the product or service could potentially be classified on the U.S. Munitions List.
2. *Integrating business and compliance processes:* Compliance programs cannot operate in parallel to the firm's day-to-day business activities. Compliance with export regulations must be an integral part of a firm's core business practices. Management must ensure that all employees involved in potential export transactions are aware of the implications of their activities when it comes to compli-

ance and know that they should engage corporate compliance personnel and practices when appropriate. Particular attention should be paid to sales and technical personnel who are in direct contact with foreign customers and who may expose the firm to liability to penalties.

3. *Enabling the parties who are involved in compliance:* All employees involved in potential export transactions should be given the tools and training needed to comply with regulations. Sales and technical personnel must be capable of identifying transactions that are subject to controls and must know how to proceed when such a situation arises.
4. *Keeping the program up-to-date:* It is important for the compliance program to keep up with changes to export control requirements. To do so the company should subscribe to list server notices posted on agencies' Web sites or monitor those Web sites as well as the *Federal Register* for changes that may affect the company's product or services. The company's commodity jurisdiction and classification guidance should be updated as the rules change and as new products or services are introduced; internal procedures should be updated as necessary to keep pace with these changes. The company should pay attention to guidance it receives from export control and enforcement officials. The internal procedures should require that compliance personnel be notified of—and optimally involved in—all contacts with inspectors and investigators from Customs and Border Protection (CBP), BIS, ICE, and even the Federal Bureau of Investigation (FBI). Any guidance the company receives should be used as a tool to improve its internal controls and continuing compliance efforts.
5. *Periodically reviewing the efficacy of the program:* Formal program reviews and compliance audits should be conducted periodically to ensure that policies and procedures are being followed and are achieving the intended goals. The results of these reviews should be used to identify deficiencies in the program so that corrective action can be taken.
6. *Knowing the company's customers and business transactions and watching for red flags:* Failures to confirm the bona fides of an export transaction are the most frequent cause of serious export violations involving proscribed end users, end uses, and destinations. The company must make certain it knows who will use its product or service as well as where and how it will be used. It is also important to know what impact those factors will have on the controls placed on transactions. This often requires screening parties to the company's transactions against the various lists of restricted and prohibited parties. The company should also know which countries its products will pass through as well as where they will ultimately reside. Transactions should be monitored for unusual requests or

activity, which may indicate that the products or services are intended for restricted or prohibited end users, destinations, or uses. Appropriate due diligence may be necessary to confirm the validity of the transaction.

7. *Taking prompt corrective action:* If periodic reviews uncover process deficiencies, they should be corrected to ensure future compliance. If the company determines that it has violated a rule, the company should make a voluntary disclosure to the appropriate export control agency. A voluntary self-disclosure can help to limit potential liability to penalties. In addition, the company should take internal steps to ensure that future violations do not occur; such corrective actions may address training deficiencies, implement new internal controls, or, where warranted, provide counseling or disciplinary action for employees responsible for the violations.
8. *Documenting compliance activities:* The company should fully document all phases of its compliance program with organizational charts, all written policies and directives, training material, and descriptions of the results of periodic and due diligence reviews as well as any corrective actions taken when deficiencies or violations were uncovered. The documenting process should be used to inform all levels of the company about export requirements and to fully implement the program company-wide. The company should not neglect the record keeping requirements for export transactions that are mandated by the DDTC, BIS, OFAC, and the Census Bureau. Failure to keep required records is another common basis for administrative penalties imposed by export control agencies.

These eight concepts should form the basis of the company's efforts to comply with federal regulations governing exports. Building the company's export compliance program on these fundamentals not only will help to ensure that the firm is following the rules and requirements set by the various agencies but also can, if needed, demonstrate to export enforcement officials that the company has made a commitment to complying with the rules. **TFL**

Doreen Edelman is an international trade attorney specializing in export issues in the Washington, D.C., office of Baker, Donelson, Bearman, Caldwell & Berkowitz.

Judicial Profile

ANTHONY D. MARTINEZ

Hon. Irma C. Ramirez U.S. Magistrate Judge, Northern District of Texas

IRMA C. RAMIREZ was born in Brownsfield, Texas, a small town just south of Lubbock. Raised on a ranch in Tokio, Texas, her humble beginnings required her to develop a work ethic that would help her succeed in everything she set out to accomplish in her life. Judge Ramirez always strived to excel in the field of law, and she is a remarkable example of someone who broke through the boundaries of her social and economic limitations.



Judge Ramirez's family, although economically underprivileged, was extremely fortunate in other areas, including its strong sense of moral and family values. Her father, a hard-working Mexican immigrant, constantly stressed the value and importance of education to her and her two sisters. Judge Ramirez's mother, who came from a family of poor immigrant workers, also encouraged her children to gain an education, work hard, and always strive to do their best in order to achieve their

goals. In discussing Judge Ramirez's upbringing with her, it is not difficult to recognize that she takes great pride in where she came from and also credits much of her success to the principles that were instilled in her throughout her childhood.

Irma C. Ramirez discovered her love for engaging in intellectual debate during her sophomore year in high school. A reminiscent smile came upon her face as she recalled, "It was during speech class that I realized I truly loved to argue." Upon this self-discovery, Judge Ramirez decided early on that she wanted to pursue a career in the legal profession. Although it was not common in her generation for Hispanic wom-

en to set their career goals so high, Judge Ramirez did not let this discourage her or disrupt her focus. She remained confident in the knowledge that, if she retained her drive to succeed, she could overcome any obstacles along the way.

Judge Ramirez completed her undergraduate degree at West Texas State University, receiving a B.A. in 1986. While attaining her degree, she served as an intern in Yoakum County's district attorney's office. It is this experience that Judge Ramirez says "cemented [her] career in law" and put to rest any doubt she may have had about attending law school in the future. Upon graduation, she began to work as a recruiter and as an admissions counselor for West Texas State University. Judge Ramirez then relocated to Hobbs, N.M., where she spent several months as a recruiter for the College of the Southwest, before beginning work at New Mexico Junior College. During her tenure at the junior college, she administered numerous federally funded programs.

Irma Ramirez's hard work and strong desire to succeed eventually led to her being awarded a full scholarship to attend the Southern Methodist University School of Law in Dallas. In 1991, Judge Ramirez received her J.D. degree and immediately started to work at the prestigious Dallas law firm of Locke, Purnell, Rain, & Harrell (now, Locke, Lord, Bissell, & Liddell LLP). The experience she gained during her legal practice there would prove invaluable to her law career.

In 1995, Judge Ramirez joined the U.S. attorney's office, where she excelled as a prosecutor in the Criminal Division. During her time at the U.S. attorney's office, she shined as a prosecution lawyer, a job she "absolutely loved." Judge Ramirez's respect and passion for the law continued to grow even stronger when she was a prosecutor—a position that granted her the opportunity to litigate and rediscover the reason that she always wanted to become an attorney.

Unlike many judges, being appointed to the bench was not an immediate goal for Judge Ramirez, because she enjoyed practicing law. However, when Judge Boyle stepped down in 2002, many of Judge Ramirez's colleagues strongly encouraged her to apply for the post. After giving the idea some serious thought, she decided to apply, and as a result was awarded one of the most distinguished honors in the

judicial field. Judge Ramirez was sworn in on Sept. 9, 2002, by Chief District Judge A. Joe Fish. She is currently a member of the Texas Bar Association, Dallas Bar Association, Dallas Bar Foundation, and Federal Magistrate Judges' Association.

Judge Ramirez's personal philosophy as a judge is to "apply the law as written." She sees it as her responsibility to "see the issues and apply the law." Judge Ramirez possesses a very confident and strong demeanor in her courtroom. She carries herself with a great sense of pride and displays a "stern, yet fair" attitude. Judge Ramirez exudes experience and a sense of quiet integrity, and she conducts herself in a manner that is both professional and efficiently lawful. She remains extremely likable without sacrificing her powerful presence.

The judge's fondest memories of events throughout her career are not ones that involve her own accomplishments or personal successes; rather, they are memories of helping others. While serving as an assistant U.S. attorney, she coached a mock trial team at Southern Methodist University. This experience allowed her to help students learn and grow through the examination of her favorite subject—the law. Judge Ramirez still displays a plaque in her office that

recognizes and reminds her of all she did for those young people and how much it meant to them and to her. She says that, of all her awards and accomplishments, this is the one she holds closest to her heart.

Judge Ramirez's life and career are a testament to the American ideal of hard work and tenacity leading to success. From her humble beginnings and throughout her life, she has relied on her conviction that education is the gateway to achievement. When asked what her advice would be to youngsters who are striving for successful careers and facing the same obstacles she faced, her words of wisdom are simply these: "Just believe you can do it." Judge Ramirez always believes in herself, and she has certainly proved that anything is possible if you want it badly enough. She has honorably dedicated her life to upholding the Constitution of the United States of America and to maintaining justice in our court system. **TFL**

Anthony D. Martinez is a junior at Arizona State University. He recently served an externship with Judge H. DeWayne "Cooter" Hale of the U.S. Bankruptcy Court, Northern District of Texas, Dallas Division.

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Five Oral Argument Tips—for Judges

MANY ARTICLES HAVE been written for lawyers about how to perform better at oral argument. Recommendations include everything from how to dress to how to handle difficult questions. But judges also are capable of performing well, or badly, at oral argument. Because they are viewed more often as consumers of oral argument, or perhaps as an audience, little attention has been paid to their active role in how

well oral argument accomplishes its purpose. Instead of viewing judges as a passive audience, perhaps we should view them as partners with the lawyers in a joint endeavor—partners who share responsibility for its success. What follows, then, are tips for helping judges do a better job with oral argument.

1. Aretha Franklin Had a Point

Respect is critical to the overall success of oral argument. But respect is a two-way street. We all seem to understand pretty well that lawyers owe a duty of respect to all judges whether or not an individual judge has earned it. While most judges believe they have earned this respect, they tend to agree with the proposition that, if another judge asks a stupid question, lawyers are obligated *not* to roll their eyes or say something sarcastic. The duty to show respect is not owed to the judge as an individual; it is owed to the institution of judges. We show judges respect because of the important place they occupy in a formal system—a system that commands our respect and that does not function very well without it.

But lawyers are not serfs or peons in that system. They also occupy an important place in it. Disrespecting lawyers also causes the whole system to function less effectively. Just as with judges, the duty of showing respect is not owed to lawyers as individuals; it is owed to them as vital participants in the administration of justice. Because the duty is not owed individually, it is not forfeited by a lawyer's individual failings. A stupid answer does not justify eye rolling or sarcasm any more than a stupid question. Such conduct denigrates the whole enterprise. In other words, we do not respect lawyers because they have earned it (although they may have); we respect them because they are lawyers.

It is also fair to add that much of the disrespect

that flows from judges to lawyers comes from a poor understanding of what the practice of law is like. In a real-life practice, perfection can be an elusive goal and the pressure to get the job completed can be tremendous. This is no excuse for mediocrity, yet it does put minor errors in context. It is probably no accident that the former practitioners who are now on the bench tend to be the judges who seldom show the lawyers disrespect.

With this in mind, it violates a fundamental rule of oral advocacy for judges to extract a promise from lawyers not to bill their clients for their time that day, or to suggest the lawyer is stupid, or to imply that his or her only motivations are financial, or to infer that the lawyer's stated purpose for a particular trial tactic merely cloaks an illegitimate purpose. This sort of behavior may satisfy some primal urge to punish the lawyer in front of the judge that day, but it does a grave disservice to the institution of law.

2. Isn't Your Case a Loser?

The difficult work of writing an opinion after oral argument can be made a lot easier if one of the lawyers would just admit that his or her client should lose. But most lawyers do not come to oral argument prepared to do that. It is not unusual to see a judge who has decided that a particular case is a loser and who is trying to get the lawyer to agree. This attitude tends to be not only pointless but also aggravating to both sides. In almost every instance, the lawyer is duty-bound not to stand in front of the judge and throw away the whole case.

This approach is different from attempts to seek concessions. A good lawyer will understand when to hold 'em—and when to fold 'em—on a particular point. Seeking concessions is an important part of what a judge should be doing at oral argument. But these concessions are not case-killing. There is a difference between getting a lawyer to agree that one of several arguments is not a winner and getting a lawyer to agree to concede total defeat.

It well may be that, at some point, the judge will have decided that one side is going to lose. There may even be occasions when it is appropriate for the judge to say so. But in almost all cases, it is inappropriate to try to get the lawyer to agree.

3. The Butch Cassidy Problem

Cassidy's relentless pursuers prompted him, at several points in the movie, to ask: "Who are those guys?" But there is a law of diminishing returns for this kind

of relentlessness at oral argument. Judges often have a “right” answer they are seeking from a particular question. Being lawyers at heart, they pay attention to minor differences between the answer they are given, and the answer they want. They want to nail it down tight.

Such relentlessness is different from the point made above about not seeking an admission of total defeat. There is nothing wrong with a few initial stabs at getting just the right answer. But with lawyers, as with witnesses at trial, there comes a point when judges need to accept that the answer they have been getting is the same answer they’re going to keep getting, and they need to move on. All the browbeating in the world is not going to change the tune; right or wrong, the not-quite-right answer is the only one the judge is going to get.

With judges on panels, this fits in with the issue of proportionality. One of the most common problems with panel arguments is that far too much time is spent on minor issues. No rational allocation of minutes would devote the amount of time that is frequently spent on a single issue at oral argument. But the judge, like a hound dog with a scent in his nose, sometimes just cannot seem to stop. Because the judges are not directly accountable to each other, this problem has no simple solution. Perhaps some pre-argument discussion of which issues deserve the most attention would help. Ultimately, each judge has to be aware of how the time is being spent and not to spend too much of it chasing down the perfect answer or the impossible concession.

4. How the Question Is Like a Piece of Wedding Cake

Judges often think out loud when framing a question. The result is a long, multifaceted question that makes sense to judges because they are supplementing what they are saying with what they are thinking. These questions can be almost impossible to answer. For one thing, the listener is stuck with only what the judge said, not what the judge was thinking. Even simply taking the words at face value, such free-range questions tend to be very challenging and just too much to swallow. Like a slice of wedding cake, it may seem fun to shove the whole thing in the poor guy’s mouth, but if you are that guy it is not as much fun as it looks.

It would be helpful if, when faced with such a question, the lawyer had the right to ask for it to be read back. These types of questions would probably decrease if judges were forced to hear them repeated out loud before they were answered. But because this modest proposal probably will not see the light of day, there needs to be another way to warn the questioner that he or she is about to launch one of these blimps. Here’s a simple suggestion: Inhale before asking a question, like a marksman getting ready to shoot. If you cannot get the question out in one breath, it is too long and should be broken up.

The same is true with lawyers’ and judges’ most common speech impediment: the parenthetical clause. Lawyers view speaking out loud as a sort of chess game,

in which they are always trying to think several moves ahead. The result is that their minds are often several sentences ahead of the words that are coming out of their mouths. This means that the speaker has thought of an exception or qualification to what he or she just said, and this now gets interjected into the middle of the sentence. (The other results of this tendency, by the way, are hyperprecise diction and maddeningly artificial speech.) These parentheticals can start piling up on each other, making it impossible to follow the line of thought buried in such a shopping cart of a sentence. The best advice I give new lawyers is worth remembering for the rest of us: Force yourself to take a sentence from start to finish without a single interruption. Avoid parenthetical expressions (unless, of course, you have a really important reason for using them, which happens far less often than you might think).

5. That Vacant Look Means Something Dumb Has Happened—But It’s Not What the Judge Might Think

Occasionally, a judge may detect a vacant look at the conclusion of his or her question, followed by the lawyer’s stumbling attempts to craft an answer. It is possible that the judge’s arrow has flown right to the heart of the matter, and the lawyer is dumbfounded and barely able to respond. But a dollop of humility will also create the possibility of another answer: the question does not make any sense.

Some judges may be smart enough never to have had this experience. But for the rest of us, the vacant look is a signal to investigate what has happened. Particularly in arcane areas of law or in areas loaded with jargon and acronyms, it is possible to ask a question that has a sensible core but is cloaked in the wrong lingo. It is possible, in other words, to ask a question that makes perfect sense to you but is meaningless or confusing to the practitioner.

The sky will not fall if the judge, faced with that vacant look, simply asks if the question makes sense. Getting the lawyer to restate what he or she thinks is being asked often reveals the problem and allows the judge and the lawyer to get to the heart of the issue.

