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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

The SEVENTH CIRCUIT REVIEW is a semiannual, online journal dedicated to the analysis of recent opinions published by the United States Court of Appeals for the Seventh Circuit. The SEVENTH CIRCUIT REVIEW seeks to keep the legal community abreast of developments and trends within the Seventh Circuit and their impact on contemporary jurisprudence. The articles appearing within the SEVENTH CIRCUIT REVIEW are written and edited by Chicago-Kent College of Law students enrolled in the SEVENTH CIRCUIT REVIEW Honors Seminar.

The SEVENTH CIRCUIT REVIEW Honors Seminar

In this seminar, students author, edit, and publish the SEVENTH CIRCUIT REVIEW. The REVIEW is entirely student written and edited. During each semester, students identify cases recently decided by the Seventh Circuit to be included in the REVIEW, prepare initial drafts of case comments or case notes based on in-depth analysis of the identified cases and background research, edit these drafts, prepare final, publishable articles, integrate the individual articles into the online journal, and "defend" their case analysis at a semester-end roundtable. Each seminar student is an editor of the REVIEW and responsible for extensive editing of other articles. Substantial assistance is provided by the seminar teaching assistant, who acts as the executive editor.
The areas of case law that will be covered in each journal issue will vary, depending on those areas of law represented in the court's recently published opinions, and may include:

- Americans with Disabilities Act
- antitrust
- bankruptcy
- civil procedure
- civil rights
- constitutional law
- copyright
- corporations
- criminal law and procedure
- environmental
- ERISA
- employment law
- evidence
- immigration
- insurance
- products liability
- public welfare
- securities

This is an honors seminar. To enroll, students must meet *one* of the following criteria: (1) cumulative GPA in previous legal writing courses of 3.5 and class rank at the time of registration within top 50% of class, (2) recommendation of Legal Writing 1 and 2 professor and/or Legal Writing 4 professor, (3) Law Review membership, (4) Moot Court Honor Society membership, or (5) approval of the course instructor.
This issue marks the third full volume of the SEVENTH CIRCUIT REVIEW and the end of my term as executive editor. Since its inaugural issue, the REVIEW has continued to grow in popularity and has carved out a unique niche in the legal community. As I pass on the executive editor duties to Sandra Stipp, I am confident that the SEVENTH CIRCUIT REVIEW will continue to offer thoroughly researched, in-depth coverage of the most recent and important decisions of the Seventh Circuit Court of Appeals.

Contributions from many people have made this latest volume possible. The student editors deserve credit for the high level of scholarship and analysis evident in each article. In addition, Chicago-Kent’s Office of Public Affairs has provided the REVIEW with invaluable technical support and a simple and efficient process for publication. Finally, support from Dean Harold Krent and numerous other professors has helped cement the REVIEW as a permanent institution at Chicago-Kent.

In closing, I would like to thank Professor Hal Morris for his strong commitment to the SEVENTH CIRCUIT REVIEW and to the students of Chicago-Kent College of Law. I cannot imagine a more enjoyable, informative, and rewarding law school experience than being a part of this laudable institution. Thank you, Professor Morris, for personally inspiring me and for creating an unparalleled opportunity for future editors of the SEVENTH CIRCUIT REVIEW.

Sincerely,

Justin Nemunaitis
Executive Editor, SEVENTH CIRCUIT REVIEW
DING, DONG, CONLEY’S DEAD: BELL ATLANTIC CHANGES THE FEDERAL PLEADING STANDARD

BRETT A. SALTZMAN

Cite as: Brett A. Saltzman, Ding, Dong, Conley’s Dead: Bell Atlantic Changes the Federal Pleading Standard, 3 SEVENTH CIRCUIT REV. 491 (2008), at http://www.kentlaw.edu/7cr/v3-2/saltzman.pdf.

INTRODUCTION

In 1957, Justice Hugo Black, writing for the Supreme Court in Conley v. Gibson, penned the famous words, that “[i]n appraising the legal sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”1 For the next 50 years, this language both defined and embodied the standard for pleading a complaint in the federal court system, under Rule 8(a)(2) of the Federal Rules of Civil Procedure.2 However, in Bell Atlantic v. Twombly, the Supreme Court, stating that Conley’s “no set of facts” language has been “questioned, criticized, and explained away long enough,” concluded that “this famous observation has earned its retirement.”3

* J.D. candidate, May 2008, Chicago-Kent College of Law, Illinois Institute of Technology. To Mom and Dad with love, everything that I am, I owe to you. Also, special thanks to Professor Joan Steinman for her edits and commentary on the rough drafts of my article. Her input was invaluable and deeply appreciated.

2 Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007) (stating that Conley’s “no set of facts” language has been cited by federal courts over 10,000 times in different contexts).
Writing for the *Bell Atlantic* majority, Justice Souter held that a well-pleaded complaint must contain factual allegations sufficient “to raise a right to relief above the speculative level.” Yet nowhere in Rule 8(a)(2) is there any mention of “facts” or “factual allegations.” Rather, the drafters of Rule 8 were careful to avoid any reference to “facts,” “evidence,” or “conclusions” in the Federal Rules, so as to avoid the confusion that abounds under the Field Code of 1848. To achieve this goal, the drafters intentionally substituted the phrase, “claim showing that the pleader is entitled to relief,” in place of the code formulation, “facts constituting a cause of action.” The *Conley* decision embraced this relaxed standard of pleadings, which sought to keep litigants in the court system rather than force them out of it. Under *Conley*, outright dismissal of a claim was only permitted when the judge had determined—that proceeding to discovery or beyond would be futile. The express disavowal of *Conley’s* “no set of facts” language

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4 *Id.* at 1965.
5 Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”
6 *Fed. R. Civ. P. 8(a).*
7 *Bell Atlantic,* 127 S. Ct. at 1975-76 (Stevens, J., dissenting). In 1848, David Dudley Field created the New York Code, which required “[a] statement of facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.” 1848 N. Y. Laws pp. 497, 521. The predecessor to modern notice pleading, the New York Code of 1848, while more accessible by the common litigant than the Hilary Rules of 1834, implemented a pleading spectrum that confounded many commentators. The spectrum moved from evidentiary facts, to ultimate facts, to conclusions of law, with the goal being to plead only the ultimate facts. However, the distinctions between these three groupings were not abundantly clear and often times were too subtle to provide any substantive guidance.
8 *Bell Atlantic,* 127 S. Ct. at 1976 (Stevens, J., dissenting) (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004)) (emphasis added).
9 *Id.* (emphasis added).
10 *Id.* at 1976-77.
11 *Id.* at 1977.
by the Supreme Court indicates a heightening of federal pleading standards, despite the *Bell Atlantic* majority’s unconvincing insistence that they remain unchanged.12

In the wake of *Bell Atlantic*, the federal appellate courts have been put to the task of interpreting the Supreme Court’s opinion and applying this new standard of federal pleading to the cases before them. Part I of this Note reviews the relevant background required to discuss the Seventh Circuit’s interpretation of *Bell Atlantic*. This background includes Federal Rules of Civil Procedure 8(a) and 12(b)(6), the Supreme Court’s decision in *Conley*, and the Seventh Circuit’s pre-*Bell Atlantic* Rule 12(b)(6) jurisprudence. Part II dissects the Supreme Court’s opinion in *Bell Atlantic* and looks at the Supreme Court’s subsequent decision in *Erickson v. Pardus*.13 Part III discusses two Seventh Circuit cases—*EEOC v. Concentra Health Services, Inc.*14 and *Airborne Video & Beepers, Inc. v. AT & T Mobility LLC*15—that interpret the Supreme Court decision in *Bell Atlantic*. Part IV explores the way in which the district courts have applied *Concentra* and *Airborne*. This Note concludes with a recapitulation of what is required for a complaint to withstand a Rule 12(b)(6) motion to dismiss in the Seventh Circuit, as well as a brief discussion of the impact that *Concentra*, *Airborne* and the other recent Seventh Circuit decisions will have on practitioners in the Seventh Circuit.

I. BACKGROUND

Before discussing *Bell Atlantic*, it is necessary to understand Federal Rules of Civil Procedure 8(a) and 12(b)(6), as well as the history of the Supreme Court’s Rule 8(a) jurisprudence.

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12 *Id.* at 1973.
14 496 F.3d 773 (7th Cir. 2007).
15 499 F.3d 663 (7th Cir. 2007).
A. Federal Rules of Civil Procedure 8(a) and 12(b)(6)

Federal Rule of Civil Procedure 8 lays out the general rules of pleading in the federal court system. Subsection (a) of Rule 8 specifically describes what information a claim for relief (also referred to in this Note as the complaint) must contain:

(a) Claim for Relief. A pleading that states a claim for relief must contain:
   (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
   (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
   (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Court’s interpret Rule 8(a)(2) when determining the standard of pleading in the federal court system. A defendant can test the sufficiency of a plaintiff’s complaint by making a motion under Rule 12(b)(6) for “failure to state a claim upon which relief can be granted.” If the complaint has not satisfied the requirements of Rule 8(a), this motion should be granted by the court. The key question is what information Rule 8(a)(2) requires to be stated in the complaint. Conley v. Gibson was one of the first cases to provide an answer to this question.

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17 Id.
20 Id.
B. Conley v. Gibson

In Conley, plaintiffs brought a class action suit under the Railway Labor Act alleging discrimination against them by their bargaining agents. The complaint alleged that the petitioners were employees of the Texas and New Orleans Railroad; that Local 28 of the Brotherhood was the designated bargaining agent for the petitioners under the Railway Labor Act; and that a contract existed between the Union and the Railroad which provided the employees in the bargaining unit certain protections against discharge and loss of seniority. It further alleged that in May of 1954, the Railroad purported to abolish 45 jobs held by the petitioners or other black railroad workers and that all of the petitioners were either discharged or demoted. The complaint further stated that the 45 jobs were not actually abolished, but instead filled by whites as the blacks were forced to leave; that despite pleas from the petitioners, the Union did nothing to protect them from the racially discriminatory discharges; and that the Union refused to give them protection comparable to that afforded to white employees. Ultimately, the petitioners alleged that the Union was acting according to a plan and that under the Railway Labor Act such discrimination violated petitioners’ rights to fair representation from their bargaining agent. Petitioners asked for a declaratory judgment, an injunction and damages.

The respondents moved to dismiss the complaint on several grounds including that the complaint failed to state a claim upon which relief could be given. The district court dismissed the case due to lack of jurisdiction, finding that the National Railroad Adjustment Board had exclusive jurisdiction over the controversy, and the Fifth Circuit Court of Appeals affirmed. The Supreme Court of the United States granted certiorari and held that the dismissal for lack of

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21 Conley, 355 U.S. at 42.
22 Id. at 43
23 Id.
24 Id.
25 Id.
jurisdiction was error. The Supreme Court also decided the respondents’ Rule 12(b)(6) motion, even though it had not been decided below because of the lower court’s ruling on the jurisdictional issue. The Court found it proper to rule on the respondent’s motion because both parties had already briefed the issue and the respondents urged the Court to uphold the decision below on grounds other than lack of jurisdiction if necessary.

Justice Black first set forth the above-quoted and oft-cited rule that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” In adjudicating the sufficiency of the petitioners’ complaint, the Court looked to the general principle that the Railway Labor Act prohibits discrimination in representation on the basis of race. Because the petitioners alleged in their complaint that the Union denied them protection on the basis of their race, the allegations, if proven, would demonstrate that the Union breached its statutory duty to fairly represent all of the employees of the bargaining unit. As such, petitioner’s complaint sufficiently stated a claim upon which relief could be granted.

The respondents argued that dismissal was proper because the petitioners’ complaint failed to set forth specific facts in support of its general allegations of discrimination. However, the Court stated emphatically that:

26 Id. at 44
27 Id. at 45
28 Id.
29 Id. at 45-46
31 Conley, 355 U.S. at 46.
32 Id. at 48.
33 Id. at 47.
[T]he Federal rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.\textsuperscript{34}

According to Justice Black, this loose standard of pleading—referred to as “notice pleading”—was made possible by the opportunity for discovery and the other pretrial procedures authorized by the Federal Rules.\textsuperscript{35} These devices, and not the pleadings, are aimed at more precisely establishing the basis of the plaintiff’s claims.\textsuperscript{36}

In dozens of cases over the next half century, the Supreme Court and the federal courts of appeals followed Justice Black’s reasoning from\textit{Conley} and cited his “no set of facts” language as the standard for notice pleading required by Rule 8(a)(2).\textsuperscript{37} Although court’s\textsuperscript{38} and

\begin{footnotes}
\item[34]\textit{Id.}
\item[35]\textit{Id.} at 47-48
\item[36]\textit{Id.}
\item[37]In Justice Stevens’ dissent in\textit{Bell Atlantic}, 127 S. Ct. at 1978, he provides the following string citation to illustrate his point that \textit{Conley}’s “no set of facts” language has indeed been the federal pleading standard since the Court’s decision in\textit{Conley} in 1957:

scholars frequently questioned this standard over that period of time, the viability of Conley remained intact until Bell Atlantic v. Twombly.

C. The Seventh Circuit’s Pre-Bell Atlantic Rule 12(b)(6) Jurisprudence

In Doe v. Smith, the plaintiff, a 16-year-old girl, engaged in consensual sexual relations with the defendant. Unbeknownst to plaintiff, the defendant used a hidden camera to make a recording of the two in bed together. Plaintiff alleged that after their relationship ended the defendant circulated copies of the videotape via email, and

38 Bell Atlantic, 127 S. Ct. at 1969 (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989); O’Brien v. DiGrazia, 544 F.2d 534, 546 n.3 (1st Cir. 1976); McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 42-43 (6th Cir. 1988)).


41 429 F.3d 706, 707 (7th Cir. 2005).

42 Id.

43 Id.
that at least one of the recipients posted the recording on the internet.44

Plaintiff filed suit under the federal wire-tapping statute,45 alleging that
the video recording was an unauthorized interception, and that its
disclosure was forbidden.46 The district court dismissed under Rule
12(b)(6) for failure to state a claim upon which relief can be granted.47
It ruled that plaintiff’s complaint was deficient because it failed to
allege that the recording was an “interception” within the meaning of
§2510(4).48 The Seventh Circuit Court of Appeals reversed and
remanded.49

Writing for the court, Judge Easterbrook agreed that the complaint
did not allege that the defendant “intercepted” anything.50 However, he
wrote:

[P]leadings in federal court need not allege facts

44  Id.
46  Smith, 429 F.3d at 707.
47  Id. at 708.
48  Id.
49  Id. at 710.
50  Id. at 708.
51  Id.
52  Id.
Judge Easterbrook cautioned that district court judges tempted to dismiss a complaint because it does not contain a specific allegation should recall that only those claims explicitly stated in Rule 9(b) are required to be pleaded with particularity. Because “interception” is not on Rule 9(b)’s short list, it was error by the district court to dismiss.

In *Kolupa v. Roselle Park District*, the Seventh Circuit Court of Appeals followed the reasoning of the *Smith* court. Plaintiff, Christopher Kolupa, alleged that the defendant violated Title VII of the Civil Rights Act of 1964 by firing him on account of his religious beliefs. The district judge dismissed the complaint for failure to state a claim upon which relief could be granted. On appeal, Judge Easterbrook affirmed in part, reversed in part, and remanded the case for proceedings consistent with the court’s opinion.

Judge Easterbrook began by explaining the applicable federal pleading standard. He wrote that, “Federal complaints plead claims rather than facts . . . It is enough to name the plaintiff and the defendant, state the nature of the grievance, and give a few tidbits (such as the date) that will let the defendant investigate. A full narrative is unnecessary.” In order to state a claim for religious discrimination, a plaintiff is only required to “recite that the employer has caused some concrete injury by holding the worker’s religion against him.”

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53 *Id.*
54 *Id.*
55 438 F.3d 713 (7th Cir. 2006) *overruled by* EEOC v. Concentra Health Servs., Inc., 496 F.3d 773 (7th Cir. 2007).
57 *Kolupa*, 438 F.3d at 714.
58 *Id.*
59 *Id.* at 716.
60 *Id.* at 714.
61 *Id.*
62 *Id.*
The district judge dismissed the plaintiff’s complaint because it failed to allege that the other employees were similarly situated with respect to him, or that the other employees were outside of the protected class. According to Judge Easterbrook, however, it was error on the part of the district court to require the plaintiff to plead facts that pertain to every aspect of a prima facie case for a Title VII violation. Citing the *Smith* decision, Judge Easterbrook reiterated “that complaints need not plead facts and need not narrate events that correspond to each aspect of the applicable legal rule. Any decision declaring ‘this complaint is deficient because it does not allege X’ is a candidate for summary reversal, unless X is on the list of Fed. R. Civ. P. 9(b).” He reversed the lower court’s decision with respect to the discriminatory discharge claim.

Plaintiff’s complaint also alleged that the Park District failed to accommodate his religious beliefs, failed to promote him, and retaliated against him when he tried to protect his rights. Judge Easterbrook affirmed the dismissal of these claims because there was no mention made of them in the plaintiff’s administrative charge.

**II. THE RECENT SUPREME COURT DECISIONS**

**A. Bell Atlantic Corp. v. Twombly**

In *Bell Atlantic*, plaintiffs William Twombly and Lawrence Marcus brought a class action suit on behalf of the subscribers of local telephone and/or high speed internet services against the incumbent local exchange carriers (“ILECs”) that comprise Bell Atlantic...
Corporation. The complaint alleged violations of Section 1 of the Sherman Antitrust Act, which proscribes “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or foreign nations.” The complaint alleged that the Bell Atlantic ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of competitive local exchange carriers (“CLECs”) and (2) by agreeing to refrain from competing against one another, as evidenced by their common failure to pursue attractive business opportunities in contiguous markets, and by a statement of one ILEC’s CEO that competing in another ILEC’s territory did not seem right.

The district court dismissed the complaint because it found that the plaintiffs failed to state a claim upon which relief could be granted. It reasoned that mere allegations of parallel business conduct do not state a claim under Section 1 of the Sherman Act, and that the plaintiffs are required to allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel action of the ILECs. On appeal, the Second Circuit, citing Conley, reversed the trial court’s ruling and held that plaintiffs’ complaint was sufficient to withstand a Rule 12(b)(6) motion because the ILECs failed to show that there is “no set of facts” that would permit the plaintiffs to demonstrate that the parallel conduct they alleged was the product of collusion rather than coincidence.

The United States Supreme Court granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct. In reversing the Second Circuit and reinstating the trial court’s dismissal of the plaintiffs’ complaint, the

70 Id.
71 Id.
73 Id.
75 Bell Atlantic, 127 S. Ct. at 1963.

503
Court held that even though a complaint need not contain detailed factual allegations, “a plaintiff’s obligation to demonstrate the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”

“Factual allegations must be enough to raise a right to relief above the speculative level,” and absent at least some factual allegations in the complaint, “it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claims, but also ‘grounds’ on which the claim rests.”

The Court’s rationale for requiring such factual allegations in the complaint was rooted in the rising costs of litigation and of compliance with discovery, in particular. According to the Court, a complaint that contains no factual allegations does not give rise to a “reasonable expectation” that discovery will reveal any evidence of the conduct complained of and “this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.”

The Court mentioned that the expense of antitrust discovery, the use of discovery by plaintiffs to extract nuisance value from suits, and the increasing caseload of the federal court system all weighed in favor of requiring a plaintiff to demonstrate the plausibility of his claims at the pleading stage.

Plaintiffs’ main argument against the “plausibility standard” was based on Justice Black’s “no set of facts” language from the Court’s decision in Conley. However, the Court says that Conley’s “no set of facts” language never was intended to be read literally or in isolation, and that such a narrow reading of those words led to the erroneous conclusion that “a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the

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76 Id. at 1964-1965.
77 Id. at 1965.
78 Id. at 1965-1966.
79 Id. at 1966.
80 Id. at 1966-1967.
81 Id. at 1966-1967.
82 Id. at 1968.
possibility that a plaintiff might later establish some ‘set of undisclosed facts’ to support recovery.” 83 Rather, the Court stated that *Conley* stands for the proposition that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”84 In dismissing the complaint, the Court reasserted that it was not applying a heightened pleading standard in the context of antitrust litigation, but instead was clarifying and enunciating an often misunderstood legal principle.85

According to the *Bell Atlantic* dissent, however, there is not, nor has there ever been, any confusion about the standard of notice pleading that has dominated the federal system for the last 50 years.86 Justice Stevens—the author of the dissent—believes that two practical concerns are at the heart of the Court’s departure from “settled procedural law.”87 Namely, the extraordinary expense that antitrust litigation can impose on a defendant, and the risk that jurors may believe that evidence of parallel conduct is sufficient to find an agreement as opposed to similar decisions made while defendants act independently of one another.88

In response to these legitimate concerns, Justice Stevens argued that careful case management, strict controls over the discovery process, close examination of the evidence at the summary judgment stage, and carefully crafted jury instructions offer a satisfactory solution.89 He did not believe that the Majority’s concerns provided a sufficient reason to dismiss an adequately pleaded complaint and to allow the defendants to avoid filing an answer in which they could deny, or perhaps admit, that they acted, or omitted to act, in concert.90

83 Id. at 1968-1969.
84 Id. at 1969.
85 Id. at 1973.
86 Id. at 1978 (Stevens, J., dissenting).
87 Id. at 1975
88 Id.
89 Id.
90 Id.
The dissent went on to describe the history of pleading rules throughout the Anglo-American experience, noting the stringency with which such rules were applied in the early 19th century and the relaxation of these standards as time passed.91 According to Justice Stevens, the goal of the relaxed pleading requirements of the Federal Rules “was not to keep litigants out of court but rather to keep them in,” and Conley’s “no set of facts” language is consistent with that goal. Its “formulation permits outright dismissal only when proceeding to discovery or beyond would be futile.”92

In further support of the dissenters’ belief that Rule 8(a)(2) does not require a plaintiff to plead any specific facts in the complaint, the dissent pointed to Rule 9’s imposition of a “particularity” requirement on all complaints that allege fraud or mistake.93 Given the canon of statutory construction expressio unius est exclusion alterius—“the expression of one is the exclusion of others”—it argued that Congress clearly did not intend plaintiffs who are not alleging fraud or mistake to have to plead with the kind of factual specificity required by the majority.94

B. Erickson v. Pardus

Just two weeks after Bell Atlantic, the Supreme Court handed down another opinion regarding Rules 8(a)(2), 12(b)(6) and the federal pleading standard.95 In Erickson, a prison inmate filed suit under 42 U.S.C. § 1983, for violations of his Eighth and Fourteenth Amendment rights by prison officials at the Limon Correctional Facility in Colorado.96 The petitioner, William Erickson, alleged that a liver condition that resulted from hepatitis C required a medical treatment

91 Id. at 1975-1976
92 Id. at 1977
93 Id. at 1977 n.4
94 Id.
95 The decision in Bell Atlantic was handed down on May 21, 2007. The Court decided Erickson on June 4.
program that the officials had commenced but wrongfully terminated, consequently putting his life in danger.\footnote{Id. at 2197-98.} The district court dismissed petitioner’s complaint for failure to state a claim, and the Court of Appeals for the Tenth Circuit affirmed, characterizing the complaint’s allegations as “conclusory.”\footnote{Id. at 2198.} The Supreme Court vacated the judgment from below and remanded the case for further review.\footnote{Id.}

According to petitioner’s complaint, officials at the Colorado Department of Corrections (“Department”) diagnosed the petitioner with hepatitis C.\footnote{Id.} Petitioner began treatment for the disease after completing the necessary courses and complying with Department procedures.\footnote{Id.} The year-long treatment program required the use of a syringe for weekly self-injections of medication.\footnote{Id.} However, after petitioner’s treatment began prison officials were unable to account for one of the syringes made available to him and the other prisoners receiving similar medical attention.\footnote{Id.} Eventually, they found it in a communal trash can, modified in a manner which suggested illegal drug use.\footnote{Id.}

The prison officials, disbelieving petitioner’s claim that he had not taken the syringe, cited him for violating the Colorado penal code’s provisions against possession of drug paraphernalia.\footnote{Id.} Furthermore, petitioner was removed from his treatment program as a result of the officials’ assessment that he intended to use drugs.\footnote{Id.} Petitioner alleged that “Dr. Bloor had ‘removed [him] from [his] hepatitis C treatment’ in violation of department protocol, ‘thus endangering [his]
life. "107 He requested relief including damages and an injunction requiring the Department to resume his treatment for hepatitis C.108

Three months after filing his complaint, petitioner filed a Motion for expedited Review Due to Imminent Danger indicating it was undisputed that he had hepatitis C, that he met the Department’s standards for treatment of the disease, and that his liver was suffering irreversible harm due to lack of treatment.109 Respondents filed a motion to dismiss, and the Magistrate Judge before whom the motion was pending recommended that the District Court dismiss the complaint because petitioner failed to allege that Dr. Bloor’s actions caused him “substantial harm.”110 The District Court agreed with the Magistrate Judge and dismissed the complaint.111 The Court of Appeals affirmed, stating that petitioner had failed to “allege that as a result of the discontinuance of the treatment itself shortly after it began or the interruption of treatment for approximately eighteen months he suffered any harm, let alone substantial harm, [other] than what he already faced from Hepatitis C itself[.]”112

The Supreme Court granted certiorari and, in a Per Curiam opinion, reversed the decision from below, holding that “[i]t was error for the Court of Appeals to conclude that petitioner’s allegations were too conclusory to establish for pleading purposes that petitioner had suffered ‘a cognizable independent harm’ as a result of his removal from the hepatitis C treatment program.”113 Quoting Justice Stevens’ opinion from Bell Atlantic, the Court stated that “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’ Specific facts are

107 Id. at 2199 (quoting Petitioner’s Complaint) (brackets in original).
108 Id.
109 Id.
110 Id. (quoting the Magistrate Judge’s Recommendation on Defendants’ Motion to Dismiss).
111 Id.
112 Id. (quoting Erickson v. Pardus, 198 Fed. Appx. 694, 697 (10th Cir. 2006)).
113 Id. at 2200 (quoting Erickson, 198 Fed. Appx. At 698).
not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."\textsuperscript{114} Petitioner’s complaint stated that Dr. Bloor’s decision to remove him from his hepatitis C treatment constituted a danger to his life.\textsuperscript{115} It alleged that his medication was discontinued shortly after the treatment program began; that the prescribed treatment program was supposed to last a year; that he was still in need of treatment for his condition; and that prison officials refused to provide him with treatment.\textsuperscript{116} According to the Court, “[t]his alone was enough to satisfy Rule 8(a)(2).” In addition, petitioner strengthened his claim by making more specific allegations in documents attached to the complaint and in later filings.\textsuperscript{117}

The Court also pointed out that petitioner was proceeding \textit{pro se}, and that documents filed \textit{pro se} are “to be liberally construed.”\textsuperscript{118} This fact made the Court of Appeals’ departure from Rule 8(a)(2)’s liberal pleading standards even more evident, because “a \textit{pro se} complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”\textsuperscript{119}

The Court did not determine whether petitioner’s complaint was sufficient in all respects, because respondents’ raised multiple arguments in their motion to dismiss that were not decided by the district court.\textsuperscript{120} The Court did decide, however, that the complaint could not be dismissed on the ground that the allegations in the complaint were too conclusory.\textsuperscript{121} The Court vacated the judgment of the Court of Appeals, and remanded for further proceedings consistent with the Court’s opinion.

\textsuperscript{114} \textit{Id.} at 2200 (quoting Bell Atlantic, 127 S. Ct. at 1964 (quoting Conley, 355 U.S. at 47)).
\textsuperscript{115} \textit{Id.} at 2200.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.}
III. THE SEVENTH CIRCUIT CASES INTERPRETING *BELL ATLANTIC V. TWOMBLY*

Although the Seventh Circuit had already cited *Bell Atlantic* in three separate decisions, it did not seriously dissect the Supreme Court’s opinion in that case until *EEOC v. Concentra Health Servs., Inc.*. In *Concentra*, the Seventh Circuit determined that the federal pleading standard laid out in *Bell Atlantic* requires a complaint not only to provide the defendant with fair notice of the claims against him and the grounds upon which they rest, but to also plausibly suggest that the pleader is entitled to relief. However, *Bell Atlantic* left largely unanswered what it means to “plausibly suggest that the pleader is entitled to relief.”

Although the Supreme Court attempted to explain the newly imposed plausibility standard with declarations such as, “the ‘plain statement’ [must] possess enough heft to ‘show that the pleader is entitled to relief,’”124 and “[f]actual allegations must be enough to raise a right to relief above a speculative level,”125 such statements do not provide any substantive guidance as to how much, or what type of factual detail is ultimately required under the “plausibility standard.” The Seventh Circuit maintained in *Airborne Video & Beepers, Inc. v. AT & T Mobility LLC* that specific facts need not be pled in the complaint.126 As a practical matter, however, it does not appear possible to satisfy either *Bell Atlantic*, or the Seventh Circuit’s

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122 The Seventh Circuit Court of Appeals issued opinions in three cases that cited to or quoted *Bell Atlantic* before *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773 (7th Cir. 2007). None of them, however, delved into the Supreme Court’s decision as deeply as the court in *Concentra* did. See In re Ocwen Loan Servicing, 491 F.3d 638, 646 (7th Cir. 2007); Jennings v. Auto Meter Products, 495 F.3d 466, 472 (7th Cir. 2007); Local 15, IBEW v. Exelon Corp., 495 F.3d 779, 782 (7th Cir. 2007).

123 *Concentra*, 496 F.3d at 776.

124 *Bell Atlantic*, 127 S. Ct. at 1966 (quoting Fed. R. Civ. P. 8(a)(2)).

125 *Id.* at 1965.

126 *Airborne*, 499 F.3d at 667.
interpretation of *Bell Atlantic*, without including some factual allegations in the complaint.

### A. EEOC v. Concentra Health Services

In *EEOC v. Concentra Health Servs., Inc.*, plaintiff Charles Horn filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) when he was fired by his employer Concentra Health Services (“Concentra”).\(^{127}\) The EEOC brought suit against Concentra on behalf of Horn alleging retaliation, in violation of 42 U.S.C. §2000e-3(a).\(^{128}\) According to the complaint, Horn reported to Concentra’s director of human resources that “his female supervisor gave a male subordinate, with whom she was having an inappropriate sexual relationship, preferential treatment over similarly situated employees with respect to his employment,” and that Concentra responded by firing Horn.\(^{129}\)

The district court granted Concentra’s Rule 12(b)(6) motion and dismissed the EEOC’s complaint.\(^{130}\) It held that Horn could not have believed that the activities he opposed violated Title VII because, at the time Horn reported the affair, favoring a subordinate because of a sexual relationship did not, without more, constitute a violation of Title VII.\(^{131}\) The court further held that even had Horn actually believed that the affair was a violation of Title VII, his belief was not reasonable, and thus the EEOC’s complaint did not state a claim.\(^{132}\)

The EEOC filed an amended complaint which, in the opinion of the district court, differed from the original only in that the paragraph setting forth the EEOC’s claim was far less detailed.\(^{133}\) It read as follows:

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\(^{127}\) *Concentra*, 496 F.3d at 775

\(^{128}\) *Id.*

\(^{129}\) *Id.*

\(^{130}\) *Id.*

\(^{131}\) *Id.*

\(^{132}\) *Id.* at 775-776.

\(^{133}\) *Id.* at 776.
Since at least 2001, Defendant has engaged in unlawful employment practices at its Elk Grove location in violation of Section 704(a) of title VII, 42 U.S.C. § 2000e-3(a). Such unlawful employment practices include, but are not limited to, retaliating against Horn after he opposed conduct in the workplace that he objectively and reasonably believed in good faith violated Title VII by reporting the conduct to Condena’s Director of Human Resources. Concentra’s retaliation includes, but is not limited to, issuing Horn unwarranted negative evaluations and terminating him. 134

Concentra again moved to dismiss and the district court again granted the motion, this time with prejudice. 135 The court based its decision on its opinion that the complaint did not provide sufficient notice of the nature of the EEOC’s claim and that the complaint failed to specify the conduct that Horn believed to be in violation of Title VII. 136 The EEOC subsequently appealed. 137

The Seventh Circuit affirmed the district court’s dismissal on appeal. Writing for the majority, Judge Cudahy engaged in a discussion about the standard of pleading required in the federal court system in the aftermath of Bell Atlantic. 138 He began by stating that the Supreme Court has interpreted the language of Rule 8(a)(2) as “impos[ing] two easy-to-clear hurdles” on the pleader. 139

First, the complaint must describe the claim in sufficient detail to give the defendant “fair notice of what the claim is

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134 Id.
135 Id.
136 Id.
137 Id.
138 Id.
139 Id.
and the grounds upon which it rests.” 140 Second, its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a “speculative level”; if they do not, the plaintiff pleads itself out of court.141

Concentra argued that the EEOC failed to meet either of the Bell Atlantic requirements.142 Somewhat confusingly, Judge Cudahy began his ‘plausibility’ analysis by focusing on the EEOC’s initial complaint rather than the amended complaint.143 Careful consideration of the arguments advanced on appeal by Concentra, as well as consideration of an argument that Concentra chose not to advance in support of dismissal are necessary to understand the Seventh Circuit’s reasoning on the plausibility issue.

Concentra’s first argument for affirming the lower court’s dismissal was that the EEOC “pleaded itself out of court by alleging that Horn reported his supervisor’s favoritism to a lover,” an argument that, according to Judge Cudahy, “reflects a fond nostalgia for the EEOC’s original complaint.”144 Judge Cudahy acknowledged that dismissal of the initial complaint was probably correct; however, he did note that the now “rejected ‘favoring a paramour’ theory [] did not logically foreclose the possibility that some other aspect of Horn’s report might have furnished a ground for relief.”145 In so doing, he pointed out that some of the Seventh Circuit’s past cases suggested that the EEOC’s initial complaint would have been able to withstand a

142  Id. at 776-777.
143  Id. at 777.
144  Id. at 777.
145  Id. (emphasis added).
Rule 12(b)(6) motion to dismiss. Yet those cases all were based on Conley’s disavowed “no set of facts” language and no longer dictated the Seventh Circuit’s jurisprudence with regard to the sufficiency of a complaint. Now, a complaint “must actually suggest that the plaintiff has a right to relief by providing allegations that ‘raise a right to relief above the speculative level.’” “It is not enough for a complaint to avoid foreclosing possible bases for relief[.]”

The court also discussed the fact that Concentra did not argue that the allegations in the EEOC’s amended complaint “fail[ed] to plausibly suggest a right to relief.” Rather, Concentra attempted to rely on a “narrow exception” to Federal Rule 10(c) that would have incorporated Horn’s original charge to the EEOC into the amended complaint, thus condemning the amended complaint to the same fate as the original. Why take this back door approach to having the complaint dismissed, as opposed to attacking its face? According to Judge Cudahy:

Bell Atlantic itself does not appear to suggest that the bare idea of an antitrust conspiracy among major telephone companies like the one alleged in that case is implausible; rather, it appears to hold that the plaintiffs pleaded themselves out of court with detailed “allegations of parallel conduct” that did not plausibly suggest such a conspiracy.

Similarly, it was Horn’s detailed allegations of the conduct giving rise to the Title VII violation that resulted in the dismissal of the

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146 Id.
147 Id.
149 Id. (emphasis in original).
150 Id.
151 Id. at 778.
152 Id. (quoting Bell Atlantic, 127 S. Ct. at 1963, 1966) (emphasis in original).
original complaint. The leaner allegations of the amended complaint, that Concentra retaliated against Horn for making a report protected by Title VII—although possibly deficient in providing the defendant with the notice required by Rule 8—is no less plausible than a prison doctor improperly withholding medication from a prisoner. The court found that the EEOC did not plead itself out of court with its amended complaint and it moved on to the question of notice.

On the notice issue, Concentra argued that dismissal was proper because the complaint did not specify the conduct that the plaintiff reported to Concentra’s Human Resources Director. Here the court agreed. Judge Cudahy reasoned that Rule 8(a)(2) requires that there be some minimum level of factual detail in the complaint that is sufficient to “give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.” The question for the court to resolve in close cases is how much factual detail is required before the defendant has been given fair notice.

Judge Cudahy explained that, although the Rules do not require highly detailed factual pleadings, they do not “promote vagueness or reward deliberate obfuscation” either. Rather:

Encouraging a plaintiff to plead what few facts can be easily provided and will clearly be helpful serves to expedite resolution by quickly alerting the defendant to the basic, critical factual allegations (that is, by providing “fair notice” of the plaintiff’s claim) and, if appropriate, permitting a quick test of the legal sufficiency of those allegations.

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153 Id. at 775-776.
154 Id. at 778 (referencing Erickson, 127 S. Ct. at 2200).
155 Id. at 778-779.
156 Id. at 779.
157 Id. at 782.
158 Id. at 779.
159 Id.
160 Id. at 780.
161 Id.
Simply put, a complaint should contain clearly important information that a plaintiff is easily able to provide.\textsuperscript{162} The Seventh Circuit affirmed the district court’s dismissal and Judge Cudahy denied the EEOC’s request for leave to file a second amended complaint in order to conform to \textit{Bell Atlantic}, expressing doubt that \textit{Bell Atlantic} changed the applicable federal pleading standard.\textsuperscript{163}

\textbf{B. Airborne Video & Beepers, Inc. v. AT & T Mobility LLC}

The Seventh Circuit refined its Rule 8 analysis in a case decided three weeks after \textit{Concentra}. In \textit{Airborne Video & Beepers, Inc. v. AT & T Mobility LLC},\textsuperscript{164} the Seventh Circuit tried to read the Supreme Court’s \textit{Bell Atlantic} decision in harmony with \textit{Erickson v. Pardus}.\textsuperscript{165} In \textit{Airborne}, an owner of a retail store specializing in cellular, pager and long-distance telephone services brought suit against a telephone company for, among other things, breach of contract, tortious interference with business relationships, and deceptive and fraudulent practices when the telephone company stopped paying the plaintiff commissions on service activations.\textsuperscript{166} Due to the plaintiff’s repeated inability to properly file an adequate complaint, the district court denied plaintiff’s motion for leave to file a fourth amended complaint.\textsuperscript{167}

On appeal the Seventh Circuit affirmed the district court’s ruling.\textsuperscript{168} In so doing Judge Wood further explored the Seventh Circuit’s pleading standards even though she acknowledged that this issue was not raised on appeal.\textsuperscript{169} In her opinion, Judge Wood recited \textit{Bell Atlantic}’s language that “a plaintiff’s obligation to provide the

\begin{footnotesize}
\begin{itemize}
\item[162] \textit{Id.}
\item[163] \textit{Id.} at 782.
\item[164] 499 F.3d 663, 667 (7th Cir. 2007).
\item[165] \textit{Id.} (citing Erickson v. Pardus, 127 S. Ct. 2197 (2007)).
\item[166] \textit{Id.} at 664.
\item[167] \textit{Id.} at 666.
\item[168] \textit{Id.} at 668.
\item[169] \textit{Id.} at 667-668.
\end{itemize}
\end{footnotesize}
‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions.”170 Yet, she found that the Erickson decision clearly indicated that Bell Atlantic did not represent a shift to fact-pleading in the federal system.171 According to Judge Wood, Erickson reaffirmed that Rule 8 does not require specific facts, but merely requires that the defendant be given “fair notice of what the . . . claim is and the grounds upon which it rests.”172 Taking these two propositions together, Judge Wood wrote:

[W]e understand the [Supreme] Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.173

As such, a plaintiff can present as little factual detail in the complaint as he wants, provided the complaint plausibly raises his right to relief above a speculative level, as well as puts the defendant on notice of the claims against him and the grounds upon which they rest.174

170 Id. at 667.
171 Id.; Contrary to the federal pleading standards, Illinois is a fact pleading jurisdiction. In a fact-pleading jurisdiction, rather than merely provide the defendant with fair notice of what the claim is and the grounds upon which it rests, Bell Atlantic, 127 S. Ct. at 1964, a plaintiff “must allege facts sufficient to bring a claim within a legally recognized cause of action.” Vernon v. Schuster, 179 Ill. 2d 338, 344 (1997); see Weiss v. Waterhouse Secs., Inc., 208 Ill. 2d 439, 451 (Ill. 2004) (stating that “Illinois is a fact-pleading jurisdiction”).
172 Airborne, 499 F.3d at 667.
173 Id.
174 Concentra, 496 F.3d 773; Airborne, 499 F.3d 663; Killingsworth v. HSBC Bank Nevada, N.A., 507 F.3d 614, 619 (7th Cir. 2007); See, e.g., Johnson v. Lappin, No. 07-1465, 2008 U.S. App. LEXIS 3393 at *4 (7th Cir.Feb. 13, 2008); Vancrete v. Appelman, No. 07-3214, 2008 U.S. App. LEXIS 2837 at *7 (7th Cir. Jan. 18, 2008); Lang v. TCF National Bank, 249 Fed. Appx. 464, 466 (7th Cir. 2007); Sellers v. Daniels, 242 Fed. Appx. 363, 364 (7th Cir. 2007); Estate of Sims v. County of Bureau, 506 F.3d 509, 514 (7th Cir. 2007); George v. Smith, 507 F.3d 605, 608 (7th
IV. ATTEMPTING TO APPLY THE SEVENTH CIRCUIT TEST

The district courts within the Seventh Circuit have had several opportunities to decide cases involving Rule 12(b)(6) motions in the aftermath of the Court of Appeals’ decisions discussed above. The cases discussed below demonstrate how the district courts’ are applying the Seventh Circuit’s interpretation of *Bell Atlantic*.

A. Higgins v. Conopco, Inc.

Michael Higgins, a commercial truck driver, was injured when his truck shifted while he was trying to secure it to a loading dock at the defendant’s facility.\textsuperscript{175} Plaintiff alleged that the mechanism by which he was supposed to hitch his truck to the dock was old, improperly maintained and, as a result, did not properly function, thus causing his injury.\textsuperscript{176} In his third amended complaint, Higgins brought negligence claims against Conopco and four other defendants—Unilever, Unilever Illinois, Seng and Overhead.\textsuperscript{177} Conopco, Unilever and Unilever Illinois filed a third-party complaint against Higgins’ employer, England.\textsuperscript{178}

Their complaint alleged that Conopco entered into an agreement with England that required England to provide Conopco with transportation services.\textsuperscript{179} The complaint further alleged that, at the time of the accident, Higgins was an employee of England, and that, in accordance with the transportation agreement, England agreed to carry liability insurance and indemnify Conopco for any harm arising out of services under that agreement.\textsuperscript{180}

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\item \textsuperscript{175} Higgins v. Conopco, Inc., No. 06 C 7077, 2008 U.S. Dist. LEXIS 5508 at *3 (N.D. Ill. Jan. 23, 2008).
\item \textsuperscript{176} *Id.* at *3-4.
\item \textsuperscript{177} *Id.* at *4.
\item \textsuperscript{178} *Id.*
\item \textsuperscript{179} *Id.*
\item \textsuperscript{180} *Id.* at *5.
\end{itemize}
contained a breach of contract claim and a contribution claim against
England. England brought a 12(b)(6) motion to dismiss the third-
party plaintiffs’ claims.

In ruling on the motion, the district court set out the standard of
pleading required to survive a Rule 12(b)(6) motion in the Seventh
Circuit. It said that “[a] plaintiff is required to include allegations in
the complaint that ‘plausibly suggest that the plaintiff has a right to
relief, raising that possibility above a speculative level’ . . . ‘if they do
not, the plaintiff pleads itself out of court.’”

England argued that the Court should grant its motion to dismiss
the breach of contract claim because the transportation agreement was
not a valid contract; that the agreement never went into effect; and,
alternatively, that if the agreement was valid and went into effect, the
accident was not covered by the agreement. As such, the third-party
plaintiffs’ contribution claim should be dismissed as well. In
response, the Court stated that the purpose of a Rule 12(b)(6) motion
is to contest the validity of the claim, and not to assess whether the
claim is meritorious. A complaint need only provide the defendant
with sufficient notice of the claim being brought. Applying the
Concentra standard, the court found that the third-party plaintiffs’
allegations concerning England’s breach of the transportation
agreement provided “sufficient detail and are not based upon pure
speculation or legal generalizations.” As such, the complaint

181 Id.
182 Id.
183 Id. at *5-6.
184 Id. at *6 (quoting Concentra, 496 F.3d at 776).
185 Id. at *7.
186 Id. at *17.
187 Id. at *8.
188 Id.
189 Id. at 9.
satisfied Rule 8(a)(2)’s requirements of plausibility and notice. The
district court denied England’s motion to dismiss.

