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CHARTERS, CHOICE, AND RESEGREGATION

Leland Ware* and Cara Robinson**

The charter schools movement is one of the fastest growing developments in the educational arena. The publication of *A Nation at Risk: The Imperative for Educational Reform*¹ in 1983 set off shock waves in the educational establishment. The report found that standardized test scores were declining, teachers were less demanding, and American schools were falling behind their foreign counterparts. The report concluded that “[t]he educational foundations of our society are presently being eroded by a rising tide of mediocrity which threatens our very future as a Nation and a people.”² Charter schools, vouchers, and other programs were among the reactions aimed at reforming the nation’s public schools.

The charter school concept was first introduced by Massachusetts teacher, Ray Budde, in his book, *Education by Charter: Restructuring School Districts*.³ Albert Shanker, who was the president of the American Federation of Teachers, embraced Budde’s idea, publicized it widely and persuaded his organization to endorse charter schools at its 1988 Convention.⁴ Charter supporters envisioned schools that would be created by educators and parents, who would develop new curricula and innovative approaches to teaching strategies.⁵ Parents and teachers would obtain a “charter” from school boards to carry out the programs they proposed. The goals, objectives, and responsibilities of the school’s sponsors would be specified in the charter. Monitoring and evaluation would be important features of the program. The charter’s duration would be limited, typically three to five years. Renewals would be conditioned on an evaluation of the success of the program. Supporters predicted that successful charters schools would inspire reform and improvements in traditional public schools.

The charter concept has also been embraced by groups ranging from the trade unionist American Federation of Teachers to neo-liberal economic theorists. In *Politics, Markets, and America’s Schools*,⁶ John Chubb and Terry Moe argued that public schools were failing because entrenched interests had too much control over educational policy. Schools were

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1. Nat’l Comm’n on Excellence in Educ., U.S. Dep’t of Educ., *A Nation at Risk: The Imperative for Educational Reform* (1983).

2. *Id.*

3. RAY BUDDE, *EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS, KEY TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION* (1988).

4. JOE NATHAN, *CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION* 65-71 (1996).

5. Joseph O. Oluwole and Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN’S J.L. COMM. 165, 176 (2007); Judith Johnson and Alex Medler, *The Conceptual and Practical Development of Charter Schools*, 11 STAN. L. & POL’Y REV. 291, 291-293 (2000) (“By expanding public school choice, charter schools are providing options that families want for their children and are helping people throughout our public school systems ask what each of us can do to improve education for all children.”).

6. JOHN CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* (1990).

obligated to respond to school boards, teachers' unions, state governments, and others whose interests sometimes conflicted with those of students. This would change with the advent of charter schools. When the government's education monopoly was eliminated, new educational providers would enter the market and compete with existing schools. The new organizations would establish instructional programs that performed better than those provided by the government monopoly. Parents and students would be "free to choose" the schools which best met their educational needs. In such an environment the most effective schools would thrive and unproductive schools would go out of business.⁷

Charter schools are popular, but they are also controversial.⁸ Supporters claim that charters will allow community residents to influence the nature and content of schooling in ways that democratize the educational system. They also believe that charters offer curricula and teaching methodologies that are not available in public schools.⁹ Thus, charters will promote educational excellence through innovative approaches to learning, curricula, and instruction.¹⁰ Critics argue that charters will increase segregation and racial isolation. They fear that charters will divert resources from traditional public schools and undermine the educational system. Minority students who enroll in charters are likely to be the most able students, leaving poorer and less prepared students in public schools.¹¹

This article examines one aspect of the charter debate — the influence of charter schools on school desegregation efforts. Part one examines the development and organizational structure of charter schools. Part two shows that in metropolitan communities across the nation student enrollments in charter schools are far less diverse than in traditional public schools. Part three examines school desegregation efforts in Delaware and explains why the Neighborhood Schools Act will adversely affect student body diversity. Part four shows that student populations in Delaware's charter schools are far less diverse than those found in public schools. Part five explains why resegregation in public schools is caused by the segregated housing patterns that persist in most metropolitan communities. The article concludes with an analysis of *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County School District*¹² and explains how that decision will undermine efforts to promote student body diversity in public and charter schools.

The data show that the average black charter student attends school with a higher percentage of black students and a lower percentage of white students than those attending traditional public schools. White students typically attend charter schools with a much higher percentage of white students than their overall share of the charter school population. This leaves most minority students in the nation's central cities with a Hobson's choice; they can attend public schools

7. James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi Market for Education*, 2007 U. ILL. L. REV. 839 (2007).

8. Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43 (2004) (describing the numerous court challenges to charter schools).

9. Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753 (2000).

10. Maurice R. Dyson, *Putting Quality Back Into Equality: Rethinking The Constitutionality Of Charter School Enabling Legislation & Centric School Choice In A Post-Grutter Era*, 36 RUTGERS L.J. 1 (2004).

11. Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563 (2001).

12. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S. Ct. 2738 (2007).

which are, more likely than not, intensely segregated or they can enroll in an inner city charter school where, on average, they will be more segregated than they would have been had they remained in public schools.¹³

I. The Organizational Structure Of Charter Schools

Charter schools are intended to function like private schools. They are funded with tax revenues but they operate without the constraints that burden the typical public school system. There are three layers of bureaucracy to which public schools must respond: local school districts, state boards of education, and the U.S. Department of Education. Public schools are established by states and governed primarily by state laws. Local school districts are political subdivisions of state governments. Public schools are usually operated by elected governing boards and financed primarily by local property taxes. School boards appoint a superintendent who is responsible for the management of the schools. States license teachers, set certification standards, and provide financial assistance to local districts. The federal government provides financial assistance through categorical grants. This financial assistance is conditioned upon the state and local school boards' agreement to develop programs which reflect educational priorities set by Congress.¹⁴

In charter schools, the regulatory demands of the state, federal, and local bureaucracies are largely eliminated. Charter proponents believe that this freedom facilitates the development of community-based educational programs and provides opportunities for parents to become more involved in the operation and governance of schools. As a result, charters range from those featuring experimental teaching techniques to those with a "back-to-basics" approach. Charter operators include for-profit corporations, nonprofit organizations, coalitions of parents, and teachers and community groups.

As charter schools are governed by state laws, there are many variations among them; however, they tend to follow the model that Budde and Shankar advocated. They are in the main:

...nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools. The "charter" establishing each such school is a performance contract detailing the school's mission, program, goals, students served, methods of assessment, and ways to measure success. The length of time for which charters are granted varies, but most are granted for 3-5 years. At the end of the term, the entity granting the charter may renew the school's contract. Charter schools are accountable to their sponsor — usually a state or local school board — to produce positive academic results and adhere to the charter contract. The basic concept of charter schools is that they exercise increased autonomy in return for this accountability. They are accountable for both academic results and fiscal practices to several groups: the sponsor that grants them, the parents who choose them, and the public that funds them.¹⁵

Minnesota enacted the first charter school law in 1991.¹⁶ In the decade that followed, forty states, the District of Columbia, and Puerto Rico adopted charter school legislation. Delaware was among the states that enacted legislation

13. *Zelman v. Simmons-Harris*, 536 U.S. 639, 707 (2002) (Ohio program providing vouchers for some students to attend public or private school, including religious school, held not to violate First Amendment's establishment of religion clause. Souter dissented, characterizing the students' options as a "Hobson's choice").

14. WILLIAM J. REESE, *AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND"* (2005).

15. U.S. Charter Schools, http://www.uscharterschools.org/pub/uscs_docs/o/index.htm.

16. U.S. Department of Education, *Evaluation of the Public Charter Schools Program: Final Report* (2004).

authorizing charter schools. The state's Charter School Act¹⁷ provides that any person, university, college, or nonreligious, non-home-based entity that can meet the requirements of the law can establish a charter school. The state and local school boards are authorized to grant charters. There is no limit to the number of schools that can be chartered. A school must have two or more grades, from kindergarten through twelve and at least two hundred students. A charter school is authorized to enroll fewer than two hundred, but not less than one hundred students, during its first two years of operation. The same enrollment requirement (less than 200 but more than 100) applies to schools that serve at-risk or special education students. Charter schools must be managed by a board of directors that operates independently of any local school board.

Charters are granted for an initial period of four years and are renewable every five years thereafter. A charter will not be renewed if the operators do not comply with the provisions of its charter. Charters are funded using the same per student formula that applies to traditional public schools; one hundred percent of state funding based on the state's unit funding formula and one hundred percent of local school district funding based on previous year's per-pupil expenditure from the school in which the student resides. The law also provides for transportation serving low-income students.

Charter schools are exempt from all provisions of the state's education code and all school district regulations, except those specified in the state's charter school law. The state does not provide funding to construct charter school facilities. Each school must identify and finance its buildings. However, the Charter School Act requires the State Department of Education to annually publish, and to make available to applicants and existing charter schools, a list of vacant and unused buildings or unused portions thereof owned by the State or school districts that may be suitable for housing charter schools.

Charter operators are obligated to submit an annual report which describes their progress in meeting their student performance goals. The report must include a financial statement that identifies revenues, expenditures, assets, and liabilities. Charters must submit yearly enrollment data to the school districts in which they are located. Charters must also have written enrollment confirmation from the students' parents. Charter school teachers are not covered by school district collective bargaining agreements. They can negotiate their own agreements as a separate bargaining unit in the charter school or work without a collective bargaining agreement.

II. Charter Schools And Resegregation In Metropolitan Communities

One of the arguments made by charter school opponents is that schools located in communities in which the population is largely segregated — white or black — are likely to experience *de facto* segregation.¹⁸ To prevent this outcome, eleven states included diversity requirements in their charter school laws.¹⁹ Two of these, South Carolina and Nevada, have numerical racial balancing requirements. The others require charter schools to reflect the racial composition of the entire districts in which they are located.

17. DEL. C. ANN. tit. 14, § 501. See also Kathi A. Karsnitz, *Charter Schools: Mile Markers On The Road Of Reform Or A Dead End For Public Education?*, 16 DELAWARE LAWYER 5 (1999).

18. Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144 (2006). See also Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice? A Legal and Policy Perspective*, 45 HOW. L.J. 281 (2002).

19. These states are California, Connecticut, Florida, Kansas, Minnesota, Nevada, New Jersey, North Carolina, Ohio, South Carolina, and Wisconsin. Gajendragadkar, *supra*, note 18.

Efforts to assure diversity in charters have not been effective. A study published by the Harvard Civil Rights Project in 2003 examined the racial composition of the nation's charter schools.²⁰ Using 2000-01 data, the researchers found that charter schools were, on average, more segregated than traditional public schools. That year, there were thirty-four states with charter schools. Forty-three percent of the charter students were white, thirty-three percent were black, and nineteen percent were Latino.

The public school population at the national level had a significantly higher percentage of white students and a lower percentage of black students than charters. The percentage of black students attending charters was nearly twice the proportion of black students enrolled in public schools. Nearly ninety percent of black charter students attended schools in which minority students were more than fifty percent of the population. Seventy percent of the black charter students were enrolled in schools in which ninety to one hundred percent of the students were racial minorities. This compared to thirty-four percent of black students who attended non-charter public schools with a ninety to one hundred percent minority student population. During the same year, the average white charter student attended a school in which the student population was seventy-two percent white.²¹

After reviewing the national numbers, the researchers examined data in sixteen states. In those states, most of the charter schools were located in cities. States that had higher percentages of charter students in cities were less likely to have significant white enrollments in those schools. More than half of the charter students in the sixteen states attended schools located in central cities; a third of the students attended charter schools in suburban communities.²² Only three states, Florida, Georgia, and Colorado, had larger percentages of charter students attending schools in suburban communities. In every state except Georgia, charter schools had higher black enrollment percentages than public schools. White students in every state attended schools with a much higher white percentage than their overall share of the charter population. In every state except Arizona, Georgia, and Colorado, at least half of black charter students attended schools with ninety to one hundred percent minority populations.²³ From their analysis of the data, the researchers concluded that:

Seventy percent of all black charter school students attend intensely segregated minority schools compared with 34% of black public school students. In almost every state studied, the average black charter school student attends school with a higher percentage of black students and a lower percentage of white students.

White students in every state studied attend schools with a much higher white percentage than their overall share of the charter school population. In many states, however, white charter school students are exposed to substantial percentages of non-white students. Furthermore, there are pockets of white segregation where white charter school students are as isolated as black charter school students.²⁴

20. E. Frankenberg and C. Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, EDUCATION POLICY ANALYSIS ARCHIVES, Vol. 11, no. 32 (Sept. 5, 2003), <http://epaa.asu.edu/epaa/v11n32/>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

III. School Desegregation In Delaware

Delaware's Charter School law was enacted in 1995 against the backdrop of a decades-long struggle to desegregate the state's public schools. Delaware was among the six consolidated cases from five jurisdictions that are remembered as *Brown v. Board of Education*.²⁵ As in almost all of the southern states, school desegregation in Delaware proceeded slowly. In 1968, the Delaware legislature enacted the Educational Advancement Act. The law prohibited any school district with a population of 12,000 or more students from consolidating with other school districts. The only district with a population of more than 12,000 students was Wilmington, which had the largest proportion of the state's African-American students. The law would have confined most of northern Delaware's black students to Wilmington schools. In 1970, a motion was filed in a pending desegregation case in the Delaware District Court, *Evans v. Buchanan*, claiming, among other things, that the Educational Advancement Act violated Delaware's duty to eliminate racially-identifiable schools.²⁶

While *Evans* was pending, the United States Supreme Court held in *Milliken v. Bradley*²⁷ that suburban school districts surrounding Detroit could not be required to participate in court-ordered desegregation plans unless it could be shown that their actions had contributed to segregation in the city. This meant that there could be no interdistrict remedy without proof of an interdistrict violation. *Evans* was one of the few cases in which this rigorous requirement was satisfied. The District Court found that the Educational Advancement Act had a significant role in prolonging segregation in Wilmington and New Castle County schools. The court issued a metropolitan remedy that included Wilmington and the suburban school districts in New Castle County.²⁸ In 1976, the three-judge panel in *Evans* rejected plans submitted by the parties and ordered the eleven school districts in New Castle County to be merged into a single district.²⁹ This resulted in a consolidation of the districts and busing to achieve the racial balance within individual schools. For the next two decades school desegregation proceeded, using busing to achieve racial balance in individual schools.

In the early 1990s the Supreme Court's desegregation jurisprudence changed with the decisions in *Board of Education of Oklahoma City v. Dowell*,³⁰ *Freeman v. Pitts*,³¹ and *Missouri v. Jenkins*.³² In the 1968 decision in *Green v. County School Board, New Kent County*,³³ the Supreme Court had held that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination

25. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

26. *Evans v. Buchanan*, 379 F. Supp. 1218, 1219 (D. Del. 1974).

27. 418 U.S. 717 (1974).

28. The Supreme Court ultimately affirmed this ruling in *Delaware State Board of Education v. Evans*, 446 U.S. 923 (1980).

29. The Delaware legislature subsequently divided New Castle County into four districts with portions of Wilmington in each district. DAVID P. VARADY & JEFFREY A. RAFFEL, *SELLING CITIES: ATTRACTING HOMEBUYERS THROUGH SCHOOLS AND HOUSING PROGRAMS* 224 (1995).

30. 498 U.S. 237 (1991).

31. 503 U.S. 467 (1992).

32. 515 U.S. 70 (1995).

33. 391 U.S. 430 (1968).

would be eliminated root and branch.”³⁴ In the early 1990s cases the Supreme Court relaxed the standard for determining whether school districts had achieved this “unitary status.” Under the revised standard, school districts could be released from court supervision if they complied in “good faith” with the original desegregation decree and eliminated vestiges of segregation “to the extent practicable.” The Court also found that if single-race schools were caused by the racial compositions of the neighborhoods in which they were located, rather than by the actions of school officials, this would not be interpreted as a violation of the desegregation obligation.

After these decisions school districts across the nation were — and currently are being — released from federal court supervision.³⁵ In 1996, applying the modified standard, the United States Court of Appeals for the Third Circuit affirmed a trial court’s ruling that the school districts in New Castle County had achieved unitary status.³⁶

In 2000 the Neighborhood Schools Act (“NSA”) was adopted by Delaware’s General Assembly to “establish and implement a plan for neighborhood schools in Northern New Castle County that is fair and equitable to all affected children in New Castle County.”³⁷ The NSA required school districts to “develop a Neighborhood School Plan ... that assigns every student within the district to the grade-appropriate school closest to the student’s residence, without regard to any consideration other than geographic distance and the natural boundaries of neighborhoods.”³⁸

Under the NSA, school districts could deviate from the geographic proximity requirement if they were able to demonstrate that a “substantial hardship” justified a different assignment plan. The law permitted districts to present alternate plans using different configurations if they believed the alternate plans would be more effective in accomplishing the legislation’s goals. This meant that districts were obligated to develop student assignment plans that complied with the NSA’s proximity requirement and, if they elected to do so, they could develop an alternate assignment plan and submit both to the State Board of Education for approval.³⁹

When New Castle County’s desegregation plans were under federal court supervision, the City of Wilmington was divided among four districts in northern New Castle County to promote student body diversity. Recognizing the NSA’s segregative potential, three of the four districts with Wilmington students resisted implementing the NSA’s proximity requirements. One of them, the Brandywine school district, was granted an exemption. The two remaining districts, Christina and Red Clay, each submitted two plans, both of which were rejected by the State Board of Education. Red Clay presented a third plan in 2004 after the legislature amended the NSA and made clear that a third plan could be submitted. That plan was approved by the State Board of Education in 2004.⁴⁰ Christina operated without an approved plan until a suit was filed that resulted in an order requiring it to do so.⁴¹ As there are high levels of residential segregation

34. *Id.* at 437-38.

35. GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION, THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996).

36. *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752 (3d Cir. 1996).

37. DEL. C. ANN. tit. 14, § 220. *See also Harden v. Christina School District*, 924 A.2d 247 (Del. Ch. 2007).

38. DEL. C. ANN. tit. 14, § 223.

39. *Harden*, 924 A.2d at 248.

40. The official decision and order on Red Clay’s application was delayed and formally issued in 2005.

41. *Harden*, 924 A.2d at 250.

in several of Wilmington's neighborhoods, the implementation of NSA would clearly have resulted in *de facto* segregation in local schools.⁴²

IV. The Racial Composition Of Delaware's Charter Schools

The student populations in Delaware's charter schools, like those across the nation, are far less diverse than the state's traditional public schools. Thirteen of the seventeen charter schools that operated during the 2007-2008 school year had enrollments that were highly segregated (seventy-five percent one race or higher). In 2000 Delaware had a total population of 783,600. According to the Census 74.6% of Delawareans were white; 19.2% were black or African-American; 2.1% were Asian; 0.3% were American Indian or Alaska Native; less than 0.1% were Native Hawaiian or Other Pacific Islander; 2% were some other race, and 1.7% reported two or more races. Delaware's Hispanic population grew by a substantial 136% during the decade of the 1990s, increasing from 15,820 persons in 1990 to 37,277 persons in 2000. By the end of the decade the Hispanic population constituted 4.8% of the state's total population.⁴³ As figure 1 indicates, the state's black residents are concentrated in the City of Wilmington and to a lesser extent in the City of Dover, the state's capital. Over the last ten years there has been an increase in the minority populations in the suburban areas of New Castle and Kent Counties.

Figure 1: Percent of Population by Race, Delaware Counties and Cities, 2000

<i>Race</i>	<i>New Castle</i>	<i>Kent</i>	<i>Sussex</i>	<i>Wilmington</i>	<i>Dover</i>
White	73.10%	73.50%	80.30%	35.50%	54.90%
Black	20.20%	20.70%	14.90%	56.40%	37.20%
Asian	2.60%	1.70%	0.70%	0.70%	3.20%
American Indian & Alaska Native	0.20%	0.60%	0.60%	0.30%	0.50%
Native Hawaiian & Other Pacific Islander	0.00%	0.00%	0.00%	0.00%	0.00%
Some Other Race	2.20%	1.30%	2.00%	5.20%	1.60%
Two or More Races	1.60%	2.20%	1.40%	2.00%	2.60%

SOURCE: 2000 Census: Summary File 1 (Washington, DC: United States Census Bureau), 2000.

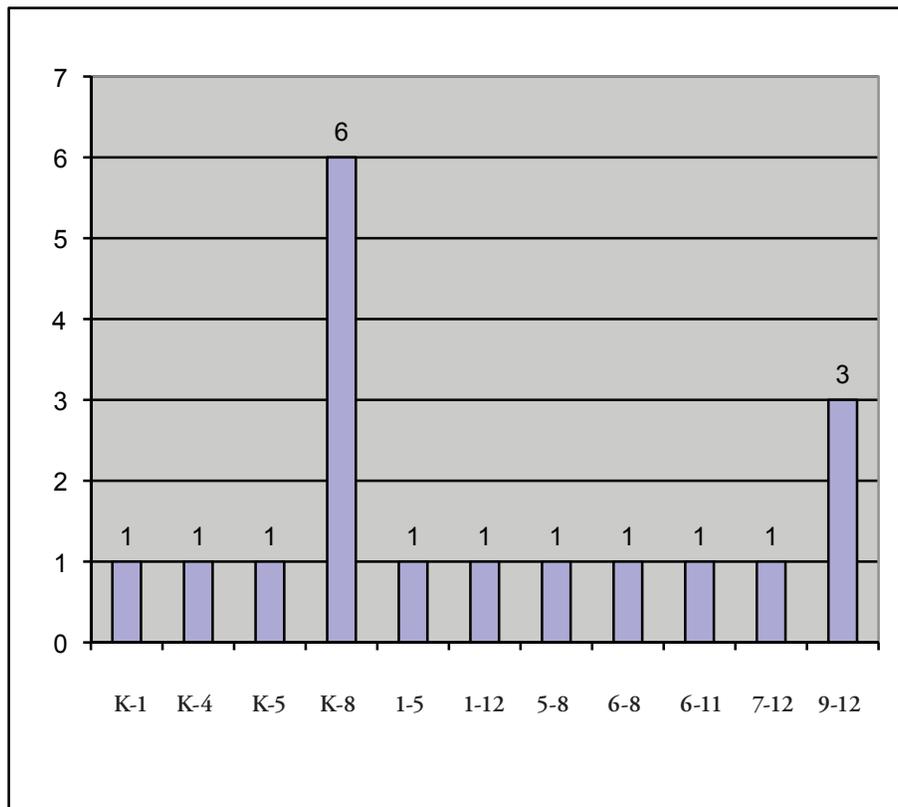
42. CensusScope, http://www.censuscope.org/us/m9160/chart_dissimilarity.html; Leland Ware and Steven Pequet, *Delaware Analysis of Impediments to Fair Housing Choice* (2003), <http://www.udel.edu/ccrs/Fair%20Housing%20Report/Fair%20Housing%20Impediments%20Report.htm>; Mike Chalmers, *Bias in Housing on the Rise in Delaware, Activists Want Better Enforcement*, *Fines*, DELAWARE NEWS JOURNAL, Sept. 30, 2007.

43. Leland Ware and Steven Pequet, *Analysis of Impediments to Fair Housing Choice in Delaware* (2003), <http://www.udel.edu/ccrs/Fair%20Housing%20Report/Fair%20Housing%20Impediments%20Report.html>.

Delaware’s first charter school opened in 1996. Currently, there are eighteen charter schools approved for operation by the Delaware Department of Education during the 2008-2009 school year. Four of these schools are located in Kent County, one in Sussex County, six in greater New Castle County, and eight in the City of Wilmington. Sixteen of the eighteen charter schools were open during the 2007-2008 school year.⁴⁴ Of those, four opened during the years 1996-1999, six from 2000-2002, and six more from 2003-2007.⁴⁵

Figure 2 shows the grade distribution of Delaware’s charter schools.

