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From the Editors…

Welcome to the 31st volume of the MIDWEST LAW JOURNAL! This is the official publication of the Midwest Academy of Legal Studies in Business. The mission of the Journal is to publish articles of general interest to teachers of business law, the legal environment and related fields of law.

The MIDWEST LAW JOURNAL, with a less than 25% acceptance rate, requires that all prospective journal entries undergo a double-blind peer review vetting process. I would like to welcome Alice Keane as our new Co-Editor in Chief. We will be working together to continue to improve the journal! I would like to thank Alice Keane and John Paul for working so hard and always having great thoughts and advice on how to make the Journal better.

We would like to thank all the Associate Editors and the Editorial Board for their hard work and dedication. Without your hard work this year, during what can at best be considered difficult times, publishing the Journal could not happen without your help. To show our appreciation, this year we are adding a Best Reviewer award. This year's winner is Thane Messinger. Thank you for your hard work! As you read this edition, if you have any interest in participating as an editor, please contact any of us and we will get you signed up!

This year we implemented another exciting change to the Journal. We are introducing a Best Article Award. The winner this year is Kevin Farmer, the author of *Denying Severely Obese Workers Unqualified Protection under the Americans with Disabilities Act Flouts Administrative Expertise, Medical Research, and Common Sense*. Congratulations!

Please remember that the Journal is now published online. You will be able to find the Journal in fully on the Midwest Academy of Legal Studies in Business website – www.MALSB.org.

The Journal is listed in CABELL'S JOURNAL OF PUBLISHING OPPORTUNITIES (Management) and is available on both Westlaw and LexisNexis databases and in hardcopy.

The Journal does not require attendance at the regional conference in order to be considered for publication. However, you are always welcome and encouraged to attend. Our next annual meeting is held in Chicago, at the Palmer House Hilton, in conjunction with the MBAA annual conference in March 2022. Please go to www.MALSB.org for more information.

Thank you,

Dr. Beth Hazels, Co-Editor-In-Chief
Alice Keane, Co-Editor-In-Chief
Dr. John Paul, Articles Editor

Midwest Academy of Legal Studies in Business
2020-21 Executive Board & Officers:

MIDWEST LAW JOURNAL

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DENYING SEVERELY OBESE WORKERS UNQUALIFIED PROTECTION UNDER THE AMERICANS WITH DISABILITIES ACT FLOUTS ADMINISTRATIVE EXPERTISE, MEDICAL RESEARCH, AND COMMON SENSE

**Winner of the MLJ Best Article Award*

KEVIN FARMER*

INTRODUCTION

The Americans with Disabilities Act (ADA) leveled a sledgehammer to the walls that stood between disabled workers and gainful employment.[1] Congress passed this landmark statute in 1990 out of recognition that discrimination against individuals with disabilities had become a "serious and pervasive social problem" that not only holds them back from competing for opportunities on an equal basis but also costs the nation billions of dollars in unnecessary expenses caused by dependency and nonproductivity.[2] The ADA embodies a national mandate to remedy the injustice of disability discrimination through "clear, strong, consistent enforceable standards that are applied by the federal government with congressional authority."[3] Despite the lofty goals of this legislation, one class of workers rapidly expanding in rank has been increasingly shunted aside by their employers as well as federal appellate courts that have sanctioned dismissal of their disability discrimination cases. They are severely obese workers, and their dilemma merits analysis not only for the injustice they have endured but as a glaring example of judicial rulings that derogate the purpose of the ADA, as amended, and administrative regulations that implement its mission.

The analysis is presented in four parts. First, the scope of coverage of the ADA—with particular emphasis on regulations and interpretative guidelines that define the impairment component of a disability—applied in cases filed by severely obese workers is summarized in Part I. In Part II, the plight of severely obese men and women in the United States conveys the urgency of the topic. In Part III, the chasm between lower federal court rulings that declare severe obesity per se to be protected and federal appellate holdings that mandate an additional showing of an underlying physiological disorder is explicated. A critical analysis of those appellate decisions is contained in Part IV. Essentially, the circuit courts misconstrue regulations and interpretative guidelines, disregard medical research, and offend common sense because their faulty interpretation of the text and purpose of controlling regulations leads to absurd results. The article concludes with a

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[1] 42 U.S.C. §§ 12101-12213 (2018). [All statutory references are to the ADA unless otherwise indicated.] The statute applies to private employers with fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year as well as employment agencies, labor organizations and joint labor management committees. § 12111(2), (5)(A).