Conclusion

As between the judge and the lawyer, oral argument is not an adversarial exchange. It can be tense; a great deal can be at stake; and the lawyer can encounter pitfalls that can do harm to the case. But fundamentally oral argument is a form of partnership. And the partnership works better if judges show respect to the lawyers and have enough humility to be critical of their own performance. **TFL**

Hon. Michael W. Mosman is a U.S. district judge for the District of Oregon. He clerked for the D.C. Circuit and the U.S. Supreme Court. In civil practice, he argued before the Oregon Supreme Court and the Oregon Court of Appeals. In his years as a federal prosecutor, he appeared many times before the Ninth Circuit.

Employment Claims

Based on Association with
Another Person

BY MICHAEL R. LIED



One can imagine the unseen narrator on “Desperate Housewives,” Mary Alice Young, saying something like this: “Relationships: From birth we begin to form relationships with others. Our deepest relationships are usually with close family members. Those relationships can bring incredible joy, but sometimes also carry legal entanglements.”

Cases involving relationships are not exactly new. Earlier cases often alleged discrimination based on interracial dating or marriage. In several recent cases, courts have explored the boundaries of situations in which family or other relationships resulted in consequences that led to litigation.

DeWitt v. Proctor Hospital

The first two recent cases are unusual in that they involve an employee’s family member who had significant medical costs. Employee Phyllis DeWitt and her husband, Anthony, were covered under Proctor Hospital’s health insurance plan. Proctor Hospital was partially self-insured—up to \$250,000 per year. Anthony suffered from prostate cancer and received expensive medical care. In 2003, the DeWitts’ medical claims for Anthony were \$71,684. In 2004, the figure jumped to \$177,826. In the first eight months of 2005, the expenses were \$67,282.

In September 2004, DeWitt’s supervisor, Davis, asked what treatment Anthony was receiving, and DeWitt responded that he was undergoing chemotherapy and radiation treatments. Davis asked DeWitt if she had considered hospice care for her husband and also explained that a committee was reviewing Anthony’s medical expenses, which she described as unusually high. In February 2005, Davis again asked DeWitt about Anthony’s treatment. In May 2005, Davis informed the employees that Proctor was facing financial troubles, which, according to Davis, required a “creative” effort to cut costs.

Proctor fired DeWitt on Aug. 3, 2005, for alleged insubordination. DeWitt sued for age and gender discrimination and alleged that Proctor had violated the Americans with Disabilities Act (ADA). The district court granted summary judgment for Proctor Hospital; DeWitt appealed.

The dismissal of DeWitt’s age and gender discrimination claims was affirmed, but not the ADA claim. Under the ADA, an employer is prohibited from discriminating against an employee as a result of the known disability of an individual with whom the employee is known to have a relationship or association. 42 U.S.C. § 12112(b)(4). DeWitt alleged that Proctor had fired her to avoid having to continue to pay for Anthony’s substantial medical costs under

Proctor’s self-insured health insurance plan.

In an earlier case, *Larimer v. International Business Machines Corp.*, 370 F.3d 698, 700 (7th Cir. 2004), the court of appeals had outlined three categories into which “association discrimination” plaintiffs generally fall: (1) expense, (2) disability by association, and (3) distraction. In the “expense” scenario, the court noted that an employee who has been fired because her spouse has a disability that is costly to the employer falls within the intended scope of the “associational discrimination” section of the ADA.

The court said DeWitt had provided fairly persuasive circumstantial evidence that her case was one that relied on direct evidence. Proctor, which faced financial trouble, was concerned about cutting costs. Because Proctor’s unusually high stop-loss insurance coverage was inapplicable until claims exceeded \$250,000, Proctor felt the bite of the DeWitts’ expenses. According to the appellate court, Proctor was not discreet about its concerns: At a May 2005 meeting, Davis informed Proctor’s clinical managers that the hospital would have to be creative in cutting costs.

In addition, Proctor was specifically interested in the high cost of Anthony’s medical treatment. The timing of DeWitt’s termination also suggested that Anthony’s continued cancer treatment was an important factor in Proctor’s decision. According to the court of appeals, a reasonable juror could conclude that Proctor, which faced a financial struggle of indeterminate length, was concerned about Anthony’s future medical costs. Because DeWitt established that direct evidence of “association discrimination” may have motivated Proctor in its decision to fire her, summary judgment for Proctor was inappropriate.

DeWitt also asserted that the district court had erred in refusing to allow her to amend her complaint to add a claim of retaliation under ERISA. Under § 510 of ERISA, an employer may not discharge a participant or beneficiary for exercising any right to which he or she is entitled under the provisions of an employee benefit plan. 29 U.S.C. § 1140. This provision seeks to discourage employers from discharging or harassing their employees in an attempt to prevent them from using their pension or medical benefits. Based on many of the same facts, a reasonable jury could have concluded that Proctor had retaliated against DeWitt, thereby violating ERISA’s provisions. The court of appeals reversed the district court on this point as well. *DeWitt v. Proctor Hosp.*, 517 F.3d 944 (7th Cir. 2008).

Trujillo v. PacifiCorp

In another case, William and Debra Trujillo were employed by PacifiCorp and participated in their employer’s health insurance plan. The Trujillos’ son, Charlie, suffered from a brain tumor that later metastasized to his spine. Charlie suffered a relapse on May 30, 2003, and was deemed to be in the final stages of cancer. Charlie’s medical care providers recommended aggressive experimental treatments to reverse the progression of the disease. Within six weeks, Charlie’s medical bills exceeded \$62,000.

PacifiCorp employees, at both the local and corporate level, were aware of Charlie’s condition, and there was evidence that the company was focused on health care costs.

Because PacifiCorp was a self-insured company, insurance claims for Charlie's health care costs were paid directly by PacifiCorp. One company executive commented that 90 percent of all health care costs were incurred as a result of claims submitted by only 10 percent of the employees. Charlie was one of only two people with a terminal illness during the relevant time period.

Health care costs for each employee were factored into the plant's budget as a line item for labor costs. The labor union and the company's management met annually to review the past year's health care claims and the firm's experience with them.

On June 10, 2003, just 11 days after Charlie's relapse, PacifiCorp began an investigation into alleged "time theft" by the Trujillos. The investigation resulted in the termination of the couple. The Trujillos sued, claiming that they were terminated because of the health care costs associated with their son's illness.

As pointed out in the *DeWitt* case, the ADA provides that covered employers may not discriminate against a qualified individual who has a disability. Disability discrimination includes denying jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or an association.

The district court held that the Trujillos had failed to raise a reasonable inference that Charlie's disability was a determining factor in PacifiCorp's decision to terminate them. After examining the earlier *Larimer* case heard by the Seventh Circuit, the court of appeals disagreed with the district court.

In *Larimer*, the plaintiff had claimed he was terminated because his twin daughters were born prematurely and thus had the potential for his employer to incur substantial costs in medical benefits. The court identified several types of ADA "association discrimination" cases:

The categories can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.

Larimer, 370 F.3d at 700. The Trujillos' case was catego-

rized as an "expense" type case. The court of appeals noted that the Trujillos offered both evidence of general concerns about the rising cost of health care and specific facts that Charlie's claims were considered high-dollar costs, that there was only one other terminal illness during the relevant time period, and that PacifiCorp was keeping tabs on those claims.

The Trujillos also presented evidence that insurance costs factored into PacificCorp's budget as a line item for labor costs of each employee. The Trujillos offered an e-mail regarding Mrs. Trujillo's personal leave related to Charlie's illness in which the company stated that it monitors both health and welfare benefits in conjunction with an employee's personal leave. From the evidence the Trujillos presented—concerns about rising health care costs, numerous efforts to cut those costs, and corporate monitoring of general health care costs as well as Charlie's specific claims—a jury could reasonably infer that PacifiCorp had terminated the Trujillos because they were expensive employees.

According to the court, the Trujillos' strongest evidence of the employer's discriminatory motive was found in the temporal proximity between the time of Charlie's relapse and the investigation of the alleged time theft and their termination. Thus, the Trujillos established a prima facie case of "association discrimination" in the "expense" category.

However, PacifiCorp asserted that the Trujillos intentionally falsified time records in order to earn compensation for time when they had not worked. In response, the Trujillos offered evidence regarding the differential treatment of similarly situated employees. For example, approximately four weeks prior to Mr. Trujillo's termination, another long-term employee, Linda Todd, was under investigation by the same management employees for two separate incidents in which she had made threats of violence against other employees. During the investigation, Todd maintained that stress had caused her behavior. She was initially put on short-term disability leave until her situation improved, although she was ultimately terminated for working while on that leave, among other reasons. Todd's treatment differed from the way both Trujillos were treated: Rather than progressively disciplining the Trujillos, taking into consideration their past performance and their current situation, PacifiCorp terminated them immediately.

The Trujillos also presented evidence of a situation in which an employee had not been terminated after serious misconduct: viewing pornography twice on company computers. Finally, the Trujillos offered evidence that many other employees had been punished for violations in filling out their time sheets by not getting paid for days they took off, rather than by termination. This disparate treatment of similarly situated employees contributed to a reasonable inference of pretext, defeating PacifiCorp's claimed legitimate business reason for terminating the Trujillos.

The Trujillos also argued that PacifiCorp terminated them in violation of ERISA. The Trujillos provided sufficient evidence that the decision to terminate them was based on discriminatory intent to violate the ADA. That evidence also supported an inference that their discharge was mo-

tivated by an intent to interfere with their ERISA benefits. Summary judgment for PacifiCorp was reversed. *Trujillo v. PacifiCorp*, 524 F.3d 1149 (10th Cir. 2008).

Holcomb v. Iona College

Though recent, another case that is relevant to the issue of discrimination because of association is a bit more typical in that it involves an interracial relationship. *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008) marked the first time the Second Circuit was called upon to decide whether discrimination against a white man, who was married to an African-American woman, violated Title VII of the Civil Rights Act of 1964. Holcomb was an assistant coach of the Iona College “Gaels” men’s basketball team, which had successful seasons in 1998, 2000, and 2001. In June 2000, Holcomb married Gauthier, an African-American woman.

About that time, the basketball program began to suffer losses, and the college eventually became concerned about the team’s on-court results and its off-court activities. Reports to college officials did not include specific criticisms of Holcomb but did criticize the coaching staff as a whole. The reports said that the staff could not get along, that it was “poor” politically, and that it did not work as it needed to in order to make the program successful.

The college president and three vice presidents decided to terminate Holcomb and another assistant coach, Chiles. Holcomb was asked to resign, but he refused to do so; he was later terminated by a letter dated May 14, 2004. In his lawsuit, Holcomb claimed that the college’s decision to terminate his employment was motivated by his marriage to an African-American woman. In response, the college said that Holcomb had been removed from the athletic department’s staff as part of a necessary overhaul of a program that had a team that was performing poorly and denied that the decision was based on race. The district court entered summary judgment for Iona College, and Holcomb appealed.

To establish a prima facie case, Holcomb had to show four elements of discrimination: (1) that he belonged to a protected class, (2) that he was qualified for the position he held, (3) that he had suffered an adverse employment action, and (4) that the adverse employment action had occurred under circumstances giving rise to an inference of discriminatory intent. The second and third elements of Holcomb’s prima facie case were not in question.

Holcomb alleged that he was discriminated against as a result of his marriage to an African-American woman. The Second Circuit Court of Appeals had never ruled on the question of whether Title VII applies in such circumstances. The court concluded that when an employee is subjected to adverse action because an employer disapproves of an interracial association, the employee suffers discrimination because of the employee’s *own* race.

In this instance, the college decided to fire Holcomb, a white man married to an African-American woman, and Chiles, an African-American man, while retaining O’Driscoll, a white man, who was not in an interracial relationship. The director of the athletics program, Brennan, and the vice president of the college, Petriccione, both knew that Hol-

comb was married to an African-American woman, and the facts suggested that both Brennan and Petriccione played a role in the decision to terminate Holcomb and Chiles.

The appellate court agreed that there was evidence that Iona College had good reason to make *some* changes to its men’s basketball program. The head coach, Liguori, testified that he chose to retain one of the three coaches for the sake of continuity, and that he selected O’Driscoll because it had been reported that O’Driscoll worked well with other departments.

According to the court, Holcomb, who claimed that the college had acted with mixed motives, was not required to prove that the employer’s stated reason was a pretext. Instead, he could show that the impermissible factor was a motivating factor without necessarily proving that the employer’s explanation was not some part of the employer’s motivation.

The appellate court said that a jury could find that Brennan and/or Petriccione wanted to remove Holcomb because his wife was black and that Brennan and/or Petriccione played a decisive role in the decision to terminate the assistant coach. A reasonable jury could favor Holcomb’s version of events on each of these two steps and thereby reach the conclusion that race had played an illegitimate role in the college’s decision. Therefore, the court of appeals reversed the lower court’s summary judgment for the college. *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008).

Thompson v. North American Stainless LP

The next case related to this topic involved a claim of retaliation and clearly expands the law by allowing a plaintiff to claim retaliation based on a family member’s charge of discrimination. Thompson worked as a metallurgical engineer for North American Stainless LP, and was terminated. At the time of Thompson’s termination, he and Regalado were engaged to be married. Their relationship was common knowledge at North American Stainless. Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that her supervisors had discriminated against her based on her gender. A few weeks later, North American Stainless terminated Thompson’s employment. Thompson alleged that he had been fired in retaliation for Regalado’s EEOC charge. The complaint was dismissed on a motion for summary judgment.

Thompson appealed, contending that the anti-retaliation provision of Title VII prohibits an employer from terminating an employee based on the protected activity of his fiancée, who works for the same employer. Section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits retaliation by employers for two types of activity: “opposition” and “participation”:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under his subchapter.

42 U.S.C. § 2000e-3. The court of appeals found the following question to be the issue in the case: Does Title VII prohibit employers from taking retaliatory action against employees not directly involved in protected activity but who are so closely related to or associated with those who are directly involved that it is clear that the protected activity motivated the employer's action?

According to the court, a literal reading of § 704(a) suggests a prohibition on retaliation by the employer only when this action is directed at the individual who instituted the protected activity. Such a reading, however, defeats the purpose of Title VII. According to the court, there was no doubt that an employer's retaliation against a family member after an employee files an EEOC charge would, under *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), dissuade a reasonable worker from such an action.

The district court believed that it was obliged to grant summary judgment, even though the court acknowledged that its ruling would undermine the purposes of Title VII. The district court recognized that retaliating against an employee's spouse or close associate would deter the employee from engaging in protected activity just as much as if the employee himself or herself had been subject to retaliatory action.

As the court of appeals noted, other courts have made a similar observation. *See*, for example, *Fogleman v. Mercy Hosp. Inc.*, 283 F.3d 561, 569 (3d Cir. 2002) ("Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace."); *Holt v. JTM Indus. Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996) ("We recognize that there is a possible risk that an employer will discriminate against a complaining employee's relative or friend in retaliation for the complaining employee's actions."). In *Fogleman*, the court even noted, "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations" (quoting *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987)).

The court of appeals concluded that permitting employers (not the individual conducting the protected activity) to retaliate against an employee would still deter persons from exercising their protected rights under Title VII. The court of appeals reversed the dismissal of the complaint. *Thompson v. North Am. Stainless LP*, 520 F.3d 644 (6th Cir. 2008).

Ellis v. United Parcel Service Inc.

To avoid claims of harassment and discrimination, some employers prohibit dating or marriage among employees. The next case to be discussed involved a policy prohibiting relationships between managers and hourly employees. United Parcel Service's (UPS) nonfraternization policy forbids a manager from having a romantic relationship with any hourly employee—even an employee the manager does not supervise. Ellis, an African-American man, sued

UPS, claiming that the company had fired him because of his race and because he was married to a white woman, in violation of Title VII of the Civil Rights Act of 1964. The district court granted summary judgment for UPS, and Ellis appealed.

Ellis, a UPS manager, began dating an hourly employee, Greathouse, and for more than three years he kept quiet about the relationship, and Greathouse told only one close friend. Other employees eventually learned that Ellis and Greathouse had a relationship. The manager of employee relations, Baker, told Ellis' direct supervisor, Wade, who was an African-American woman, that "there were plenty of good sisters out there," which Wade understood to mean that Baker, also African-American, thought Ellis should be dating an African-American woman. At his deposition, Ellis testified that Baker had called him a "sellout" because he was dating Greathouse.