Figure 2: Number of Schools by Grade Level



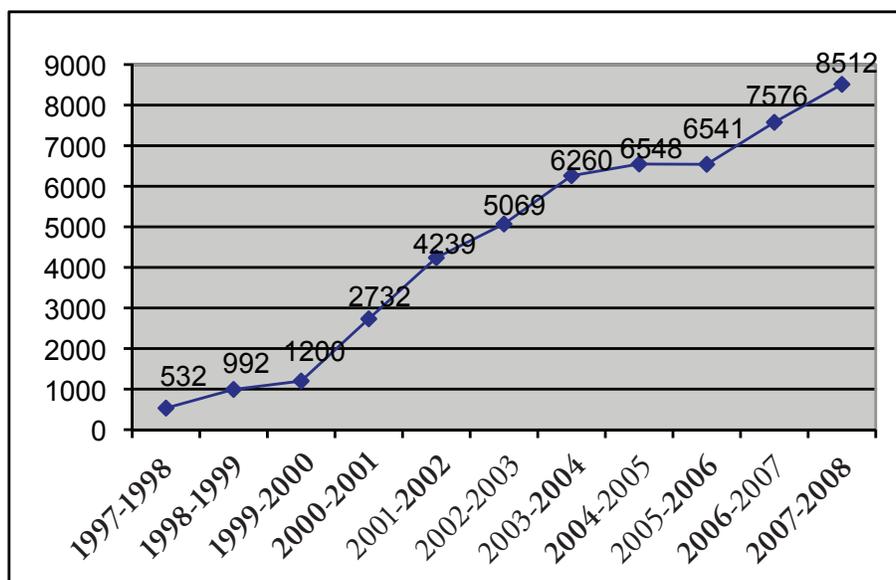
SOURCE: *List of Delaware Charter Schools* (Dover, DE: Delaware Department of Education), 2007.

44. One school, Marion T. Academy, was closed following the 2007-2008 school year.

45. The Delaware General Assembly placed a temporary moratorium on new charter school applications effective July 2008.

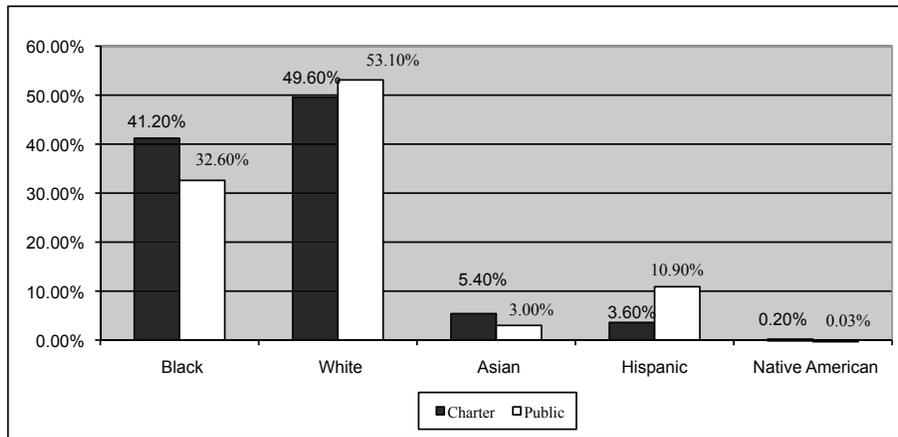
During the 2007-2008 school year, 8,512 students were enrolled in charter schools. This represents 6.9% of the public school student population and reflects a 935 student enrollment increase from 2006-2007. Figure 3 shows the enrollment trends of Delaware's charter schools since 1997-1998.

Figure 3: Delaware Charter School Enrollment, 1997-1998 to 2007-2008



SOURCE: *Annual Enrollment Reports* (Dover, DE: Delaware Department of Education), 1997-2007.

As figure 3 indicates, charter schools are growing. The enrollment trends mirror those found in other states — Delaware's charter schools are segregated by race as compared to the state's public schools. For the 2007-2008 school year, there were 3,502 black students, 4,220 white students, 458 Asian-American students, 302 Hispanic students, and 24 Native American students enrolled in Delaware's charter schools. Figure 4 shows the proportion of students by race enrolled in charter schools versus public schools in Delaware.

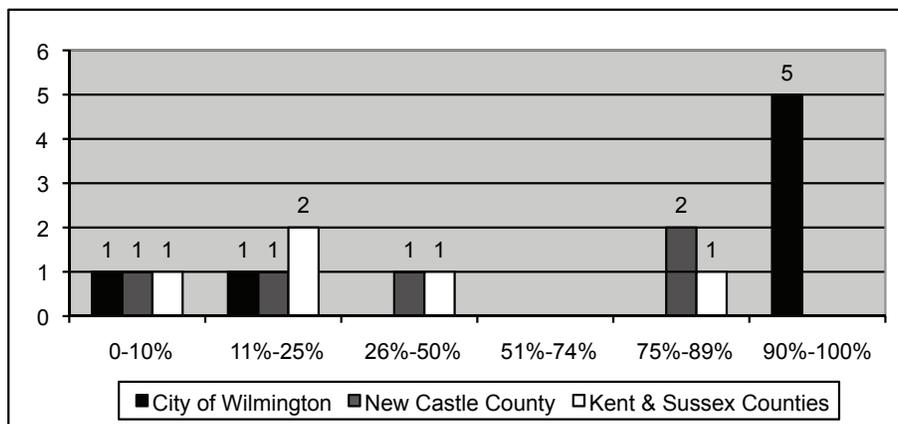
Figure 4: Charter and Public School Enrollment by Race, 2007-2008

SOURCE: *Annual Enrollment Report* (Dover, DE: Delaware Department of Education), 2007.

NOTE: There were 115,529 student enrolled in the public school system as of September 30, 2007.

As figure 4 shows, blacks represent a larger proportion of students enrolled in charter schools (41.2%) than in public schools (32.6%). Furthermore, seven charter schools have black enrollments of seventy-five percent or higher; six schools have white enrollments of seventy-five percent or higher. Thirteen of the seventeen charter schools operating during the 2007-2008 school year had highly segregated student bodies. Of the seven schools with greater than seventy-five percent black student enrollment, five are located in the City of Wilmington. The enrollment in each of these five schools is more than ninety percent black. Of the six schools with greater than seventy-five percent white enrollment, three are located in greater New Castle County and none in the City of Wilmington. The urban/suburban racial divide is reflected in charter school development and operation.

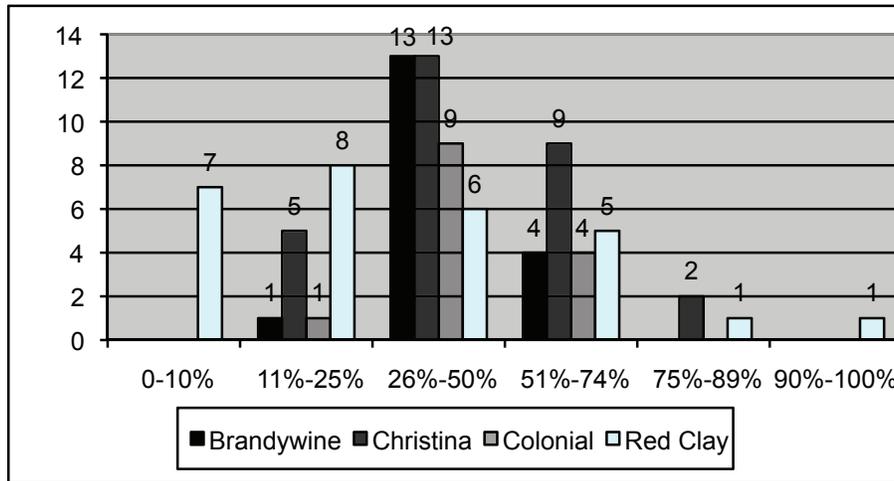
Figure 5: Percentage of Black Students, by Charter School & Geography, 2007-2008



SOURCE: *Annual Enrollment Report* (Dover, DE: Delaware Department of Education), 2007.

As figure 5 shows, only two charter schools (one in New Castle County and one in Kent County) fall within the range representative of black public school enrollment statewide (twenty-six to fifty percent). Sixty-three percent of black students attend charter schools that are greater than fifty percent minority. Sixty percent of black students attend charter schools with enrollments that are more than *ninety* percent minority. By comparison, in the four northern New Castle County public school districts, 44.5% of black students attend schools in which the minority population is greater than fifty percent and only 2.9% attend schools with a minority population above ninety percent.

The four school districts in northern New Castle County — Brandywine, Christina, Colonial, and Red Clay — contain a total of eighty-nine schools. During the 2007-2008 school year, only four had student body populations that were more than seventy-five percent black. In addition, there are only four schools that had a student body population that was greater than seventy-five percent white. This figure is likely to change as student placement plans required by the NSA are implemented. The distribution of black student enrollment in traditional public schools is presented in figure 6.

Figure 6: Percentage of Black Students Enrolled in Northern New Castle County Schools

SOURCE: *Annual Enrollment Report* (Dover, DE: Delaware Department of Education), 2007.

The public schools in New Castle County currently have diverse student enrollments. Students across the four districts attend schools with black populations that range from twenty-six percent to seventy-four percent. As figure 5 shows, only two of seventeen charter schools have black student populations in that range. In a 2007 review of the Delaware charter school system, the Western Michigan Evaluation Center found:

In terms of family income [in 2005-2006], 5 charter schools were found to be “segregative high income.” By our own definition, to be segregative high-income means the charter schools should have a difference greater than 10 points in the percentage of their students qualifying for FRL [free/reduced lunch] and the district’s FRL. On the other hand, 5 charter schools were found to be “segregative low-income,” since they enrolled a substantially higher proportion of FRL students than the local district.⁴⁶

Four of the five charter schools identified by the Western Michigan report as “segregative low-income” are located in the City of Wilmington and all of them are greater than seventy-five percent black.⁴⁷ Three of the five schools identified as “segregative high-income” are greater than seventy-five percent white. Only one is located in Wilmington.⁴⁸ The majority of the charter schools in Delaware are more segregated by race and income than the state’s traditional public schools. Since 1996, charter schools have been an expanding alternative to the state’s traditional public school system. If this trend continues, more students will be placed in segregated learning environments. The schools, often cited as innovative alternatives to the public schools, have been established across the state but they are concentrated in New Castle

46. Gary Miron, Anne Cullen, Brooks Applegate and Patricia Farrell, *Evaluation of Delaware Charter School Reform* (Kalamazoo, MI: The Evaluation Center, Western Michigan University) (Mar. 2007).

47. The fifth school is located in Dover.

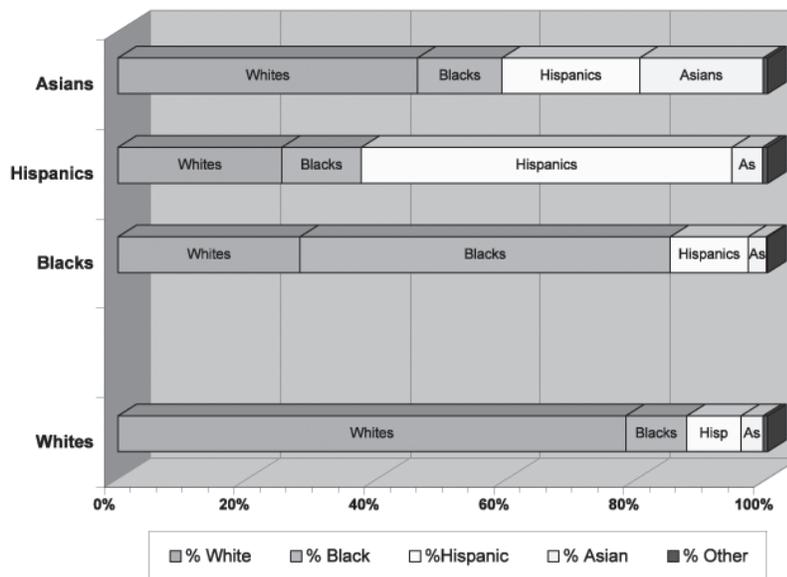
48. One school, located in Wilmington, is less than 10% black while 20% Asian and 68% white.

County and the City of Wilmington. The data show far less diversity in the student populations of charter schools as compared to public schools.

V. Separate Neighborhoods And Segregated Schools

Segregation in charter schools is just one piece of a much larger puzzle — neighborhood demographics that cause *de facto* segregation in schools. Researchers at the Lewis Mumford Center for Comparative Urban and Regional Research found that, nationally, the average white student attends a school that is more than seventy-eight percent white. Only nine percent of other children in this typical school are black. The average black student's school is more than half black. Hispanic children attend majority Hispanic schools, but black students are by far the most segregated minority group,⁴⁹ as shown in Figure 9, which shows the levels of school integration experienced by large racial and ethnic groups within the nation's cities.

Figure 7: Diversity Experienced in Each Group's Typical School – National Metropolitan Average



SOURCE: Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000 (Albany, NY: Lewis Mumford Center, 2000), figure 1.

49. John R. Logan, Jacob Stowell and Deirdre Oakley, *Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000* (2002), <http://mumford.albany.edu/census/SchoolPop/SPReport/page1.html>. The researchers used the standard measure of segregation, the "Index of Dissimilarity." This measure captures the degree to which two groups are evenly spread among schools in a given city. Evenness is defined by the racial composition of the city as a whole. The index ranges from 0 to 100, giving the percentage of children in one group who would have to attend a different school to achieve racial balance. A value of 60 or above is considered very high. Values of 40 to 50 are usually considered moderate levels of segregation, while values of 30 or less are considered low.

When *Brown* was decided in 1954, housing patterns were highly segregated as a result of decades of redlining,⁵⁰ racially restrictive covenants, and other discriminatory practices. During the post-World War II era of the 1940s and 1950s, cities were undergoing a historic transformation as white families rapidly relocated to suburban communities.⁵¹ This was made possible by a prosperous post-war economy and federal subsidy programs such as Veterans Administration and Federal Housing Authority loans. The suburban communities as we know them were developed during this period. However, black families who had the resources to purchase suburban homes were excluded by discriminatory practices, many of which were imposed by the federal government, which required racially restrictive covenants on government insured mortgage loans.⁵² Housing discrimination was outlawed by the Fair Housing Act of 1968, a generation after suburban communities had been established as all white enclaves.

Before and after the adoption of the Fair Housing Act exclusionary zoning practices contributed to the perpetuation of segregated neighborhoods. During the late-nineteenth century, land use planners decided that the public's health, safety, and welfare would be promoted by separating commercial and industrial uses from residential areas. By the early twentieth century, land use controls extended the separation principle to residential communities. Single-family and multi-family residential units were separated into different zones.⁵³ This excluded many low and moderate-income families from areas which were designated as single-family districts. Multi-family zones were often limited to older neighborhoods. Renters and lower-income families were locked into urban cores.⁵⁴

Suburbanization frustrated efforts to integrate schools in most urban communities. With the introduction of school desegregation plans, which included court-ordered busing in the late 1960s,⁵⁵ "white flight" to suburban areas continued. By that time, however, residential patterns had already been established: black families were concentrated in urban centers while white families resided in suburban areas beyond the city limits. In *Milliken v. Bradley*,⁵⁶ civil rights advocates

50. "Redlining" is a discriminatory practice institutionalized by a federal government agency, the Home Owners' Loan Corporation, in the 1930s and widely used in the real estate industry. It was used to evaluate the risks associated with loans made in specific neighborhoods. The Home Owners' Loan Corporation's underwriting guidelines established four categories of neighborhood quality. The lowest of these was color-coded red and declared ineligible for government loans. Black neighborhoods were rated in the fourth category. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 77 (1993); Amy E. Hillier, *Spatial Analysis of Historical Redlining: A Methodological Exploration*, 14 *JOURNAL OF HOUSING RESEARCH* 37 (2003).

51. Massey & Denton, *supra* note 50 at 74-78. See also *Ethnic Diversity Grows, Neighborhood Integration Lags Behind*, (Lewis Mumford Center ed., revised Dec. 18, 2001), <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/page1.html>.

52. MELVIN L. OLIVER AND THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 18 (1995).

53. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (established the power of localities to develop and regulate land use through zoning).

54. CHARLES M. HARR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996) (a case study of the New Jersey Supreme Court case, *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983), which held that the equal protection and due process clauses of the New Jersey constitution prohibited localities from using exclusionary zoning ordinances and building codes to restrict the development of low- and moderate-income housing).

55. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (approving busing as a means of achieving racial balance in schools).

56. 418 U.S. 717 (1974).

attempted to counter white flight by proposing a school desegregation plan that would have included the city of Detroit, Michigan and the surrounding suburban districts. The trial court ruled for the plaintiffs but the United States Supreme Court ultimately held that the lower court exceeded its authority when it imposed a remedy that included suburban school districts. The Court found that suburban school districts were not responsible for the segregated conditions in Detroit. With limited exceptions, *Milliken* prevented courts from including suburban districts in desegregation plans.

The problem that the lawyers in *Milliken* attempted to address has not been resolved. The pattern of racial minorities residing in central cities surrounded by mostly white suburbs persists to this day. As one researcher explained:

Cities are disproportionately non-white, with over 52 percent of blacks and 21 percent of whites residing in central-city neighborhoods; while suburbs are disproportionately white, where 57 percent of whites but just 36 percent of blacks reside. Segregation, particularly between blacks and whites, persists at high levels, and Hispanic/white segregation has increased in recent years. The typical white resident of metropolitan areas resides in a neighborhood that is 80 percent white, 7 percent black, 8 percent Hispanic and 4 percent Asian. A typical black person lives in a neighborhood that is 33 percent white, 51 percent black, 11 percent Hispanic and 3 percent Asian. And a typical Hispanic resident lives in a community that is 36 percent white, 11 percent black, 45 percent Hispanic and 6 percent Asian.⁵⁷

Continuing segregation is not the product of black and white income disparities. African-Americans do not enjoy the range of housing choices that are available to white families with similar incomes and credit histories because discriminatory practices persist in the nation's housing markets.⁵⁸ Studies commissioned by the U.S. Department of Housing and Urban Development (HUD) document the discriminatory practices of housing providers.⁵⁹ A HUD report based on data derived from a series of matched pair tests found that African-American homebuyers encountered discrimination in housing markets nationwide. White homebuyers were favored over blacks in seventeen percent of tests. White homebuyers were more likely to be shown homes in more predominantly white neighborhoods than similarly situated blacks.⁶⁰

Showing black and white buyers homes in different neighborhoods is referred to as "steering." It is driven by real estate agents' assumption that whites will not want to live in neighborhoods with more than a token number of minority residents. This unlawful practice is widespread and researchers have found that real estate agents are now using schools as a proxy for the race. White home seekers were discouraged from considering homes in racially mixed neighborhoods on the grounds that the local schools were "bad." This was a coded message which meant the schools had high minority enrollments. The researchers also found that neighborhoods from which whites were steered were recommended favorably to African-American and Latino purchasers.⁶¹

57. Gregory D. Squires and Charis E. Kubrin, *Privileged Places Race, Opportunity and Uneven Development in Urban America NIH*, Shelterforce online Issue #147 (Fall 2006); see also GREGORY D. SQUIRES & CHARIS E. KUBRIN PRIVILEGED PLACES: RACE, RESIDENCE, AND THE STRUCTURE OF OPPORTUNITY (2006).

58. Massey & Denton, *supra* note 50.

59. See generally John Yinger, U.S. Dep't of Housing and Urban Development, Housing Discrimination Study, *Incidence of Discrimination and Variations in Discriminatory Behavior* ix, 1 (1991); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 51-52, 121 (1995).

60. *Discrimination in Metropolitan Housing Markets: National Results from Phase 1 of the Housing Discrimination Study* (2000), <http://www.huduser.org/publications/hsgfn/phase1.html>.

61. *Unequal Opportunity – Perpetuating Housing Segregation in America*, National Fair Housing Alliance (2006), <http://www.mvfairhousing.com/pdfs/2006%20Fair%20Housing%20Trends%20Report>.

Studies have consistently shown that whites will desert neighborhoods when they reach a “tipping point” and become “too black.”⁶² This is fueled by the perception that the presence of African-Americans in a neighborhood causes property values to decline. This belief is driven by stereotypes, overt bias, and unconscious discrimination.⁶³ Some scholars have argued that continuing residential segregation reflects the preferences of African-Americans.⁶⁴ Polling data indicate that this view is held by most white Americans,⁶⁵ but the empirical evidence rebuts these claims. In a recent study, Kryson and Farley found that African-Americans prefer mixed communities in which the racial balance is fifty percent white and fifty percent black.⁶⁶ But, unlike the subtle motives that drive the choices of many white homebuyers, African-Americans’ preference for an equal racial mix stems in part from fears of isolation and the possibility of encountering hostility in predominately white neighborhoods.⁶⁷

Large numbers of middle and upper-middle class blacks have moved to suburban communities but these tend to be older, first-ring suburbs that are adjacent to poor neighborhoods in cities. In suburban communities African-Americans tend to reside in predominately black suburban neighborhoods. Many affluent African-Americans prefer to live in upscale homes surrounded by people who have similar educational and income levels, in pleasant locations where the potential for racial conflict is minimized.⁶⁸ Fear of isolation and conflict is not a concern for white homebuyers with similar incomes and

62. Unconscious discrimination has been the subject of a large body of psychology research. Dovidio and Gartner have explored “aversive” discrimination which they define as a subtle and unintentional form of bias that describes the actions of many white Americans who possess egalitarian values and do not believe that they are not prejudiced against racial minorities. People who engage in aversive discrimination harbor negative racial beliefs but they are not consciously aware of these feelings. And, if they have any awareness of their negative racial attitudes, they disassociate those feelings from their self-images as persons who do not engage in discrimination. Individuals who harbor unconscious racial beliefs are not likely to discriminate against racial minorities when it would be obvious to others and themselves, but they tend to engage in discrimination when there are race-neutral justifications for their behavior. SAMUEL L. GAERTNER & JOHN F. DOVIDIO, *REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL 3* (2000); *see also* SAMUEL L. GAERTNER & JOHN F. DOVIDIO, *THE AVERSIVE FORM OF RACISM, IN PREJUDICE, DISCRIMINATION AND RACISM: THEORY AND RESEARCH* (John. F. Dovidio eds.).

63. Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 *STAN. L. REV.* 245, 251-54 (1974) (discussing the twenty-five to sixty percent “tipping point” at which white families have been documented to flee a neighborhood because its growing numbers of black residents will mark it as a “Black neighborhood”); Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 *CORNELL L. REV.* 729, 744-45 (2001) (suggesting the tipping point is forty percent); Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 *U. MIAMI L. REV.* 1051, 1053-59 (1998) (discussing the longstanding perception of many white realtors, home-sellers and buyers that the presence of African-Americans in a neighborhood causes property values to decline); Oliver & Shapiro, *supra* note 52 at 147-51 (homes of similar design, size, age and appearance are priced higher in white communities than in black or integrated communities).

64. ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* (1998); ABIGAIL & STEPHAN THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1999).

65. Among Whites, 82% believed that Blacks had the same access to housing as Whites. Gallup Poll Social Audit, *Black - White Relations in the United States, 2002-2003 Update*. A recent CNN poll contains similar findings. Poll: Most Americans see lingering racism — in others, December 12, 2006, *available at* www.cnn.com/2006/US/12/12/racism.poll/index.html.

66. Maria Kryson and Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Segregation*, *SOCIAL SCIENCES*, Vol. 80, No. 3, 937-80 (2002).

67. Cashin, *supra* note 63.

68. ANDREW WIESE, *PLACES OF THEIR OWN: AFRICAN-AMERICA SUBURBANIZATION IN THE TWENTIETH CENTURY* (2004).

credit histories. While there has been significant progress, segregated neighborhoods are a ubiquitous feature of the American landscape. If neighborhoods were more integrated, schools would have more racially diverse student populations.

