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Proceedings of the Academy for Studies in Business Law

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THE WRONGFUL TAKING OF TIMBER; OR WOODMAN, SPARE THAT TREE!

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ABSTRACT

Woodman, Spare That Tree!
Touch Not a Single Bough!
In Youth it Sheltered Me.
And I'll Protect it Now,
'Twas My Forefather's Hand
That Placed it near His Cot,
There, Woodman, Let it Stand
Thy Axe Shall Harm it Not. (1)

INTRODUCTION

TREES! One can just hear the voices of Charleton Heston, John Denver and Eddie Albert on radio and television expounding on the great value of trees. We are told of the many ways that trees help mankind and we are encouraged to run right out and plant a tree, even in our own neighbor's backyard. Our own observations tell us of the wonders of trees; shade in the summer, colors in the fall, contrast in winter, and the announcement of spring. They put oxygen in the air, prevent soil erosion, give shelter to wildlife, and provide us with materials for thousands of products. They are even messengers of love - witness Cupid's heart carved in many a tree with an arrow centering the lover's initials. Although man has been able to produce new varieties of trees, grow bigger ones and taller ones, it still stands as nature's own. To paraphrase Joyce Kilmer, ". ..poems (and academic papers) are written by fools like me, but only God can make a tree."(2)

But trees provide something else - money. Although their value fluctuates as does any natural resource commodity, recently that value has risen immensely. In 1994 alone the United States produced over 47 million board feet of timber for consumption. (3) We exported over 46 million board feet. (4) In 1992, the last year that figures were available, the value of timber produced in the United States was over $935 million dollars. (5) There's money in "them thar" trees and the beauty of this natural resource is that it is renewable.

Because of this fact, landowners who raise trees, either for a living, or as a side enterprise, jealously guard their crop seeking to severely punish those who would wrongfully invade upon their treely domain.

This paper will explore the area of the wrongful taking of timber from a civil perspective, as opposed to the criminal aspects, and discuss the various rights and remedies that the landowner has when he feels that his sacred right of ownership has been violated. The paper will begin by looking at typical statutes of several states and examine how they handle the problems that arise when timber is wrongfully taken.

That Old Familiar Tree
Whose Glory and Renown
Are Spread 0'er Land and Sea
and Wouldst Thou Hew it Down?
Woodman, Forebear Thy Stroke!
Cut Not its Earth-bound Ties;
Oh, Spare That Aged Oak
Now Towering to the Skies!

THE LAW

In Louisiana the law regarding the wrongful taking of timber has been recently changed, not in substance, but rather in removing it from the area of natural resources and placing it in the Codal area of civil trespass. The provisions of wrongful taking of timber formerly listed in La.R.S. 56:1478.1 (6) are now found in La.R.S. 3:4278.1 (7). The new statute removes the exemption formerly granted to utility companies for wrongful taking of timber while maintaining rights-of-way and to professional land surveyors, and adds a provision for the payment of attorney's fees concerning a good faith violator's failure to pay damages within a certain period of time. (8)

The current statute in Louisiana (La.R.S. 3:4278.1) reads as follows:

A. It shall be unlawful for any person to cut, fell, destroy or remove any trees, or to authorize or direct his agent or employee to cut, fell, destroy or remove any trees, growing or lying on the land of another, without the consent of the owner or legal possessor.

B. Whoever willfully and intentionally violates the provisions of Subsection A shall be liable to the owner or legal possessor of the trees for civil damages in the amount of three times the fair market value of the trees cut, felled, destroyed or removed, plus reasonable attorney's fees.

C. Whoever violates the provisions of Subsection A in good faith shall be liable to the owner or legal possessor of the trees for three times the fair market value of the trees cut, felled, destroyed or removed. However, the provisions of this Section shall apply only to trees cut or removed across ownership lines, or outside designated cutting area lines, and no provision herein shall apply to cutting operations within an area covered by a contract or agreement with the owner.

D. If a good faith violator of Subsection A failed to make payment under the requirements of this Section within thirty days after notification and demand by the legal owner or possessor, the violator shall also be responsible for the reasonable attorney fees of the owner or legal possessor. (9)

One can plainly see that it's bad news for a timber cutter to stray over onto another's property and take his timber without the lawful owner or possessor's permission. The penalties are harsh.

ACTUAL MARKET VALUE

The courts, in appropriate cases, have always awarded the actual market value of the trees to the owner or legal possessor of the land. (10) Obviously, this area of damages floats with the market and will be different depending upon when the wrongful taking occurred. But, of course, this is not the purpose of the statute. If there were no penalty then there would be no deterrent to unscrupulous timber cutters to stop them from just going to any tract of timber, cutting that tract, and expecting to pay what they would have had to pay had they legally purchased the timber. This is where the treble damage provision is most effective. (11)

TREBLE OR PUNITIVE DAMAGES

This is the touchstone of the statutes. The cases cited in Endnote 11 give examples of the awarding of treble damages, that is, three times the fair market value of the timber at the time of the taking. The one amending portion of the statute in regards to treble damages is found in Subsection C of La.R.S. 3:4278.1 which applies to a good faith violator. (12) The good faith violator is only responsible for trees cut or removed across ownership lines, marked boundary lines, or outside of designated cutting areas. This limits the good faith violator's liability under this Subsection. Also, if the good faith violator has a timber contract or agreement with the owner then he is protected and is only responsible for the fair market value of the timber. (13)

The states of Delaware and Washington also award treble damages where the taking is malicious, willful or negligent. However, the landowner or possessor must show that the metes and bounds of his property lines were clearly

marked in order for the courts to award triple the fair market value of the timber. (14) Unintentional damages subject the trespasser only to pay damages equal to the conversion value of the trees plus the cost of litigation. The "conversion value"" is the fair market value of the timber at the time of the wrongful taking. (15)

North Carolina has a slightly different approach to the matter. This jurisdiction holds that any person, firm or corporation not being the bona fide owner or agent of the owner who goes on the land of another and injures, cuts or removes any valuable wood, timber, shrub or tree shall be liable to the owner for double the value of such wood, timber, shrub or tree. (16) This statute also provides for double the value of the wood or timber if the damage is done by willfully or intentionally setting the woods on fire. (17)

The North Carolina courts have, in some cases, used an alternate method of measuring damages whereby they give the landowner the difference in the value of his land immediately before and immediately after the wrongful cutting. In the alternative, the plaintiff can take the fair market value of his timber at the time of the wrongful taking then double this figure. (18)

REFORESTATION

Another measure of damages is the burden on the trespasser to pay for the reforestation of the tracts of timber that was wrongfully taken. The courts have allowed timber experts to testify as to what the cost of reforestation would be, the best methods to accomplish this and even the type of trees that should be the subject of the reforestation program. An example of this is found in the case of EVANS v B. R. BEDSOLE TIMBER CONTRACTORS, INC., where the court accepted the testimony of expert witnesses as to the cost of reforestation. To give the reader some idea of this cost the plaintiff was awarded the sum of $70 per acre site preparation, $30 per acre for the seedling trees and $45 per for the planting. (19) The court cites other cases in Louisiana that upheld this proposition of reforestation. (20)

MENTAL ANGUISH

Every incident of property damage is necessarily accompanied by some degree of worry and consternation over such things as possible financial loss, settlement of insurance claims, and discomfort or inconvenience. (21) The courts have held that the owner of a damaged property may not recover for mental anguish unless he or she proves a psychological trauma in the nature of or similar to physical injury, directly resulting from the property damage. (22) In addition, the courts have stated that damages for mental anguish are recoverable only when the conduct is so willful and wanton as to amount to bad faith. (23) This standard of proof has been held applicable to cases of trespass and wrongful removal of timber. (24) As seen in the cases cited in this area, the courts require strict proof of mental anguish when it comes to the wrongful removal of timber and are very hesitant to award damages in this area, but it has been done. (25)

ATTORNEY'S FEES

"Reasonable" attorney's fees are specifically authorized by the statutes cited above. (26) The reasonableness of an attorney fee is within the great discretion of the trial court. (27) The complexity of the case, time of preparation, duration of the trial, potential appellate procedures and the amount of the main award are but a few of the factors that the court may consider in awarding attorney fees. (28)

OTHER LEGAL POSSESSORS

Until recently, the courts had ruled that the statutes and the law allowed other parties other than the actual owner the right to collect treble damages for the wrongful taking and removal of timber. In particular, a mortgagee, i.e., a bank or other financial institution who held a mortgage on the property where the timber was located had an action against a violator for the wrongful taking of the timber.

In the case of MANGHAM -V-B & C WOOD CO., INC., the court cited La.R.S. 9:5382 and 3:4278.1 together as granting such a right. La.R.S. 9:5382 provides:

> The holder of a conventional mortgage shall have the same rights, privileges, and actions as the mortgagor land owner to recover against any person who, without the written consent of the mortgagee, buys, sells, cuts, removes, holds, disposes of, changes the form of, or otherwise converts to the use for himself or another, any trees, buildings, or other immovables covered by the mortgage. Recovery by the mortgagee may not be for more than the unpaid portion of the secured indebtedness, plus interest, advances, court costs, and attorney fees... (31)

The trial court in MANGHAM granted the mortgagee treble damages. However, a more recent Louisiana Supreme Court case reversed the MANGHAM case and held that the court in that case had erroneously applied the Louisiana statutes on this issue. The Louisiana Supreme Court stated in the case of FIRST SOUTH PRODUCTION CREDIT ASSOCIATION -V-GEORGIA-PACIFIC AND REX TIMBER Co. the following:

> In the absence of legislative intent to create such an action, we do not agree that the wording of the two statutes can be read to allow a mortgagee to recover treble damages against a timber cutter whose actions are authorized by the owner of the property. (32)

The Supreme Court went on to say that the awarding of treble damages are punitive in nature and that as such are to be strictly construed and not construed as extending powers not authorized by the letter of the law. (33)

In the FIRST SOUTH case the landowner had granted a timber deed to the defendants on land that was subject to a mortgage in favor of FIRST SOUTH. The landowner should not have had an action for treble damages under La.R.S. 3:4278.1, therefore the mortgagee should not have one either. (34)

When but an Idle Boy,
I Sought its Grateful Shade;
in All Their Gushing Joy
Here, Too, My Sisters Played.
My Mother Kissed Me Here;
My Father Pressed My Hand-
Forgive this Foolish Tear,
but Let That Old Oak Stand.

