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RESPONDING TO ALLEGATIONS OF ANTI-MALE BIAS IN SEXUAL HARASSMENT CASES IN HIGHER EDUCATION; THE 2020 TITLE IX REGULATIONS

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In a June 15, 2021 decision, the Court of Appeals for the Tenth Circuit employed the three-part *McDonnell Douglas*[1] burden shifting framework, typically employed in Title VII[2] litigation, to resolve the sexual assault allegations brought against a male University of Denver student by a female classmate. It should be no surprise that Title VII and Title IX[3] would intersect in an adjudication of sexual harassment in the context of an educational institution. Title IX of the Education Amendments of 1972 was modelled on Title VII of the Civil Rights Act of 1964,[4] and both civil rights statutes overlap in protecting employees from discrimination on the basis of sex in all United States educational institutions that receive federal funding in any aspect of their educational programs or activities.[5]

The male student, under the pseudonym John Doe, alleged that the public university had been biased against him in their investigation of the female student's allegations because he was a male. The female student had reported her allegations to the university in March 2016, about three weeks after the alleged sexual assault. The university expelled John Doe in August 2016. When Doe brought a lawsuit against the university in Colorado federal district court, the court granted summary judgment to the university. The Court of Appeals ultimately reversed and remanded Doe's case back to the district court. However, by the time of the remand, five years had expired since Doe's expulsion, and the remand meant that the case was not truly over, even by June 15, 2021.

Unfortunately, Doe was not the only male student who felt caught in a web of anti-male bias in a Title IX investigation in U.S. higher education. In the years immediately preceding the adoption of the 2020 Title IX Regulations, over five hundred male college and university students filed lawsuits alleging anti-male bias in their institutions' Title IX proceedings. However, if the allegations had been brought against this John Doe and others after August 14, 2020, the effective date of the 2020 Title IX Regulations, the situation would have been handled under a different set of rules, and the male students might have had a chance to present their sides of the stories without prejudgment of guilt and in a considerably more limited time frame.

This commentary will examine the "before" and the "now" with respect to the resolution of allegations of sexual harassment, including sexual assault, under both Title VII and the recently enacted 2020 Title IX Regulations. Part I examines and analyzes the *Doe v. University of Denver* decision as an example of the "before-August 14, 2020." Part II presents a brief overview of the genesis of the 2020 Title IX Regulations. Part III analyzes the critical provisions for resolving sexual harassment allegations in postsecondary institutions in the United States under the new Regulations. Part IV discusses recent developments with President Biden's new Department of Education and its commitment (or lack of commitment) to the 2020 Title IX Regulations. Finally, Part V concludes by presenting arguments for retaining the elements of those 2020 Regulations which level the playing field for males and females involved in sexual harassment allegations in United States postsecondary institutions, now and into the future.

Part I: Analysis of the *Doe v. University of Denver*[6] Litigation as an Exemplar of Anti-Male Bias in Resolving Sexual Harassment Allegations Before August 14, 2020

John Doe was a freshman at the University of Denver in 2015 when he met and later "became romantically involved"[7]

On The Inside

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with a female freshman student Jane Roe. However, when Jane asked for an exclusive relationship, John backed off and began to distance himself from her, although they continued seeing each other from time to time. They did not have a sexual relationship up to this point in time.[8]

However, one night in February 2016 Jane, intoxicated from drinking in her dorm and later at a bar, met John, also intoxicated. Jane led John to her dorm room and they began touching and kissing. At one point Jane ran to a friend to get help because John had passed out on her dorm room floor and Jane could not move him. John could not remember later what had actually happened but remembered that both had disrobed in the dorm room and tried unsuccessfully to have sex.[9]

John later alleged that he and Jane had sex the next morning, Saturday, after Jane had watched him put on a condom. He alleged that Jane offered no resistance, and she was astride him during sex. He also alleged that at some point Jane left abruptly, which confused him. Jane then returned to talk about their relationship, which he did not want to discuss. He reported that he left her room and returned to his, where he told his roommate what had happened.[10]

Jane later stated that she was still "pretty drunk" on Saturday morning but remembered watching John put on a condom and have sex with her, which, she admitted, she did not resist. She said that at one point she asked John to stop because it hurt, but John reassured her that was normal "because it's your first time."[11] Jane eventually left the room but returned and they argued about what had happened. Jane later tried to contact John, but he was not willing to talk with her. Later that morning Jane told her friend that she and John had sex.[12]

At a house party that evening, when Jane observed John talking with another female student about the incident, Jane became quite upset. Jane, again "very intoxicated," was escorted to her dorm and told her escort that she had awoken to being sexually assaulted by John. However, Jane contacted John the next night, saying she did not remember what had happened during their time together, and at one point, told John she "willingly gave [her virginity] to him."[13]

Over the next few days, Jane continued to tell different variations of the sexual assault story to friends, along with complaining of bruises she could not explain. Jane continued to text John, asking about what had happened, but John refused to meet with her and basically told Jane that she had a misunderstanding about their relationship.[14] After a friend encouraged Jane to get a rape kit performed, Jane submitted to a Sexual Assault Nurse Examiner's (SANE) examination, but later refused to release the results.[15]

Three weeks after the incident, when Jane discovered that John had told other students about what had happened, Jane filed a report of sexual assault with the University. The University's Title IX Coordinator notified John that a report had been filed,[16] and asked him to participate in an interview, which he did. He named five individuals with whom he had discussed the incident. Jane and eleven individuals, whom she had named, were interviewed, but none of John's named witnesses were interviewed. The University issued a Preliminary Report, which was John's first notification of the allegations against him.[17]

Upon John's email complaint that none of his witnesses had been interviewed, the University contacted one of John's proposed witnesses, his psychologist, Dr. Mary Bricker. Dr. Bricker, early on, saw a summary of her alleged statement, and sent a follow-up letter to the University, expressing concern about the integrity of the University's investigation, because the summary of her statement was inaccurate and that, throughout her interview, the investigator appeared to have "made up her mind already about what she th[ought] took place."[18] The investigative report failed to include Dr. Bricker's concern.[19]

John also expressed concerns centered on Jane's refusal to submit the medical assessment part of the SANE report, making it impossible to show the age and likely causes of the bruises and scrapes about which Jane had complained, and which could have been explained by a fall.[20] The investigators' Final Report concluded that John Doe had, more likely than not, engaged in non-consensual sex with Jane. The university's disciplinary review committee, comprised of two University administrators and one faculty member, imposed the disciplinary sanction of expulsion.[21] When John sought to appeal the decision in the Final Report, he was told he did not meet the "appeal criteria."[22]

After his expulsion, John sued the University of Denver and various administrative officers of the University in Colorado District Court, listing a plethora of causes of action, including Title IX and other federal and state law claims. The University of Denver lists itself as a private research university in Denver, Colorado.[23] John's violation of Title IX claim was dismissed for lack of a causal connection between the investigation and anti-male bias. John's Fourteenth

Amendment allegation, failure to provide due process,[24] was unsurprisingly also denied and pendent state claims were dismissed. The district court granted summary judgment to the University.[25]

Upon appeal, the Court of Appeals for the Tenth Circuit "borrowed" from Title VII and applied the burden-shifting mechanism of *McDonnell Douglas Corporation v. Green,*[26] where John had the burden to show that his sex was a motivating factor in the conduct of the investigation and in the University's decision to expel him. If John passed that hurdle, the burden then shifted to the University to show that its decision was motivated by a legitimate, nondiscriminatory reason. If the University did articulate such a reason, the burden then would return to John to show, with credible evidence, that the University's proffered reason was a pretext for discrimination.[27]

The Tenth Circuit panel reviewed the various theories that could direct their deliberations, but opted for the simple and direct analytical test, asking "do the facts alleged, if true, raise a plausible inference that the university discriminated against [the student] 'on the basis of sex'?"[28] However, looking to precedent from sister states, the court decided to frame the question for summary judgment as, "Could a reasonable jury – presented with the facts alleged find that sex was a motivating factor in the University's decision?"[29]

The University had argued in district court that its actions in sexual assault cases were determined by anti-respondent discrimination and that respondents could be male or female. However, John was able to surmount this argument with evidence of clear procedural irregularities in the University's investigation of his alleged "sexual assault," as well as additional statistical evidence of sex bias in the university's disciplinary decision in his case.[30] The University's actions in (1) failing to interview John's friends-witnesses, while interviewing Jane's eleven witnesses, (2) amending Dr. Bricker's testimony and failing to include her testimony of prejudgment of the issue, (3) "ignoring, downplaying, and misrepresenting" the numerous inconsistencies in Jane's account of the alleged assault, (4) Jane's potential motives for accusing John because he would not continue the relationship with her that she desired, and (5) that Jane refused, and the University did not insist, that Jane reveal possible exculpatory evidence about John's actions from her SANE report.[31] Similarly, the damning statistics John presented about the University's discretionary practices in handling male vs. female reports of sexual assault demonstrated that anti-male bias could be influencing outcomes.[32]

This application of the *McDonnell Douglas* framework served John well, and on the basis of his satisfying the burden-shifting tests, the court vacated the district court's grant of summary judgment to the University and remanded to the district court for further proceedings. However, John had been expelled from the University near the end of his freshman year in 2016. The Court of Appeals decision to vacate the lower court decision and to remand to the district court was not handed down until five years later, on June 15, 2021, and the case was not yet concluded: a decision on remand would be required before a final conclusion.