B. Safeco Ins., Co. v. Wheaton Bank and Trust, Co.

In *Safeco*, the plaintiff, Safeco Insurance ("Safeco"), sued
Wheaton Bank and Trust ("Wheaton") for conversion, improper use of
trust funds, and constructive trust. Safeco’s claims against Wheaton
arose out if Safeco’s duties as a surety to Integrated Construction
Technology Corporation ("ICTC"), a construction contractor that had
a deposit account with Wheaton. ICTC borrowed over $4 million
from Wheaton, and when a portion of the debt became due, Wheaton
set off over $500,000 from ICTC’s deposits—unbeknownst to ICTC or
Safeco—in order to satisfy the debt. Because of these set offs to
ICTC’s account, there were insufficient funds with which to pay its
creditors and suppliers. As such, Safeco became obligated as a
surety to provide the funds for ICTC while the account was short.
Safeco contended that the set offs were improper and, as a result of
the set offs, it had to pay more than $1.6 million in order to satisfy ICTC’s
debts to its subcontractors. Wheaton made a Rule 12(b)(6) motion
to dismiss Safeco’s complaint for failure to state a claim.

The court said that in order for a plaintiff to state a claim upon
which relief can be granted, “[h]e must plead sufficient facts to give
fair notice of the claim and the grounds upon which it rests, and those,

190 *Id.* (citing *Airborne*, 499 F.3d at 667).
191 *Id.* at *18 (finding that because it was too early in the proceedings to assess
the validity of the transportation agreement, England’s motion to dismiss the
contribution claim had to be denied).
193 *Id.* at *1.
194 *Id.*
195 *Id.* at *4.
196 *Id.*
197 *Id.* at *1.
198 *Id.* at *5-6.
if true, must plausibly suggest that the plaintiff is entitled to relief, ‘raising that right to relief above the speculative level.’”

Regarding the conversion claim, Wheaton argued that Safeco’s complaint should be dismissed under Rule 12(b)(6) because it failed to adequately allege that Safeco had a right to the money it demanded; that its right was present and unconditional; and that the defendant wrongfully refused to return the money. The court agreed.

Safeco claimed that as subrogee of the subcontractors it had a present and unconditional right to the money set off by Wheaton. However, under Illinois law a bank takes title to the money deposited with it and subsequently becomes a debtor to the creditor depositor. As such, when a trustee—such as ICTC—deposits trust funds into a bank account, only the trustee, and not the beneficiary—in this case Safeco, as subrogee of the subcontractors—has an immediate and unconditional right to possess the amount deposited. The beneficiaries of the trust may seek to recover their funds from the trustee, but they cannot recover their funds from the bank under a theory of conversion. The court reasoned that because of this principle, Safeco could not sue Wheaton for conversion based on the subcontractors’ equitable interest in the deposits.

The court also found that the conversion claim was deficient because Safeco did not allege that the bank knew, or should have known, that the set offs included trust funds. While a bank has a right to set off the accounts of its customers in order to satisfy their indebtedness, this right does not extend to situations in which the bank has notice, whether actual or constructive, that the accounts include

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199 Id. at *5 (quoting in part Concentra, 496 F.3d at 776).
200 Id. at *6.
201 Id.
202 Id.
203 Id. at *7.
204 Id.
205 Id.
206 Id. at *8-9.
207 Id. at *9.
trust funds. Because the “[c]omplaint does not contain sufficient allegations to plausibly suggest that the bank knew or should have know that it was setting off trust assets[.]” the court dismissed the conversion claim without prejudice. In so doing it stated that Safeco may be able to correct the defects by amending the complaint to allege that Wheaton had knowledge that the set offs contained trust assets, and by pleading claims subrogated from ICTC, rather than from its subcontractors.

The court dismissed the mechanics lien claim, holding that the act does not create a right of action against a bank that sets off funds held by a contractor in trust for a subcontractor, and it dismissed the constructive trust claim for failure to allege knowledge on the part of Wheaton. Because Safeco’s complaint lacked plausibility, the court did not reach the question of notice.

C. Zamudio v. HSBC N.Am. Holdings, Inc.

In 2005, plaintiff Robert Zamudio, a 55 year-old Mexican-American, attempted to refinance the mortgage on his home at Beneficial, a subsidiary mortgage company of the defendant, HSBC. Zamudio alleged that a Beneficial loan officer told the him that if his home was appraised at more than $140,000 he would be able to refinance. Plaintiff’s home was subsequently appraised at $144,900, but his loan application was denied. When plaintiff contacted the loan office to ask why his application had been denied he was informed that the value of his home was insufficient.

\[208 \text{ Id.}\]
\[209 \text{ Id. at *9, 14.}\]
\[210 \text{ Id. at *14.}\]
\[211 \text{ Id. at *15, 17-18.}\]
\[213 \text{ Id. at *2.}\]
\[214 \text{ Id.}\]
\[215 \text{ Id.}\]
Plaintiff alleged that this was not the real reason his loan was denied, but rather, the denial was a result of HSBC’s automated underwriting and credit scoring systems, which have a discriminatory impact on minority applicants, such as the plaintiff. He filed suit against HSBC alleging violations of the Fair Housing Act (“FHA”) and the Equal Opportunity Credit Act (“ECOA”). The defendant made a Rule 12(b)(6) motion to dismiss the plaintiff’s claims.

The district court said that in order to satisfy the requirements of Rule 8(a)(2), a complaint must accomplish two things:

“[T]he complaint must describe the claim in sufficient detail to give the defendant ‘fair notice of what . . . the claim is and the grounds upon which it rests . . . .' Second, its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a ‘speculative level’; if they do not, the plaintiff pleads itself out of court.”

HSBC argued that because Zamudio failed to specifically identify any discriminatory policy or practice, that he failed to provide the defendants with fair notice of the claims against them. However, the court ruled that Zamudio’s assertion that “racially discriminatory assumptions are embedded in the statistical formulas used [by the defendants] to analyze credit information and ultimately form underwriting decisions” is sufficient to meet the pleading requirements imposed by *Bell Atlantic*. Furthermore, the complaint plausibly suggested a right to relief because the FHA and ECOA both make

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216 *Id.*
220 *Id.* (quoting *Concentra*, 496 F.3d at 779).
221 *Id.* at *4.
222 *Id.*
available to plaintiffs a claim for disparate-impact claim.\textsuperscript{223} The court
denied the defendant’s motion to dismiss.\textsuperscript{224}

\textbf{D. CardioNet, Inc. v. LifeWatch, Corp.}

LifeWatch and CardioNet are competitors that make heart
monitoring devices.\textsuperscript{225} In January of 2007, LifeWatch launched a
product called the LifeStar Ambulatory Cardiac Telemetry (“LifeStar
ACT”), which was the subject of the litigation.\textsuperscript{226} Counter-plaintiff,
LifeWatch, filed suit against CardioNet for a series statements made
and actions taken by CardioNet with respect to the LifeStar ACT.\textsuperscript{227}
LifeWatch’s complaint alleged trade secret misappropriation,\textsuperscript{228}
intentional interference with expectation of business relationships,
unfair competition, and three counts of fraud.\textsuperscript{229} The district court
dismissed the fraud claims for failure to state a claim under Rule
9(b),\textsuperscript{230} but denied the CardioNet’s motion to dismiss with respect to
the other claims.\textsuperscript{231}

The district court began its analysis by setting forth the applicable
federal pleading standard.\textsuperscript{232} In order to avoid dismissal under Rule
12(b)(6), “LifeWatch need only provide enough detail [in the
complaint] to give CardioNet fair notice of its claims, show that the

\textsuperscript{223} Id.
\textsuperscript{224} Id. at *6.
\textsuperscript{225} CardioNet v. LifeWatch, No. 07 C 6625, 2008 U.S. Dist. LEXIS 15941 at
*3 (N.D. Ill. 2008).
\textsuperscript{226} Id.
\textsuperscript{227} Id. at *3-5.
\textsuperscript{228} CardioNet’s motion to dismiss do not challenge LifeWatch’s trade
misappropriation claim. As such, the court did not assess the sufficiency of
LifeWatch’s complaint with respect to that claim.
\textsuperscript{229} Id. at *1-2.
\textsuperscript{230} Fraud is one of the claims that must be pleaded with heightened specificity
under Rule 9(b). A discussion of the court’s ruling with respect to the fraud claims
contained in LifeWatch’s complaint is outside the scope of this Note.
\textsuperscript{231} CardioNet, 2008 U.S. Dist. LEXIS 15941 at *12.
\textsuperscript{232} Id. at *2.
In order to state a claim for tortious interference with prospective economic advantage, “LifeWatch must allege (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional and malicious interference inducing or causing a breach [or] termination of the relationship or expectancy; [and] (4) resultant damage to the party whose relationship has been disrupted.”

LifeWatch’s complaint alleged that in June of 2007, without its knowledge, a physician improperly arranged to have a LifeStar ACT system delivered to the CEO of CardioNet. While in the CEO’s possession, CardioNet’s heads of research and product development dismantled, tampered with, tested and photographed the LifeStar ACT without informing LifeWatch that it had done so. LifeWatch alleged that CardioNet used the information it learned to further its marketing strategy, and that it:

[M]isrepresented in advertisements and statements to physicians and governmental and private third party insurers that (1) [CardioNet’s] device was the only FDA approved and Medicare reimbursed arrhythmia detection and alarm system; (2) the LifeStar ACT device did not and could not meet the FDA’s requirements for approval of an arrhythmia detection and alarm system; and (3) its device was superior and/or safer than the LifeStar ACT.

LifeWatch argued that the statements made by CardioNet were false and misleading because they wrongfully suggested that the
LifeStar ACT was less safe and reliable than CardioNet’s device, and because the LifeStar ACT was and is FDA approved.237

The court held that LifeWatch’s allegations that CardioNet knowingly issued false and misleading statements to the targeted consumers of the LifeStar ACT device were sufficient to give notice to CardioNet of the intentional interference claim against it.238 The court also found LifeWatch sufficiently pleaded its unfair competition claim because the underlying allegations of a tortious interference claim sufficiently state a claim for unfair competition.239

E. Analysis

As mentioned before, the Supreme Court’s decision in Bell Atlantic provided very little substantive guidance to lower courts interpreting the “plausibility standard.” Understandably, it is a difficult task to provide a bright-line rule to determine to determine the sufficiency of a complaint without reverting to code pleading, or imposing fact-pleading on plaintiffs in federal court. It is thus reasonable to assume that the Court, by expressly disavowing Conley’s longstanding “no set of facts” language, intended for the circuit courts to experiment with new (and ostensibly more stringent) formulations of Rule 8(a)(2).

Although the Seventh Circuit Court of appeals has explicitly adopted Bell Atlantic’s plausibility standard, it remains unclear, even after thorough examination of Concentra and Airborne, how a plaintiff satisfies the plausibility standard without going as far as fact-pleading. While Airborne makes clear that specific facts are not required to adequately plead a claim in the Seventh Circuit, it is equally clear that the pre-Bell Atlantic standard of pleading espoused in Smith and Kolupa is no longer viable. So what is necessary to satisfy the plausibility standard and to adequately plead a claim in the Seventh Circuit?

237 Id. at *4-5.
238 Id. at *10-11.
239 Id. at *11.
One common thread that ties together the district court cases described above is that the courts in those cases seem to require either direct (factual) or inferential allegations touching on all elements of a cause of action. For example, in Safeco, the court dismissed plaintiff’s conversion claim because the plaintiff’s complaint did not plausibly demonstrate that it was entitled to relief. In order to state a conversion claim, a plaintiff must establish that it (1) has a right to certain property; (2) that it has a present and unconditional right to immediate possession of the property; (3) that it made a demand for the return of the property; and (4) that the defendant wrongfully refused to return it. 240 Plaintiff’s complaint, however, failed to adequately allege that it had a “present and unconditional right to immediate possession of the property.” 241

In CardioNet, the court denied cross-defendant’s motion to dismiss for failure to state a claim, because the factual allegations in cross-plaintiff’s complaint touched on each element of the causes of action for intentional interference with expectation of business relationships and unfair competition. 242

Similarly, in Zamudio, defendant’s motion to dismiss plaintiff’s disparate-impact claims were denied because plaintiff’s allegations of discriminatory affect in defendant’s automated underwriting and credit scoring systems were sufficient to state a disparate-impact claim under both the FHA and ECOA. 243

The Higgins court explicitly stated that, “[u]nder current notice pleading standard in federal courts a plaintiff need not ‘plead facts that, if true, establish each element of a cause of action. . . .’” 244 This, however, is not contrary to the requirement that a plaintiff plead either direct or inferential allegations in order to state a claim. In Higgins,

241 Id.
third-party defendant argued that plaintiffs’ breach of contract claim should be dismissed because plaintiffs failed to allege the consideration that supported the transportation agreement, as well as the facts regarding the formation the agreement. The court denied defendant’s motion to dismiss and found that plaintiff’s breach of contract claim was adequately pleaded. Plaintiffs’ complaint contained a description of the alleged contract, as well as the date on which it was entered into. This information is detailed enough for a court to infer that a valid contract was formed. Whether the contract was supported by adequate consideration, and whether there was a valid offer and acceptance reach the merits of plaintiffs’ claims and do not address the legal sufficiency of plaintiffs’ complaint. Providing factual details concerning these points is outside the requirements of Rule 8(a)(2).

A Seventh Circuit Court of Appeals decision handed down April 2, 2008, lends support to the requirement that a plaintiff’s complaint must contain at least inferential allegations respecting each element of a claim. In Glick v. Walker, plaintiff filed suit in the Southern District of Illinois against several prison officials at the Menard Correctional Center claiming that they were “deliberately indifferent” towards his mental health needs and the risks of harm posed to him by one cellmate’s smoking and another’s threat to kill him. The district court screened his complaint and dismissed it for failure to state a claim. A three judge panel, consisting of Judges Kanne, Rovner, and Sykes, assessed the Eighth Amendment claims of the plaintiff and vacated the judgment of the district court, remanding the case for further proceedings on all claims except plaintiff’s Americans with Disabilities Act claim.

245 Id. at *10.
246 Id. at *10-12.
248 Id.
249 Id.
The unanimous court held that plaintiff’s Eighth Amendment claim regarding his exposure to second-hand smoke included enough detail to state a claim. Exposure to second-hand smoke can give rise to two Eighth Amendment claims: one for both present injury and future injury. According to the Court:

To state a claim based on present injury, an inmate must allege that prison officials knew of and disregarded ‘serious existing health problems’ caused by the second-hand smoke. . . . To state a claim based on future injury, an inmate must allege that prison officials knew of and disregarded exposure to levels of second-hand smoke that ‘pose an unreasonable risk of serious damage to his future health.’

In the instant case, plaintiff alleged that he was diagnosed with emphysema; that he suffered increased chest pain due to his cellmate’s smoking; that defendants knew of his condition and his complaints; and, that defendants did nothing to remedy the situation. These allegations were sufficient to state a claim for both present and future injury under the Eighth Amendment.

The court also held that plaintiff’s complaint contained enough detail to state an Eighth Amendment claim against prison officials that failed to prevent his cellmate from harming him. “To state a claim for failure to prevent harm, the inmate must allege that prison officials knew of and disregarded a ‘substantial risk of serious harm,’ and that harm did occur.” Plaintiff alleged that he gave a prison social

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252 Id. at *7.
253 Id.
254 Id. (quoting Henderson v. Sheahan, 196 F.3d 839, 845 (7th Cir. 1999); Helling v. McKinney, 509 U.S. 25, 35 (1993)).
255 Id. at *7-8.
256 Id. at *8
257 Id.
258 Id. (internal citations omitted).
worker two letters describing the threats made against him by his cellmate and detailing his concerns for his own safety. The complaint further alleged that the social worker told him that she had passed his letters along to internal affairs; that he never heard from internal affair; and, that his cellmate beat him badly enough to cause his head to bleed. As such, plaintiff’s complaint satisfied the serious-harm requirement.

The court goes on to address the plaintiff’s remaining claims in an almost identical manner, reversing and remanding plaintiff’s deliberate indifference and retaliation claims, but affirming dismissal of his Americans with Disabilities Act claim. It is apparent from the Walker court’s decision that the pleading standard set forth by Judge Easterbrook in Smith and Kolupa is long gone in the wake of Bell Atlantic. Whereas in Smith and Kolupa, Judge Easterbrook indicated that district judges would be reversed for requiring plaintiffs to provide allegations on specific points, the Walker court’s analysis promotes exactly what the pre-Bell Atlantic standard prohibited. The Seventh Circuit’s analysis in the Walker opinion supports the approach that lower courts should look to see if the factual allegations contained in the complaint either directly, or inferentially, touch on all the elements of the claim to be pleaded.

CONCLUSION

The importance of understanding the Seventh Circuit’s federal pleading standard should be apparent to practitioners. Although the new standard does not represent a shift to fact-pleading, the Seventh Circuit courts are clearly requiring attorneys to provide more information in the complaint. Per Bell Atlantic, the complaint must plausibly raise the plaintiff’s right to relief above a speculative level, as well as put the defendant on notice of the claims against him and

259 Id.
260 Id.
261 Id.
262 Id. at *10-16.
the grounds upon which they rest. In order to ensure satisfaction of these requirements, plaintiffs’ attorneys should, to the extent possible, provide factual or inferential allegations respecting all elements of the claims that they plead. Through the pleadings, a plaintiff should seek to convince the court that the allegations of the complaint, if taken as true, entitle the plaintiff to recovery. As Judge Cudahy suggests in *Concentra*, a plaintiff should plead all easily provided information that would serve to notify the defendant of the critical factual allegations against him.263 Until the Supreme Court weighs in on the matter again, practitioners in the Seventh Circuit would be wise to follow Judge Cudahy’s advice.

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263 EEOC v. Concentra Health Servs., Inc., 496 F.3d 773, 780 (7th Cir. 2007).
THE DEATH KNELL TOLLS FOR REPARATIONS IN
IN RE AFRICAN-AMERICAN SLAVE DESCENDANTS
LITIGATION

CHRISTINA E. LUTZ*

INTRODUCTION

The Seventh Circuit, in its recent decision, In re Slave Descendants Litigation, dismissed the claims of plaintiffs seeking disgorgement of the profits earned by Northern companies as a result of their illegal involvement in slavery.1 It is the latest in a long line of reparations cases dismissed by courts for various reasons, including lack of standing and statute of limitations.

Part One of this Comment outlines the history of Northern involvement in slavery. Part Two traces the legal hurdles faced by African American plaintiffs during and after the statutory time period in which to bring reparations claims. Part Three explores the law of reparations, and the relevant case law. Part Four of this Comment delineates the holdings of the district court and the Seventh Circuit opinion in Slave Descendants. Part Five explains the various tolling doctrines available to courts to remedy time-barred claims. Part Six

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1 In re African American Slave Descendants Litigation (“Slave Descendants”), 471 F.3d 754, 763 (7th Cir. 2006).
outlines the manner in which the court should have applied the standard for equitable estoppel, and the considerations of efficiency, equity, and history such an application would have satisfied.

I. NORTHERN INVOLVEMENT IN SLAVERY

Slavery was an incredibly profitable endeavor that supported America’s economy in its infancy. However, many Americans are not aware of the North’s extensive involvement in slavery. To remedy that knowledge gap, Hartford Courant reporters Anne Farrow, Joel Lang, and Jenifer Frank recently published Complicity: How the North Promoted, Prolonged, and Profited from Slavery. In it, they chronicle the history of slavery in the North as well as the involvement of Northern companies in slavery. Though most people know that farmers and plantation owners in Southern states enslaved Africans and their descendants, the Northern system of slavery is far less infamous. In the 1760s, residents of Northern states, including New York, New Jersey, Pennsylvania, and Delaware, owned and housed as many as 41,000 Africans. Just as their Southern counterparts did, Northern slave owners bought and sold their slaves, separating children from parents and husbands from wives. Northern slaves slept on floors in attics, cellars, and barns, without blankets or clothing, where conditions were far colder than in the South. They could not freely travel, associate or educate themselves under the law. Slave owners routinely whipped slaves of all ages for violating these rules, or for any number of other reasons, and received no punishment for murdering a slave.

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4 Id. at 62.
5 Id at 63.
6 Id.
7 Id. at 62.
At the same time, Northern slave trading posts supplied the demands of Northern residents for slaves. At the same time, Northern slave trading posts supplied the demands of Northern residents for slaves. Rhode Island had a virtual monopoly on the “importation” of slaves, and controlled more than two-thirds of the American colonies’ slave trade with Africa. After Congress banned the trafficking of African slaves in 1808, Rhode Island continued to import slaves. As late as 1860, after the slave trade in Rhode Island had waned, New York City was the American capital of a massive international illegal slave trade, supplying slaves to markets in Brazil and Cuba. New Yorkers built and sold slave ships designed to transport 600 to 1000 people each; the ships contained crates of shackles and large water tanks. Slave traders generally evaded prosecution or bribed juries if indicted. When a Northern court convicted one notorious New York slave trader in 1861, 11,000 of his outraged fellow New Yorkers petitioned Abraham Lincoln to pardon him.

II. AFRICAN AMERICAN ACCESS TO COURT SYSTEMS

While the Civil War unequivocally changed America, it did not ameliorate slavery’s effects. The composition of the Union army evidenced the change. By 1865, one out of every four Union soldiers was African American—either Northern free blacks or escaped slaves. In the antebellum South, these same soldiers did not enjoy what was termed in the nineteenth century “the basic rights of personhood under the law.” Blacks were excluded from the right to marry, follow trade, travel, own land or property, enter into contracts,

8 Id. at 95.
9 Id.
10 Id.
11 Id. at 112.
12 Id. at 121
13 Id. at 122.
15 Id. at 31.
testify in court, and seek judicial remedy. The Framers of the Constitution viewed these civil rights as more fundamental than political rights. Political rights included the right to serve on juries and the right to vote, and the Framers granted political rights only to white land-owning men. This hierarchy of rights endured through the Civil War and into Reconstruction, where a reunified America countenanced at most only fundamental civil rights for African Americans. Though the Thirteenth Amendment abolished slavery in 1865, Southern States adopted “Black Codes” in response that denied blacks the citizenship rights granted to them by the Thirteenth Amendment. Congress ratified the Fourteenth Amendment to grant civil rights to African Americans, notwithstanding strong dispute from formerly Confederate states and several Northern states, including New Jersey, Ohio, and Oregon.

In 1873, The Supreme Court confronted the Fourteenth Amendment in The Slaughter-House Cases. The Court narrowly interpreted the Fourteenth Amendment to guarantee only federal enforcement of the privileges and immunities of citizenship, but left states free to determine the citizenship status of its residents individually. The Court restricted the power of the Fourteenth Amendment further in the 1883 Civil Rights Cases. There the court held that the Fourteenth Amendment barred only discrimination in state action, but that private racial discrimination was an unprotected social matter. The Court thus granted judicial approval to the

16 Id.
17 Id.
18 Id. at 31-32.
20 Id. at 240-253.
21 83 U.S. 36 (1873).
23 109 U.S. 3 (1883).
24 Id.
division between civil, political, and social rights, protecting only the most fundamental of civil rights for blacks. This approach was sanctioned by Congress, since many of its members from both the North and South were uncomfortable with the concept of African Americans as social equals.

In *Plessy v. Ferguson*, the Court continued its trend of separating civil and social rights. The Plaintiff in *Plessy* was an African American male who purchased a first class train ticket, but was instructed by the train’s conductor to move to the second class smoking car or disembark the train. Mr. Plessy argued that the Louisiana state law that segregated railroad cars was unconstitutional. The Court held that “equal, but separate” segregated rail coaches did not violate the Fourteenth Amendment. The Court’s decision demonstrates the fallacy of separate but equal; that first class cars were “better” than second class ones is discernible from their descending monikers and price. While *Plessy* intended to further separate civil from social rights, it simultaneously demonstrated that blacks did not have meaningful access to either type of right. Where Mr. Plessy entered into a contract for a first class ticket, his race entitled him to only a second class one. While subsequent decisions in the 1940s and 1950s found that black students were entitled to admission to various graduate schools on equal protection grounds, the Supreme Court did not overturn *Plessy*.

Political and fundamental civil rights were also unavailable to blacks in the first half of the Twentieth century. Many Southern states disenfranchised African Americans by enacting “grandfather clauses,” which made having an ancestor that was a legal citizen during slavery

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25 Redlich, *supra* note 19, at 484.
26 *Id.*
27 163 U.S. 537 (1896).
28 *Id.* at 538.
29 *Id.* at 547.
a requirement of voting. Others held whites-only primaries, which the Supreme Court held were constitutional until its decision in *Smith v. Allwright* in 1944. Even freedom from enslavement was not certain, and many African Americans agricultural workers returned to virtual slavery in a system known as peonage. Black farm workers toiled for money that was often printed by the plantation owners themselves, and redeemable only at the plantation store. Another common example of peonage was where plantation owners entered into contracts with black farm workers with no intent to ever pay them; the system endured well into the 1940s thanks to state statutes that protected it.

While peonage was common in the agricultural South, access to civil, political, and social rights was far from easy in the North for African Americans. Between 1880 and 1930, seventy-nine blacks were lynched in the North. Racial riots were common, and the City of Chicago allowed rioters to attack African Americans and their property for four days until it intervened; over 500 people were injured.

While the basic safety of African Americans may have improved in the period after the Supreme Court found public segregation unconstitutional in *Brown v. Board of Education*, that decision did not immediately improve social rights for blacks. Many schools in Northern and Midwestern states, such as Delaware and Missouri, remained segregated well into the 1960s in violation of *Brown*. Even where states complied with Brown, schools remained segregated due

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31 Ogletree, *supra* note 22.
33 Ogletree, *supra* note 22.
36 *Id*.
38 KLARMAN, *supra* note 34, at 347.
to residential patterns, known as de facto segregation. De facto segregation currently continues to deprive African American children of education. A 1973 lawsuit attempted to remedy this problem in Denver; however, the Supreme Court refused to find that de facto segregation was a violation of *Brown*. In *Keyes v. School District No. 1*, the Supreme Court held that only segregation that results from intentional government action (de jure segregation) violates Equal Protection. Just recently, the Court held that school attendance schemes in Seattle and Louisville intended to remedy de facto segregation and provide the benefit of integrated schooling to all students violated Equal Protection to white students under the Fourteenth Amendment. In a vehement dissent, Justice Breyer argued that the plurality decision broke the promise of *Brown*. "This is a decision that the Court and the Nation will come to regret," he portended.

In the decisions subsequent to *Brown*, the Court’s jurisprudence maintained the racial status quo rather than remedied it. In 1976, the Court in *Washington v. Davis* held that an Equal Protection violation requires a “discriminatory purpose,” rather than merely a discriminatory effect. As noted reparations scholar Charles Ogletree pointed out, Justice Blackmun believed his colleagues misperceived the state of racial inequality in the late 1980s. In Justice Blackmun’s dissent from an opinion finding that a class of salmon cannery workers failed to establish the racism they experienced in the workplace was a constitutional violation in their employment, Blackmun described the workers’ employment setting as being “organized on principles of

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39 *Id.*
40 Redlich, *supra* note 19, at 496.
43 *Id.* at 2837
44 *Id.*
racist stratification and segregation. In more blatant language, Justice Stevens stated that the workplace conditions, responsibilities, and housing were so inferior for black workers as to create a virtual “plantation economy.”\(^47\) Justice Blackmun lamented, “[o]ne wonders whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was.”\(^48\)

The current collective consciousness of America and the jurisprudence of the Supreme Court embody the shortsightedness that so disturbed Justice Blackmun. The country and the Court are laboring under the myth of a post-racist society, as evidenced by the lack of success of slavery reparations litigation. Reparation suits, which seek restitution for slavery, are naturally met with hostility in a legal system that refuses to acknowledge the continuing effects of slavery on the black community. In light of the legal history recounted here, one feels the same incredulity that Justice Blackmun did when Judge Posner stated in *Slave Descendants* that African Americans could have successfully brought reparations claims within the early part of the last century.\(^49\) In which Twentieth Century court would African Americans have had meaningful access to restitution for slavery: that which denied their most basic rights, or that which pretended they have always had those rights?

**III. HISTORY OF REPARATIONS**

In order to understand the significance of the *Slave Descendants* decision, we must explore its place in the continuum of reparations jurisprudence. Reparations refers to any legal or political scheme that 1) provides payment (in cash, trust, or social programs) to a large group of claimants, 2) based on wrongs permitted under the law at the time, 3) which current law may bar through a strict application of sovereign immunity, statute of limitations or standing, and 4) which


\(^{48}\) Id.

\(^{49}\) *In re African American Slave Descendants Litigation* (“*Slave Descendants*”), 471 F. 3d 754, 762 (7th Cir. 2006).
principles of corrective justice and restitution justify. The third part of its definition demonstrates that reparations are a problematic pursuit. The traditional paradigm of a plaintiff recovering from a defendant that wronged her in the recent past works poorly where defendant’s wrong is a systematic denial of plaintiff’s access to civil, political, and social rights and opportunities, for the purpose of preserving defendant’s sociopolitical dominance over plaintiff.

Reparations suits arise from abhorrent wrongs. Past cases include class action litigation for recovery from the government for the internment of Japanese-American citizens during World War II, and claims against German companies for their unjust profits from the use of slave labor during the same time. The difficulty of success in reparations suits demonstrates that courts often do not believe that the gravity of such injuries outweigh legal formalities such as statutes of limitations. However, these lawsuits resulted in legislation or extra-judicial agreements for restitution each in the amount of more than one billion dollars.

Courts summarily dismissed early African American reparations litigation. In *Johnson v. McAdoo*, plaintiffs were former slaves and descendants of slaves that sought an equitable lien on U.S. Treasury funds acquired during slavery from cotton taxes. In one short paragraph, the court held that the true defendant was not the U.S. Treasurer, as named in the suit, but instead the U.S. government, which was immune from suit.

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53 *Id.; see also, Slave Descendants.*
54 Yamamoto, *supra* note 51, at 696, Tables 1 and 2.
56 *Id.* at 441.
Subsequent suits were also unsuccessful. In an unreported decision, the Northern District of California dismissed plaintiff’s claim to the 40 acres and a mule, or the cash equivalent, guaranteed to his descendants by the Freedman’s Bureau after the Civil War. It reasoned that plaintiff’s case reinforced the need for statutes of limitations in order to “prevent surprises through the revival of claims.” One year later, the same court dismissed a claim against the United States for damages from slavery, which the Ninth Circuit affirmed on the grounds of sovereign immunity, lack of standing, and statute of limitations. In *Cato v. United States*, the plaintiffs analogized their claim to Native American reparations claims in which the statute of limitations was tolled for far longer than plaintiffs requested, but the court differentiated the African American plaintiffs because they did not have an analogous treaty relationship with the federal government. The court concluded that continuing discrimination did not toll the statute of limitations, either.

More recently, plaintiffs brought a suit seeking restitution for slavery pursuant to the Civil Liberties Act (“CLA”), an act which Congress intended to remedy the injustice of Japanese-American internment during World War II. Plaintiffs claimed that denying their claims under the CLA violated the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments. The court held that the CLA barred claims of non-Japanese citizens and the act survived judicial scrutiny. It reasoned that there are many other groups that have been wronged by the “unhappy aspects of American history” that

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58 Id.
59 Cato v. United States, 70 F. 3d 1103 (9th Cir. 1995).
62 Id. at 441.
63 Id.
the CLA does not address, and so the Act’s application to Japanese Americans did not extend to African Americans.64

Those “unhappy aspects of American history” were the cause of a reparations suit based on a race riot in Tulsa, Oklahoma in 1921. Though not a slavery reparations case the plaintiffs in Alexander v. Oklahoma did argue that the court should apply an equitable tolling doctrine to claims barred by statute of limitations. Alexander demonstrates the difficulty experienced by plaintiffs in even the strongest and most recent reparations cases.65 A young African American male had been accused of assaulting a white teenage girl.66 Fearing a lynching, about fifty black residents of the African American neighborhood in Tulsa, known as Greenwood, went to the jail to stop it.67 White residents of Tulsa confronted the Greenwood citizens at the courthouse and a melee ensued.68 In response, the police department deputized and armed hundreds of white men with machine guns, and the mayor of Tulsa called in the National Guard.69 The deputized citizens and the Guardsmen invaded Greenwood in an attempt to destroy it.70 A small group of Black World War I veterans attempted to defend their neighborhood.71 The Guardsmen fired on the town with a machine gun mounted to the top of a truck.72 The next day, conditions worsened.73 The Guardsmen arrested and transported the residents of Greenwood to buildings for “protective custody,” while the white deputies burned the newly emptied homes and businesses.74 According to the court’s findings of fact, the “angry white mob converged on

64 Id. at 442.
65 See Alexander v. Oklahoma, 382 F. 3d 1206 (10th Cir. 2004).
66 Id. at 1211-12.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
Greenwood in a devastating assault . . . killing up to three hundred people, and leaving thousands homeless.\textsuperscript{75} When the mob finished, it had burned forty-two square blocks of Greenwood to the ground.\textsuperscript{76}

On appeal, plaintiffs argued that the court should apply an equitable tolling doctrine to the statute of limitations. They claimed that they could not have discovered the full involvement of the city of Tulsa—which was responsible for deputizing and arming the mob, and for arresting the citizens of Greenwood—until it investigated the events and published a report in 2001.\textsuperscript{77} The court found that the plaintiffs knew of their injury at the time it happened, and that the plaintiff did not need to know the cause of the injury to trigger the statute of limitations.\textsuperscript{78} The court advised that plaintiffs must use reasonable diligence in discovering the facts giving rise to a claim.\textsuperscript{79} However, the court did not address the fact that during the statutory period closely following the riot, Tulsa promised to compensate the victims, but then ignored their requests for compensation.\textsuperscript{80} Nor did it address how a 1920s court in Oklahoma would have realistically received such claims in light of African Americans’ lack of meaningful access to courts at that time.

\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 1212.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 1216.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} Ogletree, \textit{supra} note 22, at 571.
IV. *Slave Descendants Opinions*

A. District Court Opinion

1. Plaintiffs

Plaintiffs consisting of former slaves alleging post-Civil War enslavement, representatives of slaves, and descendants of slaves, filed nine separate suits in varied jurisdictions seeking reparations on behalf of all African Americans against Defendant companies for their involvement in slavery. The Judicial Panel on Multidistrict Litigation transferred the suits to the Northern District of Illinois for consolidated proceedings, at which point Plaintiffs filed a consolidated complaint. In that complaint, Plaintiffs sought relief in the form of an accounting, disgorgement of profits, restitution, compensatory damages, punitive damages, and the creation of a historical commission to study the actions of Defendant companies and their predecessors in interest. Plaintiffs also requested that the court disburse monetary awards into a constructive public trust.

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81 Plaintiffs are Deadria Farmer-Paellmann, Mary Lacey Madison, Andre Carrington, John Bankhead, as administrator of the Estate of Edlee Bankhead, Richard Barber, Sr., Hannah Hurdle-Toomey, as administrator of the Estate of Andrew Jackson Hurdle, Marcelle Porter, as administrator of the Estate of Hettie Pierce, Julie Mae Wyatt-Kervin, the Estate of Emma Marie Clark, Ina Bell Daniels Hurdle McGee, Cain Wall Sr., and Antoinette Harrell Miller.


2. Plaintiffs Claims against Defendants

In their Second Consolidated and Amended Complaint, Plaintiffs alleged the following: Defendants conspired to commit tortious acts; converted the property rights slaves had in themselves; were unjustly enriched through slave labor; fraudulently concealed a cause of action for replevin from the estates of Plaintiffs; violated Plaintiffs’ constitutional rights to inherit and convey property by restricting former slaves’ access to corporate records demonstrating Defendants’ participation in slavery; intentionally and negligently inflicted emotional distress; and violated state consumer protection laws by fraudulently concealing material facts regarding their involvement in slavery from Plaintiff consumers.85

Plaintiffs alleged that the predecessors to Defendant banks made loans to slave traders and collected customs duties on ships transporting slaves.86 Defendant railroads are successors-in-interest to railroad lines that were allegedly constructed, in part, by slave labor, and that transported slaves.87 Predecessors to Defendant insurance companies allegedly issued insurance policies on the lives of slaves with slave owners as beneficiaries and insured ships transporting slaves.88 Defendant Brown Brothers Harriman allegedly accepted slaves as collateral for loans, eventually owning up to 346 slaves.89 Significantly, Plaintiffs alleged in most counts that Defendants performed these acts in violation of Northern laws applicable to them at the time, and that Defendants made intentional misrepresentations about their involvement in slavery.90

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86 Id. at ¶ 125-223.
87 Id. at ¶ 125-223.
88 Id.
89 Id. at ¶ 148.
90 Id. at ¶ 125-223.
3. Holdings

In his opinion for the Northern District of Illinois, Judge Norgle dismissed Plaintiffs’ claims with prejudice.91 He held that Plaintiffs lacked standing because they did not establish “to a virtual certainty that they have suffered concrete, individualized harms at the hands of Defendants,”92 and because their claim to their ancestor’s lost wages was “conjectural.”93 Plaintiffs also lacked standing, according to Judge Norgle, because their Complaint did not allege a sufficient causal connection between the named Defendants’ acts and Plaintiffs’ ancestors,94 and because Plaintiffs may not assert the legal rights of third-parties by virtue of their ancestry alone.95

Judge Norgle agreed with Defendants that the political question doctrine and various statutes of limitations barred Plaintiffs’ claims. He held that the issue of reparations was not justiciable because it is political in nature, and the legislative branch acted on the issue when it, for example, created the Freedman’s Bureau, ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, and enacted numerous Civil Rights Acts.96 Even if it were justiciable, he held that the statutes of limitations on all but the consumer protection fraud claims would have accrued by 1865 at the latest, and that Plaintiffs did not give “concrete instances of material representations that have been made by Defendants” within the statutory periods.97 Judge Norgle declined to toll or delay the accrual of the statutes of limitations because “Plaintiffs’ ancestors knew or should have known [either while they were slaves or in the years after Emancipation] that they were being brutalized and wrongfully forced to work,” and the

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92 Id. at 747 (internal quotations omitted).
93 Id. at 748-9.
94 Id. at 753.
95 Id.
96 Id. at 756-9.
97 Id. at 773.
defendants did not conceal the injury of slavery because it was “quite obvious when inflicted.”

B. Seventh Circuit Opinion

Judge Posner, in a succinct nine-page opinion for the Seventh Circuit Court of Appeals, modified in part and reversed in part the ruling of the district court. He held that the political question doctrine did not bar Plaintiffs’ claims because Plaintiffs sought “conventional legal relief” from the court by asking it to apply state and federal law to Defendants’ conduct. However, he dismissed without prejudice all of the claims in the complaint for lack of standing, save for those of the representatives of the slaves. He reasoned that Plaintiffs could not possibly connect Defendants’ wrongful acts with their financial harm, and the causal chain would be so long that a court would merely be speculating as to the amount of damages. Judge Posner reached the merits of the claims of plaintiffs representing the estates of former slaves, holding that, as actual slaves, they did have a concrete injury that granted them standing to sue. However, he dismissed their claims with prejudice as time-barred by the statute of limitations.

According to Judge Posner, tolling doctrines do not apply because they cannot extend the time to sue by more than a century. He reasoned that in the years immediately following the Civil War former slaves could have received a fair hearing on these matters in Northern courts, and that the descendants of slaves have had decades of

98 Id. at 776-9.
99 In re African American Slave Descendants Litigation (“Slave Descendants”), 471 F. 3d 754, 763 (7th Cir. 2006).
100 Id. at 758.
101 Id. at 763.
102 Id. at 759.
103 Id. at 762.
104 Id.
105 Id.
effective access to courts in the South. However, he reversed the dismissal of the consumer protection fraud claims. In a consumer fraud protection claim, where a seller misrepresents information material to some class of buyers fearing he will lose those buyers if they knew the truth, he perpetrates a fraud on those buyers. Judge Posner remanded the consumer protection fraud claims for further proceedings to determine whether Defendants misrepresented information regarding their involvement in slavery to Plaintiffs, causing them to purchase products they would not have purchased otherwise.

V. VARIOUS TOLLING DOCTRINES

A. Equitable Estoppel

Plaintiffs argued that the court should impose one of the various tolling doctrines to their time-barred claims. One such tolling doctrine is the “discovery rule.” According to Judge Posner in Cada v. Baxter Healthcare Corp., the discovery rule does not actually toll, or halt, the statute of limitations, but instead delays its commencement “from the date when the plaintiff is wronged to the date when he discovers he has been injured.” A doctrine “within the domain of the discovery rule” is equitable estoppel, where the defendant takes steps to conceal the injury to the plaintiff, thus delaying the accrual of the statute of limitations until the time when “the plaintiff has discovered . . . or should have discovered, that the defendant injured him.” The defendant is estopped from defending the claim on the

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106 Id.
107 Id. at 763.
108 Id.
109 Id.
110 Id. at 773.
111 920 F. 2d 446, 450 (7th Cir. 1990).
112 Id.
113 Id.
grounds that the statute of limitations bars plaintiff’s recovery.114 A court may apply equitable estoppel when the plaintiff was not aware of his injury at the time it occurred.115

According to Judge Posner in Williams v. Sims,116 the Seventh Circuit outlined a “standard example” of equitable estoppel in Bell v. City of Milwaukee.117 In Bell, the court found that on the evening of February 2, 1958, two white Milwaukee police officers shot an unarmed African American man who fled from them after they attempted to arrest him for driving with a broken tail-light.118 One officer allegedly stated to the other, “He’s just a damn nigger kid anyhow.”119 According to the court, the officers planted a knife on the victim, Bell, and claimed that he brandished the knife and confessed to a robbery while fleeing.120 Additional police officers allegedly entered into a racially-motivated conspiracy to conceal the crime.121 Bell’s siblings filed suit against the alleged conspirators in 1979 for civil rights violations and various tort claims. Defendants argued that the statutes of limitations for Plaintiffs’ claims expired in 1961 and 1964.122 The court estopped Defendants from defending on the ground that the statutes of limitations had expired because Plaintiffs alleged that Defendants actively and fraudulently concealed their wrongdoing. It held that equitable estoppel is a “far-reaching doctrine” and that the key inquiry in determining whether it should apply is whether “the defendants’ conduct and representations were so unfair and misleading as to outbalance the public’s interest in setting a limitation on bringing an action.”123 The court held that the public had a stronger interest in

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114 Id.
115 Id.
116 390 F. 3d 958, 958 (7th Cir. 2004).
117 746 F. 2d 1205, 1229-31 (7th Cir. 1984) (reversed on other grounds).
118 Id. at 1216.
119 Id.
120 Id at 1223.
121 Id.
122 Id at 1229
123 Id at 1231.
seeing Plaintiffs’ claims litigated than in imposing the statute of limitations because, if true, Defendants’ racially-motivated actions were so unfair as to carve out an exception to the statute of limitations.124 Bell demonstrated that courts should balance the interests of the public in punishing Defendant’s wrongdoing with the public’s interest in applying the statute of limitations.

B. Equitable Tolling

On the other hand, if the plaintiff knew he was injured and did not file a claim within the applicable statute of limitations, equitable tolling may be available to him. Judge Posner explained in Cada, if the plaintiff reasonably “cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant,” he may appeal to the doctrine of equitable tolling to toll the statute of limitations for the period of time necessary to obtain the information.125 In Fidelity National Title Insurance Co. of New York v. Howard Savings Bank, Judge Posner explained, “equitable tolling does not require that the defendant have borne any responsibility for the plaintiff’s having missed the deadline.”126 Thus, equitable tolling applies where plaintiff knew he was injured when it happened, and equitable estoppel applies where plaintiff did not discover he was injured until well after the injury occurred.

VI. ANALYSIS OF TOLLING DOCTRINES IN SLAVE DESCENDANTS

Both the trial court and Judge Posner conceive of Plaintiffs’ injuries as slavery. The trial court refers to Plaintiffs’ injuries as “the institution of slavery itself,” and states that Plaintiffs “knew or should have known that they were being brutalized and wrongfully forced to work for people, plantations, companies, and industries without being

124 Id.
125 Cada v. Baxter Healthcare Corp., 920 F. 2d 446, 450 (7th Cir. 1990).
compensated.” Judge Posner echoes this sentiment when he declines to apply tolling doctrines in one brief paragraph:

It is true that tolling doctrines can extend the time to sue well beyond the period of limitations—but not to a century and more beyond. Slaves could not sue, and even after the Thirteenth Amendment became effective in 1865 suits such as these, if brought in the South, would not have received a fair hearing. However, some northern courts would have been receptive to such suits, and since the defendants are (and were) northern companies, venue would have been proper in those states. Even in the South, descendants of slaves have had decades of effective access to the courts to seek redress for the wrongs of which they complain. And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system.127

Judge Posner’s assessment of African American access to courts seems revisionist, at best. The history of slavery in the North in the decades preceding the Civil War renders suspect Judge Posner’s reasoning that freed slaves would have received fair reparations trials there.128 It is doubtful that in states such as New York, which was the locus of a massive international slave trading post, courts would have been receptive to claims by blacks against those slave traders for reparations. Furthermore, in light of numerous twentieth century Supreme Court decisions recounted in this article which denied African Americans their most basic rights, and failed to redress the harms which still stem from a denial of those rights, it seems naïve to believe that any court in the North or South would have been receptive to reparations claims. After all, there has never been a successful reparations suit.