In February 2004, Ellis admitted to Wade that he was dating Greathouse. Wade told Ellis that either he or Greathouse would have to quit or Ellis would be fired. Wade reported the relationship to her black supervisor, Craft, who then met with Wade and Ellis to discuss their relationship. Craft ordered Ellis to meet with Walker, the human resources manager for the Indiana district. Walker, also black, questioned Ellis about his relationship with Greathouse. Walker explained that Ellis' relationship with Greathouse violated company policy and told Ellis that he had to "rectify the situation."

Ellis did not end the relationship, however; in fact, Ellis and Greathouse became engaged. They were married a little more than a year later, in April 2005. Ellis believed that their marriage brought him into compliance with the company's nonfraternization policy.

Three months after their wedding, Walker saw Ellis at a concert with Greathouse. Walker contacted Severson, a district manager, and told him that Ellis might be in violation of the nonfraternization policy. Severson told Walker to investigate the matter and to review his findings with Lewis, the North Central region's human resources manager. Walker determined that Ellis was in violation of the nonfraternization policy and that the situation had to be resolved. He met with Ellis and found out that Ellis and Greathouse had been married. He asked Ellis to resign. When Ellis refused to do so, he was fired. UPS said it fired Ellis because he had violated the nonfraternization policy and because he had been dishonest. The district court ruled against Ellis, and he appealed.

The court of appeals said that it had not yet decided whether an employer violates Title VII by discriminating against an employee because the employee is involved in a relationship with a person of another race. However, the court declined to address the issue, because it concluded that Ellis had not put forward enough evidence to survive summary judgment.

To make a prima facie case, Ellis had to come forward with evidence that a similarly situated employee who was not involved in an interracial relationship had been treated more favorably than Ellis had been. Ellis identified approximately 20 couples who, according to Ellis, had been

involved in intraracial romantic relationships between a manager and an hourly employee. To be similarly situated, a manager had to have been treated more favorably by the same decision maker who had fired Ellis. The court found that most of the people to whom Ellis' purported to compare himself were not similarly situated, because they were not subject to the same decision maker as Ellis had been when they violated the policy. In this case, Walker alone had made the ultimate decision to fire Ellis. Even though Walker had consulted with Lewis and in-house counsel to discuss UPS's potential legal exposure, this action simply showed that Walker had used the resources at his disposal to make an informed decision.

The undisputed evidence showed that Walker had not been the decision maker for most of the other managers whom Ellis identified. For some of his other comparisons, Ellis failed to offer any admissible evidence that these managers had been involved in a romantic relationship with UPS employees at all. Instead, Ellis had relied on his co-workers' conjecture and speculation that these relationships had occurred.

Ellis offered evidence that a romantic relationship occurred among four couples with whom Walker had been involved. For one of these couples, however, Ellis offered no evidence that Walker had known about the manager's relationship. As to the second couple, Walker learned that the manager had violated company policy in 2005, but Walker had left UPS soon after learning about the relationship and before he could take any action. Regarding the two remaining couples, there was no evidence that Walker had treated the managers who were violating the nonfraternization policy better than he had treated Ellis. Thus, Ellis' failure to establish that any other similarly situated manager in an interracial relationship had been treated more favorably than he had been doomed his discrimination claim.

It is interesting to note that the court stated that its decision should not be construed as an endorsement of the company's nonfraternization policy. "Although UPS, for the reasons stated, comes out on top in this case, love and marriage are the losers. Something just doesn't seem quite right about that." *Ellis v. United Parcel Serv. Inc.*, 523 F.3d 823 (7th Cir. 2008).

Equal Employment Opportunity Commission v. Qwest Corporation

Finally, one recent case related to discrimination because of association involved only a friendship—not a family relationship. The EEOC sued Qwest Corporation, alleging that Qwest had subjected Parra and Rodriguez to discriminatory discipline and termination based on their national origin (Mexican), and that the company had subjected Hebert to discriminatory discipline and termination based on his association with Parra and Rodriguez in violation of Title VII. Qwest argued that the terminations resulted from a customer's complaint that Hebert had spent time at home during workhours and from a subsequent investigation that revealed that Parra and Rodriguez had visited Hebert at home during company time.

Hebert, Rodriguez, and Parra were network technicians,

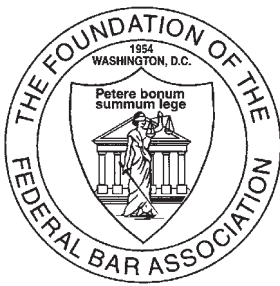
whose jobs consisted of installing and maintaining the network over which Qwest provides telephone service. They drove company vehicles to various locations to conduct such work. An investigation showed that Rodriguez and Parra had visited Hebert's house during worktime and that all three had been engaged in long-standing and widespread violations of Qwest's code of conduct by falsifying company records to indicate that they had been working when they were actually spending excessive amounts of time at Hebert's house or doing unauthorized personal business during workhours.

As to Hebert's claim, the court stated that "this is an association by friendship case." However, the law requires more than mere friendship. The court quoted from *Robinet v. First National Bank of Wichita*, 1989 WL 21158, *2 (D. Kan. 1989):

Many courts have recognized a cause of action against an employer for discrimination due to one's association with minorities under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. *Reiter v. Central Consolidated School Dist.*, 39 F.E.P. Cas. 833 (D. Colo. 1985) (Title VII) and *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (Section 1981). To maintain a claim of discrimination or harassment based on her association with an African-American person, plaintiff must show the existence of an association. The law requires something more than mere work-related friendship. There must be a significant connection between the plaintiff and the non-white person. ...

In the present case, plaintiff fails to provide sufficient evidence to establish an association with Ms. Moore to maintain actions under Title VII and section 1982 based on association. The association between plaintiff and Ms. Moore was that of co-workers who had a good friendship at work. Plaintiff, as head teller, worked [sic] with Moore, a teller, about her work-related problems. The court accepts as true plaintiff's allegations that she was more supportive and provided more assistance to Ms. Moore than any other white employee at the Bank's west branch. Although plaintiff was very supportive of her black co-worker, this is insufficient to establish the type of relationship between whites and non-whites necessary for a white person to maintain a cause of action of discrimination based on association. Plaintiff provides no evidence that she actively attempted to vindicate Ms. Moore's rights or protested against any discrimination against Ms. Moore. (Emphasis omitted.)

In the case against Qwest, Hebert had socialized with Parra and had asked Parra to check on his ailing wife. Hebert also wrote a statement in support of a discrimination claim brought by Parra and other Hispanic technicians, but Hebert did not send the statement to anyone at Qwest. Moreover, Hebert's statement appeared to be more of a complaint about management style of his supervisor, Seu-



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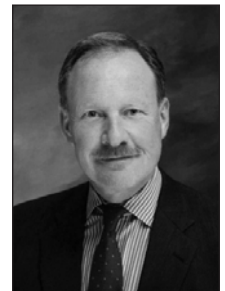
bert, rather than about issues of race. The statement also related that Hebert had been “friends with Parra for a while and Chris [Seubert] would tell me that ‘if I wanted to stay out of trouble, that I should stay away from the Rodriguez clan.’” In addition, there was no evidence that the decision maker in the case, Callister, was aware of even the friendship between Hebert, Parra, and Rodriguez.

The court found that the alleged relationship between Hebert and Parra did not rise to a level sufficient to invoke a claim of associational discrimination based on Parra’s race. Accordingly, the court granted summary judgment as to Hebert’s claim, because he had failed to show that he belonged to a protected class. *EEOC v. Qwest Corp.*, 103 FEP Cases 887 (D. Ore. 2008).

Conclusion

As pointed out at the outset, relationships can have consequences that may end up in a courtroom. Cases like *DeWitt*, *Trujillo*, *Thompson*, and *Holcomb* are certainly raising risks for employers. Employers, judges, and juries may wonder how close a relationship or association must be in order to have legal consequences. As a result of decisions like *Thompson*, a plaintiff may now be able to maintain a lawsuit alleging retaliation without actually having done anything that advances the original discrimination charge. Employers must be cautious to avoid claims of associational disability discrimination and retaliation. In making hiring decisions, employers must be sensitive to applicants who have some association with a person in a protected category. As always, employers must focus on legitimate business considerations; in situations involving discharging or disciplining an employee, the employer must be particularly careful to document the legitimate reasons for taking the employment action. **TFL**

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INTERNATIONAL LITIGATION

*The U.S. Jurisdiction To Prescribe and
the Doctrine Of Forum Non Conveniens*

BY ALLAN I. MENDELSON



SINCE THE 1945 DECISION BY JUDGE LEARNED HAND IN *United States v. Aluminum Co. of America*¹ (colloquially known as the “Alcoa” case), it has become well-established law that the Sherman Antitrust Act—

legislation that was adopted over 100 years ago—applies to and prohibits conduct in foreign countries if that conduct has an illegal “effect” in the United States.² The very important issue today is the extent to which the Sherman Act and other U.S. legislation applies to conduct in foreign countries and the circumstances in which it can be applied. This issue is of substantial importance, especially because recent U.S. Supreme Court decisions do not clearly define the exact reach and limits of U.S. jurisdiction on the international scene. In the United States, this jurisdiction is now known as the “jurisdiction to prescribe”—in contrast to the jurisdiction that we all know as the jurisdiction to adjudicate.³

In the *Alcoa* case, a group of foreign companies (including a company owned by Alcoa, but incorporated in Canada) agreed on quotas to restrict worldwide aluminum production and distribution, including in the United States.⁴ The U.S. government brought a criminal action against the companies, and the parties were found guilty of violating § 1 of the Sherman Act by conspiring to restrict importation of aluminum into the United States.⁵

The number of important similar cases, both civil and criminal, that have been brought under the Sherman Act since the 1945 *Alcoa* decision would be difficult to count. Only the U.S. government can bring criminal actions under the Sherman Act.⁶ Private litigants, on the other hand, bring civil actions and seek to collect treble damages if a violation is found.⁷ It is not at all unusual for the U.S. government to bring a criminal action, for the offending parties to either plead or be found guilty, and then for private parties to bring civil suits seeking treble damages. The cost of engaging in conduct that violates the U.S. antitrust laws is thus so substantial as to discourage all but the most dedicated (or elusive) from engaging in such conduct.

Post-*Alcoa* Antitrust Decisions

A discussion of post-*Alcoa* cases must include not only the interplay between the U.S. and U.K. governments in the quite famous *Laker*⁸ cases, but also the most recent antitrust cases that were brought, apparently jointly, by the United States and the European Commission (EC) against British Airways (BA), Virgin Atlantic Airlines, Lufthansa, Korean Airways, and other international air carriers for fixing cargo and certain passenger rates on North Atlantic and Pacific travel. Though a late starter, the EC is now very aggressive, and in various ways is even more aggressive than the United States about its jurisdiction to prescribe, in which the EC applies its competition law, particularly Articles 81 and 82 of the Treaty of Rome, to conduct, wherever it may occur, that has an anticompetitive effect within the European community states.⁹

But before getting to these most recent cases, three important antitrust cases must be considered. All three—two of which reached the Supreme Court—have been of critical significance in helping to determine the limits of U.S. jurisdiction to prescribe.

The first of these is the so-called *Laker*¹⁰ case, which involved Freddy Laker, an Englishman who was the first

entrepreneur to establish a truly transatlantic low-cost air carrier.¹¹ Though his airline closed after less than five years of operations, Laker left a trail of some of the most important litigation in the U.S. courts.¹² The second case is the so-called insurance antitrust case that was litigated in the early 1990s and decided by the U.S. Supreme Court in 1993—*Hartford Fire Insurance Co. v. California*.¹³ The third case is the 2004 Supreme Court decision in *F. Hoffmann-La Roche Ltd. v. Empagran*.¹⁴ Each of these cases has been of unique importance in American and international law.

The Laker Litigation

Freddie Laker, later to be knighted by Queen Elizabeth on the recommendation of Margaret Thatcher and known as “Sir Freddie,” started his airline service to the United States in September 1977 and shut it down in February 1982.¹⁵ It was a successful “discount” service that reached a level of some 40 weekly scheduled transatlantic flights. Some say that he was forced to shut down because he had overextended himself.¹⁶ Sir Freddie, however, claimed that his shutdown was because of an antitrust conspiracy by BA and others (including Pan Am, TWA, and other major International Air Transport Association carriers) that included predatory price-cutting and other illegal conduct.¹⁷ The case, which Sir Freddie originally filed in the U.S. federal district court in Washington, D.C., seeking treble damages under the Sherman Act, turned out to be a marathon of international litigation.

Very shortly after Laker’s Washington, D.C., filing, BA brought an action in London seeking a declaration of “non-liability” to Laker and an injunction preventing Laker from continuing his suit in Washington.¹⁸ After all, so BA argued, both airlines were British carriers, and there was simply no reason for a dispute between them to be litigated in a U.S. court. The London court agreed and ordered Laker to discontinue his suit in Washington. Laker then immediately appealed the London decision.¹⁹ Within days of that appeal, however, Judge Greene in the Washington, D.C., federal district court enjoined Pan Am, TWA, and the other defendant airlines from joining BA’s London suit and ordered a full hearing.²⁰

Meanwhile, the British government, acting under the U.K.’s 1980 Protection of Trading Interests Act, issued an order preventing BA from complying with any discovery or other order of the federal court in Washington, D.C., and from providing any documents or other evidence to the plaintiffs there.²¹ On appeal from the lower court in London, the London appeals court issued a permanent injunction preventing Laker from pursuing the Washington, D.C., action.²² At the same time, however, a divided U.S. Court of Appeals affirmed Judge Greene.²³ The appellate court concluded that the “prescriptive jurisdiction of the U.S. antitrust laws unequivocally holds that the antitrust laws should be applied,” and that the case should move forward notwithstanding what was happening in London.²⁴

At that point, no one was prepared to predict who would blink. But in a scholarly and exhaustively well-reasoned decision, Sir Kenneth Diplock, of the U.K. House of Lords, concluded that, even though both Laker and BA were British carriers, the U.S. courts nevertheless had jurisdiction over both the parties and the subject matter.²⁵ Lord

Diplock stated that it would be improper for an English court to enjoin Sir Freddie from pursuing a remedy for an alleged antitrust violation in the only court where such a remedy is available.²⁶ And thus, one of the most fascinating and serious international judicial confrontations came to a resolution—but not without definitively: (1) confirming the applicability of the U.S. antitrust laws in a modern international context; (2) illustrating the willingness of U.S. courts to provide a remedy for a foreign plaintiff no different than would be provided to a U.S. plaintiff; (3) possibly discouraging legal practices that have come to be known as anti-suit injunctions or parallel litigation, and finally (4) upholding the prescriptive jurisdiction of the United States but in a manner that did not cause major damage to British Airways.²⁷

Hartford Fire Insurance v. California: the Insurance Antitrust Case

The second critical case concerning U.S. jurisdiction to prescribe was a civil suit brought under the Sherman Act by the attorneys general of 19 states and by numerous private parties.²⁸ The suit charged that several American and foreign insurance companies, and especially a number of underwriters at Lloyd's of London, had unlawfully agreed to certain new rules that had the effect of making various forms of insurance and reinsurance unavailable in the U.S. market. These new rules, the plaintiffs argued, eliminated so-called occurrence-based coverage and allowed only "claims-made coverage."²⁹ This change became very important in the context of the asbestos claims in the United States and also the recurring litigation involving underground chemical pollution.³⁰

Under occurrence-based coverage, it made no difference when the damage was discovered, so long as it occurred when the policy was in force, for example, when the asbestos was installed or when the underground chemical pollution originally occurred.³¹ In other words, insurers could almost never close their books on a policy even though the policy was written only for a limited period of time. Under claims-made coverage, if the policy was for a specific time period, a claim would have to be made within that period or be barred forever.

The American plaintiffs argued, and the Lloyd's of London defendants did not dispute, that the problems for the U.S. market all resulted from the fact that it was the London-based companies that had formulated the new policy and had agreed not to reinsure any U.S. insurance companies except for claims-made coverage.³² The London defendants argued, on the other hand, that what they had agreed to was perfectly legal in the United Kingdom and in full compliance with a regime of regulation that had been approved by the British Parliament.³³ In short, the defendants argued, if the conduct was legal where conceived and adopted, it should not be subject to the extraterritorial reach of U.S. law.