If the interaction between John Doe and Jane Roe had occurred on August 14, 2020 or after, the University, by law, would have been required to follow the grievance procedures prescribed by 34 C.F.R. §§ 106.30- 106.46,[33] for a prompt and unbiased resolution of the allegations under the 2020 Title IX Regulations. The genesis and most relevant provisions of those Regulations are described in Part II, which follows.

Part II: Genesis of the 2020 Title IX Regulations

Both Title IX and Title VII are federal civil rights statutes that protect individuals against discrimination on the basis of sex, and Title VII jurisprudence used in the workplace often informs Title IX deliberative processes in sexual harassment claims in postsecondary educational institutions.[34] The *Doe v. University of Denver* Court of Appeals decision is one example of that sharing of Title VII jurisprudence, the use of the *McDonnell Douglas* burden-shifting framework to establish discrimination on the basis of sex.

However, while statutory interpretation of these two laws may overlap, Title IX does not incorporate the procedural requirements of Title VII involving enforcement of Title VII by the Equal Employment Opportunities Commission (EEOC).[35] Title IX may be enforced through the Department of Education's Office for Civil Rights or in a lawsuit alleging that the educational institution has been deliberately indifferent to discrimination on the basis of sex.

Title IX, like Title VII, covers three types of prohibited discrimination: (1) disparate treatment, i.e., intentional discrimination, (2) disparate impact, and (3) retaliation. Evidence of disparate treatment, under both Title IX and Title VII, requires a showing that similarly situated individuals were treated differently because of, or on the basis of, their sex. Disparate impact, on the other hand, focuses on the consequences of a facially neutral policy or practice which has a differential effect based on an individual's, or group's, sex. Intent is not one of the criteria. Retaliation against any person who files a Title IX complaint, supports a complainant, or retaliates against anyone who assists an agency in their investigative duties, violates Title IX.[36]

A. Title VII

Title VII's *McDonnell Douglas* burden-shifting framework has been used widely in Title IX disparate treatment litigation. As demonstrated in *Doe v. University of Denver*, the plaintiff need not have direct proof of discriminatory intent, but must raise the inference of such discrimination, a *prima facia* case. The plaintiff must show that:

(1) the aggrieved person was a member of a protected class;
(2) that the aggrieved person applied for and was eligible for an educational program that was a recipient of federal funds;
(3) that despite the person's eligibility, he/she was rejected; and
(4) that the recipient accepted applicants with the aggrieved person's qualifications whose only differ-

> ence was being of the opposite sex, or the position remained open and the recipient continued to accept applications.

If the plaintiff establishes a *prima facia* case, the burden shifts to the recipient to demonstrate a non-discriminatory explanation for its action. If the recipient purports to show this nondiscriminatory reason, the burden shifts back to the plaintiff to show that the recipient's reason for the disparate treatment was a pretext, and the real reason was intentional discrimination.[37]

B. Title IX

Title IX of the Education Amendments of 1972 states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[38]

Title IX requires that agencies promulgate regulations to guide recipients of federal funding in enforcing Title IX. The first of the Title IX Regulations was published in 1975.[39] When the Department of Education split off from the Department of Health, Education, and Welfare, the Department of Education adopted separate regulations. However, in 1999 the Department of Justice and twenty-three other agencies published a Notice of Proposed Rulemaking to implement Title IX.[40] The end result, reflecting the provisions of the Civil Rights Restoration Act (CRRA) of 1987[41] and its mandate for the broad, institution-wide coverage of Title IX[42] and other civil rights statutes, as well as recent precedential Supreme Court decisions regarding Title IX, was the final Title IX "common rule" adopted on August 30, 2000.[43]

Following the adoption of this Title IX common rule, the Department of Education's Office for Civil Rights (OCR) began issuing "Dear Colleague Letters" (DCLs) that provided guidance to educational institutions regarding their responsibilities in complying with Title IX.[44]

During the Obama administration, commentators noted "the sense of urgency in the OCR," which was tackling desegregation, campus sexual violence, and civil rights for all students.[45] Assistant Secretaries of Education heading the OCR promulgated numerous DCLs on various aspects of Title IX. Two DCLs in particular became especially controversial: the April 4, 2011 *DCL on Sexual* Violence[46] authored by Assistant Secretary Russlyn Ali and the April 29, 2014 DCL, *Questions and Answers on Title IX and Sexual Violence* (Q&A)[47] by Catherine Lhamon.

The 2011 DCL defined sexual harassment as "unwelcome conduct of a sexual nature" and included sexual violence as a form of sexual harassment prohibited by Title IX.[48] Title IX, according to this DCL, also required schools to investigate possible sexual harassment of which the school knew or reasonably should have known, both on and off campus, and to deal with any "hostile environment" that resulted on campus.[49] Schools did not need separate grievance procedures, but could incorporate such in their student disciplinary codes.[50] The focus was on ensuring the safety and well-being of the complainant. Particularly criticized was the 2011 DCL mandate that schools must use a preponderance of the evidence standard[51] in evaluating complaints.[52]

The 2014 Q&A repeated the "knows or reasonably should have known" standard for schools' responsibility for dealing with sexual harassment[53] and required providing the complainant with "interim steps" or "interim measures" before the final outcome of an investigation.[54] According to the DCL, all students were protected under Title IX, "male and female; straight, gay, lesbian, bisexual, and transgender; part time and full time; with and without disabilities; different races and national origins."[55] No specific grievance procedures were required, but the procedures were to achieve prompt and equitable resolution for the complainant.[56]

OCR's investigative practices also began to change under the Obama administration. OCR began keeping a public list of the schools where it was investigating possible Title IX violations, putting them, according to one college president, "under a cloud of suspicion."[57] OCR publicly threatened to withdraw Title IX funds from schools that did not comply with the new OCR rules. By March 2017, OCR had 311 open investigations at 227 schools, with the average investigation lasting over eight months.[58]

In both the 2011 and 2014 DCLs, the focus was clearly on protecting the complainant, and the complainants were overwhelmingly female.[59] In addition, a large proportion of sexual assaults or alleged sexual assaults, occurred after one, or usually both, parties were heavily intoxicated, making memories foggy at best.[60] OCR's insistence on the use of a preponderance of evidence standard meant that many institutional panels deciding allegations of sexual assault were left with real doubts about their life-altering verdicts.[61]

Both the 2011 and 2014 DCLs were criticized by Republicans in the Trump Administration as overreaching. In 2017, Trump's new Secretary of Education Betsy DeVos expressed her concerns that "dozens upon dozens" of male students were initiating lawsuits against the colleges and universities that, the male students alleged, unjustly sanctioned them for harassment or assault.[62]

On September 22, 2017, DeVos directed her then-Acting Assistant Secretary of Education at OCR, Candice Jackson, to rescind both the 2011 and 2014 DCLs.[63] Included in this rescission of the two DCLs was a new Q&A on Sexual Misconduct[64] and a promise to release new regulations for Title IX through "notice-and-comment rulemaking."[65] DeVos was quoted as saying that "the era of rule by letter [referring to the DCLs] is over."[66]

The Department of Education published the thirty-eight page "Proposed Rule" for "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" in the Federal Register on November 29, 2018.[67] The document was open for public comment until January 28, 2019, and ultimately received 124,129 comments.