[2] § 12101(a)(2), (8).

[3] § 12101(b)(2).

call for greater protection of the rights of severely obese workers through revised regulations as well as enhanced litigation tactics by their counsel.

DISCUSSION

I. THE ADA, ADMINISTRATIVE REGULATIONS, AND THE GUIDANCE THEY PROVIDE IN DISCRIMINATION CASES FILED BY SEVERELY OBESE WORKERS

A preface laying out the scope of coverage of, and a delineation of the prima facie case for, discrimination cases under the ADA, as amended, as well as the regulations and interpretative guidelines published by the Equal Employment Opportunity Commission (EEOC)[4] provides context for the issues central to this analysis.

A plaintiff must plead and prove that he or she is disabled, qualified for the job, and suffered an adverse employment decision because of his or her disability.[5] The threshold inquiry in actual discrimination cases is whether the plaintiff has a disability under the ADA.[6] To answer that question affirmatively, a plaintiff must show that he or she suffers from a physical or mental impairment, that a major life activity is affected, and that the impairment substantially limits that life activity.[7]

Because the statute does not define impairment, the EEOC formulated definitions for physical conditions that it included in the final regulations implementing Title I of the ADA published in 1991.[8] Physical impairments include physiological disorders affecting systems such as the neurological, musculoskeletal, cardiovascular, digestive, and endocrine, among others.[9] The regulations do not distinguish between covered physiological disorders and excluded physical characteristics, so the agency explained the distinction in interpretative guidelines that appear as an appendix to the regulations. The language at issue in the cases analyzed in Part III comes from section 1630.2(h) of the interpretative guidance section contained in the appendix (hereinafter section 1630.2(h)):

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[4] The EEOC is responsible for enforcing Title I, the section pertaining to employment, §§ 12111-12117, and as part of that mandate is authorized to enact regulations implementing the definitions of disabilities. § 12205a.

[5] *See* EEOC v. C.R. England, Inc., 644 F.3d 1028, 1037-38 (10th Cir. 2011); Hamilton v. Southwest Bell Telephone. Co., 136 F.3d 1047, 1050 (5th Cir.1998).

[6] § 12102(1)(A); *see, e.g.*, *Hamilton*, 136 F.3d at 1050. In addition to having an actual disability, the ADA's definition of disability includes having a record of having an impairment or having been regarded as having an impairment. § 12102(1). To succeed in discrimination cases where the theory of liability rests on a record of having an impairment, a plaintiff must prove a major life activity was substantially impaired as one would in an actual disability case. Daniel J. McDowell, Note, *Obesity As An Impairment Under The Americans With Disabilities Act*, 53 CREIGHTON L. REV. 359, 364-65 (2020). For discrimination cases based on being regarded as having an impairment, a plaintiff must prove he or she has an actual or perceived impairment (excluding transitory or minor conditions), regardless if the impairment limits or is perceived to limit a major life activity or not. § 12101(3). Thus, all definitions of disability are predicated on finding an impairment. *See* Molly Henry, *Do I Look Fat? Perceiving Obesity As A Disability Under The Americans With Disabilities Act*, 68 OHIO ST. L. J. 1761, 1766 (2007).

[7] Carreras v. Sajo, Garcia & Partners, 596 F.3d 25, 32 (1st Cir. 2010).

[8] Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,727 (July 26, 1991) (to be codified at 29 C.F.R. pt. 1630).

[9] 29 C.F.R. § 1630.2(h)(1) (2011).

> The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.[10]

Section 1630.2(h) does not define normal range. A helpful reference is contained in guidelines published by the Centers for Disease Control and Prevention (CDCP). Weight that exceeds what medical science considers a healthy weight qualifies as overweight or obese and is measured by Body Mass Index (BMI).[11] A person whose BMI is between 18.5 and 25 has a normal weight, overweight people have a BMI between 25 and 30, and obese people have a BMI exceeding 30.[12] Obesity is subdivided into three classes; those whose BMI exceeds 40 are severely obese.[13] Another common measure qualifies individuals as severely obese if their weight exceeds one hundred pounds over a healthy body weight based on height.[14]

In 1995, the EEOC published a Compliance Manual for field investigators to help them interpret laws the agency enforces. In that manual, the EEOC distinguished being overweight, which is within the normal range, with being severely obese.