After some six years of litigation, the U.S. Supreme Court, in a 5-4 decision, held that so long as British law did not require the British underwriters to act as they did, there was no conflict between British law and U.S. antitrust law.³⁴ Therefore, U.S. antitrust law could legally be applied to the conduct of the British underwriters. In other words, if

the law of the foreign country where the action was taken did not require the action to be taken, then there was no true conflict of laws, and thus the U.S. antitrust laws could apply if the action—even if legal where taken—resulted in unlawful effects in the United States.³⁵ This is perhaps the furthest extension of the prescriptive jurisdiction of the United States approved by the U.S. Supreme Court.

F. Hoffmann-La Roche Ltd. v. Empagran

F. Hoffmann-La Roche happens to be one of the most recent, as well as one of the most fascinating, antitrust cases raising the issue of the reach of the U.S. prescriptive jurisdiction. Beginning in 1989 and continuing for some 10 years, a group of foreign drug manufacturers, led by F. Hoffmann-La Roche Ltd. of Switzerland and BASF of Germany, entered into worldwide market sharing and price-fixing arrangements for the sale of various vitamins used as nutritional supplements.³⁶ Although no U.S. company was involved in the conspiracy, the foreign companies all supplied U.S. companies and otherwise did business in the United States.³⁷

In May 1999, the U.S. Department of Justice announced that F. Hoffmann-La Roche Ltd. and BASF had pleaded guilty to a worldwide criminal conspiracy and had agreed to pay fines of \$500 million and \$225 million, respectively.³⁸ Other foreign firms later pleaded guilty and paid substantial fines.³⁹ Significantly, on this occasion the EC also later weighed in, fining F. Hoffmann-La Roche Ltd. and seven other companies €855 million for participating in the conspiracy.⁴⁰ Shortly thereafter, private U.S. lawyers began to file civil suits seeking treble damages on behalf of American purchasers.⁴¹ Most of these cases—which did not include any foreign plaintiffs—were settled with payments in excess of \$1 billion.⁴² The question that came to the U.S. Supreme Court in 2004 was whether U.S. antitrust laws provided a remedy for foreign plaintiffs who were damaged by the unlawful conspiracy but whose purchases from the conspirators involved delivery of the vitamins outside the United States.⁴³

In a lengthy and well-reasoned decision, Supreme Court Justice Stephen Breyer, rejecting the contention that the sales were all made in only one global market, concluded that the U.S. antitrust laws were not intended to apply to foreign conduct that caused damage to foreigners abroad.⁴⁴ If foreign countries wished to protect their citizens and provide them a remedy against anticompetitive conduct, it was up to them to do so; it was not for the United States to do so in the absence of such a remedy in the foreign country. Justice Breyer also pointed out that several foreign countries had filed amicus briefs in the case, arguing that to apply the treble damage remedy of the Sherman Act would unjustifiably allow the citizens of these foreign countries "to bypass their own less generous remedial schemes." Justice Breyer then laid down what could be very important law for future prescriptive jurisdiction cases in the United States:

"[I]f America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."⁴⁵

The U.S. Doctrine Of Forum Non Conveniens

Two other areas of U.S. prescriptive jurisdiction—securities law and maritime law—will be considered in this article to show the similarities and differences in the ways that the United States applies its prescriptive jurisdiction in these areas. But before doing so, it would be useful to focus on another very important emerging area of U.S. law that in fact suggests an unusually interesting trend in the development of U.S. law and practice on the international scene. This is an area in which, as in *F. Hoffmann-La Roche*, it seems that the United States is becoming increasingly reluctant to open its courts and to grant its generous remedies to foreign plaintiffs.

The public is well aware of the many international aviation crashes that have occurred in recent years and of the tragic events that accompany these disasters. What we rarely, if ever, focus on, however, is the litigation that is brought after the tragedy by the victims' survivors. In almost all of these cases, the plaintiffs bring their suits in the United States.⁴⁶ For example, cases were recently brought in the U.S. federal district court in Miami by the survivors of the 160 victims of a crash that occurred in Venezuela in August 2005.⁴⁷ All victims were foreign citizens, the airline was of foreign (Colombian) registry that did not operate or do business in the United States, and the accident occurred on a trip between two foreign points.⁴⁸ In short, there was almost no connection between any aspect of the accident and the United States (except for an individual who lived in Florida and who helped to arrange for the airline to provide the flights between the two foreign points).

The role played by the Florida resident was very minor. Even if it had been major, it would have been appropriate to—as was done—file a motion promptly in the Miami court for a dismissal of the suit based on the doctrine of forum non conveniens. This is a common-law doctrine that has been developing in the United States for at least the past 50 years and that permits a court to direct a case to another court when it concludes that certain public and private interest factors weigh in favor of such a conclusion.⁴⁹ As I have been urging for some time, the doctrine of forum non conveniens should be used in every aviation crash case when foreign victims or their survivors sue in U.S. courts.⁵⁰

There is almost no aviation crash today that does not involve victims of multiple nationalities, including U.S. nationals.⁵¹ Under forum non conveniens, the issue of liability—that is, who was responsible for the crash: the airline, its pilots, air traffic control, the aircraft manufacturer, a subcontractor, etc.—would generally be determined by the U.S. court.⁵² Once liability has been largely determined (or as is often the case—if liability is admitted or stipulated to by the participating defendants in the case), then under forum non conveniens, every foreign plaintiff's suit should be dismissed with directions that it can be refiled in his or her domicile court for determination by that court—not by the U.S. court—of the damages he or she is entitled to receive. To be sure, if the case happens to involve only one or a few foreign passengers on an otherwise U.S. domestic flight, it may be easier simply to resolve their cases here. But in the multiple-party actions brought in the United States following aviation disasters in international air

transportation, forum non conveniens is clearly the preferable and fairer approach for the foreign plaintiff—victims or their survivors.

It is no secret why foreign plaintiffs prefer to sue in the United States. There are at least three reasons. First, they can find excellent lawyers, highly experienced in aviation tort law, who will generally handle their cases on a contingency fee basis.⁵³ Second, there are very substantial opportunities for discovery that are readily available in U.S. courts. And finally, it is well known that recoveries in the United States, for a number of reasons, are much more generous than they are anywhere else in the world.

It seems, however, that for many of the same reasons Justice Breyer did not want to export U.S. law or engage in “legal imperialism” in *F. Hoffmann-La Roche*,⁵⁴ U.S. courts handling aviation disaster cases today likewise believe that foreigners should be compensated under the laws of their domiciles rather than under the laws of the United States. If under the laws of their domiciles they receive only, say, 25 percent of what they would receive in the United States, or if they are required to pay a lawyer even to take their case because there is no contingency fee system in their domiciles, the United States, in the words of Justice Breyer, should not “tr[y] to impose [the U.S. system] in an act of legal imperialism.”⁵⁵

In both the antitrust and the aviation contexts, foreign plaintiffs are trying to use—some would say “game”—the U.S. system and approaches to litigation. It is questionable whether the United States should permit this. It would be better if plaintiffs, as foreign citizens, work to prevail on their governments to pass laws and adopt approaches to litigation that are more similar to those of the United States or, in any event, that are more consistent with the interests of plaintiffs in those countries and in these types of cases.⁵⁶

The Florida case is the first case anywhere in the world to raise the issue whether under the Montreal Convention,⁵⁷ adopted in 1999 largely to replace the 1929 Warsaw Convention,⁵⁸ a U.S. court can apply the doctrine of forum non conveniens to transfer cases to the courts where the foreign plaintiffs live.

In September 2007, Judge Ursula Ungaro of the federal district court in Miami handed down a comprehensive, exhaustively researched, and perceptive decision holding that the legislative history of the 1999 Montreal Convention supported the conclusion that forum non conveniens would continue to be a procedural tool available to U.S. courts to apply in cases where, balancing public and private interest factors, the case should more appropriately be decided in a foreign than a U.S. court.⁵⁹ Aided by a statement of interest filed in the case by the U.S. government (signed by senior officials in the Justice, State, and Transportation departments) in response to a request by Judge Ungaro pursuant to 28 U.S.C. § 517, the court concluded that use of the FNC doctrine under the Montreal Convention was a goal that, despite some foreign skepticism as well as opposition, was both declared and achieved by the U.S. government in the negotiations that led to the adoption of the convention.

Judge Ungaro then ordered the parties to brief the issue whether in the particular circumstances of the case and bal-

ancing the public and private interest factors involved, forum non conveniens should be granted. Given that all the victims of the crash were foreign nationals, that the airline itself was foreign, and that the facts of the case suggested few if any substantial contacts with the United States, Judge Ungaro, on Nov. 9, 2007, dismissed the case on forum non conveniens grounds, noting that defendants had stipulated that, once forum non conveniens was granted, they would submit to the jurisdiction of, and accept service of process from, the courts in Martinique, and would also waive any statute of limitations defenses. Balancing both the public and private interest factors spelled out in *Piper v. Reyno*, Judge Ungaro properly found that the principal issue in the case was the damages to which each plaintiff was entitled, that most of the damage evidence was available in Martinique, that the courts in Martinique were adequate, and that plaintiffs could and should file or refile their lawsuits there.⁶⁰

Judge Ungaro's decision was promptly appealed and is now pending before the U.S. Court of Appeals for the Eleventh Circuit.⁶¹ It is a matter of some significance that the U.S. government has formally entered the case and filed an amicus curiae brief in support of Judge Ungaro's decision. There is no question that, if Judge Ungaro's decision is affirmed, a critically important issue of international law under the 1999 Montreal Convention will be well on the road to a resolution that, consistent with Justice Breyer's decision in *F. Hoffman-LaRoche*, will inevitably lend added impetus and importance to the forum non conveniens doctrine in the federal judicial system.

Securities Law And Maritime Law

No article on the prescriptive jurisdiction of the United States can be complete without at least touching on the subjects of securities law and maritime law. U.S. securities law is full of cases where U.S. courts have allowed the Securities and Exchange Act of 1934 to apply to transactions with a foreign twist.⁶² U.S. maritime law, perhaps in recognition of the long history of international maritime law, seems reluctant to extend the application of U.S. law for almost any purpose⁶³—except the limited (and exceedingly difficult to understand) areas that were involved in the Supreme Court's recent decision in *Spector v. Norwegian Cruise Line Ltd.*⁶⁴

Almost all the cases arising in securities law are litigated under § 10(b) of the 1934 Securities and Exchange Act.⁶⁵ This section makes it unlawful for any person through "any means or instrumentality of interstate commerce ... to use [in the purchase or sale of any security] any manipulative or deceptive device or contrivance in contravention of such rules and regulations [as the Securities and Exchange Commission (SEC)] may prescribe ... in the public interest or for the protection of investors."⁶⁶ It is clear that this is a very broad statute that would seem to have almost universal application.

For the most part, and given the history of dozens of cases that have involved securities fraud, including the famous 1972 decision in *Leasco Data Processing Equipment Corp. v. Maxwell*,⁶⁷ (in which Chief Judge Henry Friendly held against Robert Maxwell, a well-known British citizen),

it may fairly be said that U.S. securities law will be applied to the following types of cases:

1. Cases in which the losses were incurred by U.S. residents, wherever the unlawful acts occurred;⁶⁸
2. Cases in which the losses were incurred by U.S. citizens abroad, but only if the unlawful acts occurred mostly in the United States;⁶⁹ and
3. Cases in which the losses were incurred by foreigners outside the United States, but only if the unlawful acts occurred in the United States and were the direct cause of the harm.⁷⁰
- 4.

Perhaps the best line of cases illustrating the problems in this area are those that arose out of the collapse in the late 1960s of the quite famous Bernard Cornfeld group of companies.⁷¹ These companies were known alternatively as the Investors Overseas Services (IOS) Fund, the Cornfeld Fund, or the Fund of Funds.⁷² The companies had perfected the American style of selling mutual funds, but sold only to customers outside the United States and thus were not subject to SEC jurisdiction. As it would happen, some of the shares ended up in the hands of 22 U.S. citizens residing in the United States. When the stock collapsed, a class action suit was brought on behalf of the 22 citizens and on behalf of all purchasers, wherever located.⁷³

In *Bersch v. Drexel Firestone Inc.*, the court found in favor of the 22 U.S. citizens but dismissed the cases brought by the foreigners, because the unlawful acts did not occur mostly in the United States.⁷⁴ In the companion case of *ITT v. Vencap Ltd.*, the court concluded that a foreign corporation was entitled to bring suit against another foreign corporation because planning of the operation and legal drafting of the major documents occurred in New York.⁷⁵ Indeed, Judge Friendly went so far as to conclude, "[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."⁷⁶

It is hard to be certain about the extent to which foreigners, who buy their securities abroad, can sue in the United States. If one predicts on the basis of the *F. Hoffmann-La Roche* decision, all foreigners may be excluded. But if securities law is treated differently than antitrust law, as at least one judge has recently concluded,⁷⁷ then the mere fact that the fraudulent security devices were created in the United States may open U.S. courts to suits by foreigners who bought those securities abroad.⁷⁸

Now, this article will address maritime law, which is relatively easy. Many years ago, the National Labor Relations Board (NLRB) brought suit in order to allow U.S. unions to organize the all-foreign crews aboard shiplines that regularly plied the U.S. trades and that were owned in whole or large part by U.S. owners, but which flew foreign flags—then of Panama, Liberia, and Honduras.⁷⁹ These vessels came to be known as "flags of convenience."⁸⁰ The owners "flagged-out,"⁸¹ so it was called, primarily to avoid taxes and to be able to hire foreign crews free from any modern-day labor law requirements.⁸²

The history that followed can be summed up quickly.

The district court found for the NLRB, but the court of appeals reversed.⁸³ When the case went to the Supreme Court in 1963, the Court decided that no matter the vessels' U.S. ownership or trade routes to and from the United States, the law of the flag governed in maritime law. The Court also held that the NLRB had no jurisdiction under the National Labor Relations Act to interfere in any way with the internal affairs of the vessels, including of course the labor relations of the foreign crews aboard the vessels.⁸⁴

In most other areas of maritime law, U.S. courts have been equally reluctant to extend the thrust of what otherwise might be looked upon as U.S. prescriptive jurisdiction. For example, in cases involving the 1920 Jones Act and its provision that "[a]ny seaman who shall suffer personal injury in the course of his employment may ... maintain an action for damages at law,"⁸⁵ U.S. courts have almost uniformly held that the Jones Act does not apply to foreign seamen on foreign flag vessels, no matter where the seaman signed on or where the injury occurred.⁸⁶

But in the more recent *Spector v. Norwegian Cruise Lines Ltd.*⁸⁷ decision, the U.S. Supreme Court seems to have concluded—though by a very divided court that handed down four separate opinions—that the law of the flag is not totally exclusive. At least some of the provisions in the recently enacted Americans with Disabilities Act (ADA) should be applied to foreign flag cruise vessels.⁸⁸ The plaintiffs in *Spector* alleged that these vessels denied them access to certain public places on board the ships and discriminated against them in the assignment of cabins by assessing surcharges.⁸⁹ A plurality of the Court held that easily achievable remedies like eliminating surcharges were valid, while other remedies like eliminating structural raised barriers (that were presumptively allowed under the international Safety of Life at Sea or "SOLAS" Convention) were not.⁹⁰ Three members of the Court dissented on grounds that, as there was no clear statement of coverage in the ADA, it could not be said that Congress intended the ADA to apply to foreign flag vessels.⁹¹ In any event, this case provides a very good idea of how controversial these issues can be. But at least one thing can be said for the *Spector* decision: it was a decision that not only protected U.S. citizens but also citizens who were disabled and who had contracted for their cruises and boarded the vessels in the United States.

Very Recent Events

In concluding this article, a brief mention should be made of two major cases that have occurred only within the past several months. Both happen directly to involve the EC.