GOOD FAITH VIOLATORS

Attention needs to be given at this point to pertinent statutes regarding good faith violators. These statutes impose penalties against a good faith violator only when trees are removed across ownership lines, marked boundary lines, or outside designated cutting area lines. (35) The courts had previously held that this statute is “somewhat inartfully drafted" and must be read in its entirety to serve the Legislative intent. (36) The awkward drafting lies in the use of the phrase "across ownership lines" without a modifier such as "marked" or "designated." In a previously cited case, *JONES* -V- DON EDWARDS TIMBER CO., INC., the defendant crossed an ownership line and caused the plaintiff's trees to be cut. But the court went on to say that if the mere act of crossing an unmarked or undesignated ownership line were sufficient to activate treble damages, then we (the court) cannot imagine any offense in which treble damages would not be appropriate. The court stated that this is certainly not the purpose of the statute; rather, it is to impose the severest penalty of treble damages on violators who flagrantly disregard the property rights of other timber owners. (37)

This "good faith violator" problem has surfaced in other cases. In SHAFFETT-V-VICKS the plaintiff "pointed out"" the property line to the defendant, who, in turn, pointed it out to the loggers. The loggers "'mistakenly"" cut 1.5 acres over the unmarked line. The trial court found that the loggers had, in fact, crossed an ownership line, and assessed treble damages. The court of appeal that noted that there were no visible ownership lines, marked boundary lines or designated cutting areas reversed this. The court in SHAFFETT interpreted the applicable statute as follows:

If the timber-cutter 'in good faith' cuts and removes timber across a property line which is not visibly designated as a demarcation line between two adjacent properties, he is only liable for the fair market value of the timber. He is not for treble damages. It should be kept in mind that as a punitive measure, this statute must be strictly construed; it is only when a person clearly violates its provisions that he will be assessed the severe penalty of triple damages. (38)

The main issue to be considered now is whether the ownership lines are visible. The courts have held that dilapidated fences, remnants of fences, and "old memories" as to where a boundary should be do not serve as visible boundaries. (39)

LOOSE ENDS

Mention should be made of two other states that have had problems in the area of the wrongful taking of timber. The State of Mississippi has statutes similar to those mentioned above. The courts in that state have held that before one engages in the deliberate act of cutting or destroying a tree, he must take whatever precautions and safeguards as are reasonably necessary under the facts to assure himself that he has the lawful authority to do so. (40) The remedies are similar to those in other states i.e., actual market value for the timber taken plus statutory damages amounting to more than four times the value of the timber. (41)

In Alabama, the courts have held that when considering punitive damages for the wrongful taking of timber, the defendant's right to fair punishment must be considered above the plaintiffs right to recover the fullest amount of punitive damages. Although punitive damages need bear no particular relationship to the actual damages, they must not exceed an amount that will accomplish society's goal of punishment and deterrence. (42)

CONCLUSIONS

The Legislatures and the Court have made it crystal clear that the rights of owners and lawful possessors of timberland are to be protected vigorously. Not only will actual or compensatory damages be awarded, but also, in the proper situations swift and severe penalty awards and punitive damages will be handed down by the courts. Although the old " Law of the West"" may be gone, it is not forgotten.

Don't come on my property and take my trees without permission. If you do you will pay!

My Heart Strings Round Thee Cling,
Close as Thy Bark Old Friend!
Here Shall the Wild-bird Sing,
and Still Thy Branches Bend!
Old Tree! The Storm Still Brave!
And Woodman, Leave the Spot;
While I've a Hand to Save,
Thy Axe Shall Harm it Not.

ENDNOTES

1. "Woodman, Spare That Tree", by George Pope Morris, (1802-1864), Printed in "An American Anthology", Edited by Edmund C. Stedman; Houghton-Miffen Publishers, Copyrighted, 1900;
2. "Trees", by Joyce Kilmer, (1886 - 1918), written in 1914;
3. The CRB Commodity Yearbook (1995), by Knight - Ridder Financial/Commodity Research Bureau, Published by John Wiley & Sons, Inc.;
4. Id.;
5. Statistical Abstract of the United States (1994). 114ed., U.S. Dept. of Commerce - U.S. Government Printing Office;
6. La.R.S. 56:1478.1;

7. La.R.S. 3:4278.1;
8. Id.;
9. Id.;
10. Evans v. B. R. BEDSOLE Timber Contractors, Inc., 521 So.2d. 837 (La.App.2d Cir. 1988); Jones v. Don Edwards Timber Company, Inc., 516 So.2d 1256 (La.App.2d.Cir.1987);Williams v. Industrial Helicopters, Inc., 519 So.2d. 1180 (La.App.3rd Cir.1988); Britt v. Georgia Pacific Co., 46 N.C. App. 107, 264 S.E. 395 (1980);
11. La.R.S. 3:4278.1;
12. Id.;
13. Jones v. Don Edwards Timber Contractors, Inc., Supra;
14. 25 Del. Laws Sec. 1401 (a) & (b), RCW 4.24.630, Washington;
15. Id. Sec.(b);
16. N.C. Statutes 1-539.1(a);
17. Id., Sec.(b);
18. Britt v. Georgia Pacific Co., Supra;
19. Evans v. B. R. Bedsole Timber Company, Inc., Supra;
20. Garrett v. Martin Timber Co., 391 So.2d 928 (La.App.2d Cir. 1980); writ denied 397 So.2d 804 (La. 1981);
21. Evans v. B. R. Bedsole Timber Company, Inc., Supra;
22. Elston v. Valley Electric Membership Corp., 381 So.2d 554, (La.App.2d Cir. 1980); Thompson v. Simmons, 499 So.2d 517, (La.App.2d Cir. 1986); writ denied 501 So.2d 772 (La. 1987);
23. Jones v. Don Edwards Timber Co. Inc., Supra;
24. Gervin v, Willamette Industries, Inc., 406 So.2d 730, (La.App. 3rd Cir. 1981); Jones v. Don Edwards Timber Co. Inc., Supra;
25. McIlwain v. Manville Forest Products, 499 So.2d 1138, (La.App.2d Cir. 1986);
26. Jones v. Don Edwards Timber Co. Inc., Supra; Evans v. B. R. Bedsole Timber Company, Inc., Supra;
27. La.R.S. 3:4278.1, Supra, RCW 4.24.630 (Washington);
28. Greer v. Ouachita Coca-Cola Bottling Co, 420 So.2d 540, (La.App.2d Cir. 1982);
29. Evans v. B. R. Bedsole Timber Contractors, Inc., Supra., Model Rules for Professional Conduct, Rule 1.5;
30. Mangham v. B & C Wood Co., Inc., 561 So.2d 822 (La.App. 2d Cir. 1990), La.R.S. 9:5382;
31. First South Credit Production v. Georgia-Pacific and Rex Timber Co., 585 So.2d 545 (S.Ct., 1991);
32. Gibbs Construction v. Department of Labor, 540 So.2d 268 (S.Ct. 1991);
33. First South Credit Production v. Georgia-Pacific and Rex Timber Co., Supra;
34. La.R.S. 3:4278.1, Supra, 25 Del. Laws Sec. 1410;
35. Morgan v. Fuller, 441 So.2d 290 (La.App. 2d. Cir. 1983); writ denied 443 So.2d 596, 599 (La. 1983);
36. Jones v. Don Edwards Timber Co., Inc., Supra, Smith v. Myrick, 412 So. 2d 677 (La.App. 2d Cir. 1982) ; Garrett v. Martin Timber Co., Supra; Morgan v. Fuller, Supra; Dowden v. Securities Ins. Co., 471 So.2d 1165 (La.App. 3d Cir. 1985);
37. Shaffett v. Vicks, 385 So.2d 419, (La.App. 1st Cir. 1980) ;
38. Garrett v. Martin Timber Co., Supra, Brown v. Bedsole, 447 So.2d 1177 (La.App. 3d Cir. 1988); writ denied 450 So.2d 358 (La. 1984);
39. Grisham v. Hinton, 490 So.2d 1201, (S.Ct. 1986);
40. Miss. Code Ann., Sec. 95-5-3;
41. Wilson v. Dukona Corporation, N.V., 547 So.2d 70, (S.Ct. 1989).

SAME-SEX SEXUAL HARASSMENT: IS NON-HOMOSEXUAL, SAME-SEX SEXUAL HARASSMENT DESERVING OF PROTECTION UNDER THE LAW? AN ISSUE FOR THE U.S. SUPREME COURT AND THE U.S. JUSTICE DEPARTMENT, AS THE STATE AND DISTRICT COURTS CONTINUE TO PRODUCE A POTPOURRI OF CONFLICTING DECISIONS AND RATIONALES

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ABSTRACT

As a starting point, please consider the following scenario taken from the workplace of Hypothetical, Inc:

Stacy Shannon had been a secretary to Chris Williams for over six years. Throughout that time, Chris repeatedly commented on how sexy Stacey's clothes were, on how physically fit Stacy appeared to be, and how Stacey must be dynamite in bed. Chris would caress Stacey's buttocks on a daily basis and provide Stacey with unsolicited and unwelcome backrubs. Chris would also stare up and down Stacey's body at every available opportunity. To make matters worse, Chris would frequently bring in pornographic material and show it to Stacey, all the while bragging to Stacey in a lewd and graphic manner about recent sexual conquests. Chris would even make frequent inquiries about Stacey's sexual history sexual fantasies. All of this upset Stacey very much, and Stacey ended up in therapy for major depression. Although Stacey repeatedly complained to the Human Resources Department about Chris' behavior, they refused to do anything about it. This was so even though Stacey's coworkers completely corroborated everything that Stacey reported . . .

INTRODUCTION

The foregoing vignette represents a flagrant and seemingly open and shut case of hostile environment sexual harassment. Open and shut, that is, unless Stacey and Chris are both males or Stacey and Chris are both females. (The use of unisex names such as "Stacey" and "Chris" was deliberate. The reader is invited to reread the hypothetical. Regardless of the reader's initial subjective perception, no gender identifying pronouns appear). No matter how offensive, unwelcome and sexual the conduct may be, and as absurd as it may seem, whether Stacey has a valid legal claim may turn on issues such as the respective gender of the parties and the sexual orientation of not the victim but rather the harasser.

An alarming number of federal judges have lost sight of the law and its underpinnings in a wave of decisions dealing with harassment between members of the same sex. Numerous decisions examining alleged sexual harassment between members of the same sex have ignored logic and Title VII precedent and instead applied a mismatch of various rationales and theories to deny plaintiffs' sexual harassment claims. As a result, the law is currently in a state of flux

on many of the issues surrounding same sex harassment. Much of the confusion is a result over the definition of sexual harassment as being "based on sex."

This paper analyzes what happens when a heterosexual employee is accused of sexually harassing an employee of the same gender -- in such cases, is the harassment be "based on sex?" The U.S. Supreme Court asked the Clinton Administration on December 16, 1996 to issue an opinion on whether same-sex sexual harassment violates federal law. Moreover, the U.S. Supreme Court has recently agreed to review this issue and will issue a much-needed ruling. *(Oncale v. Sundowner Offshore Services*, 83 F.3d 118 (5th Cir. 1996), cert. granted, 65 U.S.L.W. 3814 (U.S. June 9, 1997)(No. 97-)). The purpose of this paper is to explore how the Justice Department and the U.S. Supreme Court should decide this hotly-debated topic. The outcome will determine the direction of future litigation in the area of workplace sexual harassment.

The issue of non-homosexual sexual harassment is an evolving topic. Much case law has been generated in the last three years. As a result of fact-sensitive decisions and conflicts among and within district courts, much of the law has become at least partially outdated or in dispute. This article will provide a unique and up to date account of the law in this area with recommendations regarding the position that should be taken by the Administration and the U.S. Supreme Court.

DEFINING "BASED ON SEX"

Courts have long recognized "traditional" cases of sexual harassment in which typically a female employee is harassed by a male employee or supervisor. Courts also recognize cases in which male employees are harassed by female employees or supervisors. Eventually, the first homosexual sexual harassment cases appeared; in these cases, a homosexual employee or supervisor would sexually harass a person of the same gender. These cases were complicated, however, by the "bisexual" issue -- was bisexuality a defense to sexual harassment, which must be "based on sex". The word "sex", however, is not defined by Title VII or most state statutes. (In other words, does the expression "based on sex" mean "based on sexual content" or does it mean "based on gender?") Confusion has resulted from the fact that the term "sex" possesses two different connotations; it may relate to the "traditional" notion of sex as a gender-based classification or it can relate to erotic desires or content. (Johnson, Kristi J., *Chiapuzio v. BLT Operating Corporation: What Does It Mean to Be Harassed "Because of" Your Sex?: Sexual Stereotyping and the "Bisexual" Harasser Revisited*, 79 Iowa Law Review 731, at 737 (1994)). The lower federal courts and the EEOC have long favored the definition of sex as a gender-based classification, with many courts requiring proof that "but for" the victim's gender the victim would not have been subjected to such treatment. (*Id.* At 738). This analysis led, inevitably, to the equal opportunity harassment defense. In other words, if a harasser equally harassed both males and females, there was no sexual harassment claim under Title VII because the employee's gender was not a "but for" cause of the discrimination. (*Id.* at 738; see also, *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982); and *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 621-622 (6th Cir. 1986)). Eventually the Third, Sixth and Ninth Circuits rejected Rabidue. (See *Ellison v. Brady*, 924 F.2d 872, 877-878 (9th Cir. 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990); and *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987)). The rejection of Rabidue, however, was based more upon the extent to which a victim's psyche was affected by the sexual harassment, leaving open the issue of just what is "based on sex?"