> [B]eing overweight, in and of itself, is not generally an impairment. … On the other hand, *severe obesity, which has been defined as body weight 100% over the norm, … is clearly an impairment.* … In addition, a person with obesity may have an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder. A physiological disorder is an impairment.[15]

Thus, based on the EEOC's interpretation of the ADA, a worker claiming disability discrimination could prove that his or her weight is a physical impairment in two ways. First, for those whose weight is normal, they would show that there is a physiological disorder causing the weight (e.g., diabetes). Second, for those whose weight is beyond the normal range, proof of the

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[10] 29 C.F.R. app. § 1630.2(h)(1) (2011) (emphasis added).

[11] *Defining Adult Overweight and Obesity*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last reviewed Sept. 17, 2020), HTTPS://WWW.CDC.GOV/OBESITY/ADULT/DEFINING.HTML**.** BMI is calculated by dividing one's weight in kilograms by one's height in meters squared. BMI as a measure of body fat has been validated as an accurate estimate of body composition. *See* Paul Deurenberg et al., 65 BRITISH J. NUTRITION 105, 112-13 (1991).

[12] *Defining Adult Overweight and Obesity, supra* note 11.

[13] Severe obesity is also referred to as extreme, morbid, and Class III. Arun M. Sharma & Robert F. Kushner, *A Proposed Clinical Staging System for Obesity*, 33 INT'L J. OBESITY 289, 290 (2009).

[14] *See What is Obesity?* OBESITY ACTION COALITION (2020), https://www.obesityaction.org/get-educated/understanding-your-weight-and-health/what-is-obesity; *What is Morbid Obesity? Morbid Obesity is a Serious Health Condition*, UNIV. OF ROCHESTER MED. (2020), https://www.urmc.rochester.edu/highland/bariatric-surgery-center/journey/morbid-obesity.aspx.

[15] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 2 COMPLIANCE MANUAL § 902.2(c) (5)(ii), at C-24 (1995) (internal citations omitted) (underscoring added).

individual's weight (measured by pounds or BMI) is sufficient without the need to identify an underlying physiological disorder.[16]

The ADA received an inauspicious reception when disability discrimination cases began reaching the federal courts. In particular, the United States Supreme Court handed down decisions that coalesced to create a daunting standard for workers to qualify as disabled.[17] Congress heeded the outcry from disability advocates[18] and passed the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) to redress the judicial damage.[19]

The ADAAA made the definition of disability clearer and more worker friendly by providing guidance on key terms such as "substantially limits" and "major life activities."[20] Perhaps most importantly for severely obese workers, Congress specified an expansive, remedial goal for the ADA and established a mandate for the EEOC to reconsider its regulations to pave the way to achieve that goal.[21] "The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this Act."[22] The primary purpose of the ADAAA was to make it easier for people with disabilities to obtain protection.[23] In the regulations the EEOC reviewed and revised in light of the ADAAA,[24] two aspects of its work have the greatest bearing on severely obese workers. First, the agency

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[16] *See* Mark V. Roehling & James Dulebohn, *Obesity-Based Actual Disability Claims Post ADAAA: An Analysis of Conflicting Decisions and Interdisciplinary Assessment of Implications,* 68 LAB. L. J. 103, 105 (2017); Camille A. Monahan et al., *Establishing a Physical Impairment of Weight Under the ADA/ADAAA: Problems of Bias in the Legal System*, 29 A.B.A. J. LAB. & EMP. L. 537, 548 (2014).
[17] 29 C.F.R. app. § 1630, at 17004-05.
[18] *See* Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & L. 209, 210 & n. 5 (2009).
[19] Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).
[20] 29 C.F.R. app. § 1630, *supra* note 17, at 17004-05. More specifically, the ADAAA preempted the Supreme Court's definition of "substantially limits," by directing a broader interpretation of that term such that the analysis of whether an individual impairment is a disability should not demand extensive analysis. § 12101(2)(B)(4), (5). It also included a more expansive boundary for major life activities that embrace body systems such as the circulatory and endocrine functions. § 12102(4)(A). Lastly, it expanded the "regarded as" disability definition by eliminating the requirement that a plaintiff prove an actual disability or that the disability substantially limits a major life activity. § 12101 (1), (3). The only requirement is an adverse employment action due to an employer perceiving an impairment, irrespective of whether the plaintiff was actually impaired. Lisa Handler Ackerman, *Obesity as a Disability Under the ADA*, 38 EMP. RELATIONS L. J., 64, 66 (2013); HENRY, *supra* note 6, at 1770-71. *See, e.g.*, Nedder v. Rivier College, 944 F. Supp. 111, 118-20 (D. N. H. 1996) (obese employee who failed to establish that her weight constituted an actual disability was able to prove her employer regarded her as disabled based on stereotypes concerning the discipline and intelligence of obese professors).
[21] Hillary K. Valderrama, Comment, Is the ADAAA "Quick Fix" Or Are We Out of the Frying Pan and Into the Fire?: How Requiring Parties to Participate in the Interactive Process Can Effect Congressional Intent Under the ADAAA, 47 HOUS. L. REV. 175, 201 (2010).
[22] § 12102(4)(A); *see also* Rohr v. Salt River Project Agricultural Improvement & Power Dist., 555 F.3d 850, 860-62 (9th Cir. 2009) (the ADAAA expands the class of individuals entitled to protection under the ADA and requires a broad construction for disabilities).
[23] 29 C.F.R. app. § 1630, *supra* note 17, at 17004.
[24] Enactment of the regulations complied with the procedure set forth by the Administrative Procedure Act. On September 23, 2009, the EEOC published proposed regulations implementing the ADAAA for notice and public comment. 74 Fed. Reg. 48,431. After receiving comments, the agency published final regulations on March 25, 2011. 76 Fed. Reg. 16,978.

