SATISFACTION IN THE LAW

By Ortrie D. Smith

I begin by congratulating the staff and faculty advisers of the UMKC Law Review. The idea of an internet publication is one whose time has come. Those associated with creating this first edition are commended for their prescience in seeing the future and rushing to greet it. I am pleased to be associated with visionaries.

My assigned topic could be called equanimity and the lawyer. I understand my assignment to be one of recounting personal experiences to the extent those experiences may help others find gratification and happiness in the practice of law. I embrace the opportunity for I have enjoyed a long and rewarding courtship with that jealous mistress.

The flirtation began in 1967. As a fourth-year student at the University of Missouri at Columbia I began to realize that my Bachelor of Arts Degree provided me no marketable skills. My studies centered primarily on history and English. In terms of career preparation, I might as well have remained in the bumper pit at the Leeds Chevrolet factory in Kansas City, Missouri, the last job I held before driving off to Columbia, Missouri in 1964.

As poor as those focus areas were as job qualifiers, they were an excellent background for law school. So I applied and was accepted by the University of Missouri at Kansas City School of Law, then located at 51st and Rockhill. Upon graduation from law school I accepted an associate's position with the law firm then known as Ewing, Ewing, Carter, Wight, Woodfill and Middleton, a well-respected, third-generation law firm in Nevada, Missouri. There, I was permitted - even encouraged - to focus my practice in areas I found most gratifying. I enjoyed 24 terrific years as a practicing attorney before being nominated by President Clinton for the position of United States District Judge, Western District of Missouri.

My purpose here is to suggest some principles which will enable you to enjoy a career as gratifying as my own. They are:

A. Aggressively pursue workplace pleasure.
B. Balance is critical.
C. Embrace relationships.

I. AGRESSIVELY PURSUE WORKPLACE PLEASURE

The practice of law is an inherently difficult career. It necessarily involves interacting with other attorneys. It is an accurate generalization to say that lawyers are intellectually gifted and driven to succeed. It is unlikely you will find many slothful dullards as adversaries.

The adversary system involves competition. One of my partners at the Ewing Law Firm told me that the smartest lawyer does not commonly prevail; the lawyer who commonly prevails is the one best prepared, the one who interviews witnesses, thoroughly researches the law and unrelentingly marshals the facts for the benefit of his/her client.

Obviously, being successful requires an investment of time. There is also pressure. Managing partners have expectations that must be met. Clients, likewise, have expectations and hopes. Consistent failure to meet the expectations of either will be detrimental to a career in the law.

So, where does one find the pleasure in a demanding and competitive legal profession? My experience tells me that pleasure is found in doing the kind of legal work which provides personal and professional gratification.

I mentioned that I was permitted to focus my practice in areas that I found personally rewarding. The senior partners were sagacious in allowing me the choice. When we enjoy what we are doing, we do it better. The partners understood this precept and implicitly accepted the axiom that a happy lawyer is a successful lawyer. An amalgamation of successful lawyers creates a successful law firm. Our small firm had no formal written career track policy. It was just something imbued in the culture of the firm. And so, in the early years I was given a wide variety of assignments. I was permitted to accompany a senior partner to a preliminary hearing in a criminal case prior to passing the Bar exam. As a lawyer, though not yet an attorney, my partner introduced me to the Magistrate Judge presiding at the preliminary hearing as "a young person just out of law school knowledgeable about issues of constitutional law." The Magistrate Judge allowed me to argue a search and seizure issue. At the conclusion of my argument, the Magistrate Judge was persuaded, the evidence was suppressed and our client was released - pretty heady stuff for a 24-year-old who did not yet know whether he had passed the Bar exam.

I was assigned files involving transactional law, criminal law, civil litigation, real estate law and banking law. I was permitted - and encouraged - to meet with the firm's clients without a senior partner sitting in the conference. My confidence grew and my preferences became refined.

In retrospect, I can see that my career as a practicing attorney followed two distinct and different courses. During the first half of my career I represented people, certainly, but more predominantly insurance companies, banks, businesses, entities and organizations. During the second half of my career I primarily represented people. I found the second half more gratifying than the first. It was important to me to have a client who could express appreciation or disappointment as the occasion required. It was also important that I represent someone with a very real, personal interest in the outcome.

Imagine the practice of law as a smorgasbord. You want to sample as many areas of practice as circumstances and your supervising attorney will allow. Discover which areas satisfy your professional and personal needs. Make those fields your areas of choice. In time, you will find yourself engaged in activities which excite and engage you.

II. BALANCE IS CRITICAL

Many lessons can be drawn from athletics. Paul "Bear" Bryant was one of the most successful college football coaches in history. Prowling the sidelines

in Tuscaloosa wearing his trademark houndstooth hat, Bryant amassed 323 victories. As head coach at Alabama for 25 years, he won six national titles and 13 southeastern conference championships. When he retired, he was the winningest college football coach in America.

Coach Bryant retired in 1982. Four weeks later he was being prepped for an electrocardiogram. While there, he died of a massive heart attack.

How many of us will have regrets later in life? Did we spend enough time with our families? Are there places we wanted to see but didn't due to work commitments? Did we check off the items on our "bucket list"?

I believe a balanced life is a happy life. That was a point I tried to make in March of 1992 when I was serving as President of the Missouri Bar. An article written then is partially reprinted here with the permission of the Missouri Bar.[1]

> "I did it wrong. If I had it to do over again, I would do it differently." Those were my father's words. As he spoke them, I thought about how he had aged since his heart attack in 1983. His hair was white and loose skin hung on his face as a result of a 35-pound weight loss.
>
> My father was an excellent patient. He had successfully changed his lifestyle and eating habits following the heart attack. He very nearly died, underwent by-pass surgery before he recovered, spent weeks in the hospital, and convalesced at home for more than a year after the incident. He never really regained his health and was very limited physically. He was able to go out to the mall frequently, where he enjoyed sitting on the bench reminiscing with old friends about the years gone by. However, from the heart attack until his death in March of 1991, he led a very sedentary life.
>
> Because of his physical limitations, I am sure my father spent a good deal of time in reflection upon his life. He had dropped out of school in the eighth grade to help support his family. He was drafted the day before Pearl Harbor and was a decorated World War II veteran. He married my mother before going overseas. I was born approximately 10 months after my father returned from Germany. Dad was obviously glad to see my mother.
>
> My youngest childhood memories include kneeling by my bedside at night and saying my prayers with my mother. My dad was always working.
>
> Dad grew up during the Depression. He worked in the cotton fields, shined shoes, delivered papers or did whatever was necessary to help put food on the table. As a result of that experience, Dad's understanding of fatherhood was limited. He equated fatherhood with

---

[1] Ortrie D. Smith, *Keeping Priorities Straight*, J. MO. BAR (Mar. 1992).

> providing for his family. If that meant working 12 to 16 hours a day, that is what he did.
>
> As a boy, I was never much of a student. I was more interested in basketball, football and baseball. I participated in athletics through my junior year in College. I have no idea how many athletic contests I competed in over the years. Of this I am certain: my father saw one football game, half of another, and no more.
>
> This conversation occurred prior to my dad's last illness. He felt remorse because he hadn't spent more time with us while we were growing up. I tried to let him know that I understood. He had done what he knew how to do and he had done that very well. No matter what I said, however, I knew I couldn't erase his regret.
>
> What a tender trap it is, to be so caught up in what we are doing at the moment that we lose sight of the things which are really important in life. My observation is that this is more true of lawyers than it is of the population in general. Typically, lawyers have Class A personalities, driven by deadlines, pressures, career goals and the challenges of adequately representing a growing base of clientele. In addition, I have found lawyers to be quick at offering their time, talent and energy in the service of worthwhile community projects and civic service. The nearly undeniable temptation is to misplace our priorities, lose ourselves in the belief that what we are doing now is most important. Unfortunately, we also lose sight of that which is truly important, commitment to family.
>
> If you have stood at the bedside of a desperately ill spouse or child, you know what I am talking about. All of a sudden, whether an office appointment is kept, whether a pleading is timely filed, or a partnership meeting is attended seems unimportant. Your focus, your attention, and your concern is with the welfare of a loved one. It is then that we seem to get our priorities straight.
>
> In the days before Dad died, our family spent most of its waking hours (and some of its sleeping hours) at his bedside. He was in and out of consciousness and was heavily medicated to ease his discomfort. One quiet morning, he and I were alone in the room as the sun streamed through the venetian blinds. His eyes were closed and he was resting. I thought of those days when he was absent from the home and I prayed with my mother. I said, "Dad, would you like me to pray with you?" His eyes opened and he nodded. I chose to believe he understood that this quiet moment in his final hours made up for all the missed ballgames, the missed fishing and hunting trips, and the missed opportunities.

Think back over your life. What memories hold pleasure for you? Is it an exam? Is it the times you toiled in the fields or the yard? What about the long

days, nights and weekends you spent preparing for a trial? I would guess not. My guess is that you enjoy recalling times that were pleasurable or were warmed by the presence of those you care about.

What does that tell you? Is it possible to be too serious and driven to succeed? I believe it is. And, I believe those who are will not find happiness in the practice of law.

I have a principle that I have applied throughout my adult years: first work, then play. Work is important. But, so is recreation. I have tried to do my work first, then, I allowed myself to do the things that gave me personal gratification. I have pursued each with equal energy. I commend that principle for your contemplation.

Take time for yourself and your family. One of my most pleasant memories is the summer of 1988 when I took eight weeks away from the law to drive across America with the five most important people in my life: my wife and my daughters. We traveled over 10,000 miles. We lost a transmission in Beckley, West Virginia and left a daughter at Wendy's in Loveland, Colorado. We also created memories that will last a lifetime.

I cannot make this point better than I tried to make it in 1992. Make time for yourself and make time for your family. Don't defer doing things outside the work place that you enjoy. A well-rounded and balanced life outside the workplace is vital if you are to be happy at work. Otherwise, you will be resentful that your life is incomplete. Resentfulness and bitterness are barriers to satisfaction in the law.

III. EMBRACE RELATIONSHIPS

Relationships are important. You should develop Bar relationships, community relationships and, importantly, relationships with your clients.

Many of my closest friends today are people I did not know until I became active in the Bar. I believe lawyers have an obligation to provide their time, talent and resources for the advancement of the Bar. In so doing, we contribute to improving the administration of justice. In meeting that obligation, you will find significant benefits to you that will contribute to your personal happiness. You will most likely see one dimension of another lawyer in the context of litigation or negotiations. You will see many more while working with the same lawyer toward a common goal. Whether it is committee work or some other Bar activity, you will come to know the individual and find that you have much in common. It is common interests and joint effort that result in life-long friendships.

The same is true with the work you should do in your community. Lawyers have a pro bono obligation. That means more than simply representing individuals at a reduced rate or for no compensation at all. The pro bono duty includes an obligation to improve your community. You can do that by volunteering with your homeowners association, your church, community or government boards or simply coaching your daughter's soccer team. In so doing

you not only improve your community, you expand your circle of friends. I suppose a few of us might enjoy being alone. Most of us, however, enjoy the company of people with like interests. We share their joy and their sorrow. Equally important, we have someone with whom we can share our joy and sorrow. Broadening your base of friends and acquaintances will increase your zeal for life.

Lastly, do not be afraid to develop a relationship with clients. I do not mean an attorney-client relationship or a business relationship. Clients are more than retainers and fees. You will not like all of your clients, but you can like most of them if you are open to that notion.

I met Paul and Marvy Dick in the late 1970's. Paul was a retired laborer/farmer and Marvy was a homemaker. They were in their mid-70s when we met. I did a few small legal jobs for Paul and Marvy. Despite the vast difference in our ages, I grew very fond of them.

One Sunday afternoon I received a phone call from Paul. The call began, "Ortrie, you've got to help me."

"Why sure, Paul," I responded. "How can I help?"

Paul began, "Do you know where the KATY railroad track crosses Barrett Street out by our house? Well, Marvy and I were coming home from the Village Market. Marvy was driving. She didn't see the lights and she didn't hear the whistle, she sure didn't see the train. She ran into the front of the train and she broke it. I'm afraid they're going to sue us and take everything we have."

I was concerned. "Paul, were you and Marvy hurt?"

"Well," he continued, "we rattled around some in the cab of the truck. Marvy has some broken ribs and she's in the hospital. I've got some cuts and bruises but I'm OK."

I said, "I'll come out to the house tomorrow. In the meantime, don't worry about the railroad taking everything you have. That's not going to happen."

Two weeks later as the railroad claims adjuster left Paul and Marvy's house, I looked at Paul. He was sitting in his soiled, but favorite La-Z-Boy chair. He was staring at a check for $17,500. He looked at me, then he looked at the check, then he looked back at me. I asked, "Is something wrong, Paul?"

He said, "I just want to be sure I understand this. Marvy doesn't see the warning light. She doesn't see the train. She doesn't hear the whistle. She runs into the train and breaks it. And, they give us $17,500?"

"Yes, Paul. That's the way it works," I responded.

With a twinkle in his eye, Paul said, "What time do you reckon that train will be back through there?"

Paul and Marvy Dick were among my favorite clients. Every lawyer who is open to friendships will have favorite clients. They will also have a host of clients who are grateful and responsive. They will have a few who are disappointed in the result yet grateful for the personal interest shown by their attorney and friend.

Over the last 40 years I have developed marvelous friendships in the Bar, in the community and among my clients. They have allowed me to help them. They want to help me whenever I need help. They have made me very happy that I chose a career in the law.

I suggest that satisfaction in the law will result if you allow yourself to engage in those professional responsibilities that you find most rewarding, maintain balance in your life realizing that law is your career - it is not your life. Embrace the relationships that will develop naturally if you let them. If you will do those things, you will be happy in your chosen profession.

"CLIMBING THE LADDER" – THE PATH TO A GREAT LEGAL CAREER

By W. Perry Brandt

Like Judge Ortrie Smith before me, I too wish to congratulate the staff and faculty advisors of the *UMKC Law Review* for establishing and promoting an internet publication. As I will discuss below, staying ahead of the curve and anticipating future developments in the world is essential to charting one's career path. The *Law Review* is to be commended for taking this great legal publication into the 21st century.

A first glance at the title of this article likely evokes a cynical response of "Oh, here's another tome on how to pursue selfish ambition and make a lot of money." Well, it's not. If success and money are a by-product of the advice given here, that indeed is an added benefit; however, as you will see, the thrust of this article will be how to develop your career in such a way that you achieve maximum professional growth and maximum professional fulfillment. My metaphor of "climbing the ladder" is simply intended as a description of how to approach the various stages of your career – indeed, it is all about mastering each rung of the ladder while always reaching for the next rung.

My starting premise is that law school does a wonderful job of training each of you in the various areas of the substantive law, while also training each of you on how to "think like a lawyer." However, my other starting premise is that law school does a poor job of preparing students for a legal career (and, furthermore, is not intended to). For example, the standard law school curriculum does not focus on training students on how to accomplish even basic legal tasks (e.g., how to take a deposition, or how to draft a merger agreement). More importantly, it provides almost no insight into the business of the law, nor does it even attempt to provide guidance on how to succeed in the intangible aspects of your new career.

So, I will attempt to take on those latter tasks. Space limitations prevent me from downloading all of my thoughts on this important subject; indeed, were I to attempt to do so, this might more resemble an encyclopedia! Anyway, please read on . . .

I. IT'S ALL ABOUT YOU

Forgive the apparent narcissism, but your career really is "all about you." You may work at a big law firm, you may work at a small law firm, you may even go out on your own and hang up your own shingle, or you may enter into government service of some type. But the rules are still the same: (1) only you are in charge of your career, and (2) no one will ever look out for you like you will. So don't go into your first job, or any job, with the expectation that your employer is going to make your career for you. The fact is that the Number One priority of any law firm is serving its clients, and the Number Two priority is maintaining financial success. New lawyers in firms start out pretty far down the list, and this is true even in government service jobs.

However, a Number Three priority of any legal organization is growth, and this is where you come in. A key factor in the overall growth of a law firm or other organization is developing young talent, and resources will be devoted to this aim. Take advantage of each and every opportunity you can! Whether in the form of training programs, opportunities for community involvement, or otherwise, you should be like a heat-seeking missile toward these experiences. More on this later . . .

Meanwhile, and although it is indeed "all about you," it nonetheless is extremely valuable for you to seek out one or more mentors to help you along the way. Finding a more experienced lawyer of any vintage to give you needed career advice is priceless, and he or she will be flattered to be asked and will be more than willing to assist you. As discussed below, developing relationships is a key aspect of law practice, and gaining a mentor or two early on will put you well ahead of the curve.

II. CLIMBING THE LADDER – DEVELOPING YOUR SKILLS

When someone graduates from law school, he or she has one marketable skill: research and writing. Those who go out on their own have to develop a plethora of skills right away, but those who will be working in law firms of any size or in government service will immediately be called upon primarily to perform research and writing. Whether it is in the form of drafting motions or briefs or memoranda, the young lawyer will spend the vast majority of time in the library (or, these days, online). DO IT WELL! Even if this is the "lowest rung of the ladder," if you don't succeed here you may not even get a chance at any higher rungs. However, please keep this in mind: do you know how many successful senior lawyers there are out there who just engage in research and writing all day? Try VERY FEW! It is imperative that you keep climbing the ladder.

So, for instance, if you are a litigator, and you have done well enough on the research and writing front that those above you in the food chain want you to start drafting discovery, or conducting witness interviews, or even taking and defending depositions, you must leap at the chance. Similarly, if you are a corporate or transactional lawyer, you will start out drafting contracts and agreements, or engaging in due diligence, or also engaging in research projects; soon, however, you will want to take on more substantive responsibility for certain as aspects of "the deal."

The key is that you must progress! By your third year as a litigator, you must be able to take and defend depositions, draft and respond to discovery, and prepare substantive motions and pleadings. By year five, you must be accomplished at these skills, and perhaps be able to second chair a major trial or first chair a minor trial. Similarly, if you are a corporate type, by third year you must be able to handle a minor "deal" or make requisite securities law filings on your own, and by year five handle a minor transaction on a solo basis.

To get there, you should do two things. First, don't be bashful about simply "watching" more senior lawyers do things. Go sit in some depositions or trials, for example, or attend closings on transactions in which you might not otherwise be involved. People will welcome you. Second, and more important, ASK FOR these opportunities! You won't be able to do some of these things on a grander scale unless you already have done them on a more minor scale.

Develop a checklist of the various skill sets you need to master, and then check them off as you complete each one. Also, enlist the assistance of your mentors in making sure you have the right experiences.

III. CLIMBING THE LADDER – DEVELOPING YOUR PERSONA

At the same time you are turning out quality work, you must spend an equal amount of time developing your reputation both within the confines of your employer and also outside the office. This is much more intangible but also much more important.

First and foremost, bear in mind that above all else, the law is a service profession. Whether one is at a law firm, or in a judicial clerkship, or even in a public service position, there is always someone to be served. For more senior lawyers in law firms, the "clients" are actual clients. For younger lawyers, the "clients" are the partners, more senior associates, or supervisors (or, in the case of a clerkship, a judge). How you are judged will depend greatly upon how well you "serve" these "clients."

Thus the Number One aspect of your persona that you will need to develop is a solid reputation for "service." This includes a plethora of components, such as dedication, reliability, responsibility, enthusiasm, good interpersonal skills, good team skills, and so on. Just like you will want to have happen with real clients down the road, you will want those above you to think of you when they need a great lawyer.

One further comment: being a young lawyer can be difficult, and you will face new challenges every day. No matter how good you are, you will make mistakes or perhaps will, from time to time, be in over your head. If you have developed the right persona for service, these mistakes will be easily forgiven.

And one other thought: perhaps the most important thing you have to sell in the law business is your reputation for character and integrity. Guard it with your life! Never ever "cross the line," or even get close to the line. Instead, make sure that everyone you deal with – a client, a judge, an opponent – knows that you always tell the truth and do the right thing.

IV. CLIMBING THE LADDER – DEVELOPING YOUR NETWORK

Perhaps the most frequently ignored aspect of a young lawyer's development is building a network and building it from Day One. Simply stated, if you view your job as simply coming to the office, doing your work, and then

going home, your career trajectory will flatten out early. Just like you will be developing your internal reputation for service, you will want the whole world to know you as well!

This does not mean that you must go out and develop a "book of business" at the start (although in a solo practice you must do exactly that). What it does mean is that you need to begin forming significant personal relationships as soon as possible and then make those relationships last forever.

What does not work so well is targeting particular potential clients or other potential sources of business, and then foisting yourself upon them. What does work is introducing yourself to as many new people as you can, and then endeavoring to grow the interpersonal relationships for their own sake. Many, and perhaps even a majority of the people you will meet, will not necessarily gravitate towards you either personally or professionally, but in fact plenty nonetheless will do so. All of those people can be potential sources of business or referrals for you down the road.

How to do this? First and foremost, be authentic. Be sure to be your own true self. If you are not being yourself, others can sense it, and you will have accomplished nothing. Only if people see the real you will they trust you enough to develop a real relationship with you.

Second, find your passion. You will be much more likely to spend time networking if it is in the context of doing something you love. More to the point, you will be with other people who share your passion, and it will be easy to form personal bonds with these folks. So, whether it is bar association activities, charitable work, sports, or really anything at all, get out there and do it!

BORDER WARS: AN INTRODUCTION TO THE SERIES

By Casey Tourtillott

The line separating Kansas from Missouri has long been a source of conflict. Whether it be the historic battles between the Jayhawkers and the Bushwhackers, or the once-annual NCAA showdowns between the University of Missouri Tigers and the University of Kansas Jayhawks, the rivalry runs deep.

Geographically, the Kansas City metropolitan area touches both states. And for attorneys practicing law in the greater Kansas City area, the state line still carries heavy significance. It matters whether a case is filed in Missouri or Kansas, in either federal court or state court. It matters a great deal. In the state arena, the laws of the states differ at varying levels. In the federal arena, practitioners face not only distinct district courts, but also different federal circuits: the Missouri federal courts lie in the Eighth Circuit while the Kansas federal court lies in the Tenth. Each court has in place its own policies, procedures, and rules.

Are these differences important? Absolutely. They are critical. Plaintiffs' counsel must recognize which state's law is more beneficial for their clients so that if they have a choice, they can file in the more favorable court. And defense counsel should recognize that unique defenses may be available in one state, but not in the other. All attorneys should be aware of filing rules and procedures, and how they must tailor their actions for each court.

For example, discovery disputes in the United States District Court for the Western District of Missouri are handled pursuant to the court's Local Rule 37.1. Under that Rule, practitioners must (1) confer or attempt to confer concerning the matter; (2) arrange for an immediate phone conference with the court and opposing counsel; and (3) only after these two actions have been taken may counsel file a written motion regarding the discovery request.[1] In contrast, less than ten minutes away, in the United States District Court for the District of Kansas, discovery disputes are handled pursuant to the District of Kansas's Local Rules 37.1 and 37.2. Under those Rules, parties have a duty to confer before filing a discovery motion.[2] But a motion to compel discovery must be filed within thirty days of the "default or service of the response, answer, or objection that was the subject of the motion," unless the court finds good cause for extending the filing time.[3] The objection is otherwise waived.[4] The resulting impact? Practitioners must be cognizant of these rules or risk waiving objections.

---

[1] W.D. MO. R. 37.1(a).
[2] *See generally* D. KAN. R. 37.2 ("The court will not entertain any motion to resolve a discovery dispute pursuant to Fed. R. Civ. P. 26 through 37 . . . unless the attorney for the moving party has conferred or has made reasonable effort to confer with opposing counsel concerning the matter in dispute prior to the filing of the motion.").
[3] D. KAN. R. 37.1(b).
[4] *Id.*

Another example is found in family law: common law marriage. Kansas recognizes common law marriage but Missouri does not.[5] These differences potentially impact decisions in contract law, probate, employee benefits, and a plethora of other areas.

Finally, one more example of an area in which practitioners must be wary is comparative fault law. Kansas applies the modified comparative fault concept. Under this rule, a plaintiff who is 49% or less responsible for damages can recover some amount.[6] But a plaintiff who contributed 50% or more to her damages is barred from recovery.[7] Missouri, on the other hand, uses pure comparative fault.[8] This means that a plaintiff may receive some compensation even if she was 99% at fault in an incident. These differences are critical in guiding the decisions that attorneys must make in prosecuting and defending tort claims.

This regular series of the online *UMKC Law Review* is designed to explore the differences between Kansas and Missouri law, in both state and federal court—in much more depth than sampled above. The articles published here will identify key differences in how courts across the state line handle legal and procedural issues. Scholars and practitioners alike will find value in these glimpses at differences in law and rules determined only by whether the case is filed on the eastern side of the metro area or the western side.

Many of these differences may never change. But maybe . . . just maybe . . . we can learn from one another. As we seek the "just, speedy, and inexpensive"[9] administration of justice, perhaps it is time to set aside our differences and, to the extent possible, adopt the versions of rules, procedures, and/or laws that best aid us in reaching those ideals.

---

[5] *See, e.g.*, Fleming v. Fleming, 559 P.2d 329, 330–31 (Kan. 1977) (identifying the elements for common law marriage in Kansas); Whitley v. Whitley, 778 S.W.2d 233, 238 (Mo. Ct. App. 1989) (specifying that Missouri has rejected common law marriage).

[6] *See generally* KAN. STAT. ANN. § 60-258a(a) ("The contributory negligence of a party in a civil action does not bar that party or its legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if that party's negligence was less than the causal negligence of the party or parties against whom a claim is made, but the award of damages to that party must be reduced in proportion to the amount of negligence attributed to that party."); Forsythe v. Coats Co., Inc., 639 P.2d 43, 44–45 (Kan. 1982).

[7] KAN. STAT. ANN. § 60-258a(a).

[8] Gustafson v. Benda, 661 S.W. 2d 11, 15–16 (Mo. 1983).

[9] FED. R. CIV. P. 1.

CELL PHONE WARNINGS: CONSUMER HEALTH PROTECTION VERSUS COMMERCIAL FREE SPEECH

By Jennifer Brooks

I. A LOOK AT SAN FRANCISCO'S "CELL PHONE RIGHT-TO-KNOW" ORDINANCE AND ITS POTENTIAL IMPACT ON OTHER LOCAL GOVERNMENTS

Growing up, I admired how my father always had the latest gadget or new toy. He loved all of the new inventions the 1980's had to offer, but what he cherished the most was the invention of the mobile phone. In fact, he was one of the first people I knew to get a car phone in the late 1980's – a DiamondTel phone, weighing just under five pounds. Next, he graduated to the Motorola StarTAC, the first "clam shell" phone, a style that later became known as the "flip phone."[1] Throughout my childhood, rarely was there a dinner or a car ride which was not interrupted by the inevitable ringing of his cell phone, making it a large part of our life: at least it was up until September 11, 2001. While that was a horrific day for many families and for our nation, my family experienced a completely unrelated and personal tragedy. My father was diagnosed with glioblastoma multiforme four, an advanced form of brain cancer. He had a tumor the size of a lemon located behind his right ear; the same side of his head he had been holding his various cell phones up to for almost fifteen years.