The federal appellate courts currently seem to be split into three "camps" over the issue of same sex harassment, whether it must be "based on sex" and just what "based on sex" means. The Eight Circuit appears ready to allow all same sex sexual harassment claims to proceed under Title VII. (*Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996)). The Fourth, Sixth and Eleventh Circuits apply the "but for" test of the EEOC to justify including sexual harassment within the umbrella of sex discrimination, reasoning that "but for" the victim's sex (i.e. gender), the victim would not have been harassed. As such, it is opined that such victims are being discriminated against "because of sex." (See *Wright v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (`11th Cir. 1997); and *Fredette v. BVP Management Assoc.*, 112 F.3d 1503 (11th Cir. 1997). Finally, the Fifth Circuit has held that same sex harassment claims are not recognized under Title VII. (*Oncale* at 119). The U.S. Supreme Court recently agreed to review the *Oncale* case. Until then, it remains unclear just what constitutes "based on sex" within the confines of alleging sexual harassment.

EEOC GUIDELINES REGARDING SAME SEX SEXUAL HARASSMENT

Both the Clinton Administration and the U.S. Supreme Court will likely begin their review of same sex harassment with the EEOC guidelines. According to those guidelines, Title VII does not prohibit discrimination based on sexual orientation. (EEOC Compliance Manual (CCH) par. 3101, s.615.2(b)(3)(Example 2), at 3204 (July 1987) (citing Commission Decision Nos. 76-67 and 77-28). The guidelines do, however, provide that the victim and harasser may be of the same sex and even provide an example of a hypothetical case in which a male supervisor makes unwelcome sexual advances toward a male employee but does not make sexual advances toward a female employee. (EEOC Compliance Manual (CCH) par. 3101, s.615.2(b)(3)).

As previously discussed, much of the confusion over whether same sex sexual harassment is actionable stems from the assumption by many lower federal courts that "sex" means "gender" and that under Title VII the sexual harassment must have occurred because of the victim's gender. (DeSantis v. Pac. Tel & Tel. Co., 608 F.2d 327 (9th Cir. 1979)). The EEOC appears to have also made this same assumption. (EEOC Compliance Manual (CCH) par. 3101, s.615.2(b)(3)(Example 2), at 3204 (July 1987) (citing Commission Decision Nos. 76-67 and 77-28). The EEOC guidelines indicate that the motivation for the harasser's behavior need not be sexual (i.e. desire), but the conduct must be sexual: "Sexual harassment is sex discrimination not because of the sexual nature of the conduct to which the victim is subjected but because the harasser treats a member or members of one sex differently from members of the opposite sex. However, it is the sexual nature of the prohibited conduct which makes this form of sex discrimination sexual harassment." (EEOC Compliance Manual (CCH) par. 3102, s.615.3(a), at 3205 (Jan. 1982)).

The EEOC defines sexual harassment as (1) sexual advances; (2) requests for sexual favors; or (3) verbal or physical conduct of a sexual nature. (29 C.F.R. s 1604.11(a)(1996)). In the case of the non-homosexual same sex harasser, the conduct at issue would likely fall into the third category, verbal or physical conduct of a sexual nature. These would not be cases of sexual advances or requests for sexual favors, because the harasser's motivation is not sexual desire or gratification. Under the EEOC, however, the issue of whether the treatment is imposed because of sex, or gender, however, must still be answered. If the motivation for the conduct is hatred of one gender, then the conduct is sex discrimination and also sexual harassment. The difficult case is when a harasser engages in verbal or physical conduct of a sexual nature, aimed at a person of the same sex, but does not treat others of the victim's gender in the same way — is this sexual harassment? Or is the person being treated that way simply because the harasser hates them, but with no regard to gender? And is a distinction and differential treatment in such a case even warranted? The courts do allow cases to go forward in which, for example, a male harasser engages in verbal or physical conduct of a sexual nature against one particular female, but does not treat other females in this way. If that is the case, why should it make any difference that the harasser and victim are of the same gender?

SUPREME COURT GUIDANCE

Arguably, the U.S. Supreme Court has provided some guidance regarding the issue of same sex harassment in the *Harris v. Forklift Systems* decision. (*Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993)). Though Harris was a case of male-female sexual harassment, the Court did state that Title VII makes it unlawful for an employer to discriminate against an individual with respect to compensation, term, conditions or privileges of employment because of the individual's sex. Moreover, according to the Court, the language of Title VII evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." (Harris at 369). Of particular note is that the Court used the terms "men and women" and "people" instead of only referring to women. *Harris* is one of only two U.S. Supreme Court cases dealing with sexual harassment (the other is *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)), therefore it would seem that the Court would refer to *Harris* and *Vinson* for guidance on how to analyze same sex harassment cases.

DOES TITLE VII PROVIDE PROTECTION FOR SAME SEX, NON-HOMOSEXUAL HARASSMENT?

The much cited case of Goluszek v. Smith has been very influential in recent decisions governing same sex harassment. (*Goluszek v. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988)). The *Goluszek* decision and that court's interpretation of Title VII, though involving allegations of harassment based on sexual orientation, has been used by several different courts to destroy the previously recognized quid pro quo same sex harassment cause of action. (See, e.g., *Barnes v. Castle*, 562 F.2d 983 (D.C. Cir. 1977); and *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981)). In some ways, *Goluszek* may be viewed as a bridge between the sexual orientation harassment cases and the same sex harassment cases, insofar as it has given courts the rationale, under Title VII, for denying same sex harassment claims. *Goluszek* is cited more often than any other case in the recent multitude of cases denying plaintiffs' same sex harassment claims. The *Goluszek* rationale states that:

> [t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group. Title VII does not make all forms of harassment actionable. The 'sexual harassment' that is actionable under Title VII is 'the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person.' Actionable sexual harassment fosters a sense of degradation in the victim by attacking their sexuality. In effect, the offender is saying by words or actions that the victim is inferior because of the victim's sex. (*Goluszek* at 1455).

Because the victim in Goluszek was a male in a male-dominated environment, the court held that he was not a victim of actionable sexual harassment. (*Id.* At 1456). *Goluszek*, in a sense, has restrictively taken the gender subordination theory of sexual harassment to the point that it is applicable only to sexual harassment against women. While gender subordination is a part of understanding Title VII, nowhere in Title VII is it stated that sexual harassment and discrimination is only applicable to women. As discussed previously, the U.S. Supreme Court in *Harris* stated explicitly that both sexes are protected under Title VII against sexual harassment.

The *Goluszek* court's interpretation regarding the legislative intent of Title VII is disingenuous inasmuch as there is virtually no legislative history to guide courts in interpreting Title VII and in defining the term "sex." In *Barnes v. Castle*, the U.S. Court of Appeals for the District of Columbia recognized that "for an eight year period following its original enactment, there was no legislative history to refine the congressional language." (*Barnes* at 987). When the 1964 Act was amended in 1972, there was considerable discussion on the topic, indicating that Congress was deeply concerned about discrimination based on gender, and intended to combat it as vigorously as any other type of forbidden discrimination. (*Id.*) Moreover, the inclusion of "sex" as a protected category was a last minute addition to the 1964 version of Title VII that was inserted by opponents in an attempt to defeat it! (Adler & Pierce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 Fordham L. Rev. 773, 778, n.30 (1993)).

The *Goluszek* holding cannot be reconciled with the expanding definition of sexual harassment under the EEOC guidelines. The EEOC guidelines state that widespread favoritism based upon the granting of sexual favors in the workplace can give rise to Title VII hostile work environment claims by both males and females, regardless of whether the conduct is even directed at them, assuming that the conduct is severe and pervasive. (EEOC Notice No. 915-048 (Jan. 12, 1980)). Moreover, the EEOC has devoted a lengthy section of its Compliance Manual to articulate standards for how to judge the sexual nature of a hostile work environment, but pays virtually no attention to the question of how to judge whether the offensive conduct was directed to one or more employees because of their gender. (Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sexual Discrimination Under Title VII*, Geo. L.J. 1, 15, n.59 (1993)).

U.S. SUPREME COURT REVIEW OF THE FIFTH CIRCUIT'S HOLDING IN *ONCALE V. SUNDOWNER OFFSHORE SERVICES*

At this writing, the U.S. Supreme Court has announced that it will review the *Oncale* case, in which the plaintiff has alleged that his supervisor and two co-workers sexually harassed him. (*Oncale* at 118). In that case, it is alleged that the co-workers restrained Oncale while the supervisor placed his penis on plaintiff's neck; that Oncale was threatened with homosexual rape; and that a supervisor forced a bar of soap up Oncale's anus while a co-worker restrained him when he was showering at the workplace. (*Id.* at 118-119). The district court granted defendant's motion for summary judgment, citing no other reason than an earlier decision holding that same sex harassment was not actionable under Title VII. (*Id.* at 118-119).

The prior decision cited in *Oncale* was the case of *Garcia v. Elf Atochem North America*, in which the Fifth Circuit held in 1994 that Title VII does not permit a claim of sexual harassment by a male supervisor against a male subordinate, even if the harassment has sexual overtones. (*Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-452). Ironically, the *Garci*a case gave no logical rationale for its holding, aside from citing *Goluszek* and making the broad statement that Title VII addresses gender discrimination, and therefore concluding that what happened to Garcia could not be sexual harassment. (*Id.* at 451, 452). Absent any compelling and extensive rationale within the Fifth Circuit cases, the U.S. Supreme Court will need to review decisions within other circuit courts.

The Eight Circuit, several district courts and at least one state court take the opposite view of the Fifth Circuit, holding that all same sex harassment claims should be permitted under Title VII. (See, e.g., *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *Waag v. Thomas Pontiac Buick*, 930 F.Supp. 393 (D. Minn. 1996); *EEOC v. Walden Book Co.*, 885 F. Supp. 1100 (M.D. Tenn. 1995); *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285 (1997)). In *Quick*, the Eighth Circuit held that the harasser need not be gay for a same sex harassment claim to proceed under Title VII. In that case, the plaintiff alleged that other employees grabbed and squeezed his testicles (referred to as "bagging") more than one hundred times and that he was poked in the buttocks with a stick ("goosed"). (*Quick* at 1374). The plaintiff was a heterosexual male who was harassed by other heterosexual males because he did not fit it in with the others males in the workplace. (Id. at 1376). No sexual advances were made toward Quick, yet the conduct he endured was of a sexual nature. (Id. at 1374-1375). The *Quick* court held that this treatment fit into the EEOC's third category of sexual harassment, namely, verbal or physical conduct of a sexual nature. (*Id.* at 1379; 29 C.F.R. s 1604.11(a)(1996)). The Quick court further held that protection under Title VII is not limited to disadvantaged or vulnerable groups, but extends to all employees to prohibit disparate treatment of an individual, male or female, based on that person's sex. (*Quick* at 1378; citing *Harris* at 379 and *Vinson* at 67).

Significantly, *Quick* outlined the elements necessary to allege a claim for Title VII sexual harassment. (*Quick* at 1377-1378). The elements include membership in a protected group, which may be either gender; being subjected unwelcome sexual harassment; and exposure to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. (*Id.* at 1377-1388). Subjection to "unwelcome sexual harassment" was broken down even further with each word defined. According to the *Quick* court, "unwelcome" means uninvited and offensive. (*Id.* at 1378). "Sexual" was defined as not limited to merely behavior and comments of a sexual nature, but also including acts of physical aggression and violence and incidents of verbal abuse which constitute discriminatory intimidation, ridicule or insult. (*Id.* at 1377). Finally, "harassment" was defined as sufficiently severe or pervasive to constitute a hostile or abusive work environment in the eyes of both the actual victim and a reasonable person, though not necessarily causing tangible psychological injury. (*Id.* at 1378; citing *Harris* at 371).