127 In re African American Slave Descendants Litigation (“Slave Descendants”), 471 F. 3d 754, 762 (7th Cir. 2006).
Of significance here, however, is how Judge Posner mischaracterizes Plaintiffs’ injuries in the same manner the trial court did. He states that Plaintiffs have had “decades of effective access to the courts to seek redress for the wrongs of which they complain.” To bring any complaint into court, a plaintiff must know she has been injured. By rejecting Plaintiffs’ appeal to the court to apply one of the various tolling doctrines by stating that Plaintiffs should have brought their claim earlier, Judge Posner is also assuming that Plaintiffs’ injury is slavery. Judge Posner essentially concludes that since Plaintiffs knew they were enslaved, they therefore cannot seek refuge in any of the various tolling doctrines.

The African American slavery reparations cases mentioned in this article seek compensation for the institution of slavery generally, so Judge Posner’s conclusion is understandable, though inappropriate. Unlike prior reparations cases, Plaintiffs here do not seek redress merely for the institution of slavery—an institution that was legal in the South prior to the Civil War. Plaintiffs claim that Defendant companies violated Northern laws against slavery by engaging in the business of slavery, and in some cases, actually owning slaves. This injury is significantly different from the injury of legal slavery, because it changes how the court should apply the various tolling doctrines.

Arguably, a court could properly apply equitable tolling if the injury is legal slavery. Equitable tolling is appropriate where a plaintiff knew she was injured, but could not reasonably find out within the statute of limitations that the injury was the result of wrongdoing, and if so, that defendant committed the wrong. Plaintiffs knew they were legally enslaved. However, Northern companies, such as Defendants, could not own slaves, despite its legality in the South. If Defendants committed such a wrong, and Plaintiffs could not reasonably find out within the statute of limitations that their enslavement was the result of Defendants’ illegal involvement in slavery, equitable tolling could apply.

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129 Slave Descendants, 471 F. 3d at 762.
The stronger argument is that the injury Plaintiffs complain of is illegal slavery, though, since Plaintiffs state in their complaint that Defendants were Northern companies engaged in slavery in violation of Northern laws. Equitable tolling does not apply where the injury is illegal, rather than legal, slavery. Plaintiffs argue in their complaint that they could not determine Defendant’s illegal involvement in slavery because Defendants concealed that information. Thus, if the injury is illegal slavery, and Plaintiffs could not find out Defendants illegally enslaved them, Plaintiffs could not discover the existence of their injury. Equitable tolling applies only where a plaintiff knows she is injured, and Plaintiffs here claim they did not know about Defendants’ involvement in slavery. This analysis does not apply to equitable estoppel, however, where the plaintiff is unaware that her injury exists because defendant concealed the injury.

Only Judge Posner’s final reason for rejecting tolling doctrines, that “it’s not as if it had been a deep mystery that corporations were involved in the operation of the slave system,” alludes to equitable estoppel. By implying that Plaintiffs should have known that corporations (and thus, Defendants) engaged in the business of slavery, Judge Posner considers the possibility that the moment when the statute of limitations accrued was not the time in which Plaintiffs were legally subjugated by the institution of slavery, but was instead when Plaintiffs discovered that Defendants, who were Northern companies, allegedly illegally partook in, and profited from, the institution of slavery in violation of Northern laws.

As Judge Posner considers, the injury here is not that Southern plantation owners or Southern companies, for whom it was unfortunately legal to own and trade slaves, enslaved Plaintiffs. Plaintiffs claim that Defendants were unjustly enriched by their illegal involvement in the slave trade, including slave ownership. If the illegal ownership of slaves and illegal involvement in the slave trade caused injury to Plaintiffs, and, as Plaintiffs claim, they could not discover this injury because Defendants concealed their involvement, then the statute of limitations did not accrue until Defendants’ recent disclosures. However, Judge Posner neglects to instruct the trial court to investigate the possible misconduct by Defendants that deprived
 Plaintiffs of legal recovery on the grounds that lots of companies profited from slavery, so Defendants probably did, too.

Such an assertion renders accrual-centered tolling doctrines toothless. At best, Judge Posner’s assertion assumes that Defendants’ profits were made legally, and thus ignores the substance of the injury in Plaintiffs’ complaint. At worst, Judge Posner acknowledges that Defendants likely engaged in illegal slavery, and completely ignores their wrongdoing.

Determining whether several of the nation’s most well-known and often-patronized corporations fraudulently concealed their illegal involvement in slavery both to escape prosecution in the Nineteenth Century and to maintain their relationship with consumers in the Twentieth Century is of enormous public interest, especially where such a lawsuit seeks to certify more than ten percent of the public as members of the plaintiff-class. Although Judge Posner asserts that Bell v. Milwaukee presented the “standard” for determining whether equitable estoppel applies, he ignored its balancing test. Bell requires the court to balance the gravity of Defendants’ wrongdoing with the public interest in setting finite periods for timely claims.130 However, instead of considering the public interest in discovering the validity of Plaintiffs claims against the well-known and widely-patronized Defendants, Judge Posner completely ignores Plaintiffs’ allegations of Defendants’ fraudulent concealment. If Plaintiffs here “should have known” that corporations, including Defendants, engaged in the business of slavery in violation of Northern laws, then Plaintiffs in Bell should have known that in the 1950’s white police officers would protect fellow white officers who murdered a man because he was black. As Bell demonstrates, such assertions are immaterial. According to the Bell standard, Judge Posner should have considered whether, if Defendants did conceal their illegal involvement in slavery from Plaintiffs, that act was so unfair that the public interest demands an exception to be carved out of the statute of limitations.

Furthermore, if Plaintiffs should have known that Defendants engaged in the business of slavery, it begs the question, why remand

130 Bell v. City of Milwaukee, 746 F. 2d 1205, 1231 (7th Cir. 1984).
the consumer protection fraud claims for a trial on whether Defendants actively prevented Plaintiffs from obtaining information on Defendants’ involvement in slavery? In order to prevail on such a claim, Plaintiffs must demonstrate that Defendant sellers misrepresented information material to a class of buyers, including Plaintiffs, fearing they would lose those buyers if they knew about Defendants’ involvement in slavery. The consumer protection claim presupposes that such a class of buyers does not generally know that corporations it patronizes engaged in the business of slavery. Not only does Judge Posner fail to impose the proper balancing test in determining whether equitable estoppel should apply, he contradicts his own reason for its inapplicability by remanding the consumer protection fraud claims.

Discovery and evidence similar to that in a consumer fraud claim would result from a hearing on the issue of whether Defendants should be estopped from defending Plaintiff’s claim as time-barred by the statute of limitations because both involve evidence of what Defendants did or did not conceal from Plaintiffs. Given the equitable nature of both Plaintiffs’ claims of unjust enrichment and the applicable tolling doctrines, in addition to concerns for judicial efficiency and equity, Judge Posner should have remanded the equitable estoppel issue to the trial court pending a hearing on Defendants’ alleged misrepresentations.

Reparations are restitutional in nature, thus, they are focused on removing from the defendant the spoils of his unjust enrichment. As such, the issue of Defendant misconduct demanded a hearing. In Slave Descendants, Plaintiffs sought to establish a public trust with Defendants’ disgorged profits, not to receive a personal financial benefit. Plaintiffs desired a forum in which Defendants’ involvement in slavery would be made public, rather than to simply receive compensation, because it is in the public interest to know what Defendants actually did. The issue of causation is far more problematic in the case of reparations claims than it is when Plaintiffs’ injuries are recent as with consumer fraud claims. Where Plaintiffs can more easily prove causation because less time has passed, Defendants have more incentive to settle and avoid an adverse judgment and
public scrutiny. Thus, notwithstanding the surviving consumer fraud protection claim, Plaintiffs may never receive evidence of Defendants’ illegal involvement in slavery without the discovery phase of an equitable estoppel hearing.

Furthermore, the statute of limitations has been an insurmountable hurdle thus far in reparations cases. Though it is possible that Plaintiffs would not be able to prove a causal connection between their injury and Defendants’ conduct at trial, an application of equitable estoppel in Slave Descendants would have provided a powerful precedent for future reparations claims. As in the case of the Tulsa riots claim, not all African American reparations claims are based on slavery. Reparations cases based on twentieth century harms, where the statute of limitations expired more recently, do not shoulder the same burden of causation that do slavery reparations cases. As with the Tulsa suit, however, courts often dismiss as time-barred reparations cases based on more recent injuries. A hearing on equitable estoppel for an injury that occurred over a century ago would demonstrate the truly far-reaching nature of equitable estoppel, and could provide dispositive precedent for more recent reparations claims.

CONCLUSION

Judge Posner’s opinion in Slave Descendants gets it wrong with respect to both the law and the history it relies on. His opinion fails to consider the history of Northern involvement in slavery and the enduring nature of slavery and racism on both Northern and Southern courts. It also fails to apply the proper standard for equitable estoppel. Instead of providing precedent for other reparations suits plagued by statute of limitations problems, Slave Descendants supports the proposition that African Americans have never had access to a judicial remedy for slavery. Denied the solace of tolling doctrines such as equitable estoppel, future reparations litigation may abandon all hope of remedying the harms of slavery and Jim Crow, and instead focus on less problematic claims based on consumer fraud protection statutes.
SWEET RESULT IN SAVORY: HOW THE SEVENTH CIRCUIT TOOK THE CORRECT APPROACH TO POST-CONVICTION ACCESS TO DNA EVIDENCE IN SAVORY V. LYONS

JAMIE T. NEWTON


INTRODUCTION

The use of DNA evidence within the criminal justice system has become a part of popular culture. The growth of the “CSI” franchise on major network television, coupled with its success in attaining viewers, may suggest a public fascination with the use of scientific...
techniques to solve crimes. The popularity of the show (and its imitators) is a small example of the way in which DNA testing has revolutionized the criminal justice system. Yet for all its advantages, access to DNA evidence—and the increasingly accurate results derived from improved testing—is subject to a procedural roadblock in some jurisdictions that limits access to those who may benefit from its use. Specifically, the procedural roadblock erected in some jurisdictions prevents prisoners from gaining post-conviction access to physical evidence for the purpose of DNA testing through a § 1983 claim. Instead, those jurisdictions limit prisoners to the more complicated—and potentially more restrictive and time-consuming—habeas corpus relief.

There are two judicial methods by which a prisoner may gain access to physical evidence in order to conduct DNA testing. First, the universally accepted method is through a writ of habeas corpus, by

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3 The phenomenon does not appear limited to the U.S. As of December 2006, the CSI franchise was “syndicated in 200 countries to a global audience of 2 billion.” Gerard Gilbert, CSI: The cop show that conquered the world, THE INDEPENDENT, Dec. 19, 2006, http://www.independent.co.uk/news/media/csi-the-cop-show-that-conquered-the-world-429262.html (last visited April 22, 2008). It has been anecdotally suggested that American juries now expect a higher standard of forensic evidence due in part to the show’s popularity. Id.

4 DNA testing in the early 1990s, which used the PCR method, could isolate a genetic marker that would be shared by only 2 percent of the population, or one in fifty. The chance of two people matching genetic markers in current STR testing are less than one in a trillion. Fay Flam, Initial DNA Scientist Vindicated, but still has concerns, PHILADELPHIA INQUIRER, A-14, Jan. 13, 2006.
which a prisoner may challenge the validity of his confinement.\(^5\) The second, more controversial method is through 42 U.S.C. § 1983. Created by the Civil Rights Act, this cause of action allows any person to file a civil claim in federal court if their constitutional rights have been violated by a state actor under color of state law.\(^6\) While both methods can yield the access to post-conviction DNA testing that the prisoner seeks, habeas corpus relief is subject to several rules—such as the “state exhaustion” requirement—which can make it a less desirable route to relief than § 1983. Federal appellate courts are split on the validity of these methods. While the Ninth and Eleventh Circuits have held that a claim requesting post-conviction access to DNA evidence is cognizable under both habeas corpus proceedings and 42 U.S.C. § 1983,\(^7\) the Fourth, Fifth, and Sixth Circuits have limited the relief to such requests strictly to a writ of habeas corpus.\(^8\)

In Savory v. Lyons, the Seventh Circuit faced the question of whether a prisoner could validly make a claim under 42 U.S.C. § 1983 for post-conviction access to physical evidence for the purpose of DNA testing.\(^9\) In its opinion, the Seventh Circuit declined to join the Fourth Circuit’s approach, instead following the Ninth and Eleventh Circuits in holding that such a claim under § 1983 was viable.\(^10\) In reaching its decision, the Savory court drew support from the 2005 Supreme Court case Wilkinson v. Dotson, a case which updated the Court’s treatment of the tension between § 1983 and habeas claims for post-conviction relief without expressly speaking to the issue of DNA testing. By recognizing that Dotson’s reasoning all but expressly resolved the dispute over the viability of state prisoner’s § 1983 claims

\(^6\) Id. at 483-84.
\(^7\) See Osborne v. District Attorney’s Office for the Third Judicial District, 423 F.3d 1050, 1054 (9th Cir. 2005); Bradley v. Pryor, 305 F.3d 1287, 1290-92 (11th Cir. 2002).
\(^8\) See Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002); Kutzner v. Montgomery County, 303 F.3d 339, 340 (5th Cir. 2002); Boyle v. Mayer, 46 Fed.Appx. 340, 340 (6th Cir. 2002).
\(^9\) Savory v. Lyons, 469 F.3d 667, 670 (7th Cir. 2006).
\(^10\) Id. at 672.
for post-conviction access to DNA testing, the Savory court reached the proper result and ensured that future decisions in the Seventh Circuit will be decided on their merits, rather than be derailed by procedural roadblocks.\textsuperscript{11}

This comment examines the ramifications of the Seventh Circuit’s opinion in Savory concerning whether § 1983 may act as a vehicle to obtain post-conviction access to physical evidence for the purpose of DNA testing. Part I provides a brief introduction to the writ of habeas corpus and 42 U.S.C. § 1983, including the relative merits of each in terms of post-conviction access. Part II examines the judicial stage set for Savory, including Supreme Court precedents and the conflicting interpretations developed by the Circuits. Part III discusses the facts, holding, and reasoning of Savory. Finally, Part IV examines Savory within the context of the circuit split and the Dotson decision, and argues that the Seventh Circuit reached the proper result by holding that state prisoners’ § 1983 claims seeking post-conviction access to DNA testing are cognizable.\textsuperscript{12}

\textsuperscript{11} It has been argued that this “overproceduralism” makes it difficult for inmates to have their constitutional claims heard. Jordan Steiker, Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism, 1998 U. CHI. LEGAL F. 315, 315-16 (1998).

\textsuperscript{12} It is critical to note that while the plaintiff in Savory brought a § 1983 claim asserting a constitutional right of due process to post-conviction access to physical evidence for the purpose of DNA testing, Savory does not answer the question of whether such a right exists. 469 F.3d at 675. Indeed, because the statute of limitations for a § 1983 claim had elapsed in Savory, the court was not forced to answer such a question. Id. Instead, Savory deals with the procedural question of whether § 1983 is an appropriate vehicle to make such a challenge. Judge King’s dissent in Harvey takes special effort to note that though he believes § 1983 \textit{is} a proper vehicle for such a claim, the US Constitution does not support a due process right to post-conviction access to physical evidence for the purpose of DNA testing under the facts of that case. 278 F.3d at 388 (King, J., dissenting).

In examining whether prisoners should be able to use a § 1983 action to gain post-conviction access to physical evidence, or instead be limited to habeas corpus relief, it is necessary to address a threshold question: why does it matter which approach the prisoner uses? If a prisoner is guaranteed to have his habeas claim heard, why bother filing a § 1983 claim of questionable validity? The answer lies in the procedural elements specific to each approach, which yield concrete differences in how the prisoner’s desired result is reached. It is these procedural differences that make § 1983 claims more desirable to a prisoner than a habeas claim, thereby making the cognizability of the § 1983 claim for post-conviction access to DNA testing of importance.

A. Habeas Corpus

The writ of habeas corpus provides a vehicle by which a prisoner can challenge the validity of his imprisonment.13 Thus, if a state prisoner is held in violation of his federal constitutional rights, he may apply for a writ of habeas corpus for relief.14 Inspired by the Magna Carta and imported from English law,15 the writ of habeas corpus is often referred to as the “Great Writ” due to its central role in preserving basic notions of due process and “personal liberty.”16 The Supreme Court once wrote:

[a]though in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with

14 See Steiker, supra n.11, at 325 (writing that “federal habeas remains available for the redress of virtually all federal constitutional violations”).
15 See Fay v. Noia, 372 U.S. 391, 402 (1963) (discussing the introduction of a bill before the English House of Commons in 1593 to implement the use of the writ of habeas corpus to combat perceived violations of due process guaranteed by the Magna Carta). While Fay is no longer good law, its historical discussion of the writ of habeas corpus remains relevant.
16 Id. at 401.
the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.  

Indeed, the writ is so vital to American ideals that the Founding Fathers felt compelled to guarantee its maintenance in the Constitution's Suspension Clause.  

The federal habeas corpus statute states that a federal court may only consider a state prisoner’s writ of habeas corpus application if the grounds for that application are that his imprisonment violates federal law. Furthermore, a federal court will not grant a writ of habeas corpus if the state prisoner has failed to exercise all available state remedies. Known as the “state exhaustion” requirement, this means

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17 Id. at 401-402.
18 “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion or the public Safety may require it.” U.S. Const., art. I, § 9, cl. 2.
19 The statute reads:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

20 The statute states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State; or there is an
that if the state prisoner has any unused “right” or “procedure” available under state law to address the issue presented in his application for a writ of habeas corpus, the federal court will not grant the writ.\footnote{21}

Federalism concerns underlie the imposition of this “state exhaustion” requirement. Specifically, courts have expressed concern that allowing a federal court to correct errors of federal law made by state courts, without first giving the state court system opportunity to correct the error itself, would generate friction between the two systems.\footnote{22} The “state exhaustion” requirement is an expression of the doctrine of “comity”\footnote{23}—it does not eliminate the federal habeas corpus remedy, but rather defers its exercise until all available state remedies have been exercised.\footnote{24}

\begin{quote}
absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant.
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21 “An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.” 28 U.S.C. 2254(c) (2000).
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22 See Presier v. Rodriguez, 411 U.S. 475, 490 (1973); see also Darr v. Burford, 339 U.S. 200, 204 (1950) (explaining that “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation”).
\end{quote}

\begin{quote}
23 “[T]he doctrine of comity between courts . . . teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” Darr, 339 U.S. at 204.
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24 The Supreme Court wrote in Cook v. Hart:
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[Comity demands that the state courts, under whose process [the prisoner] is held, and which are, equally with federal courts, charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the federal court will remain unimpaired.
\end{quote}
B. 42 U.S.C. § 1983

42 U.S.C. § 1983 was enacted as part of the Civil Rights Act of 1871 as a method to enforce the Fourteenth Amendment.25 It creates a civil cause of action by which any person may challenge state action that violates their federal constitutional or statutory rights in federal court.26 The Supreme Court has compared § 1983 to a common law tort action,27 established on “the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights.”28 An action brought under § 1983 may seek declaratory, injunctive, and monetary relief.29

Like an application for writ of habeas corpus, a successful § 1983 claim requires a violation of federal law.30 In the context of obtaining post-conviction access to DNA testing, state prisoners often allege that denial of access to DNA testing constitutes a violation of due process.

146 U.S. 183, 194-95 (1892).
26 The statute states in relevant part:

Every person who, under color of any statute...of any State...subjects...any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


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under *Brady v. Maryland*.31 In *Brady*, a man convicted of murder in a Maryland state court argued that the prosecution had suppressed exculpatory statements of a witness in violation of due process.32 The Court agreed with the prisoner, holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.”33 The Court reasoned that such disclosure by the prosecution is necessary for a fair trial, which is a fundamental concept of our judicial system.34 Subsequent to *Brady*, courts have argued that if this fairness principle requires disclosure of exculpatory evidence before trial, there is no reason it should not likewise extend to disclosure of potentially exculpatory evidence (such as DNA evidence) after the trial.35 Therefore, when a state officer refuses a prisoner post-conviction access to DNA testing, a prisoner raising a § 1983 claim would argue that the state officer denying access to the evidence had deprived him of his constitutional right to due process under color of state law.

Section 1983 actions are not subject to the “state exhaustion” requirement because the statute was enacted to circumvent the legal systems of states that were unwilling to enforce their own laws.36 Specifically, the enacting Congress felt that states’ refusal to address

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31 See Savory v. Lyons, 469 F.3d 667, 674-75 (7th Cir. 2006); see also Bradley v. Pryor, 305 F.3d 1287, 1291 (11th Cir. 2002); Harvey v. Horan, 278 F.3d 370, 378 (4th Cir. 2002). State prisoners seeking post-conviction access to DNA testing are not limited to *Brady* as the basis for a due process violation. For a more complete discussion of possible constitutional violations to use as the basis for a § 1983 claim seeking post-conviction access to DNA testing, see Vetter, *supra* n.27, at 590-93.


33 *Id.* at 87.

34 *Id.* Writing for the majority, Justice Douglas wrote, “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” *Id.*

35 Harvey v. Horan, 285 F.3d at 317 (Luttig, J. concurring); see also Vetter, *supra* n.27, at 591-92. Vetter notes that while this extends the meaning of *Brady* beyond its plain language, “the extension is not entirely unreasonable and has been accepted by at least one district court.” Vetter, *supra* n.27, at 591-92.

36 Schwartz, *supra* n.29, at 89.
Klu Klux Klan violence by applying their own laws required a federal work-around.\textsuperscript{37} Where both Congress and subsequent Supreme Court opinions expressed such a clear distrust of state action in the matter, implementing a “state exhaustion” requirement would have voided the purpose of the statute.\textsuperscript{38}

C. Why the decision between habeas corpus and § 1983 matters

The growth of constitutional rights extended to state prisoners in the middle of the 20th century, paired with a dearth of post-conviction rights actually offered by the states, generated a system in which federal courts seemed to supervise state procedures.\textsuperscript{39} In order to protect their decisions, states responded by expanding their own post-conviction procedures.\textsuperscript{40} This growth of state procedure, when paired with the federal habeas statute’s exhaustion requirement, created added delay to the adjudication of prisoners’ constitutional rights.\textsuperscript{41} In addition, prisoners subject to these state post-conviction procedures may not receive the full protections ordinarily accorded under due process,\textsuperscript{42} raising the question of whether these added procedures serve the interests of justice.

Section 1983 claims present plaintiffs with a number of advantages over federal habeas applications. First, because § 1983 claims are not subject to the added delay of the state exhaustion requirement, state prisoners may seek immediate relief in federal court.\textsuperscript{43} Additionally, because § 1983 is a civil action, prisoners may seek monetary damages in addition to any injunctive or declaratory

\textsuperscript{37} Id.
\textsuperscript{38} Id. at 90.
\textsuperscript{39} Steiker, supra n.11, at 342 (1998).
\textsuperscript{40} Id. at 342-43.
\textsuperscript{41} Id. at 343.
\textsuperscript{42} Id. For instance, Professor Striker notes that prisoners are not entitled to the Sixth Amendment right to counsel in state post-conviction hearings. Id. at 343-44, n.114; see also Murray v. Giarratano, 492 U.S. 1, 10 (1989).
\textsuperscript{43} Vetter, supra n.27, at 595.
relief. On the other hand, the lack of a state exhaustion requirement means that state courts may find their decisions overturned in federal court as the result of § 1983 actions, increasing friction between the state and federal judicial systems. Nevertheless, the significant advantages in bringing a § 1983 action rather than seeking federal habeas relief led state prisoners to begin using § 1983 as an alternative to habeas corpus when attempting to have their constitutional claims heard. The significant overlap of the two approaches eventually required judicial intervention.

II. JUDICIAL PRECEDENT

The United States Supreme Court first addressed the conflict between prisoners using § 1983 and writs of habeas corpus in the 1973 case *Preiser v. Rodriguez*. The Court later clarified its position in 1994 with *Heck v. Humphrey*. Though neither case specifically addressed how § 1983 and habeas claims pertained to requests for post-conviction access to DNA testing, they created the larger framework by which later analysis would be conducted. Subsequent to *Heck*, a split developed between several Federal Circuit courts over whether such post-conviction DNA testing requests could be made using § 1983, or instead limited to habeas relief. As the Circuits debated, the Supreme Court issued *Wilkinson v. Dotson*, which further clarified *Heck* without speaking definitively on the issue of post-conviction access to DNA testing. This section will examine the development of these precedents, from the stage set by the Supreme Court in *Preiser* and *Heck*—and later *Dotson*—to the decisions creating the split amongst the Federal appellate courts.

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44 *Id.* at 595.
45 See *Darr v. Burford*, 339 U.S. 200, 204 (1950) (writing that federal courts’ power to review state court decisions through habeas actions created “an area of potential conflict between state and federal courts”).
46 Vetter, *supra n.27*, at 595.
A. Supreme Court Precedent

1. Preiser v. Rodriguez

In *Preiser v. Rodriguez*, the United States Supreme Court heard arguments from three New York state prisoners challenging the validity of their imprisonment.\(^{49}\) Decided in 1974, *Preiser* was issued almost thirty years before *Harvey v. Horan*, the first case where federal appellate courts grappled with the viability of post-conviction DNA testing requests through § 1983.\(^{50}\) In examining the more general question of whether a prisoner could challenge his confinement through a § 1983 claim,\(^{51}\) however, *Preiser* laid the groundwork for the later DNA cases.

*Preiser* consolidated a number of lawsuits that shared a common thread: each prisoner had earned a number of “good-time” credits which should have had the effect of shortening their sentence had the credits not been revoked by the state prison.\(^{52}\) The prisoners filed lawsuits under § 1983 claiming that their credits had been unconstitutionally revoked under color of state law.\(^{53}\) Because each prisoner had secured enough “good-time” credits to be released immediately but for the revocation, a successful challenge of the procedures by which they were deprived of those credits would have resulted in an immediate release from prison.\(^{54}\) New York contended that the prisoners’ claims should be limited to habeas corpus relief and were not properly brought via § 1983.\(^{55}\) Because the prisoners were poised to be released from prison if their claims succeeded, New York argued that the prisoners were actually

\(^{49}\) 411 U.S. at 476-77.

\(^{50}\) *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002).

\(^{51}\) *Preiser*, 411 U.S. at 477.

\(^{52}\) Id. at 476-82.

\(^{53}\) Id.

\(^{54}\) Id. at 487.

\(^{55}\) See id. at 482.
challenging the very validity of their imprisonment.\textsuperscript{56} Such an action traditionally could only be accomplished through a writ of habeas corpus, which required exhaustion of state remedies.\textsuperscript{57} In an \textit{en banc} hearing, the Second Circuit Court of Appeals disagreed with the State, holding that the § 1983 claims were valid, and “not subject to any requirement of exhaustion of state remedies.”\textsuperscript{58}

The Supreme Court reversed the Second Circuit in a 6-3 decision, holding that the state prisoners were limited to habeas relief.\textsuperscript{59} In justifying its holding, the Court noted that issues of federal-state comity were of primary concern.\textsuperscript{60} While the dissent argued that previous Court decisions had allowed § 1983 actions on questions of state prison administration without disturbing notions of federal-state comity, the majority replied that the issues in those cases did not implicate any other statute, while the case before them directly addressed the purpose of the federal habeas corpus statute: challenging the validity of the prisoners’ confinement.\textsuperscript{61} Thus, the court held that “when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from imprisonment, his sole federal remedy is a writ of habeas corpus.”\textsuperscript{62}

The \textit{Preiser} Court noted in dictum that its holding did not prevent a prisoner from bringing a suit under § 1983 seeking monetary damages.\textsuperscript{63} While the plaintiffs’ requests in \textit{Preiser} for equitable relief would have resulted in restoration of their good-time credits, and therefore resulted in their immediate release, the Court wrote that an award of damages would yield no direct effect on the “fact or length”

\textsuperscript{56} See id.
\textsuperscript{57} See id.
\textsuperscript{58} Id. The Second Circuit’s decision was highly contested within the \textit{en banc} panel, generating opinions by eight judges, including three dissents. Id.
\textsuperscript{59} Id. at 500.
\textsuperscript{60} Id. at 591.
\textsuperscript{61} Id. at 592 n.10.
\textsuperscript{62} See id. at 500.
\textsuperscript{63} Id. at 494.
of a prisoner’s imprisonment. Despite the Court’s plain language authorizing prisoners to use § 1983 to seek monetary damages in Preiser, the Court would be forced to readdress the issue 21 years later in Heck v. Humphrey.

2. Heck v. Humphrey

In Heck v. Humphrey, an Indiana state prisoner convicted of voluntary manslaughter filed a § 1983 claim against several state officials, alleging, amongst other things, that his prosecution had been unlawful and the defendants had destroyed exculpatory evidence. However, rather than seeking his release through injunctive relief, the plaintiff sought money damages. Heck sheds light on the split over post-conviction DNA testing because rather than seeking actual release from prison—which would have been the ultimate result had the Preiser plaintiffs succeeded in their § 1983 claims—both the Heck and DNA plaintiffs sought some other form of relief. Both the District Court and the Seventh Circuit agreed that although the Heck plaintiff’s claim did not seek his release from prison, a victory on the merits would call into question the very validity of his confinement. Because Preiser’s dictum concerning monetary damages appeared to

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64 Id.
65 The Presier Court wrote:

If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the more traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly,... a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.

67 Id. at 479.
68 Id. at 479-80.
carve out an opening for a valid § 1983 claim, the Supreme Court
granted certiorari to determine whether the prisoner’s claim could
rightly be heard.69

In a 5-4 opinion, the Supreme Court affirmed the lower court’s
holding that a § 1983 claim for money damages cannot stand if the
plaintiff’s victory on the merits would call into question the validity or
duration of his imprisonment.70 Justice Scalia, writing for the majority,
began by highlighting Preiser’s dictum, which stated that a prisoner’s
§ 1983 claim for money damages would not trigger the state
exhaustion requirement because it wouldn’t attack the validity or
duration of a prisoner’s confinement.71 However, he noted “[t]hat
statement might not be true . . . when establishing the basis for the
damages claim necessarily demonstrates the invalidity of the
conviction.”72 For instance, Justice Scalia explained that a case in
which a prisoner brought a § 1983 claim for money damages alleging
that a prison had used the wrong administrative procedures did not
violate Preiser because the prisoner was not challenging the essence of
his confinement, but rather a set of procedures that were used.73 On the
other hand, if the Heck plaintiff were to win his § 1983 claim on the
merits, a court would have to find that the defendants actually did
direct an unlawful investigation and destroyed exculpatory evidence.
Such a finding would clearly call into question the validity of the
plaintiff’s confinement, an outcome prohibited by Preiser if it results
from a § 1983 claim.

The Court rationalized its holding by drawing an analogy between
the Heck plaintiff’s suit and the common law tort of malicious

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69 Id. at 480.
70 Id. at 487.
71 Id. at 481.
72 Id. at 481-82.
73 Id. at 482-83. Here the Court was referring to the facts of Wolff v.
McDonnell, a case in which the Court held that the prisoner’s § 1983 claim for
damages was valid. See 418 U.S. 539 (1974).
prosecution. The rationale behind this requirement is that it helps provide finality in criminal judgments, and prevents prisoners from making collateral attacks on their convictions. The Court therefore reasoned that if such collateral attacks were prevented in the common law, then the same requirement should be applied to the tort liability created by § 1983.

Seeking to clarify any misconceptions caused by Preiser's dictum, the Court held that in order for a prisoner's § 1983 claim for money damages to survive, “a district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.” Justice Scalia went on to note that “if the district court determines that the plaintiff’s action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.”

B. The Circuit Split: Post-Conviction Access to DNA Testing

After Preiser and Heck, lower courts began to struggle with the issue of whether a prisoner’s post-conviction request for access to physical evidence for DNA testing could properly be brought under § 1983, or was instead restricted to habeas relief. The Fourth, Fifth and Sixth Circuits held that such requests should be limited to habeas relief. While the leading cases in those jurisdictions were heard prior to Dotson, subsequent decisions in those circuits have persisted in

74 Heck, 512 U.S. at 484. The Court also reasoned that because § 1983 created a kind of tort liability, and tort liability was derived from the common law, then the common law should be consulted for guidance. Id. at 483.
75 Id. at 484.
76 Id. at 484-85.
77 Id. at 486.
78 Id. at 487 (emphasis added).
79 Id. (emphasis in original).
holding that such requests are limited to habeas relief. On the other hand, the Eleventh and Ninth Circuits held that requests for post-conviction DNA testing could rightly be made through a § 1983 claim. This section will examine the critical cases for each approach.

1. Habeas Corpus Relief Only—the Fourth, Fifth, and Sixth Circuits

In the January 2002 decision *Harvey v. Horan*, the Fourth Circuit was the first federal appellate court to hold that a prisoner seeking post-conviction access to physical evidence for DNA testing was limited to habeas relief.80 The plaintiff in *Harvey*, a Virginia state prisoner who had been convicted of rape and forcible sodomy, filed a § 1983 claim seeking access to the rape kit in order to conduct DNA testing that had been unavailable at the time of his conviction.81 The district court found that the plaintiff’s § 1983 claim was cognizable because it did not challenge the length or duration of his conviction.82 The State appealed.83

In a 2–1 decision, the Fourth Circuit reversed the lower court and held that a plaintiff seeking post-conviction access to DNA evidence was limited to habeas corpus relief. Writing for the majority, Chief Judge Wilkinson first looked to *Heck*’s holding that a plaintiff may not use § 1983 if a successful claim would “necessarily imply the invalidity of his conviction or sentence.”84 Despite the plaintiff’s argument that DNA evidence may just as well prove his guilt, the court responded that the plaintiff’s action was only the first step in a broader attempt at challenging his conviction.85 As such, the court found that the request was merely an attempt at an end run around *Heck*, and held that the § 1983 claim was not viable.86

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80 278 F.3d 370, 375 (4th Cir. 2002).
81 *Id.* at 373-74.
82 *Id.* at 374.
83 *Id.*
84 *Heck*, 512 U.S. at 487.
85 *Harvey*, 278 F.3d at 375.
86 *Id.*
The court proceeded to list a number of policy justifications for limiting a plaintiff to habeas relief, the foremost of which was the necessity of finality in criminal judgments. The court worried that if prisoners were able to request new testing of physical evidence every time a new form of technology were developed, then the finality of criminal judgments would persistently be brought into question. The court went on to say that “[t]he possibility of post-conviction developments, whether in law or science, is simply too great to justify judicially sanctioned constitutional attacks upon final criminal judgments.”

The court also expressed concern that allowing post-conviction access to DNA testing of physical evidence through § 1983 claims would constitute judicial encroachment on an issue more properly settled by the democratic process. Noting that several state legislatures had taken action in increasing post-conviction access to DNA evidence, the court feared that allowing access via § 1983 would stunt those initiatives. The court therefore held that the plaintiff’s § 1983 claim could not stand, and limited him to habeas relief.

Shortly after the Harvey decision, several other circuits followed the Fourth Circuit’s reasoning. In August of 2002, the Fifth Circuit held that a prisoner seeking post-conviction access to DNA testing was limited to habeas relief, and specifically cited Harvey as persuasive in its reasoning. One month later, the Sixth Circuit followed similar reasoning in an unpublished opinion. As recently as June of 2007, a court in the Northern District of Texas cited Harvey and its progeny as

87 Id.
88 Id. at 376.
89 Id.
90 Id.
91 Id. at 377.
92 Id.
93 Kutzner v. Montgomery County, 303 F.3d 339, 340-41 (5th Cir. 2002).
support for denying a plaintiff’s § 1983 claim requesting post-conviction access to DNA testing.95

2. § 1983 Claims Cognizable—the Ninth and Eleventh Circuits

Though decisions issued by the Fourth and Fifth Circuits during the first 8 months of 2002 suggested a trending building toward denying prisoners post-conviction access to DNA testing via a § 1983 claim, the Eleventh Circuit arrived at a contrary position in Bradley v. Pryor, decided in September of 2002.96 The plaintiff in Bradley had been convicted in Alabama for the murder of his stepdaughter in 1983.97 In 2001, the plaintiff filed a § 1983 action seeking access to the rape kit and the victim’s clothing in order to conduct DNA testing.98 A magistrate judge suggested dismissing the plaintiff’s claim, stating that it was no different than a habeas application and was subject to the habeas requirements.99 The district court adopted the magistrate judge’s findings and dismissed the plaintiff’s claim.100 The plaintiff appealed and the Eleventh Circuit granted review on the issue of “[w]hether a 42 U.S.C. § 1983 action initiated by a state prisoner . . . which seeks to compel the state to produce physical evidence for DNA testing . . . for the purpose of later asserting a claim of actual

95 Gilkey v. Livingston, 2007 WL 1953456 at 5 (N.D. Tex. June 27, 2007), appeal dismissed on procedural grounds 2008 WL 1766876 (5th Cir. Apr 15, 2008) (looking to Harvey and Kutzner in holding that a prisoner seeking post-conviction access to biological evidence for DNA testing was restricted to habeas relief). The District Court’s opinion adopted the findings and conclusions of Magistrate Judge Paul D. Stickney. Id. at *1. In his opinion, Judge Stickney noted the circuit split, but stated that stare decisis bound the court to follow the Fifth Circuit’s holding in Kutzner. Id. at *6, n.3.
96 305 F.3d 1287, 1292 (11th Cir. 2002).
97 Id. at 1288.
98 Id. at 1289. The State contended that it no longer had the evidence the plaintiff sought, but the plaintiff pushed for discovery in order to test the State’s assertion. Id.
99 Id.
100 Id.
innocence . . . is the ‘functional equivalent’ of a petition for federal habeas corpus.”

Just as the Fourth Circuit did in Harvey, the Bradley court began its analysis by looking to Preiser and Heck. The court focused on Heck’s language regarding “‘whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.’” However, unlike the Harvey court, the Eleventh Circuit was persuaded by the plaintiff’s argument that success in his claim would not challenge the validity of his imprisonment, but instead would merely provide him access to DNA evidence. Writing for the court, Judge Barkett explained:

[the plaintiff] prevails in this lawsuit once he has access to [the DNA] evidence . . . . Nothing in that result necessarily demonstrates or even implies that his conviction is invalid. As [the plaintiff] points out, it is possible that the evidence will not exculpate him . . . . But even if the evidence, after testing, permits [the plaintiff] to challenge his sentence, that challenge is no part of his § 1983 suit. He would have to initiate an entirely different lawsuit, alleging an entirely different constitutional violation, in order to demonstrate that his conviction and sentence are invalid.

The court went on to dismiss the Harvey court’s reasoning that a § 1983 claim for post-conviction access to DNA testing was the “functional equivalent of a habeas corpus proceeding” merely because it was setting the stage for a subsequent challenge. Judge Barkett

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101 Id.
103 Id.
104 Id.
105 Id.
contended that “[a]lthough [the plaintiff] might use the evidence, at some future date, to initiate a separate action challenging his conviction, future exculpation is not a necessary implication of [the plaintiff’s] claim in this case.” As such, the Eleventh Circuit reversed the district court, and held that the plaintiff’s § 1983 claim seeking post-conviction access to physical evidence for the purpose of DNA testing did not violate the language set forth in *Heck*, and remanded for further proceedings.

C. Wilkinson v. Dotson and After

As the Circuits developed differing approaches for applying *Heck* to the issue of § 1983 claims for post-conviction access to DNA testing, the Supreme Court’s decision in *Wilkinson v. Dotson* took a step toward clarifying the issue. While *Heck* eliminated the confusion revolving around prisoners’ § 1983 claims for money damages created by *Preiser*, the Court in *Dotson* sought to make a broader statement on the validity of prisoner’s § 1983 claims. In *Dotson*, two Ohio inmates brought § 1983 claims challenging the constitutionality of state parole procedures. In each case, the prison parole board applied procedures enacted after each inmate had begun to serve his sentence. The inmates sued under § 1983 in federal district court, alleging that the prison officials had violated Due Process and the Constitution’s *Ex Post Facto* Clause, and sought declaratory and injunctive relief. While the district court found that the prisoners were restricted to habeas relief and dismissed the complaints, the Sixth Circuit found that the § 1983 claims were valid.

106 *Id.*
107 *Id.* at 1291, 92.
109 *Id.*
110 *Id.*
111 *Id.* at 77.
112 *Id.*
and reversed the lower court. The Ohio state officials filed a petition for certiorari, and the Supreme Court granted review.

In an 8-1 decision, the Supreme Court held that the Ohio state prisoners’ § 1983 claims were valid and remanded the case for further proceedings. In his majority opinion, Justice Breyer first addressed Ohio’s contention that because the prisoners believed that the success of their § 1983 claims would ultimately lead to a speedier release from prison, they were actually challenging the duration of their confinement—essentially an assertion that the prisoners’ § 1983 claim violated the holding in *Preiser*. Considering the Court’s jurisprudence on the issue, the Court held “that the connection between the constitutionality of the prisoners’ parole proceedings and release from confinement is too tenuous here to achieve Ohio’s legal door-closing objective.”

The Court next examined the progression of the issue, including *Preiser* and *Heck*. In order to provide a final and clear statement of the law on the issue, Justice Breyer wrote:

> These cases, taken together, indicate that a state prisoner’s § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner’s suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration.

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113 *Id.*
114 *Id.*
115 *Id.* at 78.
116 *Id.*
117 *Id.* at 78-81.
118 *Id.* at 81-82 (emphasis in original).
Crucially, the Court found that the prisoners were neither requesting speedier release nor challenging the validity of their confinement. In explaining the potential result of one of the prisoner’s claims, the Court wrote that “[s]uccess . . . does not mean immediate release from confinement or a shorter stay in prison; it means at most new eligibility review, which at most will speed consideration of a new parole application.” Thus, the Dotson court’s analysis hinged on the word “necessarily.” Only if the prisoner’s § 1983 claim “necessarily” implied the invalidity of his confinement would he be forced to seek habeas relief.

Justice Scalia wrote a concurring opinion in Dotson stating that Ohio’s suggestion that the plaintiff be limited to habeas relief would require the Court “to broaden the scope of habeas relief beyond recognition.” Pointing to the writ’s common law purpose of securing immediate release from unlawful confinement, Scalia argued that the writ should not be expanded to involve forms of relief too far removed from that common law foundation. Because the Dotson plaintiff’s request for relief—a new parole proceeding—did not fall within the realm of the writ’s common law purpose, Justice Scalia contended that limiting him to habeas relief would be inappropriate. Thus, where the plaintiff’s requested relief did not bear on the status of his confinement, Justice Scalia agreed that a § 1983 claim was viable.

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119 Id. at 82.
120 Id.
121 Id. at 81-82. Heck actually used the word “necessarily” in its holding, but did nothing to draw attention to its importance. Heck v. Humphrey, 512 U.S. 477, 487 (1994) (holding that habeas must be used if “judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence”). The Dotson court, however, highlighted the word’s importance by using it eight times in two pages. See Dotson, 544 U.S. at 81-82.
122 Dotson, 544 U.S. at 85 (Scalia, J., concurring).
123 Id.
124 Id. at 86.
125 Id. at 85-86.
Shortly after Dotson, the Ninth Circuit’s opinion in Osborne v. District Attorney’s Office for the Third Judicial District readdressed the issue of prisoner’s § 1983 claims for post-conviction access to DNA testing. The Osborne opinion suggested that Dotson provided the final word on the viability of § 1983 claims seeking post-conviction access to physical evidence for the purpose of DNA testing. Noting how the Dotson court “emphasized that to be barred under Heck, a § 1983 claim must, if successful, necessarily demonstrate the invalidity of confinement or its duration,” the Osborne court reasoned that the Harvey argument that claims setting the stage for subsequent attack on confinement were prohibited was “undercut considerably.”

Despite Osborne’s close reading of Dotson, the language of Dotson does not expressly overrule the holdings of Harvey and Kutzner. Moreover, as noted earlier, at least one post-Dotson federal court has persisted in holding that prisoner’s claims for post-conviction access to DNA testing must be confined to habeas corpus proceedings. Thus, the Seventh Circuit was forced to come to its own decision on the issue in the 2006 case Savory v. Lyons.