The World Health Organization estimated that, by the end of 2009, there were over 4.6 billion mobile phone subscriptions worldwide.[2] The American Cancer Society estimated that 12.7 million new cases of cancer occurred in 2008 worldwide.[3] A growing number of people believe some of these statistics may be related to one another; however, no definitive study has shown a clear correlation.[4] Nevertheless, some state and city governments have considered or attempted requiring warnings for cell phone packaging.[5] With no clear evidence

---

[1] Drew McBee, *Cracking Open the Classic Motorola StarTec Flip Phone*, TECH REPUBLIC (Feb. 27, 2008, 1:12 PM PST), http://www.techrepublic.com/photos/cracking-open-the-classic-motorola-startac-flip-phone/189119.

[2] World Health Organization, *Electromagnetic Fields and Public Health: Mobile Phones* (June 2011), http://www.who.int/mediacentre/factsheets/fs193/en/ [hereinafter WHO].

[3] AM. CANCER SOC'Y, GLOBAL CANCER FACTS AND FIGURES, 2ND EDITION 2008 (2008), *available at* http://www.cancer.org/acs/groups/content/@epidemiologysurveilance/documents/document/acspc-027766.pdf.

[4] Nate Anderson, *Swedish Researchers Find Link Between Cell Phones and Brain Tumors*, ARSTECHNICA (Mar. 31, 2006, 1:02 PM CST), http://arstechnica.com/old/content/2006/03/6502.ars (describing the Swedish National Institute for Working Life study finding increased risk connection between cell phones and brain cancer); WHO, *supra* note 2; *Cancer Link to Heavy Cell Phone Use*, BBC NEWS, (Feb. 18, 2008 11:52 AM GMT), http://news.bbc.co.uk/2/hi/7250372.stm (finding possible increased risk of cancer due to mobile phone usage).

[5] Maine considered legislation in 2010. Katie Zezima, *Maine to Consider Putting Warnings on Cell Phones*, N.Y. TIMES, Jan. 2, 2010, at A15; San Francisco's ordinance was passed in 2010 (and is currently enjoined), S.F., CAL., ENV'T CODE ch. 11, §§ 1100-1106 (2010), *available at* http://www.amlegal.com/nxt/gateway.dll/California/environment/environmentcode?f=templates$fn

that cell phones are dangerous, most warning requirements imposed by the government will probably be held unconstitutional under the First Amendment. A district court's recent decision about such a warning requirement, in *CTIA v. City of San Francisco*, summarized the case law on this issue by stating that when the government has a reasonable interest in protecting public health and safety or preventing deception, it can require businesses to disclose facts that are uncontroversial and accurate.[6] However, the First Amendment otherwise prevents the government from injecting its opinions into a business's message to consumers about a product.

This article will examine the fine line between governments' attempts to require warnings about cell phones and retailers' and manufacturers' First Amendment rights. The second part will examine the latest World Health Organization (WHO) categorization of cell phones as "possibly carcinogenetic." The third part will explain what SAR value is and its role in legislation. The fourth part will discuss San Francisco's "Right to Know" ordinance and the district court's ruling on the ordinance. Part five will discuss the possible impact of the ordinance on other local governments, and the final section will make suggestions for how to create ordinances or bills which will not violate the First Amendment or be preempted by federal legislation.

II. WHAT DOES "POSSIBLY CARCINOGENIC" MEAN?

In June 2011, the International Agency for Research on Cancer ("IARC"), a research division of WHO, announced that after reviewing scientific data from around the world, they were now going to classify cell phones as a 2B category agent, meaning they are "possibly carcinogenic."[7] IARC has five different classifications for products it has researched. Group 1, covering things that are "carcinogenic to humans," has 109 agents.[8] Group 2A, for things "probably carcinogenic to humans," has 65 agents.[9] Group 2B, comprised of things "possibly carcinogenic to humans," has 275 agents.[10] Group 3, containing things "not classifiable as to its carcinogenicity to humans," has 503 agents.[11] Finally, Group 4, for that which is "probably not carcinogenic to humans," has only 1 agent.[12]

IARC places agents in the 2B category when "a causal association is considered credible, but when chance, bias or confounding cannot be ruled out

---

=default.htm3.0vid=amlegal:sanfrancisco_ca$sync=1; New York City Council is currently drafting the text for a bill.

[6] CTIA-The Wireless Ass'n v. City & County of San Francisco, 827 F. Supp. 2d 1054 (N.D. Cal. 2011), *aff'd*, Nos. 11–17707, 11–17773, 2012 WL 3900689 (9th Cir. Sept. 10, 2012).

[7] WHO, *supra* note 2.

[8] International Agency for Research on Cancer, *Agents Classified by the IARC Monographs, Volumes 1–102* (Nov. 7, 2012), http://monographs.iarc.fr/ENG/Classification/ [hereinafter IARC].

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

with reasonable confidence."[13] Cell phones' classification in 2B as "possibly carcinogenic," puts them in the same category as diesel fuel, lead, and coffee.[14] IARC's research did not find increased risk of glioma or meningioma (types of brain cancer) with mobile phone use of more than ten years, but found indications of increased risk of glioma for people who fall within the top 10% of cumulative hours of cell phone use.[15]

III. WHAT IS SAR VALUE?

When using a mobile phone, radiofrequency (RF) energy is emitted. The RF energy is what is considered to be "possibly carcinogenic." The Federal Communications Commission (FCC) measures the amount of RF energy absorbed by the body through mobile phone use with units referred to as the Specific Absorption Rate (SAR).[16] In order to be in compliance with the FCC requirements, the maximum SAR value a mobile phone sold in the United States can have is 1.6 watts per kilogram (1.6 W/kg).[17] The FCC has compiled a database allowing consumers to look up the SAR value for each model of mobile phone.[18] According to the FCC website, any person can find a cell phone's SAR value by removing the battery pack from the phone to get the FCC ID number.[19] After identifying the FCC ID number, one must go to the web address www.fcc.gov/oet/ea/fccid,[20] enter the FCC ID number, and click on "Start Search." Although these instructions may seem simple, determining the SAR value can be difficult on this website because each ID number entered will pull up a report almost eighty pages in length describing the SAR value testing method used by the cell phone manufacturer. When I tried to identify my cell phone's SAR value, I was led to several reports, all about 80 pages in length, that never gave me a clear idea of the SAR value of my cell phone.

A. SAR Value and Legislation

While the United States government makes it a challenge for consumers to research their own cell phone's SAR value, other countries require this information be provided at the time of purchase. Switzerland, Germany, Israel, and France require cell phone retailers to list the SAR value of each phone in the store so that consumers can make informed decisions about which cell phone to

---

[13] WHO, *supra* note 2.
[14] IARC, *supra* note 8.
[15] WHO, *supra* note 2.
[16] FCC, *Specific Absorption Rate (SAR) for Cellular Telephones*, FCC ENCYCLOPEDIA, Jul. 27, 2011, http://www.fcc.gov/encyclopedia/specific-absorption-rate-sar-cellular-telephones.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

purchase.[21] The governments of those countries also encourage consumers to buy cell phones with low SAR values. France even requires retailers to sell cell phones accompanied with headsets and provide different labeling for cell phones with low SAR value in order to make them easier to identify.[22]

The FCC claims that cell phones sold in the United States do not pose a threat of overexposure of RF energy to their users because cell phones sold in the United States comply with healthy levels of SAR value.[23] The FCC website states that if a cell phone user is concerned about over exposure of RF energy despite compliance with FCC regulations, then the user should always hold his or her phone away from his or her head or body and use speakerphones when possible.[24] The FCC claims this is a more effective means of lowering RF energy exposure than buying a phone with a low SAR value.[25]

IV. "CELL PHONE RIGHT-TO-KNOW" ORDINANCE

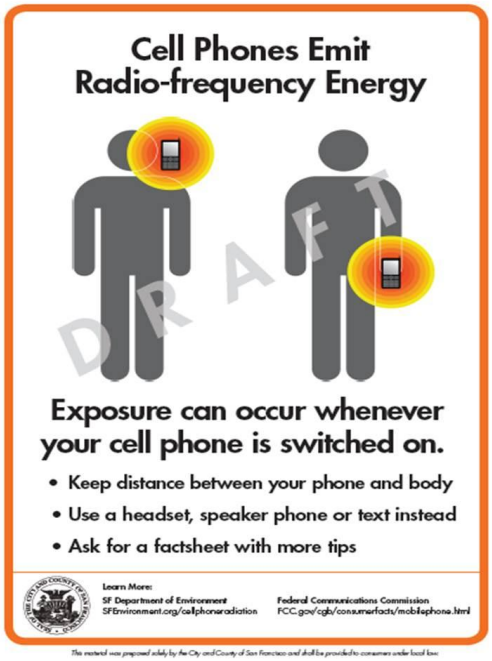
Even though the FCC's research claims there is no danger from having a cell phone which emits a SAR value of 1.6 W/kg, the IARC's report published and endorsed by WHO, along with other studies, has prompted some state and local governments to take action. In particular, San Francisco took the biggest step with the "Cell Phone Right to Know" ordinance.[26] On June 22, 2010, San Francisco City Council passed an ordinance that required sellers of cell phones in the city to have supplemental factsheets posters, and packaging stickers disclosing to consumers the maximum SAR value of each specific mobile phone and ways to reduce RF energy exposure.[27]

In response to the "Cell Phone Right to Know" ordinance, CTIA filed a lawsuit seeking a preliminary injunction and alleging that the ordinance violated the First Amendment of the Constitution and was preempted by federal regulation from the FCC.[28] After CTIA filed the lawsuit, San Francisco's city council amended its requirements so that fact-sheets, posters, and stickers would not need to display the SAR value for each cell phone, but rather just explain that RF energy is emitted by cell phone use and how to reduce the amount of RF

---

[21] Olga Naidenko, *Cell Phone Merchants Must Disclose Radiation Levels*, OPPOSING VIEWS (Dec. 23, 2010), http://www.opposingviews.com/i/french-law-cell-phone-merchants-must-disclose-radiation-levels (describing Swiss and German laws as well).
[22] *Id.*
[23] *Specific Absorption Rates (SAR) for Cell Phones: What it Means for You*, FEDERAL COMMUNICATIONS COMMISSION (May 19, 2011), http://www.fcc.gov/guides/specific-absorption-rate-sar-cell-phones-what-it-means-you.
[24] *Id.*
[25] *Id.*
[26] S.F., CAL., ENV'T CODE ch. 11, §§ 1100-1106, *supra* note 5 (draft of original ordinance on file with author; it was later amended).
[27] *Id.*
[28] CTIA-The Wireless Ass'n v. City & County of San Francisco, 827 F. Supp. 2d 1054 (N.D. Cal. 2011), *aff'd*, Nos. 11–17707, 11–17773, 2012 WL 3900689 (9th Cir. Sept. 10, 2012).

energy that could be absorbed by cell phone users.[29] The city council removed the listing of SAR values for particular cell phones because measuring the SAR value of a cell phone may vary greatly.[30] If a cell phone is used in a place with weak reception such as in an elevator or parking garage, a cell phone will emit a much greater SAR value than when standing near a cell tower with good reception. With the SAR value being uncertain at times, the city council felt that warnings about specific SAR values would have a more difficult time passing First Amendment scrutiny.[31] CTIA argued putting the SAR value on a cell phone gave consumers the "false impression" that some cell phones were safer than others.[32] CTIA's position is that all cell phones sold in the United States have a safe SAR level because they comply with FCC regulations.[33]



"Is the mere unresolved possibility that something may (or may not) be a carcinogen enough to justify compelled warnings and compelled recommended precautions by store owners?"[34] This is the question Judge Aslup posed in the *CTIA--The Wireless Association v. City and County of San Francisco, California*

---

[29] Telephone Interview with Ellen Marks, Director of Environmental Health Trust (Jan. 8, 2012).
[30] *Id.*
[31] *Id.*
[32] Press Release, CTIA-The Wireless Association Filed Lawsuit Against San Francisco for the So-Called "Cell Phone Right-to-Know" Ordinance (July 23, 2010), http://www.ctia.org/media/press/body.cfm/prid/1989.
[33] *Id.*
[34] CTIA-The Wireless Ass'n v. City & County of San Francisco, 827 F. Supp. 2d 1054, 1061 (N.D. Cal. 2011), *aff'd*, Nos. 11–17707, 11–17773, 2012 WL 3900689 (9th Cir. Sept. 10, 2012).

opinion regarding CTIA's request for an injunction. The United States District Court for the Northern District of California held that the "Right to Know" ordinance was not preempted by FCC regulations, but that the fact sheets that sellers were required to distribute, the display posters, and the stickers did violate the First Amendment.[35] Posters which retailers were required to display about potential risks arising from exposure to RF energy were held not reasonably necessary and unduly intruded on retailers' wall space.[36] The display materials and stickers were found to be unconstitutional because they "unduly intrud[ed] upon the retailers' own message," and the silhouettes with RF rays beaming on the head and hips were also ordered to be removed because the images may give the impression that cell phones are dangerous even though no untrue facts are given when explaining the image.[37]

The factsheets, however, were not found to be unconstitutional as long as they were modified to ensure they did not mislead consumers.[38] Judge Aslup provided three things that needed to be done to help to cure the misleading impression of the factsheets.[39] First, the sheets should include the statement: "Although all cell phones sold in the United States must comply with RF safety limits set by the FCC, no safety study has ever ruled out the possibility of human harm from RF exposure."[40] Next, the sheets should explain that RF energy is classified as a "possible" carcinogen by WHO as opposed to a "known" or "probable" carcinogen.[41] And third, the silhouettes should be removed from the fact sheets altogether because the general impression of the ray beams going from the cell phone to the brain and groin appeared to indicate the beams were dangerous.[42] The City of San Francisco subsequently revised the fact sheet according to Judge Aslup's suggestions.

CTIA lost its argument that the ordinance was preempted by FCC regulation. Judge Aslup determined the FCC only regulates the SAR value that a cell phone emits.[43] San Francisco's "Right to Know" ordinance does not attempt to control how much RF energy a cell phone shall emit, but instead merely tries to educate the public about the perceived risk of RF emission.[44] Because no FCC regulation or federal statute has attempted to regulate information regarding RF emission, the court held that no conflict between federal and local law existed.[45]

V. THE ORDINANCE'S IMPACT AROUND THE COUNTRY

---

[35] *CTIA*, 827 F. Supp. 2d at 1059-64.
[36] *Id.* at 1063.
[37] *Id.* at 1064.
[38] *Id.* at 1063-64.
[39] *Id.* at 1063.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 1059.
[44] *Id.*
[45] *Id.*

The litigation about San Francisco's ordinance is still in progress. CTIA has obtained a preliminary injunction prohibiting San Francisco from enforcing the ordinance, preventing the fact sheets from being handed out, while both parties have filed cross appeals. Ellen Marks stresses the importance of the ongoing lawsuit by explaining how other city and state governments have contacted the City Counsel of San Francisco, and are awaiting the litigation's outcome because they plan to adopt similar ordinances.[46] Among the cities and states Marks mentioned are New York City, Berkley, Arcadia, Burlingame, Philadelphia, Pennsylvania, New Mexico, Oregon, Chicago, and Los Angeles.[47]

A New York City Councilman, Peter F. Vallone Jr., is currently working on a bill modeled off of San Francisco's "Right-to-Know" ordinance.[48] He plans to also require cell phone retailers to display "in a prominent location visible to the public, within the retail store" posters and fact sheets explaining the emission of RF energy and how to reduce SAR value.[49] Vallone's staff has indicated that he will not wait for the outcome of the cross appeals in the San Francisco case before trying to pass his bill.[50]

Maine has already attempted to pass similar legislation twice. In January of 2010, led by Democratic State Representative Andrea Boland, Maine was the first state to consider requiring cell phone packages to have warnings.[51] The bill was considered "emergency legislation" because over 900,000 residents of Maine were using cell phones.[52] However, this bill was killed in the Maine House of Representatives.[53] A year later, a similar bill was re-introduced but again failed to pass.[54]

VI. PREDICTIONS AND SUGGESTIONS FOR CELL PHONE LEGISLATION

By focusing on non-controversial, and accurate facts, city and state legislators may have a decent chance of passing valid ordinances regarding cell phone education. Instead of making the case that cell phones should have warnings, future city council members attempting to create similar legislation should focus on only those facts that are accurate and uncontroversial. This may be easier said than done, given that the "Right to Know" ordinance originally

---

[46] Telephone Interview with Ellen Marks, *supra* note 29.
[47] *Id.*
[48] Email Interview with Sally Frank, Legislative Director for the Office of New York City Councilman Peter Vallone, Jr. (Jan. 17, 2012) (on file with author).
[49] *Id.*
[50] Telephone Interview with Ellen Marks, *supra* note 29.
[51] Zezima, *supra* note 5.
[52] *Id.*
[53] *Maine Lawmaker Submits New Cell Phone Warning Bill*, MAINE SUN JOURNAL, Mar. 31, 2011, http://www.sunjournal.com/approved/story/1008628.
[54] *Id.*

focused on SAR values, something that seems to be objective data but turned out to be capable of giving false impressions. Currently, cell phone companies are required to include information in each cell phone's manual stating how far away from your body you should hold your cell phone in order to comply with FCC SAR value regulations. For example, if you look in the back of the following manuals, in small print, you will find these instructions:

> **BlackBerry Torch: "**Use hands-free operation if it is available and keep at least 0.98in (25mm) from your body (including the abdomen of pregnant women and the lower abdomen of teenagers) when the BlackBerry is turned on and connected to the wireless network."
> **Apple iPhone 4:** "When using iPhone near your body for voice calls or for wireless data transmission over a cellular network, keep iPhone at least 15mm (5/8 inch) away from the body and only use [accessories] that do not have metal parts and that maintain at least 15mm (5/8 inch) separation between iPhone and the body."
> **Motorola:** "If you do not use a body-worn accessory supplied or approved by Motorola, keep the mobile device and its antenna at least 2.5 centimeters (1 inch) from your body when transmitting. Using accessories not supplied or approved by Motorola may cause your mobile device to exceed RF energy exposure guidelines."[55]

This information is already required by the FCC to be included in the manuals in order to be in compliance with FCC SAR value regulations. Creating legislation that closely follows this type of language, telling the consumer how far they need to keep the cell phone away from their body in order to comply with FCC SAR standards, should not violate First Amendment rights or pose any federal preemption problems. The FCC has already considered this information to be accurate and uncontroversial, and no conflict would exist between local and federal requirements. The size of the message may be an important question for this type of legislation because a larger message would be more noticeable to consumers and may unduly burden and hide the retailers' and manufacturers' messages. For this reason, requiring factsheets, which are handed out to all customers instead of large posters or stickers, may be easier to uphold under the Constitution. While including this information may not be as informative as some legislators would like and may not be displayed as prominently as they would like, it would get consumers thinking about the safety of cell phone radiation and make them more aware of SAR value and ways to reduce RF energy exposure. I believe the first cities or states trying to pass such ordinances or bills should make them conservative to ensure they are upheld by the courts. Once some have been passed and survive challenges, other cities and states will follow.

---

[55] *Cell Phone Fine Print Warnings*, ENVIRONMENTAL HEALTH TRUST, http://ehtrust.org/cell-phone-fine-print-warnings/ (last visited Feb. 24, 2013).

Of course no warnings will bring my father back, but I often wonder how things might have been had information about "SAR value," "RF energy," and the concept of reducing radiation exposure been more widely known over the past few decades. I then begin to think about the present and the amount of children using cell phones. How will cell phone radiation affect them? Are we ignoring warning signs that may harm them in the future? Though evidence about the danger of cell phones is presently inconclusive, when it comes to informing the public about possible risks, I know we can create a solution that will allow us to place caution over uncertainty and commercial profit without jeopardizing the essence of the First Amendment.

UNCERTAINTIES SURROUNDING CREDIT FOR PRIOR TEACHING EXPERIENCE UNDER MISSOURI'S TEACHER TENURE LAWS

By Adam Henningsen[*]

I. INTRODUCTION

Teaching has long been a popular choice for those seeking a second career. Although the Missouri Department of Elementary and Secondary Education does not keep statistics of the ages of newly hired teachers, in 2010 teachers over the age of 50 made up 18.2% of all the teachers in Missouri public schools.[1] It is safe to assume that a decent number of these older teachers came to the profession later in life. Teaching is an attractive option for those seeking a second career for several reasons. Teaching may not be the highest paying career in the world, but the job provides attractive benefits, including a shortened work period and access to a magnificent retirement system. Teaching is also a sensible career option during an economic recession. Compulsory education laws guarantee that there will always be children to educate, no matter what the state of the economy.[2] Perhaps the most appealing aspect of teaching for those concerned about the future is the job security the profession provides.

In Missouri, public school teachers receive job security by obtaining tenure status. Missouri's Teacher Tenure Act, codified in Mo. Rev. Stat. §§ 168.102 to 168.130, provides that any teacher who has been employed as a teacher in the same school district for five successive years and who thereafter continues to be employed as a teacher by the school district obtains the status of "permanent teacher."[3] Permanent teachers enjoy perks such as indefinite contract renewal[4] and protection from termination by the school board.[5] While enduring job security after five years is appealing, second career teachers would undoubtedly prefer to achieve tenure status sooner, if possible.

Missouri's tenure laws contain an interesting provision that cuts down on the amount of time it takes to reach tenure status for teachers "who [have] been employed in any other school system as a teacher for two or more years."[6] This

---

[*] J.D., University of Missouri – Kansas City class of 2012.

[1] The Missouri Department of Elementary and Secondary Education, *Recruitment and Retention of Teachers in Missouri Public Schools: A Report to the Missouri General Assembly* 3, (December 2011), *available at* http://dese.mo.gov/divteachqual/teachrecruit/documents/Recruit_report.pdf.

[2] *Teaching: No Fallback Career*, N.Y. TIMES, April 19, 2009 http://roomfordebate.blogs.nytimes.com/2009/04/19/teaching-no-fallback-career/.

[3] *See* MO. REV. STAT. § 168.104(4) (2012) (definition of "permanent teacher").

[4] *See* MO. REV. STAT. § 168.106 (2012) ("The contract between a school district and a permanent teacher shall be known as an indefinite contract and shall continue in effect for an indefinite period, subject only to [various defined conditions]).

[5] *See* MO. REV. STAT. § 168.114 (2012) (An indefinite contract with a permanent teacher cannot be terminated by the board of education of a school district except for one or more of the causes defined in this statute).

[6] *See* MO. REV. STAT. § 168.104(5) (2012) (definition of "probationary teacher").

seemingly straightforward provision can quickly become an issue of confusion for both teachers and school administrators. What type of prior teaching experience counts under this provision? Does teaching experience in a private school or at a university count? What about tutoring or mentoring? Must the years of prior experience be consecutive? While these questions might seem to be of little importance to most of us, the answers could be potentially life-changing for those who begin teaching in a public school later in life. The reason why the answers to these questions are important is quite simple: while a tenured teacher in Missouri enjoys substantial job security, a non-tenured or "probationary" teacher has basically no job security.[7]

This article will explore the ambiguities and potential issues surrounding the shortened tenure track for educators with prior teaching experience under Missouri's teacher tenure laws. The article will first examine the phenomena of choosing teaching as a second career, and how the job security provided by Missouri's teacher tenure laws fosters this trend. The article will then briefly explain how Missouri's teacher tenure laws work, focusing particularly on how the laws affect those who wish to teach as a second career. The focus will then shift to the central issue of the uncertainties surrounding the shortened tenure track for those with prior teaching experience. The article will conclude with a look into the future of teacher tenure in Missouri.

II. WHY IS TEACHING SUCH A POPULAR SECOND CAREER OPTION?

Many people view teaching in the public school setting as a viable second career path because the parameters of the job seem somewhat familiar. Teaching in a public school is a unique occupation because nearly everyone has spent thousands of hours in school learning from teachers. In this sense, teaching seems "comfortable." Nostalgia and familiarity with the work environment are not the only draws to the profession, however.

The average salary of a public school teacher is notoriously low in comparison to other occupations.[8] This is especially true in Missouri, where in 2011 teacher compensation ranked 45th out of 50 states and was not competitive

---

[7] Jacquie Shipma, *Heads Up for Probationary Teachers*, MISSOURI NATIONAL EDUCATION ASSOCIATION, http://www.mnea.org/Missouri/News/Heads_up_for_probationary_teachers_27.aspx (last visited Jan. 11, 2013) ("A probationary [teacher's] contract is good for one year only. It expires at the end of the school year. At that time, the district has complete discretion in deciding whether to hire the teacher back for another year.").

[8] *See* Dave Eggers & Ninive Calegari, *The High Cost of Low Teacher Salaries*, N.Y. TIMES, April 30, 2011, *available at* http://www.nytimes.com/2011/05/01/opinion/01eggers.html?_r=0 ("The average teacher's pay is on par with that of a toll taker or bartender. Teachers make 14 percent less than professionals in other occupations that require similar levels of education.").

with surrounding states.[9] Despite the low salaries, teaching is still appealing because of the benefits the profession offers.

For example, the average length of a teaching contract in Missouri is only 181.4 days of employment, compared to an average of 261 days of employment for full-year positions in other fields.[10] Having summers off gives teachers the opportunity to supplement their income by taking another job. Teachers can also take time to enjoy the summer with their family, take a vacation, or simply relax. Regardless of how the time is spent, having summers off is definitely a perk that is unique to teaching.

Another draw to the profession is the retirement system. Missouri schoolteachers enjoy access to one of the best public-sector retirement systems in the country. The Public School and Education Employee Retirement Systems of Missouri (PSRS/PEERS) provide retirement, disability, and survivor benefits to active and retired Missouri public school teachers, school employees, and their families.[11] Under the system, Missouri teachers pay a set percentage of their total compensation (salary and board-paid benefits) into the Missouri Public School Retirement System during their careers.[12] The board of education then matches that contribution.[13] Thus, an individual teacher's retirement plan is equally funded throughout that teacher's professional career by contributions from the teacher and from his or her employer.[14] The Missouri teacher retirement system is, by all accounts, one of the premier retirement systems in the country for public sector employees. "The total assets of both PSRS and PEERS were approximately $31 billion as of April 30, 2011, making the [combined system] larger than all other public retirement plans in the state [of Missouri] combined."[15]

---

[9] Chris Belcher, *Wisconsin vs. MO: Teacher compensation much different in Show-Me State*, COLUMBIA BUSINESS TIMES, (April 29, 2011), *available at* http://columbiabusinesstimes.com/11513/2011/04/29/wisconsin-vs-mo-teacher-compensation-much-different-in-show-me-state-superintendent%E2%80%99s-view/.

[10] Teacher Education, *Salary Comparisons for Beginning Teachers*, UNIVERSITY OF MISSOURI COLLEGE OF EDUCATION, (August 2009), *available at* http://education.missouri.edu/TDP/resources/beginning_teachers_salaries.php. (The average length of a teaching contract in Missouri is 181.49 days, however, individual districts vary. The 261 day estimate was obtained by subtracting 52 Saturdays and 52 Sundays from a total of 365 days in a year.).