maintained without alteration section 1630.2(h).[25] Second, the statement in the EEOC's interpretive guidance predating the ADAAA that generally excluded obesity as an impairment ("except in rare circumstances, obesity is not considered a disabling impairment"[26]) was removed.[27] Unfortunately, the agency's position on obesity was somewhat obfuscated in a concurrent move prompted by the ADAAA. The agency's pronouncement in its Compliance Manual that severe obesity is clearly an impairment[28] is no longer available since the EEOC withdrew the manual from its web site. It concluded that the section on disability, in which severe obesity is mentioned, was superseded by the ADAAA's intent to make it easier for individuals to establish that they are disabled.[29] There is no indication that the agency withdrew the manual because it repudiated its views on severe obesity per se as a physical impairment.[30]

II. SEVERE OBESITY IS AN AMERICAN CRISIS

The magnitude of severe obesity in the United States is as stunning as its impact on workers has been dire. Obesity has long been characterized as an epidemic with 66% of Americans who were overweight or obese.[31] According to the CDCP, from 1999-2018, the prevalence of obesity increased from 30.5% to 42.4%, the prevalence of severe obesity increased from 4.7% to 9.2% and the estimated medical cost of treating the obese was $147 billion.[32] Medical researchers forecast that by 2030, 42% of Americans will be obese and 11% will be severely obese, and these individuals will cause approximately $550 billion in health-related expenses.[33] Stated in terms of the number of people concerned, 80 million American adults currently live with obesity.[34] As of 2013, severe obesity cost an estimated $69 billion, a whopping 60% of the nation's total cost of obesity treatment.[35] The obese experience higher rates of unemployment and their earnings are lower—a hindrance that has been characterized as the "obesity penalty."[36] Discrimination against obese individuals has also been found in myriad personnel decisions such as selection, placement,

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[25] 29 C.F.R. app. § 1630.2(h).
[26] *Id.* § 1630.2(j); *see also* Melson v. Chetofield, No. 08-3683, 2009 WL 537457, at *3 (E.D. La. Mar. 4, 2009).
[27] Whittaker v. America's Car-Mart, Inc., No. 1:13CV108 SNLJ, 2014 WL 1648816 at *2 (E.D. Mo. Apr. 24, 2014).
[28] COMPLIANCE MANUAL § 902.2(c)(5)(ii), *supra* note 15.
[29] *Section 902 Definition of the Term Disability*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/policy/docs/902cm.html#902.2c5 (last visited Nov. 30, 2020).
[30] *See* McDowell, *supra* note 6, at 385.
[31] Jennifer Staman, *Obesity Discrimination and the Americans With Disabilities Act*, CONG. RES. SERVICE (2007), http://digitalcommons.ilr.cornell.edu/crs/26/ (citing Hales et al., *Prevalence of Overweight and Obesity Among Adults: United States, 2003-2004*, NAT'L CENTER FOR HEALTH STAT., http://www.cdc.gov/nchs/products/pubs/pubd/hestats/obese03_04/overwght_adult_03.htm).
[32] *Adult Obesity Facts*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2020), https://www.cdc.gov/obesity/data/adult.html (last visited Nov. 30, 2020). The substantial increase in the population and growth rate of the severely obese in the United States is mirrored in data collected around the world. *See* Kath Williamson et al., *Rising Prevalence of BMI ≥40 kg/m2: A High-Demand Epidemic Needing Better Documentation*, [21] OBESITY REV. e12986, at 9 (2020).
[33] Thomas A. Hemphill, *Obesity in America: A Market Failure?* 123 BUS. & SOC'Y REV., 619, 620 (2018).
[34] Roni Caryn Rabin, *Obesity Linked to Coronavirus Disease*, *Especially For Younger Patients*, N. Y. TIMES (April 17, 2020), https://www.nytimes.com/2020/04/16/health/coronavirus-obesity-higher-risk.html?searchResultPosition=2.
[35] Hemphill, *supra* note 33 at 620.
[36] Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L., 101, 102 (2016).