VI. The Seattle And Louisville Cases

The impact of residential segregation on diversity in public schools was at the center of the United States Supreme Court's decision in two consolidated cases: *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County School District*.⁶⁹ The cases involved challenged assignment plans developed to assure that student populations in individual schools broadly reflected the racial demographics of the school districts. The purpose of the plans was to prevent the *de facto* segregation which would have occurred if student assignments had been made on the basis of the proximity of neighborhoods to schools.

Parents in the two districts filed civil actions contending that the plans were discriminatory because in some cases, they prevented white students from enrolling in schools they preferred. When the case reached the Supreme Court the majority found that the school districts violated the Equal Protection Clause of the Fourteenth Amendment by considering race when making attendance assignments.

Jefferson County Public Schools operated public schools in metropolitan Louisville, Kentucky. After a federal court found that the district had maintained a segregated school system, it operated under court supervision until 2000 when it achieved unitary status. In 2001, the school district implemented a voluntary student assignment plan that required schools to maintain a minimum black enrollment of fifteen percent and a maximum black enrollment of fifty percent. If students had been assigned based on the proximity of schools to students' homes, many of the schools would have been *de facto* segregated.

In Seattle most of the white students lived in northern Seattle, most of the minority students lived in the southern part of the city. In 1998, the district adopted an assignment plan which allowed incoming ninth graders to choose from among any of the district's high schools by indicating their assignment preferences in rank order. If too many students identified the same school as their first choice, the district used "tiebreakers" to determine which students would be assigned. First preference was given to students who had a sibling enrolled in the school. The second tiebreaker considered the student's race. Seattle used the racial tiebreaker as part of a plan developed to ameliorate the effects of segregated housing patterns.

When racial classifications are used by the government there must be a "compelling justification" and the means chosen must be "narrowly tailored" to achieving the policy's goals.⁷⁰ In his plurality opinion, Chief Justice John Roberts argued that the student assignment plans violated the Fourteenth Amendment because they lacked a compelling justification and the means chosen were not narrowly tailored to achieving the school districts' goals of promoting student body diversity.

In *Grutter v. Bollinger*,⁷¹ a case involving the University of Michigan's affirmative action admissions program, the Court had previously held that student body diversity *is* a compelling governmental interest. Chief Justice Roberts

69. 551 U.S. 701, 127 S. Ct. 2738 (2007).

70. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Korematsu v. United States*, 323 U.S. 214 (1944); *Loving v. Virginia*, 388 U.S. 1 (1967).

71. 539 U.S. 306 (2003).

determined that the Seattle and Louisville cases were not controlled by *Grutter* because diversity in that case consisted of “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁷² In this case, “race [was] not considered as a broader effort to achieve exposure to widely diverse people, culture, ideas, and viewpoints.”⁷³

The school districts in Seattle and Louisville argued that their assignment plans were necessary to address the consequences of segregated housing patterns. Citing rulings in voting rights and affirmative action cases,⁷⁴ Chief Justice Roberts rejected the argument stating “remedying past societal discrimination does not justify race-conscious government action.”⁷⁵ Chief Justice Roberts also found that the school districts did not satisfy the narrow tailoring requirement. They had not explored race neutral alternatives prior to resorting to a race conscious approach and the plans did not provide for an individualized review of applicants.

Justice Anthony Kennedy provided the fifth vote for the majority ruling, which struck down the assignment plans as violations of the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy agreed with the plurality’s conclusion that the student assignment plans were not narrowly tailored, but he disagreed with Chief Justice Roberts’ rejection of student body diversity as a compelling justification. Justice Kennedy stated that “[t]he nation has a moral and ethical obligation to fulfill [its] historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”⁷⁶ Student body diversity is a compelling educational goal; school districts have a strong interest in avoiding racial isolation in schools.

Justice Kennedy argued that school officials can consider the racial composition of schools and adopt policies that promote student body diversity. They can devise race conscious measures that address racial isolation in individual schools. Such measures may include “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhood; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”⁷⁷ However, “individual racial classifications ... may be considered only if they are a last resort”⁷⁸ This means that race neutral plans that promote diversity must be explored and exhausted before resorting to race conscious student assignments.

This 2007 decision will undermine efforts to promote diversity in public and charter schools. This decision means not only that *de facto* segregation will continue, it also restricts the ways in which school districts can develop strategies to promote student body diversity.⁷⁹

72. *Parents Involved*, 127 S. Ct. at 2742.

73. *Id.*

74. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a compelling interest”); *City of Richmond v. Croson*, 488 U.S. 469, 498-99 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”).

75. *Parents Involved*, 127 S. Ct. at 2758.

76. *Id.* at 2797.

77. *Id.* at 2792.

78. *Id.*

79. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007).

The decisions in *Dowell*, *Freeman*, and *Jenkins* in the 1990s had allowed formerly segregated school districts to be released from federal court supervision even if some schools remained segregated as a result of neighborhood housing patterns. The Court effectively approved *de facto* segregation. *Parents Involved* goes further; school districts cannot make assignments which consider the students' race, even when the assignments are made to promote diverse student populations. This means, among other things, that state laws with racial balance requirements for charter schools are not likely to survive an Equal Protection challenge after *Parents Involved*. Schools must explore race neutral plans to promote student body diversity. The Court has made clear that race conscious assignments can only be used as a "last resort."⁸⁰

Chief Justice Roberts' plurality opinion in *Parents Involved* attempted to distinguish *Grutter's* diversity rationale on the ground that elementary and high schools are different from colleges and universities. But the age of the students and the academic settings are irrelevant to the *Grutter* majority's reasoning. The value of diversity rests on the educational benefits derived from the interactions of students with different backgrounds and life experiences. This is what the school districts in Seattle and Louisville were attempting to accomplish. Student assignments which result in single-race schools in segregated neighborhoods preclude the sort of student interactions and "cross-racial understanding" that the *Grutter* majority valued.

Chief Justice Roberts assumed that continuing residential segregation is attributable to "past societal discrimination."⁸¹ Segregated neighborhoods are indeed the legacy of decades of discriminatory policies and practices but that is not the primary factor. Populations in metropolitan communities are not the same as they were in 1968 when the Fair Housing Act was adopted. Many inner city neighborhoods have been gentrified with affluent residents displacing lower income families. Office complexes and sports arenas are located on land which had been residential neighborhoods in central city locations. Recently arrived immigrants populate ethnic enclaves in central cities and in suburban communities. Large numbers of African-Americans have moved from central city neighborhoods to suburban communities. Despite these dynamic population shifts, African-Americans still reside in predominately black neighborhoods, including many located in suburban communities. Neighborhood segregation today is the product of discriminatory practices that are widespread in the nation's housing markets and residential choice, driven by overt and unconscious discrimination.

Parents Involved rests on the same flawed assumptions that were made in the cases that redefined the standard for determining unitary status. The majorities in *Dowell*, *Freeman*, and *Jenkins* assumed that the lingering patterns of residential segregation were the result of the private choices of individual families. The assumption was that blacks prefer segregated neighborhoods. Yet, the data show that blacks prefer integrated neighborhoods but their residential choices are constrained by race.

The Supreme Court's decision in *Parents Involved* will not affect Delaware as it already prohibits consideration of race in student assignments. However, the case makes integration in public and charter schools far more difficult given the high levels of residential segregation in most metropolitan communities.⁸² The decision leaves an opening for the use of

80. *Parents Involved*, 127 S. Ct. at 2792.

81. *Id.* at 2758.

82. *Parents Involved* has been the subject of a growing body of scholarly commentary. See, e.g., Jonathan Fischbach, Will Rhee, and Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491 (2008); James E. Ryan, *The Supreme Court, 2006 Term: Comment: The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007); J. Harvie Wilkinson III, *The Supreme Court, 2006 Term: Comment: The Seattle and Louisville School Cases: There is no Other Way*, 121 HARV. L. REV. 158 (2007); Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1 (2006); Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251 (2008); Leslie Yalof Garfield, *Adding Colors to the Chameleon: Why the Supreme Court Should Have Adopted a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans*, 56 KAN. L. REV. 277 (2008); D. Marvin Jones, *Plessy's Ghost: Grutter, Seattle and the Quiet Reversal of Brown*, 35 PEPP. L. REV. 583 (2008).

race-neutral approaches such as those suggested in Justice Kennedy's concurring opinion, but diversity will be difficult to achieve in most urban districts.⁸³ Data using the 2000 Census show high levels of segregation in the nation's communities; thirty-three of the top fifty metropolitan areas are intensely segregated. The remaining seventeen are segregated and none was within the range that would be considered integrated.⁸⁴ Urban school districts are usually coterminous with the cities in which they are located. Suburban districts are typically separate and politically autonomous. This city-suburban separation means student populations will reflect the segregated housing patterns that persist in most urban communities.⁸⁵

VII. Conclusion

America is rapidly becoming more diverse but the population is starting to segment itself into residential enclaves.⁸⁶ Over the past three decades Americans have been locating their residences among people with similar lifestyles, beliefs, and political ideologies. This trend is producing increasingly homogeneous and culturally segregated communities. Immigration is rising rapidly and large metropolitan areas are becoming more multiracial and multilingual. Some have reacted to this trend by retreating to smaller communities where they can live among people who look like them, think like them, and comport themselves in similar ways. This demographic trend is one of the many factors contributing to racial composition of metropolitan regions.

School desegregation plans which relied on busing and other racial balance strategies were designed to counteract the effects of segregated neighborhoods. Advocates expected that when schools desegregated other aspects of American society would follow suit. This has occurred to a significant degree but the progress has not extended to everyone. Those with the means are taking advantage of a wide range of choices about where they live, where they work, and the schools that their children attend. But for some, the choices are severely constrained. Black students in central city neighborhoods can choose a public school, which is likely to be intensely segregated, or they can enroll in a charter school, in which the level of segregation is, on average, even higher than public schools. For these residents, "Where to elect there is but one, / 'Tis Hobson's choice—take that, or none."⁸⁷

83. In Texas, graduates in the top 10 percent of their high school classes are admitted automatically to the public college or university of their choice. The law was enacted in response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which struck down the University of Texas' affirmative action plan. *10 Percent Plan Survives in Texas*, *Inside Higher Ed* (May 29, 2007), at <http://inside-highered.com/news/2007/05/29/percent>.

84. *Ethnic Diversity Grows, Neighborhood Integration Lags Behind*, Lewis Mumford Center (Apr. 2001), <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/page2.html>.

85. GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION, THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 19-22* (1996); JAMES E. RYAN, *Schools, Race and Money*, 109 *YALE L.J.* 249, 284-86 (1999).

86. RICHARD FLORIDA, *WHO'S YOUR CITY?: HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION OF YOUR LIFE* (2008); BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008).

87. THOMAS WARD, *ENGLAND'S REFORMATION: A POEM IN FOUR CANTOS* (1719). Thomas Hobson (1545–1631) operated a carrier and horse rental business in Cambridge, England at the turn of the 17th century. Hobson rented horses mainly to Cambridge University students but refused to rent them out other than in their correct order. The choice his customers were given was this or none, *i.e.* Hobson's choice. *American Heritage Dictionary*.

GARCETTI IN DELAWARE: NEW LIMITS ON PUBLIC EMPLOYEES' SPEECH

Erin Daly*

In balancing the free speech rights of individuals against the ability of a government employer to control the workplace, the United States Supreme Court, under Chief Justice Roberts, has come down squarely on the side of the government. *Garcetti v. Ceballos*¹ is the most recent salvo in a spate of cases spanning 40 years that has addressed this issue, and it is the most restrictive of the speech of public employees and the most deferential of employers. Lower courts' cases in the Third Circuit illustrate the impact that *Garcetti* has had in the few years since its announcement.

Cases about the free speech rights of public employees do not tend to garner the biggest headlines, even though they profoundly affect millions of people: more than 18 million people in America are public employees² and in Delaware alone, 60,700 people work for the government.³ These individuals work in a wide range of professional areas, from schools to police, to waste management, to health services, and they speak on a huge range of topics of public concern, from corruption to discrimination to safety. Indeed, “[s]peech involving government impropriety occupies the highest rung of First Amendment protection.”⁴

The question in these cases is whether the government employer can discipline an employee who speaks out against governmental abuse or mismanagement. In the private workplace, firing an outspoken employee is well within the law — since most private employees work at will and may be terminated for any reason or no reason at all, including outspokenness. Moreover, disciplining private sector employees for their speech raises no particular issues of public concern — since most such speech interests only those who are connected to the particular workplace. But public employees have traditionally had greater protection against retaliation, in part because their speech is more likely to be of public interest: when a public employee complains about discrimination or fraud or safety hazards in a government workplace, it concerns us all, as citizens and as taxpayers. And government employers, like all government actors, are subject to constitutional constraints: disciplining an employee could implicate the First Amendment if it suppresses the employee's speech or limits the public's ability to receive information of public importance.

After years of recognizing the public interest immanent in much public employee speech, the Supreme Court in *Garcetti* drew a bright line between speech that was said in the course of an employee's official duties and speech that is outside the scope of his or her employment. The former, the Court said, is never constitutionally protected, whether or

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1. 547 U.S. 410 (2006).

2. U.S. Census Bureau data for 2006, available at <http://ftp2.census.gov/govs/apes/06stlus.txt> (Reporting 16, 135, 699 total state and local employees) and <http://ftp2.census.gov/govs/apes/06fedfun.pdf> (Reporting 2,720,688 total federal government employees).

3. Delaware Monthly Labor Review (Mar. 2008), Delaware Department of Labor, Volume XV, Number 4 (Apr. 18, 2008) available at http://www.delawareworks.com/OOLMI/resources/2008-03_mlr.pdf. Of these, 5,200 work for the federal government, while 30,500 work for state government, and 25,000 work for local governments.

4. *Lapinsky v. Bd. of Education*, 2008 U.S. Dist. LEXIS 68821 (D. Del. Sept. 11, 2008) (quoting *Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1274 (3d Cir. 1994)).

not it is of public concern.⁵ The effect of the decision, as is discussed in detail below, is to subject thousands of employees in Delaware alone to discipline when they complain about workplace issues, even if their complaints raise important issues of public concern.⁶

Not surprisingly, there is a “vast amount of lower court litigation”⁷ involving employment speech: in the two years since *Garcetti* was decided, it has been cited 700 times by lower courts — an extraordinary number by any measure.⁸ More than 70 cases citing *Garcetti* have been decided at the district court level in the Third Circuit. Of these, eleven were decided in the District of Delaware. Almost all of these have been decided *against* the employees who were disciplined or fired, reflecting the strong employer bias of the *Garcetti* rule.

This article examines the Supreme Court decision and then reviews the Third Circuit and Delaware cases applying it. Cases from other circuits are discussed in the footnotes. After this summary of the cases, the policy implications of *Garcetti* and its implementation in Delaware are examined.

I. Background to *Garcetti*

In the seminal case in the series, *Pickering v. Board of Education*, a teacher had been dismissed for sending a letter to the local newspaper “in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools.”⁹ Recognizing the competing interests of the employee and the government employer, the Court announced a straightforward balancing test: “The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁰

5. 547 U.S. 410 (2006). Notwithstanding its bright line, the decision itself is the product of a deeply divided Court. It was the only case held over for re-argument from the long transition at Justice O’Connor’s retirement. When it finally was decided, the vote was five to four, and included three dissenting opinions. Justice Kennedy wrote the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justices Stevens, Souter, Breyer, and Ginsburg dissented, the first three filing separate dissenting opinions.

6. The Court reserved judgment on the extent to which the rule established in the case would apply in the context of public academic employment: applying the rule categorically to scholarship would severely limit the traditional scope of academic freedom. *Garcetti*, 547 U.S. at 425. In *Borden v. School District*, 2008 U.S. App. LEXIS 8011, at *39-40 n.13 (3d Cir. Apr. 15, 2008), the court noted that the Supreme Court had left this issue open. Although many of the cases discussed below, particularly at the district court level, arise in academic settings, they do not concern traditional academic freedom; rather, they mostly concern statements made about fellow employees and internal school policy.

7. “In *Garcetti v. Ceballos*, ... the Court’s holding that the First Amendment did not reach speech of public employees that was part of their employment responsibilities — no matter how much a matter of public concern it might be — established a new rule governing a vast amount of lower court litigation.” Frederick Schauer, *The Supreme Court, 2005 Term: Foreword: the Court’s Agenda - and the Nation’s*, 120 HARV. L. REV. 4, 35 (2006).

8. Lexis search conducted May 9, 2008.

9. *Pickering v. Board of Education*, 391 U.S. 563, 564 (1968).

10. *Id.*

However, in *Connick v. Myers*,¹¹ the Court elaborated only on the government employer's side of the balance: "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."¹² This attention to the needs of the employer reflects the shift on the Court from the 1960s when *Pickering* was decided and the Court was particularly sensitive to free speech issues, to the 1980s when *Connick* was decided. This shift would be further entrenched in *Garcetti*.

Further, and again presaging *Garcetti*, the *Connick* Court limited the balancing of employer and public interests to cases where courts had first determined that the speech at issue was of public concern, and not merely relating to intra-office matters. In *Connick*, an employee in a district attorney's office had prepared a questionnaire for her co-workers soliciting their views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors," and so on.¹³ These matters were not of public importance because they only concerned those who worked in the office. According to the Court, since speech that is not of public concern is not constitutionally protected, the government employer has the same authority to discipline the employee for such speech as a private employer would; the matter is resolved under simple contract principles and no constitutional balancing is required.

One of the questions in the questionnaire, however, concerned whether the employees felt "pressured to work in political campaigns on behalf of office supported candidates."¹⁴ Based on "the content, form, and context of a given statement, as revealed by the whole record,"¹⁵ the court held that this question did touch on a matter of public concern because "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights."¹⁶ If the employee was disciplined for this question, the Court held, it would be necessary to balance whether the rights of the employee to speak out as any citizen could outweigh the right of the public employer to control the workplace environment.

Thus, under these two principal cases, a public employee's speech is protected against workplace retaliation only if it concerns a matter of public interest and if that public interest outweighs the employer's interest in an efficient workplace.

II. The *Garcetti* Case

In *Garcetti*, the Court carved another category out of the area of constitutionally protected speech that public employees enjoyed under *Pickering*. Richard Ceballos, a deputy district attorney, was subjected to a series of disciplinary measures after he had written a memo alleging inaccuracies in an affidavit used to support a search warrant in an ongoing investigation.¹⁷

11. 461 U.S. 138 (1983).

12. *Id.* at 150.

13. *Id.* at 141.

14. *Id.* at 155.

15. *Rankin v. McPherson*, 483 U.S. 378, 385 (1987) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

16. *Connick*, 461 U.S. at 149 (citing *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980)).

17. According to the Supreme Court, the measures included "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion." *Garcetti*, 547 U.S. at 415.

When Ceballos argued that the disciplinary measures were in retaliation for his speech, the Ninth Circuit agreed with him, finding that “Ceballos’s allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment”¹⁸ because, as allegations of governmental misconduct, they were “inherently a matter of public concern.”¹⁹ But the Supreme Court reversed, holding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²⁰ This ensures that the employer can control “what the employer itself has commissioned or created.”²¹

The Court distinguished the speech an employee engages in *as an employee* from the speech he or she engages in *as a citizen*. The first is never constitutionally protected (though the second may be under *Pickering* and *Connick*). The Court explained: “Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.”²²

To determine whether the speech at issue was uttered as an employee or as a citizen, courts should consider whether the speech was made pursuant to the employee’s duties. In the *Garcetti* case, the fact that the memo was written at work was not dispositive,²³ and neither was the fact that “the memo concerned the subject matter of Ceballos’ employment.”²⁴ What the Court found critical was the fact that Ceballos’ “expressions were made pursuant to his duties as a calendar deputy.”²⁵ Since writing memos about investigations was part of Ceballos’s job, when he did so, he was acting as an employee fulfilling his official responsibilities, not as a citizen speaking out about matters of public concern. According to the Court, “When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”²⁶

As the District Court in Delaware has since explained, *Garcetti* inserts a preliminary element in the *Pickering/Connick* calculus:

In evaluating whether speech by a public employee warrants constitutional protection, the court must engage in a three-step analysis. First, the court determines whether the public employee spoke as a

18. 361 F.3d 1168, 1173 (9th Cir. 2004).

19. *Garcetti*, 547 U.S. at 416.

20. *Id.* at 421.

21. *Id.* at 422.

22. *Id.* at 421-22.

23. *Id.* at 420.

24. 547 U.S. at 421. The Eleventh Circuit Court of Appeals also said that Ceballos’ supervisor’s expectations of Ceballos were not dispositive: “[The *Garcetti*] Court itself explicitly refrained from placing the emphasis on supervisors’ specific expectations. . . . What the Court did emphasize was whether the public employee was acting as an agent of the government at the time of the relevant speech.” *Khan v. Fernandez-Rundle*, 2007 U.S. App. LEXIS 23571 (11th Cir. Oct. 3, 2007) (finding unprotected speech of assistant district attorney who told the truth in court when he was expected to lie).

25. *Garcetti*, 547 U.S. at 421.

26. *Id.* at 422.

citizen or an employee. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 164 L. Ed. 2d 689 (2006). Second, the court determines whether, in light of the content, form and context of the entire record, the speech touched on matters of public concern. *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Third, the value of the employee's speech must outweigh "the government's interest in the effective and efficient fulfillment of its responsibilities to the public."²⁷

Thus, courts will only reach the question of whether the speech is constitutionally protected if they have first decided that the speech was not within the employee's responsibilities.²⁸

27. *Wilcoxon v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 437 F. Supp. 2d 235, 243 (D. Del. 2006). The court continued:

Determining whether the speech touched on matters of public concern and whether the value of the speech outweighs governmental interests in efficiency are questions of law for the court. Accordingly, a discharged public employee has no right to judicial review if the expression is not related to a matter of public concern or, even if it is so related, its value is outweighed by the need to permit the government to take actions that promote efficiency and effectiveness.

Id. (citation omitted). See also *Reilly v. City of Atl. City*, 532 F.3d 216, 228 (3d Cir. 2008); *Lapinsky v. Bd. of Education*, 2008 U.S. Dist. LEXIS 68821 (D. Del. Sept. 11, 2008) (both also referring to the post-*Garcetti* analysis as involving three steps). But see *Justice v. Danberg*, 2008 U.S. Dist. LEXIS 57818 (D. Del. July 29, 2008) (defining *Garcetti*'s course-of-employment test as not being within *Connick*'s public-interest test).

Other circuits have described the new *Garcetti* element similarly:

While all implications of *Garcetti* have not been developed at this point, it is clear that *Garcetti* added a threshold layer to our previous analysis. "Under *Garcetti*, we must shift our focus from the content of the speech to the role the speaker occupied when he said it." The Seventh Circuit has framed the new test ... as follows: "*Garcetti* ... holds that before asking whether the subject-matter of particular speech is a topic of public concern, the court must decide whether the plaintiff was speaking 'as a citizen' or as part of her public job. Only when government penalizes speech that a plaintiff utters 'as a citizen' must the court consider the balance of public and private interests, along with the other questions posed by *Pickering* and its successors...."

Davis v. McKinney, 518 F.3d 304, 312 (5th Cir. 2008) (citations omitted). See also *Vigil v. S. Valley Acad.*, 247 Fed. Appx. 982, 988 (10th Cir. 2007).

While the test in the Third Circuit is described as having three parts, other circuits have described it as a "two-step analysis" (*Khan v. Fernandez-Rundle*, 2007 U.S. App. LEXIS 23571 (11th Cir. Oct. 3, 2007)), a "four-factor test" (*Wilburn v. Robinson*, 375 U.S. App. D.C. 257 (D.C. Cir. 2007)), and a "five step inquiry" (*Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202 (10th Cir. 2007)). The differences seem more semantic than substantive. This commentator believes that the Third Circuit's description is the most apt.