Perhaps the most significant aspect of the *Quick* holding is that the court rejected the holdings of many courts that there can be no Title VII claim for sexual harassment by a heterosexual, same sex harasser motivated by "personal enmity or hooliganism." (*Id.* at 1379). "The proper inquiry for determining whether discrimination was based on sex is whether 'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" (*Id.* at 1379; citing *Harris* at 1372). Because only males were subjected to the assaults described in *Quick*, all elements for a Title VII sexual harassment claim were met.

Oncale has a similar factual scenario as *Quick*. For instance, in both cases, the harassers were male heterosexuals harassing other male employees. Additionally, in both cases, the male victims did not appear to fit in with the other males in the workplace and were therefore disliked. Finally, in both cases, the harassment was not in the form of sexual advances or requests for sexual favors. Should the U.S. Supreme Court deem to follow the reasoning

of the Eighth Circuit in *Quick*, almost all same sex harassment would be actionable under Title VII. The Court may, however, opt for the middle ground. If so, a review of decisions from the Fourth, Sixth and Eleventh Circuits would be appropriate.

The middle ground adopted by the Fourth, Sixth and Eleventh Circuits applies the "but for" test of the EEOC and the Supreme Court in *Vinson* to justify including sexual harassment within the definition of sex discrimination. (42 U.S.C. s 2000e-2(a)(1); Vinson at 64). This brings us full circle, once again using the following test: "but for" the victim's sex, the victim would not have been harassed; being treated differently than if their gender were different means they are being discriminated against "because of sex." Under this scenario, some, but not all, same sex harassment claims will be permitted.

Courts laying claim to the middle ground require that the victim was treated differently "because of sex," and go on to define this under the EEOC guideline stating that the critical inquiry is whether the harasser treats a member or members of one sex differently than members of the other sex. (EEOC Compliance Manual (CCH) par. 3101, s. 615.2(b)(3), at 3204 (July 1987); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996); *Fredette v. BVP Management Associates*., 112 F.3d 1503 (11th Cir. 1997); *Yeary v. Goodwill Inds.-Knoxville, Inc*., 107 F.3d 443 (6th Cir. 1997)). Moreover, the Fourth, Sixth and Eleventh Circuits distinguish between homosexual and heterosexual harassers. In other words, if a homosexual harasser chooses a victim because of the victim's gender (i.e. not because of the victim's sexual orientation), a claim of sexual harassment under Title VII may proceed under the same theory as that of a heterosexual harasser — because the harasser's actions are motivated by the victim being a member of the gender the harasser prefers. (*Wrightson* at 142; *Fredette* at 1510; *Yeary* at 448). Logically, this makes absolutely no sense at all. If a harasser prefers that gender, then how may it be argued that the harasser is discriminating (since harassment is a subset of discrimination)? In the case of male on female harassment, of course, there is a long history of the subordination of females to male. On the other hand, are we to believe that there is a long history of homosexuals subordinating other homosexuals, so as to fit the necessary element of discrimination against that gender?

Approaching the rationale of the Fourth, Sixth Eleventh Circuits from another angle, none of these circuits permit a claim based on a homosexual victim who is harassed because of sexual orientation. (*Id*.) This creates a situation where a homosexual harasser may be liable for sexual harassment based on the harasser's sexual preference, yet a victim of sexual harassment has no claim under Title VII if the harassment occurs because of the victim's sexual preference! The obvious problem with this alleged middle ground is that it seems to violate equal protection.

Another problem with basing viability of a claim on the harasser's sexual preference is the problem of bisexuals. As the law currently stands, sexual harassment is a form of sexual discrimination, and requiring that the harassment occurred because of the victim's gender leads to the odd result of the failure to state a claim in the case of a bisexual who targets both males and females. Stated another way: "The identical offense is sex discrimination under Title VII when perpetrated by a man against a woman, or by a woman against a man; yet, if a bisexual of either sex preys equally upon men and women, he (or she) is beyond the reach of Title VII." (Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 Yale L. & Pol. Rev. 333, 346 (1990)). In the dissenting opinion in Vinson v. Taylor, Judge Bork asserted that if sexual harassment was governed by Title VII, "subsidiary doctrines" should be adjusted to prevent against bizarre situations where victims of sexual harassment have no protection from attack by bisexuals. (*Vinson v. Taylor*, 760 F.2d 1330, 1333, n.7 (D.C. Cir. 1984)). It should, of course, be noted that Judge Bork did not favor allowing sexual harassment claims to come within the purview of Title VII. Nevertheless, the idea of "subsidiary doctrines" that would prevent such bizarre outcomes is not a bad idea. In reality, none of the circuits has managed to develop a fully workable analysis, one that would provide protection for the maximum number of employees, yet not violate due process or produce inconsistent and unfair results.

RECOMMENDATIONS TO THE CLINTON ADMINISTRATION AND THE U.S. SUPREME COURT

The challenge to the Clinton Administration and the U.S. Supreme Court is monumental. Whatever the outcome, much of the current case law will be outdated when the U. S. Supreme Court renders its decision in Oncale. A checklist (or "wish list") of elements in the high court's ruling should read as follows: no equal protection violations; a workable analysis that leads to consistent results; no escape from liability based on the harasser's sexual preference (in fact, no consideration whatsoever of the harasser's or the victim's sexual preference); and a definition of "based

on sex" that allows for claims of sexual harassment as a form of sexual discrimination, but also an expanded definition of "based on sex" that permits claims for acts that contain sexual content.

By borrowing analysis from various circuits, a workable definition of "based on sex" and the scope of sexual harassment is possible. The Eighth Circuit has come closest to the best result, and the U.S. Supreme Court should seriously analyze the elements of a sexual harassment claim, as set forth in the *Quick* case. (*Quick* at 1377-1378). Under the *Quick* court's enlightened view, membership in a protected group includes both genders and "sexual" is defined as not limited to behavior of a sexual nature, but including acts of physical aggression and violence and verbal abuse which constitutes discriminatory intimidation, ridicule or insult. (*Id.* at 1377). Where *Quick* needs amending is the requirement that members of one sex be exposed to disadvantageous conditions of employment to which members of the other sex are not exposed. (*Id.* at 1379). As the cases demonstrate, continuing to require discrimination as an element of sexual harassment severely limits who may bring a claim. If an employee is being subjected to hostile and unwelcome acts or words of a sexual nature, should it really matter whether the acts are done and the words are said because of the person's gender? Should not the goal be to eliminate such unwelcome sexual hostility from the workplace, regardless of the motivation? This is not to suggest that we divorce sexual harassment from the notion of sexual discrimination, but rather that we broaden the concept of sexual harassment, as some courts have already done, to include inappropriate and sexually hostile behavior in the workplace, even when it is not based on a discriminatory motive.

Other circuits have indicated in dicta a likelihood that they would permit same sex, non-homosexual sexual harassment claims. For instance, the Ninth Circuit addressed the issue of the equal opportunity harasser in the context of a lawsuit by a female plaintiff against a male harasser. (*Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994)). The defendant argued that his treatment of males was just as bad as his treatment of females, therefore he could not be held liable. The Ninth Circuit rejected his argument, holding that employer may not cure verbal conduct toward women by using language that is equally degrading to men. (*Id*. at 1464). The court further opined that "we do not rule out the possibility that both men and women working at Showboat have viable claims against Trenkle [the harasser] for sexual harassment." (*Id.* at 1464). The First, Second and Seventh Circuits have also indicated, in dicta, that they might be willing to entertain same sex harassment claims. (See, e.g., *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996); *Morgan v. Massachusetts General Hospital*, 901 F.2d 186 (1st Cir. 1990); and *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 148 (2nd Cir. 1993)).

CONCLUSION

Just as this paper began with a hypothetical, so shall it end with one:

> *Val Victim walks into a police station and cries out "I've been shot!" Immediately Pat Policeperson asks "Was the shooter holding the gun with the right hand or the left hand?" Startled at the seeming irrelevance of such a question, Val asks "What possible difference does that make?" "Well," Pat answers, "You see, if the shooter was holding the gun with the right hand, a crime has been committed. But if the shooter was holding the gun with the left hand, then there has been no crime."*

Absurd? Of course it is. But likewise, if an employee in the workplace is subjected to offensive and unwelcome "verbal or physical conduct of a sexual nature," should whether such a sexually hostile work environment is actionable really turn on the gender and/or sexual orientation of the harasser? If that were the case, extremely serious equal protection issues would be implicated: Two workers of the opposite sex, subjected to identically horrific hostile work environments of a sexual nature, might find a legal system receptive to one claim but not the other. No person, male or female, heterosexual or homosexual, should be forced to endure abusive harassment of a sexual nature in the workplace. Victims of sexual harassment often suffer from depression, low self-esteem and self-blame, regardless of the reason why the harasser was engaging in the behavior. The circuit courts have struggled with this issue for several years, with inconsistent and often blatantly unfair results. The time has come for a clear statement on sexual harassment in the workplace and, with the *Oncale* case before it, the U.S. Supreme Court has the perfect opportunity to take a stand and make a statement that will be heard and cited throughout America's halls of justice.

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THE MEDIATION OF STATUTORY EMPLOYMENT CLAIMS: THE PUBLIC POLICY IMPLICATIONS

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ABSTRACT

Statutory complaints by employees are often symptomatic of unfair management practices rather than clear and specific illegal behavior by employers. Many of these claims are ultimately dismissed. In the end, time and money has been wasted and the underlying problem remains unresolved.

Mediation programs recently initiated by the Equal Employment Opportunities Commission and the U.S. Department of Labor offer the possibility of effectively resolving these workplace disputes in a timely manner. The question is whether mediation is compatible with statutory mandates.

In the last 20 years there has been a dramatic increase in the legal regulation of the workplace. Consequently, there a has been a 400 percent increase in employment litigation during that period. Employment-based legal claims now account for approximately ten percent of all federal court cases. And the trend appears to be accelerating. Since the passage of the Americans with Disabilities Act, for example, the EEOC's caseload has increased by over 30,000 cases per year. Administrative agencies are buckling under the weight of these claims. The average processing time at the EEOC, for example, has grown from 300 to over 600 days in the last four years. Increasingly, the enforcement of employment claims has begun to mirror the common refrain: "justice delayed is justice denied."

As a result, the EEOC and the USDOL have recently promoted external mediation as the mechanism to effectively and efficiently deal with this problem. The question is whether external mediation is compatible with statutory mandates. This will require consideration of a number of issues. For example, should mediation be made available in all cases or should certain types of cases be excluded? At what point in the complaint process should mediation be initiated? How should external mediators be selected by the EEOC and assigned to the parties? What type of training, if any, should the mediators receive? Should, and if so, how can the mediators be held accountable? Should agency approval of the agreement be a pre-requisite to mediated settlement? What penalty, if any, should be imposed if one party violates the confidentiality agreement? In short, is mediation a fair alternative to the EEOC's traditional investigative procedures?

INTRODUCTION

Recently, the two federal agencies most responsible for enforcing individual employment law claims, the Equal Employment Opportunities Commission (EEOC) and the U.S. Department of Labor (USDOL), announced their support of external mediation to resolve statutory claims. The use of external mediation to resolve public rights raises significant public policy concerns. This paper will briefly discuss the motivation behind the agencies' decisions, the manner in which the mediation programs are being implemented, and the public policy implications of their proposals. A review of these issues indicates that if the public policy concerns are addressed, external mediation may offer a more effective and efficient way to resolve many employment disputes.