discipline and promotion.[37] Weight discrimination is one of the most pervasive grounds for adverse employment actions. Studies show that among women it ranks third (behind gender and age), and among men it ranks fourth (after gender, age and race).[38]

Moreover, the negative impact of obesity cuts deeper wounds. Obese individuals have been stigmatized as being lazy, lacking self-control, unmotivated, unsuccessful, unintelligent, less competent, and sloppy.[39] A meta-analysis of observational studies of weight discrimination found, generally, that perceptions of weight discrimination were common and, in particular, that perceptions of discrimination in the workplace were most prevalent among those who were severely obese.[40] The stereotypes lead to managerial prejudice resulting in lower-than-expected levels of occupational attainment.[41] "Some consider obesity to be the most disgraceful and debilitating condition in American culture."[42] Nevertheless, many condemn the ostracism obese individuals confront. One study published in 2015 found that 78% of respondents supported legislation banning weight discrimination in employment.[43]

Despite the nationwide threat to public health and economic prosperity, as well as broad public support for enacting laws combatting weight discrimination, protection for obese individuals at the state and local levels is virtually nonexistent. One state and five cities have antidiscrimination statutes or ordinances that include weight.[44] Consequently, aggrieved workers turn to federal law for protection.[45]

III. DISPARATE VIEWS TOWARD LAWSUITS FILED BY SEVERELY OBESE WORKERS IN FEDERAL COURT

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[37] *See* Mark V. Roehling, *Weight Based Discrimination in Employment: Psychological and Legal Aspects*, 52 PERSONNEL PSYCHOL., 969, 982-83 (1999); Cort W. Rudolph et al., *A Meta-Analysis of Empirical Studies of Weight-Based Bias in the Workplace*, 74 J. VOCATIONAL BEHAV. 1, 1-2 (2009).

[38] Michael L. Huggins, Note, *Not Fit For Hire: The United States and France On Weight Discrimination In Employment*, 38 FORDHAM INT'L L.J. 889, 904-05 (2015).

[39] *See* Claudia Sikorski, et al., *The Stigma of Obesity in the General Public and Its Implications for Public Health - A Systematic Review.* 11 BMC PUB. HEALTH 661, 662 (2011); Rebecca M. Puhl & Chelsea A. Heuer, *The Stigma of Obesity: A Review and Update*. 17 OBESITY 941, 941-43 (2009); Deborah Carr & Michael A. Friedman, *Is Obesity Stigmatizing? Body Weight, Perceived Discrimination, and Psychological Well-Being in the United States*. 46 J. HEALTH & SOC. BEHAV. 244, 253-55 (2005).

[40] Jenny Spahlholz et al., *Obesity and Discrimination – A Systematic Review and Meta-Analysis of Observational Studies*, 17 OBESITY REV. 43, 53-54 (2016).

[41] *See* Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENG. J. MED. 1008, 1011 (1993).

[42] Christine L. Kuss, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity As a Disability Under the Americans With Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 563, 564 (1996).

[43] Rebecca M. Puhl et al., *Legislating For Weight-Based Equality: National Trends In Public Support for Laws to Prohibit Weight Discrimination*, 40 INT. J. OBESITY 1320, 1321 (2016).

[44] Huggins, *supra* note 38, at 913-922.

[45] David M. Katz, *Disabilities*, BLOOMBERG BNA DAILY LABOR REPORT (October 5, 2012), https://www.mintz.com/sites/default/files/viewpoints/orig/5/2015/10/Katz-BNA-article-on-Obesity-as-Disability.pdf.