28. See, e.g., *Boyce v. Andrew*, 510 F.3d 1333, 1342-43 (11th Cir. 2007) ("To qualify as constitutionally protected speech ... as *Garcetti* has specified, the speech must be made by a government employee speaking as a citizen and be on a subject of public concern.").

Some other circuits describe the post-*Garcetti* landscape differently. For example, in *Curran v. Cousins*, the First Circuit explained:

Garcetti has clarified and expanded on the earlier law. The Supreme Court described the correct analysis as involving a two-step initial inquiry. The first step requires a determination of: whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. *Garcetti* recognizes that this first step itself has two subparts: (a) that the employee spoke as a citizen and (b) that the speech was on a matter of public concern. ... [I]t is the judge who decides as a matter of law the issues in the two steps *Garcetti* identifies. See *Connick*, 461 U.S. at 148 n.7 ("The inquiry into the protected status of speech is one of law, not fact.").... The court must first determine whether the speech involved is entitled to any First Amendment protection — that is, whether the speech is by an employee

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As in the other employment speech cases, the *Garcetti* Court said it was trying to accommodate competing interests. On the one hand, the Court said it wanted to preserve the right of a government employee to speak out *as a citizen*; a person does not lose his or her First Amendment rights to participate in public debate upon accepting government employment. Such speech is important not only to the speaker, but also to the general public, whose First Amendment right to receive information of public concern has long been recognized.

On the other hand, the Court wanted to protect the public employer's "heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications," the Court said, "have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."²⁹

The problem is that the *Garcetti* rule does not balance the competing interests. Like the Court's approach in *Connick*, it places all the weight on the side of the employer's interest in controlling employee speech — even if that speech is accurate, demonstrates sound judgment, and promotes the employer's mission — and takes away from the employee's right to speak out about issues of public concern, and from society's right to know what the government is doing.

III. Expanding "Official Duties" Leaves Less Speech Protected

The *Garcetti* Court itself suggested that the decision did not significantly change the landscape and was entirely consistent with the precedents.³⁰ As the Third Circuit noted in *Foraker v. Chaffinch*, the court "applied the rule it enunciated

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acting as a citizen on a matter of public concern. If so, the court then decides whether the public employer "had an adequate justification," to use *Garcetti's* rephrasing of the *Pickering* test.

Curran v. Cousins, 509 F.3d 36, 44-46 (1st Cir. 2007) (holding that menacing and threatening statements to a superior "were made in the course of [plaintiff's] duties within the Department, to his superiors, and during a discussion of official Department policy" but assuming that plaintiff was acting "as a citizen" when he posted racist and bizarre messages on a "union website open to public posting and viewing") (citing *Lewis v. City of Boston*, 321 F.3d 208, 219 (1st Cir. 2003)).

A bit more simply, the Eighth Circuit reads *Garcetti* as simply clarifying the citizen/employee distinction from the earlier cases:

After *Garcetti*, a public employee does not speak as a citizen if he speaks pursuant to his job duties. *See McGee v. Pub. Water Supply, Dist. # 2*, 471 F.3d 918, 919 (8th Cir. 2006) (holding that a public water supply district manager's complaints about environmental compliance, although involving matters of public concern, were made pursuant to his official duties to ensure regulatory compliance and thus were not made as a citizen).

Lindsey v. City of Orrick, 491 F.3d 892, 898 (8th Cir. 2007). In *Lindsey*, the court found that the city's public works director (responsible for maintenance) engaged in protected speech when he voiced concerns about the city's compliance with sunshine laws:

Although Lindsey attended a training seminar which included a session on the sunshine law, there is nothing in the record to suggest the City sent him to the seminar to learn about the law or that he was subsequently charged with ensuring its compliance. Thus, we hold his speech regarding compliance was as a citizen.

Id.

29. *Garcetti*, 547 U.S. at 422-23.

30. 547 U.S. at 422 ("This result is consistent with our precedents' attention to the potential societal value of employee speech"). *But see* *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1325 (10th Cir. 2007) (*Garcetti* "profoundly alters how courts

to Ceballos' claims. Thus, the rule announced was not purely prospective."³¹ However, review of the cases decided under *Garcetti* in the Third Circuit indicates that a public employee making a speech-based retaliation claim faces substantial new obstacles. By restricting constitutional protection for employee speech to that which is made *outside* the employee's official duties, the *Garcetti* rule forces judicial analysis of the scope of the employee's employment and reduces the scope of employee free speech rights.

Foraker v. Chaffinch illustrates many of the issues that *Garcetti* raises and provides the most thorough evaluation of the *Garcetti* rule of any case decided in the Third Circuit. It is a particularly telling case because the jury's verdict in favor of plaintiffs had to be reconsidered in light of *Garcetti*, which was decided on the day that the *Foraker* jury was instructed. In *Foraker*, the plaintiffs were former Delaware State Troopers who were instructors in the Delaware State Police Firearms Training Unit, assigned to the indoor firing range in Smyrna. According to the court,

[t]he range and those who used it encountered a number of difficulties from the outset, including problems with the heating, ventilation, and air conditioning ("HVAC") system.... [Plaintiffs] Price, Warren, and Foraker considered the range conditions intolerable, and were specifically concerned with health and safety issues there. The HVAC system did not work properly, the bullet trap was malfunctioning, and officers and students at the range were suffering the physical manifestations of contamination, including elevated levels of heavy metals in their blood.³²

These were, by all accounts, significant public concerns and, eventually, the facility was closed. However, the State Police altered the terms of plaintiffs' employment, allegedly in retaliation for their complaints. This case presents a stark illustration of the impact of *Garcetti* since the plaintiffs prevailed before the *Garcetti* decision, but not afterwards.³³

The *Foraker* court engaged in a relatively in-depth analysis of the *Garcetti* rule, referring as well to cases from other circuits. Ultimately, the court adopted a broad definition of job responsibilities, including within that term areas over which the employee had special knowledge and experience, whether or not the employee had actual responsibility over those areas. Even though Price and Warren *were not responsible* for safety at the firing range, they:

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review First Amendment retaliation claims."); Frederick Schauer, *The Supreme Court, 2005 Term: Foreword: the Court's Agenda - and the Nation's*, 120 HARV. L. REV. 4, 35 (2006) (*Garcetti* "established a new rule").

31. *Foraker v. Chaffinch*, 501 F.3d 231, 238 n.4 (3d Cir. 2007).

32. *Id.* at 233.

33. More recently, the Third Circuit has held that while reports criticizing fellow state police officers were made pursuant to a patrol supervisor's official duties and therefore unprotected, the filing of a lawsuit is protected First Amendment activity. *Skrutski v. Marut*, 2008 U.S. App. LEXIS 15452, at *8-11 (3d Cir. July 18, 2008).

The Second Circuit case of *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008), presents a similar situation. In 2003, plaintiff had filed suit alleging retaliation after he had submitted a requested report detailing serious and accurate environmental and health hazards in his department. *Garcetti* was decided two weeks before the trial was set to begin, so after 3 years of pre-trial litigation, the district court dismissed the complaint. That dismissal was not appealed (because *Garcetti* clearly foreclosed it), though the court's rejection of Ruotolo's claim of retaliation based on the filing of the lawsuit was appealed. The Second Circuit held that whether or not filing the lawsuit based on non-protected speech is itself protected, it did not raise a matter of public concern and therefore was not constitutionally protected. *Id.*

were acting within their job duties when they expressed their concerns up the chain of command because they needed to have a functioning bullet trap to conduct their educational programs and it was their special knowledge and experience with the bullet trap that demonstrated their responsibility for ensuring its functionality by reporting problems to their superiors.³⁴

Thus, areas that lie outside a person's official duties but that may be useful or relevant to one's job may be within the employee's duties for purposes of *Garcetti*.³⁵ Such speech now may be subject to retaliation without any First Amendment protection.

34. *Foraker*, 501 F.3d at 240. The Third Circuit took the "special knowledge and experience" language from the Fifth Circuit's decision in *Williams v. Dallas Independent School District*, 480 F.3d 689 (5th Cir. 2007) (per curiam), where

the Fifth Circuit applied *Garcetti* to foreclose the retaliation claim of a high school athletic director who was discharged after writing a memo to his principal concerning the handling of school athletic funds.... [T]he Court held that it was within Williams' "daily operations" to manage the athletic department, and because he needed information on the athletic accounts in order to be able to do that, his memorandum to his superior concerning accounts was necessary for him to complete his job. The Court noted that this outcome was dictated by the fact that "Williams had *special knowledge* that \$200 was raised at a basketball tournament," and that he was "*experienced* with standard operating procedures for athletic departments."

Id. (emphasis in original; citations omitted).

On the other hand, the Fifth Circuit declined to apply the "special knowledge and experience" test where a systems analyst wrote emails alleging racially discriminatory activity within his department where the emails were sent to state legislators, but from his personal email account and providing his personal contact information. *Charles v. Grief*, 2008 U.S. App. LEXIS 6275 (5th Cir. Mar. 26, 2008). The court in *Charles v. Grief* states as follows:

To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights. Also, it is apparent that Charles identified himself as a Commission employee solely to demonstrate the veracity of the factual allegations he was making in his e-mails to the legislators.... Most significantly, though, Charles's speech — unlike that of the plaintiffs in *Garcetti* and *Williams* — was not made in the course of performing or fulfilling his job responsibilities, was not even indirectly related to his job, and was not made to higher-ups in his organization (as were Ceballos's and Williams's) but was communicated directly to elected representatives of the people. As a systems analyst, Charles worked in the area of Information Resources as a senior technical lead coordinating and supporting the Commission's computer network operations.... As the district court indicated, there can be no *Garcetti*-like nexus between Charles's systems analyst's work and the malfeasance that he sought to expose to the cognizant public authorities.

Id. at *13-14.

35. The Sixth Circuit has decided cases similarly. In *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007), the court found that a police canine trainer who wrote a memo expressing his concern that the reduced training would render the police dogs less effective and would potentially endanger the public was acting in the course of his duties. *Id.* at 364-65. Likewise, plaintiff's discussion with a consultant hired by plaintiff's employer to interview her about the department in order to create a departmental evaluation was within her official duties as an "ad hoc" responsibility even if not squarely within her job description. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 544 (6th Cir. 2007). *See also* *Bevis v. Bethune*, 232 Fed. Appx. 212, 216 (4th Cir. 2007) ("Bevis used his role as Nickles's supervisor to access the meeting, and those in attendance understood his presence to be in his supervisory capacity.... Bevis explained that although his supervisory responsibilities did not require him to attend the meeting, he considered it appropriate that he do so, because he considered it 'a major meeting,' and Nickles had asked him to be present....").

In the Eleventh Circuit, the Court of Appeals has held that complaints to a supervisor about one's own workload are within one's job duties. Using language from *Connick*, the court said:

The form and context in which the complaints by [caseworkers at child welfare agency] were made are indicative of the fact that they intended to address only matters connected with their jobs at Dekalb DFCS. Verbal, electronic

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Likewise, areas that lie outside a person's official duties, but that may be mentioned in a performance review, may be within the employee's duties. In *Foraker*, plaintiff Price was apparently commended for "aid[ing] his supervisors in identifying safety issues at the facility" and "reach[ing] out to experts" in a variety of fields in order to "search out the root cause and contributing factors surrounding the dangers [the department faced] in exposure to heavy metal contamination."³⁶ The court concluded that "the fact that Price may have exceeded the expectations of his formal job description as a firearms instructor does not mean that they were not within the scope of his duties."³⁷

In several post-*Garcetti* cases, courts have drawn the scope of an employee's official duties broadly based on the plaintiffs' own descriptions in court papers, depositions, and even the complaint itself. In *Yatzus v. Appoquinimink School District*,³⁸ a school psychologist had complained about the failure of the school district to provide appropriate Individualized Educational Plans (IEP) (as required by federal law) and had assisted parents with their claims with the Office of Civil Rights regarding their children's services. At the deposition (before *Garcetti* was decided), she indicated that these activities were part of her responsibility, which she defined rather broadly. "A school psychologist has many responsibilities in that, responsible for the assessment; participation in the IEP process; being there as a consultant for teacher, the school process; counseling; crisis intervention. It's a multitude of different responsibilities."³⁹ The court held that the complaints were within her official duties.

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mail, and ADO complaints by [plaintiffs] to their supervisors focus on their respective views that their caseloads were too high, which caused each not to meet expected deadlines, and their consequent need for assistance.

Boyce v. Andrew, 510 F.3d 1333, 1343-44 (11th Cir. 2007).

The Seventh Circuit has also decided cases similarly. In *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007), "a corrections officer responsible for maintaining prison security reported a breach of a prison security policy by another prison employee to her superior." *Id.* at 962-63. The *Spiegla* court held that the corrections officer was speaking pursuant to her official duties — not as a citizen — when she reported the security policy breach because ensuring compliance with prison security policy was part of what she was employed to do. *Id.* at 965-66. Likewise, in *Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007), "Vose was employed to oversee the narcotics unit's investigations, which Vose himself stated could have been compromised by the alleged misconduct of the major case unit detectives.... Vose was merely doing his job when he reported to his superiors his suspicions of the detectives' misconduct. A public employee's more general responsibilities are not beyond the scope of official duties for First Amendment purposes." *See also* *Vigil v. S. Valley Acad.*, 247 Fed. Appx. 982, 990 (10th Cir. 2007) ("Ms. Vigil's complaints of falsely reported student statistics clearly were made in her professional capacity as office manager because she was the one charged with filing these reports.").

However, the Seventh Circuit drew a slightly narrower compass around "official duties" in *Doggett v. Cook County*, 255 Fed. Appx. 88, 88-89 (7th Cir. 2007), where the court found that memos written by an emergency room technician (ERT) in a public hospital concerning patient care, scheduling conflicts, and violations of policy by other ERTs might be constitutionally protected because "nothing in the record suggests that reporting perceived errors in the hospital's administration is part of an ERT's official duties." *Id.* at 89. In that case, however, the claims were dismissed on unrelated grounds.

36. *Foraker*, 501 F.3d at 242.

37. *Id.*

38. 458 F. Supp. 2d 235 (D. Del. 2006).

39. *Id.* at 246. After *Garcetti* was decided, she filed a clarification, attempting to distinguish between the "requirement[s] of her position" and her "ethical responsibility;" only the latter included speaking up for the rights and needs of her students and their parents, including communicating her concerns to the School District. However, Judge Sue Robinson disregarded the subsequent affidavit, finding that the only plausible explanation for it was "the intervening change in the law resulting from the Supreme Court's *Garcetti* decision." *Id.* at 247.

In *Hill v. Borough of Kutztown*, the court again relied on the complaint to define the scope of the job responsibilities:

Hill's complaint states that "[h]aving received complaints from employees [of the Borough] about hostile, intimidating, oppressive and harassing actions by Defendant Marino, Plaintiff as part of his duties as Manager and otherwise duly reported them, as well as his own complaints about the same kind of behavior, to Borough Council."⁴⁰

In his brief, Hill states that he 'relayed his and other workers' complaints [to the Borough Council] in fulfillment of his responsibilities as manager and appointed enforcer of the Borough's Affirmative Action/Equal Employment Opportunity Policy and Program."⁴¹ The court held, as a matter of law, that the reports were not protected speech because, by plaintiff's own admission, they were made pursuant to his official duties.⁴² In *Houlihan v. Sussex Technical School District*, the court again looked to the complaint to find that the reports of a Special Education Coordinator about her colleagues' violations of the Individuals with Disabilities in Education Act (IDEA) were within her official duties:

[B]oth in the allegations of her Complaint and the exhibits attached thereto, Plaintiff repeatedly refers to the "insubordination" of staff members whom she confronted with alleged IDEA violations, but who ignored her. In the Court's view, the fact that Plaintiff acknowledges her authority to approach these individuals directly and characterizes their refusal to comply with her requests as "insubordination" infers [sic] that Plaintiff was approaching these individuals as part of her official duties as School Psychologist and/or Special Education Coordinator.⁴³

After *Garcetti*, plaintiffs are on notice that their own descriptions of their jobs, whether within or outside of the litigation, will inform the court about whether the speech was within their official responsibilities.

In some cases, even speech that is unauthorized or that lies *outside* of the employer's expectations has been found to be within the employee's job duties. In *Kougher v. Burd*, the employee was a dog warden who had filed state animal cruelty charges against the operator of an unlicensed kennel. He was directed to withdraw the charges because "dog wardens lack the proper authority to file such charges,"⁴⁴ but he subsequently refiled them and then he "also spoke to the Bedford Gazette regarding the Bureau's ongoing investigation of [the] kennel, in spite of a policy that dog wardens refer all media inquiries to the Department's press office."⁴⁵ Without any discussion, the court found that the charges and the

40. *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 (3d Cir. 2006).

41. *Id.*

42. *Id.*

43. *Houlihan v. Sussex Tech. Sch. Dist.*, 461 F. Supp. 2d 252, 260 (D. Del. 2006).

44. *Kougher v. Burd*, 2008 U.S. App. LEXIS 8296, at *9-10 (3d Cir. Apr. 16, 2008). The opinion is "not precedential opinion under third circuit internal operating procedure rule 5.7. Such opinions are not regarded as precedents which bind the court."

45. *Id.* at *3.

“unauthorized contact with the press concerned matters related to his professional duties.”⁴⁶ Thus, speech that is unauthorized may be held by a court to be within one’s job responsibilities for purposes of *Garcetti*.

Other Third Circuit cases also found the *Garcetti* issue — whether the speech was within the employee’s official duties — to be relatively easy to dispose of after review of the facts. In *Shingara v. Skiles*, the court affirmed the dismissal of plaintiffs’ First Amendment claim in one short paragraph, finding that an anonymous letter written to superiors complaining about a supervisor “was not protected speech because Shingara spoke as a public employee when writing the letter, not as a citizen.”⁴⁷ Likewise, the circuit court in *Muzslay v. Ocean City*, affirmed the district court’s ruling that complaints by a long-time captain of the Ocean City Beach Patrol about lifeguard hours and the treatment of a fellow employee were “pursuant to his duties as Patrol Captain, not as a private citizen.”⁴⁸ And again in *Devlin v. Blackman*, the court quickly affirmed the district court’s finding that a correction officer’s report about contraband was within her official duties.⁴⁹

On the other hand, *DeLuzio v. Monroe County*, 2008 U.S. App. LEXIS 6961, shows the flip-side of this situation — where the employee complains about all kinds of things over which he has no particular knowledge, experience, or responsibility. Somewhat counter-intuitively, such speech is protected:

Despite his junior status, [plaintiff] DeLuzio often clashed with [his supervisor] Bahl and others over CYS’s provision of services to its clients and its internal policies and procedures. DeLuzio made his opinions on these matters known to his superiors at CYS repeatedly and insistently, often by writing

46. *Id.* at *9. See also *Khan v. Fernandez-Rundle*, 2007 U.S. App. LEXIS 23571, at *6-7 (11th Cir. Oct. 3, 2007) (finding that an assistant district attorney who told the truth in court when his supervisor had told him (and expected him) to lie, was acting within the scope of his duties). The *Kahn* court stated as follows:

By focusing on the fact that he was acting outside his “expected” duties when he told the truth to the court, Khan in effect is asking us to recognize First Amendment protection for any employee who disobeys his employer’s instructions. This approach is wholly at odds with the *Garcetti* Court’s desire to avoid “permanent judicial intervention in the conduct of governmental operations” and we decline to embrace it.

Id.

However, when a supervisor requested that an employee speak to the press, her statements were “manifestly made in [plaintiff’s] ‘official capacity’ and therefore not constitutionally protected” even though the subject matter of the interview was not related to her job. *Almontaser v. N.Y. City Dep’t of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008).

47. *Shingara v. Skiles*, 2008 U.S. App. LEXIS 8411, at *7 (3d Cir. Apr. 17, 2008). The opinion is “not precedential opinion under third circuit internal operating procedure rule 5.7. Such opinions are not regarded as precedents which bind the court.”

48. 238 Fed. Appx. 785, 789 (3d Cir. 2007) (“not precedential opinion under third circuit internal operating procedure rule 5.7. Such opinions are not regarded as precedents which bind the court”).

In two other district court cases, the *Garcetti* issue was decided summarily. In *Navarro v. Coons*, 2007 U.S. Dist. LEXIS 66280 (D. Del. Sept. 7, 2007), Judge Sleet granted defendants’ motion for summary judgment in a conference (though the court allowed plaintiff to amend his complaint). According to the subsequent opinion, “[i]n making its ruling, the court relied on the Supreme Court’s decision in *Garcetti v. Ceballos*, which limits the free speech rights of public officials and, in this case, precluded the plaintiff’s Free Speech retaliation claims (Claims I and II of the original complaint).”

In *Johnson v. George*, 2007 U.S. Dist. LEXIS 42465 (D. Del. June 11, 2007), U.S. Magistrate Judge Thyng found that statements made by a Vice-President and Director of one campus of Delaware Technical and Community College during a meeting of campus department chairs were within her job duties and not of public concern. The court pursued its *Pickering* (public concern) analysis even after finding the claims untenable under *Garcetti*.

49. 2008 U.S. App. LEXIS 16038 (3d Cir. June 20, 2008).

memos outlining the problems he saw with CYS's operations and the treatment strategies for clients of other caseworkers.⁵⁰

Similar conduct was found to lie outside a trooper's job duties when he contacted "a television reporter with concerns about the sufficiency of another officer's investigation" because it "was not one of the tasks [that the plaintiff] was expected to perform."⁵¹ As the court explained, "Indeed, the [Pennsylvania State Police] has a policy requiring that officers not interfere with ongoing investigations or release information to the public without complying with certain regulations."⁵² Such interference, therefore, was not within the bounds of his official duties. And while the court found that the speech did concern issues of public importance (an investigation of a teacher), it ultimately held that plaintiff's decision to contact the media and his failure to follow the chain of command justified the action taken against him. In the recent case of *Reilly v. Atlantic City*, the Third Circuit held that "truthful testimony in court constituted citizen speech" and that such speech was therefore "not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*."⁵³ These are among the few Third Circuit cases after *Garcetti* to actually reach the *Pickering* balancing stage of analysis.⁵⁴

Speech written privately may also fall outside the scope of official duty. In *Wilcoxon v. Red Clay Consolidated School District Board of Education*,⁵⁵ the district court found that a teacher's journal containing notations about misconduct of a fellow teacher "was not written pursuant to his official duties as a teacher. He was not employed to monitor the absences of fellow teachers, and defendants do not allege that he was required to do so."⁵⁶ (The court further held that, although the journal was written privately, it touched on matters of public concern and therefore, under *Pickering*, it was protected speech). Another district court has found that resigning one's position may be a form of symbolic speech that is protected because it is, by definition, not within the scope of one's official duties.⁵⁷

In another recent decision, Judge Robinson cautioned against reading *Garcetti* as leaving unprotected any speech that "was related in any way to their employment."⁵⁸ In that case, the court found that "plaintiff was acting as a citizen

50. *DeLuzio v. Monroe County*, 2008 U.S. App. LEXIS 6961, at *7 (3d Cir. Mar. 31, 2008). CYS is Monroe County Children and Youth Services. According to the court, "[h]is superiors' problems with DeLuzio stemmed precisely from his frequent and unwelcome comments on matters that the supervisors felt were not within DeLuzio's purview — such as the course of treatment for other caseworkers' clients, or operating procedures that DeLuzio thought were harmful but was without power to change." *Id.* at *8.

51. *Meenan v. Harrison*, 2008 U.S. App. LEXIS 3025, at *8-9 (3d Cir. Feb. 12, 2008). The opinion is "not precedential opinion under third circuit internal operating procedure rule 5.7. Such opinions are not regarded as precedents which bind the court."

52. *Id.*

53. 532 F.3d 216, 231 (D.N.J. 2008).