III. Savory v. Lyons

A. The Facts of Savory

In June of 1977, Johnnie Lee Savory II was convicted for the murder of James Robinson and Connie Cooper, who were found dead.
in their Peoria, Illinois home in January of the same year. Although his first conviction was reversed by the Illinois Appellate Court due to an involuntary confession, he “was retried and convicted” in 1981. At his retrial, three of Savory’s friends stated that he had made incriminating statements to them. The state presented several pieces of physical evidence at the trial, including 1) strands of hair resembling Savory’s collected at the scene of the crime; 2) a knife spotted with trace amounts of blood found at Savory’s home; and 3) a pair of bloodstained pants Savory may have worn which matched the blood type of the victim.

Subsequent to his conviction, Savory made several attempts to challenge his conviction and confinement, including direct appeals, habeas corpus proceedings in federal court, post-conviction proceedings in state court, and a petition for a writ of mandamus. In 1998, Savory filed a motion in Illinois state court pursuant to an Illinois state statute which, under certain circumstances, allows a defendant to conduct DNA testing on physical evidence presented at his trial if the method of testing was not available at the time of his trial. When Savory’s motion was denied, he appealed to the

130 Savory v. Lyons, 469 F.3d 667, 669 (7th Cir. 2006).
131 Id.
132 Id.
133 Id.
137 See Savory v. Lyons, 469 F.3d 667, 669 (7th Cir. 2006).
138 Id. at 669.
appellate court and the Supreme Court, both of which upheld the lower court’s order.\textsuperscript{140}

Nearly seven years after the Illinois circuit court denied Savory’s motion for access to the physical evidence, Savory filed a suit under 42 U.S.C. § 1983 against a number of state and local officials (the “State”), arguing that their denial violated his constitutional rights.\textsuperscript{141} He asked the district court to compel the State to give him access to 1) the bloodstained pants; 2) the hair samples; 3) the blood-spotted knife; and 4) DNA samples provided by Savory, his father, and others.\textsuperscript{142} The district court dismissed the claim on the State’s 12(b)(6) motion to dismiss, finding that the two year statute of limitations had run, and Savory no longer had a viable claim before the court.\textsuperscript{143} Savory then appealed to the Seventh Circuit.

\textbf{B. The Seventh Circuit’s Analysis}

Before addressing the merits of Savory’s claim, the Seventh Circuit first examined whether Savory could rightly bring an action to compel post-conviction access to physical evidence under § 1983.\textsuperscript{144} The State argued along the lines of \textit{Harvey}, asserting that Savory was a state prisoner attempting to challenge the “fact or duration” of his confinement, and his options were therefore limited to habeas corpus.\textsuperscript{145} Judge Kanne, who authored the opinion, noted that Supreme Court precedents established by \textit{Preiser} and \textit{Heck} prevented a claim

\begin{itemize}
  \item[\textsuperscript{140}] The Illinois Supreme Court held that because the success of the State’s case relied on other evidence, the bloodstained pants were not “materially relevant” to Savory’s innocence, and upheld the circuit court’s denial of his motion to compel DNA testing. \textit{People v. Savory}, 756 N.E.2d 804, 811-12 (Ill. 2001).
  \item[\textsuperscript{141}] \textit{Savory}, 469 F.3d at 669. The officials included the State’s Attorney of Peoria County, Illinois, the Clerk of the Tenth Judicial Circuit Court of Illinois, the Chief of Police of the City of Peoria, and Peoria County, Illinois. \textit{Id.}
  \item[\textsuperscript{142}] \textit{Id.} at 670.
  \item[\textsuperscript{143}] \textit{Id.}
  \item[\textsuperscript{144}] \textit{Id.}
  \item[\textsuperscript{145}] \textit{Id.}
\end{itemize}
from being brought under § 1983 if it “would necessarily imply the validity of [the plaintiff’s] conviction or sentence.”146

The court first analyzed the Supreme Court’s approaches to similar issues, noting that the high court’s opinion in Wilkinson v. Dotson had focused on Heck’s use of the word “necessarily.”147 The court then turned its attention to how the specific question of post-conviction access to physical evidence had created a split amongst its sister circuits.148 Judge Kanne highlighted the Eleventh Circuit’s reasoning in Bradley that not only could updated DNA testing further incriminate the plaintiff, but even if it did suggest the plaintiff’s innocence, he would need to bring an entirely separate action to actually challenge his confinement.149 The court also discussed the Fourth Circuit’s reasoning that because § 1983 would set up a challenge to the prisoner’s confinement, it was merely an attempt to circumvent the habeas corpus requirement.150

Ultimately the court found the Eleventh Circuit’s approach in Bradley to be more in line with the Supreme Court’s precedents set in Preiser and Heck.151 Judge Kanne emphasized that the exception requiring the use of habeas corpus over § 1983 is narrow, and that courts must consider the immediate results of the success of the plaintiff’s motion. The court wrote:

Savory will not be released from prison, nor will his sentence be shortened, if he successfully gains access to physical evidence for DNA testing. Such access would not imply the invalidity of his conviction. At most, he would have the opportunity to use the results of the DNA testing in a future proceeding. Thus, success in Savory’s action “will not demonstrate the invalidity of

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146 Id. at 669 (quoting Heck v. Humphrey, 512 U.S. 477, 487 (1994)).
147 Id. at 671.
148 Id.
149 Id.
150 Id.
151 Id. at 672.
any outstanding criminal judgment against [him],” and will not unduly intrude upon the core habeas corpus relief.\footnote{Id. (quoting Heck v. Humphrey, 512 U.S. 477, 487 (1994)) (emphasis in original).}

The court therefore held that Savory had brought a cognizable claim under § 1983.\footnote{Id. Despite the holding regarding the general viability of § 1983 claims seeking post-conviction access to DNA testing, the court ultimately affirmed the district court’s finding that Savory’s individual § 1983 claim was barred by the statute of limitations. Id. at 675.}

IV. ANALYSIS: EVALUATION OF SAVORY IN LIGHT OF THE CIRCUIT SPLIT AND DOTSON

In Savory, the Seventh Circuit was forced to choose between two conflicting approaches: the Fourth, Fifth, and Sixth Circuit’s position that prisoners seeking post-conviction access to DNA testing are limited to habeas relief, and the Ninth and Eleventh Circuit’s position that prisoners may also seek such relief through a § 1983 claim. In disapproving of the Harvey approach, the Seventh Circuit not only drew support from the Ninth and Eleventh Circuit’s decisions on the matter, but also from the recent Supreme Court Wilkinson v. Dotson opinion. In order understand why the Seventh Circuit reached the proper result in Savory, it is necessary to explain a) how the Harvey court applied Heck; b) how Dotson’s clarification of Heck drew Harvey into question; and c) why the Dotson framework applied to the facts of Savory resolves the argument in favor of the viability of § 1983 claims seeking post-conviction access to DNA testing.

A. Harvey’s “Packaging” in Applying Heck

The source of the circuit split over post-conviction access to DNA testing lay in the Harvey court’s application of Heck and its failure to draw a critical distinction between two separate legal actions. The
Harvey court reasoned that the plaintiff’s § 1983 action could not proceed because it was merely a predicate to a subsequent motion seeking his release from prison.\textsuperscript{154} By this logic, the prisoner’s claim violated Heck’s mandate that prisoners seeking post-conviction relief be limited to habeas if “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.”\textsuperscript{155}

In applying Heck, the Harvey court created a single “package” out of two separate and distinct legal actions. The first action—which was the subject of the decision—was the plaintiff’s § 1983 claim seeking post-conviction access to DNA testing (“Action One”). The second action, which could only commence if the first action proved successful, was a motion seeking release from prison (“Action Two”). In order to reach its decision that Action One violated Heck, the Harvey court merged Action One and Action Two into one indistinguishable package. While Heck never suggested that this sort of packaging was necessary, neither was it forbidden. Thus, Harvey’s “packaging” approach was not drawn into serious question until Dotson revisited Heck.

\section*{B. How Dotson Unpackaged Harvey}

In Dotson, the Supreme Court examined the conflict of § 1983 and habeas as it pertained to prisoners seeking review of parole procedures.\textsuperscript{156} The fundamental issue before the Dotson court was no different from Heck: the cognizability of a § 1983 claim for a prisoner seeking post-conviction relief.\textsuperscript{157} However, the factual situation presented in Dotson was slightly different than Heck because success in Dotson would not have necessarily invalidated the prisoner’s conviction. Success did “not mean immediate release from confinement or a shorter stay in prison; it [meant] at most new eligibility review, which at most [would] speed consideration of a new

\begin{itemize}
\item\textsuperscript{154} Harvey v. Horan, 278 F.3d 370, 375 (4th Cir. 2002).
\item\textsuperscript{155} Heck, 512 U.S. at 487.
\item\textsuperscript{156} Wilkinson v. Dotson, 544 U.S. 74, 76 (2005).
\item\textsuperscript{157} See id.; Heck, 512 U.S. at 478.
\end{itemize}
parole application.”158 In comparison, the *Heck* plaintiff could not win his § 1983 suit for damages without necessarily implying his conviction’s invalidity due to destruction of evidence and unlawful prosecution.159

This distinction, highlighted by the Court’s repeated use of the word “necessarily,”160 was the fundamental clarification that *Dotson* provided. *Dotson* implicitly drew *Harvey’s* “packaging” approach into serious question by barring only those § 1983 claims which would necessarily imply the invalidity of a prisoner’s confinement. Though *Dotson* did not specifically address the viability of § 1983 claims for post-conviction access to DNA evidence, its relevance to the issue was quickly noticed by the Ninth Circuit.161 This set the stage for the Seventh Circuit’s treatment of the issue in *Savory*.

C. How *Savory* Got It Right by Applying *Dotson*

When the Seventh Circuit analyzed the relevant precedent in *Savory*, it highlighted *Dotson’s* holding that § 1983 claims for post-conviction relief should be barred only if they “‘necessarily’ implicated the fact or duration of confinement.”162 By using *Dotson* to create the judicial framework for resolving the circuit split, the *Savory* court implicitly drew the Fourth Circuit’s approach into question. Once the court recognized *Dotson’s* relevance to the issue of post-conviction relief, it

158 *Dotson*, 544 U.S. at 76.
159 *See* *Heck*, 512 U.S. at 490.
160 *See* *Dotson*, 544 U.S. at 81 (writing that “§ 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner.” (emphasis in original)); *see also* id. at 81-82 (holding “that a state prisoner’s § 1983 action is barred… if success in that action *would necessarily* demonstrate the invalidity of confinement or its duration. (emphasis in original)); *and id.* at 82 (writing that “because neither prisoner’s claim *would necessarily spell speedier release, neither lies at ’the core of habeas corpus.’” (quoting Presier v. Rodriguez, 411 U.S. 475, 489 (1973))).
161 *Osborne v. District Attorney’s Office for Third Judicial District*, 423 F.3d 1050, 1055-56 (9th Cir. 2005).
162 *Id.* at 671.
conviction requests for DNA testing, a decision validating the use of § 1983 claims became inevitable.

The Savory court first noted that § 1983 claims for post-conviction access to DNA testing may prove either exculpatory or inculpatory. If the DNA test showed that the prisoner indeed committed the crime, then the result of the § 1983 action would not have called the prisoner’s confinement into question. As such, so long as a chance exists that DNA testing could prove inculpatory, then a § 1983 claim merely seeking access to the testing cannot necessarily call into question the validity of a prisoner’s confinement.

The Seventh Circuit then incorporated the Dotson argument, stating that even if the DNA testing proved exculpatory, the plaintiff would still have to bring another legal action to pursue actual release from prison. Judge Kanne wrote that “to overturn his conviction [the plaintiff would have to bring] ‘an entirely separate action at some future date, in which he would have to argue for his release upon the basis of a separate constitutional violation altogether.’”

Procedurally, this is synonymous with the Supreme Court’s rationale in Dotson that the plaintiff’s success in the § 1983 action would only mean a new review by the prison parole board, where an entirely separate action—the actual review itself—would be necessary to secure release from prison. By applying Dotson in this way, Savory “unpackaged” Action One (the § 1983 action seeking access to DNA testing) from Action Two (the subsequent action seeking release from prison). It is this second action—in which a plaintiff would argue that he was being imprisoned despite the existence of exculpatory DNA evidence proving his innocence—that should be limited to habeas relief, as it is the only action which truly challenges the validity of the plaintiff’s confinement. As the Savory court correctly pointed out,

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163 See id.
164 Id.
access alone cannot imply the invalidity of a prisoner’s confinement.\textsuperscript{167}

Judge Kanne also made sure to address the comity issue that played a central role in the Fourth Circuit’s reasoning in \textit{Harvey}.\textsuperscript{168} Because a plaintiff’s success “[would] not demonstrate the invalidity of any outstanding criminal judgment against [him],” his § 1983 claim would not unduly intrude upon territory traditionally reserved for habeas actions.\textsuperscript{169}

Finally, while not mentioned in \textit{Savory}, it bears noting that Justice Scalia’s concurring opinion in \textit{Dotson} provides further support for the Seventh Circuit’s result. Justice Scalia asserted that the common law roots of the writ of habeas corpus should act as a limit on the relief the writ can actually provide.\textsuperscript{170} If the sought-after relief bears no resemblance to actual release from prison (or at least the shortening of a sentence), then use of the writ would “broaden the scope of habeas relief beyond recognition.”\textsuperscript{171} In the case of \textit{Savory}, gaining access to physical evidence in order to perform DNA testing would not fall within the limited scope of habeas relief. As such, it would be inappropriate for Savory to seek access to testing through a writ of habeas corpus.

The Seventh Circuit’s recognition of \textit{Dotson}’s relevance provided the key to reaching the correct result in \textit{Savory}. \textit{Dotson} provided a method to undo the “packaging” approach created in \textit{Harvey}, which erroneously limited prisoners seeking post-conviction access to DNA testing to habeas relief. In allowing prisoners to seek such relief through § 1983 claims, the \textit{Savory} court reached the proper result and preserved habeas relief to its traditional purpose.

\begin{flushleft}
\textsuperscript{167} \textit{Savory}, 469 F.3d at 672.
\textsuperscript{168} \textit{See Harvey}, 285 F.3d at 303.
\textsuperscript{169} \textit{Savory}, 469 F.3d at 672.
\textsuperscript{170} \textit{Dotson}, 544 U.S. at 85 (Scalia, J., concurring).
\textsuperscript{171} \textit{Id.} at 85.
\end{flushleft}
CONCLUSION

Not all courts agree with Savory’s application of Dotson to the issue of § 1983 claims for post-conviction access to DNA testing. In June 2007, over two years after Dotson and nearly one year after Savory, a district court in the Northern District of Texas held that a plaintiff seeking post-conviction access to DNA testing was limited to habeas relief in Gilkey v. Livingston.\(^{172}\) While mentioning the differing results reached in Osborne and Bradley, the court stated that it was “bound by Fifth Circuit case law.”\(^{173}\) Such a result is at odds with the Supreme Court’s holding in Dotson. By holding that § 1983 claims for post-conviction access to DNA testing are viable, the Savory court reached the proper result and ensured that future cases in the Seventh Circuit on the issue would be in line with Supreme Court precedent.

By arriving at the correct result, the Savory court did more than simply secure another procedural route for prisoners seeking post-conviction access to physical evidence for the purpose of DNA testing. Section 1983 claims, which proceed directly to federal court, circumvent the state-exhaustion requirement imposed by the federal habeas statute that can create significant time delays.\(^{174}\) Additionally, while prisoners seeking post-conviction access to DNA testing through a writ of habeas corpus may not seek monetary damages, a prisoner seeking the same relief through a § 1983 claim can seek monetary damages.\(^{175}\) Thus, the advantages gained by allowing prisoners to pursue their claims through § 1983 are not merely procedural in nature. The Seventh Circuit’s decision in Savory therefore provides both timely resolution and a full range of remedies to prisoners.


\(^{173}\) Id. at *6 n.3.

\(^{174}\) For a description of the complicated process involved in seeking habeas relief, see Steiker, supra n.11, at 315-16 (writing that “[f]our, five or even six federal and state courts might address the merits of a federal claim before the defendant’s legal remedies are exhausted”).

\(^{175}\) 42 U.S.C. § 1983 (2000); see also Schwartz, supra n.29, at 89.
attempting to address wrongs suffered at the hands of government actors.

As demonstrated by the success of *CSI* and its imitators, the promise of justice provided by DNA testing has captured the public imagination. While the benefits of this technology are obvious, there should be concern when those that may possibly benefit most from its use—prisoners who may be exonerated by an exculpatory DNA test—are excluded from timely access due to procedural roadblocks. The decision in *Savory* ensures that these promises of justice do not remain a fiction confined to a prisoner’s common room TV screen.
THE SEVENTH CIRCUIT STEPS UP ON CLEANUP OF HAZARDOUS WASTE

ESTHER WU*


INTRODUCTION

The Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) of 19801 was initially created in response to the discovery of the Love Canal environmental disaster.2 Reacting to public outcry and growing awareness of the negative impact of environmental wastes, Congress hurriedly addressed the dangers of hazardous waste through CERCLA.3 In 1986, Congress enacted the Superfund Amendments and Reauthorization Act (“SARA”) of CERCLA.4

CERCLA allows various parties, either private or public, to bring a claim for recovery under Sections 107 and 113. Section 107(a) is the

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3 Id. at 341.
original cost recovery provision of CERCLA. Section 113(f) was added in 1986 as a part of SARA to allow contribution rights for parties liable under CERCLA. Section 107(a) provides that “covered persons” may be held liable for “any other necessary costs of response incurred by any other person consistent with the national contingency plan.” Section 113(f) states that “[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person.”

Within the cost-recovery framework, the two overriding goals are to promote efficiency in environmental cleanup and make the “polluter pay” by ensuring that those responsible bear the costs of creating the hazard. As conflicting cases illustrate, each court has applied the various methods of statutory construction to reach different conclusions regarding either Potentially Responsible Party (“PRP”) or “innocent landowner” recovery and liability.

Although the Supreme Court has not provided specific guidance for CERCLA interpretation, it is not a proponent of applying the “remedial canon” of statutory construction. Nonetheless, a majority of lower courts apply the “remedial canon,” which instructs courts to

interpret the statute to “achieve the statutes’ broadest underlying purpose.” Courts applying this canon interpret CERCLA to remedy pollution at any cost.

Unlike the majority of courts, the Seventh Circuit applies the “public choice” theory, which instructs courts to consider statutes as “product[s] of compromise.” Courts seeking to enforce the bargains reached between the legislature and interest groups achieve a middle ground in statutory construction. Metropolitan Water Reclamation District v. North American Galvanizing & Coating, Inc. is a classic illustration of the Seventh Circuit’s unique “public choice” approach. The factual underpinnings in Metropolitan Water are such that no overwhelming interest overpowers another. This allows the Seventh Circuit to reach a perfect balance between the two broad goals of CERCLA.

In other circumstances, the Seventh Circuit has applied the “remedial canon” within the framework of the “public choice” theory for the limited purpose of avoiding an absurd result. For example, the Seventh Circuit created the Akzo/Rumpke “innocent landowner” exception when none of the other circuits allowed recovery under Section 107(a). In doing so, the Seventh Circuit avoided rendering Section 107(a) recovery a nullity. These cases confirm the merit of the Seventh Circuit’s application of the “public choice” theory.

12 Atl. Research Corp., 459 F.3d at 834, 835, 837; E.I. DuPont de Nemours & Co., 460 F.3d at 522-23, 545; Consol. Edison Co. of N.Y., 423 F.3d at 98-99, 103. 13 E.I. DuPont., 460 F.3d at 522-23, 545. 14 Metro. Water, 473 F.3d at 824, 834, 836-37; Rumpke, 107 F.3d at 1241-42; Akzo, 30 F.3d at 770-71. 15 See Watson, supra note 9, at 217-18. 16 Metro. Water, 473 F.3d at 834, 836-37. 17 Id. 18 Id. 19 Rumpke, 107 F.3d at 1241-42; Akzo, 30 F.3d at 770-71. 20 Rumpke, 107 F.3d at 1239-40; Akzo, 30 F.3d at 770. 21 Rumpke, 107 F.3d at 1239-40; Akzo, 30 F.3d at 770. 22 Metro. Water, 473 F.3d at 834, 836-37; Rumpke, 107 F.3d at 1239-40; Akzo., 30 F.3d at 770.
Part I of this article will discuss the context from which CERCLA was born, how most courts construe CERCLA through the “remedial canon,” and the Seventh Circuit’s views on CERCLA. Part II of this article will address the context of Metropolitan Water. Part III of this article will discuss the Akzo/Rumpke exception. Part IV of this article will discuss the implications of the Seventh Circuit’s ruling in Metropolitan Water.

PART I

This section will discuss the enactment of CERCLA.

A. CERCLA’s Enactment

CERCLA is a combination of different bills considered in both the House and Senate during the end of the Carter Administration.23 House Report 7020 proposed to create a “superfund” to help finance the cleanup of hazardous dumps.24 The House Report accompanying House Report 7020 begins with a detailed discussion of the need for legislation to respond to “the tragic consequences of improper[], negligent[], and reckless[] hazardous waste disposal practices . . . and the inadequacy of existing law.”25 The more “remedial” Senate Bill 1480, which provided for strict liability was struck down.26

A comparison of the Bills drafted by the House and the Senate before the November 1980 election reveals Congress’s differences of opinion on many key points.27 The House Bill relied on a common law

23 See Watson, supra note 9, at 290.
26 See S. REP. No. 96-848, at 37 (1980), reprinted in HISTORY OF CERCLA, supra note 24, at 343.
causation scheme, but the House Bill did not. The House Bill contained a third party defense to liability while the Senate Bill did not. The House Bill included a provision governing the apportionment of liability among defendants, but the Senate Bill did not. The Senate Bill specifically attempted to impose “joint and several liability” while the House did not.

Under time pressure, Congress compromised by striking down the most aggressive proposals in both the House and Senate in order to ensure CERCLA’s passage.

B. Statutory Scheme

Section 107(a)(4)(A) provides that PRPs shall be liable for “all costs of removal or remedial action incurred by the United States Government or a state or an Indian Tribe not inconsistent with the national contingency plan.” Section 107(a)(4)(B), which governs private suits, provides that PRPs shall be liable “for any other necessary costs of response incurred by any other person consistent with the national contingency plan.” To establish a prima facie case for cost recovery under Section 107(a)(4)(B), a private plaintiff must prove four elements: 1) the site at issue is a “facility;” 2) a release or threatened release of hazardous substance has occurred; 3) release has caused the plaintiff to incur “necessary costs of response” consistent with National Contingency Plan (“NCP”) and 4) the defendant falls...

28 See Nagle, supra note 27, at 1443-44.
30 See Nagle, supra note 27, 1443-44; Grad, supra note 29, at 5, 10, 17, 19.
31 See Nagle, supra note 27, 1443-44; Grad supra note 29, at 7, 10, 19.
32 See Nagle, supra note 27, 1443-44.
within one of the four categories of covered persons within Section 107(a)(1)-(4).\(^{34}\)

Section 113(f)(1) is a provision of SARA, which provides that a contribution action could be brought “during or following any civil action under Section [106] of this title or under Section [107(a)] of this title.”\(^{35}\) Section 113(f)(3)(B), which governs contribution rights, states that a “person who has resolved its liability with the United States or a State for some or all of the response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person.”\(^{36}\) Despite Congress’s deletion of any references to “strict liability,” lower courts interpreted the 1986 SARA as a reaffirmation of “strict liability.” The reasoning behind this assumption stems from SARA’s impractical defenses for PRPs: acts of God, acts of war, act of third parties not in a contractual relationship with the defendant, any combination of the above as well as immunity for third-parties.\(^{37}\) Nonetheless, courts have often characterized liability as “strict” and “joint and several.”\(^{38}\) “Joint and several” liability means that each and every contributor is potentially liable for the entire cleanup.\(^{39}\) Likewise, “strict liability” holds each PRP responsible for their actions.\(^{40}\)


PART II

Part II will discuss the background, factual circumstances, and holdings in the circuit court split involving whether a PRP, who voluntarily commences cleanup, has the right to seek response costs under Section 107(a).

In *Cooper Industries v. Aviall Services Inc.*, Cooper Industries owned four Texas properties until 1981 when it sold them to Aviall Services, Inc. After operating those sites for several years, Aviall discovered that both it and Cooper had contaminated the property. As a result, hazardous substances leaked into the ground and ground water. Aviall notified the state of the contamination, but neither the state nor the federal government took judicial or administrative measures to compel cleanup. Subsequently, Aviall brought a Section 113(f) contribution claim against Cooper after voluntarily commencing cleanup.

On December 13, 2004, the Supreme Court issued the much-anticipated decision in *Cooper* and held that a person may not seek contribution for CERCLA response costs under Section 113(f)(1) in the absence of a prior civil action. Previously, lower courts had construed Section 113 of CERCLA to allow assertion of contribution claims by one PRP against another. As construed in the past, Section 107 of CERCLA allowed only those parties that are not liable under CERCLA to pursue cost recovery against parties who are potentially liable.

The Supreme Court in *Cooper* significantly limited the availability of the CERCLA contribution remedy created by Section

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42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.*
46 *Id.* at 166.
47 *Id.* at 164-65.
48 *Id.* at 169-170.
113— it is no longer available to parties who have conducted response actions at CERCLA sites without entering a judicial or administrative settlement.50 Post Cooper, courts have addressed the narrow issue of whether a PRP had a right to bring an action against another PRP for response costs under Section 107 (a).

A. The Circuit Court Split on Response Costs under Section 107(a)

Given these two provisions, three out of four federal circuit courts considering the issue ruled in favor of allowing PRPs to pursue Section 107(a) claims against other PRPs: the Second Circuit in Consolidated Edison Co. of New York v. UGI Utilities, Inc.; the Eighth Circuit in Atlantic Research Corp. v. United States; and the Seventh Circuit in Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc.52 Each case involved a PRP who performed voluntary cleanup.

In Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing & Coatings, Inc., Metropolitan Water Reclamation was a water district that owned a 50 acre parcel of land in Forest View, Illinois.54 It entered into a long-term lease with Lake River Corporation, a wholly owned subsidiary of North American.55 Lake River developed the property, constructing a facility to store, mix and package industrial chemicals for its own use and for the use of its

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49 Id. at 166-67
51 Atl. Research Corp. v. United States, 459 F.3d 827, 836-37 (8th Cir. 2006); E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 543 (3d Cir. 2006); Consol. Edison Co. of N.Y. v. UGI Util., Inc., 423 F.3d 90, 103-04 (2d Cir. 2005); Metro. Water Reclamation of Greater Chicago v. N. Am. Galvanizing & Coating, Inc., 473 F.3d 824, 837 (7th Cir. 2007); Cooper, 543 U.S. at 166.
52 Atl. Research, 459 F.3d 827 at 836-37; E.I. DuPont, 460 F.3d 515 at 543; Consol. Edison, 423 F.3d 90 at 103-04; Metro. Water, 473 F.3d 824 at 837.
54 Metro. Water, 473 F.3d at 825-827.
55 Id.
customers. Lake River’s operations involved accepting by truck, barge, and rail, large amounts of chemicals that it held in above-ground storage tanks located on the property. The Water District alleged that over the course of Lake River’s tenancy, the tank allegedly spilled 12,000 gallons of industrial chemicals into the soil and groundwater. The water district alleged that it had “incurred substantial expenses investigating, monitoring and remedying the contaminated portions of the property.” Subsequently, the water district sued under Section 107(a) and Section 113(f) to recover costs that it voluntarily incurred on property that it had leased to a corporation.

Similarly, in Consolidated Edison Co. of N.Y. v. UGI Utilities, Inc., appellant company, Consolidated Edison Co. sought to be reimbursed by UGI Utilities Inc. for costs it incurred cleaning up certain contaminated sites in Westchester County, New York. Consolidated Edison Co. alleged that UGI or its predecessors operated the Westchester plants and that UGI should be liable for costs under CERCLA. UGI moved for summary judgment on Consolidated Edison, finding that no reasonable juror could conclude that UGI is subject to operator liability under CERCLA with respect to the Westchester Plants not located in Yonkers. The district court granted UGI’s motion for summary judgment in its entirety and Consolidated Edison appealed to the Supreme Court.

Likewise, in Atlantic Research Corp. v. United States, appellant research corporation retrofitted rocket motors for the United States

56 Id.
57 Id.
58 Id.
59 Id.
60 Id.
62 Id.
63 Id.
64 Id.
from 1981 and 1986.\textsuperscript{65} It performed this service in Camden, Arkansas.\textsuperscript{66} The work included using high-pressure water spray to remove rocket propellant.\textsuperscript{67} Once removed, the propellant was burned. Residue from burnt rocket fuel contaminated the Arkansas site’s soil and groundwater.\textsuperscript{68} Appellant sought to recover a portion of the costs of cleanup from the United States.\textsuperscript{69} The District Court for the Western District of Arkansas denied their claims.\textsuperscript{70} Subsequently, appellant Atlantic Research Corp. sought response costs from appellee United States for costs under the CERCLA.\textsuperscript{71}

Although the Second, Seventh, and Eighth Circuit Courts of Appeals provided PRPs with standing within CERCLA, the remedies they envisioned were vague and varied as to the type of recovery a PRP could claim under Section 107(a).\textsuperscript{72} The Second Circuit noted that “it no longer made sense to view Section 113(f)(1) as the means by which the Section 107(a) cost recovery remedy is effected by parties that would themselves be liable if sued under Section 107(a).”\textsuperscript{73} The Eighth Circuit agreed with the Second Circuit, but clarified that a PRP has a cause of action under Section 107(a) based on both the theory of cost-recovery and an implied contribution theory.\textsuperscript{74} The Eighth Circuit opened another avenue of recovery, stating that “if a plaintiff attempted to use [Section] 107 to recover

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{65} Atl. Research Corp. v. United States, 459 F.3d 827, 829-30 (8th Cir. 2006).
\item\textsuperscript{66} Id.
\item\textsuperscript{67} Id.
\item\textsuperscript{68} Id.
\item\textsuperscript{69} Id.
\item\textsuperscript{70} Id.
\item\textsuperscript{71} Id.
\item\textsuperscript{72} Id. at 835-36 (8th Cir. 2006); Consol. Edison Co. of N.Y. v. UGI Utils. Inc., 423 F.3d 90, 99 (2d Cir. 2005); Metro. Water Reclamation of Greater Chicago v. N. Am. Galvanizing & Coating, Inc., 473 F.3d 824, 836 (7th Cir. 2007).
\item\textsuperscript{73} Consol. Edison Co. of N.Y. v. UGI Utils. Inc., 423 F.3d 90, 99 (2d Cir. 2005).
\item\textsuperscript{74} Atl. Research Corp., 459 F.3d at 835-36; Consol. Edison Co. of N.Y., 423 F.3d at 99.
\end{enumerate}
\end{footnotesize}
more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under [Section] 113(f).”

Similarly, the Seventh Circuit has its own unique liability scheme. The Seventh Circuit in Metropolitan Water decided that Metropolitan Water’s action under Section 107 is characterized more appropriately as a cost-recovery action than as a claim for contribution. The Seventh Circuit explained its hesitancy to label Metropolitan Water’s right of action under Section 107 as an “implied right to contribution.” First, the Seventh Circuit in Metropolitan Water noted that the Supreme Court in Key Tronic Corp. v. United States found “the statute now expressly authorizes a cause of action for contribution in [Section] 113 and impliedly authorizes a similar and somewhat overlapping remedy in [Section] 107.” For this reason, the Seventh Circuit differed from the Northern District’s opinion that labeled the cause of action under Section 107 as an “implied right to contribution.”

Rather, the Seventh Circuit construed the applicable tort law imposing liability “under the technical definition of contribution at common law” providing that a “volunteer who is not liable may not pursue [a] contribution [claim].” For the Seventh Circuit, “Section 107 (a) only imposes liability on private parties to the extent that there have been “necessary costs of response” already incurred.” “If no costs qualifying under this language have been incurred or awarded against the volunteer, then that party has no right to contribution.”

In the Third Circuit E.I. DuPont De Nemours & Co. v. United States, appellants, E.I. Dupont were facility owners and operators of

75 Atl. Research Corp., 459 F.3d at 835-36.
76 Metro. Water, 473 F.3d at 836.
77 Id.
78 Id.
79 Id. at 832; Key Tronic Corp. v. United States, 511 U.S. 809, 816 (1994).
80 Metro. Water, 473 F.3d 824 at 836.
81 Id.
82 Id.
83 Id.
industrial facilities located throughout the United States that are contaminated with hazardous waste. E.I. DuPont alleged that the government was responsible for contamination and sought to recover a share of the cleanup costs under Section 107(a) and Section 113(f).

The District Court entered summary judgment for the government, and E.I. DuPont appealed. The Third Circuit discussed the basis for precluding PRPs from pursuing a claim under Section 107(a). Drawing a distinction between a “sua sponte” environmental cleanup where a PRP undertakes cleanup without governmental involvement and a “negotiated settlement,” the Third Circuit interpreted SARA to favor settlement. For the Third Circuit, Congress and not the courts create the incentives for environmental cleanups.

B. The Circuit Court Split over the type of PRP liability

The Supreme Court in Cooper Industries, Inc. v. Aviall Services, Inc. took notice of the opportunity to impose a type of PRP liability. The Court recognized the issue of whether Cooper Industries, which sought to recover a share of its cleanup costs, may pursue a Section 107(a) recovery action under CERCLA for some form of liability other than ‘joint and several’ liability. However, Supreme Court expressly left this question open and stated that “we think it prudent to withhold judgment on these matters.”

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84 E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 525-528 (3rd Cir. 2006).
85 Id.
86 Id.
87 Id. at 542-45.
88 Id. at 523, 537-40, 541-545.
89 Id.
91 Id.
92 Id. at 170.
Court precedents have encompassed two liability methods: either “several liability” or “joint several liability.” Courts have justified construing Section 107(a) to allow “joint and several recoveries” where the plaintiff may recover 100% of response costs. However, courts denying PRPs from bringing a claim under Section 107 justified their holdings on the basis that Congress could not have intended to let some PRPs recover all of the response costs. Understandably, there is disagreement among the Second, Eighth, and Seventh Circuit Courts over PRP liability under Section 107(a).

The Second Circuit in Consol. Edison found that Section 107(a) allowed for full recovery under the theory of “joint and several liability” by any person that incurred costs for cleanup. The Second Circuit does not require plaintiffs’ innocence to receive full costs. Also, legal actions under Section 107(a) should be permitted in order to facilitate a counterclaim under Section 113(f)(1), which is a vehicle for offsetting contribution claims against another fellow PRP.

On the other hand, the Eighth Circuit imposed “several liability” on PRPs. As the Eighth Circuit noted, “the text of § 107(a)(4)(B) permits recovery of ‘any other necessary costs of response . . . consistent with the national contingency plan.’” Such a PRP may not use Section 107 to recover its full response costs.

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93 Atl. Research Corp. v. United States, 459 F.3d 827, 835 (8th Cir. 2006); E.I. DuPont de Nemours & Co., 460 F.3d at 522; Consol. Edison Co. of N.Y. v. UGI Utilis. Inc., 423 F.3d 90, 100 (2d Cir. 2005).
94 E.I. DuPont, 460 F.3d at 522; Consol. Edison, 423 F.3d at 100.
95 E.I. DuPont, 460 F.3d at 522.
96 Atl. Research Corp., 459 F.3d at 835; E.I. DuPont, 460 F.3d at 522; Consol. Edison, 423 F.3d at 100; Metro. Water, 473 F.3d at 837.
97 Consol. Edison, 423 F.3d at 100.
98 Id. at 99.
99 Id. at 100.
100 Atl. Research Corp., 459 F.3d at 835.
101 Id.
102 Id.
Contrary to both the Eighth and Second Circuit, the Third Circuit in *E.I. Dupont DeNemours & Co. v. United States* imposed “joint and several” liability on PRPS under Section 107(a).103

**C. What the Supreme Court Left Open and the Seventh Circuit’s Treatment of the Topic**

The Supreme Court in the June 2007 decision of *Atlantic Research* re-affirmed the Eighth Circuit’s decision along with the Second Circuit and Seventh Circuit’s narrow holding.104 The Supreme Court abrogated the Third Circuit Court’s decision in *E.I. DuPont* by holding that the plain terms of Section 107(a) allowed a PRP to recover costs from other PRPs.105 However, the Supreme Court avoided deciding what type of PRP liability to impose under Section 107(a) for a PRP that voluntarily commenced environmental cleanup.106

On this narrow question, the Seventh Circuit in *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.* avoided imposing a specific type of liability upon a PRP, who has voluntarily commenced environmental cleanup under Section 107(a).107 In light of how *Cooper Industries, Inc. v. Aviall Services, Inc.* had foreclosed recovery via an action under Section 113(f), the Seventh Circuit found the “innocent landowner” exceptions to be of “little value.”108 However, the Seventh Circuit in *Metropolitan Water* has not overruled a Section 107(a) claim for an “innocent landowner.”109 Within the narrow context of PRP liability,

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103 *E.I. DuPont de Nemours & Co. v. United States*, 460 F.3d 515, 522 (3d Cir. 2006).


105 *Id.* at 2332; *E.I. Dupont*, 460 F.3d at 544-45.

106 *Atl. Research Corp.*, 127 S.Ct. at 2339.


the only fact that matters after the Seventh Circuit’s overruling of the prior exceptions is whether the landowner had voluntarily commenced environmental cleanup.\[^{110}\]

PART III

First, this section will discuss the context and tradition from which the Seventh Circuit created the “innocent landowner” exception in *Akzo* and *Rumpke*. Next, this article will discuss the other courts’ reactions to the Seventh Circuit’s judicially created exceptions.

*A. Creation of the Akzo Exception*

In *Akzo Coatings, Inc. v. Aigner Corp.*, innocent landowners forced to cleanup hazardous wastes caused by third party acts or migrations from adjacent lands were granted a cause of action under Section 107(a).\[^{111}\] The holding in *Akzo* arose after Akzo Coatings, Inc. completed emergency clean-up work by the government and was ordered to perform more clean-up work at hazardous sites in Indiana.\[^{112}\] Akzo Coatings, Inc. brought suit for contribution against Aigner Corporation and a number of other companies that sent hazardous wastes to various facilities in Kingsbury, Indiana between 1972 and 1985.\[^{113}\]

Prior to *Akzo*, courts uniformly decided that a PRP could not sue under Section 107(a) against another PRP.\[^{114}\] However, these courts failed to resolve the question of whether an “innocent landowner” could bring a cause of action under Section 107(a).\[^{115}\] Thus, the

\[^{110}\] *Id.* at 836-37.
\[^{111}\] *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 770-71 (7th Cir. 1994).
\[^{112}\] *Akzo*, 30 F.3d at 762-64.
\[^{113}\] *Id.* at 762-64.
\[^{114}\] See Aronovsky, *supra* note 34, at 31.
\[^{115}\] *Id.*
Seventh Circuit in Akzo was the only circuit court that appeared to be concerned about this issue.\textsuperscript{116} Three years later in Rumpke of Indiana Inc. v. Cummins Engine Co., Inc., the Seventh Circuit again permitted an innocent landowner to bring a cause of action for recovery against a PRP under Section 107(a).\textsuperscript{117} The holding in Rumpke arose when Rumpke purchased a 273-acre dump known as Uniontown Landfill from George and Ethel Darlage. At that time, the Darlages informed Rumpke that the landfill had never accepted hazardous waste. Rumpke did not conduct its own inspection of the land for environmental hazards prior to the sale.\textsuperscript{118} In 1990, Rumpke alleged it had discovered a cocktail of hazardous wastes deposited at Uniontown for many years.\textsuperscript{119} A consent decree was approved in United States v. Seymour Recycling Corp. that resolved all obligations and responsibilities of the settling companies with respect to “the Seymour site.”\textsuperscript{120} The present case arose because Rumpke pursued response costs from the Seymour settling parties, Cummins, Ford Motor Company, International Business Machines Corp., General Motors Corp., and Essex Group, Inc.\textsuperscript{121}

Together Akzo Coatings, Inc. v. Aigner Corp. and Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc. created the well-known innocent landowner Akzo/Rumpke exception, which was affirmed by subsequent cases.\textsuperscript{122} In Am International v. Datacard Corp., the Seventh Circuit applied the “Akzo-exception” by allowing an “innocent landowner” to directly sue for response costs.\textsuperscript{123} Judge

\textsuperscript{116} Akzo, 30 F.3d at 770-771.
\textsuperscript{117} Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc., 107 F.3d 1235, 1243 (7th. 1997).
\textsuperscript{118} Id. at 1236-38.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 1236-1238; United States v. Seymour Recycling Corp., 554 F.Supp. 1334 (S. D. Ind. 1982).
\textsuperscript{121} Rumpke, 107 F.3d at 1236-38.
\textsuperscript{122} NutraSweet Co. v. X-L Engineering Co., 227 F.3d 776, 791-792 (7th Cir. 2000); Rumpke, 107 F.3d at 1243.; Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 770-71 (7th Cir. 1994).
\textsuperscript{123} Am. Inter., Inc. v. Datacorp., 106 F.3d 1342, 1346-47 (7th Cir. 1997).
Posner found the Datacard Corporation “a little less innocent” than the landowner in *Akzo* because Datacard knew of the future expensive cleanup before purchasing the property.124

**B. Courts’ Attitude towards the “Akzo-Exception”**

The Second Circuit in *Bedford Affiliates v. Sills* declined to recognize a defense for landowners who did not actively contribute to the resulting contamination.125 To do so would mean carving out a judicially created defense that Congress did not create.126 Like the Second Circuit, the Eighth Circuit in *Dico Inc. v. Amoco Oil Co.* prohibited against any expansion of the list of defenses beyond those expressed in CERCLA.127 An expansion would constitute an improper judicial effort to eschew the underlying purpose of CERCLA.128

Some courts have even expressly rejected the Seventh Circuit’s “*Akzo-exception.*”129 The Ninth Circuit in *Western Property Services Corp. v. Shell Oil Co.* found the “*Akzo-exception*” inconsistent as a comprehensive scheme for adjusting the burden among parties liable for Section 107(a) recoveries.130 For this reason, the Ninth Circuit refused to acknowledge any “non-polluting PRP landowner exception.”131 Instead, the Ninth Circuit held that a PRP may only recover costs under Section 113 as a contribution action under CERCLA.132 A proponent of the federal common law, the Ninth

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124 *Id.* at 1347.
126 *Id.*
128 *Id.*
129 *W. Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678, 690, 692 (9th Cir. 2004).
130 *Id.* at 690, 692.
131 *Id.* at 692.
132 *Id.*
Circuit characterized the “innocent landowner” exception as applying to reach equitable rather than textually supported purposes. 133

PART IV

Many commentators consider the cost provisions of Section 107(a) and Section 113(f) to be the most remedial provisions of CERCLA since they deal directly with both overriding goals of CERCLA—cleanup and allocation of responsibility. 134 Nonetheless, the Supreme Court has always disfavored applying the remedial canon of statutory interpretation. 135 In the 1960 decision of United States v. Republic Steel Corp., the Supreme Court held that the Rivers and Harbors Act of 1899 must be read “charitably in light of the purpose to be served” for granting relief and enjoining defendant pollutants from creating pollution. 136 Subsequently in Key Tronic Corp. v. United States, the Supreme Court held that petitioner pollutant was not entitled to attorney’s fees from the U.S. government because neither Section 107 nor Section 113 expressly mentioned recovery for attorney’s fees. 137 At no point in the decision did the Supreme Court respond affirmatively to the lower court’s assertion that Section 107 should be liberally construed to achieve the overall objectives of the statute. 138

Similarly, Judge Easterbrook and Judge Posner’s skepticism of purpose arguments especially within CERCLA arises from Judge Easterbrook’s view of legislation as a product of compromise. 139 As Judge Easterbrook stated, “[e]ven if all legislative history points in one

133 Id. at 690.
134 See Watson, supra note 9, at 286.
136 362 U.S. at 491-92.
137 511 U.S. at 818-20.
138 Id. at 818-20.
direction, it is still necessary to find the compromise to learn the meaning of the statute.”

Similarly, Judge Posner interpreted the “public choice theory” to mean that courts “should enforce the bargains reached between the legislature and interest groups.”

As Judge Posner further elaborated, “legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare, whether ‘welfare’ is defined as wealth, utility, or some other version of equity or justice.” For the Seventh Circuit, the broadening of rights for environmentally-aggrieved parties “serve[d] as a necessary and valuable supplement to legislative efforts to restore the natural ecology of our cities and countryside.”