[11] *See generally* Public School & Education Employee Retirement Systems of Missouri, PSRSMO.ORG (last visited Nov. 28, 2012).

[12] *See* Belcher, *supra* note 9.

[13] *Id.* (In 2011, Missouri teachers paid 14 percent of their total compensation to the Missouri Public School Retirement System. The Board of Education matched that contribution. The contribution rate for teachers has risen in recent years, and will continue to increase 0.5 percent per year to maintain adequate funding in the retirement system.).

[14] *Id.*

[15] *PSRS/PEERS Investment Expertise Nationally Recognized for a Third Time in 2011 with Nomination for Hedge Fund Industry Award*, PSRSMO.ORG, (May 3, 2011), *available at* https://www.psrsmo.org/News/PSRSPEERS-NominatedThirdTime2011.html (noting also that the plan is "the 42nd largest defined benefit plan in the United States").

Familiarity with the profession, a consistent salary, a shortened work period and access to a wonderful retirement system make teaching in Missouri an attractive option for those who are approaching retirement age. For those that choose teaching as a second career, protecting these benefits is vital. Protection comes in the form of tenure. As the Missouri Court of Appeals for the Southern District has said, the purpose of Missouri's teacher tenure laws "is to protect competent and qualified teachers in the security of their positions."[16] Application of the tenure laws has a dramatic impact on those who choose teaching as a second career.

III. THE MISSOURI TEACHER TENURE ACT

Missouri Statutes §§ 168.102 to 168.130 are collectively known as the "Teacher Tenure Act."[17] The current teacher tenure system in Missouri has been in effect since July 1, 1970.[18] Under the current system, a teacher becomes tenured once he or she has been employed as a teacher for five successive years in the same school district and thereafter remains employed in the same district.[19] Thus, a teacher generally obtains tenure status on the first day of their sixth consecutive year in the same district.[20]

A. Benefits of Tenure

Once a teacher is tenured, he or she is considered a "permanent teacher" and is employed pursuant to an indefinite contract that continues from year to year. A non-tenured, or "probationary teacher," on the other hand, typically receives a one-year contract that may simply not be renewed at the end of the school year upon timely notice to the teacher.[21] Automatic contract renewal may be the most noteworthy perk to achieving tenure status, but other valuable protections are provided to tenured teachers as well.

For example, permanent teachers are deemed to have a property interest in continued employment that is protected by both procedural and substantive

---

[16] *See* Howard v. Mo. State Bd. of Educ., 913 S.W.2d 887, 891 (Mo. App. S.D. 1995) (quoting Hirbe v. Hazelwood School District, 532 S.W.2d 848, 850 (Mo. App.1975)).
[17] MO. REV. STAT. § 168.102 (2012).
[18] *See id.*
[19] *See* MO. REV. STAT. § 168.104 (2012) (A "**permanent teacher**" is "any teacher who has been employed or who is hereafter employed as a teacher in the same school district for five successive years and who has continued or who thereafter continues to be employed as a teacher by the school district.").
[20] Fred Wickham & Brian Wood, *Know Your Rights Part 1: State's Teacher Tenure Law*, AMERICAN FEDERATION OF TEACHERS, (December 2006), http://mo.aft.org/resources/know-your-rights-part-1-states-teacher-tenure-law.
[21] *See* MO. REV. STAT. § 168.104(5) (2012) (A "**Probationary teacher**" is "any teacher as herein defined who has been employed in the same school district for five successive years or less.").

due process.[22] If a school district wants to terminate a tenured teacher's contract, a number of procedural steps must be taken. First, the indefinite contract of a permanent teacher may not be terminated until the teacher is provided with written charges specifying with particularity the grounds alleged to exist for termination.[23] Permanent teachers are also entitled to a hearing in front of the school board before they can be terminated.[24] If the board of education's decision to terminate a permanent teacher's employment is appealed and the decision is reversed, the teacher must be paid his or her salary that was lost during the period pending the appeal.[25]

In addition, the Missouri Tenure Act limits the reasons for which a tenured teacher's indefinite contract may be terminated to the following: (1) physical or mental condition unfitting him to instruct or associate with children; (2) immoral conduct; (3) incompetency, inefficiency or insubordination in the line of duty; (4) willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district; (5) excessive or unreasonable absence from performance of duties; or (6) conviction of a felony or a crime involving moral turpitude.[26]

B. Credit for Prior Teaching

The Missouri Tenure Act contains a provision that allows teachers with prior teaching experience to "fast-track" the tenure process. Mo. Rev. Stat. § 168.104(5) states that "in the case of any probationary teacher who has been employed in any other school system as a teacher for two or more years, the board of education shall waive one year of his probationary period."[27] On its face, this provision seems straightforward: if a teacher comes to a district having more than two years of teaching experience, then he or she can achieve tenure status sooner than a teacher with no prior teaching experience. In practice, however, applying this provision of the Tenure Act can be difficult. Because it becomes significantly harder to remove teachers once they reach tenure status, defining exactly what "counts" as prior teaching under the tenure laws is a matter of great importance for school administrators. Unfortunately, the Missouri legislature and the Missouri courts have provided little guidance.

---

[22] Thompson v. Southwest School Dist., 483 F. Supp. 1170, 1183 (W.D. Mo. 1980) (Permanent teacher entitled to protection under the Missouri Teacher Tenure Act had developed a property interest in continued employment protected by both procedural and substantive due process.).
[23] MO. REV. STAT. § 168.116.1 (2012).
[24] MO. REV. STAT. § 168.116.3 (2012) ("If a hearing is requested by either the teacher or the board of education, it shall take place not less than twenty nor more than thirty days after notice of a hearing has been furnished the permanent teacher.").
[25] *See id.*
[26] *See* MO. REV. STAT. § 168.114.1 (2012).
[27] MO. REV. STAT. § 168.104(5) (2012).

IV. WHAT COUNTS AS PRIOR TEACHING?

Approaching the question of what "counts" as prior teaching under the Missouri Tenure Act is a difficult proposition. Authority on the subject is scarce. The authority that is available deals with relatively narrow factual scenarios, and may not be helpful in guiding teachers and administrators facing unique issues that have not yet been specifically addressed under the law.

A. *Lopez v. Vance:* The Importance of Teaching Full-Time

In 1974 the Missouri Court of Appeals, St. Louis District, decided the case *Lopez v. Vance*.[28] In *Lopez*, a Missouri court dealt with the issue of who qualifies as a permanent teacher under Missouri's teacher tenure laws for the first time. The case centered on issues regarding the tenure status of Mr. Lopez, a teacher in Perryville School District No. 32.[29] Mr. Lopez taught electronics in the vocational and technical education program for the Perryville district for six hours (a full day) for five years.[30] In his sixth year, Mr. Lopez taught on a 5/6 basis (taking one period off).[31] In his seventh year, Mr. Lopez started teaching only two periods a day but eventually began to teach five periods a day as the year progressed.[32]

Mr. Lopez's contract was not renewed after his seventh year, and he challenged the non-renewal under the Teacher Tenure Act.[33] The circuit court upheld the district's decision to not renew Mr. Lopez's contract, reasoning that Mr. Lopez was not a permanent tenured teacher when his contract was not renewed. Mr. Lopez appealed the trial court's decision.[34]

The Missouri Court of Appeals, St. Louis District affirmed the circuit court ruling and held that a teacher who was not a full-time teacher during his sixth and seventh years of teaching was not a permanent teacher and thus was not entitled to benefits of the Act.[35] The *Lopez* court emphasized the importance of teaching full-time when analyzing tenure issues under Mo. Rev. Stat. § 168.104:

> "Under our statutes the critical point in time at which a teacher achieves a permanent teacher status is reemployment for or failure to notify the teacher of his reemployment for the sixth successive year by the same school district. He does not achieve the status of a permanent teacher unless the statutory conditions are fulfilled, i.e. he is a full-time

---

[28] Lopez v. Vance, 509 S.W.2d 197 (Mo. App. 1974).
[29] *Id.* at 199.
[30] *See id.*
[31] *See id.*
[32] *See id.*
[33] *See id.*
[34] *See id.*
[35] *Id* at 204.

> teacher for five successive years and 'thereafter continues to be employed as a full-time teacher by the school district.'"[36]

The court in *Lopez* held that under Mo. Rev. Stat. § 168.104 Mr. Lopez would need to be employed consecutively for five years before the 1971 academic school year, and then reemployed for the next year for him to be considered a permanent teacher and be entitled to tenure.[37]

Although *Lopez* did not directly deal with the issue of awarding credit toward tenure for prior teaching experience, the case does serve as a starting point for how courts may look at prior teaching positions. The *Lopez* court placed great emphasis on the distinction between full-time teaching and part-time teaching. In the court's view, achieving tenure status was contingent on full-time teaching service. Thus, under the *Lopez* framework, prior part-time teaching experience likely would not count toward tenure credit.

B. *Attorney General Opinion No. 116*: Teaching Is Teaching, Regardless of the Context

On May 28, 1975 Missouri Attorney General **John C. Danforth** issued a formal Attorney General Opinion interpreting the phrase "in any other school system," used in Mo. Rev. Stat. § 168.104 as it pertains to tenure credit for prior teaching experience.[38] Mr. Danforth opined that employment "in any other school system," includes any full-time teaching position, whether inside or outside the state of Missouri.[39] The phrase also encompasses prior teaching service in both public and private schools, as well as teaching service in junior colleges, four-year colleges, universities, and bona fide early childhood or preschool programs.[40] The Attorney General reasoned that employment in any of these positions would allow a subsequent school district to evaluate the teacher's earlier work, which was essentially the purpose of allowing prior teaching service to count toward tenure.[41]

This Attorney General's opinion seems to answer the question of what *type* of prior teaching should qualify for tenure credit. So long as a person has been employed as a fulltime teacher for two years, it appears that is does not matter whether the school system was public or private, in Missouri, or in the context of higher education or early childhood education.

---

[36] *Id.* at 203. (Emphasis in original).
[37] *Id.* at 203.
[38] Mo. Att'y. Gen. Op. No. 116-75, (May 28, 1975) *available at* http://ago.mo.gov/opinions/1975/116-75.htm.
[39] *See id.*
[40] *See id.*
[41] *See id.*

C. *Hudson v. Marshall*: Tenure Credit Requires Teaching Students

In *Hudson v. Marshall*, the Missouri Court of Appeals heard a case involving a plaintiff teacher who was employed by the same school district from 1966 to 1972.[42] He had signed the district's standard teaching contract for those years, but he did not serve as a traditional classroom teacher.[43] In 1966 the superintendent of the district assigned the plaintiff, under the authority of the board, "to become familiar with the various federal education programs under the Civil Rights Act of 1964, and to prepare proposals for the school district under Title I through Title VI of the Civil Rights Act."[44] The plaintiff's duties included discussing the various programs with the Superintendent, filling out forms for the programs, submitting them for corrections, and thereafter submitting them to governmental authorities.[45] When the plaintiff's contract was not renewed he sued the district, claiming a violation of the tenure laws.[46] The circuit court entered judgment in favor of school district.[47]

On appeal, the Court of Appeals held that the plaintiff was not "regularly required to be certified under laws relating to the certification of teachers" and, therefore, was not a "teacher" within meaning of statutes.[48] The court further held that the plaintiff failed to demonstrate that the school board's failure to reemploy him violated of any of his constitutional rights or had any effect on his efforts to obtain other employment.[49]

The *Hudson* decision appears to stand for the notion that in order to qualify for tenure credit, teachers must actually be engaged in teaching students, and not merely engaged in research or administrative tasks.

D. *Iven v. Hazelwood School Dist.*: The Power of Permanency

In *Iven v. Hazelwood School Dist.*, a math teacher had taught full time in the same middle school for nineteen years.[50] After several performance evaluations, the superintendent of the school district wrote the teacher a letter notifying him that his performance was unsatisfactory, and that his contract would not be renewed.[51] The teacher argued that the letter was insufficient to satisfy the statutory requirement that a tenured teacher be provided with written

---

[42] *See* Hudson v. Marshall, 549 S.W.2d 147 (Mo. Ct. App. 1977).
[43] *Id.*
[44] *Id.* at 150.
[45] *Id.*
[46] *Id.*
[47] *Id* at 148.
[48] *Id.* at 153.
[49] *Id* at 156.
[50] *See* Iven v. Hazelwood School Dist., 710 SW2d 462, 463 (Mo. Ct. App. 1986).
[51] *Id* at 464-466.

charges specifying with particularity grounds alleged to exist for termination.[52] The circuit court sided with the teacher, ordering that he be reinstated with back pay and benefits.[53] The school board appealed.[54]

The Missouri Court of Appeals for the Eastern District affirmed, holding that although the superintendent's letter to the teacher may have satisfied the statutory requirement that a teacher be provided with warning, the superintendent failed to comply with the statutory requirement that a teacher be given a chance to remedy any defects in his performance.[55] The letter notifying the teacher of formal charges was also insufficient to satisfy the statutory requirement that the teacher be provided with written charges specifying, with particularity, the grounds alleged to exist for termination.[56] The *Iven* court noted that:

> "The Teacher Tenure Act evidences a legislative intent to provide substantive and procedural safeguards with respect to tenured teachers. As we view the Act, its purpose is to establish strictly defined grounds and procedures for removing a permanent teacher which may not be evaded or other procedures substituted therefor."[57]

The *Iven* case illustrates how important and powerful the statutory procedural safeguards are to tenured teachers. Had the teacher in *Iven* not have been tenured, he would not have been entitled to the same procedural safeguards.

E. *Sadler v. Board of Education*: Coaching Does Not Count

In 1993, the Missouri Court of Appeals for the Southern District examined how the tenure laws intertwine with the extra-curricular duties that teachers undertake. In *Sadler v. Board of Education*, a tenured teacher who also served as a football and basketball coach was relieved from his coaching duties, but was kept on as a full-time teacher.[58] The teacher sued the school board, claiming that the board's nonrenewal of his extracurricular coaching duties violated the teacher tenure laws.[59] The circuit court found that the board had lawfully relieved teacher of his extra-curricular duties and denied the teacher's claim for compensation.[60] The teacher appealed.[61]

The Court of Appeals for the Southern District affirmed the circuit court ruling, holding that the Teacher Tenure Act did not prevent the school board

---

[52] *Id.*
[53] *Id.*
[54] *Id* at 463.
[55] *Id* at 465.
[56] *Id.*
[57] *Id.* at 464.
[58] *See* Sadler v. Bd. of Educ., 851 S.W.2d 707, 709 (Mo. App. 1993).
[59] *Id* at 710.
[60] *Id* at 708.
[61] *Id.*

from unilaterally eliminating nontenure compensation provisions from teacher's contract.[62] The court also held that a formal vote of the board was not necessary to relieve a teacher of extra duties like coaching.[63]

The *Sadler* case further illustrates that only the actual teaching of students counts toward achieving tenure status under Missouri law. Under this logic, it appears very likely that prior coaching experience, camp counseling, volunteer service, etc. should not count toward tenure credit.

F. *Mitchell v. Board of Education of Normandy School District.*: Public School Experience Only?

The Missouri Court of Appeals for the Eastern District further defined the term "teacher" in the case *Mitchell v. Board of Education of Normandy School Dist.*[64] In *Mitchell*, the plaintiff was employed as a "Vocational Program Coordinator" at Normandy High School in St. Louis.[65] Each year from 1985 through 1988, the plaintiff signed a one-page "teacher's contract" that was required for probationary teachers in the district.[66] In 1989 and again in 1990, the plaintiff signed a one-page "teacher's contract" that was required for permanent tenured teachers.[67] Despite signing these contracts, the plaintiff was not a traditional classroom teacher.[68] The plaintiff's duties mainly consisted of gathering and verifying data regarding student involvement in vocational education programs for which the district received federal funds through the state department of education, and "on occasion" he would go into vocational educational classrooms and talk to students regarding interviewing or employment opportunities.[69] After a round of budget cuts, the plaintiff's contract was not renewed.[70] The plaintiff sued the district, claiming a violation of the tenure laws.[71]

The circuit court held that the plaintiff could not be considered a tenured teacher.[72] The Court of Appeals for the Eastern District affirmed, holding that a vocational program coordinator was not a "teacher" protected by Teacher Tenure Act, and thus the district's non-renewal of his contract was appropriate.[73] In so holding, the court discussed the definition of "teacher": "A 'teacher' as defined in § 168.104(7) is 'an employee holding a position of the type mentioned in §

---

[62] *Id* at 713.
[63] *Id* at 714.
[64] *See* Mitchell v. Bd. of Educ. of Normandy Sch. Dist., 913 S.W.2d 130 (Mo. App. E.D. 1996).
[65] *See id* at 131.
[66] *See id* at 132.
[67] *See id.*
[68] *See id.*
[69] *See id.*
[70] *Id.* at 132-33.
[71] *Id* at 133.
[72] *Id.* at 134.
[73] *Id.*

168.011, that is, a public school position in which the person was employed to teach.'"[74]

On its surface, the *Mitchell* decision appears to merely reiterate that in order to receive tenure credit a teacher must actually be engaged in the teaching of students, as opposed to doing other things for a school district. However, by including the phrase "public school position" in its analysis of what is considered teaching for tenure purposes, the Court of Appeals for the Eastern District arguably altered the precedent set by the 1975 attorney general opinion formally mentioned, which held that prior teaching experience in private schools should also count toward tenure. If the *Mitchell* decision is strictly interpreted, only public school teaching experience should count toward tenure credit.

G. *Sealy v. Board of Education*.: Certification Required

In *Sealy v. Board of Education*, a preschool instructor was terminated from her position.[75] The instructor, who held a valid teaching certificate, brought action against the school board, claiming that she was wrongfully terminated under the tenure laws.[76] The circuit court entered summary judgment against the instructor.[77] On appeal, the Court of Appeals held that: (1) a preschool instructor is not a "teacher" entitled to protection of the Teacher Tenure Act, and (2) she was not a "legally certified teacher" entitled to protection of the statute governing employment of certificated teachers ineligible for permanent status under the Teacher Tenure Act.[78] The reasoning was that, although it was undisputed that the school board required the instructor to have a valid teaching certificate as a condition of her employment, to come within the purview of the tenure laws the certification requirement for the position had to be statutory, and not merely a requirement of the local school board.[79] Thus, because there is no statutory requirement that preschool teachers in Missouri must obtain a teaching certificate, the Teacher Tenure Act did not apply to the instructor in the case.[80]

The *Sealy* decision appears to strike another blow to the notion that any prior teaching experience should count towards tenure credit. Arguably, *Sealy* adds the requirement that a prior teaching position must have required certification pursuant to a statute in order to count toward tenure credit. This decision further blurs the lines of what type of teaching satisfies the requirements for tenure credit. Some "teaching" positions, such as preschool instruction, require no certification under Missouri law. Furthermore, teacher certification

---

[74] *Id.* at 133 (quoting Sadler v. Bd. of Educ., 851 S.W.2d 707, 711 (Mo. App. 1993) (quoting Hudson v. Marshall, 549 S.W.2d 147, 153 (Mo. App. 1977))).
[75] *See* Sealy v. Bd. of Educ., 14 S.W.3d 597, 598 (Mo. Ct. App. 1999).
[76] *Id.*
[77] *Id.*
[78] *Id* at 600.
[79] *Id.*
[80] *Id.*

requirements vary from state to state, making it difficult to determine whether prior teaching experience in another state should count toward tenure credit in Missouri.

V. ADDRESSING PRIOR TEACHING CREDIT - THE FUTURE OF TEACHER TENURE IN MISSOURI

As the above referenced case law indicates, determining what type of prior teaching experience counts toward tenure credit under Missouri's Teacher Tenure Act is a difficult task. The policy behind tenure credit makes sense: districts should reward experienced teachers for their prior service because such service allows the district to evaluate the teacher's abilities before they hire the teacher. In practice, however, applying the credit system can be confusing and burdensome. In order to clear up the ambiguity, the legislature should specifically define what type of prior teaching experience should count toward tenure credit. This would be much more efficient than letting individual cases trickle through the Missouri courts as various issues arise.

Recently, various bills have been introduced in the Missouri legislature proposing to overhaul some or all of the teacher tenure system in Missouri. These bills call for radical changes to the longstanding tenure system. For instance, some proposals seek to add "unsatisfactory performance" to the list of reasons for which a tenured teacher may be terminated.[81] Another proposal would require teachers to be routinely evaluated to determine if they are professionally competent enough to keep their jobs.[82] Another seeks to extend the probationary period for teachers from five to ten years.[83]

None of these proposals specifically addresses the issue of rewarding prior teaching experience. To the contrary, the proposed bills call for increased teacher evaluation and decreased job security. These proposals are flawed in that they do not reward experienced teachers. Instead, they seek to increase professional performance through the fear of potential contract non-renewal.

VI. CONCLUSION

Newly hired educators with prior teaching experience will undoubtedly wonder whether their prior experience will qualify for tenure credit under Missouri's teacher tenure system. This question is difficult to answer, in light of the limited statutory guidance and the piecemeal case law on the subject. The Missouri legislature should consider clearing up the ambiguities that make determining what type of prior teaching experience counts toward tenure credit so difficult. Overhauling the entire teacher tenure system is not the answer. The

---

[81] *See* S.B. 372, 96th Gen. Assemb., Reg. Sess. (Mo. 2011) .
[82] *See id.*
[83] *See* S.B. 806, 96th Gen. Assemb., Reg. Sess. (Mo. 2012).

current tenure system might be flawed, but it is not broken. Experienced teachers should be rewarded for their years of service – the legislature simply needs to explicitly define what type of prior teaching experience should count toward tenure credit.

CATCH ME IF YOU CAN: THE RACE TO OBTAIN DEEMED LAWFUL STATUS

By Jay Playter

I. INTRODUCTION

In mid-2005, Farmers Telephone of Riceville was a small, local telephone company serving the rural town of Riceville, Iowa.[1] This small telephone company was struggling to maintain customers within its service areas as its traditional business customers migrated to larger, more-populated commercial districts.[2] The company raced to update outdated technology, offered new and expanded services, and embarked on an extensive advertising campaign.[3] Despite its best efforts, Farmers of Riceville only generated around 14 million minutes of telecommunications traffic for the entire year, amounting to approximately $74,253,000 in gross revenues.[4]

By January 2007, Farmers Telephone of Riceville was handling nearly 28 million minutes of telecommunications traffic *per month*.[5] This boom in traffic was not the result of Farmers of Riceville dramatically expanding its service area or offering innovative technological services. Nor could the spectacular increase in minutes be attributed to an explosion in the population of Riceville.[6] In fact, the increase in minutes was the result of Farmer's provision of services to "customers"[7] that did not even reside in Iowa.[8] The enormous upsurge in minutes was a result of Farmer's partnership with free conference calling companies and engaging in a practice known as "traffic pumping"[9] within the telecommunications industry.[10]

Traffic pumping, also known as "access stimulation," has become a growing, and hotly contested, practice in the telecommunications industry,

---

[1] Dionne Searcey, *How 2 Guys' Iowa Connection Took Big Telecoms for a Ride --- Calls Sent to Their Area Piled Up Access Fees Until FCC Interceded*, WALL ST. J., Oct. 4, 2007, at A1.
[2] *Id.*
[3] *Id.*
[4] *See id.* ("In November 2006, Mr. Laudner's company handled 27.4 million minutes of calls, more than double the number he had processed in an entire year before he partnered with the Internet companies."). At the time, Farmers Telephone of Riceville's tariffed rate was $0.053 per minute. *Id.*
[5] *See id.*
[6] In 2000, the population of Riceville, Iowa was approximately 840. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, IOWA: 2010 POPULATION AND HOUSING UNIT COUNTS 82 (2012), *available at* http://www.census.gov/prod/cen2010/cph-2-17.pdf. In 2010, the population was approximately 785. *Id.*
[7] For reasons that will be discussed at length later in this article, the term "customers" is used loosely here. *See infra* notes 70-74 and accompanying text.
[8] Qwest Commc'ns Corp. v. Superior Tel. Coop., No. FCU-07-2, 2009 Iowa PUC LEXIS 428, at *4 (Iowa Utils. Bd. Sept. 21, 2009) (stating that local rural carriers like Farmers "partnered with free calling service companies (FCSCs), which are based in large metropolitan areas such as Los Angeles, California, Las Vegas, Nevada, and Salt Lake City, Utah.").
[9] For an examination of the mechanics of traffic pumping, *see infra* Part III.
[10] Searcey, *supra* note 1, at A1.

spurring vast litigation at both the state and federal level throughout the country.[11] Telecommunications providers are arguing over, and state and federal regulatory bodies are wrestling with, whether carriers that have partnered with conference calling companies are entitled to collect charges for terminating traffic generated through traffic pumping arrangements. However, even if carriers like Farmers are found to have engaged in an unlawful practice,[12] such carriers maintain that Congress has provided a shield from refund liability for any illicit charges.[13] Congress's creation of the "deemed lawful" provision under the Telecommunications Act of 1996,[14] and the Federal Communications Commission's interpretation of that provision, has created a potential legal absurdity: a telecommunications carrier whose tariff is "deemed lawful" cannot be required to return unlawfully obtained charges.

This article examines the potential impact of "deemed lawful" status on a carrier engaged in unlawful telecommunications practices. Part II will provide a brief overview of the telecommunications industry, including the players, the different compensation mechanisms, and the governing tariff regime. Part III will examine the mechanics of traffic pumping and the telecommunication industry's reaction to the rise of traffic pumping practices. Finally, Part IV will explore the cat-and-mouse game that has taken shape, and is likely to continue, as a result of the FCC's interpretation and application of the "deemed lawful" provision and possible solutions in eliminating the absurdity created by the "deemed lawful" provision.

II. AN OVERVIEW OF THE TELECOMMUNICATIONS INDUSTRY AND INTERCARRIER COMPENSATION

A. The Players

The telecommunications industry is made up primarily of three types of telecommunications providers: local exchange carriers ("LECs"), interexchange

---

[11] *See* Splitrock Props., Inc. v. Sprint Commc'ns Co., No. CIV. 09-4075-KES, 2010 U.S. Dist. LEXIS 30787, at *6 (D.S.D. Mar. 30, 2010) (citing similar cases in Iowa, New York, Minnesota, and Kentucky, as well as at least eight similar cases pending in South Dakota).

[12] 47 U.S.C. § 201(b) (2012) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.").

[13] *See generally* Sprint Commc'ns Co. v. N. Valley Commc'ns, LLC, 26 FCC Rcd. 10780 (July 18, 2011).