It was clear that something had to be done. In the minds of employers, employees, and the governmental agencies entrusted with enforcing the nation's labor laws, resolving legal claims in a timely and cost-effective manner had become an increasingly unattainable goal.

Today, lawsuits have become more than a nuisance to employers, they have become a serious threat to the bottom line. The median jury verdict reported in wrongful discharge cases in California in 1995, for example, was $234,957. (Bompey, 1997). Overall, employers have experienced an increased over 400% in the last twenty years in employment litigation. (Bompey, 1997).

For employees, on the other hand, the right to a legal claim has not translated into timely improvements gains in the workplace. The Government Accounting Office reports that the EEOC's average processing time has grown from 300 days in fiscal 1993 to over 600 days in fiscal 1996, a 57% increase in processing time. (McEwen, 1994). In short, for many employees, justice delayed has become justice denied.

Perhaps those most insistent on a change, however, have been the agencies themselves. After years of accumulating additional responsibilities (e.g., Americans with Disabilities Act, Family Medical Leave Act, etc.) with no corresponding increase in staff, the agencies were falling further and further behind in enforcing their statutory mandates. At the EEOC, for example, filings increased by over 30,000 per year from 1991 to 1996 with no corresponding increase in staff. (Miller, 1995). Consequently, there are now over 100,000 cases pending before the EEOC. Miller, 1995).

There are, of course, a number of reasons for the dramatic increase of individual employment law claims. Certainly, if the popular press is to be believed, Americans have become "sue-happy." The reporting in such high profile cases as the lawsuits against Miller Brewing (the infamous "Seinfeld Case"), Mitsubishi Motors, Texaco, Walmart and Hooters has many employers believing that another lawsuit is just around the corner. The proliferation of additional statutory and common law rights, as well as the changing demographics of the workforce, have also certainly played a role. Perhaps the biggest reason for this crush of employment claims, however, has been the lack of viable internal dispute resolution systems in America's non-union workplaces. The numbers would appear to bear this out. Less than 20% of claims filed each year at the EEOC, for example, are ever settled in favor of the complaining party. (McEwen, 1994). When these cases are closed--in many cases after long delay--the employer has been left with an unnecessary administrative burden and expense and the employee is left with the feeling that justice was not done and the underlying concerns have not been addressed adequately.

Mediation may offer a viable solution to this problem, particularly since it appears that employee-initiated claims often have more to do with underlying workforce tensions than specific legal violations. If this is the case, mediation may offer a more effective and efficient way to resolve such disputes. There are a number of advantages to mediating employment disputes, rather than handling them through the traditional enforcement process. First, mediation offers a quicker and less expensive way to resolve the dispute. Second, mediation provides the parties with a "reality check." Third, the non-adversarial setting is more likely to promote compromise and conciliation than the traditional enforcement process. The reduced tension and hostility allows the parties to rebuild their relationship if they so desire. Whether mediation works, however, depends on a myriad of factors, not the least of which is how the process is structured.

In 1990, Congress passed the Administrative Dispute Resolution Act (ADRA) on a five year trial basis authorizing, indeed encouraging, federal agencies to use mediation and other alternative dispute resolution techniques for the prompt and informal resolution of disputes. Later that year, Congress passed the American's with Disabilities Act, noting that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including...mediation...is encouraged to resolve disputes arising under this Act." (ADA, 1990).

Congress followed the ADA with the passage of the Civil Rights Act of 1991, which adopted almost identical language indicating support for alternative dispute resolution: "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution...is encouraged to resolve disputes arising under the Acts of provisions of Federal law amended by this Title." (CRA, 1991). The Supreme Court further supported the use of non-judicial resolution of employment law claims when, in the same year, it decided *Gilmer v. Interstate/Johnson Lane Corp*. upholding an employee's agreement to arbitrate all employment disputes, including those arising out of the federal Age Discrimination in Employment Act. In short, it was clear that the EEOC and the USDOL had been given a "green light" by Congress and the courts to implement alternative dispute resolution procedures, such as mediation, to deal with their burgeoning caseloads.

The EEOC implemented a pilot mediation program the next year in four regional offices (Houston, New Orleans, Philadelphia, and Washington, D.C.) The EEOC identified two general objectives: (1) an improved ability to encourage amicable resolutions and (2) an increased capacity to manage its caseload. The EEOC was particularly concerned with resolving those charges that simply reflected "poor management-employee communication and/or relations" which often result in "the charging parties belief regarding disparate treatment due to unlawful conduct." (McEwen, 1994).

The EEOC's mediation project worked as follows. Individuals who filed complaints with the EEOC were offered the opportunity to participate in mediation. If the charging party agreed to mediation, the responding party was then asked whether they were interested in mediation. If both parties indicated a willingness to attempt mediation, the problem would be mediated by private mediators, either acting as volunteers, paid by the EEOC, or paid by the parties.

The EEOC contracted with the Center for Dispute Settlement to study the mediation program. The final report was written by Professor Craig McEwen of Bowdoin College in 1994. (McEwen, 1994). Prof. McEwen found that 796 (87%) of the 920 charging parties decided to accept the EEOC's offer of mediation. Responding parties agreed to mediation in 331 (40%) of the 796 eligible cases. According to Prof. McEwen's report, 267 mediations were ultimately completed, which was 29% (267/920) of the eligible cases. The average time from the filing of the charge to the completion of the mediation was 67 days. This compares with 294 days to complete the regular EEOC charge process.

Of the 267 cases that went forward to mediation 140 (52%) resulted in a settlement. Over half of the mediated agreements provided for financial payments to the charging party ranging from $25 to $80,000. Prof. McEwen found that both charging (66%) and responding (72%) parties were generally satisfied with the mediated settlements. The vast majority of the charging (91%) and responding (93%) parties believed that the mediation process had been fair. While about one-quarter to one-third of the parties felt that the mediation process had taken too much time and 37% of the charging parties and 24% of the responding parties felt that not all the important issues had been resolved in mediation, the vast majority of the charging (84%) and responding (83%) parties indicated that they would try mediation again to solve similar problems in the future. In short, the mediation project was viewed as timely and effective.

As a result of its success, the following year the EEOC announced that alternative dispute resolution in general, and mediation in particular, would become an integral part of its private sector charge processing system. In June of 1996, Congress permanently re-authorized the ADRA. The ADRA was signed into law by President Clinton on October 19, 1996. Federal agencies, such as the EEOC and USDOL, are now allowed to use voluntary mediation to resolve statutory complaints.

In February of 1997, the USDOL announced its alternative dispute resolution program to resolve employee claims. (*Labor Law Reports*, 1997). Unlike the EEOC program, however, the USDOL program would utilize both mediation and arbitration to resolve disputes. Among the disputes the Department proposed to cover are: (1) safety-discrimination cases under the Occupational Safety and Health Act, (2) Family Medical Leave Act cases, (3) employee-whistleblower cases under a variety of environmental laws, (4) Fair Labor Standard Act cases, (5) discrimination cases under the Vietnam-Era Veterans Readjustment Act and (6) discrimination cases under Executive Order 11246.

There are several public policy implications inherent with the use of external mediation to resolve employment claims based on statutory law.

First, there is the concern that the key advantage of mediation, its lower cost, will result in a flood of non-meritorious claims. This problem could become particularly acute if complaining parties see mediation as just another way to impose costs on the responding parties. Currently, there are no plans to have the parties share in the cost of mediation. It is conceivable that unless both parties are required to pay a portion of the cost of mediation, there could be an incentive to proceed with unmeritorious claims. If the fee is too high, however, claimants with meritorious claims may be precluded from utilizing the mediation process. If only one party (typically, the responding party) pays a portion of the cost of mediation, the mediator may be presumed to be biased in favor of that party. Finally, if budgetary pressures require the EEOC to rely on voluntary mediators, there is a question concerning the quality of the mediation.

Second, other than the removal of class action and pattern or practice cases, it is unclear which cases would be ineligible for mediation. While the agencies indicate that "egregious" cases and cases dealing with "unsettled" legal issues would be excluded, the terminology is vague, at best. As a result, some parties may be denied the right to utilize mediation to resolve their dispute.

Third, there is no formal plan to screen external mediators used by the EEOC and USDOL prior to their appointment. To be effective, mediators should have both appropriate experience and training. Those who lack a thorough understanding of the law and how it is implemented, for example, would be unable to properly evaluate a case

and provide the "reality check" necessary to push the parties toward settlement. In addition, there is no indication whether and, if so, how, mediators will be held accountable for their actions. Nor are the any mechanisms in place for removing incompetent mediators. Finally, there is the concern of diversity among the available mediators. This problem becomes most acute in discrimination and sexual harassment cases.

Fourth, there is no mechanism for dealing with parties who are not represented by counsel. It is well accepted that parties lacking representation are often at a distinct disadvantage when dealing with parties that have representation. Moreover, since mediation is an extension of the negotiating process and employers generally have an advantage in dealing with individual employees, it is probable that mediated settlements could produce results incompatible with public policy. The lack of prehearing discovery only exacerbates the problem. In short, would unwitting employees be co-opted into "second-class justice?"

Fifth, while confidentiality is considered an advantage of using mediation, it may be in conflict with other public policies. For example, do confidentiality requirements abridge an individual's rights to free speech? What effect would confidentiality requirements have on the deterrent effect of publishing awards? Would such a requirement infringe on a party's right to have individuals of their choosing attend the hearing?

Sixth, a recurring problem in mediation is the lack of settlement authority by one of the parties. How would the governmental agencies deal with this problem? Would public policy be advanced if additional charges were brought against the offending party? Should the misrepresented party still be subject to the agreed-to resolution?

Seventh, mediation may result in unfair settlements in cases where egregious violations have occurred. Unlike the EEOC's conciliation efforts that would occur as part of the traditional complaint process, mediation agreements are not subject to review by EEOC staff. Nor is a final report is not submitted to the EEOC. There is no way, therefore, to ensure that the result comports with the statutory mandate. Nor is there any effective means of appeal.

Eighth, should the parties be given some time to reconsider their decision to settle the matter? A recent decision indicates that a mediated settlement to dismiss a discrimination complaint is unenforceable if the complainant was not given a reasonable time to consider the employer's offer. (*Jacobs*, 1997). It would appear that the agency should allow for a reasonable period of time for the parties to reconsider their agreement to waive his or her rights. This, again, may be particularly necessary in cases where one of the parties is not represented by counsel.

Mediation has much to recommend it. It is a faster and cheaper than the traditional enforcement process . Whether it fulfills its potential, however, will depend on whether its implementation is compatible with the public policies articulated in the employment statutes. As they say, "the devil," as they say, "is in the details."

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REAL VALUE OF DAMAGE CAPS FOR MEDICAL MALPRACTICE IN LOUISIANA

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ABSTRACT

The Louisiana Medical Malpractice Act was passed by the Louisiana legislature in 1975 with a limit of $500,000 (excluding interest, costs, and future medical care and related expenses) recoverable by a plaintiff for an act of medical malpractice. Although the Legislature apparently intended to reduce the size of damage awards and thereby control the growth of the cost of malpractice insurance, still, they did intend for sufferers of malpractice to benefit to some extent from this award. More than twenty years have passed since that time, and the real value of such an award has been significantly eroded by inflation. Many prices have increased, to twice and three times the size they had in 1975. One cannot purchase the same basket of satisfactions today for $500,000 that one could in 1975. Hence, plaintiffs today have a more severe limitation of their total recovery than did plaintiffs in 1975.

Incomes have risen in dollar terms also, causing additional economic loss of a disabled plaintiff whose lost income is now a greater number of dollars than for the same work in 1975. Many income rates are no longer fully recoverable within the cap.

With the rise in the cost of living associated with the depreciation in the purchasing power of the dollar, and the rise in incomes also resulting from the inflation of the money supply, a plaintiff suffering from medical malpractice is much worse off today than twenty years ago if he receives the cap damage award of $500,000.