On May 6, 2020, the Department of Education released the unofficial "Final Rule," in 2,033 pages of careful analysis and discussion of the public comments and what would become the new 2020 Title IX Regulations. The official copy

of the New Rule appeared in 554 pages of the Federal Register[68] on May 19, 2020, with an effective date of August 14, 2020. These new regulations, contrary to the significant guidance of the prior DCLs, are binding law.

Part III: Resolving Allegations of Sexual Harassment under the 2020 Title IX Regulations[69]

The 2020 Title IX Regulations apply equally and almost uniformly to all educational institutions, from pre-K to postsecondary educational institutions, including professional schools and vocational-technical schools, which receive any federal financial assistance in any part of their educational programs and/or activities.[70] These most recent Regulations also preempt any state and local laws that conflict with their definitions, institutional response to sexual harassment, and their grievance procedures for addressing formal complaints of sexual harassment.[71] The American Civil Liberties Union, the Commonwealth of Pennsylvania, the State of New York, Know your Title IX, the Women's Student Union – all have filed suits alleging one part or another of the 2020 Title IX Regulations violate due process, other constitutional rights or states' rights. None of these have been successful; many others are ongoing.[72]

Despite the criticism and negativity accompanying the 2020 Title IX Regulations, and unsurprisingly they are not perfect, several prominent changes from the older OCR guidance documents that promised to treat both parties more equitably and provide opportunities to combat anti-male bias.

A. The New Definition of Sexual Harassment

Perhaps the most controversial element of the 2020 Title IX Regulations has been the new definition of sexual harassment.[73] Sexual harassment is defined as conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).[74]

The first element of the definition, also known by the Latin phrase "*quid pro quo*," or "this for that," harkened back to Title VII again, with the connotation of a "boss" or "superior" in the workplace pressing an employee for sexual favors in exchange for a job benefit.

The second element qualifies and elaborates on the "unwelcome conduct" aspect of the previous definitions of sexual harassment but restricts the nature of the conduct to be judged as sexual harassment to conduct which, judged by a reasonable person, must be "severe, pervasive and objectively offensive." This language is taken verbatim from the litigation standard for establishing peer-peer sexual harassment, expressed by the Supreme Court in *Davis v. Monroe County Board of Education*.[75] This more stringent qualification of "unwelcome conduct" in the definition applies only to unwelcome conduct, as the Final Rule explained,[76] and is intended to capture "categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom."[77] The elements of *quid pro quo* harassment, and the four categories of conduct in the third element of the definition are *per se* actionable as sexual harassment.

The third element of the definition, including the offenses of sexual assault, dating violence, domestic violence, and stalking, are taken from the Clery Act[78] and VAWA.[79] These elements were added to the definition, as the Department stated, to "clarify the intersection among Title IX, the Clery Act, and the Violence Against Women Act (VAWA) with respect to sex-based offenses, and ensure that recipients must respond to students and employees victimized by sexual harassment that jeopardizes a person's equal educational access."[80]

Other definitions in 34 C.F.R. § 106 (a) include the words "Complainant" and "Respondent," signifying the difference between a Title IX proceeding and litigation between the parties. Taken together, this distinction, avoiding the possible prejudgment of "victim" and "perpetrator" language, and the three elements of the new definition of sexual harassment provide both complainants and the recipients of federal financial assistance with clear direction that an allegation of a Title IX violation, even if not in a courtroom, is serious, and the consequences for the respondent, if judged responsible, may be life altering.

B. Provisions for Withholding Judgment

In addition to the Definition section of the 2020 Regulations, other non-judgmental provisions are included in the new Regulations, especially in § 106.44 "Recipient's response to sexual harassment" and § 106.45 "Grievance process for formal complaints of sexual harassment." Title IX, according to § 106.44 (a) applies in an "education program or activity," only in "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." The educational institution "must treat complainants and respondents equitably," although before the complainant files a formal complaint, only the complainant is entitled to receive "supportive measures."[81] Once a formal complaint is filed by the complainant, the institution's Title IX Coordinator may provide supportive measures to the respondent.

The Title IX grievance process described in § 106.45 begins only after a complainant files a formal complaint

of sexual harassment. Since, as noted above, the overwhelming number of sexual harassment complaints are filed by female students, the gender of the Title IX Coordinators in institutions of postsecondary education may be relevant. The Title IX Coordinator must contact the complainant promptly after receipt of a report of sexual harassment. In providing supportive measures to the complainant, the Title IX Coordinator must interact with the complainant before even contacting the respondent, and this interaction may be critical.

A 2013 study by the National Association of Scholars surveyed fifty-two institutions of higher education in the U.S. to identify the gender of their Title IX Coordinators. In forty-three of them (82.7%), Title IX Coordinators were female; only nine (17.3%) were male. Of the other staff members involved in enforcing the "old" Title IX, 73.1% were women. In addition, women as Title IX Coordinators were greatly overrepresented compared to numbers of female students in the institutions studied. The report concluded that "the gender . . . of the people in charge might reasonably be thought to have some bearing on the integrity of the process."[82] The statistics, admittedly a small sample, suggest the possibility that female Title IX Coordinators may "bond" with their female complainants even before the grievance process begins.

Such "bonding" is prohibited in § 106.45 (b)(1)(iii) which requires that "any individual designated by a recipient as a Title IX Coordinator . . . not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent." Title IX Coordinators must now receive training on "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."

C. The Evidentiary Standard

A 2019 article in *Inside Higher Education* reported that over 500 lawsuits had been filed in the courts by males who claimed they were denied due process under the "old" Title IX. The men also allege they were presumed guilty when charged; there was no presumption of innocence.[83] In 2019, the standard of evidence required in a Title IX grievance process, which process could differ from institution to institution based on their student codes of conduct, was the preponderance of evidence standard,[84] a standard of evidence as described above as the most lenient of evidentiary standards.[85]

The 2020 Title IX Regulations changed the evidentiary standard. Now the institution may choose between applying a preponderance of evidence or the clear and convincing evidence standards.[86] "Clear and convincing evidence" requires substantial evidence that the conduct occurred as described.

The 2020 Regulations stress that the respondent is not determined "responsible" until the entire grievance process is concluded, from the complainant's formal complaint to the end of any appeals process. This presumption of innocence is repeated frequently in sections describing the grievance process, but most specifically in §106.45 (b)(1)(iv), where the "basic requirements" for a grievance process under Title IX must "[i]nclude a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process."

D. Confidential Advisors

The postsecondary educational institution must ensure and maintain confidentiality for those disclosing reports of sexual harassment, and also forbids retaliation for any reports of sexual harassment.[87] However, students in postsecondary institutions who believe they have been victims of sexual harassment may report sexual harassment to a confidential advisor, without the complaint being forwarded to the Title IX Coordinator. The Final Rule in the Federal Register contains an extended discussion of this issue, concluding that the Regulations must treat student requests for confidentiality differently in K-12 institutions versus postsecondary institutions in regard to confidential advisors:

> . . . [T]he approach in these final regulations allows postsecondary institutions to decide which of their employees must, may, or must only with a student's consent, report sexual harassment to the recipient's Title IX Coordinator . . . . Postsecondary institutions ultimately decide which officials to authorize to institute corrective measures on behalf of the recipient.[88]

> ". . . students at postsecondary institutions may benefit from having options to disclose sexual harassment to college and university employees who may keep the disclosure confidential . . . . [T]he Department believes that students at postsecondary institutions benefit from retaining control over whether, and when, the complainant wants the recipient to respond to the sexual harassment that the complainant experienced.[89]

E. Live Hearings

For postsecondary institutions, the grievance process must provide for live hearings.[90] The parties' advisors must be the ones who ask the questions of the parties and witness, and this questioning must be conducted orally and in real time and may include challenging credibility.[91] Hearings may be held in person or via technology, in order not to re-traumatize a complainant. If one party does not have an advisor, the institution must supply one of their choice with no cost to the party. Transcripts or video recordings must be made of the hearing.