[14] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 613(a)–(g)). The Telecommunications Act of 1996 was enacted in order to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Id*.

carriers ("IXCs"), and commercial mobile radio service providers ("CMRS providers").[15]

LECs primarily provide the services to place what is generally thought of as a "local" telephone call.[16] A LEC routes a call from a calling party over a "loop," the telephone line running directly from an individual residence or business, onto the LEC's network where it is then directed to an end office switch.[17] From the end office switch, the call is routed back over the LEC's network to the specific loop terminating at the premises of the called party.[18] A LEC's network is essentially a bicycle wheel, with the end office at the hub and the various loops serving as the spokes of the wheel.[19]

LECs can further be classified as incumbent local exchange carriers ("ILECs") or as competitive local exchange carriers ("CLECs").[20] ILECs are local service providers that were operating on the date that the Telecommunications Act of 1996 ("Telecommunications Act") was enacted.[21] Because LECs operating at that time exclusively owned the traditional wireline local exchange networks (i.e., the only means by which to generate, route, and terminate wireline calls), any other telecommunications provider wishing to compete would have had to duplicate the incumbent's entire existing network, a cost-prohibitive proposition.[22] Thus, those LECs "operated as monopolies" within their local service area, essentially wielding unlimited power to control prices.[23] The Act imposed specific duties on ILECs to open their networks to providers attempting to compete.[24] Such competing providers are known as CLECs.[25]

---

[15] *See In re* Developing a Unified Intercarrier Comp. Regime, 16 FCC Rcd. 9610, 9613-14 (2001). A LEC is essentially purely a local telephone provider. A LEC maintains the local telephone lines and equipment that enable a caller to place a telephone call to another party in the same local geographic area. An IXC is essentially solely a long-distance provider. An IXC does not maintain local telephone lines and equipment, but rather maintains the lines and equipment that run between two local providers' end offices. CMRS providers are essentially cell phone providers and may provide services that, at times, mirror those of both LECs and IXCs. In attempting to understand the technical information that follows, it may be more helpful to think in terms of local telephone companies, long-distance companies, and cell phone companies.

[16] Advamtel, LLC v. AT&T Corp., 118 F. Supp. 2d 680, 681 (E.D. Va. 2000).

[17] *Id.*

[18] *Id.*

[19] This is a simplified depiction of a local exchange network. An actual local call may involve switching between multiple switches before terminating at the called party's premises.

[20] *Advamtel*, 118 F. Supp. 2d at 681.

[21] 47 U.S.C. § 251(h)(1) (2012) (defining an "incumbent local exchange carrier" as a local exchange carrier that on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in a local exchange area).

[22] Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2257-58 (2011).

[23] *See* Advamtel, 118 F. Supp. 2d at 681.

[24] 47 U.S.C. §§ 251-261 (2012) (requiring ILECs to, among other duties, allow for the resale of its services at reasonable, non-discriminatory rates).

[25] *Advamtel*, 118 F. Supp. 2d at 680-81.

IXCs facilitate what are commonly thought of as "long distance" calls.[26] When a customer of a LEC attempts to call a customer of a different LEC whose network is not directly interconnected with the first, the call must be transported to the network of the LEC serving the called party.[27] IXCs provide such transport by interconnecting with the networks of both the LEC of the calling party and the LEC of the called party.[28] A long distance call is originated on the network of one LEC, passed on to the IXC (who transports the call to a second LEC), and finally terminated on the network of the second LEC serving a different local service area. Essentially, an IXC serves as a conduit between the customers, and networks, of two LECs.[29]

Finally, CMRS providers supply cell-phone service.[30] When a mobile user places a call, the CMRS provider receives a wireless radio signal at a mobile receiver, which is connected to the CMRS provider's wireline network.[31] If the called party is connected directly to the CMRS provider's wireline network, the call is delivered to the called party in essentially the same manner as a LEC would terminate a "local" call.[32] If the called party is not a member of the CMRS provider's network, the call is then transported to the network of the LEC serving the called party by handing it off directly to the LEC (if the networks of the CMRS provider and the LEC are directly connected) or often through the use of an IXC.[33] When a mobile user receives a call, the call is transported in the reverse order.

B. The Money

Intercarrier compensation for the transport and termination of telecommunications traffic between the networks of different service providers

---

[26] Iowa Network Servs., Inc. v. Qwest Corp., 385 F. Supp. 2d 850, 866 n.24 (S.D. Iowa 2005). For the purposes of this article, all references to "long distance" calls will assume that such calls qualify as "toll service" calls. *See infra* note 37.

[27] Sancom, Inc. v. Qwest Commc'ns Corp., 643 F. Supp. 2d 1117, 1122 n.2 (D.S.D. 2009).

[28] *Id.*

[29] Continuing the bicycle analogy, *see supra* text accompanying notes 15-18, just as a LEC's network may be thought of as a bicycle wheel, an IXC's network may be thought of as the bicycle frame. While the frame connects the two wheels, the frame does not connect to the individual spokes of the wheels. While the IXC's network connects the LECs' networks, the IXC's telephone lines and equipment are distinct and separate from those of the LECs. An IXC therefore must rely on the use of the originating and terminating LECs' networks in order to deliver a long distance call. For using the LECs' networks, the IXC pays an originating access charge to the calling party's LEC and a terminating access charge to the called party's LEC. *See infra* notes 36-40 and accompanying text.

[30] Alma Commc'ns Co. v. Mo. Pub. Serv. Comm'n, 490 F.3d 619, 621 (8th Cir. 2007).

[31] *See* Southwestern Bell Tel. Co. v. Fitch, 801 F. Supp. 2d 555, 577 (S.D. Tex. 2011).

[32] *How Wireless Technology Works*, CTIA – THE WIRELESS ASSOCIATION, 4, *available at* http://files.ctia.org/pdf/Brochure_HowWirelessWorks.pdf (last visited Mar. 19, 2013). *See supra* notes 15-18 and accompanying text for discussion regarding the mechanics of a "local" telephone call.

[33] Alma Commc'ns Co. v. Mo. Pub. Serv. Comm'n, 490 F.3d 619, 621-22 (8th Cir. 2007).

generally is governed by one of two distinct categories of charges: access charges and reciprocal compensation.[34] The application of the rules associated with each category "treat different types of carriers and different types of services disparately, even though there may be no significant differences in the costs among carriers or services."[35] The interconnection regime that applies in a particular case "depends on such factors as: whether the interconnecting party is a local carrier, an interexchange carrier, [or] a CMRS carrier . . . and whether the service is classified as local or long-distance, interstate or intrastate . . . ."[36]

Access charges apply to traffic that does not originate and terminate in the same local area, i.e. "long distance" calls.[37] Because a long distance call actually originates and terminates on network equipment owned and operated by LECs, the IXC involved in transporting the call must pay an originating access charge and a terminating access charge to the originating and terminating LEC respectively.[38] Access rates can be further broken down into *intrastate* access rates, which are governed by state regulatory bodies, and *interstate* access rates, which are governed by the FCC.[39] These charges are typically small, with some as low as $.01 per minute.[40] However, in typically rural areas where providing

---

[34] *In re* Developing a Unified Intercarrier Comp. Regime, 16 FCC Rcd. 9610, 9613 (2001) (summarizing the current intercarrier compensation regimes). However, the FCC has noted that stating that all calls are subject to either access charges or reciprocal compensation "is clearly an oversimplification . . . as both sets of rules are subject to various exceptions." *Id. See infra* note 37.

[35] *Id.*

[36] *Id.*

[37] *Id*. However, it may be more appropriate to state that access charges apply to "toll service" calls. Access charges apply for the provision of "exchange access." *See In re* Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, 11 FCC Rcd. 15499, 15680 (1996) ("Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer *exchange access* services.") (emphasis added). "Exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of *telephone toll services*." 47 U.S.C. § 153(20) (2011) (emphasis added). "Telephone toll service" means "telephone service between stations in different exchange areas *for which there is made a separate charge not included in contracts with subscribers for exchange service*." § 153(55) (emphasis added). While most long distance calls have traditionally incurred a separate charge on top of a calling party's base rate for telephone service (thereby meeting the definition of a "toll service" call), theoretically a call could originate and terminate in different local exchanges and not incur a separate charge. In that case, it could be argued that the LEC is not providing exchange access and so is not entitled to charge the IXC access charges. For purposes of this article, when the term "long distance call" is used, it will be assumed that the call is a "toll service" call.

[38] *In re* Developing a Unified Intercarrier Comp. Regime, 16 FCC Rcd. at 9613-14. The mechanics of a long distance call are explained in Part II.A. Because the lines and equipment that actually deliver the call from the calling party's premises to the IXC's network and then from the IXC's network to the called party's premises are maintained and operated solely by LECs, IXCs must pay the LECs for the use of the LECs' networks. The IXC then collects fees for the long distance call directly from the calling party. That is why long distance callers have traditionally had to obtain a separate long-distance provider and pay a separate per minute fee for placing a long distance call.

[39] *Id.*

[40] *In re* Access Charge Reform, 16 FCC Rcd. 9923, 9931 (2001).

service has traditionally been more expensive,[41] access charges may be as high as $.13 per minute.[42]

C. The Rules

When applicable access charges are not established by an interconnection agreement between telecommunications providers, access charges are governed by rates contained in state and federal tariffs.[43] A tariff is a document filed with the FCC that outlines the services provided by a telecommunications provider and the applicable charges for the provision of those services.[44] While not all providers must file tariffs,[45] any telecommunications carrier that does file a tariff is strictly prohibited from providing any services or charging any rates other than those specifically listed in its tariff.[46]

Generally, the rates contained in an interstate access service tariff are valid for a two-year period.[47] Typically, the access rates contained in an

---

[41]Qwest Commc'ns Corp. v. Superior Tel. Coop., No. FCU-07-2, 2009 Iowa PUC LEXIS 428, at *6 (Iowa Utils. Bd. Sept. 21, 2009).

[42] *Id.*

[43] *See In re* Developing a Unified Intercarrier Compensation Regime, Declaratory Ruling and Report and Order, 20 FCC Rcd. 4855 (February 24, 2005) (finding that tariffed rates are properly applied in the absence of a valid interconnection agreement). This article will focus on interstate tariffs and applicable federal statutes and FCC regulations. Filing requirements for intrastate tariffs may vary from state to state.

[44] *See* Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 221-22 (1998) (citing 47 U.S.C. § 203(a) (2012)).

[45] *In re* Hyperion Telecomm., Inc. Petition Requesting Forbearance, 12 FCC Rcd. 8596, 8611 (1997) (providing that non-ILEC, i.e. CLECs, may, but do not have to, file tariffs covering access services and rates); Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Commc'ns Act of 1934, as amended, 11 FCC Rcd. 20730, 20773 (1996) (providing that IXCs are no longer permitted to file tariffs covering access services and rates).

[46] 47 U.S.C.§ 203(c)(1) ("[N]o carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect. . . ."); *Am. Tel. & Tel. Co.*, 524 U.S. at 222-26 (noting that the Communications Act prohibits the offering of services not included in a filed tariff).

[47] 47 C.F.R. § 69.3(a) (2011) ("[A] tariff for access service shall be filed with this Commission for a two-year period."); however, new tariffs containing changes in services or rates may be filed more often, *Id.* §§ 61.38-.39. The two-year limitation does not apply to CLECs or "price cap" ILECs, but rather only to so called "rate-of-return" ILECs. *Id.* § 69.3(f)(1)-(2) (establishing filing requirements only for ILECs which file tariffs pursuant to 47 CFR § 61.38 or § 61.39). Such ILECs are known as "rate-of-return" ILECs because §§ 61.38-.39 allow an ILEC to establish tariffed rates based on either their projected revenues versus projected costs or their historical revenues versus their historical costs, i.e. their projected or historical "rate of return." Rather than basing their tariffed rates on their "rate of return," LECs can also set their rates based on price cap rules established by the FCC. *See id.* §§ 61.41-.49. However, because complaints regarding illicit telecommunications activities have not directly involved price cap carriers given the relatively low

interstate access tariff must be based on the LEC's projected or historical costs for providing service plus a prescribed return on investment.[48] A carrier is permitted to adjust its rates during a prescribed period if its actual return deviates from its projected return and, for practical purposes, may be obligated to make such adjustments to avoid refund liability for revenues that significantly exceed its costs.[49] After each two-year period, a LEC must recalculate its rates based on either its projected costs for the next two years or its actual costs for the previous two years and submit a new tariff with the FCC.[50]

When a tariff is filed with the FCC, the FCC can, on the filing of a petition challenging the tariff or on its own initiative, institute a hearing regarding the lawfulness of the rates listed in the tariff.[51] If the FCC does not institute such a hearing, or if it does institute such a hearing and does not find that the rates are unjust or unreasonable, the rates are presumed to be lawful and the LEC is entitled to charge such rates.[52] However, while the rates are presumed lawful, the FCC can later find that the rates are and/or were in fact unjust or unreasonable and order the LEC to refund any revenue collected pursuant to rates over and above rates that would have been just and reasonable as determined by the FCC.[53]

---

rates available under price cap rules, *In re* Connect Am. Fund, 26 FCC Rcd. 4554, 4760 (2011), this article will focus on regulations related to so called "rate-of-return" carriers.

[48] *In re* Access Charge Reform, 15 FCC Rcd. 12962, 12968 (2000) ("LECs calculate the specific access charge rates using projected costs and projected demand for access services."); *see also* 47 C.F.R. § 61.26(b) (CLECs are not required to submit cost justification data but generally cannot charge access rates higher than the access rates of the ILEC in the same service area, which do have to be cost-based).

[49] *See In re* MCI Telecomm. Corp. v. Pac. Nw. Bell Tel. Co., 5 FCC Rcd. 216, 223 (1989) ("Carriers are permitted to make mid-course corrections if their actual return deviates from the authorized return. If actual earnings are higher than the authorized return, a carrier can file reductions and thereby avoid the risk of being ordered to pay damages.").

[50] *See* 47 C.F.R. § 69.3(f)(1)-(2); *see also* §§ 61.38-.39. The ability to use historical cost data rather than projected cost data is limited to LECs that have annual operating revenues not more than forty million dollars and that serve 50,000 or fewer access lines. *See* 47 C.F.R. § 61.39(a).

[51] 47 U.S.C. § 204(a)(1) (2012) ("Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof."). Any tariff filed with the FCC must meet a mandated minimum notice period before taking effect. 47 C.F.R. § 61.58(a). Generally, an ILEC must provide sixteen days' notice, while a CLEC may provide as little as one days' notice. *Id.* § 61.58(2)(ii). *But see infra* note 52. Such notice period is meant to enable challenges to the lawfulness of the tariff. *See* 47 C.F.R. § 1.773 (2012) (requiring any person filing a petition for "investigation, suspension, or rejection of a new or revised tariff filing" to show that "there is a high probability the tariff would be found unlawful after investigation.").

[52] *In re* Implementation of Section 402(b)(1)(A) of the Telecomm. Act of 1996, 12 FCC Rcd. 2170, 2182-83 (1997). *See also* 47 U.S.C. § 205(a) (2012). If the FCC determines that the rates listed in the tariff are unlawful, the FCC can mandate what rates are just and reasonable. *Id.*

[53] *See In re Implementation of Section 402(b)(1)(A),* 12 FCC Rcd. at 2182-83 ("Under current practice, . . . if . . . a tariff filing is subsequently determined to be unlawful in a complaint proceeding commenced under section 208 of the Act, customers who obtained service under the tariff prior to that determination may be entitled to damages."). *See also* 47 U.S.C. § 205(a).

D. The "Get Out of Jail Free" Card

The Telecommunications Act implemented sweeping changes in the telecommunications industry, with one change in particular significantly affecting the rules of the game. Congress included a provision that enabled LECs, subject to certain notice requirements,[54] to obtain "deemed lawful" status for a tariff filed with the FCC.[55] Tariffs that are not suspended for investigation during the required initial notice period are automatically treated as being deemed lawful.[56] The FCC has indicated that rates charged under a deemed lawful tariff are conclusively presumed to be lawful for the period the tariff is in effect.[57] If the rates are later found to be unlawful in an investigation initiated by the FCC or in a complaint proceeding, the offending LEC cannot be required to refund charges collected prior to the determination of unlawfulness.[58] So long as service is provided pursuant to the terms and conditions of the tariff, the LEC can argue that its "deemed lawful tariff" is an absolute shield against refund liability, and the LEC can only be liable for continuing to collect the unlawful rates on a prospective basis.[59]

---

[54] Any LEC, whether incumbent or competitive, can now file on a streamlined basis: on seven days' notice, in the case of a reduction in rates, or on fifteen days' notice, in the case of an increase in rates or any other change in the terms of service. 47 C.F.R. § 61.58(2)(i). For background regarding notice requirements for tariffs not filed on a streamlined basis and the reason for notice periods generally, *see supra* notes 49-51 and accompanying text.

[55] 47 U.S.C. § 204(a)(3) ("Any . . . charge, classification, regulation, or practice [filed under the streamlined filing provisions] shall be deemed lawful . . . .").

[56] *See In re Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. at 2182 ("[W]e conclude that, because section 204(a)(3) uses the phrase 'deemed lawful,' it must be read to mean that a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect.").

[57] *Id.*

[58] *Id.* at 2183. For treatment of tariffs that are not deemed lawful, see *supra* notes 48-50 and accompanying text.

[59] *See id.* Whether "service is provided pursuant to the terms and conditions of the tariff" is the basis for much of the current traffic pumping litigation. *See, e.g.*,, Splitrock Props., Inc. v. Sprint Commc'ns Co., No. CIV. 09-4075-KES, 2010 U.S. Dist. LEXIS 30787, at *3-4 (D.S.D. Mar. 30, 2010) ("Sprint denies that it failed to pay switched access charges for services provided pursuant to Splitrock's tariffs on the ground that the services provided by Splitrock do not qualify as 'switched access service,' as that term is defined in Splitrock's tariffs.").

III. THE GAME IN ACTION

A. "Traffic Pumping" – A New Practice

Over the past decade, LECs such as Farmers Telephone of Riceville, have increasingly engaged in "traffic pumping"[60] in order to generate enormous numbers of minutes of traffic and, correspondingly, enormous revenues. Traffic pumping typically involves an agreement between a rural LEC and a free calling service company (FCSC).[61] The LEC assigns local telephone numbers to the FCSC, which then advertises those numbers across the nation through online advertisements, offering customers the opportunity to participate in conference calling by dialing the advertised number.[62] These conference services allow customers from all over the U.S. to teleconference with one another, even though none of the participants or the FCSC might actually be located in the area serviced by the terminating LEC.[63] Callers utilizing these conference services drive up the amount of long distance traffic sent to the LEC, increasing volumes as much as 100-fold in some instances.[64]

When callers dial these numbers, the caller's IXC or CMRS provider must deliver the long distance call to the LEC for termination.[65] The LEC bills the IXC or CMRS provider for such termination at the LEC's tariff access rate, which in the case of a rural LEC is relatively high.[66] Because these high rates are based on the LEC's historically low long distance traffic volumes and small number of customers,[67] as the number of long distance minutes increases, any costs associated with handling the increased traffic are vastly eclipsed by the

---

[60] The FCC recently formally defined this practice as "access stimulation." *In re* Connect Am. Fund, 26 FCC Rcd. 17663, 17676 (2011).

[61] Qwest Commc'ns Corp. v. Superior Tel. Coop., No. FCU-07-2, 2009 Iowa PUC LEXIS 428, at *6 (Iowa Utils. Bd. Sept. 21, 2009).

[62] *Id.* at *4-7.

[63] *See id.* at *4.

[64] *Id.* at *2.

[65] *In re* Establishing Just and Reasonable Rates for Local Exchange Carriers, 22 FCC Rcd. 11629, 11631 (2007) ("Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way.").

[66] *See supra* note 40 and accompanying text. However, based on new regulations promulgated by the FCC, LECs engaged in traffic pumping are unlikely to be able to obtain such high rates. *See In re* Connect Am. Fund, 26 FCC Rcd. 17663, 17882 (2011). Going forward, ILECs will be required to file revised tariffs with rates based on projected costs within 45 days after qualifying as participating in "access stimulation." *Id.* at 17882-83. Such rates will have to account for the large volumes of traffic generated by traffic pumping, thereby raising revenues and lowering costs, which in turn will lower the rates the ILECs can charge and still meet the FCC's regulations regarding rates of return. *See supra* text accompanying notes 46-48. Similarly, a CLEC engaged in "access stimulation" will be required to benchmark its rates at "a rate no higher than the lowest rate of a price cap LEC in the state," thereby significantly lowering the CLEC's rates. *In re* Connect Am. Fund, 26 FCC Rcd. at 17885.

[67] Qwest Commc'ns Corp. v. Superior Tel. Coop., No. FCU-07-2, 2009 Iowa PUC LEXIS 428, at *2 (Iowa Utils. Bd. Sept. 21, 2009).

revenues generated under the LEC's high access rates. The LEC then pays a portion or percentage of the access revenues to the conference calling companies (CCC) as a "marketing fee" for generating the traffic.[68] This system essentially enables a CCC to receive telecommunications services, even though neither the CCC nor the callers utilizing the conference calling services are located in the LEC's service area, and get paid for receiving those telecommunications services. A LEC and a CCC can maintain this relationship for up to two years before tariff regulations require the LEC to adjust its access rates to account for the high traffic volumes generated by a traffic pumping arrangement.[69]

B. The IXCs Strike Back

As was inevitable, the IXCs responsible for delivering these tremendous volumes of long distance traffic (and for paying the access charges for termination), noticed the significant increases in traffic to areas that traditionally generated relatively low volumes of long distance traffic. Upon learning of the traffic pumping arrangements responsible for generating such increases, the IXCs challenged the LECs' right to share revenues with "customers" and to collect such high access rates given the FCC's restrictions on carriers' available rates of return.[70]

Initially, the FCC determined that the LECs were not prohibited from entering into revenue sharing agreements with the CCCs,[71] and that, while the rates collected by the LECs unlawfully exceeded their prescribed rates of return, the IXCs were only entitled to prospective relief because the LECs tariffs, and thus their rates, were deemed lawful.[72] However, after it was later discovered that the CCCs had not paid any fees for the services provided by the LECs, the FCC determined that the CCCs were therefore not "customers" as defined by the LECs' tariffs.[73] Because the CCCs were not "customers" the LECs tariffs, though deemed lawful, did not apply and the LECS were not entitled to collect

---

[68] *See id.* at *2-3..

[69] *See supra* notes 47-50 and accompanying text. The relationship may last even longer in the case of an agreement between a CCC and a CLEC, given that the two-year tariff limitation does not apply to CLECs. *See supra* note 45.

[70] Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co., 22 FCC Rcd. 17973, 17976-77 (2007). *Superior Tel. Coop.*, 2009 Iowa PUC LEXIS 428 at *40-41. *See also supra* notes 47-50 and accompanying text (examining interstate access tariff requirements).

[71] *Farmers & Merchants Mut. Tel. Co.*, 22 FCC Rcd. at 17987-88 (2007) ("We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff.").

[72] *Id.* at 17983-84. One section of the FCC's order was specifically entitled "Although Farmers Earned an Unlawful Rate of Return During the Complaint Period, Qwest Is Not Entitled to Damages." *Id*. at 17983.

[73] Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co., 24 FCC Rcd. 14801, 14805 (2009).

access charges for terminating long distance traffic destined to CCCs.[74] Thus, the IXCs were entitled to retrospective relief, namely damages.

C. Return of the LECs

Following the seeming victory for the IXCs in the *Farmers* decision, the LECs moved quickly to counter. LECs began to file tariffs defining "customers" as any user of the LEC's telecommunications services, regardless of whether the user paid for such services or not.[75] IXCs again moved to challenge such tariffs.

The FCC determined that such definitions were unlawful under FCC regulations.[76] The FCC noted that for more than 25 years its regulations and orders allowed for the imposition of access charges by a LEC only when terminating traffic to a customer that subscribed to telecommunications services offered for a fee.[77] Despite being contrary to FCC regulations, the FCC determined that based on the tariffs' terms and conditions, the tariffs applied to the LECs' traffic for the period prior to the FCC's determination and that, because the tariffs were deemed lawful, the IXCs were entitled to prospective relief only.[78]

IV. LEVELING THE PLAYING FIELD

While the FCC has created regulations to curb the effects of traffic pumping,[79] the shadow cast by the FCC's interpretation and application of § 204(a)'s deemed lawful provision continues to loom over the telecommunications industry. As the battle over traffic pumping practices illustrates, the deemed lawful provision has created a perverse game of cat-and-mouse between LECs and IXCs. It is estimated that traffic pumping practices generated over $2.3 billion in revenue for LECs from 2005 to 2010,[80] so LECs clearly have a tremendous incentive to explore and adopt alternative practices

---

[74] *Id.*

[75] *See, e.g.*, Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC, 26 FCC Rcd. 8332, 8333-34 (2011).

[76] *Id.* at 8332-33.

[77] *Id.* at 8336-37 ("[T]he Commission's access service rules and orders establish that a CLEC may tariff access charges only if those charges are for transporting calls to or from an individual or entity to whom the CLEC offers service *for a fee.*") (emphasis in original).

[78] *See* Qwest Commc'ns Co v. Farmers & Merchants Mut. Tel. Co., 22 FCC Rcd. 17973, 17980; *see also* Sprint Commc'ns Co. v. N. Valley Commc'nc, LLC, 26 FCC Rcd. 10780, 10788 (2011) ("Pursuant to section 204(a)(3) of the Act, the Tariff is "deemed lawful" until found otherwise by this Commission or a court of law.").

[79] *See In re* Connect Am. Fund, 26 FCC Rcd. 17663 (2011).

[80] *Id.* at 17876 ("TEOCO estimates that the total cost of access stimulation to IXCs has been more than $ 2.3 billion over the past five years. Verizon estimates the overall costs to IXCs to be between $330 and $440 million per year, and states that it expected to be billed between $66 and $88 million by access stimulators for approximately two billion wireline and wireless long-distance minutes in 2010.").

that will generate large volumes of access minutes. Because the "deemed lawful" status appears to provide an absolute shield against retrospective relief, LECs have an incentive to adopt such practices even if such practices are contrary to established FCC regulations and precedent. This leaves IXCs and the FCC in the unenviable, and untenable, position of attempting to monitor and challenge each and every access tariff filed with the FCC for not only apparent unlawful terms and conditions, but also for any possible future unlawful application of a LEC's proposed terms and conditions. Because IXCs have to continually attempt to stay ahead of any possible traffic inflating schemes, they will increasingly have to challenge proposed tariffs, thus requiring more time and resources on behalf of all LECs and IXCs and the FCC. However, there are a number of possible solutions available to lessen the effects of the "deemed lawful" provision.

A. Refereeing the Game

One available solution to avoid providing LECs an arguably absolute shield of "deemed lawful" status is to simply increase the time and resources expended on reviewing tariffs filed with the FCC. The FCC could simply suspend for investigation all tariffs filed pursuant to the streamlined notice period. In promulgating the streamlined tariff provisions under the Telecommunications Act, Congress did not eliminate the FCC's suspension authority for investigation of LEC tariffs.[81] Tariffs that are suspended within the streamlined notice period are not eligible for deemed lawful status even if found to be lawful pursuant to FCC determination.[82]

Given what are already limited available resources, such a solution seems untenable. The resources required to monitor, suspend, and investigate the tremendous number of tariffs filed daily with the FCC would be enormous. Further, such an approach would seem to be contrary to Congress' stated intentions of deregulation and accelerated provision of telecommunications services.[83]

B. An Exception to the Rules

Another possibility for deterring LECs from proposing tariffs that enable them to artificially stimulate traffic, is to create a recognized exception to

---

[81] *In re* Implementation of Section 402(b)(1)(A) of the Telecomm. Act of 1996, 12 FCC Rcd. 2170, 2183-84 (1997) ("Congress did not amend the Act to eliminate the Commission's suspension authority for LEC tariffs . . . .").