This paper studies different measures of the reduction in plaintiff welfare associated with the damage cap held constant over the past twenty-two years at $500,000. Prices of various market baskets of goods and services are investigated to estimate the actual real benefit of a current $500,000 compared with that of 1975, and salaries and their values over work life expectancy are investigated to show the reduction in the value of income benefits recoverable under the cap.

POTENTIAL IMPACT OR INTEREST

Public policymakers, legislators, and attorneys may be interested in the decline in the real value of damages recoverable by malpractice plaintiffs which has occurred since the cap on damage awards was set. They may conclude that equity requires raising the cap amount for damage awards to cause the real value of the new damage cap to provide the same welfare as did $500,000 in 1975. Compared with plaintiffs of twenty years ago, the same benefits cap would appear to deny equal protection across time, causing current plaintiffs to be disadvantaged compared with plaintiffs of earlier years. Similarly, current plaintiffs would appear disadvantaged compared with earlier plaintiffs in their inability in some cases to recover the full value of lost income within the current dollar cap.

TEXT

Louisiana Revised Statute 40:1299.39, .41-.42 (passed, 1975, Amended 1985) establishes a maximum cap on damages awarded by judgment or settlement in a medical malpractice action at $500,000, now excluding medical care expenses. With this legislation, Louisiana joined many other States in limiting damage awards for medical malpractice, in an effort to constrain the growth of malpractice insurance premiums and the damages awarded by juries. The growth of the cost of malpractice insurance had driven some physicians out of practice in particular areas and types of service, and there was a widespread perception that some medical services would soon become unavailable due to continued growth. This limitation of damages has been upheld by the Louisiana Supreme Court. The Louisiana damage cap is larger than the damage caps of some other States, although all economic and non-economic losses are included in the Louisiana cap, while some other States include only non-economic losses within their damage caps.

In 1975, a limit of $500,000 to economic plus non-economic damages was a large amount. Twenty-two years later, this amount of cash has a much-reduced purchasing power in terms of the quantities and qualities of goods which it can afford to purchase; in addition, it cannot any longer reimburse for income loss above about $58,000 per year for more than ten years. It is likely that many disabled malpractice plaintiffs who prevail in court may have actual damages exceeding the cap amount.

There are three areas of economic change that cause the value of the $500,000 cap to be reduced in real terms today compared with its real value in 1975:

1. Price inflation–the reduction of the purchasing power of the dollar, reflected in generally higher prices for all goods and services;
2. Growth of real income–higher productivity causes the real wages of many occupations to be higher today than in the past, so that reimbursing a plaintiff for lost wages or income requires a larger present cash amount;
3. The combination of higher current-dollar occupational incomes and lower interest rates today, compared with the situation in 1975, causes the present values of streams of future lost income to be significantly larger today than in 1975 (two to four times larger), for individuals disabled from income; in many cases, the value of lost income can no longer be replaced for middle-income earners or professionals.

INFLATION

Consumer prices have increased sharply between 1975 and 1996: the average Consumer Price Index for 1975 was 53.8 (based on 1982-84 = 100), and the value of the Consumer Price Index in 1996 was 156.9. (*Economic Report of the President, 1997*, page 365, table B-58). During the 21 years, the average rate of growth of the CPI was 5.23% per year, compounded annually. This means that prices have risen by that rate, on average, or that the purchasing power of each dollar has fallen by 5.23% each year. The current purchasing power of $1.00 is therefore only 34% of its purchasing power in 1975. Alternatively put, prices are 2.92 times as high now as in 1975. But the number of dollars in the damage cap has not increased. This means that what cost $500,000 in 1975 costs $1,458,178 currently. What could be purchased for $500,000 in 1975 costs almost three times as much today. The sum of $500,000 today will purchase what $170,000 did in 1975. The constancy of the damage cap has constrained the real purchasing power of the damage award to approximately one third of what it was when the cap was enacted. Whether or not that was the intention of the Legislature, this is the actual effect.

The price of housing has increased at a faster rate, 6.15% per year, with the index rising from 48.8 in 1975 to 171.0 in 1996. Prices of housing are therefore 3.50 times as large today as in 1975. Food prices have increased at a compound annual rate of 4.56% per year, from an index of 60.2 in 1975 to 153.7 in 1996. Food which cost $1.00 in 1975 now costs $2.55. Food that costs $1.00 today cost $0.39 in 1975.

The prices of new cars have increased at a compound annual rate of 3.93% (*Economic Report of the President, 1997*, page 367, table B-59), from an index value of 62.9 in 1975 to an index value of 141.4 in 1996. New car prices are therefore 2.25 times higher now than in 1975: a car that cost $8,900 in 1975 costs $20,000 currently.

Clearly, the purchasing power of the damage cap of $500,000 is far smaller today than it was in 1975 when it was enacted. Whatever was the appropriate limit on damage awards then has been shrunk over the last twenty-two years.

CURRENT INCOME AND EXPENDITURES

Measured in current dollars, in 1975, Personal Income per person was $6,091; in 1995, it was $23,193. In 1975, Personal Consumption Expenditures were $4,765; in 1995, they were $18,717. In current-dollar terms, income and expenditures have grown four times since 1975. During that time, however, the number of dollars in circulation has increased several-fold as well. Measured in dollars of constant purchasing power, called “chained 1992 dollars”, disposable personal income in 1975 was $13,404, while in 1995, it was $18,757, an increase of 40% in real terms. Similarly, personal consumption expenditures were $11,899 in 1975, measured in 1992-constant-value-dollars; while

in 1995, personal consumption expenditures were $17,403 in the same-sized units, an increase of 46%. (*Statistical Abstract of the United States*, 1996, page 448, table 692) The number of dollars required today for the same disposable personal income has increased by 276% ($5,367 in 1975 to $20,174 in 1995). From these figures, the current purchasing power of the award cap would be 27% of its 1975 value. In 1975, $500,000 would purchase the personal consumption expenditures of 104.93 people ($500,000/$4,765); however in 1995, $500,000 would purchase the personal consumption expenditures of only 26.71 people ($500,000/$18,717). The value today of $500,000 is considerably smaller than it was in 1975. An award which would have achieved a particular economic status in 1975 cannot do the same today.

In Louisiana in 1975, personal income per capita, measured in then-current dollars, was $4,729; in 1980, this had risen to $8,672; by 1990, it had become $14,281; and in 1995, personal income per capita in Louisiana was $18,827 (*Statistical Abstract*, 1996, p. 453, Table 699). Therefore, $500,000 in 1975 was equivalent to the personal income of 105.73 people; but by 1995, the award cap of $500,000 was equivalent to the personal income of only 26.56 individuals. In contemporaneous terms, the value of the damage cap was cut over twenty years to one-fourth of its former value.

In terms of constant-value dollars (1992 dollars), personal income in Louisiana was $13,066.17 in 1975; $14,824 in 1980; and was $17,505 in 1995 (*Statistical Abstracts*, 1976, 1986, 1996): the real value increased by only 18% over 15 years and by 33.97% over twenty years. In 1972 dollars, personal income per capita in Louisiana was about $3,991 in 1975. (1980 personal income per capita was $15,371 in 1992 dollars, and was $4,695 in 1972 dollars, so to convert 1972 dollars into 1992 dollars, multiply the amount in 1972 dollars by 3.2739. In 1975, personal income per capita in Louisiana was $13,066.17, in terms of 1992 dollars.)

Although the real value of personal income increased only by about 40% over the twenty years from 1975 to 1995, the reduction in the purchasing power of the dollar over the period was larger. This means that the actual purchasing power of the $500,000 was much smaller in 1995 than the real growth of income would indicate.

Median income of all households in 1975 was $11,800 in current dollars; in 1984, median income in current dollars was $22,415. In 1994, median income was $32,264 (*Statistical Abstract*, 1996, page 461, Table 710). In 1975, $500,000 would have purchased 42.37 individuals' median income; in 1994, the same maximum dollar cap of $500,000 would have purchased only 15.50 individuals' worth of median income. The income-value of the damage cap was cut to 37% of its prior value--almost to one-third its previous value in 19 years. (Later data are not available.)

In terms of constant (1994) dollars, real median household income in 1975 was $31,117, and was $32,264 in 1994. Most of the difference between 1975 and 1994 is due to the reduction in the purchasing power of the dollar across that time span.

On the basis of comparisons of average income levels in 1975 and 1994-1995, the damage award cap constrains current plaintiffs to real purchasing power of between 25% and 60% of the value available in 1975.

PRESENT VALUES OF LOST FUTURE INCOME

The upper limit, or "cap" on damage awards in medical malpractice actions includes damages for pain and suffering and lost income. An economic analysis cannot add much to a discussion of the value of lost quality of life due to pain, suffering, or other subjective perception of a patient. However, economic analysis of the replacement of lost income can throw light on to the size of damage awards.

In 1975, long-term interest rates were somewhat higher than in 1996: ten-year Treasury Bonds yielded 7.99% per year in 1975, while in 1996, they yielded 6.44% (*Economic Report of the President, 1997*, page 382, Table B-71). Such a difference in interest rates is reflected in the present value of lost future income: over a span of ten years, for example, the present value of an income stream starting at $20,000 and growing at 3.0% per year is $161,238 at the higher discount rate of 7.99%, and is $171,872 at the lower discount rate of 6.44%, an increase of 6.60%. However, this effect is not significant in the first years following 1975 because of the increase in interest rates which occurred through 1981. Following the peak in interest rates at about 14% in 1981, rates on 10-year Treasury Bonds declined gradually and hit a temporary trough below 8% in 1986; however, they again rose into the 8.5% range and remained there until they were again in the 7% - 8% range again in 1991. During all of this time, present values of lost future income would have been smaller than in 1975 due to the height of discount rates, the size of the annual income rate

being unchanged. However, with the decrease in market rates since 1991, present values have increased due to this discount-rate effect.

Dominating this interest-rate effect, however, is the effect of the increase in actual annual money incomes during this period. For example, in 1975, the minimum wage was $4,368 for full-time work of 40 hours per week at the hourly minimum wage of $2.10. At the 1995 minimum wage of $4.25 per hour, full-time work with no overtime had an annual income rate of $8,840.00, a doubling of the annual income over the twenty years. Incomes above the minimum wage rose somewhat more. For example, average weekly earnings of oil and gas production workers rose from about $230.00 per week in 1975 to about $500.00 per week in 1990. (*Employment, Hours, and Earnings, United States, 1909-1990*, Volume 1, Bulletin 2370, pages 30-31) This was an increase of 117% in current-dollar terms.

Such increases in the current-dollar value of annual incomes has a profound effect on the present value of lost future earnings, as shown in Table 1.

TABLE 1
EFFECT OF CHANGES IN ANNUAL INCOMES
ON PRESENT VALUES

YEAR	i %	INCOME	growth	PV(10yr)	PV(20yr)
1975	7.99%	$4,368	3.00%	$35,214	$57,155
1996	6.44%	$8,840	3.00%	$75,967	$130,663
1975	7.99%	$11,960	3.00%	$96,420	$156,497
1996	6.44%	$29,640	3.00%	$254,714	$438,105
1975	7.99%	$12,948	3.00%	$104,385	$169,425
1996	6.44%	$35,568	3.00%	$305,657	$525,726
1975	7.99%	$12,116	3.00%	$97,678	$158,538
1996	6.44%	$29,224	3.00%	$251,139	$431,956
1975	7.99%	$30,000	3.00%	$241,857	$392,551
1996	6.44%	$82,410	3.00%	$708,199	$1,218,091

Table 1 has five sections, each devoted to an example full-year income rate for a particular occupation in 1975 and in 1996. The first section shows the full-time minimum wage, which was $4,368 in 1975 and was $8,840 in 1996. The second, third, and fourth sections show annual incomes for typical oil and gas ($11,960 and $29,640), mining ($12,948 and $35,568), or transportation ($12,116 and $29,224) workers in 1975, and again, the same occupation income in 1996. The incomes in current dollars in 1996 are almost three times as large as the current-dollar annual incomes in 1975. The fifth section illustrates the income of a professional earning $30,000 in 1975 and $82,410 for the same job in 1996.