This provision has been widely criticized, but where credibility hinges on personal cross examination, such hearings are invaluable. The stakes of not determining credibility are too high for either complainant or respondent.

F. "Informal" Grievance Processes

When an allegation of sexual assault is made by a party who was admittedly too intoxicated to give consent, or who was so drunk that he or she did not even remember having sex or being intoxicated, except for some questionable morning-after bruises, the ability for the

two parties involved to engage with a trained mediator or a restorative justice practitioner may be the best course that leaves fewer emotional or psychological scars. The possibility of the parties voluntarily requesting such an informal hearing[92] after the complainant has filed a formal complaint is a totally new addition to the sexual harassment resolution process.

The parties do not surrender their right to proceed to a formal resolution if they seek the informal route, and they can actually go back and forth between informal and formal grievance processes with simple written bilateral requests to the Title IX Coordinator. This could sort out allegations quickly in many cases and save months of angst for both parties.

The basic requirements of the grievance process, objective evaluation of all relevant evidence, withholding of judgment until the conclusion of the grievance process, an independent trained facilitator, impartial and unbiased deliberations – all are required under the rubric of an informal grievance process. This opportunity is unique in the 2020 Title IX Regulations and deserves more attention.

Part IV: Recent Developments with the New Department of Education and Its Commitment (or Lack of Commitment) to the 2020 Title IX Regulations

After the Trump administration's stripping away of the Title IX rights for LGBTQ individuals granted in the earlier DCLs, President Biden took no time in stepping to the forefront in restoring that protection to LGBTQ individuals through Executive Orders. On January 20, 2021, President Biden signed an Executive Order prohibiting discrimination on the basis of LGBTQ status, his *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.*[93] He followed on March 8, 2021 with an Executive Order specific to the educational environment, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, in which Section 1 stated:

> [A]ll students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.[94]

On April 6, 2021, the Department of Education's Office for Civil Rights announced the launch of a "Comprehensive Review of Title IX Regulations to Fulfill President Biden's Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination."[95] The announcement to "Students, Educators, and Other Stakeholders" gave notification of an upcoming public hearing, and the issuance of a new Q&A to provide clarity as to how OCR will enforce the 2020 Title IX Regulations, as well as issuance of a new Notice of Proposed Rulemaking (NPRM).

The Department of Education then officially confirmed that the *Bostock v. Clayton County, Georgia,*[96] decision that Title VII protection "on the basis of sex" includes protection for LGBTQ individuals "fits squarely within OCR's responsibility" to enforce Title IX in the same way. The OCR Notice affirmed the textual similarity between Title VII and Title IX, and that both laws specifically protect *individuals* against discrimination, without ambiguity as to LGBTQ individuals. Moreover, the Notice acknowledged that discrimination against LGBTQ students in schools may cause physical and emotional harms, as well as stigmatization and shame.[97]

In May 2021, President Biden selected his pick for Assistant Secretary of Education and head of OCR, Catherine Lhamon, who served in that post under the Obama administration. Lhamon had been roundly criticized for her many statements that appeared biased toward female complainants, and her confirmation hearing was fractious. The Senate vote was 50-50, with Kamala Harris breaking the tie. Lhamon was confirmed on October 20, 2021.[98]

Despite all the criticism about the 2020 Regulations, the Department of Education has continued to publish helpful Q&As on clarifying the enforcement of the regulations by postsecondary institutions. It published a weighty tome on July 20, 2021 responding to sixty-seven questions, but emphasizing that, despite possible future revisions, the 2020 Title IX Regulations had the force of law and were binding law now, until a new set of Regulations was adopted.[99]

Surprisingly, the 2020 Title IX Regulations had actually clearly stated that Title IX protects LGBTQ individuals. While noting that sexual harassment could be experienced by any individual, the Final Rule concluded that every individual must be protected under Title IX from sexual harassment.

> We emphasize that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sexual harassment under these final regulations, and that every individual should be treated with equal dignity and respect.[100]
>
> These final regulations focus on prohibited conduct, irrespective of a person›s sexual orientation or gender identity . . . .
>
> The Department will not tolerate sexual harassment as defined in § 106.30 against any student, including LGBTQ students.[101]

These final regulations apply to prohibit certain conduct and apply to anyone who has experienced such conduct, irrespective of a person's sexual identity or orientation. The Department believes that these final regulations provide the best protections for all persons, including women and people who identify as LGBTQ, in an education program or activity of a recipient of Federal financial assistance who experience sex discrimination, including sexual harassment.[102]

Part V: Arguments for Retaining Elements of the 2020 Regulations Which Level the Playing Field for Males and Females in Sexual Harassment

Allegations in Postsecondary Educational Institutions

The Biden administration has announced that May 2022 will be the earliest date at which to expect a proposal for significant changes to the 2020 Title IX Regulations. That NPRM will require a time period in which public comment is solicited. If the public comments reach the total received in the two months between November 2019 and January 2020 for the proposed 2020 Regulations, over 120,000 comments, months of analysis and deliberations will take place before the Department of Education releases 2022, or possibly even 2023, Title IX Regulations.

While female students, sexual assault survivors, and their advocates continue to press legislators to immediately roll back what they see as Trumpian evidence of female oppression,[103] these groups are not themselves looking at the 2020 Regulations with an unbiased lens. It is not the fault of the 2020 Regulations that campuses may not handle sexual harassment complaints to the protesting groups' satisfaction; the Regulations state very clearly what the institutional response should be. As a matter of fact, allegations of pro-female bias are being levelled by hundreds of young men who feel they have been railroaded by the gender bias among female Title IX Coordinators.

This brief analysis of only a small selection of the elements of the 2020 Title IX Regulations – (1) the new, more specific definition of sexual harassment, (2) the mandates to withhold judgment of responsibility until the grievance process is ended that permeates the Regulations, (3) the availability of a choice of evidentiary standards, (4) the provision allowing the postsecondary institution to identify confidential advisors from whom complainants (males or females) may seek counsel, (5) the option for live hearings (with protection for the complainant or respondent through technology) to assess credibility and consistency among parties' and witnesses' testimony, and finally, (6) the availability of informal resolution – if implemented as described in the numerous Q&A guides provided by the Department of Education and OCR, would go far to requiring consistency among all postsecondary institutions dealing with allegations of sexual harassment. This commentary has not even drawn attention to the more mundane but necessary duties of the Title IX Coordinator under the 2020 Regulations to provide notice to both parties and their advisors of notifications and the opportunity of parties and their advisors to examine all the evidence in the case *throughout the grievance process*.

Contrast the five-year period during which John Doe was, and actually still is, in limbo with regard to the outcome of the Title VII burden-shifting framework with the prompt and equitable resolution of allegations of sexual harassment envisioned under the 2020 Title IX Regulations. The Regulations and the carefully crafted explanations in OCR's Q&A documents provide postsecondary educational institutions clear directions regarding their responsibilities in a consistent-across-all-institutions grievance process.

No set of Regulations is ever perfect. However, the Biden administration would do well to remember that, despite the Trump administration's bias against LGBTQ individuals, the 2020 Title IX Regulations embraced individual protections from sexual harassment for *all* individuals. The 2020 Regulations stand apart from espousing a political ideology, and their provisions to aspire to consistency and protections from sexual harassment for all individuals, heterosexual male or female, LGBTQ, intersex or asexual, deserve consideration and protection from sexual harassment, as opposed to discrimination on the basis of sex.

Whatever unfolds with respect to the 2020 Title IX Regulations, these Regulations state an ambitious goal for the now and into the future:

> "We emphasize that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sexual harassment . . . and that every individual should be treated with **equal dignity and respect**."