54. Another case, *Espinosa v. County of Union*, 212 Fed. Appx. 146, 154 (3d Cir. 2007), seems to assume that the speech was constitutionally protected because it proceeded directly to the causation issue, affirming the dismissal upon finding that his "termination was not in retaliation for the protected expression." *Id.* Had the court applied *Garcetti*, it would have undoubtedly found that the speech was not protected since the speech was testimony given to help prosecute fellow corrections officers at a county jail.

55. 437 F. Supp. 2d 235 (D. Del. 2006).

56. *Id.* at 243.

57. *Balas v. Taylor*, 2008 U.S. Dist. LEXIS 57754 (D. Del. July 29, 2008).

58. *Justice v. Danberg*, 2008 U.S. Dist. LEXIS 57818 (D. Del. July 29, 2008).

when participating in union negotiation activities” because, while he was “required by Delaware law to be a member of [the union], he was not required to be a vice president in the union nor was he required to even be active in the union beyond that required by law.”⁵⁹

In most cases in the Third Circuit and District of Delaware, courts applied *Garcetti* in a common sense way, making fact-specific judgments about the actual scope of the employment and the particular nature of the speech at issue. *Garcetti*, then, is not problematic for how it is applied, but for its ramifications when it is *correctly* applied. It is these policy concerns that are addressed below.

IV. *Garcetti* in the Courtroom

The *Garcetti* Court said that it had decided to limit, rather than expand, the range of constitutionally protected speech because a “contrary rule” would subject almost all government employee speech to constitutional scrutiny, thereby authorizing federal courts to review routine employment decisions made by all federal and state agencies. This, in turn, would raise concerns under separation of powers and federalism principles.⁶⁰ Thus, one justification for the rule is simply judicial restraint. As Judge Pollak (sitting by designation in the Third Circuit) wrote in *Foraker*, “It may be expected that *Garcetti* will, to some extent, inhibit federal judicial micromanaging of public employment practices.”⁶¹

However, it is not at all clear that the new approach accomplishes that objective. First, the Court’s assumption overstates the role that the judiciary played before *Garcetti* was decided. While the 1968 case of *Pickering* mandated pure balancing, by 1983 the *Connick* Court had significantly narrowed judicial discretion by requiring balancing only once the court had determined, *as a matter of law*, that the speech was of public importance. For 25 years, then, there was no judicial review of routine employment decisions if the speech related to the workplace or other private matters; thus, there is no reason to think that, prior to *Garcetti*, there was a problem of federal judicial micromanaging of public employment practices that needed inhibition.

The district court case of *Gorum v. Sessom* helps to illustrate the problem.⁶² In that case, Judge Sleet granted summary judgment to Delaware State University defendants where a tenured professor claimed retaliation for actions and statements that were clearly part of his job, including voicing opposition to the finalists for the post of university president and disinviting the president to be a speaker at a school event. This is the kind of case that the *Garcetti* Court presumably had in mind when it sought to prevent disgruntled employees from constitutionalizing their grievances, and to limit federal courts’ involvement in routine employment decisions. But the court’s dismissal of the case could have just as easily been achieved under the pre-*Garcetti* rules: the court would have decided, as a matter of law, that the professor’s speech was not protected because it was not of public concern. On its own terms, then, it is not clear that the *Garcetti* rule was necessary to limit the scope of judicial review of the government workplace.

This case also reveals a deeper problem relating to judicial review under *Garcetti*. *Garcetti*, as implemented by *Foraker* and other cases, was meant not only meant to fix the quantitative problem — by reducing the number of cases

59. *Id.* at *14-16.

60. “To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.” *Garcetti*, 547 U.S. at 423.

61. *Foraker*, 501 F.3d at 250 (Pollak, concurring).

62. 2008 U.S. Dist. LEXIS 10366 (D. Del. Feb. 12, 2008).

in which a federal court reviewed public employment decisions — it would also fix a qualitative problem: according to Judge Pollak, it would avoid judicial “displacement of managerial discretion” and would prevent courts from assuming “a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business.”⁶³ And this benefit in terms of judicial restraint would be worth the cost, even though, as Judge Pollak wrote, “[i]t may also be expected that *Garcetti* will, to some extent, inhibit dissemination of information of arguable public interest about the operations of government agencies.”⁶⁴

But again, the cases discussed above suggest that the line drawn by the *Garcetti* Court is not nearly as bright in practice as it might have been in theory. Indeed, Judge Pollak’s next sentence explains why: “How the balance will be struck may be expected to depend, to some extent, on the *nuanced judgments* of public employees and their superiors, *and also of courts*, on the scope of a public employee’s employment duties.”⁶⁵ Simply put, and as the cases bear out, the *Garcetti* rule necessitates nuanced judgments and fact-based examination of the nature of the employment.⁶⁶ In *Foraker*, the Third Circuit noted the “fact-intensive nature of this inquiry,” recognizing that, “[u]nlike the question of whether speech is protected by the First Amendment, the question of whether a particular incident of speech is made within a particular plaintiff’s job duties is a mixed question of fact and law.”⁶⁷

Before *Garcetti*, the court in a case like *Gorum* would have decided *as a matter of law* that the speech did not touch on matters of public concern; now, the court must decide as a matter of fact, or as a mixed question, whether the speech was uttered pursuant to the professor’s job responsibilities.⁶⁸ This raises rather than reduces the level of judicial “micromanaging” of the employment relationship and of judicial intrusiveness into the workplace, an area which I examine in more detail next.

63. *Foraker*, 501 F.3d at 250 (Pollak, concurring).

64. *Id.* Judge Pollak’s statement also undervalues the free speech interest. Since *Connick* eliminated judicial review of speech that is not of public interest, the *Garcetti* rule only concerns speech that is of *actual* (not “arguable”) public interest. The speech that *Garcetti* finds unprotected is speech that everyone agrees is important for the public to know precisely because it concerns the operation of government agencies. The free speech interests are discussed further below.

65. *Id.* (emphasis added).

66. See *Marable v. Nitchman*, 511 F.3d 924, 932 (9th Cir. 2007) (describing the “the inquiry into whether employee speech is pursuant to employment duties” as “a practical one”). The court found neither the employee’s job description nor the training manual to be dispositive. The court stated as follows:

Functionally, however, it cannot be disputed that [plaintiff’s] job was to do the tasks of a Chief Engineer on his ferry, and such tasks did not include pointing to corrupt actions of higher level officials whom he purportedly thought were abusing the public trust and converting public funds to their own use by overpayment schemes.

Id.

67. *Foraker*, 501 F.3d at 240. See also *Houlihan v. Sussex Tech. Sch. Dist.*, 461 F. Supp. 2d 252, 259-60 (D. Del. 2006); *Kougher v. Burd*, 2008 U.S. App. LEXIS 8296, at *8 (3d Cir. Apr. 16, 2008); *Hill v. Borough of Kutztown*, 455 F.3d 225, 241 (3d Cir. 2006) (“To state a First Amendment retaliation claim, a public employee plaintiff such as Miller must allege: (1) that the activity in question is protected by the First Amendment, and (2) that the protected activity was a substantial factor in the alleged retaliatory action.... The first factor is a question of law; the second factor is a question of fact.”).

68. See also *Reilly v. Atlantic City*, 532 F.3d 216, 227-28 (3d Cir. 2008) (remanding the case for “further factual development by the District Court” where the lower court had entered judgment in plaintiff’s favor prior to *Garcetti*, but where there had been “no argument, let alone fact finding, by the District Court as to whether Reilly’s speech was made pursuant to his official duties”).

V. *Garcetti* in the Workplace

The implications of *Garcetti* go beyond the scope of judicial review; the case raises serious concerns for the effective operation of government workplaces as well. As the Court noted, “[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection.”⁶⁹ But this encourages employees to speak out publicly about concerns they have about their work before trying to resolve the problem internally. As the dissent pointed out, by disallowing constitutional protection for speech within the employee’s official responsibilities, the *Garcetti* rule encourages public employees to complain *outside* of the scope of their employment. For instance, had Richard Ceballos criticized the government’s criminal investigation not in an internal memo but in a letter to the editor of the local newspaper, he would have been acting not as an employee but as a citizen, and his speech would have been constitutionally protected.⁷⁰ This would have given him “some possibility of First Amendment protection” which would have triggered constitutional balancing under *Pickering*.⁷¹ In any given case, a court may find that the employer’s interest in efficiency or effectiveness outweighs the employee’s interest in free speech. The employer might still win the case, but the result could not be considered a victory, since most employers would surely want their dirty linen to be aired within the confines of the office and not in the press. Moreover, many public employees are forbidden, by the terms of their employment, to speak to the press absent a supervisor’s authorization. Thus, they are in a double bind: if they air their concerns in-house, they may be subject to retaliation but if they air their concerns to the press, they have violated their employment contract and are likewise subject to disciplinary action. And employees who speak out both publicly and privately are nonetheless subject to retaliation for their internal speech within the scope of their responsibilities.

Speaking out only publicly is not only problematic from the employer’s perspective, but it is also contrary to practice. One scholar of whistleblowing has noted that:

[I]nternal reporting is the most common type of initial whistleblowing. Benefits of internal whistleblowing include facilitating the prompt investigation and correction of wrongful conduct and minimizing the organizational costs of whistleblowing by permitting employers to rectify misconduct confidentially, with little disruption to the employer-employee relationship. Internal whistleblowing also enables the correction of misunderstanding, which reduces the likelihood that the organization and its employees will unfairly suffer harm.⁷²

69. *Garcetti*, 547 U.S. at 423.

70. In *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), the Ninth Circuit considered a warden’s communications to outsiders about a prison’s failure to discipline inmates for certain behaviors. It held that communications with a California state senator and the California Inspector General were clearly protected under the First Amendment because plaintiff had acted as a citizen in complaining to an elected public official and an independent state agency on these matters of public concern. *Id.* at 545-46. However, the court also held that internal reports on the same subject “were not constitutionally protected.” *Id.* at 546. See also *Charles v. Grief*, 2008 U.S. App. LEXIS 6275, at *13-14 (5th Cir. Mar. 26, 2008) (discussed at note 34).

71. The employee may try to protect him- or herself by speaking out anonymously, but this may not provide effective protection, given the sporadic coverage of shield laws and the press’s ability to reveal sources notwithstanding a contract. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). See Note, Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick’s Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc’y 45 (2007).

72. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1760 (2007) (noting that although most “state and federal statutes designate only an external recipient,” Section 806 of Sarbanes-Oxley “is unusual in specifying internal whistleblowing as an appropriate channel,” thereby following “common whistleblower practice” (referring to Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(1) (Supp. II 2002))).

The cases demonstrate that for most employees, speaking out publicly against their employer is only a last resort.

Even limiting the speech to within the office produces what might be a counter-intuitive result: an employee's speech is more likely to be protected if it falls outside of her responsibilities than within her responsibilities. Thus, an employee who complains about unsafe working conditions risks her job if her job includes safety responsibilities, but might be constitutionally protected if her job included no responsibility for safety either because she was not in a managerial position or because safety was not within her area of expertise.⁷³ This is particularly problematic for employees like ombudsmen and compliance officers, whose very job it is to rout out wrongdoing and internal violations wherever they may find them.⁷⁴ If they raise problems to their supervisor as they are required to do, they may be subject to retaliation; but if they don't, they may be disciplined for not doing their job. In addition, as one commentator has pointed out, this may be a special problem for national security employees, whose employers could reasonably argue that "the overall national security interest of the agency makes protecting that interest an official duty of the employee."⁷⁵ But it is equally true of most other employees who could reasonably be expected to report safety violations, misconduct by fellow employees or other important issues relating to their job. The "special knowledge and expertise" test adopted by the Third and Fifth Circuits may cast a wide net indeed.

The *Garcetti* Court's response is simply that "[a] public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism."⁷⁶ Thus, whether speech of public concern is protected becomes a matter of government employer grace. The Court cautions that the employer may not draw the employee's job description so broadly that it includes all forms of speech; courts should engage in a meaningful evaluation to determine the realistic contours of the employee's official duties.⁷⁷ But as we have seen, many courts have drawn the employee's job description more broadly than employers themselves.

VI. *Garcetti* in the Marketplace of Ideas

As a matter of public policy, the *Garcetti* rule may be problematic in one additional, though immeasurable, way. It has the potential to diminish the quantum of speech about issues of public concern that finds its way to the "marketplace" of ideas.⁷⁸ From a constitutional standpoint, the most significant concern about *Garcetti* is how the Court treated speech

73. See, e.g., *Lindsey v. City of Orrick*, 491 F.3d 892, 898 (8th Cir. 2007) (finding a city's public works director's speech about compliance with sunshine laws to be protected because it was not within his job responsibilities) (discussed at note 28).

74. See *Wilburn v. Robinson*, 468 F.3d 1140, 1151 (D.C. Cir. 2007) ("Wilburn's statements regarding discrimination ... [are unprotected under *Garcetti*] because they were made by [a public employee] expressly charged with exposing governmental misconduct. Indeed, Wilburn was hired not only to direct personnel matters in OHR but also to root out discrimination in the District government and, thus, when Wilburn commented on racial discrimination in the performance of her duties, she did not speak as a citizen.").

75. Jaime Sasser, Comment: *The Silenced Citizens: the Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759, 760 (2007). "As a result, national security employees cannot speak about even ordinary official duties, such as filling out forms, reporting budgeting mistakes, or any other matter that the government can tie to a national security interest, regardless of whether the employee speech is related to an official job duty." *Id.*

76. *Garcetti*, 547 U.S. at 424.

77. *Id.* at 424-25.

78. See *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

that is of dual nature: it is both part of the job *and of public concern* (as the speech admittedly was in *Garcetti* itself). The Court might have said that speech that is of public concern has such obvious First Amendment value that it should be protected even if it was uttered pursuant to official duties.⁷⁹ Or, it might have said that a *per se* rule is inappropriate in this situation and that courts will have to consider in each case how valuable the speech is from a First Amendment standpoint in order to determine whether speech-based discipline was permissible.⁸⁰ Instead, it held that the First Amendment value of such speech is nil because the employer's interest in control over the employee *invariably* trumps both the employee's interest in speaking out and the public's interest in receiving the information of admitted public concern. The recent Third Circuit case of *Kline v. Valentic*⁸¹ illustrates the problem. Where a police officer complained about misconduct by another, the Court of Appeals said that "as a general matter, police misconduct constitutes a matter of public concern."⁸² However, the speech lost its constitutionally protected character because Kline complained up the chain of command and not in any public forum and because "his actions in no way indicated that he wanted the public to know" about the misconduct.⁸³ The narrowing of the scope of constitutionally protected speech in *Garcetti* is consistent with other cases in which the Rehnquist and Roberts Courts have sided with management interests over employee claims,⁸⁴ as well as with recent First Amendment cases in which the Supreme Court has expanded the scope of governmental authority to restrict speech when the government is acting in non-regulatory roles such as manager,⁸⁵ educator,⁸⁶ and proprietor.⁸⁷

79. This would have been consistent with the cases *Pickering* and *Connick*, which distinguished between speech of public importance and private speech, but which did not distinguish between speech made pursuant to official duties or not.

80. It is true that either of these alternatives would have involved federal courts in many employment disputes, but there are several important rejoinders to this. The first is that ensuring that individuals' constitutional rights are protected is one of the most important functions of federal courts. To say that this would encroach on federalism and separation of powers values is to devalue the countervailing interests in individual constitutional rights. The second rejoinder is that, as a practical matter, the Court's rule has not diminished federal court litigation over employment disputes, but shifted it. As described above, instead of deciding the legal question of whether the speech was protected, courts are now busy with the threshold question of whether the speech was within the employee's official duties — an inquiry which is time-consuming and fact-specific and perhaps much more intrusive into the employer-employee relationship than the constitutional question of the status of the speech. See Note, Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick's Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc'y 45 (2007) on the litigation over the boundaries of the "per se" rule of *Garcetti*.

81. 283 Fed. Appx. 913 (3d Cir. 2008).

82. *Id.* at 916.

83. *Id.*

84. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007); *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2157 (2008).

85. *United States v. American Library Association*, 539 U.S. 194 (2003).

86. *Morse v. Frederick*, 551 U.S. 393 (2007).

87. *Int'l Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991). See Andrew Bernie, *Recent Development: a Principled Limitation on Judicial Interference: Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), 30 HARV. J.L. & PUB. POL'Y 1047, 1056 (2007) ("The Court seemed animated by similar principles in *Rust v. Sullivan*, where it held that Congress could constitutionally withhold government funds from recipients who counseled abortion as a method of family planning... *Rust's* relevance, which *Garcetti* reaffirmed in only a slightly different context, is that the public has the right to expect its government to work toward ends that have been 'democratically agreed upon.'").

But in none of these other areas has the Court decided that an entire category of speech that concerns matters of public importance, such as the functioning of governmental agencies, lies outside of First Amendment protection. As one commentator has noted, when the Court engages in such “categorical balancing” (that is – deciding whether a whole category of speech is protected or not), it has almost invariably decided that the category of speech *was* protected, with the sole exception of child pornography — which has, of course, no public importance.⁸⁸

The diminution of speech about issues of public concern is problematic from two perspectives. For the speaker, who would otherwise be motivated to speak, the *Garcetti* rule may force an employee to choose between her conscience and her job. For the public, the *Garcetti* rule may result in a marked diminution of information about how our government is run, if those who are most likely to have “special knowledge and experience” are less likely to speak out, whether it is about mis-statements in an affidavit supporting a warrant, or cost overruns or corruption at government agencies, misconduct in a high school, or safety at a firing range. If, as the Supreme Court told us in 1964, there continues to be a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”⁸⁹ the hidden costs of the *Garcetti* rule may be significant.⁹⁰

The Court’s response to this charge was that “the powerful network of legislative enactments — such as whistleblower protection laws and labor codes” along with the “rules of conduct and constitutional obligations apart from the First Amendment” that govern public attorneys, as well as “obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws,” protect government employees from speech-based retaliation even in the absence of First Amendment protection.⁹¹ But this may overstate the level of protection that exists for public employees. The principal sources of protection — whistleblower statutes — are sporadic and limited in scope.⁹² Indeed, in partial response to *Garcetti*, the Senate passed a bill designed to overturn some of its effects, although it has not so far become law.⁹³ In any event, the possibility of legislative protection should not detract from the mandate of constitutional protection.

88. “The recent trend in the Court, with the unique exception of child pornography, has been to use categorical balancing to expand First Amendment-protected speech.” Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 570 (2008).

89. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

90. *See Marable v. Nitchman*, 511 F.3d 924, 932 (9th Cir. 2007) (finding protected the speech of an engineer for the Washington State Ferries concerning alleged corrupt practices by management). The court stated as follows:

At the outset, we think it worth noting that an employee’s charge of high level corruption in a government agency has all of the hallmarks that we normally associate with constitutionally protected speech. The matter challenged was a matter of intense public interest, had it become known, and criticisms of the government lie at or near the core of what the First Amendment aims to protect.

Id.

91. *Garcetti*, 547 U.S. at 425.

92. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1767 n.66 (2007).

93. “Senate bill 494 was passed as an amendment to the 2007 National Defense Authorization Act, 96-0 on June 22, 2006. The Senate bill was passed to overturn the Supreme Court decision of *Garcetti v. Ceballos*.” Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1767 n.66 (2007).

Ultimately, there is no real way to measure *Garcetti's* effect on speech. The cases considered here tend to protect the employer who seeks to control the workplace environment at the expense of speech that concerns matters of public importance. However, these cases may understate the important speech that is lost under the new rule, since this review obviously does not take into account the cases that did not arise because the speech criticizing government policies or activities was not said.

CONSEQUENCES OF A CRIMINAL CONVICTION FOR ALIEN CLIENTS

Rick Hogan*

As Delaware's foreign-born immigrant population grows, state criminal defense attorneys, judges, and prosecutors are increasingly faced with legal issues concerning the federal immigration consequences of a state criminal conviction. The Immigration and Nationality Act ("INA") provides severe consequences for criminal convictions by non-U.S. citizen aliens. A criminal conviction may make an alien removable from, or inadmissible to, the United States.¹ Removal, formally referred to as deportation, requires the federal government to charge an individual with specific statutory violations under the INA and to prove those charges during proceedings before an immigration judge. Inadmissible aliens are aliens who are attempting to obtain entry into the United States or aliens who are in the United States and are seeking to change their legal status to permanent resident status.

"Aliens" include "any person, not a citizen or national of the United States."² Aliens are of three types: immigrants who are lawful permanent residents, commonly referred to as "green card" holders; non-immigrants who have temporary legal status, for example, visitors, students, and non-immigrant workers; and illegal aliens, individuals who either entered the country illegally or who entered the country legally but have remained beyond an authorized temporary stay.³

Citing data released in the United States Census Bureau's American Community Survey Hispanic report, the *Delaware News Journal* reported in February 2007, that Hispanics make up 5.9 percent of Delaware's population, or about 50,000 residents.⁴ The report, based on 2004 data, shows a 23 percent increase since 2000. The Census Bureau also reported Delaware's Asian population increased from about 2 percent to 2.8 percent between 2000 and 2004.⁵

Many of Delaware's foreign-born residents — both those with a legal status and those without — have U.S. citizen children, are married to a U.S. citizen, or have other immediate U.S. citizen family members. A state criminal conviction, even for what appears to be a minor offense, can trigger severe federal immigration consequences for an alien's entire family. In some cases, the immigration consequence of an alien's state criminal conviction far outweighs the state criminal punishment imposed. A Delaware misdemeanor theft conviction, for example, can make an alien removable or inadmissible. Criminal defense strategies, therefore, should include careful evaluation of the immigration consequences. Defense attorneys should seek to inform judges and prosecutors of the likely consequences of specific convictions. For a legal permanent resident, what appears to be a minor state conviction can result in a life-long sentence.

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1. 8 U.S.C. § 1182(a)(2).

2. *Id.* § 1101(a)(3).

3. *Id.* § 1101(a)(15)(A)-(V).

4. Summer Harlow, *Immigrants change the face of Delaware*, DELAWARE NEWS JOURNAL, Feb. 17, 2007, available at <http://www.delawareonline.com/article/20070217/NEWS/702170313/1006>.

5. Both survey reports referred to in the News Journal article are available in PDF-form on the United States Census Bureau website: www.census.gov.

I. What Constitutes a Conviction?

A conviction for federal immigration purposes is a formal judgment of guilt, or if a judgment is withheld, where there is some type of plea, and/or admission of facts warranting guilt and the imposition of some type of penalty.⁶ A juvenile court disposition, however, is not a conviction for immigration purposes.⁷ Delaware's probation before judgment ("PBJ") provides a means for certain first offenders to avoid having a conviction entered against him or her. However, a PBJ would be a conviction for purposes of the INA if there is an admission of guilt and even a minor penalty is imposed.⁸

II. Types of Conviction that Trigger Immigration Consequences

The INA lists several categories of crimes for which a conviction can place an alien at risk of either removal or inadmissibility, including aggravated felonies,⁹ Controlled Substance Offenses,¹⁰ and Crimes Involving Moral Turpitude.¹¹

An aggravated felony is defined in the INA by reference to a list of twenty-one categories of criminal offenses.¹² Any offense described within that definition, "whether in violation of Federal or State law," is an aggravated felony.¹³ An alien convicted of an aggravated felony is ineligible for most forms of relief from removal; a conviction, therefore, could trigger automatic deportation without the usual rights of appeal and would further result in a permanent bar against returning to the United States.

However, for immigration purposes a crime that is not a felony under Delaware criminal law could be considered a felony for purposes of an alien's immigration status. For example in Delaware, theft is a class A misdemeanor unless the value of the property received, retained, or disposed of is \$1,000 or greater.¹⁴ The sentence for a class A misdemeanor may include one-year incarceration at Level V.¹⁵ A commonly ordered Delaware misdemeanor theft sentence includes a one-year sentence, suspended for all but a matter of days or months. Such a conviction and sentence would be considered an aggravated felony, under section 101(a)(43)(G) of the INA: an "aggravated felony" is "a theft offense (including receipt of

6. 8 U.S.C. § 1182(a)(48).