Judge Posner’s primary objection to the “remedial canon” is how fails to take into account the role of interest groups “whose clashes blunt the thrust of many legislative initiatives.” The Seventh Circuit’s views are supported by the leading drafter of CERCLA, former vice president Al Gore, who considered the development of a federal common law interpreting CERCLA to be “improbable.” Concurring with this notion, Judge Easterbrook “does not believe that CERCLA is the kind of statute in which Congress intended to rely on the courts to fill in the gaps through a common law process.” Rather, under the Seventh Circuit’s view, while many statutory questions remain unanswered, no goal is pursued at all costs.

See Watson, supra note 9, at 247.

See id. at 217.


See Nagle, supra note 27, at 1444-45.

See id. at 1444-45.

See id. at 1439-40.
A. How the Seventh Circuit employed the “Public Choice” Framework by creating the Akzo/Rumpke Exception

The Seventh Circuit in *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.* is the closest the Seventh Circuit has ever come to applying the “remedial canon” of statutory construction.148 Before *Rumpke* was decided, Section 113 provided a general avenue of recovery for an “innocent landowner” to bring a suit against a PRP for contaminated land.149 In *Rumpke*, Section 107(a) became the default avenue of recovery for an “innocent landowner.”150 Furthermore, the Court in *Rumpke* explicitly labeled Section 107(a) as providing for “strict liability” in the context of “innocent landowners” suing a PRP for direct injury.151

The “polluter pays” principle of CERCLA is achieved by ensuring that someone is responsible for cleaning up the contaminated property. The alternative to not allowing an “innocent landowner” with a claim for recovery is for Section 107(a) to be effectively obsolete as a cost-provision of CERCLA.152 As the Seventh Circuit in *Rumpke* noted, “if one were to read § 107(a) as implicitly denying standing to sue even to landowners like Rumpke who did not create the hazardous conditions, this would come perilously close to reading § 107(a) itself out of the statute.”153

B. How the Seventh Circuit in Metropolitan Water Utilizes the “Public Choice” Theory

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148 *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1241-42 (7th Cir. 1997).
149 *Id.* at 1240-1242.
150 *Id.* at 1240-1242.
151 *Id.* at 1240-41.
152 *Id.* at 1241-42.
153 *Id.* at 1241-42.
The Supreme Court’s attempt in United States v. Atlantic Research Corp. to reach the broad goals of CERCLA has pushed it the furthest it has ever come to applying the “remedial canon” of statutory interpretation. First, the United States v. Atlantic Research Corp. Court came close to applying “strict liability.” Second, the Supreme Court’s reasoning showed a clear bias towards promoting settlement with the government rather than voluntary cleanup.

The Supreme Court in Atlantic justified its earlier holding in Cooper that foreclosed a Section 113(f) contribution claim for a PRP who has voluntarily commenced cleanup. In doing so, the Supreme Court denied a potential conflict between the 2 interests of voluntary cleanup and settlement. By affirmatively barring a potential cause of action for contribution, the Court encouraged settlement.

Unlike the Supreme Court, the Seventh Circuit utilized the “public choice” theory of statutory construction in Metropolitan Water by inviting the EPA to submit an Amicus brief. The EPA was not directly involved in Metropolitan Water. However, in the amicus brief, the EPA articulated concern over discouraging settlement with the government by allowing additional avenues of recovery. According to the EPA, the PRP would rather litigate than take any immediate action for environmental cleanup.

On the other hand, not allowing additional avenues of recovery would sacrifice the goal of encouraging the real polluter(s) to take

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155 Id.
156 Id. at 2337-39.
157 Id. at 2337-38.
158 Id. at 2338.
159 Id.
161 Id. at 1.
162 Id. at 1, 3-4, 18-23.
163 Id. at 1, 3-4, 18-23.
responsibility for pollution. In reply to the EPA’s concern, the Seventh Circuit was “sensitive to the EPA’s concerns regarding diminished settlement leverage.”164 However, allowing a PRP, who voluntarily commenced environmental cleanup to sue another PRP under Section 107(a) of CERCLA accomplishes the goal of encouraging the real polluter to pay for cleanup.

Furthermore, one of the most important extremes the Seventh Circuit avoided was imposing “strict liability” on PRPs within the narrow context of a PRP cause of action under Section 107(a).165 Imposing “strict liability” achieves the goal of “making the polluter pay,” but fails to encourage the quickest and most cost-effective environmental cleanup. For the Seventh Circuit, it was important to avoid reaching the absurd result of imposing 100% liability upon a landowner with no legal recourse.166 Thus, the Seventh Circuit split from the Second Circuit, which allowed the imposition of “strict liability” under Section 107(a).167 The Second Circuit noted that “strict liability” is not too harsh given the availability of a contribution counterclaim under Section 113(f).168 To decide otherwise would “impermissibly discourag[e] voluntary cleanup.”169

In doing so, the Seventh Circuit avoided encouraging the landowner to wait to be sued rather than to commence cleanup.170 This is because strict liability complicates the decision to cooperate by reporting or cleaning up hazardous waste. Under strict liability, the PRP will compare expected shares of cleanup costs with the value of the land because an individual may be held liable for damages

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165 Id. at 837.
166 Id.
168 Id.
169 Id.
170 Metro. Water, 473 F.3d at 837.
regardless of intent to cause the contamination.\textsuperscript{171} The PRP will also have to predict the potential solvency of all PRPs over a period of time leading up to and possibly through litigation.\textsuperscript{172} Due to the unpredictability of potential liabilities, the PRP will often litigate to recover response costs. Ultimately, an increase in litigation discourages quick and efficient environmental cleanup.

However, unlike some other circuit courts, the Seventh Circuit has never expressly denounced “strict liability” either.\textsuperscript{173} The reason is because the Seventh Circuit wished to preserve all the tools of statutory interpretation under the “public choice” theory.\textsuperscript{174}

As the Supreme Court in \textit{Cooper Industries, Inc. v. Aviall Services, Inc.} noted, some courts have expressly denounced “strict liability” in order to provide maximum incentives for polluters to reveal knowledge of contaminated property for quick and effective cleanup.\textsuperscript{175} Other courts applied strict liability for deterrence purposes.\textsuperscript{176} For example, the Seventh Circuit applied “strict liability on PRPs in the “innocent landowner” context in order to make the polluter as opposed to the “innocent landowner” to pay for the costs of

\textsuperscript{172} See id. at 669-70.
\textsuperscript{173} \textit{Metro. Water}, 473 F.3d at 837.
\textsuperscript{174} \textit{Id.}
\textsuperscript{176} E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 522 (3rd Cir. 2006); Consol. Edison Co. of N.Y., Inc. v. UGI Utilities, Inc., 423 F.3d 90, 100 (2nd Cir. 2005).
cleanup.\textsuperscript{177} Private land ownership is encouraged as potential buyers are no longer deterred from buying a piece of contaminated property while knowing that the polluter would bear the cost of cleanup.

Additionally, the Seventh Circuit’s refusal to allow “implied contribution” recovery contrasts with the Eighth Circuit in \textit{Atlantic Research Corp. v. United States}.\textsuperscript{178} The Eighth Circuit circumvented the plain language of Section 107(a) to allow “implied contribution.”\textsuperscript{179} As the Eighth Circuit stated, “if a plaintiff attempted to use § 107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under § 113(f).”\textsuperscript{180} By allowing both general cost-recovery and contribution, the Eighth Circuit has strengthened the PRP’s claim by providing for “implied contribution” regardless of fault.\textsuperscript{181} In contrast, the Seventh Circuit shied away from the kind of judicial activism necessitated by use of the “remedial canon” of statutory construction to ensure the costs of cleanup are borne by those who are responsible.\textsuperscript{182}

Similarly, the Seventh, Eighth, and Second Circuit’s narrow holdings are contrasted with the Third Circuit in \textit{E.I. DuPont Nemours & Co. v. United States}.\textsuperscript{183} Unlike the Seventh Circuit, the Third Circuit in \textit{E.I. DuPont} refused to allow an avenue of recovery under Section 107(a).\textsuperscript{184} For the Third Circuit, an avenue of recovery would discourage settlement with the government.\textsuperscript{185} However, not allowing

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\textsuperscript{177} Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc., 107 F.3d 1235, 1240 (7th Cir. 1997); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994).
\textsuperscript{178} Atl. Research Corp. v. United States, 459 F.3d 827, 835-36 (7th Cir. 2006); Metro. Water, 473 F.3d at 836.
\textsuperscript{179} \textit{Atl Research}, 459 F.3d at 835-36.
\textsuperscript{180} \textit{Id.} at 835.
\textsuperscript{181} \textit{Id.} at 835-36.
\textsuperscript{182} \textit{Metro. Water}, 473 F.3d at 835-837.
\textsuperscript{183} \textit{Atl. Research}, 459 F.3d at 836-37; E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 543 (3d Cir. 2006); Consol. Edison Co. of N.Y. v. UGI Util., Inc., 423 F.3d 90, 103-04 (2d Cir.2005); \textit{Metro. Water}, 473 F.3d at 837.
\textsuperscript{184} \textit{E.I. DuPont}, 460 F.3d 515 at 543.
\textsuperscript{185} \textit{Id.}
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such an avenue of recovery would be directly against creating incentives for voluntary private party cleanups.\textsuperscript{186} To the extent that opening up another narrow exception would increase litigation, the broad goal of encouraging fast and efficient cleanup is accomplished by encouraging a PRP to voluntarily commence cleanup. Furthermore, the “polluter pays” principle is furthered when a PRP recovers costs from other PRPs.

**CONCLUSION**

The Seventh Circuit’s “public choice” theory offers the best interpretation of CERCLA because it furthers the two different and conflicting goals of CERCLA. Courts want to encourage clean up of hazardous waste sites quickly and effectively. However, Courts also want to ensure that the polluters bear the costs for cleaning up the hazardous condition. As such, the existence and degree of conflict between the two goals of CERCLA will be dependent upon the particular factual circumstances and legal context. Each court construing CERCLA in a particular factual circumstance and trying to further a particular goal, must be aware of competing interests. The “public choice” theory offers the solution in each circumstance because legislation is a product of compromise that requires reaching a middle-ground among competing interests.

While the Seventh Circuit is the only circuit that employs the “public choice” theory with regard to CERCLA interpretation, it has done so to reach the most equitable results. For example, in *Akzo* and *Rumpke*, the Seventh Circuit was the first court to address the issue of Section 107(a) recovery for either an “innocent landowner” or a PRP. In creating the “*Akzo/Rumpke*” “innocent landowner” exception and imposing “strict liability” on PRPs, the Seventh Circuit advanced the “polluter pays” principle of CERCLA.

*Metropolitan Water* represents a classic application of the “public choice” theory. The Supreme Court’s arresting remiss of directive in either statutory construction or principle on the issue of PRP liability

\textsuperscript{186} See Gergen, *supra* note 171, at 672-73.
left the Seventh Circuit and many circuit courts in a precarious situation. In affirmation of *Akzo* and *Rumpke*, the Seventh Circuit carved out another narrow exception within Section 107(a) for PRPs, who had voluntarily commenced cleanup. In doing so, the Seventh Circuit encouraged quick and effective cleanup. The Seventh Circuit also avoided the extremes of some other the circuit courts by not imposing “strict liability” on PRPs or labeling cost recovery under Section 107(a) as “implied contribution.” Applying the “public choice” theory, the Seventh Circuit has continuously expanded the interests of all environmentally aggrieved parties.
CAUTION! GOVERNMENT INTRUSION MAY BE CLOSER THAN IT APPEARS: THE SEVENTH CIRCUIT CONSIDERS GPS DEVICES UNDER THE FOURTH AMENDMENT

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INTRODUCTION

The Fourth Amendment provides protection for individuals from unreasonable searches and seizures of their persons, property, and effects.1 However, as technology advances and the need for security in this country increases, individuals’ Fourth Amendment rights are in danger. Global Positioning System (“GPS”) tracking devices can now be easily installed on anyone’s car. The GPS device can then track that person’s movement for an extended period of time through the use of sophisticated computer and satellite technology. Under the current state of the law, the police are able to place these GPS devices on cars or possessions without reasonable suspicion, probable cause, or a warrant.

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1 U.S. Const. amend. IV.
This convergence of rapidly improving technology and Fourth Amendment rights has created a novel legal issue: If the police install a GPS device on an individual’s car or possession without first proving reasonable suspicion or probable cause, or without first obtaining a warrant, does their action violate the Fourth Amendment?

In *Katz v. United States*, the Supreme Court found that the police violate the Fourth Amendment when they infringe on an individual’s privacy in a place where that individual has a reasonable expectation of privacy.\(^2\) However, a few years later in *United States v. Knotts*, the Supreme Court found that police monitoring of a beeper installed on an individual’s car did not constitute a search or seizure and therefore did not violate the Fourth Amendment, because the individual did not have a reasonable expectation of privacy while traveling on a public road.\(^3\)

GPS technology is very new; therefore, few cases across the country have addressed the possible Fourth Amendment violation that installing the GPS device creates. The Supreme Court has yet to decide the issue of “whether installing [a GPS] device in [a] vehicle convert[s] the subsequent tracking into a search.”\(^4\) The circuits are split over the issue with the Fifth and Ninth Circuits holding that installing a GPS device does not constitute a search, and the First, Sixth, and Tenth Circuits holding the opposite.\(^5\) In the circuit split cases, it is important to note that these cases concern tracking devices in general, not just GPS devices.

The Seventh Circuit recently addressed this issue in *United States v. Garcia*.\(^6\) In *Garcia*, the Seventh Circuit agreed with the Fifth and the Ninth Circuits’ finding that the evidence obtained by using the GPS

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\(^4\) United States v. Garcia, 474 F.3d 994, 996-97 (7th Cir. 2007); See Knotts, 460 U.S. 276 (where the Court found that monitoring a beeper, as opposed to installing a beeper, to track a vehicle did not constitute a search. The court did not decide the issue of whether installing the device constituted a search).

\(^5\) See Garcia, 474 F.3d. at 997 (listing cases).

\(^6\) Id.
device was not the fruit of an illegal search.\(^7\) Therefore, there was no Fourth Amendment violation.\(^8\) The Seventh Circuit put heavy weight on the fact that the police used the GPS device simply to make their job of tracking the suspect easier.\(^9\) Instead of assigning an officer to follow a suspect in a car—an activity that would not violate the Fourth Amendment—the court held that the police can install a GPS device to follow the suspect instead.\(^10\) However, in deciding Garcia, the Seventh Circuit made many errors in its reasoning. The court should have found that installing a GPS device constitutes a search; therefore, a warrant is required prior to installing the device. The Seventh Circuit should have protected the Fourth Amendment by requiring that the police obtain a warrant prior to commencing the search, that is, prior to installing the GPS device.

Part 1 of this comment will provide a background on beeper and GPS technology; a discussion of searches and seizures within the Fourth Amendment; and an overview of the warrant requirement, and the probable cause and reasonable suspicion standards. Part 2 will examine judicial precedent surrounding the issue, including four United States Supreme Court cases and circuit and state court cases. Part 3 will examine a recent Seventh Circuit decision, United States v. Garcia, where the court found that installing a GPS device without a valid warrant was not a search; therefore, there was no Fourth Amendment violation. Part 4 will explain why Garcia was wrongly decided and why a warrant should be required before the police can install a GPS device on an individual’s car or possession.

\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
I. BACKGROUND

A. Beepers and GPS Technology

GPS technology is a very recent technological advancement. The U.S. Air Force launched the twenty-fourth NAVSTAR satellite into orbit on June 26, 1993.\(^{11}\) Launching NAVSTAR was the last step in creating the Global Positioning System.\(^{12}\) GPS tracking is a much more technologically advanced tracking system than the beepers and radio transmitters used by the police prior to GPS to track suspects.\(^{13}\) The GPS system consists of a network of at least twenty-four satellites that send radio signals transmitting their location.\(^{14}\) Then, GPS receivers on Earth “triangulate their own three-dimensional position using information from at least four of the satellites.”\(^{15}\) Triangulating means that the GPS “calculates the distance to each satellite by measuring the time necessary for a radio signal to travel to that satellite.”\(^{16}\)

The information gained from a GPS device is called a “fix” and includes the longitude, latitude, and time.\(^{17}\) Once the fix is recorded, it operates as a track or precise record of travel.\(^{18}\) The fix must then be downloaded because the actual device does not hold much information, and then the police can obtain a precise chronological

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\(^{12}\) Id.


\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Keener, supra note 11, at 474.

\(^{17}\) Ganz, supra note 13, at 1328.

\(^{18}\) Id.
Typically, GPS devices fit on the underside of a car, are the size of a book, and can be installed by using magnets. GPS allows the police to track suspects without having to do real-time visual surveillance and without taking up any individual police officer’s time. GPS devices can be tracked in real time as well as by using a computer and a map that displays where the device is currently located. The GPS device is capable of storing information for days, weeks, or even years.

Prior to GPS, police used beepers and radio transmitters to aid them in tracking a suspect. Police attached a beeper to a suspect’s car or possessions allowing the police to more effectively follow the suspect live. The beeper or radio transmitter “emits periodic signals that can be picked up by a radio receiver.” Then, the police can follow the suspect visually in the car and also follow the signal being emitted by the beeper. Beepers allow the police to follow a suspect by following the radio signals or to find a suspect if the police lose track during live visual surveillance. In comparison to today’s technology—namely GPS technology—beepers are considered unsophisticated.

Therefore, because of its amazing capabilities including its ability to keep a precise record of one’s travel for an unlimited amount of time, and the fact that the police do not need to actively follow the suspect in real time in their cars, the GPS device is radically different and much more technologically advanced than beeper technology.

19 Id. at 1329.
20 Id.
22 Id.
23 Id.
24 Ganz, supra note 13, at 1328.
25 Id.
27 Id.
Because GPS technology is so new, courts often look at cases involving beepers for guidance. However, strict dependence on beeper cases might not be wise considering the vast differences between the two technologies.

B. The Fourth Amendment

GPS and beeper cases are typically examined under the Fourth Amendment.29 The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.30

The Fourth Amendment serves a gate keeping function between free society and police actions.31 The Supreme Court has clearly stated that “[a] ‘search’ occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”32 Prior to Katz v. United States, the government typically had to physically intrude for a search to occur.33 However, in Katz, the Court found physical intrusion was not necessary in order to perform a search.34 The Katz court found that the Fourth Amendment protected people, not just places.35

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30 U.S. Const. amend. IV.
33 Hutchins, supra note 31, at 409; Katz, 389 U.S. 347.
35 Id. at 351.
In addition, a seizure “occurs when there is some meaningful interference with an individual’s possessory interests in that property.”36 Further, the Court has stated that:

The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated, however, for an actual trespass is neither necessary nor sufficient to establish a constitutional violation.37

C. Warrant, Probable Cause, and Reasonable Suspicion

There are three different standards that describe the level of proof that the police must have before commencing certain activities such as seeking a warrant, conducting a search of a person or property, or frisking an individual. The highest standard is a warrant, followed by probable cause, and then reasonable suspicion.

The Supreme Court has created a presumption that the police must secure a warrant prior to conducting a search, absent exigent circumstances.38 In GPS cases, a central issue is whether the use of the GPS device constitutes a search. If it does, then absent exigent circumstances, it would follow that the police must secure a warrant prior to using the device.

However, if a court finds that police use of a GPS device is not a search and therefore a warrant is not required, then the courts could find that police must show probable cause before the GPS device can be properly installed on a vehicle or possession. Proving probable cause imposes a higher burden than proving reasonable suspicion, but a lower burden than obtaining a warrant.39 Police can prove probable cause when, looking at the totality of the circumstances, they can show

36 *Jacobsen*, 466 U.S. at 113.
that a reasonably prudent person would believe that the search of a particular area will produce evidence of a crime.40 In proving probable cause, the officers must make common sense judgments and reasonable inferences, based on the totality of the circumstances and their training and experience, about what a search will uncover.41 As long as the officers can prove this, then they can prove probable cause exists.42

The lowest threshold—below a warrant and probable cause—is reasonable suspicion.43 To prove reasonable suspicion, one must show some objective finding that someone is about to do something typically prohibited.44 Reasonable suspicion is similar to probable cause in that reasonable suspicion can be based on an officer’s common sense and inferences about how people typically act.45 The totality of the circumstances will determine if the officers had a reasonable belief that illegal activity was likely and that their intrusion was justified.46 Therefore, the officers’ experience and common sense, as well as inferences about the suspect, come into play.47

II. JUDICIAL PRECEDENT

The Supreme Court has yet to decide whether the installation of a tracking device constitutes a search under the Fourth Amendment.48 However, the Supreme Court has held that the warrantless monitoring

40 Id.
41 Id. at *6.
42 Id. (quoting United States v. Parra, 402 F.3d 752, 763-64 (7th Cir. 2005)).
43 Garcia, 2006 WL 1294578, at *3 (finding “[r]easonable suspicion is the lowest cognizable evidentiary threshold, one step above an inchoate and unparticularized hunch, but below probable cause and considerably lower than a preponderance of the evidence.”).
44 Id.
45 Id.
46 Id.
47 Id.
48 United States v. Garcia, 474 F.3d 994, 996-97 (7th Cir. 2007).
of a *beeper* or *radio transmitter* does not constitute a search.\(^{49}\) The Court first tackled the issue in *Katz v. United States*;\(^{50}\) it was further fleshed out in *United States v. Knotts,*\(^{51}\) *United States v. Karo,*\(^{52}\) and *United States v. Kyllo.*\(^{53}\) Subsequent to these cases, a split has developed among the circuit courts and state courts as to whether the installation of a tracking device constitutes a search under the Fourth Amendment. This section will focus on all of these cases which examine whether the warrantless installation and monitoring of a GPS device constitutes a search.

**A. Supreme Court Cases: Katz, Knotts, Karo, and Kyllo**

1. *Katz v. United States*

   In *Katz,* the Supreme Court found that a search or seizure under the Fourth Amendment occurs when one’s justified expectation of privacy is violated.\(^{54}\) In *Katz,* the defendant made gambling bets via a pay phone on a public street.\(^{55}\) The FBI then attached an electronic listening and recording device to that public phone booth.\(^{56}\) The trial court and the appellate court found that recording the defendant’s calls did not violate the Fourth Amendment.\(^{57}\) The Supreme Court disagreed and stated that “the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”\(^{58}\) The Court stated that “what he seeks to


\(^{50}\) Katz v. United States, 389 U.S. 347 (1967).

\(^{51}\) *Knotts,* 460 U.S. 276.


\(^{54}\) *Katz,* 389 U.S. at 353.

\(^{55}\) *Id.* at 348.

\(^{56}\) *Id.*

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 351.
preserve as private, even in an area accessible to the public, may be constitutionally protected." The Court held that the presence of a physical intrusion is not necessary and that:

The government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.

Therefore, the Court determined that the defendant’s belief that his conversation would be private was reasonable, and accordingly, the government’s actions infringed on his Fourth Amendment rights. Searches conducted without probable cause or a warrant “are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.”

Justice Harlan wrote a concurring opinion in Katz and laid out a two-part test for determining reasonable expectations of privacy. The first part of the test involves determining “that a person [has] exhibited an actual (subjective) expectation of privacy.” The second part of the test involves determining “that the expectation be one that society is prepared to recognize as ‘reasonable’.” This two-part test has been followed by countless courts and now represents the standard for a court to determine if an individual has a reasonable expectation of privacy.

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59 Id. at 351.
60 Id. at 353
61 Id.
62 Id. at 357.
63 Id. at 360-62.
64 Id. at 361.
65 Id.
2. United States v. Knotts

Unlike in Katz where the government attached a recording device to a public phone booth, United States v. Knotts dealt with the police using a beeper inside a canister for the purpose of electronically tracking the suspect.\(^{66}\) In Knotts, law enforcement officials believed that the defendant was involved in the manufacture of illegal drugs.\(^{67}\) Therefore, they coordinated with the seller of a chloroform product the defendant was about to purchase and placed a radio transmitter beeper inside the container.\(^{68}\) Using the beeper, the police followed the defendant to a cabin in Wisconsin, obtained a warrant and searched the cabin, and discovered an amphetamine laboratory.\(^{69}\)

The trial court denied the defendant’s motion to suppress evidence based on the warrantless monitoring of the beeper.\(^{70}\) However, the appellate court reversed “finding that the monitoring of the beeper was prohibited by the Fourth Amendment because its use had violated respondent’s reasonable expectation of privacy.”\(^{71}\)

The Supreme Court, relying on Katz, noted that Fourth Amendment claims turn on whether the individual had a reasonable expectation of privacy.\(^{72}\) The Court then noted that monitoring the beeper was akin to the police following the defendant in a car on a public street.\(^{73}\) The Court then cited multiple cases that state that when one is in an automobile, he has a diminished expectation of privacy.\(^{74}\) Specifically, the Court quoted a case that stated:

\(^{67}\) Id. at 278.
\(^{68}\) Id.
\(^{69}\) Id. at 279.
\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) Id. at 280 (citing Smith v. Maryland, 442 U.S. 735 (1979)).
\(^{73}\) Knotts, 460 U.S. at 281.
\(^{74}\) Id. at 281 (citing Rakas v. Illinois, 439 U.S. 128 (1978); South Dakota v. Opperman, 428 U.S. 364 (1976)).
One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.75

As noted, the Court placed a heavy emphasis on the idea that the information gathered by the police could have been gathered by simply following the defendant in his car.76 Police use of the beeper merely assisted the police in gathering information and did not indicate to the Court that the police could not have obtained the information without it.77 The Court stated that “[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.”78 Therefore, the Court held that “monitoring the beeper signals did not invade any legitimate expectation of privacy on the respondent’s part, and thus there was neither a ‘search’ nor a ‘seizure’ within the contemplation of the Fourth Amendment.”79

However, the author of the opinion, Justice Rehnquist, stated that if law enforcement begins using “dragnet type law enforcement practices,” perhaps then it will be time to consider whether a constitutional issue arises.80 The Court ultimately determined that in Knotts, the beeper merely served to make the police search more effective; therefore, there was no constitutional violation.81

75 Knotts, 460 U.S. at 281 (citing Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).
76 Knotts, 460 U.S. at 282.
77 Id.
78 Id.
79 Id. at 276.
80 Id. at 284.
81 Id.
3. *Unites States v. Karo*

Shortly after *Knotts*, the Court again tackled whether beepers violated the Fourth Amendment in *United States v. Karo*. In *Karo*, the Court focused on the monitoring of a beeper that ended up inside of a house, where occupants typically have a reasonable expectation of privacy.82

In *Karo*, Drug Enforcement Administration agents suspected the defendant was manufacturing drugs.83 They obtained a court order to attach and monitor a beeper in a can of ether that the defendant was about to purchase.84 After a period of days during which the agents monitored the can of ether, including while the can was inside a private residence, the police arrested the defendant for conspiring to possess cocaine with the intent to distribute.85 The trial court granted the defendant’s pretrial motion to suppress evidence because the court found that the beeper installation and monitoring was unauthorized and invalid.86 The Tenth Circuit affirmed the trial court, reasoning that a warrant was required prior to the beeper installation.87 The Tenth Circuit argued that the defendant’s Fourth Amendment rights were violated when he obtained the can of ether.88 The Tenth Circuit stated:

All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken.89

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83 *Id.* at 708.
84 *Id.*
85 *Id.* at 709-10.
86 *Id.* at 710.
87 *Id.*
88 *Id.* at 711-12.
89 *Id.* at 712.
In *Karo*, Justice White stated that the Court needed to decide two issues left unresolved by *Knotts*: first, whether the installation of a beeper installed with the consent of the original owner before the ultimate buyer takes possession constitutes a search or seizure when the ultimate buyer has no knowledge of the beeper; and second, “whether monitoring of a beeper falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance.”

First, the Court found that the installation of the beeper on the can of ether was not a search or seizure. The Court reasoned that at the time the beeper was placed on the can of ether, it was the property of the DEA. Second, the Court held that monitoring of the beeper did violate the defendant’s rights because the DEA agents monitored Karo by monitoring the beeper while it was inside a private residence. Private residences are typically recognized as spaces where individuals have a right to expect privacy from government intrusion without a warrant.

To be clear, the difference between *Knotts* and *Karo* is that in *Knotts*, the information the police obtained could have been obtained by following the defendant on a public street. However, in *Karo*, the police could not have obtained the information without performing an unreasonable search under the Fourth Amendment. They could not have visually obtained the information without entering the defendant’s home. Therefore, in *Karo*, the Court found that the

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90 Id. at 707.
91 Id. at 712-13.
92 Id.
93 Id. at 714.
94 Id. at 714-15 (citing Welsh v. Wisconsin, 466 U.S. 740, 748-49 (1984); Steagald v. United States, 451 U.S. 204, 211-12 (1981)).
95 *Karo*, 468 U.S. at 715.
96 Id.
97 Id.
defendant’s Fourth Amendment rights were violated by the monitoring of the beeper while inside a private residence.98

4. United States v. Kyllo

Many years after Karo, the Supreme Court again dealt with a case involving government surveillance, although this time with a new, novel technology.99 In Kyllo, government agents suspected the defendant was growing marijuana in his home, an activity which required the use of high-intensity lamps.100 Therefore, government agents quickly scanned the defendant’s home with a thermal imager in the middle of the night from the street, unbeknownst to the defendant.101 This scanner helped the agents determine if the amount of heat radiating out of the defendant’s home was consistent with the use of the required high-intensity lamps.102 The scan revealed that the area over the garage and on one side of the defendant’s home were “relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex.”103

From the scan, the agents obtained a warrant, searched the defendant’s home, and discovered he was indeed growing marijuana.104 The trial court denied defendant’s petition to suppress the evidence resulting from the scan.105 The court of appeals found that the defendant made no attempt to hide the heat escaping from his home; therefore, he had no subjective expectation of privacy.106 Also, even if he had shown a subjective expectation, there was no objective

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98 Id.
100 Id. at 29.
101 Id.
102 Id.
103 Id. at 30.
104 Id.
105 Id.
106 Id. at 31.
expectation of privacy, because the scan only revealed hot spots in the defendant’s home, not any intimate details of his life.\footnote{107}

The Court found that:

\begin{quote}
[T]he Government use[d] a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.\footnote{108}
\end{quote}

Therefore, similar to \textit{Karo}, because the police would not have been able to obtain the information without entering the defendant’s home, the Court found the scan to be a search.\footnote{109}

\textbf{B. A Chronological Look at Circuit Court and State Court Cases Finding the Use of GPS Devices or Beepers Is a Search}

The Supreme Court has created a presumption that in order for police to legally conduct a search, they must obtain a warrant when doing so is feasible.\footnote{110} However, a warrant is only required when there is an actual search under the Fourth Amendment.\footnote{111} Therefore, the issue of whether the installation and monitoring of a beeper or GPS device constitutes a search or seizure under the Fourth Amendment is central to the issue of whether a warrant is required. In the cases that follow, the courts ruled that there was a search within the meaning of the Fourth Amendment.

\footnotesize
\begin{itemize}
\item\footnote{107} \textit{Id.}
\item\footnote{108} \textit{Id. at 40.}
\item\footnote{109} \textit{Id.}
\item\footnote{110} United States v. Garcia, 474 F.3d 994, 996 (7th Cir. 2007).
\item\footnote{111} \textit{Id.}
\end{itemize}
1. *United States v. Moore* (First Circuit, 1977)—Beeper Case

In *Moore*, the district court found that evidence obtained by using beepers to track movement violated the Fourth Amendment. DEA agents attached a beeper to a box carrying chemicals before the defendant possessed it. Another beeper was attached to the underside of the defendant’s vehicle. Relying on *Katz*, the First Circuit looked to whether the use of a beeper violated a reasonable expectation of privacy, and commented that although one does not have an expectation of privacy when on public roads; one does not expect to be tracked while in public. The court concluded that a beeper “transforms the vehicle, unknown to its owner, into a messenger.” Therefore, “[w]hile a driver has no claim to be free from observation while driving in public, he properly can expect not to be carrying around an uninvited device that continuously signals his presence.” Recognizing these competing ideas, the First Circuit held that the state must show that it had probable cause before attaching a beeper. In *Moore*, the court found such probable cause so that the use of the beepers did not violate the Fourth Amendment.


In *Shovea*, federal agents suspected the defendant of being involved in the manufacture of methamphetamine, so they attached a...
beeper to his car in order to track his movements. After days of observation and after accumulating evidence that their suspicion was correct, the agents arrested the defendant. The Tenth Circuit attempted to balance the fact that the installation of the beeper was a trespass with the fact that one may not have a reasonable expectation of privacy when traveling on public roads. Inexplicably deciding to ignore the trespass in its decision, the court found that it need not resolve this problem because the police had probable cause to attach the device. The court stated that: “[i]f there is probable cause, an automobile, because of its mobility, may be searched without a warrant in circumstances that would not justify a warrantless search of a house or office.” Therefore, because there was probable cause, there was no violation of the defendant’s Fourth Amendment rights.

3. United States v. Bailey (Sixth Circuit, 1980)—Beeper Case

The Sixth Circuit determined that a beeper installed even after police obtained a warrant violated the Fourth Amendment. In Bailey, DEA agents installed a beeper into a drum of chemicals that the defendant was about to purchase, obtained a warrant to enter the building the defendant was in, and arrested him for drug crimes. The Sixth Circuit did not characterize the installation of the beeper as a search or a seizure. Rather the court focused on if the installation violated a legitimate expectation of privacy. The court noted that even de minimis intrusions are relevant to the Fourth Amendment if

119 United States v. Shovea, 580 F.2d 1382, 1384 (10th Cir. 1978).
120 Id.
121 Id. at 1387.
122 Id.
123 Id. at 1388.
124 Id.
125 United States v. Bailey, 628 F.2d 938, 939 (6th Cir. 1980).
126 Id.
127 Id. at 940.
128 Id.
they violate an expectation of privacy.\textsuperscript{129} The court disagreed with the government’s assertion that the intrusion was minor, stating that “the intrusion is minor only if it does not violate protected individual privacy.”\textsuperscript{130}

The court disregarded whether the beeper installation constituted a search because the police installed the beeper while the container was in the agents’ custody, and not the defendant’s.\textsuperscript{131} Therefore, the only issue to consider was whether the monitoring constituted a search, and the court concluded that it did.\textsuperscript{132} The court found under \textit{Katz}, the defendant had a subjective expectation of privacy because his actions of keeping the chemicals in private areas and out of public view demonstrated that he wanted to keep the location of the chemicals private.\textsuperscript{133} Additionally, the court found that “the law is prepared to recognize as legitimate an individual's expectation of privacy with respect to what he does in private with personal property he has a right to possess.”\textsuperscript{134}


In \textit{Jackson}, the defendant called the police to report his missing daughter.\textsuperscript{135} After a few days, police believed the defendant was involved in his daughter’s disappearance, so they obtained warrants to search his house and two cars and also installed GPS tracking devices on his cars.\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.} at 943.
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.} at 943-44.
  \item \textsuperscript{134} \textit{Id.} at 944; \textit{See also} \textit{State v. Campbell}, 759 P.2d 1040 (Or. 1988) (where the court found that because the police failed to effectively follow the defendant in his car and therefore had to install a radio transmitter to track him, there was a search under the Oregon Constitution).
  \item \textsuperscript{135} \textit{State v. Jackson}, 76 P.3d 217, 220 (Wash. 2003).
  \item \textsuperscript{136} \textit{Id.} at 220-21.
\end{itemize}
Police then tracked him to two remote locations. At the first location, police found the body of the missing daughter in a shallow grave, and at the second location, police found duct tape and plastic bags containing hair and blood from the victim. Police then arrested the defendant. The trial court found him guilty of first degree murder and sentenced him to prison time. On appeal, the defendant argued that the use of the GPS device violated the Washington Constitution. The appellate court held that the warrantless installation of a GPS device did not violate the Washington constitution.

Accordingly, Jackson appealed to the Washington Supreme Court. The court found that while they were affirming Jackson’s conviction, police should be required to obtain warrants prior to installing GPS devices pursuant to the state constitution.

5. **Biddle v. State** (Delaware State, 2006)—GPS Case

In *Biddle*, a civilian installed a GPS device in another civilian’s vehicle. The State argued that there is “an expectation of privacy in the undercarriage of one’s vehicle” and that the defendant violated this when she installed the GPS device. The court held that there is a reduced privacy expectation when traveling on public roads, “but the police do not have the unfettered right to tamper with a vehicle by surreptitiously attaching a tracking device without either the owner’s

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137 Id. at 221.
138 Id.
139 Id.
140 Id.
141 Id. at 221-22.
142 Id. at 222.
143 Id.
144 Id. at 224.
146 Id.
consent or without a warrant issued by the court."\textsuperscript{147} The court held that “the basic principle that a person has a protected privacy interest in his/her automobile is still applicable."\textsuperscript{148} Therefore, the court held that the defendant violated this legitimate privacy expectation.\textsuperscript{149}

C. A Chronological Look at Circuit Court and State Court Cases
Finding the Use of GPS Devices or Beepers is NOT a Search

In the cases that follow, the courts ruled that there was not a search within the meaning of the Fourth Amendment.\textsuperscript{150}

1. \textit{United States v. Pretzinger} (Ninth Circuit, 1976)—Beeper Case

In \textit{Pretzinger}, DEA agents attached a beeper to a plane to track the defendant’s movements.\textsuperscript{151} After doing so, the agents were able to arrest the defendant for drug related crimes.\textsuperscript{152} The defendant argued that his arrest was the product of an illegal search because the police attached a beeper to the plane.\textsuperscript{153} The court noted that the law in the Ninth Circuit is clear that when a device is attached to a vehicle moving on public roads—or airspace in this case—it is not a search because it does not infringe on a reasonable expectation of privacy.\textsuperscript{154} The court found that no warrant is required in a case like this unless Fourth Amendment rights could be violated.\textsuperscript{155} In \textit{Pretzinger}, the Tenth Circuit noted that the DEA agents had established probable

\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} at *2.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} United States v. Michael, 645 F.2d 252 (5th Cir. 1981); United States v. Bernard, 625 F.2d 854 (9th Cir. 1980); United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976).
\textsuperscript{151} \textit{Pretzinger}, 542 F.2d at 519.
\textsuperscript{152} \textit{Id.} at 520.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
cause and had applied for a warrant, protecting the Fourth Amendment.  

2. United States v. McIver (Ninth Circuit, 1999)—GPS Case

In McIver, the police placed a GPS device on the underside of the defendant’s vehicle. The court found that the warrantless installation of the GPS device did not violate the Fourth Amendment for many reasons. First, the defendant never did anything to manifest his intent to keep the underside of the vehicle private. Second, the defendant failed to prove that the warrantless installation of the GPS device deprived him of dominion and control of his vehicle. Therefore, the Ninth Circuit held a search or seizure did not occur and that the Fourth Amendment was not violated.

3. People v. Gant (New York, 2005)—GPS Case

In Gant, the police placed a GPS device on an RV, leading to the defendant’s arrest. The defendant unsuccessfully moved to suppress all evidence obtained as a result of the GPS device. The court stated

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156 Id.
157 United States v. McIver, 186 F.3d 1119, 1126 (9th Cir. 1999).
158 Id.
159 Id. at 1127.
160 Id.
161 Id.; See Osburn v. Nevada, 44 P.3d 523 (Nev. 2002), where the court held that the defendant did not have a reasonable expectation of privacy in the exterior of his car; therefore, there was no search or seizure. Id. at 526; See also People v. Lacey, 2004 WL 1040676, at *8 (N.Y. Co. Ct. May 6, 2004), where the court held that the police should have obtained a warrant before attaching the GPS device. Id at *8. However, the court found that the defendant did not have a reasonable expectation of privacy in his vehicle because it was used in connection with committing a crime and he did not own the vehicle. Id. at *9. Therefore, the court held that installing the GPS was allowed. Id.
163 Id.
that without a valid expectation of privacy, there can be no search or seizure under the Fourth Amendment. Therefore, the defendant had the burden of proving a valid expectation of privacy, which he failed to do. Accordingly, the court determined that the police were not required to obtain a warrant before installing the GPS device. In doing so, the court relied on Knotts, which stated that “a person traveling on a public roadway has no reasonable expectation of privacy in his movements from one place to another.” The court, again relying on Knotts, noted that “one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.”

III. SEVENTH CIRCUIT DECISION: UNITED STATES V. GARCIA

United States v. Garcia is the first case where the Seventh Circuit squarely faced the issue of whether covert use of a GPS device is a search under the Fourth Amendment. In an opinion authored by Judge Posner, the Seventh Circuit found that GPS use does not constitute a search; therefore, the Fourth Amendment is not violated.

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164 Id. at 618-19.
165 Id. at 618.
166 Id.
167 Id. at 619.
168 Id.; See also United States v. Moran, 349 F.Supp.2d 425 (N.D.N.Y. 2005) (where the court held that because the defendant did not have a valid expectation of privacy while traveling on a public road, it was not a search or seizure and the Fourth Amendment was not implicated); State v. Scott, 2006 WL 2642001, at *4 (NJ Aug. 8, 2006) (where the court held that when the police had probable cause prior to attaching a GPS device, that was enough to avoid implicating the Fourth Amendment).
169 United States v. Garcia, 474 F.3d 994 (7th Cir. 2007).
170 Id.
A. The Facts of Garcia

In Garcia, the police suspected the defendant was involved in making methamphetamine. Therefore, they installed a GPS device on the vehicle he was using, without his knowledge, while the car was parked on a public street. The police did not obtain a search warrant or court order prior to doing so. After reviewing the information obtained from the GPS device, the police learned the locations where the vehicle had been driven. Then, the agents obtained a warrant to search those locations and found materials used to make methamphetamine. While the agents were searching the property, the defendant drove onto the property whereby the agents searched his car, finding other methamphetamine materials. Accordingly, the defendant was charged “with crimes related to methamphetamine cooking.”

B. First Report and Recommendation

In the first of two Report and Recommendations, the defendant attempted to suppress evidence obtained as a result of the GPS device, alleging a Fourth Amendment violation. The magistrate judge noted that the Seventh Circuit, among others, had yet to decide this issue. After Knotts, the defendant knew that he would likely be unsuccessful in any GPS monitoring challenge because he was tracked on a public street.

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172 Id.
173 Id.
174 Id.
175 Id.
176 Id.
177 Id. at *2.
178 Id. at *1.
179 Id.
street.\textsuperscript{180} Therefore, “Garcia limit[ed] his challenge to the question left open in \textit{Knotts}: the reasonableness of the warrantless installation of a tracking device on his vehicle.”\textsuperscript{181} The court noted that this issue has been previously avoided by the Supreme Court.\textsuperscript{182}

The court then discussed the \textit{Knotts} decision, specifically noting that individuals do not have a reasonable expectation of privacy while traveling on public roads and that using a beeper is simply augmenting what the police could have done on their own without it.\textsuperscript{183} The district court then noted that three justices concurred in \textit{Knotts}—Justices Brennan, Stevens, and Marshall—stating that “it would have been a much thornier case if the defendants had challenged the installation of the beeper.”\textsuperscript{184} The district court also noted that \textit{Karo} held that the Fourth Amendment was violated when the device was used on private property, but that \textit{Karo} was not directly on point because in \textit{Karo} the defendants did not challenge the installation of the beeper.\textsuperscript{185}

The court then analyzed many federal and state court cases that dealt with beepers being used in surveillance, but noted that many of them were not as damaging to Garcia as the government wanted them to be.\textsuperscript{186} The court settled on the single issue it needed to decide: “under what circumstances, if any, does the Fourth Amendment forbid the government from installing a tracking device on a person’s private property?”\textsuperscript{187} The court then stated it seemed “reasonably clear that the government must at least have a reasonable suspicion that the suspect is engaged in criminal activity and that monitoring his motor vehicle will produce evidence useful to the investigation.”\textsuperscript{188}
Further, the court did not agree with the government’s idea that the government could install a GPS device “on nothing more than its say-so.” The court then narrowed the issues down. First, “[m]ust the government go a step further and establish probable cause to install a locational transmitter in a case like Garcia’s?” Second, “[r]egardless which level of proof must be established, may the government obtain the court’s post-hoc imprimatur in a case like Garcia’s?”

The court found that reasonable suspicion is enough, and that a post-hoc hearing is enough to protect the defendant’s rights. The court then noted that the GPS installation on Garcia’s car caused minimal government intrusion, and that the real intrusion is the monitoring of the car that follows. However, since the monitoring was not deemed an intrusion in *Knotts*, the court reasoned that the installation could not be a more significant intrusion than the monitoring. The court finally noted that the government had to prove that no violation had occurred, but failed to do so. Therefore, the magistrate judge recommended that suppression was appropriate unless the government could prove it had reasonable suspicion to install the GPS device. The magistrate judge recommended the following:

Before the government may install a [GPS on a vehicle] . . . it must establish at least a reasonable suspicion that the car’s owner(s)/driver(s) are engaged in criminal activity, and that

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189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.* at *8.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
knowledge of the car’s movement in public places will lead to the discovery of evidence relevant to the criminal investigation.