ENDNOTES

[1] **McDonnell Douglas Corp. v. Green**, 411 U.S. 792 (1973).
[2] 42 U.S.C. § 2000e et seq. (1964).
[3] 20 U.S.C. § 1681 et seq. (1972).
[4] "Title VII jurisprudence is frequently used as a guide to inform Title IX." *See* U.S. Dept. of Justice, *Title IX Legal Manual*, https://www.justice.gov/crt/title-ix.
[5] Courts of Appeals are split on the question of whether a Title VII lawsuit takes precedence over a Title IX filing in the educational context.
[6] *Doe v. Univ. of Denver*, 1 F.4th 822 (10th Cir. 2021).
[7] *Id.* at 825.
[8] *Id.*
[9] 1 F.4th at 825.
[10] *Id.*
[11] *Id.* at 825-26.
[12] *Id.* at 826.
[13] *Id.*
[14] *Id.*
[15] *Id*. at 826-27.
[16] The Title IX Coordinator did not disclose the charges against Doe at this point.
[17] *Doe v. Univ. of Denver*, 1 F.4th at 827.
[18] *Id*. at 827.
[19] *Id.*
[20] *Id.* at 827-28.
[21] Note 4 to the Court of Appeals decision indicates, "The committee's role was limited to imposing a sanction based on the investigators' finding that, by preponderance of the evidence, John had sexually assaulted Jane. The committee had no power to challenge or reverse that conclusion." *Doe v. Univ. of Denver*, 1 F.4th at 828 n4.
[22] *Doe v. Univ. of Denver*, 1 F.4th at 828.
[23] *See* https://www.du.edu/research/about.
[24] Fourteenth Amendment claims of failure to provide due process are not recognized as viable against private institutions of higher education; employees of private institutions are not state actors.
[25] *Doe v. Univ. of Denver*, 1 Fed.4th at 828.
[26] 411 U.S. 792 (1973).
[27] *Doe v. Univ. of Denver*, 1 Fed.4th at 829.
[28] *Id*. at 830, *citing*, *Doe v. Purdue Univ.*, 928 F.3d 652, 667-668 (7th Cir. 2019).
[29] *Id.* at 830.
[30] *Id.* at 831.
[31] *Id.* at 831-35.
[32] *Id.* at 835-836.
[33] *See* Code of Federal Regulations, Title 34, https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106?toc=1.
[34] U.S. Dept. of Justice, *Title IX Legal Manual*, 3, https://www.justice.gov/crt/title-ix.
[35] *Id.* at 7.
[36] *Id.* at 18-19.
[37] *Id.*
[38] Title 20 U.S.C. §§ 1681-1688.
[39] 40 Fed. Reg. 24128 (1975).
[40] 64 Fed. Reg. 58567 (1999).
[41] Pub. L. No. 100-259, 102 Stat. 28 (Mar. 22, 1988).
[42] Two Supreme Court decisions were especially noteworthy: *Gebser, v, Lago Vista Indep, Sch, Dist,* 524 U.S. 274 (1998) and *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629 (1999).

[43] The Title IX common rule covers education program providers that are funded by other federal agencies, in addition to the Department of Education, https://www.justice.gov/crt/fcs/TitleIX-SexDiscrimination. *See also* 65 Fed. Reg. 52857 (2000), which states: "This final common rule provides for the enforcement of Title IX of the Education Amendments of 1972, as amended ("Title IX"), by the agencies identified above. Title IX prohibits recipients of Federal financial assistance from discriminating on the basis of sex in education programs or activities. The promulgation of these Title IX regulations will provide guidance to recipients of Federal financial assistance who administer education programs or activities. The provisions of this common rule will also promote consistent and adequate enforcement of Title IX by the agencies identified above." A list of agencies is provided.

[44] The DCLs were determined to be "significant guidance documents" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

[45] James S. Murphy, *The Office for Civil Rights Volatile Power*, ATLANTIC, Mar. 13, 2017, https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/.

[46] U.S. DEPT. EDUC., Rescinded, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[47] U.S. DEPT. EDUC., Rescinded, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

[48] 2011 DCL at 3.

[49] *Id* at 4.

[50] *Id.* at 8.

[51] The preponderance of evidence standard requires that "more likely than not, the conduct occurred as described." This standard has been described as putting a small feather on one side of an equal balance.

[52] 2011 DCL at 10-11.

[53] 2014 DCL at 2.

[54] *Id.* at 3.

[55] *Id.* at 5.

[56] *Id.* at 10.

[57] Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/.

[58] *Id.*

[59] Kay Hymowitz, *What's at Stake in the Coming Title IX Wars*, INST. FAMILY STUDIES (Feb. 9, 2021), https://ifstudies.org/blog/whats-at-stake-in-the-coming-title-ix-war-.

[60] Martha Nussbaum, *Thoughts About Sexual Assault on Colleges*, BROOKINGS (Oct. 21, 2021), https://www.brookings.edu/research/thoughts-about-sexual-assault-on-college-campuses/.

[61] *See* Emily Yoffe, note 57.

[62] Andrew Kreighbaum, *DeVos's Legacy Snags Biden's Rewrite of College Male-Bias Rules*, BLOOMBERG LAW (Apr. 5, 2021), https://news.bloomberglaw.com/daily-labor-report/devoss-legacy-snags-bidens-rewrite-of-college-male-bias-rules.

[63] Andrew Kreighbaum, *New Instructions on Title IX,* INSIDE HIGHER EDUC. (Sept. 25, 2017), https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance.

[64] U.S. DEPT. OF EDUC., Rescinded, https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix.

[65] Notice-and-comment rulemaking is the process of complying with the Administrative Procedure Act, in drafting an agency regulation that would have the force of law. *See Admin. Procedures Act*, CTR.EFFECTIVE GOVT., https://www.foreffectivegov.org/sites/default/files/regs/library/apa.pdf.

[66] R. Shep Melnick, *The Strange Evolution of Title IX*, NATL. AFFAIRS (Summer, 2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix.

[67] 83 Fed. Reg. 61462 (2018).

[68] 85 Fed. Reg. 30026 (2020).

[69] This overview of the 2020 Title IX Regulations is not intended to be a comprehensive summary of the Regulations but serves to point out the features of the Regulations that the author believes most effectively operate to eliminate anti-male bias in resolving allegations of sexual harassment.

[70] 34 C.F.R. § 106.30 (b). This author has written separately to urge separation of Title IX regulations into two regulatory schemes, one for preK-12 institutions and the other for postsecondary institutions. *See* Kathleen Conn, *Salvaging and Separating the 2020 Title IX Regulations*, 386 Ed.Law Rep. [557] (April 15, 2021).

[71] 34 C.F.R. § 106.6 (h).

[72] Jonathan Taylor, *DeVos Era Title IX Regulations Go Five for Five in Federal Court*, TITLE IX FOR ALL (Aug. 9, 2021), https://titleixforall.com/devos-era-title-ix-regulations-go-five-for-five-in-federal-court/.

[73] 34 C.F.R. § 106.30 (a). *See* Jeannie Suk Gerson, *How Concerning Are the Trump Administration's New Title IX Regulations?* NEW YORKER (May 16, 2021), https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations.

[74] 34 C.F.R. § 106.30 (a). This statutory definition of sexual harassment was expanded from the definition suggested in the Notice of Proposed Rule Making (NPRM) which contained a prohibition of sexual assault, but did not include dating violence, domestic violence, and stalking. The new definition was also much more limiting than the general definition of "unwelcome conduct of a sexual nature" previously stated in the 2011 DCL.

[75] "Moreover, we conclude that such an action [sexual harassment] will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633.

[76] Dept. of Educ., *Guidance on Federal Title IX Regulations: Analysis of Section 106.30(a): Sexual Harassment* (June 4, 2020), https://system.suny.edu/media/suny/content-assets/documents/sci/tix2020/Sexual-Harassment.pdf. *See* 85 Fed. Reg. 30026, 30141-30142 (May 19, 2020).

[77] *Id*. *See* 85 Fed. Reg. at 30142 (May 19, 2020).

[78] The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092 (1990).

[79] 42 U.S.C. ch. 136 (1994). VAWA was part of the Violent Crimes Control and Law Enforcement Act, but expired on Feb. 15, 2019, after the government shutdown of 2018. VAWA was recently reintroduced into the House as H.R. 1620 – 117th Congress (2021-2022), Mar. 17, 2021.

[80] *See* Dept. of Educ. at note 76. *See* 85 Fed. Reg. at 30037 (May 19, 2020).

[81] "Supportive measures" are defined in 34. C.F.R. § 106.30 (a) as nondisciplinary, nonpunitive individualized services offered to the complainant and/or respondent to ensure continued equal access for both parties to the education program or activity.