7. Matter of Devison, 22 I. & N. Dec. 1362, 1373 (B.I.A. 2000); Matter of Ramirez-Rivero, 18 I. & N. Dec. 135 (B.I.A. 1981).

8. DEL. CODE ANN. tit. 11, § 4218.

9. 8 U.S.C. § 1227(a)(2)(iii).

10. *Id.* § 1227(B).

11. *Id.* § 1227(a)(2)(A)(i).

12. See, e.g., *id.* § 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"); § 1101(a)(43)(F) ("a crime of violence ... for which the term of imprisonment [is] at least one year"); § 1101(a)(43) ("a theft offense ... or burglary offense for which the term of imprisonment [is] at least one year").

13. *Id.* § 1101(a)(43).

14. DEL. CODE ANN. tit. 11, §§ 4205(b)(7); § 841; § 841(c)(1).

15. *Id.* § 4206(a).

stolen property) or burglary offense for which the term of imprisonment is at least one year.” The one-year determination is governed by the alien’s actual sentence, not, for example, a suspended sentence.¹⁶ Therefore, a Delaware misdemeanor theft conviction with a 364-day sentence avoids triggering the INA’s aggravated felony definition.

Even if a theft offense is not an aggravated felony (because, for example, the term of imprisonment imposed is less than one year), it could still be considered a crime involving moral turpitude under the INA.¹⁷ Any alien, including a lawful permanent resident, who is convicted of a crime involving moral turpitude, committed *within five years of admission*, and is convicted of a crime for which a sentence of one year or longer *may* be imposed (even if the sentence imposed is less than one year) is removable under the INA.¹⁸

It should be noted that the United States government often charges an alien as being removable under several different sections of the INA, even though only one crime occurred. As described above, crimes such as theft can be both a removable offense and an inadmissible offense in certain situations.

III. Crimes Involving Moral Turpitude

The definition of moral turpitude has been defined by immigration case law and is, as a result, extremely broad. Moral turpitude crimes include fraud, thefts, burglaries, robberies, murder, manslaughter, conspiracy related crimes, and drug trafficking.

Aliens who have multiple convictions involving moral turpitude, not arising out of a single scheme, are both deportable and inadmissible.¹⁹ A single scheme has been defined under immigration law as a situation where an alien did not have any opportunity between the commission of two crimes to reflect or think about the crimes, or the crimes occurred as a result of a single action.²⁰ Two separate misdemeanor convictions can trigger removal proceedings. A single conviction of a moral turpitude crime that provides for a penalty of less than one year will normally not result in removal.

16. *Singh v. Ashcroft*, 383 F.2d 144, 162 (3d Cir. 2004) (citing *U.S. v. Graham*, 169 F.2d 787, 790-91 (3d Cir. 1999)).

17. 8 U.S.C. § 1227(a)(2)(A)(II). Although “moral turpitude” is not defined by statute, the United States Court of Appeals for the Third Circuit affirmed two approaches for defining it in *Partyka v. Attorney General of United States*, 417 F.3d 408, 413 (3d Cir. 2005). The court said moral turpitude includes “conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general.” *Id.*

The court also approved a longstanding test employed by the Board of Immigration Appeals (“BIA”) to determine the existence of moral turpitude in removal proceedings that asks “whether the act is accompanied by a vicious motive or corrupt mind.” *Id.* (internal citations omitted).

In addition, the court approved the BIA’s alternate approach in which moral turpitude is found to inhere in serious crimes committed recklessly, *i.e.*, “with a conscious disregard of a substantial and unjustifiable risk that serious injury or death would follow.” *Id.* at 414.

The court declared that “[u]nder either standard, the hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation.” *Id.*

18. 8 U.S.C. § 1101(43)(G).

19. *Id.* § 1182(a)(2)(B).

20. *Matter of Amentia*, 20 I. & N. Dec. 506, 509–10 (B.I.A. 1992) (holding that in order for multiple crimes to be considered a “single scheme” ... there must be no substantial interruption that would allow the participant to disassociate himself from his enterprise and reflect on what he has done”).

IV. Controlled Substance Conviction

Under the INA, a single conviction for any controlled substance triggers inadmissibility.²¹ Specifically, any drug conviction, other than for the personal use of thirty grams or less of marijuana, provides for removal and/or inadmissibility.²² In some cases, a conviction for a second offense of possession may qualify as an aggravated felony depending on the circumstances.

As defined under other aggravated felony convictions, convictions related to drug trafficking provide for removal and inadmissibility. Almost any state or federal drug offense involving the sale, distribution, or manufacture of drugs qualifies as a trafficking offense under the INA, and therefore a conviction mandates removal.²³ Specifically, distribution and possession with intent to distribute and conspiracy to violate the federal Controlled Substance Act are removable offenses.²⁴

Given the interplay of the immigration code and state criminal law, a comprehensive review of possible immigration consequences is required in order to sort all issues resulting from a criminal conviction.

V. Other Common Convictions That Result In Deportation

The INA includes several types of commonly committed crimes that, if convicted, make an alien deportable, including, for example, violations of protective orders, domestic violence, and stalking or child abuse.²⁵ Crimes of violence found in Section 16 of Title 18 of the United States Code committed against a variety of family members, former spouses, or a person with whom the convicted shares a child in common result in deportation.²⁶ Conviction of nearly any firearms offense — sale, purchase, using, owning, possession, or conspiracy thereof — also triggers deportation.²⁷

VI. Waivers And Other Forms Of Relief From Removal

An Immigration Judge decides whether an alien is inadmissible to or removable from the United States.²⁸ The local office of Chief Counsel, Immigration and Customs Enforcement for the United States Department of Homeland Security prosecutes immigration cases. Immigration proceedings are civil proceedings.²⁹

21. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

22. *Id.* §§ 1227(a)(2)(B); § 1182(a)(2)(B); § 1182(a)(2)(B).

23. *Id.* § 1101(43)(B).

24. *Id.* § 1182(a)(2)(A)(ii)(C).

25. *Id.* § 2227(E).

26. *Id.*

27. *Id.* § 1227(C).

28. *Id.* § 1229(a).

29. *Airsides v. Toughness*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”).

If an alien is found to be removable by an immigration judge, the immigration laws in some cases provide opportunities for an alien to seek a waiver that may allow him to remain in, or be admitted to, the United States. Because a conviction of an aggravated felony is an absolute bar to the type of waiver known as Cancellation of Removal,³⁰ and is likely to be a bar to a waiver of inadmissibility,³¹ it is important for criminal practitioners to consider the requirements of cancellation of removal before a plea is accepted. In many cases, even minor adjustments of the nature of the offenses or the length of the sentence for a crime can make all the difference for eligibility.

Cancellation of removal is applicable only in two situations, however. The first is for permanent residents who have resided in the United States for a minimum of seven years, with at least five years in permanent residence status.³² This form of relief also requires establishing that removal of the alien would cause extreme hardship on the alien's family members.³³ This waiver is commonly used for criminal aliens and is available for some felonies that are not aggravated felonies.

Convictions for theft or a violent offense in which the sentence imposed is even one day shy of a year may make an alien eligible for cancellation of removal. Judges and prosecutors in many cases are willing to agree to convictions or sentences that allow for immigration relief.

The second form of cancellation of removal waiver applies to non-permanent residents (i.e., illegal aliens) who have been in the United States for 10 years.³⁴ Proof of "good moral character" is required.³⁵ Because this form of relief is discretionary, virtually any criminal conviction could prevent an Immigration Judge from finding "good moral character" has been demonstrated.³⁶

Note that a conviction for possession of controlled substances cannot be waived unless the conviction is for possession of less than thirty grams of marijuana.³⁷ A waiver is not required for a misdemeanor because it does not qualify as an aggravated felony.

VII. Conclusion

Legal analysis of the potential immigration consequence of a criminal conviction of an alien is a complicated process. It is necessary, however, because a criminal conviction can have dramatic, long lasting consequences for an alien beyond the criminal penalty. Indeed, a state penalty or sentence is, in some cases the least of an alien's worries. By carefully evaluating potential immigration consequences to specific convictions, criminal practitioners may be able to develop a resolution that will allow the alien to avoid removal or to be eligible for a waiver or readmission into the United States.

30. 8 U.S.C. § 1229b.

31. *Id.* § 1229b(a)(3).

32. *Id.* § 1255(A)(b)(1)(B).

33. *Id.* § 1229b(a)(3).

34. *Id.* § 1229b(b)(1).

35. *Id.* § 1229b(b)(B).

36. *Id.* § 1101(f).

37. *Id.* § 1227.

RECENT DEVELOPMENTS IN DELAWARE BANKRUPTCY LAW

Brendan L. Shannon and Christopher J. Sontchi*

I. Standard For Determining Whether A Creditor May Be Treated As A “Non-Statutory Insider” For Purposes Of Extending The Time For Recovering Preferential Transfers

In *Schubert v. Lucent Technologies Inc. (In re Winstar Communications Inc.)*, the U.S. court of Appeals for the Third Circuit clarified the standard for determining whether a creditor is a “non-statutory insider” for purposes of extending the time in which the trustee may recover preferential transfers under section 547 of the Code.¹

The appeal arose out of a pre-petition “strategic partnership” between the debtor, Winstar Communications, Inc. (“Winstar”), and Lucent Technologies Inc. (“Lucent”), one of Winstar’s primary creditors and suppliers. Both the bankruptcy court and district court below had concluded, *inter alia*, that Lucent’s relationship with Winstar was such that Lucent was an “insider” of Winstar under the Code and, accordingly, the trustee could seek to recover for preferential transfers received from Winstar during the year before Winstar’s bankruptcy, rather than those received in the 90-day period before bankruptcy applicable to non-insiders. More specifically, the bankruptcy court had held that Lucent was an insider of Winstar under both section 101(31)(B)(iii), which makes a “person in control” of a debtor an insider, and as a “non-statutory insider.” The district court affirmed. Lucent appealed to the Third Circuit.

On appeal, Lucent argued that in order for a creditor to be an insider as either a “person in control” of the debtor or a non-statutory insider, that creditor must exercise “actual managerial control over the debtor’s day-to-day operations.”² The Third Circuit held otherwise.

Like the bankruptcy court before it, the Third Circuit held that “actual control (or its close equivalent) is necessary for a person or entity to constitute an insider under § 101(31)’s ‘person in control’ language.”³ The Third Circuit held that a finding of such control, however, is not necessary for an entity to be a so-called “non-statutory insider.”⁴ To hold otherwise “would render meaningless Congress’s decision to provide a non-exhaustive list of insiders in 11 U.S.C. § 101(31) (B) because the ‘person in control’ category would function as a determinative test.”⁵ In light of this, the Third

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1. 554 F.3d 382 (3d Cir. 2009).
2. *Id.* at 395 (quoting Appellant’s Br. at 32-33).
3. *Id.* at 396. The text of section 101(31) provides that “[t]he term ‘insider’ includes ... (B) if the debtor is a corporation- (i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor.” 11 U.S.C. § 101(31)(B).
4. A “non-statutory insider” is an entity that falls within the definition of insider but is not included in the non-exclusive list (due to the use of the word “includes,” of enumerated examples of insiders set forth in section 101(31) of the Code. *Schubert*, 554 F.3d at 395.
5. *Id.*

Circuit embraced the view taken recently by the Tenth Circuit “that it is not necessary that a non-statutory insider have actual control; rather, the question ‘is whether there is a close relationship [between debtor and creditor] and ... anything other than closeness to suggest that any transactions were not conducted at arm’s length.’”⁶

On the record before it, the Third Circuit found Lucent to be an insider of Winstar under this test. The Circuit held that the bankruptcy court’s “extensive findings regarding Lucent’s ability to coerce Winstar into transactions not in Winstar’s interest amply demonstrate Lucent’s insider status.”⁷ These included findings that Lucent controlled many of Winstar’s decisions relating to a specific project, forced the purchase of its goods well before the equipment was needed, and treated Winstar as a captive buyer for Lucent’s goods.

II. District Court Reversal Of Bankruptcy Court Finding That Chapter 11 Cases Were Filed In Good Faith And Remand To Bankruptcy Court For Dismissal

In *Bepco L.P. v. 15375 Memorial Corporation*,⁸ the district court reversed the bankruptcy court’s ruling that the debtors’ bankruptcy petitions were filed in good faith and remanded the case (as consolidated) to the bankruptcy court for dismissal.

Citing prior Third Circuit case law, the district court noted that chapter 11 bankruptcy petitions are subject to dismissal under section 1112(b) of the Code unless filed in good faith, and that “[w]hether the good faith requirement has been satisfied is a ‘fact intensive inquiry’ in which the court must examine ‘the totality of the circumstances’ and determine ‘where a petition falls along the spectrum ranging from the clearly acceptable to the patently abusive.’”⁹ Third Circuit case law also counsels that two questions relevant to the good faith inquiry are (i) whether the petition served “a valid bankruptcy purpose, e.g., by preserving a going concern or maximizing the value of the debtor’s estate,” and (ii) whether the petition was “filed merely to obtain a tactical litigation advantage.”¹⁰

Because the bankruptcy in question did not seek to preserve a going concern, the district court focused on whether the bankruptcy filing maximized the value of the debtors’ estates in answering the first question. The district court found that the record did not support the conclusion that the debtors’ petitions captured value for the estates that otherwise would have been lost. More specifically, the district court found that nothing in the record showed that each of the debtors’ major assets — composed primarily of settlement funds, intercompany receivables, and indemnity rights and claims — “would not be just as valuable — and just as accessible — outside of bankruptcy.”¹¹

As to the second question, the district court held that the record supported the conclusion that the debtors’ primary objective in filing the petitions — approximately two months before a major lawsuit against them was scheduled to go to trial — was to gain a tactical advantage in litigation. In reaching this conclusion, the district court held that the

6. *Id.* at 397 (quoting *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 (10th Cir. 2008)).

7. *Id.*

8. 400 B.R. 420 (D. Del. 2009).

9. *Id.* at 427 (quoting *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 118 (3d Cir. 2004)).

10. *Id.* (quoting *Integrated Telecom*, 384 F.3d at 119-20).

11. *Id.*

fact that the chapter 11 petitions were filed out of a desire to distribute efficiently the debtors' assets, without more, did not establish the debtors' good faith.

III. No Right To Triangular Setoff Under The Bankruptcy Code

In *In re SemCrude, L.P.*,¹² the bankruptcy court was faced with a motion from Chevron Products Company ("Chevron") seeking relief from the automatic stay to affect a "triangular setoff" of certain debts that were owed or owing between it and three separate debtors in a series of jointly administered cases. More specifically, Chevron owed a balance of approximately \$1.4 million to one of the debtors, SemCrude. Chevron was owed \$10.2 million by SemFuel, a second debtor, and an additional \$3.3 million by SemStream, a third debtor.¹³

Chevron argued that its contracts with each of the three debtors permitted it to set off the debt it owed to SemCrude against the debts owed to it by SemFuel and SemStream. But the debtors, the official committee of unsecured creditors, and a host of the debtors' creditors filed objections to Chevron's motion. These objections took issue with Chevron's argument that parties can contract around the Code's requirement in section 553 that debts be "mutual" in order to be set off. The objectors contended that triangular setoff is impermissible in bankruptcy, even if contemplated by a valid, pre-petition contract. Alternatively, the objectors argued that even if there was such a contract exception to the mutuality requirement, the contracts in the instant case failed to effect such a result.

The court did not address the latter argument. Rather, it held that Chevron was not permitted to effect such a setoff against the debtors because, as a matter of law, section 553 of the Code prohibits a triangular setoff of debts against one or more debtors in bankruptcy.

The court noted that section 553 of the Code does not create a right of setoff under the Code, but merely preserves any setoff right that a creditor may have under applicable non-bankruptcy law. Nonetheless, section 553 of the Code imposes additional restrictions on a creditor seeking to enforce its non-bankruptcy right to a setoff debts against a debtor. These restrictions include the requirement that "to effect a set off in bankruptcy, courts construing the Code have long held that the debts to be offset must be mutual, prepetition debts."¹⁴ The court also cited case law holding that, as a general rule at least, "triangular setoffs are impermissible in bankruptcy" because of the failure to meet the mutuality requirement.¹⁵

The court then discussed Chevron's contention that a valid, pre-petition contract — executed by a creditor, a debtor, and one or more third parties — either satisfies the mutuality requirement on its own or allows the parties to contract around the mutuality requirement found in section 553(a) if the contract provides that one or more parties to the agreement can elect to set off any debt it owes to one of the other parties against an amount owed to it by a different party to the agreement. The court observed that, "[a]t first blush, Chevron's position appears to enjoy a measure of support in the case law."¹⁶ Almost a dozen cases decided in the last three decades under the Code, and a smaller number of cases decided under the Bankruptcy Act of 1898 have observed that an exception exists along the lines of that espoused by

12. 399 B.R. 388 (Bankr. D. Del. 2009).

13. These amounts are approximations.

14. *Id.* at 393.

15. *Id.*

16. *Id.*

Chevron in this case. Nonetheless, the court noted that, upon closer inspection, “not one of these cases has actually upheld or enforced an agreement that allows for a triangular setoff; each and every one of these decisions have simply recognized such an exception in the course of denying the requested setoff or finding mutuality independent of the agreement.”¹⁷ The court also observed that “these decisions cite only to other cases that recognize this purported exception in dicta, or, in some of the more recent cases, to a short reference in *Collier on Bankruptcy*, which also relies on this same handful of decisions for authority.”¹⁸ Each of these cases, in turn, directly or indirectly traces back to a single case decided under the Bankruptcy Act of 1898, *In re Berger Steel Co.*¹⁹ The court in *Berger Steel* was faced with a request for triangular setoff. In analyzing the non-bankruptcy cases cited in favor of the setoff the court noted that all of the cases required the existence of a tripartite agreement, which was absent in the case before the court in *Berger*. Thus, the court held that, assuming the triangular setoff was permissible under the Act, it was nonetheless unavailable because the state law requirement of the existence of a tripartite agreement had not been met. The *Berger* court did not specifically hold that triangular setoff was permissible in bankruptcy.

Because of the history of these cases and the fact that no binding authority on the question exists, the court conducted its own analysis of two distinct questions. First, the court analyzed whether debts owing among different parties may be considered “mutual” when there are contractual netting provisions governing all parties’ business relationship. Second, the court examined whether, if the answer is “no” to the first question, a “contractual exception” exists to section 553’s mutuality requirement.

In answering the first question, the court noted that section 553 speaks only of setting off mutual debts. Therefore, the court concluded that, in determining whether a tripartite agreement that contemplates a triangular setoff can create mutuality for purposes of section 553, the court must scrutinize the meaning of the term “mutual debt” as it is used in that section. Because the term is not defined by the Code, the court looked to the definition of mutuality embraced by other courts tasked with interpreting section 553, and noted that “[i]t is also widely accepted that ‘mutuality is strictly construed against the party seeking set off.’”²⁰

Observing that “the overwhelming majority of courts to consider the issue have held that debts are mutual only if ‘they are due to and from the same persons in the same capacity,’”²¹ the court held that construing this definition narrowly means “that ‘each party must own his claim in his own right severally, with the right to collect in his own name against the debtor in his own right and severally.’”²² The court then concluded that mutuality cannot be supplied by a multi-party agreement contemplating only a triangular setoff. The court reasoned that, unlike a guaranty of debt where the guarantor is liable for making a payment on the debt it has guaranteed, an agreement to set off funds does not create an indebtedness from one party to another. The court further held that an agreement to set off funds, such as the one claimed by Chevron, does not give rise to a debt that is “due to” Chevron and “due from” SemCrude. Or, put another way, “[a] party such as SemCrude does not have to actually pay anything to a creditor such as Chevron under a tripartite setoff agreement; rather,

17. *Id.* at 394.

18. *Id.* (citing 5 COLLIER ON BANKRUPTCY ¶ 553.03[3][b][ii], at 553-31 (15th ed. rev. 2008)).

19. 327 F.2d 401 (7th Cir. 1964).

20. *SemCrude*, 399 B.R. at 396 (citing *In re Bennett Funding Group, Inc.*, 212 B.R. 206, 212 (2d Cir. BAP 1997)).

21. *Id.* (collecting cases).

22. *Id.* (collecting cases).

it only sees one of its receivables reduced in amount or eliminated. SemCrude does not owe anything to Chevron. Thus, there were no debts in the case before the court owed between the ‘same persons in the same capacity.’”²³

Moreover, the court held that Chevron did not have a “right to collect” against SemCrude under their agreement. At most, the agreement of the parties would have given Chevron a “right to offset” — a right to pay less than it would otherwise have to pay to the extent of the setoff. The agreement did not call for SemCrude to make a payment to Chevron, however. Consequently, the court observed, the agreement did not call for Chevron to “collect” anything from SemCrude. Chevron was, thus, without a “right to collect” from SemCrude.

The court found further support for its holding in the express language of section 553 of the Code, which speaks only of “the ‘right of a creditor to offset a mutual debt owing by *such* creditor to the debtor that arose before the commencement [of the bankruptcy case] against a claim of *such* creditor against the debtor that arose before the commencement of the case.’”²⁴ Chevron and SemCrude did not fall within the terms of this language because the statute only allows for setoff of debts between a single creditor and a single debtor, and SemCrude does not owe Chevron anything. Moreover, the court noted, Chevron did not even have a claim against SemCrude because to have a claim it must have a “right to payment” from SemCrude, or “a ‘right to an equitable remedy for breach of performance if such breach gives rise to a right to payment;’”²⁵ and SemCrude had neither.²⁶ Accordingly, the court held that non-mutual debts cannot be transformed into a “mutual debt” under section 553 simply because a multi-party agreement allows for setoff of non-mutual debts between the parties to the agreement.

The court then addressed whether there is a “contract exception” to the mutuality requirement found in section 553. The court found that nothing in the language of section 553 would permit it to recognize such an exception, and that policy considerations also counseled against allowing such an exception. Consequently, the court refused to recognize such an exception, and the court denied Chevron’s motion for relief from the automatic stay.²⁷

IV. Denial Of Confirmation Of Plan Of Reorganization Due To Discriminatory Settlement Contained Therein

The court in *In re Nutritional Sourcing Corp.*²⁸ was faced with a group of creditors who contended that their claims were unfairly discriminated against in a chapter 11 liquidation plan submitted to the court for confirmation. The

23. *Id.* at 397.

24. *Id.* (quoting 11 U.S.C. § 553(a)).

25. *Id.* at 398 n.8 (quoting 11 U.S.C. § 101(5)).

26. The court overlooked the fact that 11 U.S.C. § 102(2), the Code’s construction section, provides that “a ‘claim against the debtor’ includes [a] claim against the property of the debtor.” This oversight does not affect the Court’s ultimate ruling, however, because Chevron did not have a claim against the property of SemCrude for the same reason that Chevron did not have a claim against SemCrude itself: because Chevron did not have a “right to payment” from the Chevron receivable, just as it did not have a right to payment from SemCrude. If Chevron’s triangular setoff agreement were enforced as written, it would not have been entitled to receive any payment from SemCrude or its receivables — it would only have been entitled to pay less or, in this case, nothing, to SemCrude. A “right to pay less or nothing” is not the same as a “right to payment.”

27. Chevron later sought reconsideration of the court’s opinion, arguing for the first time that its contracts with the debtors were “forward contracts” and/or “swap agreements” that fall under the so-called “safe harbor provisions” of the Code, and that as a result the general rules for set-off should not apply. The court denied the motion for reconsideration and Chevron appealed.