[82] *See id.* at 2182 ("[T]he 'deemed lawful' language does not govern streamlined tariff filings that become effective after suspension in those instances where the Commission suspends and initiates an investigation of a LEC tariff within the 7 or 15 day notice periods specified in section 204(a)(3).").

[83] *See id.* at 2172-74.

deemed lawful status. The FCC recently adopted such an exception for LECs involved in traffic pumping.[84] The FCC determined that any LEC engaged in traffic pumping that failed to meet regulatory guidelines regarding tariff filings would be considered to have engaged in "furtive concealment" and would forfeit deemed lawful status for its tariff, subjecting the LEC to refund liability as of the date on which the tariff was required to have been filed.[85]

However, such a measure would be ineffective against alternative future traffic stimulating activities. The FCC indicated that finding that a LEC had engaged in furtive concealment would require a knowing circumvention of FCC regulation aimed at curbing a recognized telecommunications practice.[86] As the long-raging battle over traffic pumping illustrates, the FCC's regulations necessarily leave room for argument over whether a given practice is unlawful. Before the FCC has the opportunity to address the lawfulness of a traffic stimulating activity, LECs would be able to rack up enormous amounts of revenue while avoiding knowingly circumventing FCC regulations, nullifying the effectiveness of a "furtive concealment" exception to deemed lawful status.

C. Redefining the Rules

Another alternative available is to redefine what "deemed lawful" status means. When the FCC originally interpreted the meaning of deemed lawful status, it acknowledged two possible available alternative interpretations with vastly different effects.[87] Under the alternative interpretation originally rejected by the FCC, deemed lawful status would establish a presumption of lawfulness for all tariffs filed pursuant to the streamlined notice period. The presumption of lawfulness would merely establish a higher burden for suspension and investigation[88] and would not protect a LEC from refund liability.[89]

However, the FCC is unlikely to reinterpret the deemed lawful provision. Doing so would require a tremendous reversal of FCC precedent and federal case law relying on the FCC's interpretation of the deemed lawful provision. Further, in adopting the alternative interpretation of deemed lawful status, the FCC would be required to adopt an interpretation that the FCC has already determined would be clearly contrary to unambiguous statutory language and relevant appellate case law.[90]

---

[84] *In re Connect Am. Fund*, 26 FCC Rcd. at 17888-89.
[85] *Id.*
[86] *See id.*
[87] *In re Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. at 2175-76.
[88] Several carriers suggested that the FCC interpret the "deemed lawful" provision to provide a presumption of lawfulness which would require that a party challenging a tariff filed under the streamlining provisions show that the tariff would "more likely than not" be found to be unlawful. *Id. at* 2179-80.
[89] *Id.* at 2175-76.
[90] *See id.* at 2181-82 ("[W]e determine that [the current interpretation of the deemed lawful language] is compelled by the language of the statute viewed in light of relevant appellate

D. Eliminating the Rule

A final alternative is for Congress to repeal the deemed lawful provision altogether. In instituting the streamlined provisions of the Telecommunications Act, Congress sought to deregulate the telecommunications industry while providing for the "deployment of advanced telecommunications and information technologies and services to all Americans."[91] While Congress has certainly provided the means for deregulation by creating the streamlined filing provisions, when it established the deemed lawful provision, Congress failed to ensure the deployment of advanced telecommunications and information technologies and services. The deemed lawful provision provides LECs an incentive to engage in practices that impose undue costs on consumers and harm competition.[92] By repealing the deemed lawful provision and maintaining the streamlined filing provisions, Congress would continue to promote the deregulation of the telecommunications industry. It would also simultaneously deny LECs an absolute shield against refund liability, thereby eliminating any incentive for LECs to engage in traffic stimulating activities that would inefficiently divert funds away from the development and deployment of more advanced and sophisticated telecommunications technologies.

V. CONCLUSION

By including the "deemed lawful" provision in the Telecommunications Act of 1996, Congress sought to create a "pro-competitive, deregulatory national policy framework."[93] Instead, Congress arguably provided LECs an absolute shield against refund liability, creating a legal absurdity whereby LECs are not even required to refund revenues generated by practices that are contrary to established FCC regulations and precedent. The deemed lawful provision has created a perverse game of cat-and-mouse, with LECs attempting to adopt new, and questionable, practices to artificially stimulate access traffic while IXCs and CMRS providers challenge tariffs for any seemingly questionable possible future unlawful application. While the deemed lawful provision sought to lessen regulation regarding tariff filings, it has actually created a mechanism for generating increased investigation and litigation. Congress can avoid such inconsistency with its stated goals simply by repealing the deemed lawful provision and maintaining the streamlined filing provisions of the Telecommunications Act of 1996. In doing so, Congress can be assured that resources will be channeled into the development and deployment of more

---

decisions, and that our alternative approach outlined in the NPRM is not a permissible reading of this statutory provision.").

[91] *Id.* at 2172.

[92] *See In re* Connect Am. Fund, 26 FCC Rcd. 17663, 17875 (2011).

[93] *In re Implementation of Section 402(b)(1)(A),* 12 FCC Rcd. at 2172.

advanced and sophisticated telecommunications technologies rather than the exploration of, and litigation over, traffic stimulating practices.

THE EFFECT OF THE 2010 TAX ACT ON ESTATE PLANNING WITH RETIREMENT PLAN BENEFITS

By Russell E. Utter Jr.*

I. INTRODUCTION

Estate planning attorneys have to take many factors into consideration when determining the best way to prepare a client's estate plan. Many of the considerations are practical ones, such as who should act as a trustee under a trust or as an attorney-in-fact under a Durable Power of Attorney. Some are based upon the varying state laws, such as the amount of assets a surviving spouse is entitled to under an elective share, while others are based on tax implications, such as whether it is more beneficial economically to transfer property to children during lifetime or at death. Oftentimes, the most difficult issues for attorneys are the ones that concern taxation due to the complicated, ever-changing, and unpredictable nature of the tax code.[1]

At issue in this article are the planning considerations and tax implications that exist when retirement plan benefits make up part of a client's assets. This article examines the 2010 Tax Act and how it has affected or is likely to affect estate planning decisions when a majority of a client's assets consist of retirement plan benefits. Section II of this article will look at the transfer tax law prior to the enactment of the 2010 Tax Act and survey the law's evolution to its current state. Section III will discuss how the increased exemption amounts, decreased tax rates, and the addition of the concept of portability can be utilized in a beneficial way when dealing with retirement plan benefits to reduce taxes and increase accumulation. It will highlight the advantages of using portability as opposed to a credit-shelter trust when retirement plan benefits are a significant asset. Section IV will discuss the pitfalls of the 2010 Tax Act in relation to retirement plan benefits. It will look at the possibility of portability not being extended, the effect of exemption amounts

---

*The author would like to offer a special thanks to Professors Joe Price and Christopher Hoyt (UMKC School of Law) for their invaluable assistance and guidance with the research and drafting of this article. This article was written prior to the date that the 2010 Tax Act was set to expire. As many now know, the 2010 Tax Act did in fact sunset; however, on January 2, 2013 President Obama signed into law the American Taxpayer Relief Act of 2012 (hereinafter, the 2012 Tax Act) which retroactively reinstated many of the same provisions that were in effect under the 2010 Tax Act. The 2012 Tax Act made the FET, Gift Tax, and GST Tax provisions permanent as of December 31, 2012. It also reset the FET, Gift Tax, and GST Tax exemptions at five million dollars (currently 5.25 million dollars reflecting the adjustment for inflation), increased the FET rate from 35% to 40%, and made portability permanent. Despite these changes, many of the estate planning concepts discussed in this paper still hold true.

[1] *See generally* UMB Bank, Planning and Drafting in an Uncertain World – Flexible Solutions for Estate Planning 9 (Nov. 17, 2011) (unpublished CLE outline) (on file with author) (showing the unpredictability of Congress and the tax code by suggesting that most estate planning attorneys and scholars would not have conceived the idea that in 2010 the Federal Estate Tax would completely be repealed by the sunset provisions of EGTRRA).

falling below the current amount, the possibility of clawback, and the re-marriage problem. Further, Section IV will discuss how the use of a credit shelter trust may, in some instances, be more beneficial than using portability as an estate planning tool. The article will conclude that portability can be a useful tool for estate planning attorneys, especially when retirement plan benefits are an asset. Estate planners should use caution when relying on portability and weigh out the benefits of portability against other estate planning vehicles that allow more predictability and asset protection.

II. 2010 TAX ACT

A. The Precursor

Wealth can be transferred by way of *inter vivos* gift, at death through intestacy, or by legal instruments such as wills or trusts. When wealth is transferred it is generally subject to at least one of the following taxes: Federal Estate Tax (hereinafter FET), Gift Tax, and/or the Generation-Skipping-Tax (hereinafter GST).[2] It is no wonder then why they are collectively referred to as transfer taxes.[3] The FET is a tax on the wealth that passes from a decedent, at his date of death, to his heirs.[4] It was first enacted in 1916 with the purpose of reducing the concentration of wealth.[5]

In 2001, the year George W. Bush took office, Congress introduced the Economic Growth and Tax Relief Reconciliation Act of 2001 (hereinafter EGTRRA) to the tax regime with the purpose of, among other things, completely phasing out the FET by 2010.[6] EGTRRA was scheduled to sunset on December, 31, 2010 and be replaced by the provisions that preceded the act.[7] In 2001 the estate tax exemption amount was set at $675,000, and any wealth transferred at death would be taxed at 55% with a 5% surtax.[8] Between the years 2001 and 2009 the FET exemption amount continued to rise and the rate at which it was

---

[2] Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1051 (2004).
[3] *Id.*
[4] *Id.* at 1050.
[5] *Id.* at 1050-51.
[6] *Id.* at 1046.
[7] Richard L. English, *Estate Tax Law Update*, 2011 ESTATE PLANNING INTERNSHIP PROGRAM (UMKC/CLE 20119) 1, 5 (2011).
[8] Christopher R. Hoyt, Planning for Maximum Tax Benefits From Lifetime Charitable Gifts, 17 (2011) (unpublished manuscript), http://www1.law.umkc.edu/Faculty/Hoyt/CharPlanGiv/1STCLASS-Charitable-Giving-Estate-Planning.pdf. This assumes that the amount over the exemption amount does not qualify for a marital deduction or is being hit with the GST.

taxed either remained constant or decreased, until 2010, the year in which the FET was set to be completely repealed under EGTRRA.[9]

1. The Enactment

Much uncertainty enveloped estate planning professionals who did not know whether Congress was going to reinstate the FET and make it apply retroactively, or if it would allow the estates of wealthy decedents to pass free of the death tax in 2010. When it seemed as though the latter would occur, President Barack Obama signed into law the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010 (hereinafter 2010 Tax Act) to reinstate the FET and to reinstate the step-up basis rules that had been eliminated for 2010 under the language of EGTRRA.[10] The 2010 Tax Act raised the FET exemption to $5 million and set the tax rate at a flat 35% for the years 2010, 2011, and 2012[11] and also "introduced the law of portability for estates of married decedents to the federal estate tax paradigm."[12] The FET exemption amount increased to $5,120,000 for the year 2012; however, the tax rate and portability provisions have remained the same. Perhaps due to possible constitutional issues that would be raised if the 2010 Tax Act applied retroactively, Congress decided to make the FET optional for decedents who died in 2010.[13] The executor of a decedent dying in the year 2010 could either elect the rules of EGTRRA or the amendments of the 2010 Tax Act.[14] Under the EGTRRA rules no FET would be payable, but the step-up in basis one could make use of was limited; under the amendment of the 2010 Tax Act the exemption was limited to $5 million, but the step-up in basis was not limited.[15]

The 2010 Tax Act is scheduled to sunset December 31, 2012, so by January 1, 2013 the provisions and amendments of the code modified by EGTRRA or the 2010 Tax Act will be treated as though they never existed and the law will revert back to the law that existed prior to the enactment of EGTRRA.[16] In essence, if Congress does nothing and allows the 2010 Tax Act

---

[9] *Id.* However, although EGTRRA completely repealed the FET for the year 2010, it also eliminated the step-up in bases that was allowed for property that passed at death. *See* Diane L. Mutolo, *Effect of Reinstated Estate Tax on Basis Rules and Estates of 2010 Decedents*, 2011 EMERGING ISSUES 5565, 1 (2011).

[10] Mutolo, *supra* note 9, at 1.

[11] Hoyt, *supra* note 8, at 17.

[12] Christopher R. Hoyt, *Retirement Assets to Surviving Spouses – Rollovers & Portability are Your First Choice*, PROB. & PROP., Jan./Feb. 2012, at 21.

[13] *See* English, *supra* note 7, at 6.

[14] *Id.*

[15] *Id.* If the EGTRRA rules were elected, the property acquired from a decedent would be subject to the modified carryover basis rules under I.R.C. § 1022 (repealed 2010), which generally allows for $1.3 million to be stepped-up in basis. *See* Mutolo, *supra* note 9, at 1.

[16] UMB Bank, *supra* note 1, at 25.

to sunset, then the FET exemption will drop to $1 million and the tax rate will rise to 55%.[17]

As mentioned above, the 2010 Tax Act also introduced the "new concept of portability for decedents dying in 2011 and 2012."[18] The basic concept of portability is to give the surviving spouse the ability to utilize the unused portion of the FET exemption amount of the first to die spouse (hereinafter First Spouse).[19] Section 303 of the 2010 Tax Act sets out a formula to compute how much of an FET exemption a surviving spouse is entitled to.[20] "[T]he applicable exclusion amount is the sum of (A) the basic exclusion amount, and (B) in the case of a surviving spouse, the deceased spousal unused exclusion amount [(hereinafter DSUEA)]."[21] The basic exclusion amount is set at $5 million but is inflation adjusted for years after 2011.[22] The DSUEA is computed by taking the "lesser of (A) the basic exclusion amount, or (B) the excess of (i) the basic exclusion amount of the last such deceased spouse of such surviving spouse, over (ii) the amount with respect to which the tentative tax is determined under section 2001(b)(1) on the estate of such deceased spouse."[23] The language that defines DSUEA allows a surviving spouse to re-marry without affecting the amount of DSUEA from the First Spouse that would go to the surviving spouse, as long as the second spouse does not predecease the surviving spouse.[24] However, since the surviving spouse is limited to using the DSUEA of the "last" deceased spouse, if after re-marriage the second spouse also predeceased the original surviving spouse, the surviving spouse is limited to the DSUEA of the second deceased spouse.[25]

The following example illustrates how portability can be used effectively: if the First Spouse died in 2011 without utilizing any of his "basic exclusion amount" because he used the marital deduction to pass all of his assets to his wife, and the wife later dies in 2012, she would (assuming Congress does not amend any provisions of the 2010 Tax Act) have a $10 million exemption or "applicable exclusion amount." Five million dollars would be her own "basic exclusion amount" and the other $5 million would be the DSUEA.

There is one more important caveat in order for portability to be applicable. In order for a surviving spouse to utilize the DSUEA, the executor of the First Spouse's estate must file a timely estate tax return and make an irrevocable election to allow the surviving spouse to utilize the unused exemption

---

[17] *Id.* at 8.
[18] *Id.* at 26.
[19] *Id.*
[20] Hoyt, *supra* note 12, at 21.
[21] Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303, 124 Stat. 3296, 3303 (2010).
[22] *Id.*
[23] *Id.*
[24] UMB Bank, *supra* note 1, at 28.
[25] REGIS W. CAMPFIELD ET. AL., TAXATION OF ESTATES, GIFTS AND TRUSTS 32 (24th ed. 2012).

amount.[26] If the estate tax return is not filed on time, then portability is lost to that deceased spouse.[27]

III. THE BENEFITS OF THE 2010 TAX ACT IN RELATION TO RETIREMENT PLAN BENEFITS

The 2010 Tax Act, with its low tax rate, its high exemption amounts, and its new concept of portability, offers several tax advantages to wealthy clients, especially those with a significant portion of their estate composed of retirement plan benefits. Since retirement plan benefits are generally tax deferred, more complicated tax planning exists when dealing with these assets because income tax is taxable in the year that the distributions are made.[28] Usually, leaving retirement plan benefits to a surviving spouse outright offers the best income tax advantages.[29] However, prior to the 2010 Tax Act, clients with large taxable estates and significant retirement plan benefits have been precluded from leaving assets outright to a spouse because they did not want to waste the FET exemption of the First Spouse and leave the surviving spouse with a large taxable estate.[30] Instead, clients were forced to use up the First Spouse's FET exemption by leaving retirement plan benefits to other beneficiaries or to the surviving spouse in trust, both of which received less favorable income tax treatment than leaving the benefits outright to a surviving spouse.[31] Portability allows for the retirement plan benefits to be left outright to the surviving spouse in order to receive the most favorable income tax treatment, while also allowing the surviving spouse to utilize the DSUEA of the deceased spouse to offset the negative FET consequences of leaving the benefits outright to the surviving spouse.[32]

There are several advantages to leaving retirement plan benefits to a surviving spouse outright. A surviving spouse is entitled to use special minimum distribution rules, and special rollover rules.[33] Most of the special rules require the spouse to be a "sole beneficiary."[34] A surviving spouse has the ability to (1) keep the plan in the name of the deceased spouse as an "inherited plan," (2) rollover the benefits to her own plan as participant, or (3) elect to treat it as her

---

[26] § 303(a)(5).
[27] UMB Bank, *supra* note 1, at 29. That does not prevent someone from going out and looking at nursing homes for a poor person to marry that is likely to die soon in order to take advantage of their DSUEA.
[28] NATALIE B. CHOATE, LIFE AND DEATH PLANNING FOR RETIREMENT BENEFITS 122 (7th ed. 2011). However, Roth IRAs are not tax deferred and thus income tax is not due in the year distributions are made as long as it is a qualified distribution. *Id.* at 128.
[29] *See id.* at 208.
[30] Hoyt, *supra* note 12, at 21.
[31] *Id.*
[32] *Id.* at 22.
[33] CHOATE, *supra* note 28, at 87-88.
[34] *Id.* at 87.

"own retirement plan" if it is a Traditional IRA or Roth IRA[35]; by contrast, if the plan is bequeathed to another beneficiary or to the surviving spouse in trust, it has to be treated as an "inherited plan."[36] If the surviving spouse receives the benefits in an inherited plan and is the sole beneficiary, or is deemed to be the sole beneficiary by the beneficiary finalization date, then she may elect a later required commencement date (the date upon which she has to start taking minimum required distributions) if the participant dies prior to his required beginning date.[37] Additionally, the surviving spouse is able to utilize the recalculation method of determining the applicable distribution period factor, which provides a longer payout than the alternative method used for other beneficiaries.[38] Both the later required commencement date and recalculation method are available to certain trusts if the surviving spouse is considered the sole beneficiary of them.[39] Having a later required commencement date and longer payout allows for more tax deferred accumulation and helps insure that the benefits will last throughout the surviving spouse's actual life and perhaps longer for the benefit of remainder beneficiaries.[40]

More favorable income tax treatment and accumulation potential is possible if the surviving spouse rolls over the plan into her own plan as a participant or if she elects to treat it as her own if it is a Traditional IRA (or Roth IRA).[41] To be able to elect to treat an IRA as her own, the surviving spouse would have to be a sole beneficiary of the IRA, and the IRS has stated that this rule is not satisfied if a trust is named as beneficiary, even if the spouse is a sole beneficiary of the trust.[42] In order for a surviving spouse to roll over the benefits into a plan in her own name, she does not have to be the sole beneficiary.[43] However, the law is unclear whether benefits left in trust for a surviving spouse can be rolled over into her own plan as a participant.[44] The advantages of having a retirement plan treated as her own are the following: she will not have to start taking minimum required distributions until she turns seventy and one half (actually not until her required beginning date),[45] she will be able to use the Uniform Lifetime Table to determine her minimum required distributions instead

---

[35] A Traditional IRA is a "private, one person retirement account" and is located in § 408 of the Internal Revenue Code. *Id.* at 540. Traditional IRAs are generally tax deferred, meaning the distributions are taxable. *Id.* at 121. A Roth IRA (§ 408A) is also a private retirement account, however, the major difference is that the distributions from a Roth IRA are generally tax-free as opposed to tax deferred. *Id.* at 318.

[36] *See id.* at 208 (emphasis removed).

[37] *Id.* at 93.

[38] *Id.* at 91.

[39] *Id.* at 98-99.

[40] Hoyt, *supra* note 12, at 22.

[41] CHOATE, *supra* note 28, at 90.

[42] *Id.* at 98.

[43] *Id.* at 211.

[44] *Id.* at 98, 220.

[45] *Id.* at 50. Her required beginning date would be the April 1st of the year following the year she turned seventy and one half. *Id.* at 55.

of the Single Life Expectancy Table (which allows her to take much smaller minimum required distributions and will ensure that the account balance will never reach zero),[46] she will have more control over naming successor beneficiaries, and the successor beneficiaries may have more favorable distributions.[47] One situation in which it would not be favorable for a surviving spouse to rollover a plan into her own would be if she is under the age of fifty-nine and one half, and plans to withdraw funds prior to attaining age fifty-nine and one half, because of the 10% penalty on distributions to participants under that age.[48] To plan around this, if there is a chance the surviving spouse will need to take money from the plan, the surviving spouse should still be named the sole beneficiary and should keep it as an inherited plan (enabling her to take distributions if she wants, but not requiring so), until she reaches fifty-nine and one half at which point she can roll the plan over into her own plan as participant.[49]

As demonstrated above, there are numerous favorable advantages to bequeathing the retirement plans to a surviving spouse outright. Not only are there income tax advantages, but also tax deferred accumulation advantages that allow the original participant's benefits to be preserved for future generations. Portability allows these advantages to be utilized without the adverse FET consequences that existed prior to the enactment of portability. It allows for a better alternative compared to the use of credit shelter trusts, that while generally solve FET issues, when combined with retirement plan benefits, frustrate income tax issues since generally trusts receive the worst payout methods and allow little opportunity for accumulation.[50]

In addition to portability, low tax rates, and high exemption rates, the 2010 Tax Act also extended the ability of IRA owners aged seventy and one half or older to make gifts up to $100,000 per year from their IRAs to a qualified charity and have it count towards their minimum required distribution.[51] It only extended through December 31, 2011 and has yet to be extended further.

There has been some congressional support towards changing the minimum required distribution rules and making a mandated five-year payout period for all inherited plans, subject to some limited exceptions.[52] Although the Senate Committee on Finance did not approve the portion of the bill dealing with the changes to minimum required distributions, if a similar bill were passed in the

---

[46] *Id.* at 46-47. Of course, the balance could reach zero if distributions above the minimum required distributions were taken.
[47] *Id.* at 86.
[48] *Id.* at 219.
[49] Hoyt, *supra* note 12, at 23.
[50] *Id.* at 21-22.
[51] *From ERISA to the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010*, Fed. Income Tax'n Retirement Plans (MB) § 1.01, [3][z.3] (2011).
[52] *See* STAFF OF J. COMM. ON TAXATION, 112TH CONG., DESCRIPTION OF THE CHAIRMAN'S MODIFICATION TO THE PROPOSALS OF THE "HIGHWAY INVESTMENT, JOB CREATION AND ECONOMIC GROWTH ACT OF 2012", JCX-11-12, at 15 (Feb. 7, 2012).

future, one likely exception to a mandated five-year payout requirement would be leaving the inherited plan to surviving spouses.[53] If such a bill were passed, portability would be even more beneficial than it is under the current minimum required rules.

IV. THE PITFALLS OF THE 2010 TAX ACT IN RELATION TO RETIREMENT PLAN BENEFITS

Despite all of the benefits that exist from the 2010 Tax Act, there are a number of pitfalls. The most detrimental pitfall is that it is set to sunset on December 31, 2012, thus making it difficult to rely on the current tax law when planning a client's estate plan.[54] What makes the situation worse is that it is an election year, which makes it unlikely that Congress will even address the issue and more likely that the 2010 Tax Act will sunset. If it sunsets, then not only will the exclusion amount drop to back down to $1 million and the tax rate increase to 55%, but portability will cease to exist.[55] If portability does not continue, then the only way for clients to be able to take advantage of it (besides utilizing lifetime gifts) is if both spouses die during 2011 or 2012, while portability exists.[56] Due to the uncertainty of whether or not it will be extended, it is difficult to rely on portability as a vehicle for an estate plan.[57] The issue of using portability to make larger lifetime gifts transfer tax free does not come into play when a majority of a client's assets consist of retirement plan benefits, since they cannot be gifted during life to another individual.

Assuming that portability gets extended, there are additional concerns with relying on its use. The following hypothetical will illustrate those concerns: (Hypo 1) *The First Spouse leaves an IRA of $9 million to the surviving spouse solely and outright, utilizing the marital deduction to pass it transfer tax free and relying on the idea that the surviving spouse will be able to utilize his left over DSUEA ($5 million) when he dies along with her own basic exclusion amount. The surviving spouse (wife) then re-marries another man (Second Spouse) who also predeceases her but uses up his entire basic exclusion amount.* This situation would leave her with no DSUEA, since she would only be entitled to the DSUEA of the Second Spouse, and cause her to have a taxable estate at her death.[58] If the assets were not retirement plan benefits, a credit shelter trust would have been more advisable in the planning stages if re-marriage were

---

[53] *See* Heather M. Rothman, *Senate Panel OKs Transportation Funding, But IRA Tax Provision Will Not Survive*, COMMUNITY FOUNDATION (Feb. 9, 2012), http://www.yourcommunityfoundation.org/index.cfm?fuseaction=news.details&ArticleId=95&returnTo=resources.

[54] *See* discussion *supra* Part II.A.

[55] *See* discussion *supra* Part II.B.

[56] Marc S. Bekerman, *Credit Shelter Trusts and Portability – Does One Exclude the Other?*, PROB. & PROP., at 11 (May/June 2011).

[57] UMB Bank, *supra* note 1, at 9-10.

[58] *See* discussion *supra* Part II.B.

likely.[59] Since retirement plan benefits are at issue in the previous hypothetical, the client and attorney have more difficult planning decisions to make and would have to carefully analyze the benefits and pitfalls of each course of action.[60] Using a credit shelter trust to utilize the first to die spouse's exclusion amount may have the negative income tax consequences mentioned above.[61] If dealing with retirement plan benefits, it may be desirable to rely on portability and advise the surviving spouse of the negative consequences of re-marrying (especially if to a wealthy person).

(Hypo 2) *Assume the same facts from the above hypothetical (and that portability still exists), except instead of a re-marriage situation, assume the exclusion amount falls to $1 million in the year of the surviving spouses death.* If this happened, then the DSUEA would be limited to $1 million.[62] Such a risk could cause many clients to choose a credit shelter trust over hoping portability is extended and the exclusion amount does not drop, even if retirement plan benefits encompass a large amount of the assets.