The Airline Price Fixing Cases

In February 2006, EC inspectors raided the European offices of several major European and Asian airlines to search for evidence as to whether they were conspiring to fix transatlantic air freight rates.⁹² At the same time as these raids were occurring in Europe, FBI agents in the United States were raiding the offices of KLM, Air France, and other airlines in Chicago and elsewhere, seeking similar evidence of a price fixing conspiracy.⁹³ The EC announced that it "has reason to believe that the companies concerned may have

violated [a European Union] treaty, which prohibits practices such as price fixing."⁹⁴ The Justice Department made a similar announcement.⁹⁵ On Aug. 1, 2007, BA and Korean Air Lines pleaded guilty in the United States to charges that they had conspired to fix prices for passenger and cargo flights.⁹⁶ Each agreed to pay a criminal fine of \$300 million to the U.S. government.⁹⁷ In addition, BA agreed to pay a \$247 million fine to the U.K. Office of Fair Trading.⁹⁸

Investigators from the U.S. Justice Department said that there were three separate conspiracies—one overarching worldwide cargo rate conspiracy, a second conspiracy involving only BA and Virgin Atlantic on passenger fuel surcharges, and a third involving U.S.–Korean rates.⁹⁹ Although Virgin Atlantic and Lufthansa were deeply involved in the illegal conduct, they were granted amnesty because they were the first to report the illegal activity and had cooperated in the investigation.¹⁰⁰ A number of other international airlines are still under investigation. Meanwhile, on March 11, 2008, European investigators carried out another series of raids or "surprise inspections" on this occasion targeting Lufthansa, Air France-KLM, and perhaps others over suspicions that the carriers had participated in other cartel price fixing activities involving passenger flights between Europe and Japan.¹⁰¹

As was to be expected, private antitrust lawyers in the United States have in the meantime filed numerous treble damage civil suits against all the airlines suspected to have been involved in the criminal conspiracy.¹⁰² All of these suits are pending, though it was reported some months ago that Lufthansa had agreed to pay \$85 million to settle the suits that were brought against it.¹⁰³ At the same time, BA and Virgin have both stated they are not willing to pay any civil damages for the time being.¹⁰⁴ It has since been reported, however, that in mid-February 2008, B.A. and Virgin agreed to pay an amount in excess of \$200 million to settle the treble damage private antitrust suits that were brought against them in the U.S. district court for their illegal agreement to fix fuel surcharges.¹⁰⁵ Meanwhile, investigations seem to be continuing within the EU, the United States and other countries; and it has yet to be determined whether the EU will be assessing its own fines in addition to those already assessed by other governmental authorities.

The Microsoft Case

As recently as Sept. 17, 2007, Europe's second highest court, known as the European Court of First Instance (CFI), affirmed a decision of the EC, holding that Microsoft had abused its dominant market position in Europe and fining Microsoft \$689 million.¹⁰⁶ In *Microsoft Corp. v. Commission*,¹⁰⁷ Microsoft was found to have abused its dominant market position by engaging in the practice of what is generally referred to as "bundling," designed to lockout competitors.¹⁰⁸ On Feb. 26, 2008, moreover, the EC imposed a fine on Microsoft of \$1.3 billion, the "largest fine [the EC] has ever imposed on a company."¹⁰⁹ This latest fine is reportedly to penalize Microsoft for failing to comply with the earlier EC orders to terminate its allegedly unfair competitive practices.¹¹⁰

Looking at these Microsoft decisions in the context of the EC's investigatory efforts in the airline price fixing cases just

discussed, there are three significant (if tentative) conclusions that observers of this area of the law are already drawing from the decisions.

First, the decisions demonstrate an increasing dedication on the part of European regulators and reviewing courts to engage in much the same kind of aggressive assertions of regulatory jurisdiction as have been common in the United States since the 1945 *Alcoa* decision.¹¹¹ No matter the nationality of the perpetrator, so long as there is some unlawful effect felt within the EU, the EU seems not at all reluctant to exercise its prescriptive jurisdiction.¹¹² While there have been other similar cases handled and decided by the EC in recent years—especially the General Electric and Honeywell merger case that the EC found to be illegal in July 2001¹¹³—none of them carry nearly the message as the more recent Microsoft and airline price fixing cases.

Second, because the U.S. Justice Department in 2001 had more or less approved the very same Microsoft conduct as Europe was now finding illegal under the EC's broad concept of what is "abuse of a dominant [market] position,"¹¹⁴ it appears that Europe may now actually be one-upping the United States in its zeal to protect and enhance competition within the EU, if not throughout the world. It is certainly interesting that, when U.S. Justice Department authorities were asked for their views on the earlier Microsoft decision, the assistant attorney general for antitrust criticized it and suggested that "rather than helping consumers, [the decision] may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition."¹¹⁵ This statement seems to imply that the EC's objective in its antitrust enforcement efforts is primarily to protect corporate competitors, while the objective of the U.S. Justice Department is to protect consumers.

Finally, the airline price fixing investigation and the Microsoft decision both suggest that Europe is growing increasingly aggressive in the area of asserting its prescriptive jurisdiction. At the same time, the *F. Hoffmann-La Roche* decision and the increasing use by U.S. courts of the doctrine of forum non conveniens both seem to suggest that the United States is moving largely in the opposite direction. Perhaps the law on both sides of the ocean may one day meet at some midpoint. **TFL**

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Endnotes

¹*United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

²See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran*, 542

U.S. 155, 162 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795–96 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Alcoa*, 148 F.2d at 444; Restatement (Third) Of Foreign Relations Law Of The United States § 455, reporter's note 3 (1987).

³See Restatement (Third) Of Foreign Relations Law §§ 402–16.

⁴*Alcoa*, 148 F.2d at 422–423.

⁵*Id.* at 445.

⁶U.S. Dep't Of Justice, ANTITRUST ENFORCEMENT AND THE CONSUMER (1996), available at pueblo.gsa.gov/cic_text/misc/antitrust/antitrus.htm.

⁷15 U.S.C. § 15 (1914).

⁸See *infra* part II A.

⁹Treaty Establishing the European Economic Community arts. 81, 82, Mar. 25, 1957, 298 U.N.T.S. 4.

¹⁰*Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124 (D.D.C. 1983).

¹¹Sam Knight, *Cheap Flights Pioneer Sir Freddie Laker Dies*, TIMES ONLINE, Feb. 10, 2006, www.timesonline.co.uk/tol/news/uk/article729420.ece.

¹²See *infra* notes part II A.

¹³509 U.S. 764 (1993).

¹⁴542 U.S. 155 (2004).

¹⁵See Andreas F. Lowenfeld, INTERNATIONAL LITIGATION AND ARBITRATION 121–36 (3d ed. 1993) for a more extensive discussion of all the *Laker* litigation. The author uses Professor Lowenfeld's casebook in teaching his Georgetown Law School course on International Litigation and Conflicts of Law and wishes to express his appreciation to Professor Lowenfeld for the excellence and timeliness of his casebook.

¹⁶*Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1126 (D.D.C. 1983); Lowenfeld, *supra* note 15, at 122.

¹⁷*Laker Airways*, 559 F. Supp. at 1126–27; Lowenfeld, *supra* note 15, at 122.

¹⁸Lowenfeld, *supra* note 15, at 121–36.

¹⁹*Id.* at 123.

²⁰*Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1126 (D.D.C. 1983).

²¹Lowenfeld, *supra* note 15, at 123.

²²*British Airways Bd. v. Laker Airways Ltd.*, (1984) Q.B. 142, 169 (U.K.).

²³*Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 956 (D.C. Cir. 1984). Judge Kenneth Starr dissented from the decision, stating that it would "be viewed by many of our friends and allies as a rather parochial American outlook." *Id.* at 956, 958.

²⁴*Id.*

²⁵*British Airways Bd. v. Laker Airways Ltd.*, (1985) A.C. 58, 59–60 (H.L.) (appeal taken from Eng.) (U.K.).

²⁶*Id.* at 80, 93–95.

²⁷Then U.K. Prime Minister Margaret Thatcher reportedly intervened personally with President Reagan to ensure that the U.S. Department of Justice would not issue an indictment; and on Nov. 19, 1984, the department announced that its investigation was being closed "on orders from President Reagan." The civil litigation was settled the following year reportedly also following personal intervention by Prime

Minister Thatcher. See Lowenfeld, *supra*, n.15 at 144–45.

²⁸*Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

²⁹*Id.* at 769, 771, 795, 810.

³⁰George B. Flanigan, Kathleen A. McCullough, & Charles R. McGuire Jr., OCCURRENCE AND CLAIMS MADE: THE ROAD BEHIND AND THE ROAD AHEAD 8, 11–12 (2004).

³¹See *Hartford*, 509 U.S. at 771.

³²*Id.* at 773–78.

³³*Id.* at 797–99.

³⁴*Id.* at 799.

³⁵See *id.* at 799. Lowenfeld believes that the decision on this point, by ignoring the conflict of laws while focusing on the absence of compulsion, improperly confuses conflict with compulsion. See A. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, AM. J. INT'L. L. 42 (1995).

³⁶Press Release, U.S. Dep't of Justice, F. Hoffmann-La Roche and BASP Agree to Pay Record Fines for Participating in International Vitamin Cartel (May 20, 1999), www.usdoj.gov/opa/pr/1999/May/196at.htm.

³⁷David Barboza, *Six Big Vitamin Makers Are Said to Agree to Pay \$1.1 Billion to Settle Pricing Lawsuit*, N.Y. TIMES, Sept. 8, 1999, at C2.

³⁸Press Release, U.S. Dep't of Justice, *supra* note 36.

³⁹See, e.g., Barboza, *supra* note 37, at C2; Press Release, U.S. Dep't of Justice, Canadian Vitamin Company Agrees to Plead Guilty for Role in International Vitamin Cartel (Sept. 29, 1999), justice.gov/atr/public/press_releases/1999/3726.htm.

⁴⁰James Kanter, *A Crackdown on Cartels by European Regulators*, N.Y. TIMES, Dec. 26, 2005, at C3.

⁴¹Brenda Sandburg, *Culture Shock: Chinese Companies are Learning Some Painful Lessons About the American Way of Litigation*, CORP. COUNS., NOV. 2006, at 63.

⁴²Barboza, *supra* note 37, at C2.

⁴³*F. Hoffmann-La Roche*, 542 U.S. 155, 162 (2004).

⁴⁴*Id.* at 164.

⁴⁵*Id.* at 167–69.

⁴⁶See, e.g., *Lueck v. Sundstrand Corp*, 236 F.3d 1137 (9th Cir. 2001).

⁴⁷*In re W. Caribbean Airways*, 32 Av. L. REP. (CCH) ¶ 15,595 (S.D.Fla. Sept. 26, 2007). Of the 160 victims, 152 were French citizens or residents of Martinique and the remaining eight were Colombian national crew members. See *In re Caribbean Crew Members*; Consolidated Case No. 07-22015 (S.D.Fla. Civ-Ungaro).

⁴⁸*Id.*

⁴⁹See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Change of venue transfers between U.S. federal district courts are governed today by the provisions of 28 U.S.C. §§ 1404 and 1406. When the doctrine of forum non conveniens (FNC) is applied by a U.S. federal district court in an international context, however, there is no comparable or equivalent transfer. Rather, the district court dismisses the lawsuit on the basis of the FNC doctrine but conditions its dismissal by placing various requirements on the moving defendants. These requirements include, for example, that the defendants agree to submit to the jurisdiction of the foreign court, to waive any applicable statute of limitations defenses, to make witnesses and documents available to the foreign court, etc. Because of

such conditions, FNC dismissals are generally viewed as virtually tantamount to transfers, assuming of course that plaintiffs refile their lawsuits in the foreign court and that court otherwise has and asserts jurisdiction over the case.

⁵⁰See Allan I. Mendelsohn & Renee Lieux, *The Warsaw Convention Article, the Doctrine of Forum Non Conveniens, and the Foreign Plaintiff*, J. AIR L. & COM. 75, 111 (2003) (hereinafter *The Foreign Plaintiff*); Allan I. Mendelsohn, *Recent Developments in the Forum Non Conveniens Doctrine*, 52 FED. LAW. 45, 46 (2005) (hereinafter *Recent Developments*).

⁵¹See, e.g., *World Briefing: Americas: Cuba: 17 Die in Plane Crash*, N.Y. TIMES, Mar. 15, 2002, at A6; Edward Cargan, *Over 200 Die as Taiwan Jet Crashes in Bad Weather*, N.Y. TIMES, Feb. 17, 1998, at A3.

⁵²*Recent Developments*, *supra* note 50, at 46.

⁵³*The Foreign Plaintiff*, *supra* note 50, at 111.

⁵⁴*F. Hoffmann-La Roche*, 542 U.S. 155, 168 (2004).

⁵⁵*Id.*

⁵⁶It was recently reported that French President Nicolas Sarkozy had publicly suggested that the EC consider adopting a form of class action lawsuit not unlike that commonly used by plaintiffs in the United States for antitrust and securities fraud litigation. See Caroline Byrne & Cary O'Reilly, *Sarkozy, U.S. Lawyers Shift Class-Action Suits to Europe*, N.Y. SUN, July 25, 2007, available at www.nysun.com/article/59069. On April 3, 2008, the EC issued a white paper suggesting that steps should be taken to encourage the adoption of judicial methods within the EU to provide private damages for victims of EU competition law violations. See *97 Antitrust Trade Regulation Report* 353, April 4, 2008.

⁵⁷Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, ICAO Doc. 9148.

⁵⁸Bin Cheng, *A New Era in the Law of Int'l Carriage by Air: From Warsaw (1929) to Montreal (1999)*, 53 INT'L & COM. L. Q. 833, 833 (2004).

⁵⁹See *In re W. Caribbean Airways*, 32 Av. L. REP. (CCH) ¶ 15,595 (S.D.Fla. Sept. 26, 2007) (preliminary order by District Judge Ungaro).

⁶⁰See *id.* ¶ 15,764.

⁶¹*In re West Caribbean Airways*, 32 Av. L. REP. (CCH) ¶¶ 15,595, 15,764 (S.D. Fla. 2007). *Bapte et al. v. Neuvac Corp., et al.*, (11th Cir., Case No. 07-15828). This author is counsel for the defendant who filed for the forum non conveniens dismissed before Judge Ungaro and is now seeking affirmance by the court of appeals of the application of the doctrine in the case.

⁶²See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968).

⁶³See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953).

⁶⁴545 U.S. 119 (2005).

⁶⁵See generally Carlos L. Israels, *Banks and Federal Securities Regulation*, 85 BANKING L.J. 1 (1968); see also 15 U.S.C.A. § 78(j) (West 1997 & Supp. 2007).

⁶⁶15 U.S.C.A. § 78(j).

⁶⁷468 F.2d 1326, 1344 (2d Cir. 1972).

⁶⁸See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968).

⁶⁹See, e.g., *Bersch v. Drexel Firestone Inc.*, 519 F.2d 974,

986 (2d Cir. 1975).

⁷⁰See, e.g., *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991).

⁷¹See, e.g., *Bersch*, 519 F.2d 974 (2d Cir. 1975); *IIT v. Vencap Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

⁷²Lowenfeld, *supra* note 15, at 105.

⁷³*Id.*

⁷⁴See *Bersch*, 519 F.2d at 987, 991, 1001.

⁷⁵See *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975); Lowenfeld, *supra* note 15, at 107.

⁷⁶*IIT*, 519 F.2d at 1017.

⁷⁷*In re Royal Abold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 356 n.10 (2004).

⁷⁸See also the extended discussion of the securities cases in Lowenfeld, *supra* note 15, at 76–111.

⁷⁹See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12, 14 (1963).

⁸⁰GUIDE TO EMPLOYMENT LAW AND REGULATIONS § 17:64 (1992 & Supp. 2007).

⁸¹See Alexander J. Marcopoulos, *Flags of Terror: An Argument for Rethinking Maritime Security Policy Regarding Flags of Convenience*, 32 TUL. MAR. L.J. 277, 284 (2007) (defining “flagged out”).

⁸²Kirsten Bohmann, *The Ownership and Control Requirement in U.S. and European Union Air Law and U.S. Maritime Law—Policy; Consideration; Comparison*, 66 J. AIR. L. & COM. 689, 732 (2001).

⁸³*McCulloch*, 372 U.S. at 12. This author was counsel for the NLRB when the case was before both the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit. See *Empressa Hondurena de Vapores v. McLeod*, 300 F.2d 222 (1962).

⁸⁴*McCulloch*, 372 U.S. at 20–22.

⁸⁵Jones Act, Pub. L. No. 66–261, § 27, 41 Stat. 988, 999 (1920) (current version at 46 U.S.C.A. § 30104 (West 2007)).