28. 398 B.R. 816 (Bankr. D. Del. 2009).

court concurred, finding that the plan improperly classified the creditors' claims in violation of sections 1122 and 1123(a) (4) of the Code, which require equal treatment for substantially similar claims.

The case involved three separate debtors, Nutritional Sourcing Corporation ("NSC"), Pueblo International, LLC ("Pueblo"), and FLBN, LLC ("FLBN"), which together operated a chain of supermarkets. The dispute in question had its origins in an earlier bankruptcy of NSC, the corporate parent of Pueblo and FLBN. NSC filed for bankruptcy in 2002 and emerged in 2003. An integral part of NSC's 2003 reorganization was the issuance by NSC of senior secured notes dated June 5, 2003 that were issued in exchange for certain other senior secured notes that were due on August 1, 2003. The holders of the existing notes requested that the new notes be supported by secured guarantees by NSC's subsidiaries. NSC resisted this request and, instead, the Restated Subordinated Intercompany Real Estate Note dated June 5, 2003 was executed by Pueblo in favor of NSC (the "Mirror Loan Note"). Because NSC, as a holding company, did not have assets of its own to make payments on the new senior secured notes, the Mirror Loan Note provided for a transfer of funds from Pueblo to NSC and was secured by certain of Pueblo's real estate.

In order to assure Pueblo's trade creditors that they would be paid ahead of NSC's creditors, though, a subordination provision was added to the Mirror Loan Note. In particular, the Mirror Loan Note provided that payment would be "subordinate to *all* claims of any trade creditors of [Pueblo]." ²⁹ The Mirror Loan Note did not include a definition of "trade creditor," however, nor did the senior note indenture executed in connection with the new senior secured notes and the Mirror Loan Note. This lack of definition in the Mirror Note and the subsequent definition in the plan of liquidation led to the dispute at issue.

The plan provided for dividing Pueblo's general unsecured creditors into two sub-classes — Class 4A: Pueblo Trade Claims ("Pueblo Trade Claims") and Class 4B: Pueblo General Unsecured Claims ("Pueblo General Unsecured Claims"). The plan defined "Pueblo Trade Claim" to include, essentially, only those creditors who had supplied Pueblo with groceries and other merchandise to be used as inventory in Pueblo's business.

The objecting parties' arguments hinged on the proposed plan's definition of Pueblo Trade Claims. The objectors argued that the definition sought to redefine the term "trade creditor" as included in the Mirror Loan Note. This distinction was important because, according to the disclosure statement filed with the proposed plan, Pueblo Trade Claims, totaling approximately \$27 million were to be paid 100% on allowed claims, while Pueblo General Unsecured Claims, totaling approximately \$79 million were only to receive an estimated recovery of 13.2% on allowed claims.

Although the plan proponents attempted to invoke the use of the term "trade creditor" within the supermarket industry to argue otherwise, the court found that the term trade creditor, as used in the Mirror Loan Note, encompassed the "commonplace, unambiguous meaning" of the term under applicable New York law, which was defined by the court as "someone who provides a good or service in the ordinary course of business and to whom debt is owed."³⁰ "Accordingly," the court held, "the definition of Pueblo Trade Claim in the Plan altered the definition of 'trade creditor' as intended by the parties to the Mirror Loan Note, likely to the surprise of many trade creditors."³¹

This led the court to conclude that the definition of "Pueblo Trade Claim," and, consequently, the definition of "trade creditor," was a "settlement" that the court had to evaluate under Federal Rule of Bankruptcy Procedure 9019, which sets the standards to be used in deciding whether to approve or reject a settlement. Of the four factors courts have laid out to determine whether a settlement is fair and reasonable, the court noted that three were relevant in the evaluation

29. *Id.* at 820 (quoting Doc. # 1676, ex. A, p. 2 (emphasis added)).

30. *Id.* at 827.

31. *Id.* at 832.

of the settlement constituted in the definition of Pueblo Trade Claim: (i) the probability of success in litigation; (ii) the complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and (iii) the paramount interest of creditors. The court found that the first two factors are closely intertwined and that both factors marginally weighed in favor of approval of the settlement and of the plan.

But the third factor led the court to reject the settlement. The court found that “[t]he compromise that is the definition of Pueblo Trade Claim severely adversely impacts ‘non-goods’ trade creditors who were not at the negotiating table and who were not adequately represented in their absence.”³² Furthermore, the court found that the parties negotiating settlement were the senior secured note holders and three “goods” trade creditors. While the official committee of unsecured creditors was a party to the negotiations and owed a fiduciary duty to the unrepresented non-goods trade creditors, the composition of the committee was such that it could not be said to adequately represent the non-goods trade creditors in the negotiations. Consequently, the court held that it “cannot hold that a settlement was fair and equitable under Rule 9019 when those parties whose rights were severely adversely impacted were not afforded meaningful participation in the negotiations.”³³

In doing so, the court also rejected the plan proponents’ argument that the non-goods trade creditors voiced their opinion when they voted to accept the plan, contending that the court should take the vote as a demonstration of approval for the settlement. Nonetheless, the court held that the fact that eight non-goods trade creditors were currently objecting to the plan and only one of these creditors affirmatively voted against the plan did not indicate that such an inference was warranted. This conclusion was bolstered by statements from some of these creditors proclaiming that they did not understand that their claims had been reclassified until after voting on the plan. Thus, the court denied confirmation of the plan.³⁴

V. Overruling Objection To Confirmation Of Plan Of Reorganization Based On The Argument That Plan Inappropriately Substantively Consolidates The Estates, Unfairly Discriminates Among Similarly Situated Creditors And Does Not Provide A Recovery To Creditors That Is Better Than They Would Receive In Chapter 7

In *In re New Century TRS Holdings, Inc.*,³⁵ the debtors’ prepetition operations consisted of the origination, servicing and purchase of mortgage loans, as well as the sale of mortgage loans through whole loan sales and securitization. The debtors filed for chapter 11 and a confirmation hearing was held on the proposed chapter 11 plan.

The plan contained the following salient features:

- **Debtor Groups:** To facilitate distribution to unsecured creditors the plan separated the debtors into three distinct groups, based upon the function of each debtor entity (the “Debtor Groups”). Thus, the debtors were grouped into: (1) the Holding Company debtors; (2) the Operating Debtors; and (3) Access Lending.³⁶

32. *Id.* at 835.

33. *Id.* at 836-37.

34. *Accord In re New Century TRS Holdings, Inc.*, 390 B.R. 140 (Bankr. D. Del. 2008).

35. 390 B.R. 140 (Bankr. D. Del. 2008).

36. The Access Lending debtor group consisted solely of Access Lending, a subsidiary that provided warehouse financing to independent mortgage companies.

- **Classification of Claims:** The Plan classified claims based upon the three Debtor Groups. Thus, the Plan contained classes HC1 through HC13, which contained certain classes of claims against the Holding Company debtors, OP1 through OP12, which contained certain classes of claims against the Operating Debtors, and AL1 through AL3, which contained certain classes of claims against Access Lending. By way of illustration, Class HC3b, the sole dissenting class, consisted of “Other Unsecured Claims” against NCFC.
- **Treatment of Unsecured Claims:** The Plan provided for the distribution of the net cash available from the assets of the debtors in each Debtor Group to the holders of allowed unsecured claims against the debtors in that Debtor Group.
- **Claims Allowance:** The amount of allowed unsecured claims was determined by a set of formulas, resulting in a distribution amount. However, the distribution amount was also subject to certain protocols. These protocols were highly negotiated, and were designed to simplify the claims allowance process and to effect a settlement of certain potential litigation. The protocols included the following:
 - *The Multi-Debtor Claim Protocol:* This protocol adjusted the distribution amount for creditors holding allowed unsecured claims for which more than one debtor is jointly and/or severally liable. For example, a creditor holding allowed unsecured claims for which Holding Company debtors (i) NCFC and (ii) NC Credit are jointly and/or severally liable was assigned a distribution amount of 130% of the amount of its allowed unsecured claim against NCFC, and a distribution amount of 0% with respect to its claim against NC Credit.
 - *The Intercompany Claim Protocol:* This protocol addresses claims held by one debtor against another debtor. For example, all claims by one debtor in the Holding Company Debtor Group against another debtor in that same group were assigned a distribution amount of 0%. The same approach applies for debtors within the Operating Company Debtor Group. However, some intercompany claims were not completely wiped out. For instance, the claims by NCFC (in the Holding Company Debtor Group) against NCMC (in the Operating Company Debtor Group) received a distribution of 50%.

Out of the sixteen classes of claims eligible to vote, all but one voted in favor of the plan. The creditors that filed the sole unresolved objection to the plan were members of the rejecting class (the “Objecting Creditors”). The Objecting Creditors objected to confirmation of the Plan on three grounds: (1) the plan provided for substantive consolidation, which is precluded in the Third Circuit by *Owens Corning*;³⁷ (2) the plan did not provide for the same treatment of all claims within Class HC3b, the class containing the Objecting Creditors’ claims; and (3) the Plan failed to comply with the “best interests of creditors test” as required by § 1129(a)(7).

The court first turned to the substantive consolidation argument. Substantive consolidation, the court noted, is a construct of federal common law that treats separate legal entities as if they were merged into a single survivor, resulting in the claims of creditors against separate debtors being consolidated against the survivor. This may be detrimental to creditors. For example, in extreme cases, claims against the assets of a solvent company may be merged with claims against an insolvent entity where those claimants share the solvent company’s assets with creditors of the insolvent entity; thus, reducing the recovery for the solvent company’s creditors.³⁸

In *Owens Corning*, the Third Circuit eschewed a multi-factor test to determine whether substantive consolidation is permitted. Rather the court articulated the following guiding principles:

37. *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005).

38. Of course, this is advantageous for the insolvent company’s creditors.

1. Limiting cross-creep of liability by respecting entity separateness is a ‘fundamental ground rule.’ ... As a result, the general expectation of state law and of the Bankruptcy Code, and thus of commercial markets, is that courts respect entity separateness absent compelling circumstances calling equity (and even then only possibly substantive consolidation) into play.
2. The harms substantive consolidation addresses are nearly always those caused by debtors (and entities they control) who disregard separateness. Harms caused by creditors typically are remedied by provisions found in the Bankruptcy Code (e.g., fraudulent transfers, §§ 548 and 544(b)(1), and equitable subordination, § 510(c)).
3. Mere benefit to the administration of the case (for example, allowing a court to simplify a case by avoiding other issues or to make post petition accounting more convenient) is hardly a harm calling substantive consolidation into play.
4. Indeed, because substantive consolidation is extreme (it may affect profoundly creditors’ rights and recoveries) and imprecise, this ‘rough justice’ remedy should be rare and, in any event, one of last resort after considering and rejecting other remedies (for example, the possibility of more precise remedies conferred by the Bankruptcy Code).
5. While substantive consolidation may be used defensively to remedy the identifiable harms cause by entangled affairs, it may not be used offensively (for example, having a primary purpose to disadvantage tactically a group of creditors in the plan process or to alter creditor rights).³⁹

The court then found that:

With these principles in mind, the *Owens Corning* Court held that, absent consent, what must be proven regarding the entities for whom substantive consolidation is sought is that (1) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (2) post petition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.⁴⁰

The bankruptcy court then turned to the facts at issue in *New Century*. The proponents of the plan argued that the plan did not affect a substantive consolidation, but rather “embodies a global settlement which benefits all creditors by resolving a myriad of issues without the costs, delay and uncertainty of litigation.”⁴¹ Thus, the court found its task was to determine whether the plan was either a proper framework for the fair and efficient resolution of complex disputes, or merely a way of circumventing the prohibitions of *Owens Corning*.

First, the court held that the plan did not propose substantive consolidation in form. Substantive consolidation typically merges separate entities into a single entity, with the survivor holding all the assets and liabilities of the now-defunct entities. In contrast, the proposed plan fashioned three Debtor Groups based upon the function of the entities comprising that group in an attempt to resolve intercompany claims and issues regarding asset ownership. The court found

39. *New Century*, 390 B.R. at 150-60 (citing *Owens Corning*, 419 F.3d at 211).

40. *Id.* at 160.

41. *Id.*

that the framework recognized the separate business functions and creditor bodies of the respective groupings. Moreover, the court-approved procedures required creditors to file claims against specific debtor entities, allowing creditors holding claims against multiple entities to file claim against each.

Second, the court held the plan did not propose to work an effective substantive consolidation, since the plan's use of claim protocols mitigated the typical harms found in substantive consolidation. The court noted that one of the primary concerns with substantive consolidation is that creditors who rely on the separateness of companies are harmed because they are no longer able to look for satisfaction from more than one entity. The Multi-Debtor Claim Protocol avoids that harm. "The Multi-Debtor Claim Protocol is applicable when a creditor has valid claims against more than one Debtor and, therefore, has claims in multiple classes. The Multi-Debtor Claim Protocol adjusts the [distribution amount] of the multiple claims to a single claim that is less than 100% of each claim against the Debtors, but more than 100% of a single claim against the combined Debtor Group."⁴² The court then noted the second major concern with substantive consolidation is that it cancels inter-company claims. This harm was mitigated by the inclusion of the Intercompany Claim Protocol, which resolves many disputes over intercompany claims, but does not cancel those claims entirely.

The court then noted that, other than the single group of Objecting Creditors, the debtors "achieved a global agreement, settling all key intercreditor and inter-estate disputes through the use of numerous, tailored, interrelated protocols. This effect is far from the imprecise, 'rough justice' of substantive consolidation against which *Owens Corning* warns."⁴³ Instead, the court found, the plan "embodies thoughtful compromises that carefully preserve creditors' rights, rather than diminish or eliminate them."⁴⁴ Accordingly, the court held the plan did not provide for substantive consolidation.

Next, the court turned to the Objecting Creditors' argument that the plan does not comply with § 1123(a)(4), which requires that a plan shall "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."⁴⁵ The Objecting Creditors argued that the Plan, via the Multi-Debtor Claim Protocol, provided for better treatment for certain creditors in their class than they received. The proponents of the plan countered that the treatment characterized by the Objecting Creditors as better treatment for other creditors was, in fact, worse treatment. The court agreed, finding that for creditors in Class HC3b holding the same claim against other Holding Company entities, the Multi-Debtor Claim Protocol reduced their distribution:

By way of illustration, instead of receiving a 100% [distribution amount] on account of its HC3b claim against NCFC and a 100% [distribution amount] on account of its HC10b claim against NC Credit (for a total Determined Distribution Amount of 200%), a creditor holding a claim for which both NCFC and NC Credit are liable has agreed to accept one claim against the Holding Company Debtors' assets with a 130% Determined Distribution Amount.⁴⁶

Thus, rather than receiving more favorable treatment, Class HC3b provides worse treatment to certain creditors holding claim on which multiple debtors were jointly and/or severally liable, with their consent. Thus, the Multi-Debtor Claim Protocol did not violate section 1123(a)(4).

42. *Id.* at 161.

43. *Id.*

44. *Id.*

45. 11 U.S.C. § 1123(a)(4).

46. *New Century*, 390 B.R. at 163.

The court then analyzed whether the plan complied with section 1129(a)(7)'s "best interests of the creditors" test. The court found its task was to determine whether the Objecting Creditors, who voted against the Plan, "would receive more under the Plan as member of Class HC3b than they would if [the entity of which they were a creditor] were liquidated on its own in a chapter 7 case."⁴⁷ The court noted that under the liquidation analysis provided by the proponents of the plan, the Objecting Creditors would receive between 1.9% and 14.3% under the plan, and between 0% and 13.7% in a liquidation. As to the assumptions in the analysis, the court found sufficient evidence in the record to support the plan proponent's estimates. The court found that converting to Chapter 7 would result in substantial cost and delay. Moreover, the court found that the intricately negotiated settlements that were the bedrock of the plan would likely collapse if the case were converted. As such, the court held that the plan's treatment of the Objecting Creditors satisfied section 1129(a)(7).

Finally, the court turned to the approval of the settlements in the Plan. The court noted that, under section 1123(b)(3)(A), a plan may provide for settlements or adjustments of any claim or interest. However, citing *Exide Technologies*,⁴⁸ the court noted it was under a duty to determine that the proposed compromise is fair and equitable. Furthermore, the Third Circuit has established four factors for consideration analyzing a proposed settlement: "(1) the probability of success in litigation, (2) the likely difficulties in collection, (3) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it, and (4) the paramount interest of the creditors."⁴⁹

Analyzing the plan, the court first noted that it constituted a global settlement of various claims and issues, which would likely fail if any one of the particular compromises were not approved. Citing *Exide Technologies*, the court found its duty in evaluating the merits of the litigation was to determine whether the settlement was reasonable in light of the potential litigation. As such, the settlement was clearly reasonable. Next, the court found that because the disputes being settled were largely intercompany disputes, the substantial expenses of such litigation would adversely impact the various entities' likelihood of collection. Third, the court found that the size and complexity of the potential claims would lead to lengthy, expensive trials. Finally, the court found that, as displayed in the overwhelming acceptance of the plan, the settlements were in the interest of the creditors. For those reasons, the court concluded the settlements contained in the plan were fair and equitable.⁵⁰

Accordingly, the court overruled the Objection of the Objecting Creditors and confirmed the Plan.

VI. Claims Under WARN Act Arising From Pre-Petition Termination Of Employment Are Not Administrative Claims Under Section 503(b)(1)(A)(ii), Rather They Are Priority Unsecured Claims Under Section 507(a)(4)-(5) Up To The Statutory Cap After Which They Are General Unsecured Claims

In *Henderson v. Powermate Holding Corp. (In re Powermate Holding Corp.)*,⁵¹ the bankruptcy court was presented with a question "of first impression in this Circuit" — whether WARN Act claims are entitled to administrative priority in bankruptcy following the 2005 amendments to section 503 of the Code governing administrative claims.

47. *Id.* at 164.

48. *In re Exide Techs.*, 303 B.R. 48 (Bankr. D. Del. 2003).

49. *New Century*, 390 B.R. at 167.

50. *Accord In re Nutritional Sourcing Corp.*, 398 B.R. 816 (Bankr. D. Del. 2009).

51. 394 B.R. 765 (Bankr. D. Del. 2008).

Powermate Holding Corp., Powermate Corporation, and Powermate International, Inc., (collectively, “Debtor Defendants”) filed chapter 11 on March 17, 2008. Prior to filing, the Debtor Defendants operated in three states. Their corporate headquarters and main operations center was in Illinois, with additional facilities in Nebraska and Minnesota. Seven days prior to filing bankruptcy, the Debtor Defendants sold all of their assets located in Minnesota, and terminated the employment of all workers at that location. On the same day that the Debtor Defendants filed bankruptcy (but immediately prior to doing so), they fired all of their remaining employees without prior notice. Approximately 260 employees lost their jobs.

A fired employee sued the Debtor Defendants on behalf of himself and other discharged employees alleging that the defendants violated his rights under the Worker Adjustment and Retraining Notification Act (“WARN Act”)⁵² in what he referred to as “part of a mass layoff and/or plant closing” at the Nebraska and Illinois locations.⁵³ Plaintiff further alleged that he and the other similarly situated former employees were entitled to recover their wages and other benefits for sixty days because he and his fellow employees were terminated without the sixty days’ notice workers are entitled to under the WARN Act, and that these damages were entitled to administrative priority status pursuant to the 2005 amendments to section 503 of the Code. The Debtor Defendants answered the complaint and moved to dismiss. In the motion, the Debtor Defendants sought the court’s determination that, if the court found that there were WARN Act violations, any damages be assigned fourth (or fifth) priority status under sections 507(a)(4) and (5) of the Code, and not administrative expense priority status.

After concluding that such a determination was ripe for adjudication, and noting that the question of whether any of the statutorily recognized exceptions to the WARN Act’s sixty day notice requirement were not presently before it, the court addressed the issue of what priority status a WARN Act claim would receive. In doing so, the court examined the only other case that had interpreted section 503(b)(1)(A) of the Code since its 2005 amendment, *In re First Magnus Financial Corp.*,⁵⁴ as well as the plain language of section 503(b)(1)(A). As noted by the court, the pivotal language in section 503(b)(1)(A) reads, in relevant part, as follows: “(b)... there shall be allowed, administrative expenses ... *including* ... (1)(A) the actual, necessary costs and expenses of preserving the estate, *including* — (i) wages, salaries ...; *and* (ii) wages and benefits awarded....”⁵⁵

The court began its analysis by reviewing the interpretation of this language by the court in *First Magnus*. The court in *First Magnus* held that because the word “and” appears between subsections (i) and (ii) in section 503(b)(1)(A), the two provisions must be read together. Or, put another way, the *First Magnus* court held that the requirements of both sections must be satisfied for a claim to qualify as an administrative expense.

In this case, however, the court embraced a different interpretation of section 503(b)(1)(A). Relying on the placement of the word “including” before subsection (i), the court held that the word “and” makes subsections (i) and (ii) categories within a particular subset of allowable administrative expenses. The court also noted that this formulation, “including” followed by an “and,” appears twice in section 503(b) alone, and that the final word prior to listing the various types of administrative expense claims is “including.” Furthermore, the final word, set off by a semi-colon, between (b)(8)(B) and (b)(9) is “and.” Thus, under the *First Magnus* statutory construction, “everything in subsection (b) would

52. 29 U.S.C. § 2101 *et seq.*

53. *Powermate*, 394 B.R. at 768.

54. 390 B.R. 667 (Bankr. D. Ariz 2008).

55. *Powermate*, 394 B.R. at 774 (emphasis in original).

have to be present in order for a claimant to have an administrative expense.”⁵⁶ Although it did not say as much, the court clearly viewed such a reading as unreasonable.

With these principles in mind, the court noted that one’s initial reaction to reading the amended section 503(b) is to conclude that the section is unclear. This is because the section describes two different time periods: (i) the period to which back pay is attributable and (ii) the time in which the unlawful conduct occurs and/or when the services were rendered. The court then observed that this confusion is further complicated by the fact that the priority of a given claim is dependent on how these two time periods correspond with the filing of the bankruptcy petition. But, the court’s opinion stated, a closer reading “reveals that the only relevant consideration is the former time, the time to which the back pay is attributable which is when the rights or claims vest or accrue, and how that time relates to the petition date.”⁵⁷ The effect is that if a claim vests pre-petition, then the back pay is attributable to the time occurring prior to the commencement of the case and, therefore, it is not an administrative expense claim. Conversely, if a claim vests post-petition, then the back pay is attributable to the time occurring after the commencement of the case and, therefore, is an administrative expense claim. Furthermore, the date the unlawful conduct occurred and/or services were rendered does not affect this determination, and the “payment due date” is not controlling because the accrual may occur before or after the payment date.

In order to determine when the WARN Act claim vested, the court observed that back pay under the WARN Act is meant as “compensation for lack of notice,” or, more specifically, “pay at termination in lieu of notice” under existing case law.⁵⁸ The court further observed that, under existing Third Circuit case law, pay at termination in lieu of notice “vests at the time of the termination because it is based solely on lack of notice.”⁵⁹ Therefore, the court concluded, “the entirety of [a WARN Act] claim becomes an administrative expense claim in a post petition discharge. Conversely, a claim for severance pay for a pre-petition termination does not receive administrative expense status.”⁶⁰ Thus, the workers in *Powermate*, who were discharged from their jobs pre-petition, albeit on the day of filing, could only possess WARN Act claims that vested pre-petition and were not entitled to administrative expense status; instead, any damages they could prove would only be recoverable under section 507(a)(4)-(5) of the Code.

Because the court concluded the language of section 503(b) was unambiguous, it did not need to examine the legislative history accompanying the 2005 amendments to the section. Still, for “the sake of completeness,” the court also examined the legislative intent behind the amended section.⁶¹ In doing so, the court noted that its holding was consistent with pre-BAPCPA law requiring a claimant to render post-petition services in order to have an administrative expense claim. Changing this would be a “monumental shift in the administration of estates under bankruptcy law” on the part of Congress, and such a change presumably would have produced significant legislative history, the court reasoned.⁶²

56. *Id.* at 774 n.52.