In Table 1, the present values of these income streams are computed, for two periods of time, ten years or twenty years. All incomes are assumed to grow at the rate of 3% per year, steadily across the future. Each year's income is discounted at the rate shown beside the year, 7.99% for 1975 and 6.44% for 1996.

Note the increase in the present value of ten years' worth of minimum wage: from $35,214 in 1975 to $75,967 in 1996. Twenty years of lost income at the minimum wage now require $130,663 for reimbursement instead of the $57,155 of 1975.

But higher annual incomes are even more striking. Middle-income occupations, which paid $12,000 to $13,000 in 1975 nowadays pay $30,000 to $40,000. To reimburse ten years of income nowadays requires about

$300,000, while reimbursement of twenty years of income takes the entire $500,000 cap, leaving no funds available for pain and suffering.

Lost professional incomes are nowadays not reimbursable. An income of $30,000 in 1975 is today on the order of $80,000 and over. In 1975, reimbursement of ten years of lost income required about half of the cap, $241,857. In 1996, reimbursement of the same occupation income of $82,410 for ten years of loss requires $708,199. Should a young professional person nowadays be disabled from his profession and its $82,000 income for twenty years by medical malpractice, it would not be possible to make him whole within the $500,000 cap, since replacing his income would require $1,218,091. The damage cap could pay less than half the true economic loss for a disabled professional. Of course, higher incomes are even more egregiously non-reimbursable.

The present values in Table 1 show the impact of inflation on the present value of a lost future income stream, such as might be lost due to some acts of medical malpractice. Considering the cap value of $500,000, it is clear that occupations from which a patient may be disabled can no longer be reimbursed within the $500,000 cap. Even lesser-paying occupations can no longer be reimbursed along with some award for pain and suffering. If a patient is disabled from ten years of future work, and his current income is $60,000, not an outrageously unusual income these days, it would cost $515,616 to replace that income. Twenty years loss of $60,000 annual income would require $886,852 to replace. If a middle-income earner currently earning $35,000 were disabled for twenty years, replacement of his loss would require today $517,330, not quite within the damage cap. Should a person with higher income be disabled due to medical malpractice, even larger income would not be replaceable by the damage cap, and this would appear to be an unfair result of the fixed dollar amount of the cap.

To whatever extent the Louisiana Legislature meant for successful plaintiffs in medical malpractice actions to receive awards compensating them for pain and suffering as well as lost future income, such compensation is greatly diminished or completely unavailable today because of the fixed size of the damage cap.

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CO-INSURANCE: AN EDUCATIONAL OPPORTUNITY

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ABSTRACT

Some topics are so important in their own right that they demand attention. For example, the principles and procedures associated with the time value of money are used in financial accounting, managerial accounting, finance courses, and management courses. The time value of money is also applied to lost earnings potential in compensatory claims involving injury. The time value of money is so important to so many areas that it demands attention. However, other topics deserve attention not necessarily because of their own importance as an issue, but because of their more general educational benefits. In particular, the topic of co-insurance is one of the topics. Regretfully, co-insurance is a topic which initially seems confusing to many students, and one which is generally presented as a series of rules to be followed. But the truth of the matter is that the rules behind the procedures are based on proportional allocation and simple logic, This paper illustrates the logic behind the co-insurance procedures and shows how it can be used to greatly enhance the education of students.

INTRODUCTION

Accounting educators have long treated the intermediate accounting sequence of courses as a series of courses to prepare students for the Certified Public Accountant (CPA) exam. If a "new" topic is covered on the exam, textbook authors feel compelled to make certain that their next edition covers that topic. Thus, when a Co insurance problem popped up on a CPA exam several years ago, intermediate texts suddenly found it "necessary" to explain how to handle the problem. Their explanations, however, were largely rule based and designed to cover the topic rather than teach it. We find it interesting, and disturbing, that the topic has been moved from the financial section of the CPA exam to the business law section of the exam. One can only speculate as to the reasons for such action, but once co insurance was relocated to business law on the CPA exam most financial textbooks dropped the topic immediately.

While many laws are based on common sense ideas, business law textbooks seldom delve into the development of the logical foundation behind the laws. They simply present the laws as rules and procedures to be followed. Such a presentation is quite logical since law courses deal with laws whether they are logical or not. Furthermore, many business law textbooks treat co insurance as an accounting topic, not a topic in business law. Stated alternatively, they do not cover co insurance at all. Thus, many students are not exposed to co insurance and those that are exposed learn how to solve the problem but do not learn the logic behind the solution. (Note: Even when the topic was covered in accounting texts, it was still often presented as a rule based procedure to be applied rather than understood.)

We find this treatment of co insurance tragic. It is tragic because, as noted by Kinney, it is much more important for students to learn logical reasoning and critical thinking rather than learn any particular procedure. Without a solid foundation in the logic behind accounting methods they cannot adapt to changes in the rules and the rules will change. Furthermore, students should be involved in their own education, and co insurance forces them to do so. Co insurance can be effectively used to show students how to "learn to learn" and how to use simple concepts to solve (what initially appears to be) complex problems.

The purpose of this paper is to provide both business law and accounting professors an easy to use illustration of the logical solution to a problem that many students initially find quite complex. At a minimum, business law professors can distribute it to their accounting majors to prepare them for its potential appearance of the problem on a CPA exam. But more importantly, they can use it to illustrate that many of the laws (and procedures) that initially

appear complex are based on simple logical concepts rather than contrived rules. Accounting professors can also distribute it to prepare their students for a potential topic on the CPA exam. But more importantly, they can use it to show that complex problems have logical underpinnings, and most importantly they can use these illustrations to develop the logical thinking processes of their students. Since a college education cannot prepare students for all challenges that they will encounter, development of this analytical approach is critical to their long run success in their chosen field. The first tool needed in understanding co insurance is the concept of proportional allocation.

PROPORTIONAL ALLOCATION

Proportional allocation is prevalent in both accounting and business law and a separate paper more thoroughly covers the development and application of this tool so only a brief illustration is needed here. Assume the following prices of two stereo components:

Receiver/amplifier	$300
Speakers	700
	$1,000

If this "system" was acquired for a "package" price of $800, it would be allocated by one of the following processes:

Process One:				
Receiver/amplifier	800 x 300/1000	=	240	
Speakers	800 x 700/1000	=	560	
				800
Process Two:				
Receiver/amplifier	300 x 800/1000	=	240	
Speakers	700 x 800/1000	=	560	
	1000			800

If allowed to do so, most students will arrive at the solution without assistance from their instructor by one of the two processes. Of course, these are essentially the same due to the properties of multiplication. That is, a(b/c) = b(a/c). It should be clear that the allocation is done by proportions, but to further simplify the learning process this method will subsequently be referred to as the "stereo" method rather the "proportional allocation" method and the simplicity of the solution is emphasized. Simplifying the terminology makes it more "user friendly."

THE CO-INSURANCE PROCEDURES

In the case of single coverage, the insurance company simply pays to the extent that coverage is met. That is, the amount paid is the loss times the proportion of coverage divided by required coverage. The case of multiple policies is simply extended to add a proportion of total coverage. First, consider the following example involving one insurance policy covering one item of property:

Face of policy	$ 7,000	
Original cost of property	6,000	
Accumulated depreciation to date	3,000	
FMV of property before a casualty*	10,000	
FMV of property following a casualty	4,400	
Co insurance requirement	80%	
Casualty loss		?

- FMV [Fair Market Value] or insured value, dependent upon the concept used. FMV is consistent with most accounting texts while many texts outside of accounting use insured value.

It should be noted that the casualty loss relies on economic value, not on book value. Thus, the economic loss subject to recovery is $5,600 ($10,000 4,400). Given an 80% co insurance requirement applied to property with a value of $10,000, the required insurance coverage is $8,000. A policy with a face of $7,000 fails to meet the required coverage. Thus, the insured acts as a "co insurer" (with the insurance company) in the event of a loss. Since 7/8

($7,000/ $8,000) of the coverage has been met, the insurance company will cover 7/8 of the loss, subject to the other logical limitations. These limitations are the amount of the loss and the face of the policy. After all, it would not make much sense for insurance to pay more than the amount of the loss. Likewise, the insurance company would not pay more than the amount of coverage, the face of the policy. In the current case, the proportional share is less than both of these and, accordingly, is the amount covered by the insurance company.

Particularly for subsequent development, it helps to illustrate both of the limitations by varying the example slightly. In the event of a complete loss (i.e., $10,000) the relevant numbers appear as follows:

(1) the amount of the loss = $10,000
(2) the face of the policy = $ 7,000*
(3) the proportional share = 7/8 x $10,000 = $8,750

* Face of the policy is the lesser of the three and the amount recoverable under the insurance policy.

In the event of "over insurance" (as it relates to the co insurance requirement), the insurance company will not pay more than the amount of the loss:

(1) the amount of the loss = $7,000*
(2) the face of the policy = $9,000
(3) the proportional share = 9/8 x $7,000 = $7,875

• The amount of the loss is the lesser of the three and the amount recoverable under the insurance policy.

In other words, the ratio of face to co insurance requirement has a limit of 1. Insurance of more than 100% of the co insurance requirement is useful only if the loss exceeds the co insurance requirement. Logically, more insurance will not result in larger payments for smaller losses, and (3) becomes (1 x $7,000) = $7,000. The logic of this simple situation should be thoroughly understood by the students before proceeding. Note carefully that the application of proportional allocation must be tempered with a bit of logical reasoning . It should be fairly easy for students to understand that an insurance policy will not pay more than the amount of coverage, nor will it pay more than the amount of the loss.

The discussion of insurance coverage can be continued to include situations where an item of property is covered by more than one insurance policy, such as in the following example:

	Policy A	Policy B
Face of policy	$5,000	$2,000
Co insurance requirement	none	none
Original cost of property	$8,000	
Accumulated depreciation		3,000
NBV	5,000	
FMV of property	10,000	
FMV following a casualty	4,400	
Casualty loss	5,600	

As a result of the casualty, how much of the $5,600 loss will each policy cover? By this point most of the students will quickly determine the correct solution 5/7 for A and 2/7 for B. This can easily be related to the typical textbook presentation:

$$\frac{\text{Face of Policy}}{\text{Total Face of all Policies}} \times \text{Amount of Loss}$$

The case of multiple insurance policies can be taken to the final step by adding different co insurance clauses. The preceding example can be modified to include the following co insurance provisions:

Policy A - 80% requirement
Policy B - 60% requirement

By combining formulas from the preceding examples, the following is derived:

Face of Policy	X	Total Face of all Policies	X	Amount of Loss
Total Face of all Policies		Co-insurance Requirement		

The first term represents the proportional share for each company while the second represents the extent that coverage is met. It should be obvious that the face value of any one policy cannot exceed the face value of all policies, which implies that the first term has a maximum value of 1.00. As previously argued, the second term has a logical limit of 1.00 as well. Applying the mathematics to the present example, the portion of the $5,600 loss covered by the policies is computed as follows:

Policy A:	5,000	X	7,000	X	5,600 = 3,500
	7,000		.8 x 10,0000		
Policy B:	2,000	X	7,000	X	5,600 =
	7,000		.6 x 10,0000		
	2,000	X	1	X	5,600 = 1,600
	7,000				

Of the total loss, Policy A pays 5/8 X 5,600, Policy B pays 2/7 x 5,600 = 1,600, and the insured party (as co-insurer) bears the remainder of the loss.