⁸⁶See, e.g., *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 384 (1959); *Lauritzen v. Larsen*, 345 U.S. 571, 593 (1953).

⁸⁷45 U.S. 119 (2005) (plurality opinion).

⁸⁸*Id.* at 125.

⁸⁹*Id.* at 133, 134.

⁹⁰See *id.* at 138–39.

⁹¹*Id.* at 149 (Scalia, J., dissenting).

⁹²See Sachi Izumi & Jason Neely, *Global Airlines Probe Widens to Asia*, REDORBIT, Feb. 15, 2006, www.redorbit.com/news/international/392205/global-airlines-cargo-probe-widens-to-asia/; David Lawsky & Jeremy Pelofsky, *Update 4—Airlines Raided in EU, US Cargo Probe*, REUTERS, Feb. 14, 2006, today.reuters.com/news/articlebusiness.aspx?type=basicIndustries&storyID=nL14520882&from=business.

⁹³Izumi & Neely, *supra* note 92; Lawsky & Pelofsky, *supra* note 92.

⁹⁴Lawsky & Pelofsky, *supra* note 92.

⁹⁵*Id.*

⁹⁶Peter Kaplan & James Vicini, *BA, Korean Air to Plead Guilty in U.S. Price Probe*, REUTERS, Aug. 1, 2007, www.reuters.com/article/businessnews/idUSN0135743520070801.

⁹⁷*Id.*

⁹⁸Andrew Compart, *BA, Korean Air Plead Guilty to Price-Fixing*, TRAVEL WKLY., Aug. 6, 2007; Adrian Schofield & Jens Flottau, *BA, Korean See Mammoth Fines in Price-Fixing Probe*, AVIATION DAILY, Aug. 2, 2007, at 1. More recently, in early July 2008, it was disclosed that four foreign airlines (Cathay Pacific, Air France-KLM, SAS, and Martinair) had entered an agreement with the U.S. Department of Justice to plead guilty and pay more than half a billion dollars in criminal fines for fixing air cargo rates. See YAHOO NEWS ASIA, July 6, 2008.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹Steve McGrath and Carolyn Hanson, *EU Investigates Possible Price Fixing by Airlines*, WALL ST. J., Mar. 12, 2008, at A22; see also *New Round of EC Collusion Raids Target Carriers Serving Japan*, ATW DAILY NEWS, Mar. 12, 2008, at www.atw-online.com/news/story.html?storyID=12026.

¹⁰²David Knibb & Peter Conway, *Cargo Probe Focuses on Surcharges*, AIRLINE BUS., Apr. 1, 2006; John R. Wilke & Daniel Michaels, *Luftbansa Offers to Cooperate in Antitrust Probe—Deal Could Be Breakthrough in Price-Fixing Inquiry of the Air-Cargo Industry*, WALL ST. J., Mar. 8, 2006, at A3.

¹⁰³Compart, *supra* note 98.

¹⁰⁴*Id.*

¹⁰⁵Adrian Schofield, *BA, Virgin Agree to \$200 US Million Payout in Class Action Suit*, AVIATION DAILY, Feb. 19, 2008, at 2; *Settlement on Airline Price Fixing*, N.Y. TIMES, Feb. 16, 2008, at C04. The airlines agreed to pay some \$59 million to U.S. passengers and almost \$145 million for passengers in the U.K. *2 Airlines Settle Suit on Fuel Fees*, INT’L HERALD TRIB., Feb. 16, 2008, at 11.

¹⁰⁶Kevin J. O’Brien & Steve Lohr, *European Court Faults Microsoft on Competition*, N.Y. TIMES, Sept. 14, 2007, at A1.

¹⁰⁷Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 WL 2693858 (Sept. 17, 2007).

¹⁰⁸See *id.*

¹⁰⁹Kevin Sullivan, *E.U. Slaps Third Fine on Microsoft*, WASH. POST, Feb. 28, 2008, at D01.

¹¹⁰*Id.*

¹¹¹Lowenfeld, *supra* note 15.

¹¹²The fact that Microsoft has offices and does business within and throughout the EU, as do the airline companies involved in the conspiracies to fix cargo rates and air fares to and from Europe, suggests that the EU’s aggressive assertions of its perspective jurisdiction against anticompetitive prices are not ipso facto “extraterritorial.” On the other hand, given the rise and extraordinary expansion of multinational companies in this era of unprecedented globalization, it may rather suggest that the concept of an “extraterritorial” assertion of jurisdiction is rapidly evolving into a relic of 20th century thought.

¹¹³Commission Decision 2004/134 of 3 July 2001, Case No. COMP/M.2220-General Electric/Honeywell, 2004 O.J. (L048) 567 (EC), available at ec.europa.eu/comm/competition/mergers/cases/decisions/m2220_en.pdf.

¹¹⁴Case T-201/04, 2007 WL 2693858; see Press Release, U.S. Department of Justice, Dep’t of Justice and Microsoft Corp. Reach Effective Settlement on Antitrust Lawsuit (Nov. 2, 2001), available at www.usdoj.gov/opa/pr/2001/November/01_at_569.htm.

¹¹⁵O’Brien & Lohr, *supra* note 106, at A1.

Ramifications of *Baxter*

The Sixth Circuit's new summary judgment standard for mixed-motive cases offers a difficult standard for defendant-employers while easing the burden for plaintiff-employees. For plaintiff-employees, this case will streamline their ability to have their discrimination cases heard by a jury, as they now merely need to show that a protected characteristic such as race or age played a role in the employer's decision. Conversely, for defendant-employers, by increasing the burden for summary judgment, the new *Baxter* analysis will make it more difficult for an employer to receive a grant of summary judgment, thus increasing the chances of going to trial. Furthermore, this new standard increases the likelihood that plaintiffs will choose to bring any discrimination claim as a mixed-motive claim. Thus, defendants are warned to be on the lookout for an increased number of mixed-motive accusations.

Throughout the circuits, there has been no consensus as to this important standard that acts as a gatekeeper for a case to proceed to trial. It is important for employment counsel to be aware of this widely conflicting split among the circuits. **TFL**

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Endnotes

¹42 U.S.C. § 2000e-2(a)(1).
²*PriceWaterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).
³42 U.S.C. § 2000e-2(m).
⁴*Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d

277, 284 (4th Cir. 2004).
⁵42 U.S.C. § 2000e-5(g)(2)(B).
⁶*Rachid v. Jack in the Box Inc.* 376 F.3d 305, 310 (5th Cir. 2004).

⁷Under *McDonnell Douglas/Burdine*, a plaintiff must first prove by a preponderance of the evidence a prima facie case of discrimination; the burden then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection"; then, third, the plaintiff must prove that the defendant's proffered reason was pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981).

⁸*Trans World Airlines Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (holding that the *McDonnell Douglas/Burdine* framework is inapplicable when there is direct evidence of discrimination).

⁹*Wexler v. White's Fine Furniture*, 317 F.3d 564, 571 (6th Cir. 2003); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999).

¹⁰*Desert Place Inc. v. Costa*, 539 U.S. 90, 92 (2003).

¹¹*Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

¹²*Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004); *Burstein v. Emtel Inc.*, 137 Fed. Appx. 205, 209 n.8 (11th Cir. 2005) (unpublished).

¹³*Rachid*, *supra* note 6, 376 F.3d at 310; *Machinchick v. PB Power Inc.*, 398 F.3d 345, 352 (5th Cir. 2005).

¹⁴*Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004); *Fogg v. Gonzales*, 492 F.3d 447, 451 (D.C. Cir. 2007).

¹⁵To date, the First, Third, and Tenth Circuits have yet to address this issue.

¹⁶*White v. Baxter Healthcare Corp.*, No. 071626, 2008 U.S. App. LEXIS 14188, at *14 (6th Cir. July 3, 2008).

¹⁷*Id.* at *47-48.

¹⁸*Id.* at *48.

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<p>It is with great pleasure that we invite you to participate in the sixth annual Washington, D.C./Baltimore Public Service Career Fair!</p> <p>Last year's event brought more than 75 employers and 400 students together through interviews, table talk sessions, and résumé collections to meet and discuss public interest and government opportunities in the Washington, D.C., area.</p> <p>There are six participating law schools with more than 5,000 J.D. students, many of whom are interested in working in federal careers!</p>	<p>Friday, January 30, 2009 9:00 a.m.–4:30 p.m. George Mason University School of Law</p> <p>For more information: www.fedbar.org</p>
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Q• I wince when I am *verbed*. The latest example of verbing I have seen occurred in an advertisement by a women's store bragging that it "has wardrobed Chicago for years." The new verb *to curate* is even worse than the verb *to four-lane*. Please comment.

A• The correspondent who hates *verbing* may have seen, quoted in this space, Humpty-Dumpty's comment to Alice: "I love to verb. Verbing weirds words!" In that three-word sentence, Humpty-Dumpty "verbed" twice, using both the noun *verb* and the adjective *weird* as verbs.

Unlike Humpty-Dumpty, most people do not like *verbing*, or, for that matter, any change of words from one category to another—unless, that is, those people are the ones who are making the change. Some readers wrote to deplore the verb phrases *to access a file* and *to notice a deposition*. Other readers criticized a news item containing the verb *recidivate*, created from the noun *recidivism*.

When the verb *conflicted* was introduced, readers mailed in their objections, but people now seem comfortable with the new verb. Those of you old enough to have been around then may recall the complaints when *finalize* was introduced and rapidly became a fad word. But, as with all neologisms, when a new word is used often enough, it becomes acceptable and complaints cease.

Some readers objected to the verb *postage* in the phrase, "printing, *posting*, and mailing." They sensibly commented, "Why not use the shorted verb *posting*, which already exists?" Readers were also unhappy about the verb *incentivized*, first noticed in a stock fund prospectus: "The rational hedge fund manager is incentivized to employ this leverage." That verb came from the noun *incentive*, which had also become an adjective (as in "incentive pay").

As recently as the 1940s, English teachers in the public schools were decrying the "new verb" *to contact*. If those teachers are still around, they are probably complaining about the "newer" verb *to impact*.

People have always been unhappy with new words. In 1712, Dean Jonathan Swift wrote a list of the new words he strongly disliked. Some of those have disappeared, but others still around are *bubble*, *bully*, *banter*, *sham*, *shuffling*, *cutting*, and *palming*.

In his infamous 1755 *Dictionary*, Samuel Johnson announced that he intended to "ascertain, purify, and fix" the language. He would purify it by deleting recent additions, many of which he disapproved of. Then he naively expected to "fix" the language (that is, keep it from changing). But when he later wrote the preface to his dictionary, Johnson had come to realize that "neither reason nor experience" justified that expectation. "Being able to produce no example of a nation that has preserved their words and phrases from mutability, [no lexicographer] shall imagine that his dictionary can embalm his language and secure it from corruption and decay. ..."

Our American philosopher, Benjamin Franklin, was an authority on many subjects, but not on language change. When he returned from a long stay in France, he found that during his absence changes had taken place. Among them, a new verb had been created from the noun *notice*. The noun *advocate* had added a verb *to advocate*; and the noun *progress* had spawned the verb *to progress*, which he called "the most awkward and abominable of the three."

Franklin advised his friend, lexicographer, Daniel Webster, that, "if you should happen to be of my opinion with respect to these innovations, you will use your authority in reprobating them." In his book, *Benjamin Franklin, His Wit, Wisdom, and Women*, Seymour Block, Franklin's biographer, comments: "If Webster *advocated* such action it is unlikely it *progressed* very

far, for very little effect can now be *noticed*."

Most of us are comfortable in our old clothes and with the language we learned at our mother's knee. But change is inevitable, and once new words become widely used, they too become comfortable. But if the majority rejects them, they will disappear.

Potpourri

"[The law] is like a single-bed blanket on a double bed, and three folks in the bed and a cold night. ... Hell, the law is like the pants you bought last year for a growing boy, but it is this year and the seams are popped. ... The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit, and by the time that law gets on the books you would have done something different." (Robert Penn Warren, *All the King's Men*, quoted in Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations*.) **TFL**

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Liberty of Conscience: In Defense of America's Tradition of Religious Equality

By Martha C. Nussbaum

Basic Books, New York, NY, 2008. 406 pages, \$28.95.

REVIEWED BY DAVID M. ACKERMAN

Martha Nussbaum is not a lawyer; she is a political philosopher, who currently holds appointments in the Philosophy Department, Law School, and Divinity School at the University of Chicago. Reflecting her broad interests and competencies, her new book, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*, seeks to do much more than parse the Supreme Court's decisions involving the Establishment Clause and the Free Exercise Clause of the First Amendment—although she does that well. Instead, she identifies the animating principles that undergird our tradition of religious liberty, shows how they have developed in our history, and demonstrates how they have been tested—and sometimes repudiated—in the numerous controversies involving government and religion that permeate the American story. The book recounts some fascinating history and expertly analyzes a variety of judicial decisions. But, above all, this is a book of ideas—ideas that Nussbaum claims have created a tradition of religious fairness in our polity that is both fragile and enduring. *Liberty of Conscience* is eminently readable, perceptive, and provocative. It is well worth the time of anyone concerned about religious liberty.

From the outset, Nussbaum recognizes that no single idea can fully account for the complexities of how the American colonies, states, and nation have dealt with religion. Instead, she looks at six normative principles whose interplay, she says, has created “a distinctively American” tradition of religious liberty: (1) equality, (2) respect for conscience, (3) liberty, (4) accommodation, (5) nonestablishment, and (6) separation. All these principles are important, Nussbaum asserts, but the

first two are particularly significant—the notions that, regardless of our religious commitments, we all stand as equals in our political system and that the public sphere needs to respect and protect the exercise of conscience.

Nussbaum looks primarily to American history both for the philosophical writings and the practices that gave rise to our “distinctively American” understanding of religious liberty. She concentrates in particular on the views and experiences of two remarkable men—Roger Williams in the 17th century and James Madison in the 18th century. Both men, she notes, were religious, and both lived in times marked by vigorous political and religious contention. Both men, she says, stand as the fundamental theoretical and practical architects of the principles that have shaped our tradition of religious liberty.

If *Liberty of Conscience* does nothing else (and it does much more), it convincingly rescues Roger Williams from the narrow philosophical confines to which he has been relegated by past scholarship. Indeed, Nussbaum finds Williams' writings and actions to be the wellspring of all the principles of religious liberty identified above and especially of the principles of respect for conscience and civic equality. According to Nussbaum, some scholars—in particular, Mark Howe, in his book, *The Garden and the Wilderness*—have used Williams' passing reference to a “wall of separation” between religion and the state to mean that his primary concern was to protect the “garden” of religion from the “worldly corruptions which might consume the churches if sturdy fences against the wilderness were not maintained.” Certainly, Williams wrote passionately about the preciousness and fragility of the individual conscience and its need for protection. But Nussbaum convincingly demonstrates that Williams was equally concerned with overreaching by the churches in the public domain and with the need to keep the political realm free from religious orthodoxy. Indeed, much of his writing was intended to rebut the views of John Cotton, a prominent minister in the Massachusetts Bay Colony, who vigorously defended the desirability of

theocratic government and the necessity of persecuting dissenters. It is Williams, she contends, who first caught “hold of the whole family of principles that form ... the distinctive American approach to religious fairness.” Moreover, she notes, he put these principles into practice in the colony of Rhode Island, which he founded after being forced into exile from the Massachusetts Bay Colony and which became a haven for religious dissenters in the 17th and 18th centuries and a model—albeit an imperfect one—of how persons of differing faiths could live together in peace.

The principle of human equality became even more central in the philosophical discourse of the 18th century, Nussbaum says, and she illustrates this contention with intriguing forays into Stoic philosophy—which, she says, was the foundation of classical education during the century—and the writings of John Locke, Adam Smith, and Immanuel Kant. The equality principle, she contends, gave powerful impetus to our rejection of the English monarchy and to our creation of a republic “that did not contain various baneful types of hierarchy.” “Salient among the rejected types of hierarchy,” she asserts, “was an establishment of religion, by which the framers meant governmental privileges ... granted to one church or group of churches.” Such establishments, she shows, inevitably created favored and disfavored classes of citizens, rarely “protected religious liberty with an equal hand,” and often led to the persecution of those who were not part of the established church or churches.