Besides the uncertainty of whether portability will be extended and whether the exclusion amount will drop, there is also uncertainty of how portability is applied. For example, can a surviving spouse utilize the DSUEA of a deceased spouse by making a $5 million lifetime gift (it would have to be a gift of a non-retirement plan benefit), re-marry and survive another spouse, then utilize the second spouse's DSUEA plus her own basic exclusion amount to exempt an IRA of $10 million (assuming basic exclusion amounts are at or above $5 million) from FET? It is uncertain whether the initial lifetime gift would come from the DSUEA or from her own basic exclusion amount first.[63] Additionally, in such a situation where a client makes a lifetime gift within the gift tax exemption amount at the time of the gift but the basic exclusion amount is reduced in the year of the client's death, does "clawback" come into play causing unexpected transfer tax?[64] If "clawback" does in fact happen, then it could cause beneficiaries of a decedent's estate to incur the transfer tax that is attributable to a lifetime gift.[65] Many respected estate planners do not believe

---

[59] *See* Hoyt, *supra* note 12.
[60] *Id.*
[61] *See supra* Part III.
[62] UMB Bank, *supra* note 1, at 26-27; *see supra* Part II.B.
[63] Bekerman, *supra* note 56, at 13.
[64] English, *supra* note 7, at 16.
[65] Michael J. Jones, *Who's Afraid of (Gasp!) CLAWBACK?*, WEALTHMANAGEMENT.COM (Jan. 18, 2012), http://wealthmanagement.com/financial-planning/who-s-afraid-gasp-clawback; *see also* Ann B. Burns, *They Say You Can't Take it With You – But How Do You Give It Away? Using the $5 Million Exclusion Amount*, 46 ANN. HECKERLING INST. ON EST. PLAN., 4-1,4-4 (2012). One possible solution may be to apportion the tax that may become due at the decedent's death from a prior lifetime gift to the beneficiary of the lifetime gift. *Id.* at 4-5 – 4-6.

that there will be a "clawback" and have found ways to counter the negative effects of it if it does happen.[66]

Of concern also, in order for the surviving spouse to be entitled to the DSUEA of the first to die spouse, the executor of the estate of the deceased spouse must make an affirmative, irrevocable, timely election on an estate tax return (Form 706).[67] If such an election is not made, the DSUEA is forever lost.[68] Of course, if the election was missed, nothing would prevent someone from finding a new spouse to marry that was poverty stricken and near death in order to take advantage of their DSUEA. One other problem associated with filing an estate tax return is the high costs of getting one prepared by an attorney or CPA. The costs could range anywhere from $3,000 to $10,000 (or possibly even higher) depending on the complexity of the return and who prepares it.[69] The IRS has not made any guidelines allowing a taxpayer who is below the filing threshold, but wants to take advantage of portability, to file a shortened form.[70] Even worse, if portability does not get extended and no filing requirement existed, then that money spent on a return is wasted.

Additional disadvantages of relying on portability instead of other estate planning vehicles such as a credit shelter trust may include: DSUEA is not indexed for inflation,[71] growth of assets are included in the surviving spouses gross estate if portability is used (not included if credit shelter trust),[72] portability does not apply to the GST exemption,[73] credit shelter trusts provide better asset protection,[74] in second-marriage situations credit shelter trusts may be more advisable to prevent disinheritance, portability may not apply to same-sex couples (even if the state they live in recognizes same-sex marriages),[75] and relying on portability may cause negative state estate or inheritance tax implications.[76] However, all of those may not be disadvantageous when dealing with retirement plan benefits. For example, certain retirement plan benefits such as a 401(k) cannot be put into a trust without the consent of the non-participant spouse.[77]

---

[66] Steve R. Akers, *What Now? Planning Strategies Under the Tax Relief . . . Act of 2012*, 30 ANNUAL KAN. CITY EST. PLAN. SYMP., 13 (2011), *and* Jones, *supra* note 65; *see also* English, *supra* note 7, at 16.
[67] UMB Bank, *supra* note 1, at 29. *See also* Thomas W. Abendroth, *Portability: The New Estate Planning Wonder Drug?*, 46 ANN. HECKERLING INST. ON EST. PLAN, 6-10 (2012).
[68] UMB Bank, *supra* note 1, at 29.
[69] Deborah L. Jacobs, *How to Get the Latest Tax Break Without Spending A Bundle on Legal Fees*, FORBES (Jan. 11, 2012, 8:03 PM), http://www.forbes.com/sites/deborahljacobs/2012/01/11/how-to-get-the-latest-tax-break-without-spending-a-bundle-on-legal-fees/.
[70] Abendroth, *supra* note 67, at 6-18 – 6-19.
[71] Akers, *supra* note 66, at 10; *see also* Abendroth, *supra* note 67, at 6-9.
[72] Akers, *supra* note 66, at 10.
[73] *Id.*
[74] *Id.*
[75] Hoyt, *supra* note 12, at 24; CAMPFIELD ET. AL., *supra* note 25, at 170.
[76] Abendroth, *supra* note 67, at 6-25.
[77] Hoyt, *supra* note 12, at 23-24.

V. CONCLUSION

The 2010 Tax Act provides many advantages to estate planners and their clients; however, extreme caution must be used when relying on portability. If non-retirement plan benefits are major assets, portability might not be the best route, and using a credit shelter trust may be more preferable. However, if retirement plan benefits encompass a large portion of the estate, portability may be more desirable. One possible solution to consider, since one of the major fears estate planners and their clients have with portability is the uncertainty surrounding it, is to build flexibility into the estate plan by using post-mortem planning. During the participant's life, he or she can name the surviving spouse outright as primary beneficiary and have a credit shelter trust be the contingent beneficiary. The purpose of this would be to allow the surviving spouse (and his or her attorney) to reassess the transfer tax situation at the time of the decedent's death. If portability still exists at that time and the circumstances are favorable, he or she may want to accept the whole bequest outright to receive the most advantageous minimum required distribution rules. However, if relying on portability doesn't seem very sensible, the surviving spouse can disclaim either a portion or the entire bequest in order to make use of the decedent's exemption. An estate planner will have to weigh the benefits and pitfalls of relying on portability to carry out the client's objectives. Fully advising the client of the inherent risks of relying on portability as a vehicle of the estate plan and getting informed consent would be a must of any prudent estate planning attorney.

PREVENTING A MODERN DAY CUYAHOGA: MISSOURI SHOULD APPLY THE "FISHABLE/SWIMMABLE" WATER QUALITY STANDARD TO ALL UNCLASSIFIED WATERS

By Ted Weiss

I. INTRODUCTION

In June of 1969, a disturbing event occurred: the Cuyahoga River near Cleveland, Ohio caught fire, burning for more than two hours.[1] As the story goes, flammable debris from a nearby steel mill was discharged directly into the river and pooled underneath a railroad truss bridge.[2] A spark from a passing rail car ignited the material, setting the river ablaze with flames reaching up to five stories high.[3] The Cuyahoga, like many of the nation's navigable waterways at that time, had long been neglected.[4] Industrial facilities and open sewers lining the river's banks regularly discharged their untreated wastewater directly into river.[5] Debris consisting of anything from tires to picnic benches clogged its waters.[6] Oil slicks up to two inches thick, spanning the entire width of the river, were not unheard of.[7] Through much of the early 20th century, the Cuyahoga was devoid of life, lacking the oxygen content necessary to support fish and many other aquatic species.[8] Indeed, the Cuyahoga became so contaminated that it was widely thought of as one of the most polluted rivers in the country.[9]

The 1969 fire was not the first or even the most intense fire on the Cuyahoga,[10] but it had a national impact.[11] The spectacle of a major river actually catching fire caught the nation's attention and became a primary driving force behind legislation that eventually became the Clean Water Act (CWA).[12] Living in the 21st century, it is difficult to fathom that this river, today used for

---

[1] DANIEL A. VALLERO, PARADIGMS LOST: LEARNING FROM ENVIRONMENTAL MISTAKES, MISHAPS, AND MISDEEDS 168 (2006).
[2] Michael Scott, *The Burning Cuyahoga Got Public's Attention and Pushed Pollution Issues to the Forefront*, CLEVELAND PLAIN DEALER, Apr. 12, 2009, at A1.
[3] Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing A History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 96 (2002); Michael Scott, *Fire 40 Years Ago Ignited Cleanup of the Cuyahoga,* CLEVELAND PLAIN DEALER, June 22, 2009, at A1.
[4] *See* Adler, *supra* note 3 ("[F]ederal laws protecting commercially navigable waterways went largely unenforced.").
[5] *Id.* at 99-100.
[6] Scott, *supra* note 3, at 96.
[7] Adler, *supra* note 3, at 103.
[8] *The Cities: The Price of Optimism*, TIME, Aug. 1, 1969, at 51.
[9] Adler, *supra* note 3, at 107.
[10] *Id.* at 101-02. The Cuyahoga has caught fire at least nine other times, the first such incident as early as 1868.
[11] *See* Adler, *supra* note 3, at 90 (noting the nation-wide attention brought to the fire through publications such as TIME and NATIONAL GEOGRAPHIC).
[12] 118 CONG. REC. 10,244 (1972) (statement of Rep. Edward Boland).

both recreational purposes and as a public drinking water supply, or any other, could be so polluted as to actually ignite and burn for several hours. This modern mentality is due in large part to increased national awareness of environmental issues and the revolutionary effect that the CWA has had upon our nation's rivers and other waterways. Due to the CWA, Americans today enjoy vastly improved waters for recreational activities, as sources of drinking water, and for observing nature.[13]

The CWA is one of the more significant federal environmental programs, responsible for regulating industrial wastewater discharges, implementing permit programs, and establishing water quality standards for water bodies.[14] While the federal Environmental Protection Agency (EPA) is the agency charged with implementing the CWA and promulgating regulations,[15] states are delegated the responsibility for implementing and enforcing water quality standards for waters within their borders.[16] States implementing the provisions of the CWA have experienced dramatic improvement in water quality. Indeed, the Cuyahoga, once relegated to an industrial stream and devoid of life, has been reborn. The river today supports "more than 60 species of fish" and provides habitat for beavers and birds of prey such as bald eagles.[17] The rebirth of the Cuyahoga and other rivers, lakes, and streams throughout the United States is due in large part to requirements placed upon states under the CWA.

For forty years, Missouri has been subject to the provisions of the CWA. However, Missouri's implementation of the Act is currently in conflict with the federally mandated requirements. Among other responsibilities under the CWA, states are required to designate all water bodies with a "use," describing the activities for which that water body is best suited.[18] Once a designated use is determined, the state must then apply water quality criteria designed to maintain the utility of the water for its designated use.[19] However, Missouri's implementation of the CWA adds an additional requirement before assigning a water body a designated use. Under Missouri's regulatory scheme, a water body must be "classified" according to its flow characteristics prior to assigning a designated use and implementing associated water quality criteria.[20] While this

---

[13] *See generally* Donna Frye, *The Clean Water Act: Thirty Years Later*, SAN DIEGO EARTH TIMES, Nov. 2002, http://www.sdearthtimes.com/et1102/et1102s6.html ("Today, thirty years later, there is much to celebrate as it relates to Clean Water Act successes. Nationally, point source pollution such as discharges from industry and sewage plants has been greatly reduced. More than one billion pounds per year of toxic pollutants are now removed from our nation's waterways. The Cuyahoga River is cleaner, generating substantial economic revenue from tourism and pleasure boaters.").

[14] *See generally* Clean Water Act, 33 U.S.C. § 1251 (2006) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

[15] § 1251(d).

[16] § 1313(c)(2)(A).

[17] Christopher Maag, *From the Ashes of '69, A River Reborn*, N.Y. TIMES, June 21, 2009, at A18.

[18] 40 C.F.R. § 131.6(a) (2011); § 131.10.

[19] § 131.6(c).

[20] *See* MO. CODE REGS. ANN. tit. 10, § 20-7.031(1)(F) (2011).

may sound like an insignificant step, as much as 85%, or 150,000 miles of Missouri streams and waterways, remain unclassified.[21] Missouri's unclassified waters are thus left relatively unprotected, since water quality standards do not apply until classification. Since much of Missouri's waters remain in CWA limbo, they remain unprotected by the Act's provisions. This policy conflicts with the mandate under the CWA that each water body be given a designated use and associated protections, and the EPA lacks the power to force Missouri to comply.

Part I of this article summarizes the relevant history of the CWA, the State requirements in implementing the CWA, the current regulatory framework applied in Missouri, and environmental consequences of Missouri's classification system. Part II of this article will address recent litigation seeking to bring Missouri into compliance with CWA requirements and proposed Missouri regulatory changes that may reconcile Missouri's scheme with the federal requirements.

II. THE CLEAN WATER ACT AND STATE RESPONSIBILITIES

A. The Federal Clean Water Act

Enacted in 1972 as an amendment to the Federal Water Pollution Control Act, the CWA sought the "restoration and maintenance of [the] chemical, physical and biological integrity of [the] Nation's waters."[22] In order to achieve this ambitious undertaking, the CWA established as a "national goal that wherever attainable" water quality in the United States must provide "for the protection and propagation of fish, shellfish, and wildlife and . . . recreation in and on the water. . . ."[23] This is commonly known as the "fishable/swimmable" standard of the CWA, and represents the minimum standard of protection for all bodies of water in the United States.[24] In short, the CWA seeks to make all waters in the United States clean enough to, at a minimum, support fishing and recreation.

At the time the CWA was enacted, many rivers, streams and lakes throughout the United States were like the Cuyahoga: industrial waterways clogged with various pollutants and far from being suitable for human recreation

---

[21] *Missouri's Unprotected Waters*, MISSOURI COALITION FOR THE ENV'T, http://www.moenviron.org/index.php/program-areas/clean-water-program/protecting-missouri-s-waters/missouri-s-unprotected-waters (last visited Feb. 17, 2013).

[22] Clean Water Act, 33 U.S.C. § 1251(a) (2006).

[23] *Id.* at § 1251(a)(2).

[24] M. Ann Bradley & Joseph M. Dawley, *West Virginia's Antidegredation Policy for State Waters: From Theoretical Construct to Implementation Procedures*, 103 W. VA. L. REV. 331, 333-34 (2001); *see also* U.S. ENVTL. PROT. AGENCY, NPDES PERMIT WRITERS' MANUAL (2010), at ch. 6, p. 6-3, *available at* http://www.epa.gov/npdes/pubs/pwm_chapt_06.pdf (noting the fishable-swimmable standard is a rebuttable presumption for water quality, per regulations at 40 C.F.R § 131.10(j)).

and fishing.[25] In order to achieve the ambitious goals set by the CWA, states and Indian tribes were charged to enact and enforce water quality standards for all navigable waters within their jurisdictions.[26] These standards are the foundation of the CWA, and a primary reason for the restoration of many of the nation's waterways. The water quality standards program, found under section 303 of the CWA, consists generally of three parts: (1) assignment of a designated use, (2) setting water quality criteria, and (3) establishing and maintaining an anti-degradation policy.[27]

Under the first prong, states identify appropriate uses for the water body, taking into consideration "the use and value" of the water body for drinking water, recreation, protection and propagation of fish and wildlife, etc.[28] When considering the most appropriate use, the state or tribe also bases its decision on "the physical, chemical, and biological characteristics of the water body, its geographical setting and scenic qualities, and the social-economic and cultural characteristics of the surrounding area."[29] Regardless of what use a state designates for its waters, the water body must at a minimum support the "fishable/swimmable" standard, discussed above.[30]

Once a water body is provided with a designated use, the state must, under the second prong of the water quality standards program, implement water quality criteria to prevent degradation of the water body to a degree inconsistent with that use.[31] Generally, this requires states to adopt narrative and numeric water quality criteria to maintain the designated use, discussed further below.[32] States enforce these criteria through developing technology-based effluent limitations on industry and other direct dischargers. These limitations are usually outlined in permits, issued under another CWA program.[33] If further protection is needed, the state may determine the total maximum daily load (TMDL) of pollutants a water body can take without degradation and limiting all discharges to that TMDL.[34]

Although the EPA oversees implementation of the CWA by the states, its role in determining water quality standards is limited largely to review and approval or denial of state standards. States are required to review their standards at least every three years (triennial review) and make changes "as

---

[25] Adler, *supra* note 3, at 95-96.
[26] *See* 40 C.F.R. § 131.4(a)-(c) (2011).
[27] 40 C.F.R. § 131.10(a); 40 C.F.R. § 131.11(a); 40 C.F.R. § 131.12(a).
[28] 40 C.F.R. § 131.10(a).
[29] *Water Quality Standards: Region 7*, U.S. ENVTL. PROT. AGENCY (May 22, 2012), www.epa.gov/region07/water/wqs.htm.
[30] *See* NPDES PERMIT WRITERS' MANUAL, *supra* note 24, at ch. 6, p. 6-3.
[31] 40 C.F.R. § 131.12(a).
[32] *See Water Quality Standards*, *supra* note 29; NPDES PERMIT WRITERS' MANUAL, *supra* note 24, at ch. 6, p. 6-7.
[33] *Water Quality and Technology-Based Permitting*, U.S. ENVTL. PROT. AGENCY, (Nov. 1, 2010, 3:49 PM), http://cfpub.epa.gov/npdes/generalissues/watertechnology.cfm.
[34] 40 C.F.R. § 130.7(c).

appropriate."[35] The CWA does not require the EPA to implement water quality standards if states fail to do so. The statute only explicitly grants power to the EPA to review new or revised state standards.[36] The CWA does not provide that the EPA must re-examine existing standards that remain unchanged.[37] This lack of enforcement power is what has allowed Missouri to largely ignore applying water quality standards to its waters. Since this provision of the CWA has no teeth, Missouri cannot be compelled by the EPA to apply all three prongs of the water quality standards program to all of its navigable waters.

B. Missouri's Regulatory Scheme

States are granted primary authority to develop water quality standards for all waters within their jurisdiction including designating an appropriate use, developing water quality criteria, and implementing antidegredation procedures.[38] However, Missouri law is not structured to carry out the federal mandates to establish water quality standards for all eligible waters within its borders.[39] Prior to establishing water quality standards, Missouri has developed an additional layer of regulation, requiring that a water body be "classified" according to its flow characteristics prior to establishing the three-part water quality standards discussed above.[40] This extra requirement is not mandated by the CWA. On the contrary, by adding this extra layer of regulatory red tape, Missouri has left an estimated 85% of its waters largely exempt from the protections provided by the CWA because they remain unclassified.[41] While some unclassified waters consist of intermittent streams, others are prominent urban waterways or major tributaries of classified waters, including Brush Creek in Kansas City, Missouri; River Des Peres in St. Louis, Missouri; and Flat Branch Creek in Columbia, Missouri.[42]

There does not appear to be any explanation for why Missouri chose to add this requisite step before implementing CWA protections. However, the potential consequences of requiring classification prior to implementing water quality standards arguably leave some waters unsafe for even the minimal "fishable/swimmable" standards required by the CWA.

To gain the protections provided by the CWA, a water body in Missouri must be classified by its flow characteristics: i.e. as a lake, reservoir, permanent

---

[35] 33 U.S.C. § 1313(c)(1) (2006).
[36] *Id.* at § 1313(c)(2)(A).
[37] Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1130 (D.C. Cir. 1997).
[38] 40 C.F.R. §§ 131.10-12.
[39] *See id.* at § 131.10(a).
[40] MO. CODE REGS. ANN. tit. 10, § 20-7.031(1)(F) (2012) (outlining the characteristics for each classification).
[41] *Missouri's Unprotected Waters*, *supra* note 21.
[42] Ken Midkiff, *Even 'Unclassified' Streams Merit Protection in Missouri*, COLUMBIA TRIB., Oct. 31, 2008, http://archive.columbiatribune.com/2008/Oct/20081031Comm002.asp.

stream, or wetland, among others categories.[43] The main problem with this system is that Missouri generally requires an actual field assessment to assign a water body a classification.[44] Missouri, however, rarely undertakes a field assessment under its own initiative.[45] Of the waters that have been classified through field assessments, many were conducted years or even decades ago.[46] The slow pace of field assessments and irrational regulatory procedures have resulted in a large number of prominent streams and waterways being left unclassified.[47] A second method for instigating classification of a water body is through public participation.[48] This method requires that citizens submit their own data showing that a particular water body meets the required flow characteristics for classification.[49] However, few water bodies have been classified through this method, leaving most of Missouri's waters unclassified.[50]

The protections afforded to classified waters under the Missouri regulatory scheme are significantly more stringent than those afforded to unclassified waters. Missouri regulations provide for two levels of water quality protection: (1) General Criteria and (2) Specific Criteria.[51] The general criteria standards apply to all "waters of the state," including in some cases "unclassified" waters, and provide for general protection of water bodies in narrative form.[52] Examples of general protections include mandates stating "waters shall be free from substances in sufficient amounts to cause the formation of putrescent, unsightly, or harmful bottom deposits" and "waters shall be free from oil, scum, and floating debris in sufficient amounts to be unsightly."[53] These black and white narrative standards merely serve to keep state waters visibly clean and prevent waters from becoming so polluted that they are toxic "to human, animal, or aquatic life."[54] Although general criteria may be sufficient to keep some waters fishable and swimmable, such standards alone are insufficient to ensure that all waters of the state maintain this minimal designated use. With only general criteria protections, a body of water may be visibly clean,

---

[43] MO. CODE REGS. ANN. tit. 10, § 20-7.031(1)(F).
[44] *See generally* MO. DEP'T OF NATURAL RES. WATER PROT. PROGRAM, FINAL GUIDELINES FOR WATER BODY CLASSIFICATION, at 2-10 (Mar. 2, 2005) *available at* http://dnr.mo.gov/env/wpp/wqstandards/water_classification_guidelines.pdf [hereinafter *Water Protection Program*] (providing guidelines for field assessments regarding each classification of water).
[45] Second Amended Complaint at 9, Missouri Coalition For The Environment v. Jackson, No. 10-04169 (W.D. Mo. Oct. 6, 2011) [hereinafter Second Amended Complaint].
[46] *Id.*
[47] *Id.* at 8-9.
[48] *Water Protection Program*, *supra* note 44, at 9.
[49] *Id.*
[50] Second Amended Complaint, *supra* note 45, at 9.
[51] MO. CODE REGS ANN. tit. 10, § 20-7.031(3)-(4) (2012). General and specific criteria are Missouri's terms for the CWA narrative and numeric criteria. *Id.*
[52] *See id* § 20-7.031(3).
[53] *Id.* at § 20-7.031(3)(B).
[54] *Id.* at § 20-7.031(3)(D).

but can contain unseen pollutants that would make it unsuitable for recreation or fishing.

Specific criteria, on the other hand, apply only to "classified" waters and consist of numeric restrictions on various pollutants specifically designed to ensure that a designated use is protected.[55] For example, Missouri law provides that discharges into water bodies designated as cold-water fisheries shall not "raise or lower the temperature . . . more than five degrees Fahrenheit."[56] Application of specific numeric criteria is especially important because it limits priority toxic pollutants, which interfere with designated uses of state waters.[57] The consequences of leaving so much of the state's waters unclassified means that such waters are not assigned with a designated use and protected with the specific, numeric criteria. As a result, much of the state's waters that would normally be protected without a classification system, are denied this protection.

III. CHANGING THE MISSOURI CLASSIFICATION SYSTEM

A. Recent Litigation Regarding Missouri's Classification System

Missouri environmental groups have been well aware of the problems with State's implementation of the CWA for many years.[58] One such group, the Missouri Coalition for the Environment (MCE), has actively participated with both the EPA and Missouri in an attempt to reform the Missouri system.[59] However, for reasons unknown, Missouri has resisted repeated calls by MCE and the EPA to apply water quality criteria to the state's unclassified waters.

In an attempt to force the federal agency to compel Missouri to comply with the Act, MCE brought suit against the EPA in 2010.[60] In its complaint, MCE outlines its repeated attempts to amend Missouri law and broken promises by Missouri to address its deficiency; the suit further alleges that the EPA has failed to compel Missouri to come into compliance.[61] The suit, in addition to other prayers for relief, seeks to compel the EPA to promulgate water quality standards for Missouri's unclassified waters since the state has failed to do so.[62]

---

[55] *Id.* at § 20-7.031(4).
[56] *Id.* at § 20-7.031(4)(D).
[57] 40 C.F.R. § 122.44.
[58] *See, e.g.*, Jeffery Tomich, *Group Asks EPA To Help Clean Up Missouri Streams*, ST. LOUIS DISPATCH, Nov. 30, 2012, *available at* http://www.stltoday.com/news/local/metro/group-asks-epa-to-help-clean-up-missouri-streams/article_588f51bf-492b-5dd5-af4a-bf036a561077.html.
[59] *See generally What We've Done*, MO. COAL. FOR THE ENV'T (last visited Feb. 23, 2013), http://moenviron.org/index.php/about-us/achievements-and-successes (providing a timeline of the Coalition's steps to support several environmental initiatives in Missouri, including the protection of water sources).
[60] Second Amended Complaint, *supra* note 45. The Missouri Coalition for the Environment filed its initial complaint on Aug. 4, 2010.
[61] *Id.* at 20.
[62] *Id.*

Although MCE merely sought to bring Missouri into compliance with the CWA, its suit against the EPA was doomed to fail.[63] As stated above, the EPA's role in the process is to review and approve or deny new or revised water quality standards submitted by states under Triennial Review.[64] There is no requirement under the CWA that the EPA re-examine existing standards which remain unchanged.[65] Thus, the EPA lacks the authority to compel Missouri, or any other state, to assign uses and promulgate water quality standards for unclassified waters unless Missouri, in its Triennial Review, seeks to adopt new standards for its unclassified waters. Such a suit may have been successful if brought at the time Missouri originally adopted its standards, but retroactive enforcement is not granted under the CWA.

B. Proposed Missouri Regulatory Changes

Although MCE's suit against the EPA was unsuccessful, it appears to have prompted Missouri to take initiative in amending its classification system. On December 1, 2011, the Missouri Department of Natural Resources (MDNR) published a proposed rule which would radically amend its current classification system and apply designated uses to its unclassified waters.[66] The purpose of the proposed rule is to ensure state water quality standards are functionally equivalent to federal standards by "expanding Missouri's classification system to currently unclassified waters, or otherwise satisfy the rebuttable presumption of 'fishable/swimmable' uses as required by Section 101(a) of the federal Clean Water Act.[67] The proposed rule appears to be in response to repeated requests from both the EPA and the public; in particular, a 2000 EPA request and the 2010 lawsuit filed by MCE against the EPA.[68]

Among other changes, the proposed rule would apply a rebuttable presumption that streams, lakes, reservoirs, and other water bodies support the minimal fishable/swimmable designated use.[69] Implementation of such a rule would effectively do away with the State's classification system as applied to a large number of water bodies and apply additional protections provided by numeric specific criteria. The MDNR estimates that an additional 84,845 miles of streams, previously unclassified, would be designated for fishable/swimmable use under the new regulation.[70] While some water bodies will continue to remain

---

[63] The case was settled and the suit dismissed by the federal district court on February 16, 2012.
[64] 33 U.S.C. § 1313(c) (2006).
[65] *See id.* at (a)-(i).
[66] *See* Clean Water Commission, 36 Mo. Reg. 2521-2586, vol. 36, number 23 (proposed Dec. 1, 2011) *available at* http://www.sos.mo.gov/adrules/moreg/previous/2011/v36n23/v36n23b.pdf (to be codified at MO. CODE REGS. ANN. tit. 10, § 20-7.031).
[67] *Id.* at 2521-22.
[68] *Id.* at 2673.
[69] *See generally id.* at 2525.
[70] MO. DEP'T OF NATURAL RES., REGULATORY IMPACT REPORT, at 9, June 3, 2011, *available at* http://www.dnr.mo.gov/env/wpp/docs/RIRWQSMaster060311.pdf.

uncovered by the proposed rule, many of Missouri's waters would now reflect federal standards.