[82] Peter Wood, *Gender Inequity Among the Gender Equity Enforcers*, NATL. ASSN. SCHOLARS (JUNE 13, 2013), https://www.nas.org/blogs/article/gender_inequity_among_the_gender_equity_enforcers.

[83] James Moore & Kursat Christoff Pekgoz, *The Unfairer Sex*, INSIDE HIGHER EDUC. (Dec. 18, 2019), https://www.insidehighered.com/views/2019/12/18/men-are-banding-together-class-action-lawsuits-against-discrimination-title-ix.

[84] OCR, *Know Your Rights* (Archived) (where the OCR document stated, "Every complainant has the right for the complaint to be decided using a preponderance of the evidence standard (*i.e*., it is more likely than not that sexual harassment or violence occurred"), https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html.

[85] *See* note 51.

[86] *See* 34 C.F.R. § 106.45 (1)(vii).

[87] 34 C.F.R. § 106.71 (a) states, "The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness . . . ."

[88] 85 Fed. Reg. 30040 (2020).

[89] *Id*.

[90] 34 C.F.R. § 106.45 (b)(6)(i).

[91] On August 10, 2021, a judicial challenge to part of § 106.45 (b)(6)(i) ruled that a decision maker may now consider statements made by parties or witnesses that are otherwise permitted under the regulations when reaching a determination of responsibility, even if those parties or witnesses do not participate in cross-examination during the live hearing. *Letter to Students, Educators, and other Stakeholders re Victim Rights Law Center et al. v. Cardona,* Dept. of Educ. (Aug. 24, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf.

[92] *See* 34 C.F.R. § 106.45 (b)(9)(i-iii).

[93] *See* Whitehouse, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.

[94] *See* Whitehouse, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/.

[95] *See* Dept. of Educ., https://www.ed.gov/news/

press-releases/department-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination.

[96] 140 S. Ct. 1731 (2020).

[97] Dept. of Educ., Notice of Interpretation, https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf.

[98] Jordan Davidson, *Senate Narrowly Confirms Due Process Foe Catherine Lhamon To Education Department,* FEDERALIST (Oct.20, 2021), https://thefederalist.com/2021/10/20/senate-narrowly-confirms-due-process-foe-catherine-lhamon-to-education-department/.

[99] Dept. of Educ., *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July2021), https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf.

[100] 85 Fed. Reg. 30031 (2020).

[101] *Id.* at 30179.

[102] *Id*. at 30477.

[103] Maria Carrasco, *Groups Deliver #EDActNow Petition to Education Department*, INSIDE HIGHER EDUC. (Oct. 7, 2021), https://www.insidehighered.com/news/2021/10/07/groups-deliver-edactnow-petition-education-department.

DESPERATE TIMES CALL FOR DESPERATE MEASURES: THE CAUSATION QUESTION IN EMPLOYEE DISHONESTY CLAIMS

By C. Scott Rybny, Esquire, Morgan & Akins

As the adage goes – desperate times call for desperate measures. Given the current trifecta of inflation, the prolonged effects of Covid-19, the haphazard regulations that followed and inventory shortages, the increased risk of fraud seems inevitable. When these factors are coupled with the increase in the number of individuals working remotely, it would not be particularly surprising that individuals would be tempted to take or "borrow" funds from their employer. In light of this current economic environment and the inevitable increase in these types of claims, a review of the standard employed by courts in evaluating the causation question is both timely and appropriate.

Since the early 1900s and prior to the creation of standard bond and policy forms, businesses and financial institutions have insured themselves against employee dishonesty. Edward G. Gallagher, et. al., A Brief History of the Financial Institution Bond, *Financial Institution Bonds* 1, 9 (Duncan L. Clare ed. 1998). Since those early days, various insurance policy forms have evolved to afford coverage against property loss along with money or securities and any other property of intrinsic value. While employee dishonesty coverage generally requires that the claimed loss result "directly from" a covered risk, as is true of many provisions in an insurance policy, the requirement of "direct" causation has been the subject of increased judicial scrutiny. Consider this, does "direct" encompass monies that a business pays to settle third-party claims or litigations arising out of an employee's dishonesty? Does it include consequential damages incurred by an insured that arose out of the alleged dishonesty? To answer these questions, is the analysis confined to the policy of insurance or, as some have suggested, by whether the jurisdiction utilizes a proximate cause test for evaluating the nature of the loss?

We also have to recognize this truism - not every dishonest act of an employee constitutes an insured loss under a contract of insurance. As stated in *Simon Marketing v. Gulf Ins. Co.*, "[t]here must be loss of, or damage to, insured property; to use Couch's phrase, 'detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property' is not compensable under a contract of insurance." 149 Cal.App.4th 616, 623, 57 Cal.Rptr.3d 49, 53 (2007) (internal citation omitted). When applied to claims arising out of liability to third parties, courts historically accepted the insurer's arguments that the "directly from" causation requirement precluded coverage for an insured's liability to third parties for the dishonest or fraudulent conduct of its employees.

Despite the apparent clarity of the policies and their use of the word "direct", insureds have argued and seen success in persuading some courts to erase the adverb "directly" out of the policy and interpose the tort concept of proximate causation to permit recovery for employee dishonesty only upon a showing that the losses were substantially or proximately caused by a covered risk. For example, in *Jefferson Bank v. Progressive Casualty Ins. Co.*, 965 F.2d 1274 (3d Cir. 1992), the insured sought indemnification under a loan created with the aid of an imposter notary, who affixed her invalid notarization to the mortgage, and then failed to record it. The insurer argued that the bank's loss was not covered under the bond's coverage for losses "resulting directly from" fraudulent signatures, since its cause was not the forged signature of the notary, but the fact that the building was so heavily encumbered. The court rejected that argument, and in doing so noted that 'direct cause' or 'immediate cause' is a nebulous and largely indeterminate concept, and one that does not enjoy favor under Pennsylvania law." *Id*. at 1281-82.

A similar decision was rendered in *Scirex Corp. v. Fed. Ins. Co*., 313 F.3d 841 (3d Cir. 2002). In that case, a pharmaceutical testing company sued its insurer over its denial of coverage under the company's employee dishonesty policy for losses from misrepresentations of the company's nurses concerning several clinical studies. The court cited affirmatively the proximate cause test espoused by *Jefferson Bank* and found that the nurses' failure to follow protocol and their deceptive recordkeeping singlehandedly rendered the studies worthless and resulted in a loss to Scirex's property.

Turning our attention to our neighbors to the north, in *Continental Bank v. Aetna Cas. & Sur. Co.*, 626 N.Y.S.2d 385 (App. Div. 1995), the court refused to

afford coverage to a brokerage firm that suffered losses arising from a scheme created by two of its brokers. The brokers artificially raised the price of the stock by making unauthorized cross-trades in customer accounts in an effort to corner the market in Chase Medical stock. When the American Stock Exchange became aware of the scheme, it halted trading in Chase Medical stock, leaving the brokerage firm holding a large number of unpaid shares. Since the customers did not authorize the trades, they refused to pay for them, forcing the broker to pay for the shares. *Id.* at 387-88. A claim was thereafter submitted for the losses. The court denied coverage, stating, "[t]he fact that the insured may be liable to a third party for a loss of money resulting from employee dishonesty does not transform a policy covering the insured against a direct loss into one indemnifying against liability." *Id.* at 389 (internal quotation and citation omitted). The court further concluded that the trading of customer accounts did not amount to a "direct" loss to the brokerage firm. *Id.* at 388.

Courts have also traditionally been reluctant to extend coverage under employee dishonesty provisions to lost profits. *U.S. Gypsum Co. v. Ins. Co. of North America*, 813 F.2d 856 (7th Cir. 1987), illustrates this point. In *U.S. Gypsum*, a dishonest employee leaked trade secrets to a competing company that resulted in the competitor earning $139,298.58—money U.S. Gypsum would have earned but for the leak. The court refused to extend coverage, holding that there was no loss of, or damage to, property since U.S. Gypsum did not "lose" the leaked formula. That decision was cited affirmatively in *Patrick Schaumburg Autos., Inc. v. Hanover Ins. Co*., 452 F. Supp. 2d 857 (N.D. Ill. 2006).