57. *Id.* at 774-75.

58. *Id.* at 775.

59. *Id.*

60. *Id.* at 775-76 (footnote omitted).

61. *Id.* at 777.

62. *Id.* at 777-78.

Because the legislative history concerning the amended section is “extremely sparse,” however, the court inferred that Congress did not intend such a change.⁶³

VII. Landlord’s Entitlement To Administrative Expense Claim For “Stub Rent”

In *In re Goody’s Family Clothing, Inc.*,⁶⁴ the court addressed two related issues: (i) whether sections 365(d)(3) and 365(b)(1)(A) are the sole bases for allowance of an administrative expense claim for post-petition rent; or (ii) whether a claim for unpaid post-petition rent on behalf of a commercial landlord may be entitled to administrative status under section 503(b)(1) of the Bankruptcy Code as an actual, necessary cost and expense of preserving the estate.

Prior to the bankruptcy filing, the debtors operated approximately 350 stores throughout the United States and held unexpired leases of nonresidential real property (the “Leases”) with certain landlords. The debtors did not pay the rent under the Leases due on June 1, 2008. On June 9, 2008 (the “Petition Date”), the debtors filed Chapter 11 petitions. Thereafter, the debtors continued to occupy the premises under each of the Leases and failed to pay rent for the post-petition period from the Petition Date through June 30, 2008 (the “stub rent”). Three landlords filed a motion for allowance and immediate payment of the applicable stub rent, and the debtors objected to each motion.

The debtors argued that the landlords could not seek administrative expense status or timely payment of stub rent under section 365(d)(3) because the obligation to pay the stub rent arose prepetition. The court agreed, noting that the section requires the trustee to timely perform all the obligations of the debtor *arising from and after* the order for relief under unexpired leases of nonresidential real property, until such leases are assumed or rejected, *notwithstanding* section 503(b)(1).⁶⁵ The Leases required the rent to be paid in advance on the first of each month, and the June rent was due on June 1st, nine days before the Petition Date. As such, the obligation to pay arose *before* the order for relief and could not receive administrative expense status under section 365(d)(3).

In addition, the debtors argued that section 365(d)(3)’s “notwithstanding” language preempted section 503(b)(1). Furthermore, they asserted that section 503(b)(1) conflicted with sections 365(b)(1)(A) and 365(g)(1), as the determination of whether the landlords’ claims for stub rent could be allowed and paid as administrative claims depended entirely on whether the debtors assumed or rejected the applicable lease. The landlords countered that sections 365(d)(3) and 503(b)(1) were mutually exclusive.

The court agreed with the landlords. Based on the dictionary definition of “notwithstanding,”⁶⁶ it found that the proviso “notwithstanding section 503(b)(1)” at the end of section 365(d)(3) meant that the trustee must “timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, *in spite of the terms of section 503(b)(1).*” The debtors’ interpretation of “notwithstanding” would have it mean “in lieu of” or “in place of.” Instead, the plain meaning of section 365(d)(3) expanded a landlord’s remedies for payment of post-petition rent rather than limiting them.

Furthermore, the court held that the effect of the debtors’ ultimate assumption or rejection of the Leases on the priority of the landlords’ claims did not alter the court’s conclusion that it could allow an administrative claim for stub

63. *Id.* at 778 n.73.

64. 392 B.R. 604 (Bankr. D. Del. 2008).

65. 11 U.S.C. § 365(d)(3) (emphasis added).

66. See II SHORTER OXFORD ENGLISH DICTIONARY 1952 (6th ed. 2007) (notwithstanding means “[i]n spite of, without regard to or prevention by”).

rent under section 503(b)(1). The debtors assumed that, if they rejected one or more of the Leases, all of the landlords' claims under the rejected leases would be unsecured because of section 365(g)(1), including the claims for unpaid stub rent. However, the court observed that the courts routinely allow administrative claims for post-petition occupancy and use of real property by a debtor as an actual, necessary cost of preserving the estate, even if the debtor had already rejected the applicable lease or if the lease expired prepetition.

The court noted that the Third Circuit had stated that “[t]here is no question, of course, that the payment of rent for the use and occupancy of real estate ordinarily counts as an ‘actual, necessary’ cost to which a landlord, as a creditor, is entitled.”⁶⁷ Indeed, the Third Circuit noted that there is no authority to support the contrary position, i.e., “possession free of charge.”⁶⁸ The fact that, under section 365(g)(1), the rejection of the lease constituted a breach of the lease immediately before the date of the filing of the petition was of no moment as to whether the debtors might be liable for an administrative expense claim for post-petition use and occupancy of the premises. Moreover, allowing a landlord whose premises were occupied by the debtors post-petition under an unexpired lease that is ultimately rejected to be in a worse position than a landlord whose lease expired pre-petition would grant the debtors a windfall neither contemplated nor justified by the Code.

The court held that the amount of an administrative claim for use and occupancy is the market rate of rent, which is presumptively the contract rate. As no evidence was offered to rebut that presumption, the court awarded each of the moving landlords an administrative claim based on the contract rate. However, the court did not require immediate payment of the claims. The landlords argued that the debtors should not be allowed to pick and choose when certain administrative claims would be paid, as that could result in different treatment for claims of the same priority in derogation of key principles of the Code, and unfairly place the risk of administrative insolvency solely on unpaid administrative claimants. The debtors argued that, for the same reason, i.e., risk of disparate treatment, that the court should allow the debtors to wait to pay the landlords until confirmation of the debtor's reorganization plan. The debtors also contended that requiring payment would be inequitable to other administrative claimants, and that such a requirement would open the floodgates of litigation by encouraging other landlords to request immediate payment of stub rent.

The court noted that it had discretion to decide when the administrative expenses would be paid, and that one of the chief factors that courts consider in exercising this discretion is bankruptcy's goal of an orderly and equal distribution among creditors and the need to prevent a race to the debtor's assets.⁶⁹ It then found the landlords' argument regarding inequitable treatment of claims to be fundamentally flawed because equal distribution among creditors does not require simultaneous distribution. While the landlords are losing the time value of their unpaid stub rent, that is simply a normal and unremarkable result of the fact that bankruptcy proceedings take time. Furthermore, the court found little risk of administrative insolvency and that any risk of administrative insolvency would be further reduced since the debtors had a pending plan of reorganization that was scheduled for confirmation about a month away from the date of the court's decision. In addition, there was no evidence before the court of any potential harm to the landlords arising from the ongoing delay in payment of the stub rent.

Alternatively, the court found the debtor's decision as to the timing of the payment of post-petition rent to be within the ordinary course of the debtors' business and, thus, within the scope of the debtors' authority under the Code. As

67. *Zagata Fabricators, Inc. v. Superior Air Prods.*, 893 F.2d 624, 627 (3d Cir. 1990).

68. *Id.* at 628.

69. *In re HQ Global Holdings, Inc.*, 282 B.R. 169, 173 (Bankr. D. Del. 2002).

such, the decision was entitled to deference under the business judgment rule. The court, therefore, allowed the landlord's claims for stub rent as administrative expenses but denied the request for immediate payment.

VIII. Secured Creditor Has Standing To Assert Claims Of Equitable Subordination Against Other Secured Creditors Based Upon Assertion Of Individualized Harm

The court in *Elway Co., LLP v. Miller (In re Elrod Holdings Corp.)*⁷⁰ was presented with the question of whether a secured creditor has standing to seek the equitable subordination of another secured creditor's claim.

The adversary proceeding in which the *Elrod* opinion was issued was commenced by a secured creditor, Elway Company, LLP ("Elway"), that was seeking (i) a determination of the scope, validity, and priority of its liens on the debtors' property, and (ii) the allowance of its claims against the debtors. The adversary complaint filed by Elway named the chapter 7 trustee in the case and the debtors' other secured creditors, including Webster Growth Capital Corp. ("Webster"), as defendants.

After filing a response, Webster sought leave to amend its response to include several cross-claims and counter-claims that were essentially the same as claims the chapter 7 trustee had already asserted on behalf of the debtors' estates. Elway and the trustee objected to Webster being granted leave to amend, however, on the ground that the only party with standing to assert the claims was the trustee. Webster responded by conceding to the objection as to all counts except its claim for equitable subordination against Elway.

The court began its analysis by noting that, under section 541(a) of the Code, an estate is created upon the commencement of a bankruptcy case, which "is made up of, *inter alia*, 'all legal or equitable interests of the debtor in property as of the commencement of the case.'"⁷¹ This estate "includes 'causes of action existing at the time the bankruptcy action commences.'"⁷² The court also noted that section 323(a) of the Code provides that the trustee is the sole representative of this estate, and that section 323(b) provides that the trustee "has the capacity to sue and be sued."⁷³ Taken together, the court reasoned, these two provisions "grant the trustee the exclusive standing to assert causes of action that have become property of the estate by operation of § 541."⁷⁴ For this reason, the court observed, "the Third Circuit has stated that, 'once a company or individual files for bankruptcy, creditors lack standing to assert claims that are 'property of the estate.'"⁷⁵

But, the court also noted that the Third Circuit has held that a cause of action is only property of the estate if it is a general claim with no "particularized injury" to any creditor resulting from it.⁷⁶ Accordingly, the court reasoned, it must determine whether a secured creditor's claim for equitable subordination pursuant to section 510(c) of the Code is such a general claim.

70. 392 B.R. 110 (Bankr. D. Del. 2008).

71. *Id.* at 114 (quoting 11 U.S.C. § 541(a)).

72. *Id.* (collecting cases).

73. *Id.* (quoting 11 U.S.C. § 323(b)).

74. *Id.* (citing *Cain v. Hyatt*, 101 B.R. 440, 442 (E.D. Pa. 1989)).

75. *Id.* (quoting *Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 (3d Cir. 2002)).

76. *Id.* (quoting *Bd. of Trs. of Teamsters*, 296 F.3d at 170).

The court cited a number of cases indicating that equity may sometimes “require a court to subordinate a senior secured claim to a junior secured claim,” or, in “other instances of more egregious misbehavior, equity may require a court to strip a secured claimant of its secured status altogether.”⁷⁷ In the former instance, the court noted, “only the junior secured creditor benefits from a court’s employment of § 510(c) as it alone surpasses the senior secured creditor in priority.”⁷⁸ In the latter circumstance, however, each creditor benefits from the subordination of the senior secured claim. Consequently, the court noted that “a secured creditor is capable of having suffered a particularized injury and that a court may fashion a remedy in response to that injury that benefits only the affected secured creditor and not all general creditors ultimately seeking to recover from a debtor’s estate.”⁷⁹

The court also reasoned that a secured creditor with such a particularized injury should be “permitted to pursue its separate interest apart from the trustee.”⁸⁰ The court based this conclusion, in part, on the fact that circumstances could exist where “a trustee has little interest in an equitable subordination dispute between two secured creditors,” and also partly on the fact that a number of other courts have taken similar positions.⁸¹ Accordingly, the court held that “a secured creditor has standing to seek the equitable subordination of another secured creditor’s claim to the extent that it seeks relief for a particularized injury, which differs from the injury incurred by all creditors.”⁸²

The court held that Webster failed to state such a particularized claim, however, because his proposed equitable subordination claim simply mirrored the trustee’s claim that was brought to remedy the injury suffered by all creditors. Thus, the court denied Webster’s motion.

IX. Based Upon Third Circuit Decision In *In re Price*, Post-Discharge Repossession Of Motor Vehicle By Secured Creditor Is A Violation of Discharge Injunction Where Debtor Entered Into A Reaffirmation Agreement But Agreement Was Not Approved By Court — Distinguishes/Disagrees With *In re Anderson*, 348 B.R. 652 (Bankr. D. Del. 2006) (MFW)

In *In re Baker*,⁸³ the debtors filed a chapter 7 case and subsequently agreed to and filed a Reaffirmation Agreement to reaffirm the debtors’ car loan with its lender, which had a security interest in the car. The Reaffirmation Agreement provided debtors would make 48 monthly payments of \$348.90. The debtors’ monthly income less expenses, as reflected in the Reaffirmation Agreement as well as the debtors’ schedules, was \$200. The Reaffirmation Agreement was presumed to be an undue hardship, since the debtors’ income less expenses was insufficient to make the monthly payments under

77. *Id.* at 115 (collecting cases).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* In so holding, the Court stated that, “It would make little sense to preclude an injured party from pursuing unique relief in the hope that a disinterested party would zealously pursue it for them.” *Id.*

82. *Id.*

83. 390 B.R. 524 (Bankr. D. Del.), *aff’d*, 400 B.R. 136 (D. Del. 2008).

the Reaffirmation Agreement. No evidence to rebut the presumption was presented to the court at the hearing to consider the Reaffirmation Agreement and, thus, the court entered an order declining to approve it.

The debtors were granted a discharge and the case was closed. Six days later, the lender repossessed the debtors' vehicle. At an evidentiary hearing relating to the vehicle repossession, the lender acknowledged that the sole basis for repossessing the vehicle was the court's failure to approve the Reaffirmation Agreement.

The debtors argued that under the Third Circuit's decision in *Price*,⁸⁴ the car loan passed through the bankruptcy case unaffected. In *Price*, the Third Circuit held that the enumeration of three options for treatment of secured property under former section 521(2), i.e., surrender, redemption or reaffirmation, did not preclude the debtor from exercising a so-called "fourth option," i.e., retaining the property while remaining current on payments.⁸⁵ The bankruptcy court analyzed the holding of *Price* after the enactment of BAPCPA, finding that, subject to certain limitations, none of BAPCPA's changes preclude a debtor from retaining the collateral while remaining current on payments.

First, the court noted the importance of section 521(a)(2)(A) in the Third Circuit's analysis in *Price* and that BAPCPA made no changes to that section.⁸⁶

Second, the court analyzed the addition of section 521(a)(6),⁸⁷ finding that, although the section terminates the automatic stay and removes the property from the estate in certain circumstances, the debtor was in compliance with the section's requirements because the debtors and creditor timely entered into a reaffirmation agreement.

Third, the court analyzed the interplay between section 521(a)(2)(C) and 362(h). Although section 521(a)(2)(A) (upon which the Third Circuit relied in *In re Price*) was not altered by BAPCPA, section 521(a)(2)(C) was modified to provide that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, *except as provided in section 362(h)*."⁸⁸ In turn, "section 362(h) provides that the stay will be terminated and the collateral will no longer be property of the estate if the debtor fails to file and perform a statement of intention to surrender, redeem, reaffirm or, in the case of leased property, assume the unexpired lease."⁸⁹ The

84. *Price v. Delaware State Police Fed. Credit Union (In re Price)*, 390 B.R. 524 (3d Cir. 2004).

85. *Baker*, 390 B.R. at 527.

86. "[T]he debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying ... that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property." 11 U.S.C. § 521(a)(2)(A).

87. [I]n a case under chapter 7 of this title in which the debtor is an individual, [the debtor shall] not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either-

(A) enters into [a reaffirmation] agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law ...

11 U.S.C. § 521(a)(6).

88. 11 U.S.C. § 521(a)(2)(C) (emphasis added).

89. *Baker*, 390 B.R. at 529.

court noted that “[c]ourts have held that the proviso at the end of section 521 (a)(2)(c) referencing section 362(h) trumps the ‘if applicable’ language in section 521(a)(2)(A).” Indeed, Judge Walrath had so ruled in *In re Anderson*.⁹⁰ Nonetheless, the court in *Baker* held otherwise, respectfully disagreeing with the holding in *Anderson* and finding that the language in section 521(a)(2) and the “context” of the Code upon which the Third Circuit had relied in *Price* remained unchanged.

In addition, the court distinguished *Anderson* and the other cases with similar holdings on the facts. Although the debtors in *Baker* filed a statement of intention which did not indicate one of the three options, instead stating the debtors’ intention to retain the collateral and continue making payments, the debtors cured the defect by complying with section 362(h)(B), i.e., timely entering into a reaffirmation agreement.

Thus, after analyzing the relevant BAPCPA amendments, the court found that the “fourth option” under *Price* remained viable and a debtor may retain collateral while remaining current on the payments. In order for the automatic stay to remain in effect and for the property to remain in the debtor’s estate, however, the debtor must *enter* into a reaffirmation agreement within 45 days after the section 341 meeting. But, the court’s refusal *to approve* the reaffirmation agreement is of no consequence to debtor’s ability to retain the collateral.

The court also addressed the lender’s right to repossess the vehicle under Delaware law. Since the debtors were current on their payments, the only default under the debtors’ loan agreement was the filing of a bankruptcy petition. Noting that *ipso facto* clauses are generally unenforceable, the court found there are limited exceptions. In particular, section 521(d)⁹¹ provides for the limited enforceability of *ipso facto* clauses if a debtor does not comply with sections 521(a)(6) or 362(h)(1) and (2). However, the court noted that state law must also allow for enforceability of the *ipso facto* clause. In this case, the court found that it need not reach the question of the enforceability of *ipso facto* clauses under Delaware law, since the debtors complied with sections 521(a)(6) and 362(h). Thus, the Code prevented the creditor from exercising its right, if any, under state law to repossess the vehicle based on the *ipso facto* clause.

Accordingly, as the debtors properly exercise the “fourth option” under *Price* to retain their car while remaining current on their payments and the lender had no right to repossess the car, the court found the lender violated the discharge injunction, awarded compensatory damages and ordered the immediate return of the debtors’ vehicle.

X. Presumption Of Abuse Under The “Means Test” In An Individual’s Chapter 7 Case

In *In re Smale*,⁹² the court addressed whether an individual chapter 7 debtor in performing the “means test” calculation was entitled to deduct monthly payments on motor vehicles that the debtor intended to surrender. In the case before the court, the debtor’s personal property included four vehicles on which other parties held secured claims. The

90. *In re Anderson*, 348 B.R. 652, 658 (Bankr. D. Del. 2006).

91. Section 521(d) states:

If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property ... as to which a creditor holds a security interest ... nothing in this title shall prevent or limit the operation of a provision in the underlying ... agreement that has the effect of placing the debtor in default under such ... agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

11 U.S.C. § 524(d).

92. 390 B.R. 111 (Bankr. D. Del. 2008).

debtor intended to surrender three of the vehicles and claim one remaining vehicle as exempt property. Nonetheless, the included as deductions in completing his “means test” calculation the loans for all four vehicles.

The debtor’s calculations indicated he had no disposable income. However, if the debtor was unable to claim the deductions for the vehicles to be surrendered, his disposable income would trigger the presumption of abuse under section 707(b)(2) of the Code and his case would have to be dismissed or voluntarily converted to a chapter 13 case. The United States Trustee filed a motion to dismiss the case, arguing that section 707(b)(2)’s presumption of abuse arose because giving effect to the debtor’s intention to surrender his vehicles by excluding them from the calculation of his monthly disposable income would result in that income being higher than allowed under section 707(b)(2)’s “means test.”

The “means test” applies a formula to calculate disposable income by deducting a list of permitted expenses from a figure calculated by averaging the debtor’s income for the six months prior to the petition date. The section permits a deduction based on a debtor’s actual payments on secured debts, calculated as the sum of “the total of all amounts *scheduled as contractually due* to secured creditors in each of the 60 months following the date of the petition . . . divided by 60.”⁹³ The debtor argued that this provision enabled him to deduct his debt payments, notwithstanding that he intended to surrender three of his four vehicles. The United States Trustee argued that the debtor could not deduct payments on debts secured by property he intended to surrender.

The court found the phrase “scheduled as contractually due” to be ambiguous. It also noted a split of authority on the question of whether payments on property that has been or will be surrendered may be included in calculating a debtor’s average monthly payments on account of secured debts under section 707(b)(2)(A)(iii)(I).

The majority of courts have determined that a debtor could claim a deduction for payments on debts secured by property that the debtor intends to surrender by determining the amount of payments owed under the contract for each secured debt at the time of filing. These courts cite to the dictionary definition of “schedule” to mean “to plan for a certain date,” and the common meaning of “as contractually due” to be “that the debtor is legally obligated under the contract . . . to make a payment in a certain amount, with a certain amount of interest, for a set number of months into the future.” The courts in the minority assert that the term “scheduled” in section 707(b)(2)(A)(iii) has a bankruptcy-specific meaning that refers to how the debt is listed on the debtor’s schedules and statements.

The court found both lines of argument problematic. The majority courts construed the plain meaning of the statute as providing for the calculation of the total of all amounts contractually due. This argument is flawed because one could come to the same conclusion about the meaning of the statute if the words “scheduled as” were not present. The arguments of the minority courts fare no better because the same courts go on to hold that “the [d]ebtor’s schedules *and statements*” form the basis from which courts should determine whether a debt is “scheduled as contractually due,” even though section 707(b)(2)(A)(iii)(I) fails to mention the debtor’s statements. The court also noted the argument that Congress intended to use the phrase “scheduled as” to refer to whether a debt is identified on a debtor’s bankruptcy schedules had been proven inaccurate.

Since the statutory language failed to clarify the purpose of the statute, the court next examined the legislative history to the 2005 amendments to the Bankruptcy Code. However, the court found it difficult to apply any overarching legislative purpose. Other courts attempting to do so had arrived at disparate conclusions. Moreover, the legislative history specifically applicable to section 707 was irrelevant to the issue before the court.

The court therefore turned to the principle of *noscia a sociis*. Under this theory, of the various possible meanings a word should be given, the particular meaning to be given to an unclear word or phrase must be determined in a manner

93. 11 U.S.C. § 707(b)(2)(A)(iii) (emphasis added).

that makes the word ‘fit’ with the words with which it is closely associated.⁹⁴ Applying the principle, the court held that the most reasonable interpretation of sections 707(b)(2) and (3), taken as a whole, was to allow the debtor to include in its calculations the average monthly payments on property that has been or would be surrendered under section 707(b)(2)(A)(iii).

The court observed that Judge Shannon had recently analyzed the interplay between sections 702(b)(2) and (b)(3) in *In re Haman*.⁹⁵ Specifically, Judge Shannon analyzed cases discussing whether a debtor can deduct payments on debts secured by property he intends to surrender. The court agreed with Judge Shannon that allowing a movant to include the outcome of future events as part of the means test would eliminate the distinction between the presumption of abuse test and the totality of the circumstances test. An analysis that includes future circumstances would be more properly conducted under section 707(b)(3), rather than section 707(b)(2).

Finally, the court noted that its analysis was consistent with Judge Walrath’s opinion in *In re Pennington*.⁹⁶ The issue in *Pennington* was whether, in considering the “totality of the circumstances of the debtor’s financial situation” under section 702(b)(3), the court was limited to considering the debtor’s financial situation as of the date of the filing of the petition, and whether the court may or must consider the debtor’s financial situation at the time the motion to dismiss was heard. The court held it had to consider the debtor’s financial condition at the time of the hearing on the motion to dismiss when deciding whether granting chapter 7 relief would be an abuse under section 707(b)(3). In so ruling, Judge Walrath noted that the contrary decision in *In re Walker*⁹⁷ was inapplicable because there the court addressed the issue of whether payments due at the time of filing were used for purposes of the means test under section 707(b)(2), but not for purposes of the totality of the circumstances test under section 707(b)(3).

Thus, the court held that a presumption of abuse had not arisen under section 707(b)(2) and denied the U.S. Trustee’s motion to dismiss.

94. *James v. United States*, 550 U.S. 192 (2007) (Scalia, J., dissenting) (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961)).

95. *In re Haman*, 366 B.R. 307, 316-17 (Bankr. D. Del. 2007).

96. 348 B.R. 647 (Bankr. D. Del. 2006).

97. *In re Walker*, 2006 WL 3804682, 2006 Bankr. LEXIS 845 (Bankr. N.D. Ga. 2006).