While Missouri has finally recognized its deficiency regarding CWA compliance, its proposed rule falls short of completely alleviating its problem of non-compliance. MDNR could have ensured full compliance if it had instead applied blanket coverage of the fishable/swimmable standard to all waters of the state, as defined by 10 C.S.R. § 20-2.010(83). Instead, Missouri chose to apply the standard to enumerated waters only, leaving some waters unprotected. Notwithstanding this shortcoming, Missouri has publicly acknowledged that state regulations are deficient and is attempting to rectify this deficiency through actively promulgating new rules. However, until Missouri imposes new rules, Missouri cannot ensure that its waters maintain the minimal standard under the CWA that they be fishable and swimmable.

IV. CONCLUSION

The 1969 Cuyahoga fire signified a low point in the way states viewed and treated waters of the United States. The Cuyahoga, and rivers like it, were not maintained as to preserve the use for which they were best suited, but were instead used largely as a means for unregulated industrial disposal and transportation of goods. The 1969 fire, despite being a reminder of America's polluting past, served as a wakeup call and a driving force behind the creation of the CWA.

Missouri's current regulatory scheme, as it now stands, is wholly insufficient to provide the necessary protection for state waters. Although some unclassified waters are merely small, intermittent tributaries, others are vibrant waters used for recreation. Brush Creek, an urban waterway flowing through the heart of the upscale Country Club Plaza area of Kansas City, is lined with a river walk frequented by residents and visitors alike.[71] It is also a major tributary of the Blue River, which is itself used for fishing, boating, and other leisure activities.[72] Despite its popularity and importance to the Blue River watershed, Brush Creek is an unclassified stream.[73] Thus, it does not need to meet the minimal fishable/swimmable standard that classified waters must, and contains elevated levels of many pollutants.[74] Under Missouri's proposed regulation, Brush Creek would be subject, at a minimum, to the fishable/swimmable standard mandated by the CWA. Although there would be public and private costs associated with curbing unregulated point and non-point discharges into the

---

[71] *Brush Creek*, WATERSHEDS OF THE KANSAS CITY REGION (Sept. 25, 2012), http://www.marc.org/watershed/watershed.asp?ID=4.
[72] *Id.*
[73] *See* Midkiff, *supra* note 42.
[74] *Brush Creek*, *supra* note 71. Pollutions of concern include "bacteria, elevated nutrients, dissolved solids, and other trace elements." *Id.*

creek,[75] Brush Creek would gradually become suitable for more than just the casual stroll.

[75] Costs would most likely include more efficient storm water runoff controls and potential National Pollution Discharge Elimination System (NPDES) permitting costs.

MUNICIPAL IMMUNITY FOR DISCHARGE: PUBLIC POLICY NOT SERVING ITS PUBLIC

By Chris R. Playter

I. THE MISUSE OF POWER BY VIRTUE OF STATE LAW

On June 28, 2011, the Missouri Supreme Court made its decision. It would not grant Jim Brooks' Application for Transfer from the Missouri Court of Appeals. Public policy had been served.

Approximately three years earlier, Jim Brooks had been employed as a police officer for the City of Sugar Creek.[1] While patrolling the city one night in his squad car, he witnessed a vehicle running a red light. After stopping the vehicle, Brooks administered a field sobriety test which the vehicle's driver was unable to pass.[2] From there, he placed the suspect under arrest and transported her back to police headquarters.[3]

Brooks followed procedure every step of the way as if second nature, unfettered by the suspect's jabbering about her "close relationship with the Police Department" and her threats to arrange that his job be taken.[4] This wasn't the first time he had encountered such patter, and Brooks had been thoroughly prepared by his extensive training with the Academy to deal with a criminal who will say anything to be released. He could not listen to such nonsense. He had a job to do. He had a duty. Serve the public, protect its citizens, and get drunk drivers off the road.

At that point, nothing about this arrest was any different than the countless number of arrests he had completed during his service. However, things changed for Jim Brooks from there, and they changed in a hurry. Upon informing his supervisor of the arrest, Brooks was told to shred all documentation of the arrest, the detention, and the field testing.[5] Within a day, Brooks was called into the Police Chief's office and terminated, and the reason for his termination was for arresting a drunk driver who happened to be a prominent business owner in the community.[6] Jim Brooks had been terminated for doing his job.

Nine months after Brooks filed his lawsuit for wrongful discharge, his suit was dismissed on summary judgment.[7] The average Missouri citizen is likely to believe that the public interest could not have been served by Jim Brooks' termination; however, Missouri statutory and common law, as it stands today, says otherwise.

---

[1] Brooks v. City of Sugar Creek, 340 S.W.3d 201, 204 (Mo. Ct. App. 2011).
[2] *Id.*
[3] *Id.*
[4] *See id.*
[5] *Id.* at 204-05.
[6] *See id.* at 205.
[7] *See id.* at 204-05.

II. SOVEREIGN IMMUNITY FOR MUNICIPALITIES

A. At-Will Employment Doctrine

The doctrine of at-will employment is well established in both federal and state labor and employment law. While first being somewhat invented in 1877 by legal scholar Horace G. Wood,[8] the doctrine itself has been recognized in the United States for well over a century now.[9] Similarly, Missouri has long recognized the existence of at-will employment. Although the term "at-will employment" was more recently coined, the premise[10] of the doctrine had been discussed by courts in Missouri before the beginning of the twentieth century.[11] At-will status arises where an employee is hired without a definite statement of duration attached to his employment.[12] In cases of at-will employment, an employee can be terminated for any reason (with limited exceptions) or for no cause at all, so long as the firing is not unconstitutional or statutorily prohibited.[13] Following a termination, the discharged employee will have no cause of action for wrongful discharge as a matter of law.[14]

In Missouri, an exception to this tenet of at-will employment, that an employee can be fired for any reason, is that an employee cannot be fired for reasons that circumvent public policy.[15] In cases where the reason for

---

[8] Horace G. Wood's 1877 treatise articulated his belief that the at-will doctrine was an accepted doctrine among many United States courts, but scholars looking back today agree that the authorities Wood cited did not support his characterization of the at-will doctrine. Nonetheless, his pronouncement and characterization of the doctrine has been essentially unanimously accepted since. Magnan v. Anaconda Indus., Inc., 479 A.2d 781, 783-8 n. 8 (Conn. 1984).

[9] EMPLOYMENT CLASS AND COLLECTIVE ACTIONS 732 (David Sherwyn & Samuel Estreicher eds., 2009) (citing to Horace G. Wood's treatise written in 1877). *See also* Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75, 88 (1995) (stating that the idea of at will employment existed in New York even during colonial times).

[10] It is fairly conceded by legal scholars that the premise of the doctrine has long been discussed, but it is less certain as to the policy upon which the doctrine was originally based as Wood's original statement of the doctrine and the early courts that followed it did not explain the policies upon which the rule was based. However, one plausible reasoning has been presented by Ronald B. Standler that because an employee must be free to quit at any time to prevent the possibility of involuntary servitude prohibited by the Thirteenth Amendment, courts at the time believed there was a need to provide employers a reciprocal right. Ronald B. Standler, *History of At-Will Employment Law in the USA* (2000), http://www.rbs2.com/atwill.htm.

[11] *See* Harrington v. Kansas City Cable Ry. Co., 60 Mo. App. 223, 230 (1895).

[12] Luethans v. Washington Univ., 894 S.W.2d 169, 172 (Mo. 1995).

[13] For example, an employer cannot terminate an employee for being a part of a statutorily protected class. Firing an employee because of his race, color, religion, national origin, sex, ancestry, age or disability is expressly prohibited by the Missouri Human Rights Act. Keveney v. Missouri Military Academy, 304 S.W.3d 98, 101 (Mo. 2010) (citing MO. REV. STAT. § 213.055 (2005)).

[14] Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 91 (Mo. 2010).

[15] Bell v. Dynamite Foods, 969 S.W.2d 847, 852 (Mo. Ct. App. 1998).

termination is contrary to public policy,[16] an employer can be liable to her former employee for damages under the theory of wrongful termination or wrongful discharge. Although it is not the only instance which satisfies the public policy exception to at-will employment,[17] a cause of action for wrongful discharge often arises where an employee is terminated in retaliation for reporting acts by his employer which violate the law.[18] The Missouri Western District Court of Appeals has concisely articulated the parameters of this exception:

> [W]here an employer has discharged an at-will employee because that employee refused to violate the law or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, or because the employee reported to his superiors or to public authorities serious misconduct that constitutes violations of the law and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.[19]

This often occurs where an employee files an internal complaint or otherwise reports unlawful acts by his immediate supervisor to human resources or a supervisory employee higher up the corporate chain of command. The law violated does not have to have a specific provision that prohibits retaliation;[20] however, the law must be a clear mandate of public policy promulgated within a constitutional provision, a statute, a regulation based on a statute, or a rule created by a governmental body.[21] In this way, the at-will employment doctrine is not static but can be narrowed or expanded by new legislation or new governmental regulation.[22] Where the reason an employee is terminated is the result of an employee reporting violations of a clear mandate of public policy, and the employee was dismissed for having reported the illegal activity, the employee will have a cause of action for wrongful discharge.[23]

---

[16] Put simply, the public policy exception is a principle of law tending to punish employers where their action in terminating an employee is "injurious to the public or against the public good." Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo. Ct. App. 1985). However, even the smallest amount of research shows that the public policy exception is no simple matter.

[17] The public policy exception includes (1) discharge for refusal to perform an illegal act, (2) discharge for reporting an illegal act performed by a superior, (3) discharge for participating in acts that public policy encourages "such as jury duty, seeking public office. . ., or joining a union;" and (4) discharge for filing a worker's compensation claim. *See* Bell, 969 S.W.2d at 852 (citing *Boyle*, 700 S.W.2d 859, 873-75 (Mo. Ct. App. 1985).

[18] *See, e.g.*, Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 S.W.2d 147, 150 (Mo. Ct. App. 1995).

[19] *Boyle*, 700 S.W.2d at 878.

[20] *Fleshner*, 304 S.W.3d at 97 (citing Porter v. Reardon Mach. Co., 962 S.W.2d 932, 938 (Mo. Ct. App. 1998)) (stating there is no need for the rule of law to specifically provide that an employee cannot be dismissed for reporting a violation).

[21] *See* Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 663 (Mo. 1988).

[22] *See Fleshner*, 304 S.W.3d at 92.

[23] *Lynch*, 901 S.W.2d at 150.

B. Municipal Immunity Differs from Sovereign Immunity

Unlike state entities,[24] a municipality's immunity is qualified upon certain conditions. Because a municipality's immunity is conditional, sovereign immunity does not describe the immunity afforded municipalities.[25] Rather, a municipality has immunity from actions in common law tort in all but four cases: (1) where a plaintiff's injury arises from a public employee's negligent operation of a motor vehicle, (2) where the injury is caused by a dangerous condition of the municipality's property, (3) where the injury is caused by the municipality performing a proprietary function as opposed to a governmental function,[26] or (4) to the extent the municipality has procured insurance.[27]

The proprietary exception exists because municipalities often function differently than other governmental entities. While municipalities do usually serve some form of governmental function, they often function at a proprietary, or corporate, level as well.[28] Municipal acts are regarded as proprietary if they are performed for the special benefit or profit of the municipality as a corporate entity.[29] A municipality does not receive immunity for torts that arise from performing these types of acts.[30]

Proprietary functions are distinguished from governmental acts, which are regarded as those acts that are performed for the common good of all.[31] Examples of governmental acts include providing airport security, establishing and operating schools, and creating municipal fire departments.[32] These and similar acts performed for the common good *will* receive immunity from torts that may arise from negligent performance.

While some acts performed by a municipality are deemed strictly governmental and some deemed strictly proprietary, the two classifications are not always mutually exclusive. There is some gray area in which functions performed by a municipality could be considered either proprietary or

---

[24] However, a Missouri state entity's sovereign immunity is also not absolute since its immunity can be statutorily waived. For example, by including state entities within its definition of employer, the Missouri Human Rights Act waives a state's immunity and subjects state entities to tort liability for violations covered under its provisions. *See* Brady v. Curators of the Univ. of Mo., 213 S.W.3d 101, 108 (Mo. Ct. App. 2006) (citing MO. REV. STAT. § 213.010 (West 2012)).

[25] W. Dudley McCarter, *Sexual Harassment of Employee by a Company Supervisor Warranted Punitive Damages Against the Company*, 65 J. MO. B. 8, 10 (Jan-Feb. 2009).

[26] State *ex rel.* Bd. of Tr. of N. Kan. City Mem'l Hosp. v. Russell, 843 S.W.2d 353, 358 (Mo. 1992) (en banc); Kunzie v. City of Olivette, 184 S.W.3d 570, 574 (Mo. 2006) (en banc).

[27] MO. REV. STAT. §§ 537.600-537.610 (2012).

[28] Parish v. Novus Equities Co., 231 S.W.3d 236, 241 (Mo. Ct. App. 2007).

[29] Junior Coll. Dist. of St. Louis v. City of St. Louis, 149 S.W.3d 442, 447 (Mo. 2004) (en banc).

[30] Gregg v. City of Kansas City, 272 S.W.3d 353, 359 (Mo. Ct. App. 2008).

[31] Dallas v. City of St. Louis, 338 S.W.2d 39, 44 (Mo. 1960); Nichols v. City of Kirksville, 68 F.3d 245, 247 (8th Cir. 1995).

[32] *Gregg*, 272 S.W.3d at 360.

governmental or both.[33] Even those acts that serve the community in some general way may still be considered proprietary in nature,[34] and a municipality's actions that may compete with a private business industry may nonetheless serve a dual governmental function as well.[35]

While many acts do fall within this cloudy area, Missouri courts have been clear that a termination decision is not one of those questionable acts. Instead, Missouri courts have consistently held that hiring and firing decisions are governmental acts and definitely not proprietary.[36] Although Missouri courts have been somewhat apologetic in their determination in cases where an employee's termination reflects more shamefully on the municipality,[37] the courts have nonetheless consistently considered all termination decisions within a municipality as being a part of the "internal administration of operating a municipal department."[38] Because hiring and firing decisions are never considered proprietary, a municipality will always be afforded immunity when an employee is terminated from his employment with the municipality[39] as long as the municipality has not procured liability insurance for civil tort actions.[40] With no real incentives for a municipality to procure liability insurance that covers wrongful termination and thus waiving its immunity, all termination decisions pertaining to whistleblowing that occur within a municipality cannot give rise to liability against the municipality itself or the supervisors responsible for the final decision to discharge the employee. In this sense, a blanket immunity is bestowed to municipalities which is impenetrable no matter how egregious the termination or the improper conduct that gave rise to the initial employee complaint.[41]

III. PUBLIC POLICY EXCEPTION TO AT-WILL EMPLOYMENT IS EFFECTIVELY BARRED BY MUNICIPAL IMMUNITY

Giving blanket immunity protection for all municipality termination decisions negates the public policy that supports wrongful discharge claims in the first place. It is true that the public policy exception is narrow and would present no threat to employers who operate within the parameters of the law and public

---

[33] Bennartz v. City of Columbia, 300 S.W.3d 251, 259 (Mo. Ct. App. 2009).
[34] *See id.*
[35] *Gregg*, 272 S.W.3d at 361.
[36] *See Kunzie*, 184 S.W.3d at 574; State *ex rel.* Gallagher v. Kansas City, 7 S.W.2d 357, 362 (Mo. 1928) (en banc); *Nichols*, 68 F.3d at 247.
[37] McCarter, *supra* note 25, at 11 (stating that the court was "sympathetic to well-intentioned and law-abiding municipal employees").
[38] *Kunzie*, 184 S.W.3d at 574.
[39] *Bennartz*, 300 S.W.3d at 260. *See also Nichols*, 68 F.3d at 248 (the court asserting that defendant city's act of firing plaintiff city employee was governmental, not proprietary, and therefore subject to sovereign immunity).
[40] *Kunzie*, 184 S.W.3d at 574.
[41] *See Bennartz*, 300 S.W.3d at 261.

policy.[42] However, the immunities given to municipalities provide added protection for some employers who choose not to operate within the mandates of the law.

"In our society we encourage and protect employees who stand up and report wrongdoing and illegal activities."[43] This statement certainly is not outlandish; in fact, most Missouri citizens would support the policies underlying this idea. This statement is akin to the driving policies for enacting and maintaining the whistleblower public policy exception to the at-will employment doctrine.[44] This policy of protecting whistleblowers, while widely accepted,[45] is jeopardized, or at the very least unjustifiably limited, by the immunity provided municipalities for their termination decisions. As the immunity rules in Missouri stand, a significant sector of employees are forced to face the difficult decision of whether to report violations of the law by their supervisors to their employers which could result with losing their jobs and being left with no legal recourse, or to turn a blind eye and allow illegal activity to continue at their places of employment.

Because of this blanket immunity, persons working in positions within municipalities are provided less protection than those employees working in the private sector.[46] This reality is further contrary to the nation's public policy which has consistently imposed a higher duty on government entities than those employers who are in the private sector.[47] The individuals who are most heavily affected by the at-will employment doctrine are upper and middle level employees who often have substantial investments in life insurance, medical insurance, and retirement programs through their employers, which are difficult, if not impossible, to replace if terminated.[48] When one considers the consequences of failing to provide protection to wrongfully terminated

---

[42] Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 878 (Mo. Ct. App. 1985).

[43] Topps v. City of Country Club Hills, 272 S.W.3d 409, 419 (Mo. Ct. App. 2008).

[44] *See* Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire a Noble Warrior?*, 61 MERCER L. REV 551, 557 (Winter 2010).

[45] The notion of this policy's acceptance is supported by the fact that adoption of whistleblower protection has occurred in various forms of state and federal statutes. A few examples of the wealth of anti-retaliation statutes include the Aviation Investment and Reform Act to promote reporting violations of federal aviation regulations; environmental protection laws such as the Water Pollution Act, the Solid Waste Disposal Act, or the Clean Air Act; and state and federal anti-retaliation clauses within human rights statutes. Not only is the number of such statutes increasing, but the amount of protection is increasing as well. For example, the Sarbanes-Oxley Act, passed by Congress in 2002, has been coined the "gold standard" of whistleblower protection because it imposes both criminal sanctions against the wrongdoer and provisions for monetary compensation to the whistleblower. *Id*. at 564-65.

[46] *Topps*, 272 S.W.3d at 419.

[47] *See, e.g.*, NCAA v. Tarkanian, 488 U.S. 179, 191 (1988) (an employee is granted the protections of due process against a state actor but this protection does not extend to "private conduct that abridges individual rights" (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961))); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (employees at a public school have free speech rights that are protected against state action).

[48] Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 877-78 (Mo. Ct. App. 1985).

employees in light of this fact, the ill effects of permitting municipalities to wrongfully discharge their employees becomes apparently dire.

Similarly, giving blanket immunity protection for all municipality termination decisions also does not serve the policy reasons that support individual immunity. While individual immunity[49] is guided in general by distinguishing between ministerial and discretionary decisions,[50] the factors that are weighed in determining where immunity applies include the nature of the official's duties, the extent to which the acts involve policymaking, and the likely consequences of withholding immunity from the official.[51] When one looks at the more specific factors announced in *Kanagawa*, it becomes apparent that individual employee terminations do not usually require policy-making. For instance, Jim Brooks' termination from the Sugar Creek Police Department was far removed from the municipality's policy-making; the Police Department had policies in place which were well established within the department. In fact, terminating Brooks required discharging an employee for upholding the policies the entity purported to endorse.

Unlike layoffs,[52] a termination of an employee who has reported illegal activity does not occur at the governmental policy-making level.[53] Instead, such decisions are usually made by one or a few individuals who have no bearing in any respect upon the policies through which the municipality operates. In fact, termination decisions are sometimes made by persons who may hold some supervisory duties but nonetheless have no authority in policy-making for the municipality.

In addition, the consequences of withholding immunity will encourage municipalities to follow the laws of state and national governing bodies. Under current Missouri statutory and common law, a municipality and its officials are permitted to discharge an employee who reports their illegal activities without

---

[49] The individuals working within a government entity are not afforded sovereign immunity, as this doctrine is uniquely applicable to the governmental entities themselves. Rather, a public officer must establish his or her conduct is protected under the doctrine of official immunity. *See* Rustici v. Weidemeyer, 673 S.W.2d 762, 768 (Mo. 1984) (en banc).

[50] *Id.* at 769; Kanagawa v. State *ex rel*. Freeman, 685 S.W.2d 831, 835 (Mo. 1985) (en banc).

[51] *Kanagawa*, 685 S.W.2d at 836.

[52] Often called reduction in force at the governmental level, layoffs occur where a discretionary or budgetary determination is made to abolish an existing position entirely and is not based on an employee's conduct such as reporting illegal violations. U.S. OFFICE OF PERS. MGMT., SUMMARY OF REDUCTION IN FORCE UNDER OPM'S REGULATIONS, http://www.opm.gov/rif/general/rifguide.asp#1 (last visited April 6, 2013).

[53] *See* Bockes v. Fields, 999 F.2d 788, 791 (4th Cir. 1993) (distinguishing firing decisions from policy-making and stating "'[P]olicymaking authority' implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government." (quoting Spell v. McDaniel, 824 F.2d 1380, 1386 (4th Cir. 1987) (stating that policy implies choosing a course of action from among various alternatives as opposed to "episodic exercises of discretion in the operational details of government.")).

civil repercussion[54] and thus continue to misuse their power by continuing to act in a manner contrary to the public good after the complaint has been silenced. While such a misuse of power seems like a far-reaching hypothetical, in reality, it is not uncommon for cases to be filed alleging similar tortuous conduct on the part of municipal employees.[55] Protecting against similar types of misuse of power has been the driving force behind enacting much of this country's legislation. For example, it was the central aim of enacting the Civil Rights Act and a cause of action under section 1983.[56]

The consequence of *withholding* municipal immunity would encourage compliance with public policy. Imposing liability should cause officials who have doubts about the lawfulness of their termination decisions to err on the side of caution.[57] Further, heightened liability will encourage municipalities to have extra checks or supervision and investigatory measures in regards to termination.[58] Finally, although it is not a factor articulated in *Kanagawa*, it is equally important to note the consequence of *continuing* to afford immunity to municipalities and its officers establishes the anomaly that Justice Brennan stated in *Owen v. City of Independence, Mo.* should not be permitted the government:

> How "uniquely amiss" it would be, therefore, if the government itself - "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" - were permitted to disavow liability for the injury it has begotten.[59]

IV. CONCLUSION

Over approximately one hundred fifteen years since first recognizing the at-will employment doctrine, Missouri has established only a few exceptions to the application of the doctrine. One of those exceptions protects employees who are terminated in retaliation for reporting their employer's or supervisors' unlawful conduct. With so few exceptions made over such a long period of time,

---

[54] *See* Bennartz v. City of Columbia, 300 S.W.3d 251, 261 (Mo. Ct. App. 2009) (stating that even when assumed that an employee's report of illegal activity is true, the termination will still not fall within an exception to governmental immunity).

[55] *See, e.g.*, Wright v. City of Salisbury, Mo., 656 F. Supp. 2d 1013, 1031 (E.D. Mo. 2009) (granting summary judgment against police officer complaining of being instructed not to make drunk driving arrests); Aiello v. St. Louis Cmty. Coll. Dist., 830 S.W.2d 556, 559 (Mo. Ct. App. 1992) (affirming dismissal of wrongful discharge claim filed for supervisor having filed fraudulent expense reports).

[56] Owen v. City of Independence, Mo., 445 U.S. 622, 650 (1980) (stating the Civil Rights Act targeted "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." (quoting Monroe v. Pape, 365 U.S. 167, 184 (1961))).

[57] *See id.* at 651-52.

[58] *See id.* at 652 n.36.

[59] *Id.* at 651.

one would suspect that the exceptions that do exist are important to the people whom they serve. However, applying municipal immunity as Missouri currently does for whistleblowing activities effectively negates that exception for a large number of people who need to be protected from the very real possibility of abuse of power by municipal government and its individual officials.[60] A change has to be made.

The most expansive change which would afford the best possible protection for governmental employees would be to exclude whistleblower retaliation claims from the protection of sovereign and municipal immunity outright.[61] Such a change would protect government employees who stand up against illegal activities that occur within our governmental systems.[62] Without this change, government employees will have to continue to face the reality that reporting wrongdoing could very likely cost them their jobs. Because this change is such a dramatic departure from existing law, it would most likely have to occur at the legislative level.

Although this change is certainly a dramatic departure from the current Missouri approach, a study of the criticism of the governmental-proprietary approach to municipal immunity and the subsequent changes some jurisdictions have effectuated in response displays a legislative change in Missouri would be less dramatic, if dramatic at all, in the larger scheme American jurisprudence. For example, the Wisconsin Supreme Court acknowledged the immense criticism of the doctrine which was occurring as early as the 1940s and 1950s stating:

> There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine. This court and the highest courts of numerous other states have been unusually articulate in castigating the existing rule; text writers and law reviews have joined the chorus of denunciators.
> . . . .
> "It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong', should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury…."[63]

---

[60] Topps v. City of Country Club Hills, 272 S.W.3d 409, 419 (Mo. Ct. App. 2008).
[61] *Id.*
[62] *Id.*
[63] Holytz v. City of Milwaukee, 115 N.W.2d 618, 621-22 (Wis. 1962) (reiterating criticism within its jurisdiction and later quoting Barker v. City of Santa Fe, 136 P.2d 480, 482 (N.M. 1943)).

In response to this and homogeneous criticism, several states have limited or abolished municipal and sovereign immunity through judicial abrogation of the common-law doctrine or legislative enactment.[64]

Missouri would be best served by enacting a statute comparable to the Rhode Island Whistleblowers' Protection Act.[65] Similar to the definition used in Missouri's Human Rights Act,[66] the Rhode Island Whistleblowers' Protection Act defines an employer to include state and municipal government,[67] and in so doing, the Act abolishes municipal immunity entirely as it pertains to wrongful discharge for reporting illegal acts.[68] By mimicking the approach taken by the Rhode Island Whistleblowers' Protection Act, Missouri law would eliminate municipal immunity entirely in cases of wrongful discharge, thus providing unfettered protection to government employees to report violations of the law.[69] In addition, the new approach would be an easy transition for Missouri courts as this approach is practically identical to the treatment of government entities under the Missouri Human Rights statutes.[70]

The Rhode Island approach is only one possible avenue through which Missouri legislature can pass to afford the needed protection for employees who choose to hold government entities accountable when they falter. Rhode Island's model may be the most comfortable for Missouri legislature, however, because it is so congruous with the well-settled body of law regarding human rights. Whether this model is chosen over any other similar approach does not matter so long as change occurs.