C. Second Report and Recommendation

In the First Report and Recommendation, the magistrate judge stated that the police must have reasonable suspicion before installing the GPS device. Therefore, the issue before the court in the Second Report and Recommendation was whether the government could prove that it had reasonable suspicion to install the GPS device. After analyzing the facts the agents had available to them before installing the GPS device, the court determined that the agents had more than a reasonable suspicion that the defendant was involved in criminal activity. Therefore, the court denied Garcia’s motion to suppress.

However, the court went on to note that “[a]lthough this court has not imposed on the government a duty to establish probable cause to attach the GPS device, the Seventh Circuit might, so we should address the issue prophylactically. As a technical matter, this section of the report is dicta.” After a long discussion of the probable cause standard, the court found that if the government had to prove probable cause in this case, it would have no trouble.

D. Order

The defendant objected to the Second Report and Recommendation on the grounds that although the police may have

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198 Id. at *1.
199 Id. at *1.
201 Id. at *5.
202 Id.
203 Id.
204 Id. at *5-*6
had reasonable suspicion to suspect that the defendant was involved in criminal activity, they did not have reasonable suspicion that tracking the defendant’s vehicle would lead to the discovery of evidence.\textsuperscript{205} Both were required according to the First Report and Recommendation.\textsuperscript{206} The judge did not agree with Garcia, finding that the agents had reasonable suspicion (and actually had probable cause as well) to support their decision to install a GPS tracking device.\textsuperscript{207}

E. Appellate Court Case: February 2, 2007

The issue on appeal was “whether evidence obtained as a result of a [GPS] . . . should have been suppressed as the fruit of an unconstitutional search.”\textsuperscript{208} The Seventh Circuit held that the GPS installation was not a search; therefore, the evidence should not be suppressed and did not violate the Fourth Amendment.\textsuperscript{209}

On appeal, the defendant argued that in addition to reasonable suspicion and probable cause, the police had to have a warrant before installing the GPS device.\textsuperscript{210} The government argued that a warrant was not needed because the police actions did not constitute a search under the Fourth Amendment.\textsuperscript{211} The court noted that there is nothing in the Fourth Amendment requiring a warrant for a search to be reasonable.\textsuperscript{212} However, the Supreme Court “has created a presumption that a warrant is required, unless infeasible, for a search

\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.} at *2.
\textsuperscript{208} United States v. Garcia, 474 F.3d 994, 995 (7th Cir. 2007).
\textsuperscript{209} \textit{Id.} at 994.
\textsuperscript{210} \textit{Id.} at 996.
\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.}
to be reasonable.”213 The court went on to note that this presumption only matters when there has been an actual search or seizure.214

The defendant claimed that when the police installed the GPS device, it was a seizure.215 The court disagreed, stating:

[the device did not affect the car’s driving qualities, did not draw power from the car’s engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not even alter the car’s appearance, and in short did not “seize” the car in any intelligible sense of the word.216

The court next considered if monitoring the GPS device was a search, but following *Knotts*, determined it was not.217 However, the court noted that *Knotts* did not answer the question of “whether installing the device in the vehicle converted the subsequent tracking into a search.”218 The Seventh Circuit noted a circuit split over this exact issue and that *Garcia* was a case of first impression in the Seventh Circuit.219 The Fifth and Ninth Circuits have held that installation does not constitute a search and the First, Sixth, and Tenth circuits have held the opposite.220

The court noted the issue here is the difference between the police following the defendant in their own cars and the police using GPS devices to do it for them.221 Judge Posner called this a difference between the new technology and the old.222 Judge Posner concluded

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213 *Id.*
214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *Id.* at 996-97.
219 *Id.* at 997.
220 *Id.*
221 *Id.*
222 *Id.*
that GPS tracking is not a Fourth Amendment violation because it is just new technology which makes following defendants easier.\textsuperscript{223}

However, Judge Posner wrote that \textit{Katz} must be considered because in \textit{Katz}, the Supreme Court noted “that the meaning of a Fourth Amendment search must change to keep pace with the march of science.”\textsuperscript{224} Additionally, the court noted that in \textit{Kyllo}, “the use of a thermal imager to reveal details of the interior of a home that could not otherwise be discovered without a physical entry” was a search.\textsuperscript{225} However, the court went on to distinguish \textit{Kyllo} because in \textit{Kyllo} the technology completed a search that the police could not otherwise have done without the imager.\textsuperscript{226} Judge Posner called the imager a “substitute for a form of a search,” but in \textit{Garcia} the GPS device was a substitute for an activity, an activity already determined not to be a search.\textsuperscript{227} Accordingly, the court noted that when the officers installed the GPS device, it was not a search under the Fourth Amendment.\textsuperscript{228}

Further, Judge Posner noted that GPS could allow for wholesale surveillance.\textsuperscript{229} The police could install GPS devices to thousands of cars at random,\textsuperscript{230} or laws could be passed requiring all cars to have GPS so that the police can easily monitor them.\textsuperscript{231} Importantly, Judge Posner noted that at this time he cannot say that those situations would not implicate the Fourth Amendment.\textsuperscript{232} However, he noted that there is no reason to think that the police should not get more efficient as

\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.} (citing \textit{Katz} v. United States, 389 U.S. 347 (1967)).
\textsuperscript{225} \textit{Garcia}, 474 F.3d at 997 (citing \textit{Kyllo} v. United States, 533 U.S. 27, 34 (2001)).
\textsuperscript{226} \textit{Garcia}, 474 F.3d at 997.
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.} at 994.
\textsuperscript{229} \textit{Id.} at 994.
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} \textit{Id.}
\textsuperscript{232} \textit{Id.}
time goes on. Judge Posner noted:

Technological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive. Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues that fortunately we need not try to resolve.

Therefore, Judge Posner was aware of the danger his ruling could create, but inexplicably avoided dealing with it, stating that there was no evidence of mass surveillance at this time. Rather, he said that in Garcia, the police had “abundant grounds for suspecting the defendant.” But he also noted, “[s]hould government someday decide to institute programs of mass surveillance of vehicular movements, it will be time enough to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.”

IV. GARCIA WAS WRONGLY DECIDED

The Seventh Circuit decided Garcia incorrectly. The Seventh Circuit should have held a warrant is required prior to the police installing a GPS device. Four separate arguments for why Garcia should have come out differently are detailed below.
A. The Seventh Circuit Made Many Errors in Its Reasoning

1. Beeper Cases Should Not Be Controlling in Deciding GPS Cases

A dissenting opinion by Justice Douglas from United States v. White stated that “[w]hat the ancients knew as ‘eavesdropping,’ we now call ‘electronic surveillance’; but to equate the two is to treat man’s first gunpowder on the same level as the nuclear bomb.” So too is comparing beepers and GPS devices. GPS technology is so new and so different than anything that the drafters of the Fourth Amendment and the authors of previous beeper cases could have imagined. Therefore, the beeper line of cases should not be controlling in deciding GPS cases.

The level of intrusiveness, invasiveness, and sophistication of GPS devices as compared to beepers mandates that beeper cases cannot be controlling in deciding GPS cases. There are many differences between GPS devices and beepers as discussed above in the Background section. To recap, GPS devices, as noted in State v. Jackson, are particularly invasive because they provide constant uninterrupted surveillance. Beepers do not and cannot provide a detailed report of the vehicle’s movements like GPS devices can. GPS devices can track and record every single movement that a defendant makes for days, weeks, and months on end. Beepers are not that reliable and they can lose their signal. GPS devices do not lose their signal.

Perhaps most important, GPS devices can be installed and then left alone. Someone can then go back and download the data from the GPS days, weeks, or months later. Beepers must be followed in real time by an actual person as the search is occurring. Beepers do not locate exactly where an object is, but rather emit a signal when the

240 State v. Jackson, 150 Wash.2d 251 (Wash. 2003) (where the court discussed the possible dangers of not requiring warrants before attaching GPS devices).
241 Id.
beeper is nearby. Therefore, the police must stay with the beeper during a live search to derive the benefit from it. In short, following a beeper signal requires an active search, whereas a GPS is a passive search.

Because beepers and GPS are so different, courts are wrong to rely on beeper cases when deciding GPS cases. When the Supreme Court was deciding the various beeper cases discussed above, GPS technology was not yet available. There is no way the justices could have contemplated the “all-encompassing surveillance that is possible today” by using GPS. Their decisions were based on beeper technology. To compare the two is to compare apples and oranges, gun powder and the atomic bomb.

Back when the beeper cases jurisprudence was being formulated, the resources required to track a suspect 24/7 proved to be a necessary check on the police. Therefore, the police would only follow a suspect 24/7 when they were pretty sure that it would produce evidence. Now, however, police can install a GPS device even without strong evidence and without having to prove reasonable suspicion or probable cause and without having to obtain a warrant.

Because GPS is a technology that was not at all contemplated when beeper cases were being decided, the reasoning from those cases is irrelevant to GPS cases and should not apply. Following this argument then, the “no reasonable expectation of privacy while travelling on public roads” argument from Knotts should not be relevant to GPS cases.

242 Hutchins, supra note 31, at 435.
243 Id.
246 Id.
247 Id.
248 Id.
249 Id. at 2234.
2. Garcia: Missed Opportunity to Keep Science in Check

Technology in this country is rapidly advancing, as evidenced by the rise of GPS technology. When the Fourth Amendment was written, there was no way for the drafters to even contemplate GPS technology. Therefore, courts today have to reconcile Fourth Amendment protections in a time of rapidly advancing technology. First, in 1963, in a concurring opinion in *United States v. Lopez*, Chief Justice Warren expressed concern over advances in science posing a threat to the privacy of individuals and a threat to an individual’s Fourth Amendment rights.250 Chief Justice Warren stated:

Fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system.251

GPS technology constitutes a “fantastic” advancement in technology that Chief Justice Warren warned against back in 1963.252

Additionally, in *United States v. Knotts*, Justice Rehnquist, “recognizing that constitutional protections may be warranted if tracking surveillance revealed more than the limited quantity of information disclosed by a beeper,”253 stated that if law enforcement begins using “dragnet type law enforcement practices” then perhaps it will be time to consider whether a constitutional issue arises.254 Therefore, Justice Rehnquist was aware that the issue of warrantless installation of beepers could pose a constitutional problem. He warned

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251 *Id.*
252 *Id.*
future courts that if the beeper technology expands beyond what it was in 1983, then courts will need to take a second look to determine if constitutional issues arise. Today, it is time for courts to heed Justice Rehnquist’s warning and take this second look.

Further, in *Dow Chemical Company v. United States*, the Environmental Protection Agency took aerial photographs of a plant. The Supreme Court found it was not a search for many reasons including that the information gained from the pictures was nothing more than augmentation of naked-eye view. However, the Court noted, “[i]t may well be . . . that surveillance of private property by using highly sophisticated surveillance equipment . . . such as satellite technology, might be constitutionally proscribed absent a warrant.”

Furthermore, Judge Posner spent about a quarter of the *Garcia* decision discussing how there is a danger of “dragnet type law enforcement practices” in the form of mass surveillance lurking in the *Garcia* case. He discussed the tradeoff between privacy and security. He talked about how science is advancing and the meaning of the Fourth Amendment needs to change to keep current with science. He even referenced the above quote from Chief Justice Warren about the fantastic advances in science. But then, after noting all the possible problems with police use of GPS devices, Judge Posner stated that for now the problems are not big enough to cause concern.

Judge Posner could have, and should have, offered some guidance on how the police should lawfully use GPS devices and he could and should have guided future courts on how to rule on GPS use without infringing on the Fourth Amendment. Judge Posner could have and should have taken the opportunity to state that police must obtain a warrant before the police can lawfully install the device. This ruling would have kept in line with the balance between privacy and security.

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256 *Id.* at 238.
257 *Id.* (emphasis added).
258 United States v. Garcia, 474 F.3d 994, 997 (7th Cir. 2007).
259 *Id.*
that he spoke of in his opinion. Why did Judge Posner avoid the opportunity to address these issues? *Garcia* was a case of first impression after all.\(^{260}\) It would have been a great chance for the Seventh Circuit to set out clear standards that would serve to protect the Fourth Amendment.

The invention of GPS and the advent of the police using it without having to show reasonable suspicion or probable cause or without having to obtain a warrant is exactly the type of “dragnet type law enforcement practices” that Justice Rehnquist warned about. Therefore, the Seventh Circuit and other courts should have heeded Chief Justice Warren’s warning and found that installing GPS devices constitutes a search; therefore, a warrant is required prior to installation.

3. The Seventh Circuit’s Discussion of the Possibility of 24/7 Police Surveillance is Impractical

 Judge Posner stated that the police could have accomplished the search in *Garcia* without GPS, but that GPS made the search easier. However, on closer inspection, it is pretty clear that that the police could not have accomplished the 24/7 tracking of the defendant if they had to do it with manpower alone. It is nearly impossible to imagine a police force that could handle such a task. It is very unlikely that the police could follow any defendant long enough to maintain a perfect record of all of movements.\(^{261}\)

Imagine a police force attempting to obtain the same results by following a person that they could obtain with a GPS. The discussion below will prove this to be impossible. If the police had five suspects who they wanted to follow for a period of two months, this would take at the very least forty officers dedicated full time to tracking these suspects and maintaining the perfect record. There are three eight-hour shifts a day, seven days a week, for a total of twenty-one shifts a week. Imagine that each officer works four shifts a week with a partner.

\(^{260}\) *Id.*

\(^{261}\) *Id.*
Therefore, it would take eight officers tracking a suspect full-time to track just one suspect. If there are five suspects, that would require forty officers tracking the suspects full-time.

Therefore, it is easy to see that police officers likely cannot perform such searches without the use of a GPS device. What police force has forty police officers—eight per suspect—to spare? Therefore, the Seventh Circuit’s argument that the police could have performed the search without the GPS, but the GPS made it easier, is impractical, and that reasoning should have no bearing on the decision. The Seventh Circuit should have found, like in *Kyllo*, that when the officers cannot perform the search without the device, they should not be able to do it.

B. Requiring a Warrant Imposes a Rather Low Burden on Police, but Provides a High Benefit to Individuals

In today’s rapidly advancing electronic day and age, obtaining a warrant is not hard to do. A police officer could ask a judge for a quick meeting, could call him or her on the phone, or can even send the judge an *email* requesting a warrant. Generally speaking, the decision to install a GPS device to a suspect’s car is likely made in a police station. And presumably, the decision is made after looking at the evidence in a case and deciding that it would be worthwhile to follow a particular subject. Also, presumably, the police officer has to request a GPS device from somewhere. Is it really possible that police officers have handfuls of GPS devices just laying around? Doubtful.

Considering that at least part of this process is presumably done in the police station, it would not be that difficult to require the police officer to send a quick email to the judge to get a warrant before installing the GPS device. It is hard to imagine a circumstance that would arise where in the middle of an emergency a police officer would absolutely need to install a GPS device, and if he did it is likely this situation would fall under the exigent circumstances exception to requiring a warrant anyway. Therefore, it seems like a very small
burden to impose on the police, for a very high payoff for individuals—the utmost protection of the Fourth Amendment.\textsuperscript{262}

C. Previous Cases Provide Valuable Insight that the Seventh Circuit Should Have Adopted

Previous cases that have addressed electronic surveillance could have provided the Seventh Circuit with valuable insight that would have led the court to make the proper ruling in \textit{Garcia}. The First Circuit in \textit{Moore}, as previously discussed above, stated that when a beeper is attached to a car, the beeper “transforms the vehicle . . . into a messenger” to aid the police.\textsuperscript{263} The court noted that people “properly can expect not to be carrying around an uninvited device that continuously signals his presence.”\textsuperscript{264} This court clearly noted that even though people might not have an expectation of privacy on public roads, they do have certain privacy expectations deserving of protection.

“In the case of GPS-enabled tracking, it is this aggregation of substantial amounts of personal data that makes the limitless use of the technology constitutionally troublesome.”\textsuperscript{265} Therefore, it is quite likely that back when \textit{Knotts} was decided in 1983, the Supreme Court did not envision “the unfettered use of GPS-enabled tracking” and the sophistication of GPS technology.\textsuperscript{266}

Further, the Sixth Circuit in \textit{Bailey} expressed its opinion that no matter how small the intrusion, it can still have an effect on Fourth Amendment concerns when the intrusion invades an expectation of

\textsuperscript{263} United States v. Moore, 562 F.2d 106, 112 (1st Cir. 1977).
\textsuperscript{264} Id.
\textsuperscript{265} Hutchins, \textit{supra} note 31, at 453.
\textsuperscript{266} Id. at 453-54.
privacy.\textsuperscript{267} The court clearly expressed its idea that the Fourth Amendment can be violated even when the violation is de minimus.\textsuperscript{268}

In addition, the Delaware Supreme Court in \textit{Biddle} noted that “the police do not have the unfettered right to tamper with a vehicle by surreptitiously attaching a tracking device without either the owner’s consent or without a warrant issued by a court.”\textsuperscript{269} The court held that “the basic principle that a person has a protected privacy interest in his/her automobile is still applicable.”\textsuperscript{270}

Therefore, the Seventh Circuit would not have been the only court to find that one has a reasonable expectation of privacy that their possessions will not be meaningfully interfered with. It is not unreasonable to expect that one’s possessions will not be tampered with on a public road. The Seventh Circuit should have adopted the holdings or reasoning of these courts when they decided \textit{Garcia}.

\textbf{D. Installation of a GPS is A Seizure; Therefore, There are Fourth Amendment Concerns}

A concurring opinion from the Ninth Circuit in \textit{McIver} by Judge Kleinfeld sets out an interesting way of addressing the GPS problem—a way that the \textit{Garcia} court and all courts should follow. He stated that installing tracking devices on vehicles should be subject to Fourth Amendment concerns.\textsuperscript{271} He disagreed with the majority in \textit{McIver} that doing so was not a seizure.\textsuperscript{272} He noted that under the Fourth Amendment, a seizure occurs when there is “some meaningful interference with an individual’s possessory interests.”\textsuperscript{273} He argued that the meaningful interference in \textit{McIver} was not the liberty to drive

\begin{itemize}
  \item \textsuperscript{267} United States v. Bailey, 628 F.2d 938, 940 (6th Cir. 1980).
  \item \textsuperscript{268} \textit{Id}.
  \item \textsuperscript{270} \textit{Id}. at *2.
  \item \textsuperscript{271} United States v. McIver, 186 F.3d 1119, 1133 (9th Cir. 1999).
  \item \textsuperscript{272} \textit{Id}.
  \item \textsuperscript{273} \textit{Id}. at 1127 (quoting United States v. Karo, 468 U.S. 705, 712 (1984)).
\end{itemize}
on a public street without being watched, but rather the “possessory interest of the owner of a vehicle in excluding individuals from performing mechanical work on his vehicle or altering it without his consent.”

Further, Judge Kleinfeld noted that the Supreme Court has extended Fourth Amendment analysis recently. He stated that it was extended to include situations “to protect privacy from government intrusion even where the individuals intruded upon lack any property interest in the area where the intrusion was made.” The Supreme Court held that “the Fourth Amendment protects property as well as privacy.” Therefore, he argued that even if the defendant in *McIver* did not have a privacy interest in the car, “he had a right guaranteed by the Fourth Amendment to be free of a ‘seizure’ of his car unless a search warrant issued upon probable cause” existed in the case.

The concurrence stated that one of the main property rights “is the right to exclude others.” Therefore, car owners’ possessory rights are interfered with when the police install a device to their car even if there is not a reasonable expectation of privacy in the car.

Judge Posner stated that the use of GPS did not constitute a seizure. He stated that the GPS device “in short did not ‘seize’ the car in any intelligible sense of the word.” While it is true that the GPS device did not interfere with the functioning of the car and did not take up space, that is not the correct way to determine if the car was seized however. It was a seizure in the *Garcia* case for the reasons Judge Kleinfeld stated above and because of the reasons previously discussed in *Moore, Bailey, and Biddle*.

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274 *McIver*, 186 F.3d at 1133.
275 *Id.*
276 *Id.*
277 *Id.* (quoting Soldal v. Cook County, 506 U.S. 56 (1992)).
278 *McIver*, 186 F.3d at 1133-34.
279 *Id.* at 1134 (quoting Rakas v. Illinois, 439 U.S. 128 (1978)).
280 *McIver*, 186 F.3d at 1134.
281 United States v. Garcia, 474 F.3d 994, 996 (7th Cir. 2007).
282 *Id.*
CONCLUSION

The focus of this comment is not to question whether police officers should use GPS technology, but rather to argue that police should be required, before using GPS technology, to successfully pass through the gate keeping functions set out to protect individuals’ Fourth Amendment rights, namely requiring a warrant prior to commencing a search. Currently, courts are deciding GPS cases based off of beeper jurisprudence. However, when courts were deciding beeper cases, GPS technology had yet to even be contemplated. Therefore, beeper cases should not be used to analyze GPS cases. Instead, GPS cases should be analyzed under an entire new line of reasoning based on the idea that people do have a reasonable expectation that their every movement is not being 100% accurately tracked by the police. Therefore, the installation of GPS devices should be considered a search. Accordingly, police officers should be required to obtain a warrant prior to installing a GPS device.
LOST IN CYBERSPACE: A CALL FOR NEW LEGISLATION TO FILL THE BLACK HOLE IN INFORMATION PRIVACY LAW FOLLOWING PISCIOTTA V. OLD NATIONAL BANCORP

ELENA N. VRANAS-LIVERIS


INTRODUCTION

We live in the Information Age,1 an age in which we rely on computers and the Internet every day and in almost every aspect of our lives, from personal communications to business transactions to entertainment. Along with this constant use of computers and the Internet, however, comes a risk. In order to take advantage of the convenience which computers provide through online shopping and banking, for example, we must often provide our most personal information. Unfortunately, this personal information is not always

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1 Glossary, Readiness for the Networked World, available at http://cyber.law.harvard.edu/readinessguide/glossary.html (defining Information Age as “the current stage in societal development which began to emerge at the end of the twentieth century” and is “marked by the increased production, transmission, consumption of and reliance on information.”).
completely secured by the database owners who store it. In exchange for the convenience of online dealings, therefore, we put ourselves at risk that our personal information will be wrongfully accessed. Since 2005, there have been hundreds of publicized database security breaches, which have affected the personal data of more than two hundred million people.2

With little legal precedent regarding liability surrounding database security breaches, there is great uncertainty as to who should bear the costs—consumers or database owners—associated with providing personal information for online transactions. Should consumers bear the costs in return for the conveniences of online transactions, or should database owners bear the costs in return for the opportunity to develop their business over the Internet?

Consumers throughout the country who have been affected by database security breaches have begun to bring civil lawsuits against database owners to place liability on them for these breaches. The Seventh Circuit first dealt with such a situation in Pisciotta v. Old National Bancorp.3 The consumers in this case brought their action against the database owner under claims of negligence and breach of contract.4 The issue that the Seventh Circuit dealt with in examining these claims was whether the plaintiffs had suffered the requisite harm, considering their personal information was wrongfully accessed but no identity theft or other fraud resulted from the security breach.5 The Seventh Circuit was rather definitive in its ruling that the plaintiffs had not suffered the requisite harm to place liability on the database owner. Pisciotta, therefore, raises significant concerns for consumers. It also suggests important implications for the future of database security breach cases, which embody a new intersection of privacy law and tort law.

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3 Pisciotta v. Old Nat’l Bancorp, 499 F.3d 629 (7th Cir. 2007).
4 Id. at 632.
5 Id. at 635.
This Note examines *Pisciotta* and its effect on the state of the law regarding liability resulting from database security breaches. Part I of this Note reviews the background necessary to discuss *Pisciotta*, which includes a basic understanding of the Internet, privacy law, and current regulations addressing database security breaches. Part II then examines *Pisciotta*, detailing the facts of the case and analyzing the Seventh Circuit’s holding. Part III explores whether *Pisciotta* could have come out differently, particularly had the court analogized the exposure of the plaintiffs’ personal information to toxic exposure in toxic tort cases. Part III also discusses the role of the economic loss doctrine in database security breach cases and whether it should have played a part in *Pisciotta*. Lastly, Part IV assesses what should be done to protect consumers’ privacy interests in light of the difficulties consumers face under current common law, as illustrated in *Pisciotta*. Specifically, this Note proposes that legislation be enacted to provide for the recovery of credit monitoring costs by affected consumers of a database security breach.

I. BACKGROUND

*Pisciotta* is particularly interesting because it illustrates a new intersection between privacy law and tort law in the context of technology. Considering this unique intersection of the law, one must have an understanding of certain technology, such as the Internet, as well as knowledge of privacy law and tort law, which are implicated because of this technology. This section provides this necessary background and also sheds light on federal and state regulations which address database security breaches. Through this background, one recognizes the lack of redress for victims of database security breaches whose personal information has been wrongfully accessed, but who have not yet suffered identity theft or other fraud.

A. What is the Internet?

As described by some of its developers, “[t]he Internet has revolutionized the computer and communications world like nothing
before. . . The Internet is at once a world-wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location."

The Internet was created in 1969 following years of research by the Advanced Research Projects Agency of the Department of Defense. It essentially is a worldwide series of networks which can transmit data between each other using a special language called the Internet Protocol. One of the Internet’s most distinctive characteristics is that it is a “packet switching” network. This means that the Internet can break down information into packets, or formatted pieces of data, so that it can transmit the information as quickly and efficiently as capacity allows. Packets are labeled with the address of their final destination and may then travel through different routes until they reach their destination computer where they are reassembled. This differs from more traditional communication media, where information travels as a whole and may tie up an entire channel while it is transmitted. The Internet is also controlled through “smart communications” such that there is no centralized control of the Internet. Rather, all of the computers in the worldwide network assess the traffic of packets and control the flow of the information. There is thus no central authority which governs who may use the Internet and for what purposes; it is an autonomous network. Lastly,

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7 *Id.*
9 *Id.* at 1097.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at 1098.
14 *Id.*
15 *Id.*
the Internet provides for “telepresence,” meaning that the Internet is unconstrained by geography.\textsuperscript{16} A user may “access computers, retrieve information, or control various types of apparatus from around the world,” while his or her physical location is unidentifiable.\textsuperscript{17} This universe of international information that Internet users have access to is referred to as “cyberspace.”\textsuperscript{18}

The Internet was originally intended for use only by academics and government officials; however, the Internet became much more accessible with the development of personal home computers and “browser” software.\textsuperscript{19} Today the Internet is widely used by businesses and consumers and its use continues to grow exponentially. Electronic commerce or “e-commerce,” which includes the sale and purchase of products and services,\textsuperscript{20} has become a multi-billion dollar industry, with approximately 259 billion dollars of online sales having been expected in 2007.\textsuperscript{21}

Although the Internet provides consumers with many benefits, it also creates great concern for consumers who are required to provide personal information over the Internet for e-commerce transactions. These consumers face potential misuse of their information in several ways. For instance, consumers are susceptible to: the reuse of their information for purposes other than those for which they provided it; the replication of their information to third parties; the use of their information to commit fraud; the intrusive use of their information such as through telemarketing; and the interception or misappropriation of their information by third-party hacking, which

\begin{itemize}
\item \textsuperscript{16}\textit{Id.}
\item \textsuperscript{17}\textit{Id.}
\item \textsuperscript{18}\textit{Id. at 1099.}
\item \textsuperscript{19}Christopher F. Carlton, \textit{The Right to Privacy in Internet Commerce: A Call for New Federal Guidelines and the Creation of an Independent Privacy Commission}, 16 St. John’s J.L. Comm. 393, 401 (2002).
\item \textsuperscript{20}Daniel J. Solove, Marc Rotenberg, & Paul M. Schwartz, \textit{Privacy, Information, and Technology} 112 (2006).
\item \textsuperscript{21}Online Sales Spike 19 Percent, CNNMoney.com (May 14, 2007), http://money.cnn.com/2007/05/14/news/economy/online_retailing/.
\end{itemize}
was at issue in *Pisciotta.* These examples of misuse of personal information which is provided over the Internet directly implicate the consumers’ right to privacy, which leads us to the next section regarding privacy law.

**B. Privacy Law**

The concept of a right to privacy was first introduced in American jurisprudence by Samuel D. Warren and Louis D. Brandeis in their seminal article written in 1890, *The Right to Privacy.* They wrote, "[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Particularly, the new right they espoused in this era of change, marked by the Industrial Revolution, was the “right to be let alone.” The article was embraced by jurists throughout the country, and courts began deciding cases by looking at different principles of privacy. This led to the creation of common law causes of action to protect an individual’s right to privacy through property, tort, and contract law.

The right of privacy came to the forefront of American jurisprudence again in the mid-twentieth century when the United States Supreme Court, through a series of decisions, established a constitutional right of privacy. Although the right of privacy is not

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22 FRED H. CATE, PRIVACY IN PERSPECTIVE 6-7 (2001).
24 *Id.* at 193.
25 *Id.* Justice Louis Brandeis later wrote of “the right to be let alone” that it is “the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
26 Carlton, *supra* note 19, at 399.
27 *Id.*
explicitly provided for in the Constitution, the Supreme Court found
that the “roots of this right” were implied in the “‘penumbras’ and
‘emanations’ of the protections guaranteed in the Bill of Rights,” and
particularly in the First, Fourth, Fifth, Ninth, and Fourteenth
Amendments.

With the acceptance of the right of privacy in modern law, many
scholars have devoted their research to exploring exactly which
privacy interests are protected and to what extent. Professor Jerry
Kang has described privacy in terms of being “clustered into three
groupings”: privacy regarding 1) physical space, 2) decisions, and 3)
information. This last grouping, information privacy, is most relevant
in our discussion of the legal ramifications surrounding a database
security breach. Information privacy “concerns an individual’s control
over . . . the acquisition, disclosure, and use [] of personal
information.” Personal information is “information identifiable to the
individual,” meaning that it entails a connection between the
information and the person, not necessarily that it is sensitive or
private. Information may be identifiable to an individual when the
information 1) is authored by the individual—i.e., phone conversation
or e-mail, 2) describes the individual—i.e., birth date or mother’s
maiden name, or 3) is “instrumentally mapped to the individual for
institutional identification”—i.e., Social Security number or credit
card number.

29 MARTIN KUHN, FEDERAL DATAVEILLANCE: IMPLICATIONS FOR
CONSTITUTIONAL PRIVACY PROTECTIONS 8 (2007) (quoting Griswold, 381 U.S.
479).
30 Roe, 410 U.S. at 152.
31 Jerry Kang, Information Privacy in Cyberspace Transactions, 50 STAN. L.
32 Id. at 1203 (adopting this definition from a report by the Information
Infrastructure Task Force which was created under the Clinton administration).
33 Id. at 1206-1207.
34 Id. at 1207.
1. Privacy Torts

Following Warren and Brandeis’s 1890 article, courts and legislatures recognized the “right to be let alone” through case law and statutory law. In 1960, Dean William Prosser cataloged the more than three hundred privacy tort cases that were decided since the Warren and Brandeis article, and concluded that there were four distinct privacy torts. These “invasion of privacy” torts have since been codified in the Restatement (Second) of Torts as the following:

1) intrusion upon seclusion—when one intrudes “upon the solitude or seclusion of another or his private affairs or concerns” and where this “intrusion would be highly offensive to a reasonable person;”

2) appropriation—when “one appropriates to his own use or benefit the name or likeness of another;”

3) public disclosure of private facts—when one publicly discloses a private matter that is “highly offensive to a reasonable person” and “is not of legitimate concern to the public;” and

4) false light—when one publicly discloses a matter that places a person “in a false light” that is “highly offensive to a reasonable person.”

These torts, however, provide little protection of personal information in the private sector. Particularly, they are not useful against database owners who merely store information which is then misappropriated, as was the case in Pisciotta. First, intrusion upon seclusion does not provide a remedy in this scenario. In the context of

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37 Restatement (Second) of Torts § 652A (1977).
38 Id. at § 652B.
39 Id. at § 652C.
40 Id. at § 652D.
41 Id. at § 652E.
personal information, intrusion upon seclusion looks to whether the particular means used to collect the information is highly offensive.\textsuperscript{43} This is not helpful in e-commerce situations, where consumers voluntarily provide information to receive goods or services;\textsuperscript{44} there is no problem with the means the database owner uses to obtain that information. If any party has intruded upon seclusion in these situations, it is the third-party hacker; however, this is immaterial when a plaintiff seeks redress from the (wealthier) database owner.

Second, a plaintiff can only sue a database owner under appropriation when the database owner itself uses or benefits from the name or likeness of the consumer. This practically would only occur when a database owner disseminates “personal information for commercial purposes without consent.”\textsuperscript{45} That is not the situation in a database security breach where a third party hacker has misappropriated the information without the knowledge of the database owner. Privacy concerns with the collection or storage of data are therefore largely outside the scope of appropriation.\textsuperscript{46}

Third, an action for public disclosure of private facts is unhelpful for a plaintiff under this scenario, because the tort entails that the information is distributed to the general public, not to an individual or small group of people,\textsuperscript{47} as is often the case in a database security breach. Furthermore, like intrusion upon seclusion, public disclosure of private facts is not applicable when the plaintiff voluntarily provides information.\textsuperscript{48} Again, such an action may work against the third-party hacker if he or she distributes the information publicly, but will not work against the database owner.

\textsuperscript{44} \textit{Id.}
\textsuperscript{45} \textit{Id.} at 225.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.} at 224.
\textsuperscript{48} \textit{Id.} at 223-24.
Lastly, the false light tort is inapplicable in this context because it pertains only to the dissemination of inaccurate information;\(^{49}\) a database owner provides accurate information in a database security breach. As with public disclosure of private facts, the false light tort also requires that the information be disclosed to the public,\(^{50}\) not to a small group of people as occurs in most data breaches. A plaintiff could use this tort against the third-party hacker, for example, if the hacker publicly and fraudulently uses the plaintiff’s identity.

Parties who seek to hold database owners liable for wrongful access to their personal information following a database breach thus have limited means to do so under common law. Without an applicable invasion of privacy tort, they must rely on claims of negligence and/or breach of contract, as in \textit{Pisciotta}. Although the requisite duty for a negligence claim may be found through a contractual privacy policy or fiduciary relationship, claims under negligence and/or breach of contract remain very difficult to recover under because of the plaintiffs’ burden to prove a compensable injury, as we will see in \textit{Pisciotta}. Recognizing the hurdles that consumers confront under common law to protect their information privacy, we now turn to what protection consumers have under federal and state regulation.

2. Federal Regulation

The United States currently has no comprehensive legislation dealing with the collection of personal information. Consequently, information privacy has been protected through a “patchwork of Constitutional, statutory, common law and private sector guidelines,” which has often proven ineffective.\(^{51}\) Congress has passed some industry-specific statutes to control the use of personal information in reaction to particular industry and consumer interests; however, these

\(^{49}\) Id. at 224-25.
\(^{50}\) Id.
statutes have not always been able to keep pace with advancing technology to protect consumers’ privacy rights.\textsuperscript{52}

Of some relevance in \textit{Pisciotta}, which dealt with personal information provided to a bank, is the Gramm-Leach-Bliley Act ("GLBA").\textsuperscript{53} The GLBA states that “[i]t is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ nonpublic personal information.”\textsuperscript{54} The GLBA accordingly requires certain agencies, including the Federal Trade Commission and the Securities Exchange Commission, to “establish appropriate standards for the financial institutions subject to their jurisdiction” in order to 1) “insure the security and confidentiality of customer records and information;” 2) “protect against any anticipated threats or hazards to the security or integrity of such records;” and 3) “protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.”\textsuperscript{55} The GLBA further requires that financial institutions develop and give notice of their privacy policies to their customers at least annually.\textsuperscript{56} Before a financial institution may share personal information with certain nonaffiliated companies, it must also provide its customers with the ability to opt out of this disclosure.\textsuperscript{57} Although the GLBA is a move in the right direction for federal information privacy regulation, it does not create a private cause of action.\textsuperscript{58} Therefore, a customer cannot sue

\begin{itemize}
\item \textsuperscript{52} Id. at ¶ 76.
\item \textsuperscript{54} 15 U.S.C. § 6801(a).
\item \textsuperscript{55} 15 U.S.C. § 6801(b).
\item \textsuperscript{56} 15 U.S.C. § 6803(a).
\item \textsuperscript{57} 15 U.S.C. § 6802(b).
\end{itemize}
a financial institution for breaching its duty to protect the customer’s personal information.\textsuperscript{59}

Although there is not much federal guidance on information privacy, particularly within the context of personal information stored on databases, there is evidence that Congress realizes the growing necessity to regulate this area. Specifically, there are a number of Bills which are currently working their way through the political process.\textsuperscript{60} These include S. 239: Notification of Risk to Personal Data Act,\textsuperscript{61} H.R. 958: Data Accountability and Trust Act,\textsuperscript{62} H.R. 836: Cyber-Security Enhancement & Consumer Data Protection Act,\textsuperscript{63} and S. 495: Personal Data Privacy and Security Act of 2007.\textsuperscript{64} These Bills contain provisions which would establish requirements for data security\textsuperscript{65} and breach notification,\textsuperscript{66} criminalize concealment of data breaches,\textsuperscript{67} pre-empt state laws,\textsuperscript{68} and delegate regulatory responsibility to the FTC.\textsuperscript{69} Notably, however, none of these Bills provide for a private cause of action.

3. State Regulation

Considering the lack of regulation at the federal level, many states have attempted to provide some guidance in regulating database

\textsuperscript{59} Id.
\textsuperscript{61} S. 239, 110th Cong. (2007).
\textsuperscript{62} H.R. 958, 110th Cong. (2007).
\textsuperscript{63} H.R. 836, 110th Cong. (2007).
\textsuperscript{64} S. 495, 110th Cong. (2007).
\textsuperscript{65} S. 495, 110th Cong. (2007); H.R. 958, 110th Cong. (2007).
\textsuperscript{67} H.R. 836, 110th Cong. (2007).
\textsuperscript{69} S. 239, 110th Cong. (2007); H.R. 958, 110th Cong. (2007); S. 495, 110th Cong. (2007).
security. Most of these states have followed the lead of California, which has the strongest privacy law in the country.\(^{70}\) For example, as of January 2008, thirty-nine states and the District of Columbia have passed security breach notification laws,\(^{71}\) with California the first to enact such a law in 2003.\(^{72}\) Most security breach notification laws, as the one discussed in *Pisciotta*, require that companies which store personal information notify individuals in the event of a security breach where personal information is improperly accessed.\(^{73}\)

Security breach notification laws became common following the security breach of ChoicePoint, a data aggregation company, in 2004.\(^{74}\) At that time, California was the only state to have a notification law, and ChoicePoint sent more than 30,000 letters to California residents informing them that their personal information had been improperly accessed.\(^{75}\) More than 145,000 consumers nationwide were affected by the breach though, many of whom were not notified of the breach due to lack of notification laws in their states of residence.\(^{76}\) This incident caused many states to question their privacy standards and to enact notification laws of their own.\(^{77}\)

Despite the states’ efforts to create some protection for consumers’ personal information through security breach notification statutes, consumers still have little means to ensure that their personal information is protected. Most of the notification statutes are extremely narrow in that they only create a duty to notify consumers of a security breach and do not expressly create a duty generally to protect data.\(^{78}\) Additionally, most of these statutes do not provide for

\(^{70}\) SOLOVE, *supra* note 20, at 227.


\(^{72}\) Security Breach Information Act, CAL. CIV. CODE § 1798.82(a) (2003).

\(^{73}\) SOLOVE, *supra* note 20, at 228.

\(^{74}\) Id. at 255.

\(^{75}\) Id.

\(^{76}\) Id.

\(^{77}\) Id.

\(^{78}\) Id.
civil action by an affected consumer in the event that a database owner breaches its duties under the statute.\textsuperscript{79} The California notification statute is one of the few that both creates a data protection obligation and authorizes civil action for damages in this situation.\textsuperscript{80}

It is with this understanding of the limited protection of information privacy in the context of database security breaches, and the limited avenues for redress by affected consumers in these situations, that we examine \textit{Pisciotta v. Old National Bancorp}.

\section{\textit{Pisciotta v. Old National Bancorp}}

Luciano Pisciotta and Daniel Mills brought a class action on behalf of customers and potential customers of Old National Bancorp ("ONB").\textsuperscript{81} They alleged that ONB failed to secure personal information which had been solicited through ONB’s website from applicants for banking services.\textsuperscript{82} Depending on the service requested, customers or potential customers would provide their name, address, Social Security number, driver’s license number, date of birth, mother’s maiden name, and credit card or other financial account numbers over the website.\textsuperscript{83} In 2005, as a result of ONB’s failed security, a third-party computer hacker gained access to this private information of tens of thousands of people who used ONB’s website.\textsuperscript{84} The security breach was found to be “sophisticated, intentional and malicious.”\textsuperscript{85} ONB sent written notice to its customers of the intrusion, once it was notified by the hosting facility, NCR.\textsuperscript{86}

\textsuperscript{80} \textsc{Cal. Civ. Code} §§ 1798.81.5, 1798.84(b).
\textsuperscript{81} \textit{Pisciotta v. Old Nat’l Bancorp}, 499 F.3d 629, 631 (7th Cir. 2007).
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id. at} 632.
\textsuperscript{86} \textit{Id.}
A. Procedural History

The plaintiffs brought an action in the United States District Court for the Southern District of Indiana, having jurisdiction under the Class Action Fairness Act of 2005. They alleged negligence claims against ONB and NCR, as well as breach of implied contract against ONB and breach of contract against NCR. They alleged that they suffered “substantial potential economic damages and emotional distress and worry that third parties [would] use [the plaintiffs’] confidential personal information to cause them economic harm, or sell their confidential information to others who [would] in turn cause them economic harm.” The plaintiffs did not, however, claim any “completed direct financial loss” nor that any member of the class “already had been the victim of identity theft” because of the security breach. The plaintiffs sought damages in the form of compensation for past and future credit monitoring costs.

The district court granted NCR’s motion to dismiss for failure to state a claim, leaving ONB as the sole defendant. ONB moved for judgment on the pleadings and opposed the plaintiffs’ motion for class certification. The district court ruled in favor of ONB on both motions, concluding that “the plaintiffs’ claims failed as a matter of law because ‘they have not alleged that ONB’s conduct caused them cognizable injury,’” where “under Indiana law, damages must be more

87 Id. at 633. Under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), the district court had jurisdiction over the case because at least one member of the proposed class was a citizen of a state different from ONB (the class members included residents of Indiana, Illinois, Kentucky, Missouri, Ohio, and Tennessee) and the matter in controversy exceeded five million dollars, exclusive of interest and costs.
88 Pisciotta, 499 F.3d 629, at 632.
89 Id. (citing R.37 at 2).
90 Id.
91 Id. at 631.
92 Id. at 632.
93 Id.
than speculative."94 Furthermore, the district court concluded that compensation for the cost of credit monitoring could not be an "‘alternative award for what would otherwise be speculative and unrecoverable damages,’” as the cost to monitors one’s credit is, “‘not the result of any present injury, but rather the anticipation of the future injury that has not yet materialized.’”95

The plaintiffs appealed the judgment for ONB on the negligence and breach of implied contract claims to the Seventh Circuit, and also requested that the Seventh Circuit vacate the order denying class certification.96

B. Seventh Circuit Opinion

In an opinion written by Judge Ripple, the Seventh Circuit affirmed the judgment of the district court, concluding that the damages of past and future credit monitoring costs sought by the plaintiffs were not compensable under Indiana law.97 Therefore, claims for negligence and breach of implied contract failed as a matter of law.98 The Seventh Circuit reviewed the district court’s decision de novo because it was based on a 12(c) motion for judgment on the pleadings.99

1. A Quick Look at Jurisdiction

Having found jurisdiction under the Class Action Fairness Act of 2005, the court went on to review its subject matter jurisdiction over the case.100 In an interesting precursor to its discussion on the merits, the court noted that many federal courts (including those that the

94 Id. (citing R.78 at 3).
95 Id. (citing R.78 at 3-4).
96 Id. at 633.
97 Id. at 640.
98 Id.
99 Id. at 633.
100 Id. at 633-34.
district court relied on in its reasoning) concluded that they did not have jurisdiction in similar cases where the plaintiffs’ data had been compromised but not yet misused, because these plaintiffs had not met the injury-in-fact requirement for standing under Article III. The court went on to say, however, that the injury-in-fact requirement of Article III could be “satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant’s actions.” Therefore, the court reasoned, it had jurisdiction over the matter. In its following discussion, however, the court concluded that this potential harm, which was enough to confer standing, was not enough to bring a successful claim for negligence or breach of implied contract.