Nussbaum examines in detail both the controversy in Virginia in 1784–1785 over whether a general tax ought to be levied for the support of teachers of the Christian religion and the adoption of the religion clauses of the First Amendment; Madison played an indispensable role in both controversies. On the former, Nussbaum finds the central argument of Madison's famous *Memorial and Remonstrance Against Religious Assessments*, which turned the tide against the assessment bill, to be based on equality. The fact that the as-

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assessment bill would endorse one religion—Christianity—and fund its teachers, Madison wrote, “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.” Madison’s *Memorial* uses other arguments as well but, Nussbaum says, its central argument was that the bill would set up a hierarchy of religious favorites and nonfavorites, insiders and outsiders.

Nussbaum writes that the principle of equality also underlies both the “no religious Test” clause in Article VI, section 3, of the Constitution and the Free Exercise and Establishment Clauses of the First Amendment. Indeed, she says, the principle was so widely accepted at the time that the “no religious Test” clause passed “without demur.” With respect to the religion clauses, Nussbaum notes that, even though Madison authored the original draft, the clauses ultimately were a product of congressional debate and compromise and that it may not be possible to determine their original meaning with absolute clarity. Nussbaum maintains, however, that the equality principle is implicit “in the idea that Congress may not prohibit free exercise—to anyone.” Moreover, the Establishment Clause, she says, embodied the widely held view (and the one Madison expressed in his *Memorial*) that “any establishment makes people’s civil rights unequal.”

Nussbaum spends considerable time on the question that has often bedeviled our political system: How should the beliefs and practices of religious minorities be handled? Religious majorities, she observes, rarely make laws that inhibit their practice of religion; but such laws may well burden religious minorities, especially those that are unfamiliar to others. Should religious minorities, she asks, be required to bear the burden as best they can (as Locke contended)? Or should the law accommodate the beliefs and practices of such minorities and excuse them from compliance when a law unduly burdens a religious practice (as Williams contended)? Which approach better serves religious liberty?

Nussbaum analyzes these questions not only by reviewing all the pertinent

Supreme Court decisions and congressional enactments but also by recounting three instances in our history when “admirable principles of equal respect and equal liberty seemed to fly out the window, and politics was driven by fear and hate.” All are fascinating stories—the overt discrimination against Catholics that arose when their numbers burgeoned in the 19th century and persisted well into the 20th century; the suppression of the Mormon practice of polygamy in the latter half of the 19th century; and the violence against, and expulsion of, Jehovah’s Witnesses who refused to join in the Pledge of Allegiance and salute to the flag in the public schools in the 1930s and early 1940s. As Nussbaum makes clear, religious liberty was often crushed during these episodes. Yet, in what may be an overstatement, she claims that ultimately “the respect-conscience tradition triumphed.” (Interestingly, in the course of her analysis of the controversy over Mormon polygamy, she vigorously defends polygamy, particularly as compared to the legal status of women in monogamous marriages in the late 19th century.) Through these and other instances, Nussbaum builds a strong case that for religious liberty to be substantively equal, religious minorities ought to be accommodated.

Nussbaum also examines in detail all the knotty theoretical and practical issues and arguments that have arisen under the Establishment Clause, including religious exercises in the public schools, public aid to religious schools, the display of religious symbols by government entities, private religious speech, incorporation, nonpreferentialism, originalism, and others. In the course of that examination, she repeatedly critiques what she sees as excessive judicial reliance on the principle of separation of church and state—a principle she nonetheless considers to be an essential element of our tradition of religious liberty. The principle of separation of church and state, she argues, has often been an instrument of hostility toward people of faith and—particularly in the area of public aid to sectarian schools—has led the Supreme Court astray. She analyzes the various tests the Court has devised for cases

involving the Establishment Clause—the *Lemon* test, coercion, and endorsement—and makes clear her view that Justice O’Connor’s endorsement test best embodies the principle of civic equality that ought to animate decision-making in this area of the law.

Nussbaum makes a glaring omission in her discussion of the cases involving school prayer. She critiques the Supreme Court’s decisions in *Engel v. Vitale*, *Abington School District v. Schempp*, *Wallace v. Jaffree*, and *Lee v. Weisman*, and finds much that is commendable in the Court’s reasoning. But because the last case she examines, *Lee v. Weisman*, relied only on the coercion test, she concludes that “the tradition that bases analysis of school prayer on a fundamental concern for fairness is now seriously at risk.” She seems unaware of the Court’s subsequent decision in *Santa Fe Independent School District v. Doe*, which held that student-led prayer at school football games violated the Establishment Clause. That ruling was based on the application not only of the coercion test but also the endorsement test and the *Lemon* test. It seems likely that analysis of that case would have changed Nussbaum’s conclusion about the state of the law on this issue; and because of her obvious familiarity with all of the pertinent Supreme Court decisions in the other areas she analyzes, its omission is surprising.

Nonetheless, that lacuna amounts to little more than a quibble in the context of the whole book. *Liberty of Conscience* is an excellent, thoughtful work. At the outset, Nussbaum describes its purpose to be “both to clarify and to warn.” The clarification is essentially related to how the principles underlying our distinctive tradition of religious liberty, and particularly the principle of equality, arose and how they have been used and sometimes abused in dealing with concrete issues. Nussbaum’s warning recalls the historical truth that our tradition of religious liberty has often been threatened, particularly at times when fear has been a major element of our national experience. Those threats, she says, have come from both the left and the right, and now seem to be coming from “an organized, highly funded, and

widespread political movement [that] wants the values of a particular brand of conservative evangelical Christianity to define the United States.” She concludes the book by saying that “Americans have done pretty well in forging a political order that exemplifies equal liberty of conscience. Given human frailty, however, we always need vigilance lest backsliding occur. ...” This book fully accomplishes both its purposes. **TFL**

David M. Ackerman recently retired after serving as legislative attorney with the Congressional Research Service at the Library of Congress. Among his legal specialties is the law of church and state.

The Next Justice: Repairing the Supreme Court Appointments Process

By Christopher L. Eisgruber

Princeton University Press, Princeton, NJ, 2007.
191 pages \$27.95.

REVIEWED BY CHARLES S. DOSKOW

During the confirmation hearings of Chief Justice Roberts, a senator who was among the last to question the nominee made a most revealing comment: “There comes a time,” he said, “when everything has been said, but not everyone has said it.” As a senator, the questioner was entitled to his few minutes of national exposure, which he was not about to relinquish, but his comment amounted to an acknowledgment that by then there was no particular point to his personal bloviation. The same might have been said of the comments of the senators who had already questioned the nominee. Each of the hearings on the nominations of both Roberts and Samuel Alito was a grand Kabuki drama, with the senators expressing their opinions at length and then inserting a question mark at the end of their ramblings, followed by the nominee’s giving as minimalist an answer as he could get away with.

It was an awful process. As the Russian worker said, “We pretend to work, and they pretend to pay us.” During the hearings, the senators pretended to ask questions, and the candidates pretended to answer them. And this farce was all

in the name of an attempt to determine the nominee’s “judicial philosophy.”

Christopher L. Eisgruber bills his book, *The Next Justice: Repairing the Supreme Court Appointments Process*, as a treatise that proposes a new and improved way to allow the Senate and the public to make informed judgments about the persons nominated to serve on the Supreme Court. Eisgruber does not really succeed at achieving that goal, but it is a pretty good book anyway.

Eisgruber, a former Supreme Court law clerk, is now provost and professor of public affairs at Princeton University. His observations on the Court, its justices, and past Senate confirmation processes, are lucid. Eisgruber describes approaches taken by senators on both sides of the aisle: Republicans asserting that only the nominee’s qualifications are at issue, and Democrats wanting to explore the nominee’s “legal philosophy and judicial ideology.” Eisgruber maintains that knowing the nominee’s judicial philosophy is essential to a making a sound decision.

But what is a judicial philosophy, and is it relevant? Eisgruber writes that the term refers to “the basic themes or values that govern [a nominee’s] attitude toward judicial enforcement of the Constitution.” The book provides excellent discussions of the philosophies of Justices William Brennan, Hugo Black, Stephen Breyer, Antonin Scalia, and Sandra Day O’Connor. Eisgruber’s comments on each justice buttress the point that there are such philosophies and that they are knowable, but that the present process does not lead to acquiring knowledge of them.

Eisgruber believes that the quest in choosing a justice should be for what he calls “moderation.” He describes a moderate judicial philosophy as “an open-mindedness toward novel claims of constitutional justice brought by disadvantaged groups or persons, and a lively and thoughtful understanding of the limits of the judicial role.” An effort to find a person with these qualities will not involve characterizations such as “strict construction” or “judicial restraint”; nor will the pejorative “activist judge” substitute for analysis and provide a basis for partisan attacks.

Eisgruber’s position is clear: the hearings as currently conducted are

not the way for the Senate to inform itself or the public. Instead, prior to the hearings, the senators should study the record of the nominee with great care. At the hearings, they should ask about the nominee’s record and encourage the nominee to be candid about his or her beliefs. The senators should not allow the nominee to hide behind the excuses that he or she cannot comment on matters that may come before the Court, or that the question is too general or too hypothetical to answer. Eisgruber describes the Roberts and Alito hearings as “spectacular failures,” because the nominees were not required to define their judicial philosophies.

Eisgruber suggests that senators should ask nominees the following questions:

- What twentieth-century justice’s jurisprudence do you most admire and why?
- What purposes does judicial review serve?
- Do you believe that justices should defer to Congress and to state legislatures when the meaning of the Constitution is unclear or contestable?

These are all good questions, but would they assure getting meaningful answers?

Reliance on moderation is a wistful hope as long as the nomination process itself forces the inquiring senators to take extreme positions. The issues that have become touchstones in the nomination process—particularly abortion—do not, in the present state of our polity, lend themselves to moderate viewpoints. As long as senators must justify themselves to advocates on both sides of hot button issues, it is unlikely that the partisanship of the confirmation process as it stands today will be significantly diminished.

Also, of course, one person’s moderation is another’s extremism. Bill Clinton named two moderates to the Court, the last in 1994. When George W. Bush’s turn came, he named two individuals who were entirely acceptable to his conservative constituency.

The Next Justice contains many in-

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teresting descriptions of the Court, including its inner workings, the role of the law clerks, and the process of decision-making. Eisgruber has a great deal of respect for the Supreme Court as an institution, and he would like to have a confirmation process worthy of the Court. So would we all. **TFL**

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Striking First: Preemption and Prevention in International Conflict

By Michael W. Doyle

Princeton University Press, Princeton, NJ, 2008. 200 pages, \$24.95.

REVIEWED BY TODD GARVEY

When to employ armed force in the interest of self-defense is perhaps the most important foreign policy issue of our time. Although the consequences of engaging in a pre-emptive or preventive war are great, the failure to act in the face of an imminent threat can be even more destructive. In *Striking First*, Professor Michael W. Doyle attempts to develop a paradigm for determining the point at which a country is justified in taking preventive military action. In the midst of the war on terror and the war in Iraq—two wars arising from the Bush doctrine of pre-emption—and a third potential preventive war in Iran on the horizon, Doyle's analysis of what constitutes a just defensive war is timely.

In Doyle's view, existing international standards for anticipatory self-defense are ineffective and have failed to evolve in the post-Sept. 11 world. He quickly distinguishes between the oft-confused principles of pre-emption and prevention. Pre-emption, the more narrow doctrine, was defined by Secretary of State Daniel Webster in 1841 to include only a response that is "(1) 'overwhelming' in its necessity; (2) leaving 'no choice of means'; (3) facing so imminent a threat that there is 'no moment for delibera-

tion'; and (4) proportional." Very few scenarios can satisfy this standard: the enemy must be at your doorstep and on the verge of an attack. The broader prevention doctrine, by contrast, requires no imminent threat and allows acts intended only to forestall a distant threat from evolving into a real and active one. Doyle argues that current international law requires a state to prove the overly restrictive standards of pre-emption in order to be justified in attacking another state. The Bush administration, by contrast, uses its own far broader standard, known as the "one percent doctrine," to justify its unilateral action. Neither pre-emption nor prevention has been successful as a standard in justifying action when it is warranted and barring it when it is not. Doyle's purpose is to find an effective middle ground for the United Nations and individual states to use in determining whether to take or approve preventive action.

The Bush administration's expansive one percent doctrine stands in drastic opposition to accepted international law. When intelligence shows even a one percent chance that a terrorist attack will be carried out on American soil, the Bush administration considers a pre-emptive response to be justified. A one percent risk is treated as a certainty. Doyle argues that the Bush doctrine is "subjective and open-ended" and fearfully open to abuse. The country is kept in a permanent state of fear, in which attacks of minute likelihood are treated as inevitable. The Bush administration's lawyers, exaggerating the inevitability of potential attacks, fail to accurately weigh the costs and benefits of preventive action. Doyle adds that unilateral action based on a one percent risk courts "international instability" and weakens "moral restraints" by purporting to justify preventive action on a subjective belief that a threat exists. Were the Bush doctrine to become commonplace globally, the result would be constant military conflict between the most contentious border states, such as India and Pakistan, China and Taiwan, and Israel and Lebanon—all in the name of preventive war.

As little as Doyle likes the Bush doctrine, he freely admits that the tradition-

al alternatives to preventive war, which were successful during the Cold War, no longer work and mislead us when developing foreign policy. When the enemy is an irrational non-state actor, conventional tactics—such as deterrence, strong military defense systems, economic embargoes, and diplomacy—are ineffective. Groups such as Al Qaeda cannot be rationally deterred. Deterrence hinges on the looming threat of military retaliation, but when there is no defined entity to retaliate against and when, as Doyle notes, death in the war against the Western world "is for them, in effect, a reward, not a punishment," deterrence through the threat of retaliation is futile. In addition, terrorists attack in ways that traditional military defenses cannot prevent, and terrorists are unaffected by economic embargoes and diplomatic ventures. Doyle argues that, for these reasons, "active preventive measures"—including unilateral or multilateral armed attack—may be a necessary and effective strategy. Recognizing this fact, Doyle attempts to provide a standard for determining when such action, whether unilateral or multilateral, is justified.

Doyle seeks to present a workable standard for anticipatory self-defense—a standard positioned between the "too strict" international standard and the "too loose" Bush doctrine. Doyle would have the United Nations Security Council use this standard when it considers whether preventive action is justified in a given situation, but he concedes that, when the U.N. fails to act, this standard may be used cautiously by a single nation contemplating unilateral action. Doyle's proposed standard actually consists of four standards that would be used together to evaluate potential preventive actions: lethality, likelihood, legitimacy, and legality. Doyle's formula is multiplicative, so when one standard is valued at zero, the net product is zero and no action is justified.

Doyle defines the first standard, lethality, as the amount of anticipated harm, discounted by the reversibility of the harm. Doyle does not measure harm solely in terms of lives lost or property destroyed, but he includes the loss of territorial integrity and political

independence. Any destruction that can subsequently be reversed (property that can be rebuilt, for example) would be discounted from the final evaluation.

The second standard, likelihood, refers to the probability that a perceived threat will occur. Doyle's definition includes an assessment of the threatening actor's capability to carry out an attack as well as the actor's intentions or motives. The likelihood that potential harm will actually occur is incredibly hard to determine. Doyle argues, as have many modern international relations scholars, that liberal regimes are less likely to take aggressive action against other liberal regimes, whereas dictatorships are less predictable and more likely to engage in aggressive actions. Doyle settles on a definition of "likelihood" that includes an analysis of the regime in question—particularly its military capacity and its past behavioral patterns—and focuses on the explicitness and credibility of its threats.

The third standard, legitimacy, includes weighing a proportional response, limiting the response to the minimum necessary to mitigate the threat, and undertaking the requisite deliberation before deciding to act. When considering a proportional response, a nation must consider the entire gambit of preventive actions, including everything from a blockade and sanctions, to a surgical military strike, to a full-scale invasion and occupation. Doyle argues that, to prevent civilian casualties, it is imperative that any proportional preventive measure discriminate between combatants and noncombatants and target only those who are most responsible for the threatened aggression. In addition, a claim of legitimacy requires that a state be able to explain why preventive action is immediately required to counter a threat.

The final and perhaps most complex standard, legality, focuses on whether the threatening actor has violated international law, and whether the proposed response comports with international law. Process provides the key to legality. Prior to taking preventive action a state must show that the aggressor has violated international law either domestically or extraterritorially. In addition, the preventive response itself must be

legal, which means that the state must seek authorization from the U.N. Doyle argues that some unilateral acts may be legal and justified even when the U.N. refuses to authorize multilateral preventive action. This possibility exerts pressure on the U.N. to approve justified actions, because, as Doyle writes, "Rather than enjoying a monopoly, the [U.N. Security Council] will now know that its actions are subject to the 'market' of alternative judgment."