For example, in *Frontline Processing Corp. v. American Economy Ins. Co.*, 335 Mont. 192, 149 P.3d 906 (2006), the court concluded that the insured's employee dishonesty coverage afforded coverage for consequential damages arising out of an alleged theft committed by its Chief Financial Officer, even though the policy provision limited coverage to "direct" losses. The consequential damages Frontline sought compensation for included, among others, payment of its forensic accountants, handwriting experts as well as penalties, interests, and fees it owed the Internal Revenue Service. While the decision is important insofar as the court expanded the employee dishonesty coverage to encompass consequential damages incurred by an insured while investigating an alleged loss, perhaps more significant is the analysis that the court employed in arriving at its conclusion.

The court ultimately rejected American Economy's argument that the damages were consequential as opposed to direct losses and relied on, among other cases, Vons Companies, Inc. v. Federal Ins. Co., 212 F.3d 489 (9th Cir. 2000). In doing so, the court noted that *Vons Companies* and those cases cited by American Economy arose out of the First, Fifth, Sixth and Seventh Circuits, jurisdictions which had expressly declined to apply a proximate cause analysis to the phrase "direct loss." *Id.*, 335 Mont. at 196, 149 P.3d at 909. Instead, the court looked to decisions authored by the Third Circuit (applying Pennsylvania law) and New Jersey that employed a proximate cause analysis to determine whether a loss is "direct" for purposes of employee dishonesty coverage—*Jefferson Bank v. Progressive Cas. Ins. Co.*, *supra*; *Resolution Trust Corp. v. Fidelity & Deposit Co.*, 205 F.3d 615 (3d Cir. 2000), *Scirex Corp v. Federal Ins. Co.*, *supra* and *Auto Lenders v. Gentilini Ford*, 181 N.J. 245, 854 A.2d 378 (2004). Under this analysis, the court reasoned, it was possible that the employee dishonesty coverage afforded coverage for consequential damages sustained by an insured. While the court noted, albeit in dicta, that third party liability is "typically" not compensable under this type of coverage, it did not expressly rule it out. *Id.*, 335 Mont. at 197, 149 P.3d at 909. As a result, at least one other court has seized upon this analysis to extend coverage to costs incurred in connection with the litigation and settlement of a third-party lawsuit.

Investigating and evaluating these types of claims are not easy since the perpetrators of this type of fraud are not limited to a particular level in the corporate structure, as well as the probability that the thefts occurred over an extended period thereby potentially implicating multiple insurers. Add to this conundrum the coverage quagmire that various courts have created concerning potential liability for consequential damages and third-party losses, and many are left pondering the precise scope of coverage. What can be said is that, at best, the reaction of courts around the country to employee dishonesty coverage continues to evolve, with the ultimate outcome being contingent upon the courts' position with respect to the proximate cause test.

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DOES THE FAIR SHARE ACT APPLY TO FAULTLESS PLAINTIFFS? A DEFENSE POSITION IN THE WAKE OF *SPENCER V. JOHNSON*

By Joseph Lesinski, Esq. and Brad Haas, Esq., Marshall Dennehey Warner Coleman & Goggin, P.C.

Last March the Pennsylvania Superior Court issued an alarming decision for defendants related to the Pennsylvania Fair Share Act in the case of *Spencer v. Johnson*, 249 A.3d 529 (Pa. Super. 2021). While the implications from the decision have yet to be seen, some commentators argue the Court signaled a return to traditional joint and several liability in cases involving a plaintiff who is assessed no comparative fault.

Prior to the passage of the Fair Share Act, the traditional rule of joint and several liability applied. This meant any defendant found to be even 1% liable for an accident could be required to pay the entire verdict. When this would occur, the only recourse for the minimally culpable, "deep-pocketed" defendant was to seek reimbursement of its excess payment from any of the other liable co-defendants. The fundamental unfairness of requiring such a minimally culpable defendant to pay an entire verdict brought about changes to traditional joint and several liability in the form of the Fair Share Act in 2011. 42 Pa. C.S. § 7102. The Act provides that in cases involving multiple defendants, each defendant is only responsible for paying the percentage of the verdict corresponding to the fault attributed to them.

vSeveral exceptions are included in the Fair Share Act, which allow for traditional joint and several liability in certain situations. These include cases involving intentional misrepresentation, intentional torts, release of a hazardous substances, and violations under the Liquor Code. The final exception applies traditional joint and several liability for a defendant found to be 60% or more liable as apportioned by the jury. In the absence of the above exceptions, since the passage of the Fair Share Act in 2011, defendants were only required to pay their respective percentage of apportioned negligence. Courts and practitioners alike have interpreted the Fair Share Act as a repeal of traditional joint and several liability. This paradigm has now come into question following the Superior Court's decision in *Spencer*.

By way of background, the *Spencer* case arose out of a motor vehicle versus pedestrian accident in which the defendant was driving under the influence of alcohol. The vehicle operated by the defendant was owned by the employer of defendant's wife. Plaintiff asserted negligent entrustment against defendant's wife and her employer. At trial, the jury found in favor of the plaintiff and apportioned 36% of negligence to the defendant, 19% to the defendant's wife, and 45% to the wife's employer. The jury did not find plaintiff comparatively negligent.

Following post-trial motions and appeals, the Superior Court held that the verdict should be molded by combining the negligence of the driver's wife and the wife's employer under a vicarious liability theory. The combined negligence of the two was molded to total 64%, thus surpassing the 60% exception mark under the Fair Share Act, and permitting traditional joint and several liability.

The *Spencer* court then delved further into a hypothetical concerning what they may have done had they not molded the verdict. The court pronounced, via dicta, that traditional joint and several liability still would have applied because the plaintiff's comparative negligence was not at issue. In particular, the *Spencer* court stated, "[f]or the Fair Share Act to apply, the plaintiff's negligence must be an issue in the case" and that the Fair Share Act only "concerns matters where a plaintiff's own negligence may have or has contributed to the incident." *Spencer*, 249 A.3d at 559. Essentially, the court implied that the Fair Share Act is inapplicable and traditional joint and several liability remains the law in Pennsylvania if the case involves a plaintiff who is attributed no comparative negligence. Although dicta, the *Spencer* decision represents the first appellate decision to express such an interpretation of the Fair Share Act.

The *Spencer* case settled prior to Supreme Court review. For the time being, the decision remains as published and precedential case law. Plaintiffs will undoubtedly cite it in future cases to support joint and several liability. Indeed, the potential ramifications of the *Spencer* decision are significant. Depending on future judicial treatment, it could signal a complete return to the pre-Fair Share Act days of traditional joint and several liability in any case where a plaintiff is attributed no percentage of negligence. A defendant found to be only 1% at fault for causing an accident may again be called upon to satisfy the entire verdict and thereafter seek reimbursement from co-defendants.

There are several noteworthy pieces of information for defense attorneys to keep in mind when handling argument on the *Spencer* case. First, as mentioned above, the problematic portion of the *Spencer* decision relative to joint and several liability is dicta, as it was unnecessary to Court's holding. The *Spencer* case was also decided by a two-judge panel.

In addition, the legislative history of the Fair Share Act cuts against the *Spencer* court's interpretation. Legislative efforts to reform traditional joint and several liability date back to 2002. In 2002 and 2006, a prior version of the Fair Share Act passed the State House and Senate, but was later vetoed. The successful 2011 version of the Fair Share Act continued prior discussions from these previous bill efforts. Congressional discussions related to the 2002, 2006, and 2011 Fair Share Act bills all had one thing in common -- a clear understanding that the Fair Share Act would be a complete repeal of traditional joint and several liability. The following discussions

during floor debate are particularly germane:

> (The Fair Share Act) "in effect, has a de facto repeal of joint and several liability."
>
> "If you look at the bill itself, and all of the bills, what they do is repeal joint and several liability and then provide certain exceptions."

-Senator Greenleaf; Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

> "What this amendment would do is essentially eliminate the doctrine of joint and several liability…"

-Senator Leach, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

Based upon the above, it would appear the Fair Share Act was meant to do away with traditional joint and several liability in full, except for certain enumerated exception situations, which do not include faultless plaintiffs. The exceptions section of the Act was heavily debated and was the primary reason the Act failed the first two times it came to the floor. None of the prior general assembly debates addressed an exception in situations where a plaintiff is not at fault.