2. Was There Requisite Harm?

The main issue in Pisciotta was whether “the harm caused by identity information exposure, coupled with the attendant costs to guard against identity theft, constitutes an existing compensable injury and consequent damages required to state a claim for negligence or for breach of contract.” Stemming from this issue was the more general question of whether Indiana would recognize a cause of action for a data exposure injury, a question with substantial ramifications under Indiana law, considering it had never been addressed.

Because the case was brought under diversity jurisdiction and alleged causes of action under Indiana law, the court was required to apply the substantive law of Indiana. As stated above, however, there was no Indiana precedent addressing the issue at hand.

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101 Id. at 634.
102 Id.
103 Id. at 640.
104 Id. at 635.
105 Id. at 636.
106 Id. at 634.
107 Id. at 635.
Therefore, the court was required to examine the case based on its prediction of how the Supreme Court of Indiana would decide it.\textsuperscript{108} To do this, the court considered 1) Indiana legislation on the issue,\textsuperscript{109} 2) Indiana case law regarding analogous areas of the law,\textsuperscript{110} and 3) the reasoning of other courts applying the law of other jurisdictions, but on the same legal issue.\textsuperscript{111} Although the Seventh Circuit would look at this range of sources for guidance, it emphasized that it would take a restrictive approach to this “novel theory of liability.”\textsuperscript{112} The court asserted, “Without state authority to guide us, ‘[w]hen given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path.’”\textsuperscript{113}

\textit{a. Indiana Legislation}

In deciding whether the plaintiffs had suffered the requisite harm for a successful negligence or breach of contract claim, the court first looked at Indiana legislation on the matter.\textsuperscript{114} Specifically, it examined a statute which was enacted on March 21, 2006 and imposes certain duties on private entities (as well as state agencies) if their databases which contain personal information are accessed by unauthorized third parties.\textsuperscript{115} The statute, in effect, is one of notification, requiring a database owner who knows or should know of a security breach to notify all potentially affected consumers of that breach.\textsuperscript{116} It further requires the database owner to provide information to each consumer

\begin{itemize}
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id. at 636-37.
  \item \textsuperscript{110} Id. at 637-39.
  \item \textsuperscript{111} Id. at 639-40.
  \item \textsuperscript{112} Id. at 636.
  \item \textsuperscript{113} Id. at 635-36 (quoting Todd v. Societe Vic, S.A., 21 F.3d 1402, 1412 (7th Cir 1994)).
  \item \textsuperscript{114} Id. at 636-37.
  \item \textsuperscript{115} Id. at 636 (citing I.C. § 24-4.9 \textit{et seq.}).
  \item \textsuperscript{116} Id. at 637 n.6.
\end{itemize}
reporting agency, where the breach potentially affects more than one thousand consumers.\textsuperscript{117} It is interesting to note that the court recognized that the statute took effect on July 1, 2006, after the incident involved in \textit{Pisciotta}, and thus was not directly relevant to the case.\textsuperscript{118} Nonetheless, the court looked at the statute for guidance on how the Indiana Supreme Court would rule on the matter.\textsuperscript{119}

The Seventh Circuit noted that the Indiana statute requires no affirmative act other than notification, and that if the database owner fails to notify, enforcement actions may only be taken by the Attorney General of Indiana.\textsuperscript{120} The court concluded, therefore, that the legislation creates no private right of action by a consumer against the database owner, and likewise creates “no duty to compensate affected individuals for inconvenience or potential harm to credit.”\textsuperscript{121} Significantly, the court rejected the plaintiffs’ argument that the statute is evidence of the Indiana legislature’s belief that an individual has suffered a compensable injury when his or her personal information is wrongfully acquired by a third party in a security breach.\textsuperscript{122} Rather, the court concluded that the Indiana legislature would have made a definite statement of its intent to create a cause of action in such a situation.\textsuperscript{123}

Having found no support for the plaintiffs’ allegations in light of Indiana legislation, the court then turned to Indiana case law dealing with analogous legal issues.\textsuperscript{124}

\textsuperscript{117} \textit{Id.}.
\textsuperscript{118} \textit{Id.} at 636-37.
\textsuperscript{119} \textit{Id.}.
\textsuperscript{120} \textit{Id.} at 637.
\textsuperscript{121} \textit{Id.}.
\textsuperscript{122} \textit{Id.}.
\textsuperscript{123} \textit{Id.}.
\textsuperscript{124} \textit{Id.} at 637-39.
b. Indiana Case Law

The plaintiffs argued that there was Indiana case law in analogous settings acknowledging that banks have a special duty to prevent disclosure of their customers’ private information.\textsuperscript{125} They further argued that Indiana courts recognized that failure to perform this duty could result in harm to customers.\textsuperscript{126} The court quickly dismissed these arguments, stating that the cases presented by the plaintiffs were of “marginal assistance” because the facts of the cases were not similar enough to the facts of the instant case.\textsuperscript{127} Specifically, the court distinguished the cases cited by the plaintiffs by noting that the plaintiffs in those cases were compensated for harm from injuries to their reputation that were “direct and immediate,” whereas the plaintiffs in \textit{Pisciotta} sought compensation for “guarding against some future, anticipated harm.”\textsuperscript{128}

After dismissing the plaintiffs’ arguments regarding analogous case law, the court, on its own, examined the possibly analogous case law of toxic tort liability.\textsuperscript{129} In this setting, the court was able to find precedent from the Supreme Court of Indiana implying that “compensable damage requires more than an exposure to a future potential harm.”\textsuperscript{130} It explained further that even courts allowing medical monitoring damages, those being damages to monitor harm after toxic exposure, showed doubt that there should be an allowance for credit monitoring damages.\textsuperscript{131} Moreover, no Indiana courts were

\textsuperscript{125} \textit{Id.} at 637-38.
\textsuperscript{127} \textit{Pisciotta}, 499 F.3d at 638.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} The court, however, was careful to qualify this argument, stating that it did not have to “endorse this analogy for present purposes.” \textit{Id.} at 639.
\textsuperscript{130} \textit{Id.} at 638-639 (citing Allied Signal, Inc. v. Ott, 785 N.E.2d 1068 (Ind. 2003)).
\textsuperscript{131} \textit{Id.} at 639 (citing the Southern District of Ohio in Kahle v. Litton Loan Servicing, LP, 486 F. Supp. 2d 705, 712 (S.D. Ohio 2007)).
among those allowing medical monitoring damages.\textsuperscript{132} In fact, the court contended that by looking at the Supreme Court of Indiana’s treatment of toxic tort liability, it seemed that the Supreme Court of Indiana actually “supports the view that no cause of action for credit monitoring is available.”\textsuperscript{133}

Again, having found no support for the plaintiffs’ cause of action, and with no other authority from Indiana law, the Seventh Circuit proceeded to examine the reasoning of other courts applying the law of other jurisdictions, but to the same legal issue presented in \textit{Pisciotta}.

c. Case Law From Other Jurisdictions

The court listed a number of district court cases, including from districts in Ohio, Minnesota, Arizona, and Michigan, where plaintiffs with similar allegations to those in \textit{Pisciotta} were denied damages because they had not suffered the requisite harm.\textsuperscript{134} The court concluded by stating that it would not “adopt a ‘substantive innovation’ in state law or ‘[] invent what would be a truly novel tort claim’ on behalf of the state absent some authority to suggest that the approval of the Supreme Court of Indiana is forthcoming.”\textsuperscript{135} This was particularly in light of the fact that the plaintiffs had not brought forth any case or statute authorizing the cause of action they sought recovery under.\textsuperscript{136}

\textsuperscript{132}Id.
\textsuperscript{133}Id. (citing \textit{Allied Signal}, 785 N.E.2d 1068).
\textsuperscript{135}Id. at 640 (quoting \textit{Combs v. Int’l Ins. Co.}, 354 F.3d 568, 578 (6th Cir. 2004) and \textit{Insolia v. Philip Morris, Inc.}, 216 F.3d 596, 607 (7th Cir. 2000); and citing \textit{Birchler v. Gehl Co.}, 88 F.3d 518, 521 (7th Cir. 1996) and \textit{Ry Express Agency, Inc. v. Super Scale Models, Ltd.}, 934 F.2d 135, 138 (7th Cir. 1991)).
\textsuperscript{136}Id. at 639-40.
III. COULD PISCIOTTA HAVE COME OUT DIFFERENTLY?

The Seventh Circuit made clear in Pisciotta that it would not recognize a claim to recover past and future credit monitoring damages from a database owner following a database security breach, where the only harm suffered was the wrongful access of the plaintiffs’ personal information, and where no identity theft or other fraud resulted. Despite the Seventh Circuit’s definite language in reaching this conclusion, it is valuable to explore whether Pisciotta could have come out differently for the plaintiff consumers (and consequently for similarly situated consumers in future cases). In particular, we look at whether the plaintiffs could have recovered by analogizing their injury to that suffered in a toxic tort claim. We also look at whether the court could have disregarded the economic loss doctrine, which limits economic recovery in negligence actions. Through this analysis, we recognize that a favorable result for the plaintiffs was possible in theory, but not in practice. Plaintiffs therefore need to look to new legislation, as discussed in Part IV, in order to recover credit monitoring damages in these situations.

A. Analogizing to Toxic Tort Liability

An interesting argument that the plaintiffs in Pisciotta failed to make, but that the Seventh Circuit raised on its own, was whether an injury could be found by analogizing data breach liability to toxic tort liability.137 Multiple state and federal courts have allowed victims of toxic exposure, without proof of further injury caused by the exposure, to recover medical monitoring damages.138 If the analogy between

137 Id. at 638-39.
toxic exposure and exposure of personal information to identity theft is accepted, it follows that these courts could also allow for the recovery of credit monitoring damages.

The analogy is as follows: a consumer who loses personal information due to a database security breach is like a person who suffers exposure to a toxic substance in that both risk greater harm to their person as a result of this occurrence.\(^{139}\) In the case of toxic exposure, the exposed party has increased chances of having a disease, while in the case of a database security breach, the exposed consumer has increased chances of falling victim to identity theft and fraud.\(^{140}\) In either case, the victim of the exposure is in the best position to mitigate future harm by, in the least, monitoring the risk of the future harm.\(^{141}\)

In theory, because there was no Indiana authority on awarding credit monitoring damages, the Seventh Circuit could have looked at other jurisdictions, including those that have accepted medical monitoring damages, and used this authority to support a finding for credit monitoring damages under Indiana law. The Supreme Court of Indiana, however, had spoken to the issue of awarding damages in a toxic exposure case.\(^{142}\) The Supreme Court of Indiana ruled in *Allied Signal, Inc. v. Ott* that “no compensable injury occurs at the time of [toxic] exposure.”\(^{143}\) Therefore, the Seventh Circuit was constrained to this ruling. Although other states have allowed medical monitoring

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<td>Id. (citing <em>Allied Signal</em>, 785 N.E.2d at 1075).</td>
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damages, Indiana is not one of them. Therefore, even if the Seventh Circuit found the analogy to be apt, which it did not take a position on, it would be forced to conclude that credit monitoring damages were not available following a database security breach, just as medical monitoring damages were not available following toxic exposure.

Still, this leaves the door open for actions seeking credit monitoring damages brought to the Seventh Circuit under other states’ laws. For example, it remains largely unsettled in Illinois whether medical monitoring damages are available without physical injury. Therefore, it is possible, though still rather unlikely, that the Seventh Circuit could recognize credit monitoring damages in a case brought under Illinois law, if the court accepted the analogy to medical monitoring damages.

B. Economic Loss Doctrine

The plaintiffs in Pisciotta also could have made the argument that the standard for proving compensable injury should have been broadened in the context of a database security breach because the economic loss doctrine, which effectively narrows the standard, is not implicated in this context. The economic loss doctrine states that in order for a plaintiff to recover economic losses resulting from a defendant’s negligence, the plaintiff must have suffered physical harm to his or her person or property. This doctrine, although having its roots in product liability, is applicable in most negligence cases and may effectively limit recovery in tort cases involving internet security, as implicitly illustrated in Pisciotta. The concept of physical harm to
one’s person or property is a questionable one though in the context of
cybertorts, and it is for this reason that we need to evaluate the purpose
and value of the economic loss doctrine in this context.

The economic loss doctrine has three significant functions: 1) to
protect a defendant from a disproportionately wide range of liability,\textsuperscript{148}
2) to ensure that damages are proven with certainty, and 3) to define a
doctrinal boundary between tort and contract law.\textsuperscript{149} If one looks only
at the damages requested in \textit{Pisciotta}, the costs of credit monitoring,
one realizes that the functions of the economic loss doctrine are not
met. The doctrine is thus an unnecessary limitation on recovery in this
context.

First, the scope of liability in \textit{Pisciotta} is not in question. Limiting
the scope of a defendant’s liability is certainly crucial in tort law,
considering that “acts of negligence often have extremely broad
adverse economic consequences.”\textsuperscript{150} This is also the reason why most
jurisdictions require proof of proximate causation in a negligence
action. A defendant otherwise could be sued by parties having almost
no relation to the negligent act. In \textit{Pisciotta}, however, the plaintiffs
were all customers or potential customers of ONB who had provided
ONB with personal information.\textsuperscript{151} It was consequently the
information of these plaintiffs that was stolen through the security
breach of ONB’s database.\textsuperscript{152} As such, the liability of the defendant is
restricted to ONB’s customers.

Second, the plaintiffs in \textit{Pisciotta} could prove their requested
damages with certainty. This is not a situation where the court must
calculate lost economic opportunity, a situation that the economic loss
doctrine most directly addresses under this function. By requiring that
damages be proven with reasonable certainty, the economic loss
doctrine not only ensures that defendants not pay for speculative

\textsuperscript{148} See Robert L. Rabin, \textit{Tort Recovery for Negligently Inflicted Economic
\textsuperscript{149} Johnson, \textit{supra} note 58, at 296.
\textsuperscript{150} \textit{Id.} at 296-97.
\textsuperscript{151} \textit{Pisciotta} v. Old Nat’l Bancorp, 499 F.3d 629, 631 (7th Cir. 2007).
\textsuperscript{152} \textit{Id.}
amounts, it also “promotes judicious use of limited judicial resources, ensuring that those scarce assets are not squandered on the burdensome, and perhaps dubious, task of trying to quantify endless economic losses that may, in truth, not be provable with reasonable precision.” In *Pisciotta*, however, the plaintiffs would merely need to present receipts or online invoices showing the cost of past and, to the extent reasonable, future credit monitoring services they used or would use following the security breach of ONB’s database. One can go to the website of almost any credit monitoring service provider and find the price for services, which generally range from ten to fifteen dollars per individual per month. Therefore, damages could be limited to this amount, protecting ONB from paying mere speculative amounts.

Lastly, as argued by Professor Vincent Johnson, providing a plaintiff with the costs of credit monitoring after a database security breach, as requested in *Pisciotta*, would not pose a problem in delineating between tort and contract law. Professor Johnson explains that the protection of personal information in databases should not be an area of bargaining between consumers and database owners. The majority of states, through their data breach notification statutes, seem to support this idea. Even though database owners may have privacy policies that must be accepted by consumers, consumers should not be able to contract out of their right to sue for credit monitoring costs through these policies. Furthermore, plaintiffs arguing breach of contract in these situations would likely be unable to recover credit monitoring costs if they were not expressly contracted for, because they would be considered consequential damages, which are generally difficult to recover if not contemplated.

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153 Johnson, supra note 58, at 297-98 (citing Vincent R. Johnson & Alan Gunn, STUDIES IN AMERICAN TORT LAW 7, 9 (3d ed. 2005)).


155 Johnson, supra note 58, at 300-01.

156 Id.

157 Id.
at the time of contract formation.\textsuperscript{158} Rather, tort law is better equipped to provide for recovery of the cost of credit monitoring, where compensation would depend on the reasonableness of these costs in the context of each case.\textsuperscript{159}

In all, the plaintiffs in \textit{Pisciotta} could have argued that courts should not be limited by the economic loss doctrine when deciding whether plaintiffs have suffered the requisite compensable injury in a data security breach case where the consequent damages are the cost of credit monitoring, because the functions of the economic loss doctrine are not implicated in this context. Nonetheless, considering that the Seventh Circuit traditionally has espoused the economic loss doctrine, with Judge Posner as one of its strongest advocates,\textsuperscript{160} this argument would not ensure the plaintiffs in \textit{Pisciotta} recovery of credit monitoring costs.

\section*{IV. WHERE DO CONSUMERS GO FROM HERE?}

Following \textit{Pisciotta}, it is clear that the Seventh Circuit is not willing to find a common law cause of action under tort law, at least in Indiana, to provide credit monitoring costs to consumers who have lost personal information due to a database security breach. The court noted in \textit{Pisciotta} that allowing for recovery of credit monitoring costs after a security breach would constitute a “substantive innovation” in state law, and the court justifiably refused to do this.\textsuperscript{161} In the short time since \textit{Pisciotta} was decided, it has already been followed by a district court in the Fifth Circuit,\textsuperscript{162} having ruled that consumers need to prove more than wrongful access to their personal information to

\begin{flushleft}
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recover under tort law, and that credit monitoring costs are thus not compensable damages.163 As noted above, there are also other district courts, including in Ohio,164 Minnesota,165 Arizona,166 and Michigan167 which decided, prior to Pisciotta, that credit monitoring costs are not recoverable after a database security breach. Although there is thus reason to believe that consumers in many states will not be able to recover credit monitoring costs through common law when the consumers’ personal information is wrongfully accessed, the issue remains whether consumers should be able to recover credit monitoring costs despite the court decisions. If so, their best prospect for recovery is through new legislation.

A. Why Require Credit Monitoring Services?

Legislatures should require that database owners offer credit monitoring services to all consumers whose personal information has been wrongfully accessed due to a database security breach. This would be advantageous to database owners as well as consumers. In 2007, the average cost to a database owner following a database security breach by a third-party hacker was $231 per compromised record (this cost is even greater for financial institutions where consumers have higher expectations of security).168 The cost of lost business due to customer turnover accounted for about 56% of this total cost, and the cost of providing credit monitoring accounted for only 1%.169 One must note that even though a database owner may

163 Id. at 797.
168 2007 Annual Study: U.S. Cost of a Data Breach (study by the Ponemon Institute, LLC) (Nov. 2007).
169 Id.
offer credit monitoring services, only about five to thirty percent of the affected consumers actually exercises this offer, which translates to the database owner’s cost. Therefore, a database owner’s greatest concern following a security breach is the loss of customers.

By requiring that database owners provide credit monitoring services, consumers may be more sympathetic to the database owners (particularly in the case of a breach by a third-party hacker) and thus give a second thought to transferring their business. Furthermore, by offering credit monitoring services, database owners could potentially save future legal costs related to a security breach. Many companies already voluntarily provide affected consumers with credit monitoring after database security breaches, recognizing the potential liability if such monitoring does not take place. After all, credit monitoring decreases affected consumers’ risks of falling victim to identity theft and other fraud. Providing for credit monitoring services, though less of a cost than other potential liability, would still be a considerable expense for database owners, and therefore would also create an incentive for these owners to increase database security. With this increase in security, database owners will likely see an increase in their online business because consumers will feel that their personal information is being better protected.

For affected consumers, such legislation would at least provide compensation for out-of-pocket expenses. As seen in Pisciotta, consumers face an up-hill battle in protecting information privacy through common law. Unless they are victims of identity theft or other actual fraud, consumers will have significant difficulty receiving even those out-of-pocket expenses through a negligence or breach of contract action considering, among other difficulties, the high standard of proving a compensable injury. Affected consumers of a database security breach may also find it difficult in a negligence action, for

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example, to prove proximate causation, because the intentionally tortious or criminal conduct of a hacker may break the chain of causation, thus absolving the database owner of liability.\textsuperscript{172} As stated above, requiring database owners to provide credit monitoring services following a database breach will also likely improve database security, which surely is advantageous for consumers providing personal information online.

\textbf{B. Other Proposed Legislation}

Professor Vincent Johnson proposes legislation which would allow consumers to recover credit monitoring costs when their personal information is wrongfully accessed, provided that these credit monitoring costs are a limitation on a database owner’s liability.\textsuperscript{173} The fact that most states have enacted security breach notification statutes illustrates that there is a recognized privacy interest in the personal information provided to the database owners.\textsuperscript{174} In practice, however, the notification statutes provide limited protection, because many of these statutes do not ensure that affected consumers receive the most expedient notice which is crucial in minimizing harm following a security breach.\textsuperscript{175} Database owners are generally only obligated to notify consumers of a database breach upon actual discovery or notification of the breach, when in reality they may be able to discover the breach earlier, yet have no incentive to do so.\textsuperscript{176} By introducing credit monitoring costs as a statutory remedy and a limitation on liability, database owners will have an incentive to discover security breaches as early as possible so as to shift liability to the consumer as early as possible.\textsuperscript{177} Once a database owner notifies an affected

\begin{itemize}
\item \textsuperscript{172} Johnson, \textit{supra} note 58, at 309 (citing Restatement (Second) of Torts 448 (1965)).
\item \textsuperscript{173} \textit{Id.} at 306.
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{Id.} at 306-07. \textit{See, e.g.,} CAL. CIV. CODE § 1798.29(a) (2003).
\item \textsuperscript{176} Johnson, \textit{supra} note 58, at 306.
\item \textsuperscript{177} \textit{Id.} at 307.
\end{itemize}
consumer of a security breach, the database owner would only be liable for credit monitoring costs from that point and for no other liabilities resulting from the security breach.

The advantages for database owners and for consumers are, for the most part, the same as those from legislation without a cap on liability. For database owners, however, limiting liability to credit monitoring costs is even more advantageous than simply requiring credit monitoring costs because it would necessarily prevent devastating liability from subsequent legal actions. Without this cap, their risk of liability is merely decreased.

Consumers, on the other hand, do face the disadvantage of not being able to bring a negligence claim against the database owner once they have actually suffered financial injury through identity theft or fraud. On the whole, however, the majority of affected consumers will not fall victim to identity theft or fraud, and would prefer some redress following a security breach than none. Furthermore, with free credit monitoring services, consumers should be less likely to fall victim to identity theft in the first place, consequently lessening this disadvantage.

CONCLUSION

Pisciotta is a fascinating case because it highlights the difficulties plaintiffs face when the law does not necessarily keep up with the advancement of technology. Indeed, Pisciotta presented the Seventh Circuit with an issue it had never faced: whether the costs of credit monitoring spent by consumers whose personal information was wrongfully accessed through a database security breach, but who were not victims of identity theft or fraud, are compensable damages and thus recoverable under a negligence or breach of contract action. The Seventh Circuit was unwilling to extend the definition of compensable damages to the costs of credit monitoring in this situation, and definitively refused to create a common law cause of action for such damages.

178 Id. at 309.
Following *Pisciotta* then, individuals in Indiana whose personal information is wrongfully accessed because of a database security breach effectively have no avenue of redress unless they fall victim to identity theft or other fraud. Although this is a rather narrow reading of *Pisciotta*, it can easily be broadened to encompass other states in the Seventh Circuit and even beyond the Seventh Circuit because of the similar state of the law regarding database security breaches. Most states have security breach notification laws, but do not require database owners to provide affected consumers with credit monitoring services. If other circuits follow the Seventh Circuit in refusing credit monitoring damages, there will not only be lack of redress through regulation, but lack of redress through the common law. Consumers therefore need to rely on their legislators to create statutory credit monitoring damages, if they are to receive them at all.
(TRADE) SECRETS, SECRETS ARE NO FUN—ESPECIALLY WHEN DISCLOSED THROUGH FOIA REQUESTS TO EVERYONE

DANIEL B. GOLDMAN*


INTRODUCTION

Though trade secrets began as creatures of the common law, they first achieved widespread acceptance as valuable intellectual property after their incorporation into the Restatement of Torts.1 Forty years later, The Uniform Trade Secret Act (UTSA) slightly modified the Restatement’s definition.2 Nearly every state has now adopted its own trade secrets act that is substantively similar to the UTSA.3

The Freedom of Information Act (FOIA) was enacted to serve policies essentially antithetical to those of trade secrets—allowing individuals to access records collected by governmental agencies.4 While the FOIA contains a provision exempting trade secrets from

1 See RESTATEMENT OF TORTS § 757 cmt. b (1939).
3 See 2 MELVIN JAGER, TRADE SECRETS LAW § 12.1 (2007).
public FOIA requests,\textsuperscript{5} invocation of the exemption discretionary on the part of the agency. The purported trade secret owner has no power to influence the agency’s decision.\textsuperscript{6} Consequently, competitors in business occasionally are able to obtain information through a FOIA request considered to be trade secrets by their owners. This type of situation raises a legal question about whether a trade secret can continue to exist after its disclosure by the government.

Patriot Homes, Inc. and Forest River Housing, Inc. are competitors in the modular housing industry.\textsuperscript{7} In \textit{Patriot Homes, Inc. v. Forest River Housing, Inc.},\textsuperscript{8} the defendant admitted that the plaintiff’s former employees took information from the plaintiff after being hired by the defendant, but argued that any misbegotten information was no longer a trade secret after showing it to be ascertainable through FOIA requests. While the Seventh Circuit rightfully vacated an impermissibly vague preliminary injunction issued by the lower court,\textsuperscript{9} the parties continue to disagree about whether a trade secret can exist where nearly all of the allegedly secret information is available through FOIA requests to state agencies.

The first section of this paper will discuss the facts, procedural posture, and issues raised by \textit{Patriot Homes}. This will provide an important framework through which to view the subsequent analysis of the two seemingly disparate legal regimes implicated by the case—trade secret law and the Freedom of Information Act.

The second section will analyze the various statutory schemes under which trade secrets have been accorded legal protection. The most well-established common law trade secret definition derives from the 1939 Restatement of Torts. That definition was eventually

\textsuperscript{5} 5 U.S.C. § 552(b)(4).
\textsuperscript{7} Modular homes are houses that are divided into multiple modules, or sections, which are manufactured in a remote facility and then delivered to their intended site of use. The modules are assembled into a single residential building using either a crane or trucks. Typically, modular dwellings are built to local state or council code, so dwellings built in a given manufacturing facility will have differing construction standards depending on the final destination of the modules.
\textsuperscript{8} Patriot Homes, Inc. v. Forest River Hous., Inc., 512 F.3d 412 (7th Cir. 2008).
\textsuperscript{9} Id. at 416.
supplemented by interpretations in both the Uniform Trade Secret Act (UTSA) and the Restatement (Third) of Unfair Competition. All of the states within the Seventh Circuit have adopted the UTSA, though each state’s trade secret law contains its own subtle differences.

The third section considers the Freedom of Information Act’s seemingly conflicting goals—providing transparency to governmental records and ensuring that private entities are not harmed by entrusting their records with the government. This paper offers analysis of the FOIA’s Exemption 4, designed to protect trade secrets and confidential information from disclosure to the public. Finally, this section discusses the individual state FOIA statutes within the Seventh Circuit and their trade secret exemptions, which provide good examples for the range of methods that states have chosen to address the contrasting areas of law.

Finally, the last section of this paper will discuss some policy considerations related to several foreseeable legal conflicts arising from FOIA’s policy of maximum disclosure of agency records. Included is an analysis of the likely outcome of Patriot Homes’ trade secret issue and proposals that would afford those submitting information to government agencies greater control over their privacy without substantially diminishing the public’s access to government records.

I. PATRIOT HOMES, INC. V. FOREST RIVER HOUSING, INC.

In 2004, Forest River Housing attempted to purchase Patriot Homes, a Midwest company that builds modular homes.\(^{10}\) Unsuccessful in its attempt to purchase the company, Forest River hired away four of Patriot’s management level employees, formed a new company called Sterling Homes, and entered the modular housing industry.\(^{11}\) Prior to leaving Patriot, the four departing employees

\(^{10}\) Id. at 413.

\(^{11}\) Id. Prior to entering the modular housing industry, Forest River primarily focused on selling recreational vehicles. Forest River, Inc. company profile, http://www.forestriverinc.com/nd/default22.asp?nav=housing&page=aboutus (last visited May 1, 2008).
copied information from Patriot’s computers and brought those materials with them to Sterling.12

According to Patriot, Sterling then used the purloined information to build and sell homes that were identical to those sold by Patriot.13 Therefore, in its suit against Sterling, Patriot claimed, *inter alia*, that Sterling had misappropriated its trade secrets.14 Patriot therefore sought injunctions against, and damages from, Sterling and Patriot’s four former employees.15

Like manufacturers in many industries, modular home manufacturers must obtain approval from the states in which they desire to sell their homes.16 In order to obtain that approval, companies must submit a wide variety of technical data to the appropriate state agencies. As such, in order to sell its products in Indiana, Patriot submitted to state agencies a great deal of the information in which it later claimed trade secret protection.17

While the foregoing facts follow a pattern very common to many trade secret cases, *Patriot Homes* is somewhat unique due to the character of Sterling’s defense to the trade secret misappropriation claim. Sterling did not deny that Patriot’s former employees took useful information from Patriot’s computers before leaving the company.18 Nor did Sterling deny that it used that information.19 Instead, Sterling argued that all of Patriot’s alleged trade secrets and confidential information were readily ascertainable and in the public domain so that Sterling’s use of the information did not constitute trade secret misappropriation.20 In supporting this defense, Sterling provided thousands of pages of documents, submitted by Patriot to various state agencies, which Sterling obtained through FOIA requests.

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12 *Patriot Homes, Inc.*, 512 F.3d at 413.
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.* at 414.
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
after Patriot initiated the litigation. After the district court for the Northern District of Indiana issued a preliminary injunction against Sterling, Sterling submitted FOIA requests to various state agencies, in Indiana and elsewhere, requesting copies of all the documents that Patriot submitted in order to obtain approval to sell its homes in those states. In response to Sterling’s request, government agencies in Indiana, along with agencies in all of the other states that received requests from Sterling, produced thousands of documents, comprising the bulk Patriot’s purported trade secrets and confidential information. Though Patriot wrote each state requesting that they take remedial action to preserve the confidential nature of the information, none of the state agencies indicated that it would comply or that the documents were improperly produced.

Patriot contended that the information it submitted to the various state agencies still constituted proprietary trade secrets. Sterling, on the other hand, continued to assert that Patriot could claim trade secret protection only for information that was not readily ascertainable. In light of the results from its FOIA request, Sterling argued that the vast majority of Patriot’s asserted trade secrets could no longer receive statutory protection from the Indiana Uniform Trade Secrets Act (IUTSA) because it was readily available.

Procedurally, Patriot Homes reached the Seventh Circuit on interlocutory appeal to review whether Patriot’s preliminary injunction was too vague for a court to ensure proper enforcement. The injunction enjoined Sterling from “using, copying, disclosing, converting, appropriating . . . or otherwise exploiting Patriot’s

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21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
copyrights, confidential information, trade secrets, or computer files.”

It also required Sterling to “certify that copied data and materials of Patriot’s property, confidential information and trade secrets on computer files and removable media . . . have been deleted or rendered unusable.”

While Sterling did not take issue with the injunction’s prohibition on using the computer files taken from Patriot’s computer, it asserted that the remainder of the injunction was too vague because it did not define Patriot’s “confidential information and trade secrets,” and thereby failed to give Sterling notice as to which actions would violate the injunction.

As will be discussed in greater detail in the proceeding section, the IUTSA prohibits using another’s trade secrets but also requires that information not be publicly known or readily ascertainable in order to be protectable as a trade secret. In light of the results of Sterling’s FOIA requests, the appellate court held that Patriot’s injunction did not clarify what the confidential information or trade secrets were. The district court essentially needed to determine whether the results of Sterling’s FOIA requests were still protectable trade secrets or had become public information. “Sterling cannot tell, and neither can we, whether using the information it obtained through the FOIA requests would violate the injunction.”

The Seventh Circuit previously held, as have many other circuits, that the protectable substance of a trade secret must be defined in order to determine the proper scope of an injunction. If it is not, the injunction will not be detailed or specific.

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30 Id.
31 Id.
32 Id.
34 Patriot Homes, 512 F.3d at 415-16.
35 Id.
36 Id. at 415.
37 See Am. Can v. Mansukhani, 742 F.2d 314, 326 (7th Cir. 1984) (holding that the district court erred by failing to consider what information about plaintiff’s formulas were public knowledge in determining the scope of a preliminary injunction); see also E.W. Bliss Co. v. Struthers-Dunn, Inc., 408 F.2d 1108, 1115-17 (8th Cir.1969) (trade secret injunction too vague); cf. Syntex Ophthalmics, Inc v.
enough to ensure proper enforcement, through contempt proceedings or otherwise.\textsuperscript{38}

It can be difficult at the preliminary stages of a case to determine what information actually constitutes a trade secret or confidential information. Ultimately, though, a district court still must make that determination in order to put a defendant on notice regarding its responsibilities pursuant to a preliminary injunction.\textsuperscript{39} The Seventh Circuit, therefore, vacated the district court’s preliminary injunction and remanded the case for proceedings consistent with the opinion.\textsuperscript{40}

During the time that Sterling’s interlocutory appeal was pending, the Northern District of Indiana heard Sterling’s motion for partial summary judgment on Patriot’s trade secret claims.\textsuperscript{41} Sterling based its motion on its defense that Patriot’s asserted trade secrets were readily ascertainable by proper means.\textsuperscript{42} The district court was unreceptive to Sterling’s arguments and denied its motion for three reasons. First, not all of Patriots asserted trade secrets were contained in Sterling’s FOIA responses.\textsuperscript{43} Second, because “it is ‘no defense to claim that one’s product could have been developed independently . . . if, in fact it was developed using plaintiff’s proprietary designs.’”\textsuperscript{44} Finally, the court noted that the data stolen by Patriot’s former employees held value independent of the hard copies obtained through FOIA requests, based

\textsuperscript{38} See Fed. R. Civ. P. 65(d). The Federal Rules of Civil Procedure require that injunctions “describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” \textit{Id}.

\textsuperscript{39} Patriot Homes, Inc. v. Forest River Hous., 512 F.3d 412, 415 (7th Cir. 2008).

\textsuperscript{40} \textit{Id}. at 416.

\textsuperscript{41} Patriot Homes, Inc. v. Forest River Hous., Inc., No. 3:05 CV 471 AS, 2007 WL 2782272 at *1 (N.D. Ind. Sept. 20, 2007)

\textsuperscript{42} \textit{Id}. at *2.

\textsuperscript{43} \textit{Id}.

\textsuperscript{44} \textit{Id}. at *3 (citing Amoco Prod. Co. v. Laird, 622 N.E.2d 912 (Ind. 1993)) (emphasis added).
solely on its medium, because the electronic format lends itself to more efficient engineering and copying than does the paper format.45

While the court ultimately was not receptive to the specific defense raised by the defendant, Patriot Homes highlights the inherent potential for conflict between trade secret law and FOIA laws. The district court’s denial of Sterling’s motion does not obviate need for companies like Patriot Homes to be able to protect their trade secrets. Patriot initiated its litigation against Sterling because Patriot’s former employees stole confidential information. Sterling’s subsequent housing designs too closely resembled Patriot’s designs not to raise suspicions. Had Sterling originally taken the FOIA route to obtaining Patriot’s information, Patriot likely would have had no legal recourse to stop its competitor from using its designs.46

Oftentimes, companies are statutorily compelled to disclose information to government agencies whose secrecy is intrinsic to its value.47 However, due to federal and state FOIA laws, which recognize the societal benefits of transparent governance, companies can, without recourse, lose valuable proprietary information to their competitors.48 Patriot Homes is merely one example of the possible ramifications of the conflict between trade secret law and freedom of information laws.

Just as the Northern District of Indiana, on remand, must now negotiate the seemingly asymptotic relationship between the two areas

45 Id.
46 In that situation, Patriot might still have a viable copyright infringement claim relating to its architectural plans, which were also included in Patriot’s initial complaint but have yet to be decided. Such copyright claims generally cover only the design elements of plans, however, and not the functional or statutorily required elements. For more on the copyrightability of architectural works, see generally William Patry, Patry on Copyright, ch. 3, §§ 102-116 (2007).
47 In Patriot Homes’ case, the disclosures were necessary in order to sell their homes in Indiana. Patriot Homes, 512 F.3d at 414. Other circumstances where a company might be forced to disclose proprietary information to government agencies include, for example, bids to win government contracts, FDA or EPA reporting requirements, and financial reporting requirements such as those in the Sarbanes-Oxley Act of 2002, Pub.L. 107-204 (2002).
of law, so too shall this paper analyze the two bodies of law. In order to illuminate the conflict, this paper will first discuss trade secret law in general and then analyze trade secrets’ treatment by freedom of information laws.

II. TRADE SECRETS

The formal protection of confidential business information dates back to Roman law.\(^49\) Both early English cases and early American cases tended to treat the subject as a breach of confidence rather than one that involved property rights.\(^50\) In contrast, treating trade secrets as property is a crucial facet of most modern caselaw on the subject.\(^51\) This remains true even in cases that turn on a defendant’s actions—such as breach of good faith—rather than on the nature of the secret itself.\(^52\)


\(^50\) See Peabody v. Norfolk, 98 Mass. 452 (1868) (emphasizing that confidential disclosures do not destroy a trade secret’s requisite secrecy), Tabor v. Hoffman, 23 N.E. 12 (N.Y. 1889) (recognizing competitors’ right to acquire information through reverse engineering); Morison v. Moat, (1851) 68 Eng. Rep. 492 (Ch.) (enforcing a contract between the parties that treated “Morrison’s Secret Formula” as a trade secret); Newberry v. James, (1817) 35 Eng. Rep. 1011 (Ch.) (denying an injunction because the court was unable to protect a secret not disclosed in court).

\(^51\) See Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (holding trade secrets to be property protected under the Fifth Amendment). In *Monsanto*, the plaintiff sought compensation under the Fifth Amendment’s Takings Clause for the EPA’s disclosure, through a response to a FOIA request, of Monsanto’s highly valuable trade secrets concerning a pesticide that Monsanto developed. *Id.*

\(^52\) See, e.g. Smith v. Snap-On Tools Corp., 833 F.2d 578, 579 (5th Cir. 1987) (reversing lower court’s finding that defendant misappropriated plaintiff’s trade secret after finding that the defendant owed the plaintiff no duty of confidence).
A. The Restatements and the Uniform Trade Secrets Act

1. The Restatement of Torts

The early trade secret decisions demonstrated that a practical definition of a “trade secret” was developing slowly and haphazardly in the common law. Trade secret law lingered in a somewhat uncertain state when the Restatement of Torts was published in 1939.\(^\text{53}\) The Restatement’s treatment of trade secrets became the focus of courts’ attention and helped coalesce trade secret concepts in the common law.\(^\text{54}\)

The Restatement defined trade secrets as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know how to use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.\(^\text{55}\)

The Restatement also qualifies that trade secrets are not single or temporal pieces of information.\(^\text{56}\) Rather, “a trade secret is a process . . . for continuous use in the operation of the business.”\(^\text{57}\) Courts subsequently held that a bevy of nontechnical subject matter can

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\(^\text{53}\) 2 MELVIN JAGER, TRADE SECRETS LAW § 3.1 (2007).


\(^\text{55}\) RESTATEMENT OF TORTS § 757, cmt. b (1939).

\(^\text{56}\) Id.; see also Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 297-98 (2d Cir. 1986) (citing the Restatement in finding that a trade secret “is not simply information as to single or ephemeral events in the conduct of the business” such as “the amount or other terms of a secret bid for a contract or the salary of certain employees.”).

\(^\text{57}\) RESTATEMENT OF TORTS § 757, cmt. b (1939).
qualify as trade secrets, including business pricing information,\(^{58}\) sales data,\(^{56}\) supplier capabilities,\(^{60}\) marketing plans,\(^{61}\) promotional materials,\(^{62}\) and even some religious texts.\(^{63}\) Though generally afforded weak protection, courts almost unanimously hold that customer lists can also qualify as trade secrets.\(^{64}\)

Abstract ideas, though not completely precluded from trade secret protection, often face challenges because it can be difficult for a plaintiff to claim that they possess economic value.\(^{65}\) A lack of definitiveness may preclude proof of secrecy,\(^{66}\) a determination of whether the purported secret has been appropriated, or an appropriate formula for relief.\(^{67}\)

\(^{58}\) See SI Handling Sys, Inc. v. Heisley, 753 F.2d 1244, 1260 (3d Cir. 1985); \textit{but see} Fortna v. Martin, 323 P.2d 146 (Cal. Dist. Ct. App. 1958) (holding that methods of pricing were not protectable because they were not confidential and therefore not secret).


\(^{60}\) Sigma Chem. Co. v. Harris, 794 F.2d 371 (8th Cir. 1986).


\(^{62}\) Clark v. Bunker, 453 F.2d 1006 (9th Cir. 1972).

\(^{63}\) Religious Tech. Ctr. v. Scott, 869 F.2d 1306, 1309-10 (9th Cir. 1989) (holding that if scriptural materials pertaining to the Church of Scientology had economic value, they too may qualify as trade secrets).

\(^{64}\) See MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993) (granting trade secret protection to sales lists, field operation manuals, and computer software); Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410 (7th Cir. 1992) (mailing lists); Zoecon Indus. v. Am. Stockman Tag Co., 713 F.2d 1174 (5th Cir. 1983) (customer lists); Allen v. Johar, Inc., 308 Ark. 45 (1992) (customer lists do not need to be written down to be trade secrets); \textit{but see} Mercer v. C.A. Roberts Co., 570 F.2d 1232 (5th Cir. 1978) (denying protection to a “mere list of customers”);

\(^{65}\) See Richter v. Westab, Inc., 529 F.2d 896 (6th Cir. 1976).


\(^{67}\) See AMP, Inc. v. Fleischhacker, 823 F.2d 1199, 1203 (7th Cir. 1987) (plaintiff failed to specify the exact nature of the asserted trade secret, relying instead on a long list of areas of general information containing unidentified trade secrets). \textit{AMP} was superseded by the Illinois Trade Secrets Act although the law remains substantively the same. \textit{See} PepsiCo, Inc. v. Redmond 54 F.3d 1262, 1268 (7th Cir. 1995).
Of course, the single most important requirement for a trade secret is that it must actually be secret.⁶⁸ Without actual secrecy, none of the other elements of trade secret law are relevant. Matters of public or general knowledge in a particular industry cannot comprise trade secrets.⁶⁹ Likewise, matters that are publicly disclosed through marketing and sales of goods are not trade secrets, so sales reports and pricing information that might otherwise qualify as trade secrets would not be entitled to protection if that information is readily available to customers or routinely quoted over the telephone.⁷⁰

Additionally, in order for a trade secret to be “used in one’s business,” a trade secret owner must be able to communicate it to his or her employees – total secrecy is not required.⁷¹ The Restatement generalizes that “a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information.”⁷²

While some courts found it difficult to devise an exact definition of a trade secret,⁷³ the Restatement offered six often-cited factors for consideration in determining whether to accord one’s information the status of “trade secret.” Those factors are:

(1) the extent to which the information is known outside of [the trade secret owner’s] business; (2) the extent to which it is known by employees and others involved in [the trade

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⁶⁸ Restatement of Torts § 757, cmt. b (1939). This, in essence, defines Sterling’s defense that, regardless of its actions, it could not have misappropriated Patriot’s trade secrets because all of the asserted trade secrets were comprised of information publicly available through FOIA requests. Patriot Homes, Inc. v. Forest River Hous., Inc., No. 3:05 CV 471 AS, 2007 WL 2782272 (N.D. Ind. Sept. 20, 2007).


⁷¹ Id.

⁷² Id.; see also Cent. Plastics Co. v. Goodson, 537 P.2d 330 (Okla. 1975).

secret owner’s] business; (3) the extent of measures taken by [the trade secret owner] to guard the secrecy of the information; (4) the value of the information to [the trade secret owner] and to his competitors; (5) the amount of effort or money expended by [the trade secret owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.74

The Supreme Court solidified the Restatement definition’s standing in the common law when it cited to it in Kewanee Oil Co. v. Bicron Corp.75 The Kewanee court summarized the policy rationales for trade secret protection as the “maintenance of standards of commercial ethics and the encouragement of invention,”76 the efficient exploitation of information by encouraging the dissemination of ideas through confidentiality agreements,77 and protecting the right to privacy that is threatened when industrial espionage is condoned or made profitable.78

2. The Uniform Trade Secrets Act

Although the Restatement’s treatment of trade secrets gained wide acceptance, the subject of trade secrets was omitted from the Restatement (Second) of Torts. Reacting to that, and a need to address several important aspects of trade secret law that the 1939 Restatement did not cover, such as injunctive relief and the statute of limitations, in

76 Id. at 481.
77 Id. at 486-87.
78 Id. at 487.
1979 the National Conference of Commissioners on Uniform State Laws approved the Uniform Trade Secrets Act (UTSA).\textsuperscript{79}

The UTSA’s definition of “trade secrets” departs from that of the Restatement by omitting the requirement that a secret be used “continuously” by a business and is broad enough to include so-called “negative” information.\textsuperscript{80} According to the Act, “trade secret” means:

Information, including a formula pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.\textsuperscript{81}

This definition essentially sets out four requirements that a purported trade secret must meet to fulfill the UTSA’s definition.\textsuperscript{82} In modified form, the Uniform Trade Secrets Act has thus far been adopted in forty-six states.\textsuperscript{83} Among those states are all three that comprise the Seventh Circuit.\textsuperscript{84}

\textsuperscript{79} For an extensive commentary on the need for a uniform act and its adoption, see Ramon A. Klitze, The Uniform Trade Secrets Act, 64 MARQ. L. REV. 277 (1980).