Let us contrast this to the typical treatment found in an accounting textbook [Keiso and Weygandt, 1989, p. 471]:

> If the policies have co-insurance requirements, the amount recoverable under each of the policies is computed by multiplying the loss by a fraction, the numerator of which is the face value of the individual policy, and the denominator of which is the higher of (1) the total face value of all policies, or (2) the amount required under the co-insurance requirement of the particular policy (emphasis theirs).2

This rule can be applied to the last example as follows:

Policy A:	5,000	X	5,600 = 3,500
	8,000		
Policy B:	2,000	X	5,600 = 1,600
	7,000		

Some would claim that the above coverage is adequate since it "gets the job done." Indeed it conveys how to solve the problem. But that is the problem--it tells how but does nothing to expand the logical reasoning capacity of the students. In fact, it hinders the development of logical reasoning by encouraging the memorization of rules.

SUMMARY

The solution of the co-insurance problems requires more than the simple logic of proportional allocation, such as not paying more than he amount of the loss or the amount of coverage. But herein lies the beauty of the problem, and why it should remain part of standard accounting textbooks even if co-insurance is no longer a financial topic for the CPA exam. Students apply multiple logic structures and a basic allocation mechanism to solve a fairly complex problem. In brief, they think their way to the solution. By taking the time to guide them through the solution to this problem, their learning process is greatly enhanced. In particular, the logical solution of this problem helps achieve an objective set forth in the Accounting Education Change Committee Positive Statement Number One: "Students must be active participants in the learning process, not passive recipients of information. They should identify and solve unstructured problems that require use of multiple information sources (p. 309)." Compare this intuitive approach to the application of "rules" provided for memorization.

Students can memorize rules and apply then or they can learn the logic that drives the rules. Both alternatives have been demonstrated. Since memorization fades with time, knowing how to approach a problem is the preferable alternative, as well as being more intrinsically rewarding. By being active participants in solving this complex

problem, students feel good for thinking their way through it and for their efforts they are better able to cope with a changing world.

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WHAT GOES AND STAYS WHEN THE LEASE RUNS OUT - CAN YOU REALLY TAKE IT WITH YOU?

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THE REALITY OF MOVING OUT - HAS THIS HAPPENED TO YOU?

John Doe owns a plot of ground located in Anytown, USA. He wants to make this art income-producing piece of property so he advertises in the local newspaper that the half-acre lot is for rent and that he will build to satisfy any potential tenant. Mary Smith answers the ad and, after lengthy negotiations, the landlord and the tenant agree that Mary will lease the lot for a primary term of ten (10) years and have two (2) five (5) year options to renew at terms to he negotiated by the parties. Mary installs a basic "car wash" on the leased premises, which consists of concrete stalls that are covered. Inside the stalls are high-pressure hoses for washing the cars, the hoses being connected to underground pipes, which are in turn connected to a hot water heater and a high-pressure compressor located in a metal shed. The hot water heater and the compressor are connected to the underground pipes by simple couplings and each are bolted to the floor of the metal shed by four steel bolts.

Mary operates the car wash for the full term of the lease plus the two options and at the end if the final option John tells her that the has other plans for the property and that he will not renew the lease. Mary begins to remove all of the improvements that she has made to the premises over the last twenty years and John immediately objects. He tells Mary that all the improvements of whatever nature stay with the property and Mary can take nothing with her when she leaves, especially the hot water heater and the compressor.

Each year thousands of small family businesses, either because of lack of capital or because of location or through necessity, lease or rent their physical facilities. When these leases expire the tenants are faced with the problem of what improvements stay and what goes. When the landlord objects to the removal of some or all of the improvements we have the makings of a classic lawsuit.

THE LAW - COMPONENT PARTS VS FIXTURES

A good starting point would be to examine a sampling of the State statutes applicable in this area and the jurisprudence interpreting these statutes. Article 466 of the Louisiana Civil Code deals directly with the question of what is a component part. The article states:

> Things permanently attached to a building or other construction, such as plumbing, heating, cooling, electrical or other installations, are its component parts.
> Things are considered permanently attached if they cannot be removed without substantial damage to themselves or to the immovable to which they are attached (1).

This article has been substantially amended from its original text to reflect a more updated treatment of what is and is not considered components and fixtures (2). Prior to this amendment things such as wire screens, water pipes, gas pipes, sewerage lines, heating pipes, radiators, electric wires, electric and gas lighting fixtures, bathtubs, lavatories, closets, sinks, and furnaces were considered component parts of the building when actually attached to the building (3).

Today, the statutes and the Courts have adopted a different approach to this subject. They look more to what were the "societal expectations" as to what is and what is not a chattel or movable when it comes to being a component part of a building. A case in point is the *"Equibank"* case, supra, that begins by quoting Professor A. N. Yiannapoulas, Professor of Law at both Louisiana State University and Tulane University School's of Law, "...We are talking about what an ordinary man who purchases (leases) a house with ordinary prudence ought to know and ought

to expect. We are talking about what ideas prevail in society today with respect to an ordinary buyer (tenant) of ordinary prudence. Or an ordinary mortgagor or an ordinary mortgagee of ordinary prudence. It is an objective test rather than a subjective test (4)." (Parenthesis added above)

"Equibank " dealt with certain chandeliers that were part of the home of Norman and Dorthea Johnson, valued in excess of $75,000, and were the subject of seizure by the IRS for back taxes. The Plaintiff, *Equibank,* had a mortgage on the Johnson home and they objected to the seizure by the IRS (5). In its reasoning the court distinguished between common, everyday electrical appliances and devices to more sophisticated electrical implements (6). The court had no problem with the simple electrical units that are operated by the simple act of inserting a male plug into a female socket. The item can be just as easily disconnected by pulling the plug out of the socket. Table and floor lamps, toasters, can openers, blenders, drills, mixers, radios, televisions, and stereo units are to name a few examples (7). It is obvious that these items are viewed by society as movables or chattels; they are not electrically installed; not fixed in place and require no special knowledge or expertise to engage or disengage the power source. Therefore, they are not component parts of the building or construction in which they are found. Thus the Court concluded that a lamp (or as in the case of John and Mary, an air compressor and hot water heater) which is simply plugged into a socket is a movable or chattel and may be removed from the structure without damaging the building itself (8). As to the chandeliers in the *Equibank* case, the court concluded that the ordinary view of society was indeed a relevant consideration and finished its opinion by asking the near-rhetorical questions: "...Does the average, ordinary prudent person buying a home expect the light
fixtures to be there when he or she arrives to take possession? Does that person expect the room to become illuminated when the light switch is thrown...?" The court answered both questions in the affirmative (9).

Other jurisdictions refer to "goods" and "fixtures" when deciding what goes and stays when the lease terminates. Alabama law states that goods are fixtures when they become so attached to particular real estate that an interest in them arises under real estate law (10). Delaware follows the same concept (11). North Carolina law states that ordinary building materials incorporated into the premises become part of the premises (12) and goods become accessions when they are installed in or affixed to other goods(13). In determining whether or not these goods or fixtures have become a permanent part of the structure that is]eased the courts, in some cases, have considered three points. One, has the chattel become so affixed to the structure that the identity of the chattel is lost, or so annexed that it cannot be removed without material injury to the structure or itself? Two, is the article readily distinguished as furniture as opposed to improvements? And three, taking the entire fact situation as a whole, what were the intentions of the parties when the chattel was annexed to the structure along with the degree and form of the annexation (14)?

How would this effect the introductory situation with John, Mary and the "car wash"? Society shouldn't expect the concrete stalls and the underground pipes be removed without causing damage to the structure itself But the hot water heater and the air compressor could easily have been uncoupled or unbolted and removed so as not to lose their identity or cause damage to themselves or to the soil or surrounding area.

ALTERNATE VIEWS

Some courts have formulated other criteria to determine if improvements were in fact movable and could be removed or had they become component parts of the structure (1 5). The *Benoit* case, supra, in tracing the jurisdiction in this area stated that Courts have held that "improvements" or "fixtures" that became a part of the structure included such things as a cistern (16), a corn mill (17), a gas tank (18), a barbed wire fence (19), an outdoor advertising sign (20), and a railroad track (21). The three criteria most mentioned in these cases were (1) the size of the improvement or fixture, (2) a certain degree of integration or attachment to the soil, and (3) some degree of permanency (22). *The Benoit* case concerned a hydraulic lift, an air compressor and three gasoline pumps. The Court concluded the hydraulic lift was a component part of the structure while the air compressor was not (23). Again, we look at John and Mary's case. The concrete stalls and flooring have been integrated and attached to the soil with a degree of permanency, as have been the underground pipes. But, as in the *Betioit* case, supra, the air compressor can go.

Additional standards have been added in more recent cases. One such example dealt with three 5000 pound electrical transformers (24). The case list five factors that are to be used in determining whether or not something can be removed or if it is a component part of the structure. First, the court noted that component parts of immovables (structures) are immovables. Second, things permanently attached to an immovable are its component parts. Third,

electrical installations are permanent attachments. Fourth, the court considered the "societal expectations" factor in determining if an item is removable or not. And fifth, the degree of skill necessary for a safe connection and disconnection of the thing shall be considered inasmuch as society expects a thing to be a component part il' professional skill in handling and removal is necessary (25). Septic tanks, field lines and air conditioner pipes were considered to be an integral component of the building based of societal expectations, notions and needs of the times (26). Carpeting that had been installed in a residence had become a component part of the building since a reasonable buyer would expect to have finished flooring such as carpeting to be there when he took possession of the house. And finally, a hoist which was attached by bolts to a gantry crane so that it could easily be removed without doing substantial damage to either the crane or the hoist was held not to be a component part of the crane (27).

AVOIDING THE PROBLEM

One way to avoid the entire problem of what stays and what goes after the lease runs out is by agreement between the landlord and the tenant. Many states have statutory provisions that provide that improvements to a leased premise made with the consent of the landlord belong to the tenant. At the termination of the lease the tenant may remove the improvements but must restore the property to its former condition (28). If the improvements or additions to the leased structure are made without the consent of the landlord then the landlord has the right to retain them (29). Most jurisdictions further provide that if the tenant has the right to remove the improvements then he must do so within a reasonable length of time after the termination of the lease. Failure to do so after written notice has been given by the landlord will result in the forfeiture of the improvements to the landlord (30). A great deal of trouble and controversy can be avoided by deciding the fate of the improvements in the original lease contract. Should the improvements come after the original lease is signed then an amended lease would take care of any future problems.

CONCLUSIONS AND THOUGHTS

Several recommendations can be made based on the jurisprudence and the statutory law that will aid the landlord and tenant to avoid any problems at the end of the lease. Certainly, the easiest and best way is to simply have a written agreement between the parties as to the disposition of any additions or improvements to the leased premises. Absent this, then we must look at several factors. Does the addition or fixture lose its identity when attached to or incorporated into the structure? What is the extent and nature of the changes made and to what degree will the removal of the changes damage or destroy the building? What are the societal expectations of the ordinary prudent buyer or leasee in similar circumstances? And last, the degree of skill or expertise needed to do the installations or the removal. After considering all these factors, one can decide if he or she can really take it with you. Mary will probably leave with her hoses, hot water heater and air compressor. The concrete stalls and underground pipes will more than likely stay. As to the metal shed - Well! You be the judge!

ENDNOTES

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4. Id.
5. Id.
6. Id., page 1179
7. Id.
8. Id.
9. Id., page 1180
10. Code of Alabama, Title 7 - 2a - 309, et. seq..
11. 25 Del. Law, Sec. 5501 et. seq.
12. N.C. Code, 25 - 2A - 309
13. N.C. Code, 25 - 2A - 310(5)(a)
14. State v. Livingston, 110 N. E. 297, 222 Mass. 192 (1915)
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26. Lakeside National Bank of Lake Charles v. Moreaux, 576 So.2d 1095, (La. App. 1st. Cir., 1991)
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29. Id.
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