Prior congressional discussions also touched on the *Spencer* Court's interpretation that the Fair Share Act "merely sought to modify which parties bear the risk of additional losses in cases where the plaintiff was not wholly *innocent*". *Spencer*, 249 A.3d at 559. However, the legislative intent behind Fair Share Act appears to apply equally in situations where a plaintiff is determined to be *innocent* or *not at fault*:

> "What this bill does, if we repeal joint and several liability, is now, instead of long-standing decades of policy where we favor the victim--*they are not at fault*. They are the ones who were injured, and so we have always, in Pennsylvania, given the advantage to the plaintiff."

-Senator Greenleaf, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

> "…the individual defendants who have been found to be neglectful or are responsible for committing a tort against an *innocent* victim…"

-Senator Costa, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

> "Historically, we have said that it is better for a guilty party, a tortfeasor, a party who has done wrong, to bear the risk of an imperfect result of a defendant who is unable to pay than it is for an *innocent*, injured victim to bear the risk."

-Senator Leach, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42.

The floor debates also contained a series of hypothetical situations involving plaintiff passenger children involved in motor vehicle accident lawsuits. *See e.g.,* Senator Orie, Pennsylvania Senate Journal, 2011 Reg. Sess. No. 42. These discussions were had based on an unsuccessful attempt to include an exception in Section 3 for minor children, where traditional joint and several liability would remain. As innocent vehicle passengers, minor children would have no percent of negligence attributed to them in such cases. Because of this, the exact scenario involving potential "innocent" or faultless plaintiffs appears to have been contemplated and discussed by the legislature. Had the legislature intended for the Fair Share Act not to apply to "innocent" plaintiffs as the *Spencer* Court has suggested, there would have been no reason for multiple Senators to raise the issue and demand an exception for minors involved in motor vehicle accidents as passengers. If the *Spencer* Court's legislative interpretation is correct, the Fair Share Act would never have been applicable from the outset in such cases because the minors were innocent, faultless passengers. However, the senators raised the issue because they understood that the passage of the Fair Share Act meant that traditional joint and several liability was no more, including situations where plaintiffs, such as faultless minors, were determined to be "innocent" or without fault.

In sum, defense counsel and carriers have a valid basis upon which to argue that the "innocent" plaintiff portion of the *Spencer* opinion appears to be nonbinding dicta and an advisory opinion by the Superior Court on the scope of the Fair Share Act. The legislative history of the Fair Share Act also supports an argument that no exception was intended for situations where plaintiff is not apportioned any fault.

PREMISES LIABILITY CASES

By Joseph Lesinski, Esq., Marshall Dennehey Warner Coleman & Goggin, P.C.

1. Landlord out of possession has no duty to repair dangerous condition when known to plaintiff and plaintiff is not a business invitee.

Sprouse v. Keller, et al., 245 A.3d 1105 (Pa. Super. 2020)

In this personal injury action, Monica Sprouse alleged she tripped and was injured while walking up the stairs of a rental home in which she resided due to an incomplete railing. She claimed the defendants, the Kellers, Re/Max, and Neill (an employee of Re/Max) were negligent in failing to keep the stairs free of defects. The defendants moved for summary judgment. The Kellers argued a lack of duty as they were landlords out-of-possession at the time of the fall. Re/Max and Neill asserted that they were not liable to Sprouse because they had no duty to maintain the premises. The trial court granted both motions, and the plaintiff appealed. The Superior Court stated that the while a landlord out-of-possession may be liable for hidden dangerous conditions, here, the staircase was in the same condition when Sprouse moved in, and Sprouse was aware that the first three stairs lacked a railing. The Court further discounted the plaintiff's attempted application of the *Goodman v. Corn Exchange National Bank & Trust Co.*, 200 A. 642 (Pa. 1938) case, because that it involved a business invitee of the landlord, rather than a tenant. Furthermore, Sprouse failed to establish that either the Kellers or Re/Max and Neill owed her a duty of care. The Superior Court affirmed the dismissal of the case against all defendants.

2. Issue of fact regarding "choice of ways doctrine," *inter alia*, prevents summary judgment.

Snair v. Speedway, LLC, 2021 WL 168329 (W.D. Pa. Jan. 19, 2021)

Slip and fall Plaintiff Monty Snair and his wife sued a gas station, snow removal service company, and a subcontractor for alleged failure to timely remove snow. The gas station, Speedway, contracted with a snow removal service that in turn contracted with a subcontractor to complete the snow removal. On a motion for summary judgment, Speedway argued that the plaintiffs lacked evidence showing that it had notice of the snow and ice that caused the plaintiff to fall. However, the court found that there were genuine issues of material fact as to any constructive notice on the part of the gas station. The court also determined there were genuine issues of material fact as to whether or not the snow removal service company owed any duty to the Plaintiff. The court found that the subcontractor was not liable for indemnity or contribution under the contract. The court also found genuine questions of fact regarding the applicability of the Pennsylvania "choice of ways" doctrine. It stated that summary judgment was inappropriate in this case because it was not "indisputably obvious" that the plaintiff either failed to heed an obvious hazard or that the gas station's proposed alternate routes were safe.

3. Res Ipsa Loquitur does not apply where there is a non-negligent possible cause of the plaintiff's injury.

Pyle v. Otis Elevator Co., 2021 U.S. App. Lexis 10501 (3d Cir. April 13, 2021)

Plaintiff Cyril Pyle sued the Otis Elevator Company for personal injuries allegedly caused by an unleveled elevator while he was working as an emergency room technician. The plaintiff argued that after he tripped and fell while exiting the elevator, he observed that it was six inches to a foot higher than the floor. He had never observed this before, or after the incident. No other sources corroborated this account. Otis filed a motion for summary judgment arguing failure to set forth a prima facie case of negligence by failing to obtain an expert report to show that Defendant failed to reasonably inspect or maintain the elevator, and because Plaintiff could not rely on the doctrine of res ipsa loquitur. The Eastern District Court agreed and found the res ipsa doctrine inapplicable because the plaintiff failed to meet the first and second prongs, that the incident was of a kind which ordinarily does not occur in the absence of negligence and because he could not rule out other causes for the "misleveling" incident. The Eastern District granted summary judgment and the Plaintiff appealed to the Third Circuit Court of Appeals for the Eastern District, which affirmed.

4. Spoliation of video recording precluded entry of summary judgment and allowed permissive adverse inference on the question of notice.

Nixon v. Family Dollar Stores, 2021 U.S. Dist. Lexis 95826 (M.D. Pa. May 20, 2021)

Plaintiff slipped and fell on a puddle in a Family Dollar store and was injured. While there were video cameras working within the store, and the plaintiff's family attorney sent a video preservation request the day after the fall, no video footage of the incident was maintained or ever produced. Family Dollar moved for summary judgment to dismiss the plaintiff's negligence claim due to lack of evidence of constructive notice and asserting that the puddle was open and obvious. The court denied Family Dollar's arguments for dismissal and sanctioned the defendant with a permissive adverse inference precluding summary judgement on the issue of notice of the claimed dangerous condition due to the defendant's spoliation of the video evidence. The court also found that the jury would be allowed to infer that the Family Dollar employees had notice of the puddle.

5. Summary Judgment granted in slip and fall case absent evidence of actual or constructive notice of dangerous condition.

Cole v. Wal-Mart, Inc., No. 20-3436 (E.D. Pa. July 1, 2021)

In this premises liability negligence claim, Plaintiff Shiretha Cole alleged she suffered injuries after slipping and falling because of negligence attributable to the Walmart defendants.

The court granted summary judgment in favor of the Defendant store because the Plaintiff failed to offer any evidence that the Defendant had actual or constructive notice of the alleged dangerous condition that allegedly caused the Plaintiff to fall. The court also noted, 1) that the record did not have any evidence as to how long the alleged hazard existed and therefore a jury would be left to impermissibly speculate as to the issue of notice, 2) the presence of an employee near the hazard, in and of itself, is not sufficient to establish constructive notice on the part of the Defendant, 3) the alleged failure of the store employees to follow store policy did not, in and of itself, establish a breach of the duty of care because the store policy is only considered after notice has been established and 4) photographs of the spill secured after the accident were not probative of its existence prior to the accident.

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