\textsuperscript{80} Metallurgical Indus., Inc. v. Fourtek, Inc., 790 F.2d 1195, 1202-03 (5th Cir. 1986).

\textsuperscript{81} UNIFORM TRADE SECRETS ACT, § 1(4)(i)-(ii) (1985).

\textsuperscript{82} From this definition, the UTSA requires that a trade secret be (1) information; (2) that derives independent economic value; (3) from not being generally known or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and (4) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy. \textit{Id.}

\textsuperscript{83} For an extensive list of citations to all forty-seven state trade secret acts, see JAGER, supra note 3, § 12.1.

\textsuperscript{84} Among other differences, Illinois reworded its remedies provisions eliminating a perceived loophole in the UTSA and making it easier for plaintiffs to receive injunctive relief: \textit{Id.} at § 31.2.
3. Restatement (Third) of Unfair Competition

The American Law Institute instead revised its treatment of trade secrets, harmonizing it with the UTSA, and incorporated trade secrets into the Restatement (Third) of Unfair Competition. The new treatment omitted the six factors, opting instead for a more holistic approach to relevant factors such as the monetary value of the purported trade secret, the secrecy and definiteness of the information, and the nature of the defendant’s (mis)conduct in obtaining the information. While the Restatement of Torts continues to be cited in many trade secret cases, some courts have begun to recognize and endorse the more recent iteration.

The Restatement (Third) of Unfair Competition defines a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” Notably, however, the Restatement (Third) of Unfair Competition’s treatment of trade secrets “is directly applicable only to the imposition of civil liability” and “does not apply . . . in other circumstances not involving civil liability for the appropriation of a trade secret, such as the protection of trade secrets from disclosure under the Freedom of

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85 Restatement (Third) of Unfair Competition, ch. 4 §§ 38-45 (1995); see Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 297 n.16 (2d Cir. 1986) (noting that trade secrets were more appropriately incorporated into the Restatement (Third) of Unfair Competition).

86 In re Bass, 113 S.W.3d 735, 739 (Tex. 2003) (holding that the Restatement of Torts’ six factors are unnecessary in light of the UTSA and Restatement (Third) of Unfair Competition).

87 See Stenstrom Petroleum Servs. Group, Inc. v. Mesch, 874 N.E.2d 959, 972 (Ill. App. Ct. 2007) (using the Restatement of Torts to inform the court’s interpretation of Illinois trade secret law); Minuteman, Inc. v. Alexander, 434 N.W.2d 773, 777-78 (Wis. 1989) (noting that while Wisconsin law no longer follows the Restatement of Torts’ definition of trade secret, it still is a helpful resource in interpreting trade secret laws).

88 In re Bass, 113 S.W.3d at 740.

This paper’s analysis of the newer Restatement will thus be similarly limited.

Although, by its own terms, the Restatement is not directly applicable to FOIA trade secret issues, the Restatement contains some relevant discussion. The subject matter of a trade secret is defined as “a formula . . . device, method, technique, process, or other form or embodiment of economically valuable information . . . [and] can relate to technical matters . . . necessary to perform a particular operation or service.” The final clause, implicating a relationship between the trade secret and the performance of an operation or service is similar to the language used by a number of courts in conceptualizing the definition of trade secrets for the purposes of the FOIA exemptions.

Unlike the Restatement of Torts, the newer Restatement (Third) of Unfair Competition does not require that trade secrets be capable of continuous use or maintain their value for any duration. Trade secrets can relate to single events such as secret bids and impending business announcements, whose value derives from its secrecy and whose secrecy is temporary.

The Restatement (Third) of Unfair competition largely adopted other elements of trade secrets, as they were defined in the Restatement of Torts. Trade Secrets still pertain to just about any information that can offer a competitive advantage based on its secrecy. And trade secret information still must not be readily obtainable. While a trade secret must have competitive value, time

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90 Id. § 39, cmt. b.
91 Id. § 39, cmt. d.
93 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39, cmt. d.
94 Id.
95 Id.; see Phillips v. Frey, 20 F.3d 623, 628 (5th Cir. 1994) (a trade secret “must give the owner a competitive advantage”); see generally e.g. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 482 (1974) (a trade secret need not be patentable); but see Nickelson v. Gen. Motors Corp., 361 F.2d 196, 199 (7th Cir. 1966) (a “trivial” advance might not be protectable).
96 See Amoco Prod. Co. v. Laird., 622 N.E.2d 912, 919 (Ind. 1993) (acquisition by proper means need not be economically infeasible “a substantial investment of
and money spent developing the secret, precautions to maintain its
secrecy, and a third party’s willingness to pay for access through
licensing agreements all serve as evidence of the information’s value.\textsuperscript{97}
The same factors can also be useful as evidence of relative secrecy,\textsuperscript{98}
and can signal to employees and others that information is
confidential.\textsuperscript{99} If, however, a misappropriation was not the result of
security lapses, “those lapses should not be the basis for denying
protection.”\textsuperscript{100}

\textbf{B. Representative State Trade Secret Statutes}

The three states that comprise the Seventh Circuit represent a fair
sampling for the various ways that states across the country have
chosen to adopt the Uniform Trade Secrets Act. For example, Indiana’s
legislature enacted the UTSA shortly after its adoption and with
minimal changes.\textsuperscript{101} Wisconsin adopted most of the UTSA’s
provisions but continues to use the Restatement of Torts’ definition of
“trade secrets.”\textsuperscript{102} Illinois, on the other hand, changed several UTSA
provisions prior to enacting its own version of the law.\textsuperscript{103}

\begin{itemize}
\item \textsuperscript{97} See Rockwell Graphic Sys., Inc. v. DEV Indus, Inc., 925 F.2d 174 (7th Cir.
1991) (precautions taken to protect secrecy can indicate value); Tan-Line Studios,
(willingness of licensees to pay for access to secret and defendant’s decision to resort
to improper means are evidence value).
\item \textsuperscript{98} See Metallurgical Indus., Inc. v. Fourtek, Inc., 790 F.2d 1195, 1200 (5th Cir.
1986); cf. Victor Chem. Works v. Iliff, 132 N.E. 806 (Ill. 1921) (precautions are not
efficient if evidence reveals that the information is generally known).
\item \textsuperscript{99} See, e.g. Surgidev Corp. v. Eye Tech., Inc., 828 F.2d 452 (8th Cir. 1987).
\item \textsuperscript{100} Syntex Ophthalmics, Inc. v. Novicky, 1982 WL 63797, at *5 (N.D. Ill. 1982),
aff’d 701 F.2d 677 (7th Cir. 1983).
\item \textsuperscript{101} See JAGER, supra note 3, § 32:1 (Trade Secrets Law of Indiana).
\item \textsuperscript{102} See id. at § 67:1 (Trade Secrets Law of Wisconsin).
\item \textsuperscript{103} See id. at § 31:2 (Exploring several differences between the UTSA and the
Illinois trade Secret Act). Despite their differences, however, the three states’

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Under the Indiana Act, a trade secret is (1) information; (2) deriving independent economic value; (3) that is not generally known or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use; and (4) is the subject of efforts, reasonable under the circumstances, to maintain its secrecy.\textsuperscript{104} Like \textit{Patriot Homes}, the majority of recent trade secrets cases in Indiana have turned on whether a purported trade secret is publicly available or readily ascertainable, and the resources required to independently discover it.\textsuperscript{105}

Unlike Indiana, Wisconsin chose to keep its definition of trade secrets in line with the common law rather than based on the UTSA definition.\textsuperscript{106} Wisconsin trade secret law, therefore, employs the definition of “trade secrets” found in § 757 of the Restatement of Torts and Wisconsin courts still refer to that restatement’s six factor test to determine the presence of a trade secret.\textsuperscript{107} Notably, in determining the threshold for which information is entitled to trade secret protection, statutes are largely in agreement with each other and are fair representatives of other state trade secrets statutes across the country.

\textsuperscript{105} Amoco Prod. Co. v. Laird, 622 N.E.2d 912, 916 (Ind. 1993) (holding that information requiring a substantial investment of time, expense, or effort is not readily ascertainable); see also Coleman v. Vukovich, 825 N.E.2d 397, 405 (Ind. App. Ct. 2005) (customer list was not protectable because it was available to all employees, was kept unlocked, and on computers that were not password protected); Flotec, Inc. v. Southern Research, Inc., 16 F. Supp. 2d 992, 1000-1001 (S.D. Ind. 1998) (holding that information is not entitled protection where reverse engineering is a viable option for discovering an alleged trade secret); Xpert Automation Sys. Corp. v. Vibromatic Co., 569 N.E.2d 351, 355 (Ind. App. Ct. 1991) (customer lists are not entitled protection if they can be discovered by reasonable means); but see Ackerman v. Kimball Intern, 634 N.E.2d 778, 784 n. 3 (Ind. Ct. App. 1994) (rejecting the “economically feasible” standard, instead requiring that defendant could have replicated the asserted trade secret without “substantial investment of time, expense or effort”).
\textsuperscript{107} Id. Wisconsin law also does not provide trade secret protection for “single event” information such as bidding prices.
Wisconsin courts have interpreted “readily ascertainable” quite differently than their sister courts in Indiana. According to Wisconsin law, information is “readily ascertainable” only if it is discoverable “with a fair degree of ease, without difficulty.”108

Illinois, which did not enact its trade secret act until 1988, benefitted by waiting for its neighbor states to interpret some of the more ambiguous sections of the UTSA.109 In defining trade secrets, the Illinois Trade Secrets Act adopted a hybrid between the UTSA and Restatement definitions. In Illinois, a trade secret owner must show: “(1) that the information is sufficiently secret to derive economic value; (2) that the information is not within the realm of general skills and knowledge of the relevant industry; and (3) that the information cannot be readily duplicated without involving considerable time, effort, and expense.”110 Additionally, the six Restatement factors have been held applicable in determining whether a trade secret exists.111

Illinois law, therefore, does not require reasonable efforts to maintain a trade secret’s secrecy even though efforts to maintain secrecy might factor into whether the information is readily ascertainable as well as the secret’s relative value.

While other states employ subtly different definitions of “trade secrets” and may employ slightly different standards in determining when a misappropriation has occurred, these three statutes represent a fair sampling of how trade secret law has developed in the 46 states that have enacted some version of the UTSA. These three statutes also exemplify that—regardless of how states have enacted their trade

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111 Learning Curve Toys, Inc. v. PlayWood Toys, Inc., 342 F.3d 714, 727 (7th Cir. 2003). The third factor in Illinois' trade secret definition also indicates that Illinois has adopted a standard that information must be more analogous to Indiana’s strict “readily ascertainable” standard than to Wisconsin’s relaxed standard.
secret statutes—there remains an inherent conflict with the federal and state freedom of information laws.

III. THE FREEDOM OF INFORMATION ACT

During the late 1950’s and early 1960’s, a growing public appreciation for transparent governance led Congress to enact the 1966 Freedom of Information Act (FOIA). The FOIA mandated that federal government records be accessible to the public upon request. According to the FOIA, each agency, upon a reasonably descriptive request for records, must make the records promptly available to any person. Under the FOIA, the identity of a requester is irrelevant. A requester also does not need to demonstrate any specific need or reason for his or her request. Because the federal FOIA only applies to federal executive agencies, and not to records held by state governments, all 50 states and the District of Columbia have enacted their own state FOIAs that are almost unanimously identical to the federal act.

In the interest of full public disclosure, FOIA statutes make no distinction between records created by government agencies and those merely collected by government agencies after being submitted by private business concerns. Generally, any document in an agency’s files is subject to requests made under the FOIA. This makes it

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113 Id.
114 Id. § 552(a)(3)(A).
115 See id.
117 St. Michael’s Convalescent Hosp. v. California, 643 F.2d 1369, 1373 (9th Cir. 1981) (“agency” under the federal FOIA does not include state agencies).
highly possible that any information filed with the government will be revealed to the public upon request.

It is hardly surprisingly, therefore, that studies reveal that the vast majority of FOIA requests do not come from private citizens or institutions. Most FOIA requests are made by businesses, either directly or through third party intermediaries, to agencies that compile data provided to the government by American businesses. In this way, nearly any information that a business submits to a government agency can end up in the hands of a competitor.

Statistics such as these imply that the Patriot Homes situation might not be uncommon at all. Perhaps the only reason that Patriot Homes distinguishes itself from "business as usual" is that chronologically, the defendant waited until after the preliminary injunction hearing to make its FOIA requests. Had Sterling Homes simply made its FOIA request first, before using the information taken by Patriot's former employees, it may have been able to claim from the onset that the purported trade secrets were readily ascertainable and not protected under the Indiana Uniform Trade Secret Act.

A. Policy and Exemptions

Prior to enacting the federal FOIA, Congress contemplated potentially competing interests. FOIA addressed the public's right to access governmental records. There was also a competing interest in maintaining the confidentiality of information submitted to the

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Information, 32 STAN. L. REV. 339, 339 (1980) (agency files generally subject to the FOIA include "a vast array of documents submitted by private firms that include commercially valuable information").


121 Id. While there are studies reaching the opposite conclusion through studies of direct and reverse FOIA litigation, see Mark Q. Connelly, Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data, 1981 WISC. L. REV. 207, 209–210 (1981), those results are questionable in light of the costs of complicated litigation that "might well preclude a small business from ever seeking to prevent [FOIA] disclosures." Nat'l Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 681 n.24 (D.C. Cir. 1976).
government. Congress felt that FOIA’s "success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."\textsuperscript{122} Therefore, although disclosure of agency records is the act’s foremost goal,\textsuperscript{123} Congress carved out nine exemptions to the FOIA’s mandated disclosures.\textsuperscript{124}

Among those eight exemptions are “(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.”\textsuperscript{125} Courts have recognized several justifications for Exemption 4, including protecting the confidentiality of information submitted to the government,\textsuperscript{126} insuring the competitive position of parties submitting information,\textsuperscript{127} and encouraging cooperation with the government by those with useful information.\textsuperscript{128} Unfortunately, two issues prevent Exemption 4 from fully achieving all of its goals.

First, parties submitting information to government agencies cannot fully control whether that agency will disclose it. The Supreme Court held that an agency’s invocation of the FOIA’s exemptions is discretionary, not mandatory—allowing agencies to withhold records

\textsuperscript{122} S. REP. NO. 89-813 at 3 (1965); see also H.R. REP. NO. 89-1497 at 5-7 (1966).
\textsuperscript{124} 5 U.S.C. § 552(b) (2000).
\textsuperscript{125} Id. at § 552(b)(4) (clearly there is no accounting for the 92nd Congress’ impeccable grammar).
\textsuperscript{126} See Shermco Indus., Inc. v. Sec. of Air Force, 613 F.2d 1314, 1317 (5th Cir. 1980) (purpose of Exemption 4 is to protect interests of individuals who disclose information and to protect the government)
\textsuperscript{127} See Nadler v. FDIC, 899 F. Supp. 158, 160-61 (S.D. N.Y. 1995), aff’d 92 F.3d 93 (2d Cir. 1996) (Exemption 4 helps ensure the government’s continued ability to collect information);
\textsuperscript{128} See Burke Energy Corp. v. Dep’t of Energy, 583 F. Supp. 507, 510-11 (D. Kan. 1984) (holding that the purposes of Exemption 4 include avoiding substantial competitive harm, protecting privacy, and “facilitate[ng] citizens’ ability to confide in their government”).
but not requiring them to do so.\textsuperscript{129} Consequentially, the FOIA protects a private party’s interest in the confidentiality of information submitted to the government “only to the extent that this interest is endorsed by the agency collecting the information.”\textsuperscript{130}

Second, the Freedom of Information Act contains no specific definition of “trade secrets” or “confidential” as applicable to Exemption 4.\textsuperscript{131} Prior to FOIA’s enactment, the common law definition of trade secrets, based chiefly on the Restatement (First) of Torts, had been largely settled.\textsuperscript{132} Since the FOIA’s passage, however, the majority of states have passed their own state trade secret laws modeled after the UTSA.\textsuperscript{133} This alone creates the potential for conflict between the laws that states have enacted to protect trade secrets and the body of law used to construe trade secrets under he FOIA. In addition, at least one circuit created its own narrow definition of “trade secret” for the explicit purpose of FOIA litigation.\textsuperscript{134} Thus, while modern trade secrets generally have similar definitions and treatment across the states with respect to intellectual property litigation, the same cannot be said for FOIA litigation.

Another obstacle to protecting the secrecy of information provided to the government lies in the FOIA’s own provisions. If an agency denies a FOIA request, the requestor may sue the government agency to challenge the withholding. In such cases, a court may examine the contents of any withheld agency records to determine

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\textsuperscript{129} See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979) (holding that “Congress did not design the FOIA Exemptions to be mandatory bars to disclosure”).

\textsuperscript{130} Id.


\textsuperscript{133} See JAGER, supra note 3, § 12.1.

\textsuperscript{134} See, e.g., Pub. Citizens Health Research Group v. Food and Drug Administration, 704 F.2d 1280, 1286-87 (D.C. Cir. 1983) (rejecting the Restatement’s definition of trade secrets and construing the term more narrowly than its traditional common law definition).
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whether they fall under any of the FOIA’s exemptions. If they do not, the court may enjoin the agency from withholding the records.\footnote{5 U.S.C. § 552(a)(4)(B) (2000).} Importantly, according to the FOIA, the agency bears the burden of proving that such records were properly withheld.\footnote{See Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 861 (D.C.Cir.1980)) (holding that “conclusory assertions will not suffice to carry the government’s burden of proof in withholding information requested through the FOIA”).} If the agency cannot meet its burden, it is liable for the other party’s attorney’s fees and litigation costs.\footnote{5 U.S.C. § 552(a)(4)(B) (2000).}

Those FOIA provisions effectively create a disincentive for an agency to withhold anything but the most clear-cut trade secrets. Under the FOIA, refusing to release requested documents—especially if a documents’ trade secret status is not manifestly obvious—simply is not in an agency’s interest. A party that submits information that it considers valuable or confidential therefore can have little expectation that such information will remain secret.

**B. Scope of the Trade Secrets Exemption**

The legislative history of FOIA’s trade secret exemption, Exemption 4, neither reveals its scope nor defines its legal terminology.\footnote{See H.R. REP. No. 89-1497at 10 (1966); S. REP. No. 89-813 at 9 (1965). The states have similar state FOIA provisions protecting trade secret and confidential information. See Coblentz v. City of Novi, 719 N.W.2d 73, 80 (Mich. 2006) (discussing the Michigan FOIA statute, Mich. Comp. Laws Ann. § 15.231 et seq. (West 2008)).} In construing its language, courts have generally concluded that Exemption 4 recognizes two distinct classes of information: (1) trade secrets, and (2) commercial or financial information that was obtained by a person and is privileged and confidential.\footnote{See Pub. Citizen Health Research Group v. Food and Drug Admin., 704 F.2d 1280, 1288-90 (D.C. Cir. 1983).}
In accordance with the FOIA’s general objective of public disclosure, courts tend to narrowly construe the specific subject matter covered by Exemption 4. The definition of “trade secret” as explicitly applied to Exemption 4, therefore, is far more restrictive than the definition that developed elsewhere in the common law, either Restatement, or the UTSA. For the purpose of Exemption 4 of FOIA, “trade secret” has been defined as a “secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be end product of either innovation or substantial effort.”

In Public Citizen Health and Research Group v. FDA, concerning ongoing clinical studies on the safety and efficacy of intraocular lenses, the court rejected the Restatement’s "overly broad construction" of trade secrets with regards to Exemption 4 of the FOIA. In that case, the D.C. circuit adopted its definition from an obscure case from 1925 that was moot when it was decided, and a second case that was dismissed as moot on appeal. Unlike previous

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140 FBI v. Abramson, 456 U.S. 615, 630 (1982) (noting the “oft-repeated caveat that FOIA exemptions are to be narrowly construed”); see Dep’t of Air Force v. Rose, 425 U.S. 352, 361 (1976) (explaining that “disclosure, not secrecy, is the dominant objective of the statute”).

141 Pub. Citizen, 704 F.2d at 1288; see also Anderson v. Health & Human Servs., 907 F.2d 936, 943-44 (10th Cir. 1990).

142 Pub. Citizen, 704 F.2d at 1288.

143 Id. at 1282.

144 Norwegian Nitrogen Prods. Co. v. U.S. Tariff Comm’n, 6 F.2d 491 (D.C. Cir. 1925), reversed, 274 U.S. 106 (1927). The Norwegian court defined trade secret as “an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities.” Id. at 495 (emphasis added). Notably, Norwegian was decided 4 years before the Restatement of Torts suggested the trade secret definition that ultimately was adopted in the common law and 50 years before Kewanee Oil, in which the Supreme Court employed the Restatement definition of trade secrets. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 474-75 (1974).

145 Norwegian, 274 U.S. at 110.

FOIA Exemption 4 decisions, the *Public Citizens* test requires a “direct relationship between the information at issue and the productive process.”

One problem with the *Public Citizen* test is that it essentially disqualifies basic research that has not yet been commercialized from Exemption 4’s protection because basic research is not “commercial” and may not yet lend itself to the productive process. With *Public Citizen*, what began as “a precedential aberration in trade secret law” has now been adopted by many circuits that have addressed the issue. The *Public Citizen* standard also precludes a great deal of subject matter protectable as trade secrets under the common law but not specifically “used for the making, preparing, compounding, or processing of trade commodities.”

For matters other than trade secrets, such as commercial, technical, and financial data, courts have developed a two-part test to determine whether withholding information under the FOIA’s Exception 4 is proper. The Circuits have unanimously interpreted that information is “confidential” commercial or financial information under Exemption 4, and thus exempt from disclosure under the

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147 *Pub. Citizen*, 704 F.2d at 1288.
Freedom of Information Act, if its disclosure would likely (1) impair the government’s ability to obtain necessary information in the future, or (2) cause substantial competitive harm to the party from whom the information was obtained.\textsuperscript{153}

Generally, for “confidential and privileged information” an important consideration is whether submitters are statutorily required to provide information to the government. If a statute requires submitting information, there will be a presumption that public disclosure of that information will not impair Exemption 4’s justification.\textsuperscript{154} The same is true for information submitted to governmental agencies for the purposes of obtaining government contacts or obtaining permits.\textsuperscript{155} Conversely, when information is volunteered, the government has a stronger interest in ensuring its continued availability and therefore a stronger interest in its protection.\textsuperscript{156}

\textsuperscript{153} Id. at 679; accord Judicial Watch, Inc. v. Food & Drug Admin., 449 F.3d 141, 148 (D.C. Cir. 2006); Contact Freighters, Inc. v. Sec’y of U.S. Dep’t of Transp., 260 F.3d 858, 861-62 (8th Cir. 2001); Nadler v. F.D.I.C., 92 F.3d 93, 95-96 (2d Cir. 1996); GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994); Acumenics Research & Tech. v. U.S. Dep’t of Justice, 843 F.2d 800, 807 (4th Cir. 1988); Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 399 (5th Cir. 1985); Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm’n, 750 F.2d 1394, 1398 (7th Cir. 1984); 9 to 5 Org. for Women Office Workers v. Bd. of Governors of Fed. Reserve Sys., 721 F.2d 1, 8 (1st Cir. 1983).


\textsuperscript{155} See Nat’l Parks & Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (noting that the government’s ability to obtain information would not be impaired because submission of financial statements was a mandatory requirement of operating concessions in national parks).

\textsuperscript{156} See id.; see also Critical Mass Energy Project v. Nuclear Regulatory Comm’n, 975 F.2d 871, 879-80 (D.C. Cir. 1992) (holding that information voluntarily provided by industry group to regulatory commission was “confidential” and exempt from FOIA disclosure).
C. State FOIA Trade Secret Exemptions

State FOIA trade secret exemptions are very similar in scope across all three states within the Seventh Circuit and are indicative of the type of state FOIA trade secret exemptions found elsewhere across the country. Indeed, the state FOIA trade secret exemptions mirror the language and rationale behind the federal FOIA trade secret exemptions.157 State courts, however, tend to defer to the judgment of protectionist state agencies more often than their federal counterparts.

For example, the Illinois FOIA trade secret exemption applies to “trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged, or confidential, or where disclosure of the trade secrets or information may cause competitive harm.”158 Like the two-pronged test that courts have adopted for the federal FOIA trade secret exemption, Illinois’ trade secret definition encompasses information that “(1) would either inflict substantial competitive harm, or (2) make it more difficult for the agency to induce people to submit similar information in the future.”159 Unlike the federal FOIA exemption, however, the Illinois legislature intended that “trade secret” in the Illinois FOIA disclosure exemption be construed broadly in order to encourage private parties to do business with the state.160

Illinois courts have also qualified the “competitive harm” that the trade secret exemption was designed to prevent.161 The burden is still on the state agency to demonstrate both that “the person or entity from which information was obtained actually faces competition . . . and

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160 Id.; Roulette, 490 N.E.2d at 64 (extending trade secret exemption to psychologist’s written evaluation of applicant for police officer’s personality test and interview).
161 Cooper v. Dep’t of the Lottery, 640 N.E.2d 1299, 1303 (Ill. App. Ct. 1994) (quoting Calhoun v. Lyng, 864 F.2d 34, 36 (5th Cir. 1988)).
substantial harm to a competitive position would likely result from disclosure of the information.\textsuperscript{162}

Like courts in Illinois, Indiana courts have also interpreted the state’s FOIA trade secret exemptions broadly.\textsuperscript{163} Unlike the more restrictive definition attributed by courts to trade secrets under the federal FOIA regime, the Indiana legislature specifically adopted the same definition for trade secrets with regard to the FOIA exemption that it did with regard to the IUTSA.\textsuperscript{164} Similarly, Wisconsin also applies the same definition to trade secrets with regards to its FOIA exemption as in its trade secret law, which mirrors the UTSA language.\textsuperscript{165}

The breadth with which these three states apply their FOIA trade secret exemptions signify that the states have recognized the value in protecting their industries’ valuable proprietary information. Patriot Homes was unable to prevent state agencies from releasing their purported trade secret information, possibly because it failed to mark its agency submissions as confidential. Had Patriot made a more concerted effort to ensure the confidentiality of its records, however, these statutes and interpretations indicate a potential willingness on the part of state agencies to more proactively protect privately submitted records than is found under the federal FOIA exemption.

\textsuperscript{162} Id. In Cooper, the court held that the Illinois lottery is a legal monopoly. Id. The court then reasoned that because the lottery does not face any competition, disclosing a marketing report would not be harmful to the outside firm that prepared it. Id.


\textsuperscript{165} Wis. Stat. Ann. § 19.36(5) (West 2008), referring to Wis. Stat. Ann. § 134.90(1)(c), the definitions section of Wisconsin’s Trade Secret Act, for the definition of trade secrets under the state FOIA exemption.
D. Private Actions to Enjoin Agency Disclosure

Individuals and companies have attempted to protect their trade secrets by affirmatively seeking to enjoin agency disclosure. These so-called “reverse-FOIA” suits, however, have been met with extremely limited success. In *Chrysler Corp. v. Brown*, the Supreme Court essentially foreclosed most grounds under which private parties might seek to enjoin agency disclosure of trade secrets. “The FOIA is *exclusively a disclosure statute* and affords Chrysler no private right of action to enjoin agency disclosure.”

Before the *Chrysler* decision, the circuits were split on whether the FOIA exemptions were mandatory or permissive. Since *Chrysler*, however, courts have overwhelmingly adopted the Supreme Court’s rule that the FOIA favors disclosure. Furthermore, even agencies that apply the FOIA exemptions prior to deciding whether to disclose are free to decide the extent to which they apply.

The *Chrysler* decision did not leave parties attempting to prevent government agencies from disclosing submitted information entirely without recourse. Jurisdiction for reverse-FOIA lawsuits are rarely denied because the Supreme Court allowed for a remedy under the

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167 Id. at 282 (emphasis added).
168 See Union Oil Co. v. FPC, 542 F.2d 1036, 1045 (9th Cir. 1976) (holding that the exemptions were mandatory was later withdrawn as premature); Westinghouse Elec. Corp. v. Schlesinger, 542 F.2d 1190, 1199 (4th Cir. 1976) (holding that some of the FOIA exemption are mandatory); *but see* Pennzoil Co. v. Fed. Power Comm’n, 534 F.2d 627, 630 (5th Cir. 1976) (holding that the FOIA exemptions are permissive).
170 See *GTE Sylvania, Inc.*, 598 F.2d at 800 (the agency may establish more liberal disclosure policies than the FOIA requires).
Administrative Procedures Act (APA)\textsuperscript{172} if a submitter can claim to be a “person . . . adversely affected or aggrieved” by agency action.\textsuperscript{173}

The standard APA review in reverse-FOIA cases involves an examination of the agency’s record regarding its decision-making process.\textsuperscript{174} While some courts have allowed for \textit{de novo} review of agency determinations to disclose information,\textsuperscript{175} the standard reverse-FOIA standard of review is whether the administrative record shows an agency’s decision to disclose the information at issue to be arbitrary or capricious.\textsuperscript{176} That standard places a heavy burden on the plaintiff-submitter who brings a reverse-FOIA lawsuit.\textsuperscript{177}

While a review of an agency’s record regarding its decision does allow parties attempting to foreclose government disclosure of trade secrets or private information, it does not allow submitting parties to play any role in making that decision in the first place. Reverse-FOIA litigation, therefore, is limited in that it only allows parties to review decisions that have already been made. Even where litigants are able to review the agency decisions \textit{de novo}, reverse-FOIA lawsuits are steeply uphill battles. Better alternatives would be to allow parties who submit proprietary information to government agencies to make their case against disclosure from the beginning. One possibility might be to

\begin{footnotes}
\footnotetext[172]{5 U.S.C. §§ 701-706 (2000).}
\footnotetext[173]{Id. at § 702.}
\footnotetext[174]{U.S. v. Geophysical Corp. of Alaska, 732 F.2d 693, 701 (9th Cir. 1984); \textit{see also} McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 304-05 (D.C. Cir. 1999) (tracing the proper procedure for precluding agency disclosure under the FOIA).}
\footnotetext[175]{Anderson v. Health & Human Servs., 907 F.2d 936, 941 (10th Cir. 1990) (remanding case for lower court review on a document by document basis); Worthington Compressors, Inc. v. Gorsuch, 668 F.2d 1371, 1374 (D.C. Cir. 1981).}
\footnotetext[176]{CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1153-54 (D.C. Cir. 1987) (evaluating submitter’s claims of confidentiality under the abuse of discretion standard); Union Oil Co. v. Fed. Power Comm’n, 542 F.2d 1036, 1040-41 (9th Cir. 1976) (evaluating regulations guiding agency determinations of whether information should be excluded from FOIA disclosures under a “substantial evidence” standard of review).}
\footnotetext[177]{\textit{See} Pacific Architects & Eng’rs, Inc. v. U.S. Dep’t of State, 906 F.2d 1345, 1347-48 (9th Cir. 1990) (holding that there will be a strong presumption that the administrative agency has proceeded with adequate fact-finding procedures and that the administrative decision favoring disclosure is not reviewable \textit{de novo}).}
\end{footnotes}
allow the submitters’ interests to temper the agencies’ initial decisions. Another might be to allow parties attempting to prevent disclosure to assume the governmental agencies’ burden of “fighting” rejected disclosure requests.

IV. POLICY CONSIDERATIONS

_Patriot Homes_ exemplifies the need for a cohesive method of managing the inherent inconsistencies between FOIA statutes and trade secret law. Aside from the numerous industries that are closely regulated by state and federal agencies, there has also been a recent trend towards heightened disclosure of corporate financial information and more precise corporate valuations of intellectual property assets.\(^{178}\) Whereas disclosing corporate financial records for government oversight and scrutiny certainly serves an important public purpose, part and parcel with increased disclosure comes an increased risk that contributing parties will lose control of their valuable confidential information.\(^{179}\)

With great power comes great responsibility.\(^{180}\) An agency that receives vast amounts of trade secrets and confidential financial information must ensure that such information can be protected. While the public’s interest in its ability to request agency records is unquestionable, there currently is no appropriate mechanism to ensure that confidential information remains confidential.\(^{181}\) _Patriot Homes_ is somewhat unique in that a FOIA request occurred well after the alleged trade secret misappropriation. It is not unique, however, in the respect that it involves one company successfully mining government agencies for its competitor’s valuable confidential information.\(^{182}\)

\(^{178}\) _See_ Wilson, _supra_ note 48, at 265-66.

\(^{179}\) _See_ id.

\(^{180}\) Stan Lee, _Spiderman_ (advice given from Uncle Ben to Peter Parker).

\(^{181}\) _See generally_, Wilson, _supra_ note 48. Wilson ultimately contends that in light of various reporting statutes and the difficulties in protecting a company’s trade secrets, good corporate management and conscientious business practices give companies the best chances of preserving its trade secrets. _Id._ at 291.

\(^{182}\) _James T. O’Reilly, Federal Information Disclosure_ § 10.1 n.12 (3d ed. 2000) (contending that prior to the rise of the internet, “perhaps 85% of the
A. Likely Outcome of Patriot Homes

Based on the district court’s ruling on Sterling’s summary judgment motion, Sterling Homes is not likely to succeed in its defense that Patriot’s asserted trade secret claims were essentially preempted by their disclosure by state regulatory agencies. As the Northern District of Indiana already held, there are a number of reasons that Sterling’s FOIA-disclosure defense will ultimately fail.183

First, Sterling admitted that while nearly all of Patriot’s trade secret information was available through state FOIA requests, not all of the information was available in the public domain.184 Summary judgment should only be granted where all of the asserted trade secrets are readily ascertainable by other means.185

Additionally, courts have regularly held that where a defendant’s product was actually developed using the plaintiff’s proprietary information, there is no cognizable defense that the product could have been developed independently.186 Just because Sterling was able to obtain the vast majority of the same information from state agencies does not change the fact that it used Patriot’s designs.

Furthermore, and importantly, the aggregate of information that Sterling received from the state agencies was all in paper form.187 The information that Sterling’s employees took from Patriot was in electronic form.188 This shows that Patriot’s information was not readily available to Sterling in the same format, and presumably there is independent economic value in the electronic files not present in the

FDA’s 30,000 annual FOI requests . . . had come from businesses seeking other firms’ reports.”).


184 Id. at *2.

185 See id. at *2-3.


187 Patriot Homes, 2007 WL 2782272 at *3.

188 Id.
voluminous paper files. The electronic files are far more efficiently adapted than are the paper files, which would require considerable time and effort to convert to usable engineering schematics.

Finally, the court insinuated that perhaps within the context of trade secret law, information only available through the plaintiff company itself or a state agency that collected the information might not really be “readily available.” While not dispositive, in combination with the other arguments, this “equitable” reasoning seems to embody the spirit of both trade secret law and FOIA’s lofty goals.

This result reflects an accurate interpretation of trade secret law but does not necessarily answer some of the underlying legal conflicts that this case brings to light.

B. Equitable Proposal

It would seem entirely antithetical to the needs of modern businesses and the government if valuable trade secrets and confidential information regularly escaped their owners’ control. This, however, is exactly what can currently happen because FOIA punishes agencies for withholding information and a gives private entity nearly no recourse in trying to maintain its secrets. Because agencies currently bear the burden and costs of maintaining industry’s secrets, it is simply cheaper and less onerous to disclose “close calls” than to deny a FOIA request and risk litigation.

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189 See Northern Elec. Co., Inc. v. Torma, 819 N.E.2d 417, 426 (Ind. Ct. App. 2005) (electronic compilation of motor servicing information was held not to be readily ascertainable even though all the information was publicly available in paper form).
190 Id.; Patriot Homes, 2007 WL 2782272 at *3.
191 Patriot Homes, 2007 WL 2782272, at *3; see Taco Cabana Intern., Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1124 (5th Cir. 1991), aff’d 505 U.S. 763 (1992).
192 See U.S. DEP’T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 431, 436 (Sept. 1998) (directing government agencies to favor disclosure over withholding information unless the agency could anticipate foreseeable harm in disclosure).
Conversely, many parties contributing proprietary and confidential information to government agencies would likely seize the opportunity to take on the agencies’ burden and “fight” FOIA disclosure requests themselves. The flurry of reverse-FOIA litigation—where a private party sues an agency to prevent the agency from complying with a FOIA request—is evidence of that pervasive willingness.

A solution presents itself that would encompass FOIA’s policy of maximized disclosure while accounting for a submitting parties’ interest in maintaining the secrecy of their confidential information. Submitters should have the option of self-policing the disclosure of their own confidential information. This would mean that a party compelled to disclose confidential records to a government agency could essentially opt to supplant the government agency in “fighting” to uphold a FOIA rejection. Under this scheme, private entities would be responsible for litigating the agency’s position when it denies a FOIA request.

Individuals or businesses that contribute information to government agencies should be able to denote the specific pieces of information that they consider to be trade secrets. Trade secret owners could also provide additional documentation to help prove to agency personnel that the claimed trade secrets should remain protected under FOIA’s trade secret exemption. The agency personnel in charge of fulfilling FOIA requests will then be able to make more informed decisions regarding whether to disclose the information if requested through FOIA. If an agency agrees with the trade secret owner, and invokes FOIA’s trade secret exemption, then the burden will remain with the agency to defend its decision should the requesting party sue.

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193 See Kuhl, supra note 171.
194 If an agency decides to withhold information requested through FOIA, it currently bears the burden of defending its decision should the requesting party sue to compel the agency for disclosure. See 5 U.S.C. § 552(a)(4)(B) (2000).
195 Currently, businesses can attempt to identify trade secret information when submitting bids for government contracts, though they generally do not have the opportunity to provide additional documentation to back up their designations. See ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 12.02 (2003).
for disclosure. On the other hand, if the agency disagrees with the purported trade secret owner and declines to invoke FOIA’s trade secret exemption on its own, then the information’s owner could intervene. The agency will then withhold the purported trade secret so long as the information’s owner agrees to accept the costs and legal burden if the requesting party sues for disclosure.

The benefit of this scheme will be twofold. First, it will allow purported trade secret owner more latitude in controlling the secrecy of its valuable information. Individuals can determine exactly which pieces of information they consider to be trade secrets and precisely the lengths they will undergo and costs they will incur to protect that information. By marking trade secret information before submitting it to government agencies, and providing any additional necessary documentation, individuals could help better inform agency decisions regarding whether the agency should invoke FOIA’s trade secret exemption. This plan will then allow individuals to shoulder the litigation-related burdens of withholding information from FOIA requests if they still want to protect their information after an agency declines to invoke a FOIA exemption. That will force an individual or business to determine precisely the lengths they are willing to go to protect their information, both financially and strategically.

This scheme will also benefit the government agencies by relieving them of the burden of fighting FOIA-related litigation in three ways. It will eliminate the need to defend some of an agency’s decisions to withhold information because the burden will shift to the information’s owner. Additionally, where an agency does have to legally defend its decision to withhold information under FOIA’s trade secret exemption, it will oftentimes have documentation from the trade secret’s owner available as evidence to support the agency’s judgment. This new scheme will also all but eliminate reverse-FOIA litigation, which will free up any resources that an agency otherwise would have

196 If an agency determined that information did not fall under FOIA’s trade secret exemption after reviewing documentation that attempted to justify its status as a trade secret, it would obviously help indicate to the information’s owner the trade secret’s probable protectability. This, in turn, would inform the individual or business’ decision of whether to accept the burden of protecting the information.
to devote to fighting lawsuits brought by parties attempting to protect submitted information.

Every state and the federal government has its own FOIA law. Therefore, any new law that attempted to remedy the trade secret disclosure problem would need to either be enacted by each state individually or by Congress through its commerce power. A federal law, enacted through the Commerce Clause, would be applicable to all states and would systematically solve FOIA's problem. Congress could also simply amend the federal FOIA statute and wait for the states to follow suit. The problem with this route is that, like Patriot Homes, many businesses operate in multiple states and must submit proprietary information to agencies in each state. Changes in one state’s FOIA statute would not help a business protect its trade secrets if the same changes were not also made in the other states.

As previously noted, anyone can make a FOIA request for any reason. This scheme does run the risk of abuse by large companies protecting too much information, regardless of the cost, to the public’s detriment. It also runs the risk of wealthy companies attempting to bankrupt their smaller competitors through “frivolous” FOIA-related litigation. These risks, while real, do not detract from the overall efficacy of this new scheme. First, companies will not want to abuse the new system for fear of reverting to the current system. Second, companies currently cannot affirmatively protect any information from competitors’ FOIA requests. Allowing them to pick and choose which

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198 “The Congress shall have the power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. CONST. art. 1, § 8 (commonly referred to as the “Commerce Clause”).
199 Id.
200 Patriot Homes, Inc. v. Forest River Hous., Inc., 512 F.3d 412, 414 (7th Cir. 2008).
201 The defendant in Patriot Homes, for example, made FOIA requests in Indiana, Illinois, and Michigan, even though it was only sued in Indiana. Id.
202 A potential problem might arise where a smaller company attempts to protect information that a government agency is unwilling to protect and a larger competitor sues for disclosure simply to create an expense for its smaller competitor.
information is worth protecting will allow companies to avoid costly, “frivolous” litigation if they do not feel the trade secret is worth the high costs of protection.

Reverse-FOIA litigation can be exceedingly complex and expensive. So can losing one’s valuable trade secrets to a competitor. Both needless costs are not just possible, but likely, under current FOIA statutes. While this one solution certainly is not exhaustive for such a complex issue, it is a good start. Taking account for the competing interests and economic realities pertaining to the value of confidential information and trade secrets, allowing for a secret’s owner to bear the burden of protecting it seems to be a fair compromise.

V. CONCLUSION

Trade secrets are notoriously difficult to maintain, enforce, and protect. Though they are property, unlike other forms of intellectual property, once misappropriated—disclosed to, or used by a competitor—they are nearly impossible to recover. Injunctions, like the one at the heart of the Seventh Circuit’s opinion in *Patriot Homes*, are limited in their effectiveness because they can only apply to limited parties and not society at large. If a trade secret were posted on the internet, for example, no injunction could realistically put the proverbial cat back in the bag.

FOIA is a statute focused on government transparency.203 Judicial interpretations have focused on FOIA’s disclosure mandate and have limited the breadth of FOIA disclosure exemptions, including the trade secret exemption.204 This poses a great risk for trade secret owners because any proprietary information whose value or business advantage derives from its secrecy may lose that value when disclosed to the public through FOIA requests. Currently, individuals or businesses seeking to prevent disclosure of their secrets must either rely on government agencies to invoke FOIA’s trade secret exemption

204 FBI v. Abramson, 456 U.S. 615, 630 (1982) (noting the “oft-repeated caveat that FOIA exemptions are to be narrowly construed”)
or attempt the uphill battle of bringing a reserve-FOIA lawsuit to enjoin agency disclosure. Neither option provides sufficient assurances that trade secrets disclosed to government agencies can remain secret.

In fact, *Patriot Homes* highlights the precise risk that companies face when they must disclose their proprietary information to government regulatory agencies. *Patriot Homes* does not represent the norm though because, chronologically, Sterling did not acquire Patriot’s trade secrets through FOIA requests until *after* Patriot sued for trade secret misappropriation. Because of this, Patriot actually found itself in a better position than do most companies in similar situations. It had a legal recourse to recover for the loss of its trade secrets.

When a company’s competitor attempts to acquire its confidential information through FOIA requests, there currently are no adequate means to prevent the disclosure. Companies and individuals should be afforded the opportunity to help inform government agency decisions concerning whether certain information should be withheld from FOIA requests as trade secrets. They should also be afforded the opportunity to affirmatively attempt to protect information they consider to be trade secrets if a government agency is unwilling to invoke the FOIA trade secret disclosure exemption. Amending FOIA statutes to allow individuals and companies better opportunities to protect their secret information will help remedy this situation—benefitting individuals, companies, government agencies, and the public.

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205 *Patriot Homes, Inc. v. Forest River Hous., Inc.*, 512 F.3d 412, 413-14 (7th Cir. 2008).

206 *Id.*