Will Doyle's idealistic standards for justified action really work? Will they lead a government to make the right decisions? Doyle attempts to answer these questions by applying his standards to historical instances of preventive action, including South African apartheid, the Cuban missile crisis, and Israel's air strike on the Iraqi nuclear reactor in Osirak. Consider the Cuban missile crisis, perhaps the defining moment of John F. Kennedy's presidency and perhaps the most dangerous event in human history. The assessment of lethality was high, with ballistic missiles in such close proximity to the mainland that U.S. cities were vulnerable to attack with little warning. The experience of the Cold War indicated that the likelihood that the Soviet Union would indeed use the missiles in Cuba was small, but the secrecy with which the Soviet Union placed the missiles in Cuba was alarming. Although Doyle writes that a proposed air strike would have been an illegitimate response to the missile threat, the more measured quarantine represented a justifiable use of preventive force. Although the blockade was technically a violation of international law, and there was nothing illegal in the Soviet Union's shipping missiles to Cuba, "Kennedy appropriately chose the minimum proportional measure that forced the withdrawal of the missiles."

In applying his standards to the invasion of Iraq by the United States in 2003, Doyle finds justification for the preventive action to be lacking. Although Iraq had clearly violated international law through a long record of human rights violations and defiance of U.N. resolutions, the American response broke the bounds of proportionality. Doyle argues that Saddam Hussein's history of aggression and his

destabilizing influence in the Middle East may have justified continued economic sanctions, inspections, and perhaps strategic and targeted air attacks, but the dubious evidence of the existence of weapons of mass destruction and the lack of a connection between Saddam and Al Qaeda made the U.S. invasion and subsequent occupation "illegitimate, radically disproportionate, and unjustifiable." Iraq presented a low lethality threat that was not likely to come to fruition, and the response of the United States was excessive, illegitimate, and probably illegal.

With politicians openly discussing preventive action against Iran because of its nuclear program, we find ourselves in the midst of the latest debate over the potential use of anticipatory self-defense. If we apply Doyle's four factors to the Iranian situation, how does it come out? In Doyle's view, a preventive attack on Iran would not be justified. The Iranian military possesses the potential for significant lethality, but it is debatable whether President Ahmadinejad's threats have merit or are simply bluster. Doyle also points out that Iran's pursuit of nuclear capabilities seems to be within the scope of the Nuclear Non-Proliferation Treaty, and that, with the uncertainty over Iran's ultimate goal—whether Tehran seeks to obtain nuclear power for military purposes or for energy use—only cautious, multilateral, and limited sanctions are currently justifiable. Thus, a preventive attack on Iran could not be justified even if one dismisses the enormous costs of any military action of sufficient capacity to remove Iran as a threat.

Striking First includes comments on Doyle's standards by Harold Koh, the dean of Yale University Law School; Jeff McMahan, professor of philosophy at Rutgers University; and Richard Tuck, professor of government at Harvard University. Each commentator generally supports Doyle's conclusion and none of them presents a strong critique of Doyle's essays. Dean Koh's chief concern is over Doyle's contention that there are times when unilateral preventive action must be authorized. Koh argues that the premise of "anticipatory self-defense" is logically inconsistent; for Koh, all pre-

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emptive force is inherently unjustifiable. Koh would ban unilateral preventive military action and would require countries that engage in such conduct to submit their justifications as a defense to an illegal act. Professor Tuck identifies the classic barrier to internationally enforced standards: the lack of an entity, such as the U.N. Security Council, to enforce international law. Finally, Professor McMahon advises Doyle to consider more deeply the moral restraints on preventive military action. According to McMahon, no attack can be justified based on a potential future act—no matter how imminent it may appear. He goes so far as to argue, quite unrealistically, that no military action is justified unless each individual attacked is morally culpable for the threat posed by his or her nation or organization. McMahon bases culpability on action, which means that even an armed and uniformed Iranian soldier stationed at a nuclear facility or an Al Qaeda training camp full of new recruits would not qualify as a target of a justified preventive action.

Preventive military action is a fact of modern international military strategy—so much so that the public today elects leaders with the expectation that, if the country is threatened, the leader will take swift, decisive, and preventive action. If preventive military action is inevitable, world leaders are left only with the task of determining the point at which a threat becomes actionable. The line has yet to be drawn, but certainly the line must be drawn somewhere between imminent pre-emption and Bush's reckless one percent doctrine. Doyle presents the reader with a set of truly idealistic standards to be applied in drawing that line, but perhaps a certain level of idealism is required—and indeed encouraging—in the face of the very real, very volatile, and very deadly doctrine of preventive war. **TFL**

Todd Garvey is a third-year law student at William and Mary School of Law, where he chairs the student division of the Institute of Bill of Rights Law and writes for its blog (www.ibrlsd.blogspot.com). He earned his undergraduate degree in political science from Colgate University.

Law Firm Fees & Compensation: Value & Growth Dynamics

By Edward Poll

LawBiz Management Co., Venice, CA, 2008. 150 pages, \$47.00.

REVIEWED BY JOHN C. HOLMES

The goal of billing, Edward Poll states in *Law Firm Fees and Compensation*, “is to deliver value as perceived by the client for a total price deemed to be appropriate and reasonable by both client and attorney.” This how-to book gives a concise explanation of suggested methods of managing a law firm's billing and discusses related issues as well.

Poll strongly advocates that lawyers use engagement letters that spell out the terms of their agreements with their clients, the means of payment, and other matters that will aid their clients in understanding the lawyer's role in representing their interests. Throughout the book, Poll emphasizes that keeping clients informed and aware of the services being rendered on their behalf is crucial to making clients feel that the fees they are charged are justified. Lawyers do not want to leave clients with the impression that the lawyer's primary goal is to bill hours.

But billing by the hour is only one method, of course, and Poll discusses them all, including a fixed or flat fee, contingent fees, retainers, and premium pricing. He considers the advantages and disadvantages of each, which type is most appropriate in certain circumstances, and how fee arrangements might be modified or combined. He recommends that, in many cases, lawyers should not bill for the time they spend discussing legal issues with their colleagues.

Retainers enable a law firm to serve its clients' long-term interests while providing flexibility that will allow for different types of billing when a situation calls for an alternative. Flat or fixed fees for particular services are popular, but they should take into account all costs of doing business, including potential collection costs. Stating what may be obvious, Poll notes that contingency fees are usu-

ally associated with plaintiffs' actions, particularly personal injury and collection cases. Contingent fees are useful not only because many plaintiffs are unable to make payments based on hourly rates but also because an experienced and shrewd lawyer can size up a case in a way that makes it possible to obtain maximum value at minimum cost. Poll also makes a less obvious point, however: defense lawyers may also use contingency fees. A defense lawyer may, for example, offer his or her services at a “discounted” hourly rate, supplemented by a contingent award based on settling or litigating an outcome in which the defendant must pay the plaintiff less compensation than an amount upon which the defense lawyer and the defendant had previously agreed.

Poll also discusses how to negotiate billing rates; when to adjust fees (up, if warranted, but rarely, if ever, down); and the nuts and bolts of billing, including collections. He addresses not only good management practices but also ethical requirements, including those that govern splitting fees with other attorneys. He briefly describes recent trends that have reduced lawyers' earnings; for example, large corporate clients have pared down their use of outside law firms and have focused on settling cases for the lowest possible cost.

Although Poll purports that *Law Firm Fees and Compensation* is aimed at large law firms, his guidance can also benefit small and medium-sized firms, which may have less experience and expertise in billing. Yet I found the book disappointing in its lack of real-world examples of how actual law firms schedule their billing and in its lack of explanations of why various billing methods have succeeded or failed in actual cases. Readers looking for exciting revelations or insights into the legal profession will be disappointed by the book's narrow focus. **TFL**

John C. Holmes served as a U.S. administrative law judge for 30 years, retiring in 2004 as chief administrative law judge at the U.S. Department of the Interior. He currently works part time as an arbitrator and mediator and can be reached at trulnterry@aol.com.



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Sally Franklin Zweig

New Members—July

Ruth J. Addison
Stephanie F. Ahlstrom
Eric M. Allain
Michael D. Allmont

Paul W. Ambrosius
Bonnie J. Anderson
Theresa S. Anderson
Salvador J. Antonetti-Stutts
Julie A. Arbore
Fay Arfa
Byron R. Arthur
J. Christopher Baird
Margaret E. Baker
Valerie P. Barbon
Mark L. Barbre
William F. Barnes
Caroline F. Bartlett
Aaron M. Barton
Paige S. Bass
Mary L. Beers
Steven P. Befera
Ashleigh E. Bergeron
R. Craig Bettis
Justin Boron
Renee S. Bourg
David Bowman
Scott Bradney
Jeffrey M. Brandt
Dave L. Brannon
Karl B. Brock
Jacqueline C. Brown
Jason G. Brown
Gregory Brumfield
Grant T. Burgoyne
Cheryl A. Bush
Daniel J. Card
Patrick R. Carlson
Dione C. Carroll
Walter H. Carter
Robert J. Chambers
Shann M. Chaudhry
Kathleen G. Chewning
Dominic J. Chieffo
Madeline M. Chimento
Jeremy D. Chisholm
Stacey S. Chubuck
Carlo A. Ciccone
Lilliam M. Coleman
Alissa R. Collins
Allison M. Colomb
Thaddeus J. Conlisk
Joseph B. Connell
Colm F. Connolly
Anne Cooper
Michael J. Cooper
Jessica L. Copeland

Joshua T. Copeland
Selket N. Cottle
Thomas W. Cunningham
Robert K. D'Andrea
Chad A. Danenhower
Lafcadio Darling
Jared A. Davidson
Judith L. Davila
Shannon A. Davis
Gerald C. deLaunay
Anthony N. DeMaria
Erinn D. DePorre
Traci S. Dingle
Brendan J. Dolan
William K. Dozier
Rosanne M. Dummer
Pamela E. Dunn
Courtney D. Earle
Jennifer M. Eble
Derek B. Ensminger
Renee L. Erickson
Diana M. Espinosa-Nunez
Irasema Estrada
Tod J. Everage
Abigail L. Fee
Joseph G. Feldstein
Ann P. Fenton
Kennisha Firstley
Jacqueline A. Flemons
Bruce S. Flushman
Rachel M. Flynn
Benjamin Y. Ford
Walter J. Gabriel
Gregory W. Gardner
Arthur M. Garel
Shiva P. Gill
Lawrence F. Girard
Timothy J. Goodson
Andrew J. Graeve
Ashley B. Graham
Helaine Gregory
Wayne R. Gross
Medlock M. Harbison
Milagros L. Hardy
William D. Harter
Melissa S. Hedrick
Andrew C. Heinrichs
Heather M. Hendrix
Stephen L. Hennessy
Amy E. Hensley
Kathleen E. Herbein
Peter J. Herne

Maurice L. Hood
Joel D. Horton
Ashanti S. Huey
Lacy G. Hugh
Brian M. Hull
Christopher J. Hunter
Rachel M. Hutchens
Sara E. Hutchins
John H. Inabinet
Jo Lynn Jeter
Valerie W. Jusselin
Robert A. Kaatz
Amir Kahana
Alexis A. Kaylor
Brian C. Kelly
Raymond M. Kethledge
Louise A. Kirk
Tanya B. Koenig
Anthony J. Kotchis
George S. Kounoupis
Lea P. Krauss
Diea D. Kroulik
David B. Lail
Bart E. Lemmon
Ira D. Leuy
Allison B. Lewis
Andrew T. Lilly
Jarrod F. Loadholt
Lauren E. Lonergan
Dennise N. Longo Quinones
Cathy M. Mahon
Manuel C. Maltos
Jeffrey E. Marcus
Jorge L. Marquina
Jason E. Marshall
Jobby C. Mathew
William L. Mauk
Aaron C. Mayer
Mary G. McAuliffe
Frank M. McElroy
Elisabeth M. McOmber
Stafford J. McQuillin
Keri A. McWilliams
Christopher B. Mead
Hon. John M. Meisburg
Steven F. Meyer
Bert J. Miller
Natalie K. Mitchell
Marne K. Mitskog
Esther K. Moore
Matthew F. Morgan
Jenny R. Moser

Ben E. Motal
Hailey M. Mullican
Moheeb H. Murray
Yvonne R. Murray-Boyles
Mark R. Nash
Mariana Negron-Vargas
Christine Nestor
Christina Neville
Derek M. Newberry
Sarah K. Newcomer
Stephanie E. Nodine
Raul Noriega
James E. Nutt
Nina L. Palmer
Corey P. Parenton
Arlene V. Patino
Steven M. Pena
Joseph H.L. Perez-Montes
Deborah S. Perry
Jeffrey C. Perry
Thomas H. Peyton
Travis Pietrusza
William B. Porter
Gregory S. Powell
Lauren M. Pringle
Sabrina D. Puglisi
Lindsay V. Purnell
Banureka Ramachandran
Robert P. Ray
Rebecca L. Reed
Cathy L. Reese
Anthony R. Reeves
Devin Reid
Jessica L. Reinsch
Elizabeth R. Richard
Albert J. Roberts
Carlos A. Rodriguez
Jackeline S. Rodriguez
Laura A. Rossini
David E. Runck
Adam J. Russ
Patrick B. Sanders
Truman W. Schabilion
Jonathan R. Schulz
James G.B. Scott
Richard D. Serio
Colin D. Sherman
Meredith C. Shoop
Douglas J. Shumway
James R. Silvers
Matthew D. Simone
Andrew D. Skale

Lindsey M. Skoviera
Brian D. Smith
Kristin U. Somich
Brian E. Sopp
Caroline A. Spangler
Mary M. Spell
Christine L. St. Germain
Taylor H. Stair
Don Stecker
Matthew L. Stedman
Natalia Steele
Courtney A. Stevens
Marc A. Stroope
Jeanette B. Sullivan
Julia C. Summers
Sandra L. Sutak
Kara M. Swasey
Grey Tesh
Lloyd A. Thames
Michael Thompson
Michael C. Tornero
Kaci L. Trojan
Bedemoore Udechukwu
Johanna C. Valenzuela
Erica E. Valladares
Marlon O. Valladares
Rhaiza G. Velez
Adam T. Vernon
J.P. B. Vogel
Ben L. Wagner
John E. Wallace
Katherine A. Wallar
Nicole Walsh
Daniel J. Walter
Teckla S. Wamack
Elizabeth C. Warren
Derrick N. Weber
David A. Weintraub
Wilson G. Weisenfelder
Stephanie H. Wilke
Gregory L. Wilkinson
Jarell Williams
Rebecca L. Williams
Chad E. Willits
Meredith A. Wilson
Jay L. Withee
Jacob Wittig
Ryan N. Yadav

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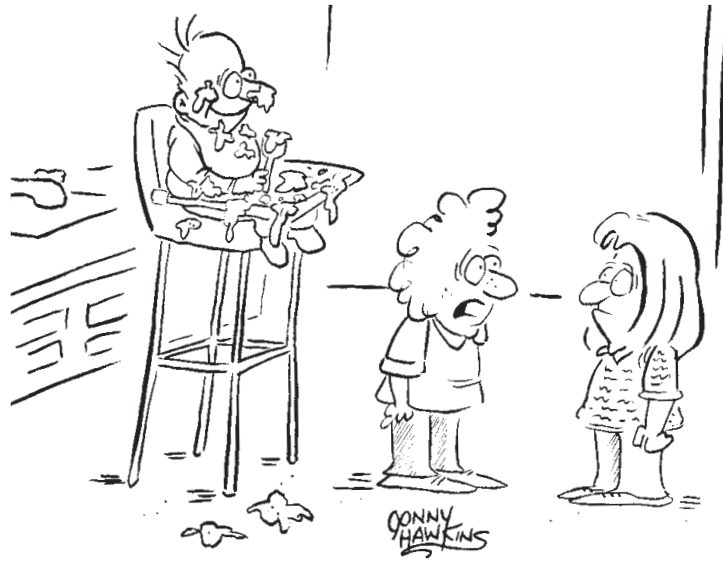
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"Watch out for my little brother - he uses smear tactics."