Misuse of government power is real, and it is happening in many municipal entities in cities throughout Missouri. Municipal employees can no longer tolerate being treated as "second-rate" employees with fewer rights than those working within the private employment sector.[71] Every employee must be afforded the protection necessary to affect change and hold Missouri government entities accountable for the acts they conduct in the name of public service.

---

[64] *Sovereign Immunity and the Governmental-Proprietary Distinction*, 18 MCQUILLIN MUN. CORP. § 53.02.10, nn.36-37 (July 2012).
[65] R.I. GEN. LAWS §§ 28-50-1 to -9 (West 2012).
[66] MO. REV. STAT. § 213.010 (West 2012).
[67] R.I. GEN. LAWS § 28-50-2 (West 2012).
[68] *See id.* § 28-50-3.
[69] Under this approach, municipal and state employers would still be able to discharge employees whose reporting is not grounded in a good faith belief, protecting government employers from employees making knowingly false reports. *See id.*
[70] *See* Howard v. City of Kansas City, 332 S.W.3d 772, 787 (Mo. 2011) (en banc) (holding municipal entities are subject to the same actual and punitive damage treatment as any other employer); H.S. v. Bd. of Regents, S.E. Mo. State Univ., 967 S.W.2d 665, 673 (Mo. Ct. App. 1998) (affirming award of punitive damages to former employee of state university).
[71] Topps v. City of Country Club Hills, 272 S.W.3d 409, 419 (Mo. Ct. App. 2008).

A SOUR NOTE IN THE SAME OLD SONG: DETERMINING AND PROTECTING OWNERSHIP RIGHTS IN THE DIGITAL AGE

by Cory VanDyke*

"One good thing about music, when it hits you feel no pain."[1] When this lyric was wailed by reggae legend Bob Marley in 1971, the music industry was very different than the one in which artists currently find themselves. Today, the music industry is almost synonymous with "pain" as an increase in illegal downloading has resulted in a large amount of financial loss and legal turmoil. From 2004 to 2009 alone, over thirty billion songs were illegally downloaded, resulting in an overall global market decline of approximately thirty one percent.[2] In an effort to thwart digital piracy and protect their works, the recording industry has brought suits against over thirty-five thousand private individuals.[3] Though litigation against individual consumers seems to be subsiding, a more important legal battle looms on the horizon due to a change in copyright law that took place nearly forty years ago.

The Copyright Act of 1976, which actually took effect in 1978, arguably gave many musicians the ability to reclaim copyrights in their original creations, starting thirty-five years after a grant of copyrights was made, effectively terminating any rights that the artists may have granted (e.g. to record companies) when their songs were first recorded.[4] On January 1, 2013, the first songs covered by the 1976 Act became eligible for reclamation.[5] Now, with each subsequent year, a new batch of songs will become available for possible reclamation.[6] Legendary artists such as Bob Dylan, Bruce Springsteen, Tom Petty, and Bryan Adams have reportedly already filed claims at the United States Copyright Office on eligible songs.[7] As one could imagine, these "termination rights" are not uncontested. In an effort to enforce what they believe is their property, as well as attempt to further mitigate the damage that has already resulted from advanced technology in the last decade, major record labels have made it clear that they will not give up these rights without a fight.[8] As a result, 2013 marks the starting point to a string of legal battles, not between private

---

* J.D. and M.B.A., University of Missouri-Kansas City School of Law and Bloch School of Business, May 2012; B.S. Economics, Saint Louis University, 2007.

[1] BOB MARLEY & THE WAILERS, TRENCHTOWN ROCK (Tuff Gongo 1971).

[2] *For Students Doing Reports*, RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA), http://www.riaa.com/faq.php (last visited Feb. 22, 2012).

[3] Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

[4] *See* Jacob Moore, *Copyright Law from the '70s Suggests Oncoming Legal Battle Between Labels and Artists*, COMPLEX, (Aug. 15, 2011), http://www.complex.com/music/2011/08/copyright-law-from-the-70s-suggests-oncoming-legal-battle-between-labels-and-artists.

[5] *Id.*

[6] *See id.*

[7] *Id.*

[8] *See id.*

individuals and the music industry, but within the industry itself, as artists and record companies fight to determine who owns some of the most popular music ever written.

This paper will address the forthcoming impact that the termination rights of the Copyright Act of 1976 will have on the music industry. Part I describes the evolution of Copyright law in the United States and the addition of termination rights in 1978. Part II discusses the legal arguments that the artists and record companies have respectively raised in support of their claims. Finally, Part III addresses the difficulties that all copyright holders face in protecting their works in the digital age.

I. THE EVOLUTION OF COPYRIGHT LAW AND THE DEVELOPMENT OF TERMINATION RIGHTS

Copyright laws were developed in an effort to protect an original author's expression of ideas as they are "fixed in any tangible medium,"[9] and thereby to encourage the development of subsequent works by the author. Copyright owners enjoy the exclusive right to, and ability to authorize others to: reproduce the work; prepare derivative works based upon the work; distribute copies of the work; perform the work publicly in a live manner or by means of a digital audio transmission; and display the work publicly.[10] However, these rights are not unlimited. For example, the "first sale doctrine" limits those rights in that the copyright holder may not "restrict subsequent resale or distribution . . . [of a] lawful copy."[11] Under the doctrine, the buyer of the copy does own the physical copy of the work but nonetheless is not granted any copyrights in the underlying works simply by lawful ownership of the copy.[12]

Though copyright law has existed since the 1710 Statute of Anne,[13] the progression of the law has been slow and fitful. In fact, it took nearly 200 years to extend copyright protection to musical compositions and eventually the right in the performance of such compositions.[14] Sound recordings finally received federal copyright protection in 1976.[15] Under the 1909 Act, the author of an eligible work was given a twenty-eight year term of protection from the date of publication, as well as the right to renew copyright protection for another twenty-

---

[9] 17 U.S.C. § 102(a) (2012).
[10] 17 U.S.C. § 106 (2012).
[11] ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE (Wolters Kluwer eds. 5th ed. 2010) (hereinafter MERGES). *See also* 17 U.S.C. § 109 (2012); *see* 17 U.S.C. § 101 (2012).
[12] 17 U.S.C. § 109 (2012); *see* MERGES, *supra* note 11.
[13] *Copyright Timeline: A History of Copyright in the United States*, ASSOCIATION OF RESEARCH LIBRARIES, http://www.arl.org/pp/ppcopyright/copyresources/copytimeline.shtml (last visited Feb. 22, 2012); *see* MERGES, *supra* note 11.
[14] *See Copyright Timeline*, *supra* note 13.
[15] *Id.*

eight years during the final year of the first term.[16] Congress also provided to the author a right of "reversion" during the renewal term, which allowed authors to recapture all of the work's rights that were previously granted.[17] It was widely thought that Congress included these rights to protect the author from the "unprofitable or improvident disposition of the copyright" and to balance the inferior position that young artists often found themselves in when dealing with the superior and more experienced publishing companies.[18]

With continuing objections from both advocates and proponents of the 1909 Act, the 1950s brought a wave of reform talks with the U.S. Copyright Office and eventually resulted in the development of the 1976 Act approximately twenty years later.[19] Actually enacted in 1978, the 1976 Act not only expanded the rights of protectable subject matter and extended the duration of those rights from fifty-six years to seventy-five years[20] but, with the inclusion of termination rights, the 1976 Act also gave authors and their survivors a much more effective way to reclaim any copyright interests at a later time.[21] The Act specifies that if a work was created and its copyright granted *before* January 1, 1978, the author and his heirs might be able to terminate the grants "during a five-year window beginning at the end of the fifty-sixth year of protection."[22] For copyright grants executed *on or after* January 1, 1978, an author and his heirs may qualify to terminate the grant during a five-year window beginning at the end of the thirty-fifth year of protection.[23]

Both artists and record companies understand the significance that these termination rights will have on the music industry. By terminating the original contractual copyright grants before their natural expiration, artists will be able to reclaim the ownership rights that had previously been legally contracted away to publishing companies; effectively treating them as if they had never existed. A win for either party will be substantial but the potential loss to record companies could prove devastating. With so much on the line, legal teams for interested groups are preparing for the onslaught of legal battles that seem imminent in the coming years. After all, early victories could lead to far-reaching and significant precedents.

---

[16] Copyright Act of 1909, 17 U.S.C. § 24 (repealed and amended by Copyright Act of 1976) (*available at* http://www.kasunic.com/1909_act.htm).
[17] *See* Vincent James Scipior, *The Amazing Spider-Man: Trapped in the Tangled Web of the Termination Provisions*, 2011 WIS. L. REV. 67, 75 (2011).
[18] Mills Music, Inc. v. Snyder, 469 U.S. 153, 172 (1985); Scipior, *supra* note 19, at 77.
[19] *See* Scipior, *supra* note 19.
[20] 17 U.S.C. § 304(d)(2) (2002).
[21] *See* 17 U.S.C. § 203(a)(3) (2002).
[22] *See* Scipior, *supra* note 19, at 70; *see* 17 U.S.C. § 304(c)(3) (2012).
[23] § 203(a)(3).

II. THE ARGUMENTS RAISED

The threat of enforcing termination rights under Section 203 will likely encourage countless settlement agreements and extensive contract negotiations as record companies and artists attempt to avoid expensive litigation in the uncertain legal landscape. Nonetheless, 2013 will also undoubtedly mark the starting point to numerous legal battles that have been thirty-five years in the making. It is rare that parties to litigation are afforded such an extensive amount of trial preparation time as the opposing record companies and artists have been given. As a result, it has allowed interested parties to solidify and polish the arguments that they will raise in the coming years, increasing the possibility of a number of early and well-informed decisions on these issues.

A. The Record Companies

Since the enactment of the 1976 Act, record companies have anxiously prepared for 2013. The companies' main contention is that these works were never the artist's property but are, and have always been, "works made for hire."[24] Under the 1976 Act, one type of work made for hire is "a work prepared by an employee within the scope of his or her employment," and, thus, is wholly owned by the employer.[25] Even the work of an outside or independent creator may be classified as a work made for hire if there is an express, written agreement that is signed by each party, designating the work as such.[26] A court's ruling adopting this argument would be significant, as record companies and similar companies would become the statutory author of many works that would otherwise have been subject to the termination rights of Section 203.[27]

In an effort to solidify its position, the Recording Industry Association of America took its argument to Congress in 1999, using an unusual strategy. The RIAA lobbied for a provision to the Satellite Home Viewer Improvement Act[28] that effectively changed musical works into "works made for hire."[29] After President Bill Clinton signed the law into effect, the backlash was immediate as popular artists, including Sheryl Crow and Don Henley, raised objections.[30] Congress quickly backed down and the provision was eventually repealed,

---

[24] Leslie Chuang, *Copyright Termination Rights: The Looming Battle for Music Industry*, THE ENTERTAINMENT, ARTS AND SPORTS LAW BLOG (Oct. 4, 2011 1:52 PM), http://nysbar.com/blogs/EASL/2011/10/copyright_termination_rights_t.html.
[25] 17 U.S.C. § 101 (2010) (defining "work made for hire").
[26] *Id.*
[27] 17 U.S.C. §§ 201(b), 304(c) (2002); *see* Anthony Cheng, *Lex Luthor Wins: How the Termination Right Threatens to Tear the Man of Steel in Two*, 34 COLUM. J.L. & ARTS 261, 265 (2011).
[28] *See* S. 1948, 106th Cong. (1999), *available at* http://transition.fcc.gov/mb/shva/shvia.pdf.
[29] *See* Mike Masnick, *Musicians Starting to Assert Copyright Termination Rights Against Record Labels*, TECH DIRT (Oct. 9, 2009, 5:34 PM) http://www.techdirt.com/articles/20091009/0233096474.shtml.
[30] Larry Rohter, *Legislator Calls for Clarifying Copyright Law*, N.Y. TIMES, Aug. 29, 2011, at C1.

forcing courts to decide the arguments at a later time, and reaffirming the 2013 deadline.[31]

B. The Artists

Artists seem to raise the strongest and most sound argument going into 2013 - the statutory language itself. The termination rights provided for by the 1976 Act differ substantially from those of the "recapture" provisions in the Act of 1909. For example, under the 1976 Act, the termination rights are much more difficult to lose and they cannot be contracted away.[32] This distinction, the artists argue, clearly shows the paternal intention of Congress to protect young artists from the superior positions that record companies had in contract dealings. Artists further argue that the U.S. Supreme Court also recognizes that "the termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product."[33] Backed by this language, the existing statutory language and Congress' clear reluctance to cast an overly broad definition of works made for hire, artists likely feel confident going into the coming years.

In an unusual turn of events, artists will now hold superior bargaining power in contract negotiations, and 2013 will mark a permanent deadline for many record companies and similar holders to adopt a fairer approach to begin dealings with artists if they wish to retain any rights in the works at all. Nonetheless, due to significant developments in technology over the last two decades, it seems that, regardless of which party is awarded ownership rights, the victor may be left with the most daunting task of all: enforcing those rights in a digital age.

III. PROTECTING OWNERSHIP RIGHTS IN THE DIGITAL AGE

The advancement of technology will impact any industry as products are moved faster, more efficiently, and on a greater scale. The music industry is no different. For example, the introduction of blank cassette tapes in the early 1960s had a profound impact on the industry as it allowed consumers the capability, for the first time, to create manual recordings of songs on public radio. This process, known as "time shifting," afforded consumers the ability to listen to recorded songs at any time, rather than being subject to a radio station's playlists.[34] As

---

[31] *Id.*

[32] 17 U.S.C §§ 203(a), 304(c)(5) (2002) ("Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."); *see also* Penguine Grp. (USA) Inc. v. Steinbeck, 537 F.3d 193, 201-02 (2d Cir. 2008).

[33] Mills Music, Inc., v. Snyder, 469 U.S. 153, 172-73 (1985).

[34] *See* Sony Corp. of Am. v. Universal City Studios, Inc, 464 U.S. 417, 421 (1984).

duplication technology improved and became widely available to the public, copyright infringement became a very real concern.

Copyright infringement occurs when a person "violates any of the exclusive rights of the copyright owner…" [35] Further, courts recognize that copyright liability extends not just to those who infringe directly but also to those who contribute to or vicariously profit from the infringing acts of others.[36] Indirect infringement, which encompasses vicarious and contributory infringement, has become a substantial fear in the music industry. In response to industry concerns, Congress elected to further revise the 1976 Act by passing the 1998 Digital Millennium Copyright Act (the "DMCA"); which, among other things, could extend copyright protection to intellectual property and broaden protection in the digital age.[37] However, as time and technology progressed it became increasingly obvious that, even with the added protection of the DMCA, authors and record companies were faced with increased infringement of their rights, and the overwhelming burden of enforcing their rights in an age that has seen the rise and fall of Napster Inc., the unfathomable growth of Apple Inc., and the widespread launch of YouTube, Inc.

A. A New Technology

The advent of peer-to-peer ("P2P") technology, for lack of a better description, *blindsided* the music industry like never before. P2P technology eliminates the need for a central server and allows each user (consumer) to transfer data to one another for free and with ease through a network of computer systems connected over the Internet.[38] Though the back-story has been the subject of much debate, the development of P2P technology is largely credited to Shawn Fanning when he created the file-sharing program Napster™ ("Napster") in his dorm room while a student at Boston's Northeastern University.[39] Napster quickly became the fastest-growing application in the history of the Internet and its effect on the music industry was unprecedented.[40] In essence, Napster is a file-sharing program and through its platform, users were able to download and share studio-quality songs and full-length albums for free. The impact on the

---

[35] 17 U.S.C. § 501 (2002) (defining copyright infringement).
[36] William Landes & Douglas Lichtman, *Indirect Liability for Copyright Infringement; Napster and Beyond*, 17 J. ECON. PERSP., no. 2, p. 113–124 at 115-16, *available at* http://pubs.aeaweb.org/doi/pdfplus/10.1257/089533003765888467.
[37] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).
[38] *P2P*, TECHTERMS, http://www.techterms.com/definition/p2p (last visited Sept. 19, 2012) (defining "P2P").
[39] Don Dodge, *Napster- the inside story and lessons for entrepreneurs*, DON DODGE ON THE NEXT BIG THING – THOUGHTS ON BUSINESS AND TECHNOLOGY (Oct. 5, 2005, 2:50 PM), http://dondodge.typepad.com/the_next_big_thing/2005/10/napster_the_ins.html.
[40] *Id.*

music industry was massive,[41] leaving artists and recording companies with a fraction of the profits and the unsettling reality that the music industry would never be the same.

The courts responded to industry concerns with perhaps the most historic decision of this digital era. In *A&M Records, Inc. v Napster, Inc.*, the United States 9th Circuit Court of Appeals held that A&M Records effectively showed that Napster was in violation of the Copyright Act by knowingly facilitating the ability to illegally upload and transfer copyrighted material for commercial use by its users.[42] Further, the court emphasized that due to Napster's knowledge of the infringing acts and its failure to remove such blatantly infringing content from its system, the "safe harbor" defense under the DMCA was not available.[43] The burden imposed by the court requiring Napster to restrain transfer of infringing files as well as the potentially devastating liability eventually pushed Napster into bankruptcy, ending the file-sharing program's immense influence on the music market.

Napster certainly looked like a win for the music industry, as it was now armed with solid court precedent that could be carried forward to subsequent lawsuits against similar file sharing programs[44] and even individuals.[45] However, the court's warning shot to infringers ultimately proved to be a dud. Despite the fact that the music industry began legal proceedings against approximately thirty-five thousand people since 2003, it "did little to stem the tide of illegally downloaded music, [and in 2008]… [a]fter years of suing thousands of people for allegedly stealing music via the Internet, the recording industry [dropped] its legal assault … [against] online music piracy."[46]

B. A Changing Environment

Even with the *Napster* decision on its side, the music industry remained in upheaval and the future of profitable music sales was in serious jeopardy. Music needed a white knight; a visionary that would revolutionize the industry and re-ignite the riches that music stores once garnered. The industry did not have to wait long, and with the launch of its iTunes™ Music Store ("iTunes") in January 2003, it was clear that Apple, Inc. ("Apple") had firmly embraced the role as the savior of the music industry.

---

[41] *See* RIAA, *supra* note 2 ("In the decade since … Napster emerged in 1999, music sales in the U.S. have dropped 47 percent, from $14.6 billion to $7.7 billion.").
[42] A&M Records, Inc. v Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
[43] *Id.* at 1025; *see also* 17 U.S.C. § 512(d) (2010).
[44] *E.g*, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
[45] *See Woman Faces the Music, Loses Download Case*, CBSNEWS (Feb. 11, 2009 4:07 PM), http://www.cbsnews.com/stories/2007/10/04/national/main3330186.shtml.
[46] Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1 ("In 2003, the industry sold 656 million albums. In 2007, the number fell to 500 million CDs and digital albums, plus 844 million paid individual song downloads -- hardly enough to make up the decline in album sales.").

iTunes not only produced profits, it exploded onto the music scene and has yet to falter. Just two years after its launch in 2003, iTunes reported $500 million in sales.[47] By February 2006, sales reached $1 billion; $3 billion by July 2007; and, in February 2010, Apple reported an unbelievable $10 billion in sales.[48] These statistics prove that, "on average, more than 46 songs have been purchased on iTunes every single second, since the store launched on April 28, 2003,"[49] and the online store currently accounts for 28% of all music sales within the United States.[50] Simply put, Apple is massive, and the influence its iTunes platform has on the music industry is mind-boggling.

Based on these numbers, it seems inconceivable that artists would *not* want to license their music on iTunes if just for the exposure alone. Yet, artists argue that Apple's influence on the music marketplace may prove to be more negative than positive. Among the many objections that artists and record companies raise is the concern that Apple has become too powerful, giving the company an unfair advantage in the market place and allowing it to charge higher licensing fees. As a result, record companies contend that they find themselves in a tough position when looking to license to a publisher. Either they can license to iTunes, possibly giving up many of their financial rights, or they can try a less recognized music retailer, an option that is actually not uncommon but frequently results in decreased sales.[51] Artists, on the other hand, are mindful of the risks that accompany snubbing the online retailer, recognizing that "not only is [iTunes] the biggest force in music sales, but keeping songs off the service could prompt listeners to look for illegal downloads instead."[52] As a result, even outspoken opponents of iTunes recognize the influence that Apple holds on the marketplace and admit that licensing on iTunes is essentially unavoidable.[53]

With Apple dominating the music industry, artists and record companies believe they are effectively forced to license on iTunes; a platform that, they argue, uses a technology that unfairly allows consumers to purchase individual songs at minimal cost rather than paying the cost for full albums. Many artists and record companies believe that Apple's platform strips them of their rights to

---

[47] Mike Luttrell, *Never-ending iTunes sales tally hits 10 billion*, TG DAILY (Feb. 24, 2010 9:01 PM), http://www.tgdaily.com/consumer-electronics-brief/48578-never-ending-itunes-sales-tally-hits-10-billion.

[48] *Id.*

[49] *Id.*

[50] Chris Brandrick, *iTunes Accounts for 28% of U.S. Music Sales*, GIGAOM (May 26, 2010, 1:10 PM), http://gigaom.com/apple/itunes-accounts-for-28-of-u-s-music-sales/.

[51] Many artists including Kid Rock, Garth Brooks, and groups AC/DC and the Eagles have all decided to snub iTunes. *See* Ian Youngs, *Kid Rock Boycotts iTunes Over Pay*, BBC NEWS (June 18, 2008 10:25 GMT), http://news.bbc.co.uk/2/hi/7459796.stm; *see also* Ethan Smith & Nick Wingfield, *More Artists Steer Clear of iTunes*, WALL ST. J., Aug. 28, 2008, at B1. ("decision to sell [the Eagles] album, 'Long Road Out of Eden,' only through Wal-Mart.").

[52] Smith & Wingfield, *supra* note 51.

[53] Youngs, *supra* note 51.

effectively market the albums efficiently as complete works,[54] turning the "business back into a singles business."[55] The financial effect the platform has on artists and record companies is costly and does not seem to be slowing.[56] In fact, 2011 marked the first time in history that digital music sales exceeded physical sales.[57]

C. A New Threat

As artists and record companies attempted to adapt to Apple's dominance in the marketplace, technology continued to advance and new concerns began to arise. Most notably, 2005 marked the launch of online service provider YouTube™ ("YouTube"), bringing an extraordinary technology that allows "billions of people to discover, watch and share originally-created videos," with ease.[58] Due to the accessibility and simplicity of the website, users are not only able to upload their own, self-created content, but also large amounts of third party copyrighted material without the requisite consent from owners. The sheer volume of the content and the minimal policing of such material by YouTube has resulted in massive amounts of unlicensed and illegal content on the website. As a result of the large database and high-functioning search engine, users are able to search for nearly any song ever recorded and listen to a studio-quality version, without ever having to download the file or pay for the access.

YouTube's advanced technology, enormous database, and seeming lack of regulation form the basis of artist and record company complaints against the online service provider in which they assert that consumers no longer need to purchase music because they can stream any song online for free; making their assertions eerily similar to the winning arguments leveled against Napster. However, YouTube opponents contend that the provider poses a much more serious problem than Napster ever threatened as users are able to enjoy the same benefits that Napster users were afforded, but are now provided with unlimited music libraries. Artists and record companies argue that this creates a significant problem and enormous loss of revenue to the industry, a problem that is exasperated by the considerable size of YouTube's user-base. In fact, YouTube's widespread reach is, by all accounts, staggering. By February 2010, YouTube boasted approximately 48.2 million users worldwide,[59] who

---

[54] *Id.*

[55] Ethan Smith & Nick Wingfield, *supra* note 51.

[56] *Id.* ("Pop singer Katy Perry has sold 2.2 million downloads of her hit song 'I Kissed a Girl' in the U.S., nearly 10 times the 282,000 copies she has sold of her 'One of the Boys' album" which contains the song.).

[57] Laurie Segall, *Digital Music Sales Top Physical Sales*, CNN MONEY (Jan. 5, 2012, 5:47 PM), http://money.cnn.com/2012/01/05/technology/digital_music_sales/index.htm.

[58] YOUTUBE, http://www.youtube.com/t/about_youtube (last visited Aug. 23, 2012).

[59] *Number of YouTube Users*, #NUMBEROF.NET, http://www.numberof.net/number-of-youtube-users/ (last visited April 6, 2013).

collectively uploaded over seventy-two hours of video every minute,[60] thus resulting in nearly twelve years of content uploaded every day.

Arguments against YouTube came to a head in 2007 when Viacom International Inc. ("Viacom") brought suit against YouTube for knowingly allowing infringing material to be supplied through its website.[61] Viacom, a global entertainment company, claimed that YouTube knowingly provided a platform where "tens of thousands of videos . . . resulting in hundreds of millions of views, were taken unlawfully from Viacom's copyrighted works without authorization."[62] Viacom's argument was silenced when the court found that YouTube had responded adequately to copyright holder take-down notifications by removing the infringing content and was therefore protected by the Safe Harbor provisions of the DMCA; the very defense that Napster had failed to establish.[63]

The court, mindful of the immense amount of content that is uploaded on YouTube and similar sites every day, emphasized that the "DMCA notification procedures place the burden of policing copyright infringement—identifying the potentially infringing material and adequately documenting infringement—squarely on the owners of the copyright"[64] and declined "to shift a substantial burden from the copyright owner to the provider."[65] Thus, not only had the music industry failed to substantially limit the presence of unlicensed content on YouTube, but the opinion also affirmed that the task of protecting ownership rights lay solely with the work's owners and not the content provider.

IV. CONCLUSION

Starting in 2013, record companies and artists are expected to face off to untangle a web of copyright laws and determine "who owns what." Artists may see the approaching years as a long awaited justification for the unfair dealings that have persisted for far too long, while record companies may see it as yet another obstacle to surviving a digital era that has already devastated them through online piracy. Nevertheless, what is undoubtedly certain is that January 1, 2013 marked the beginning of a flurry of lawsuits, settlement agreements, commentary and lobbying efforts that may threaten to upend the music industry as artists and records companies fight for their respective survival in an industry that changes all too quickly.

---

[60] YOUTUBE, http://www.youtube.com/t/press_statistics (last visited April 6, 2013).
[61] Viacom Int'l Inc. v. YouTube Inc., 07 Civ. 2103 (S.D.N.Y. Jun. 23, 2010) *available at* http://i.zdnet.com/blogs/viacom-youtube-ruling.pdf.
[62] *Id* at 6.
[63] *Id.*
[64] Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007).
[65] *Id.*