After the ADA was enacted, federal decisions generally adhered to section 1630.2(h).[46] In the wake of the ADAAA, commentators expected that courts would be even more solicitous of workers given Congressional intent to make the threshold for disability more lenient.[47] Such was not the case. Indeed, several appellate holdings swayed toward a perplexing interpretation of section 1630.2(h) by going beyond mere weight to require proof of an underlying physiological cause even where severely obese workers are concerned.

A. SEVERE OBESITY PER SE IS AN IMPAIRMENT

One of the first cases to address obesity heralded support for classifying severe obesity as a disability. In *Cook v. State of Rhode Island*,[48] an applicant who had two successful stints as an attendant for an institution for the mentally challenged was denied employment a third time on the grounds that she was unable to evacuate patients in emergencies (and was likely to develop serious problems because of her weight (she was 5'2" and weighed 320 pounds)) despite the fact that she had passed a medical exam that found no performance limitations.[49] A jury awarded her $100,000, and the district court denied defendant's post-trial motions challenging the assertion that severe obesity qualifies as a disability.[50] On appeal, the First Circuit dismissed the state's arguments that being severely obese was a mutable condition or was the product of plaintiff's voluntary conduct and affirmed the lower court's ruling. It held the jury plausibly found that severe obesity was a physiological condition based on the "plethoric evidence" adduced from plaintiff's expert that it was a physiological disorder involving a dysfunction of the metabolic and neurological systems that were capable of adversely affecting the musculoskeletal, respiratory, and cardiovascular systems.[51] In its conclusion, the court admonished those employers who erect barriers to the severely obese. "In a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences."[52]

The tone set by *Cook* apparently fell on deaf ears as several federal district courts that applied the ADA proceeded to rule against obese workers.[53] However, there were slivers of hope. For example, in *Lowe v. American Eurocopter*,[54] the court denied a motion to dismiss a pro se

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[46] *See* Roehling & Dulebohn, *supra* note 16, at 106.
[47] *See, e.g.*, Shannon Liu, Note, *Obesity As An "Impairment" For Employment Discrimination Purposes Under The Americans With Disabilities Act Amendments Act of 2008*, 20 B.U. PUB. INT. L.J. 141, 160-61 (2010).
[48] 10 F.3d 17 (1st Cir. 1993).
[49] *Id*. at 20-21.
[50] *Id*. at 21.
[51] *Id*.
[52] *Id*. at 28.
[53] *See, e.g.*, Frank v. Lawrence Union Free Sch. Dist., 688 F. Supp. 2d 160, 169 (E.D.N.Y. 2010); Merker v. Miami-Dade Cty. Fla., 485 F. Supp. 2d 1349, 1253 (S. D. Fla. 2007); Marsh v. Sunoco, Inc., No. 06-CV-2856, 2006 U.S. Dist. W.L. 3589053, at *4 (E. D. Pa. Dec. 6, 2006); Coleman v. Georgia Power Co., 81 F. Supp. 2d 1365, 1369 (N.D. Ga. 2000); Ridge v. Cape Elizabeth Sch. Dep't, 77 F. Supp. 2d 149, 162-64 (D. Me. 1999); Hazeldine v. Beverage Media, Ltd., 954 F. Supp. 697, 703-06 (S.D.N.Y. 1997); Fredregill v. Nationwide Agribusiness Ins. Co., 992 F. Supp. 1082, 1088-90 (S.D. Iowa 1997); Smaw v. Commonwealth of Va. Dep't of St. Police, 892 F. Supp. 1469, 1475 (E.D.Va. 1994).
[54] No. 1:10-CV24-A-D, 2010 U.S. Dist. WL 5232523 (N.D. Miss. Dec. 16, 2010), *aff'd on other grounds*, 471 F. App'x 257 (5th Cir. 2012).

employee's disability discrimination count (based on actions predating the ADAAA) and in so doing questioned the viability of case law hostile to severely obese workers in light of the amendment. Based on the substantial expansion of federal disability law by the ADAAA, the court dismissed the assertion that obesity can never be considered a disability.[55]

Building on the dicta in *Lowe*, the importance of section 1630.2(h) was the subject of a ruling squarely in favor of a severely obese employee who was fired after the effective date of the ADAAA. In *EEOC v. Resources for Human Development*,[56] Lisa Harrison was hired as supervisor for a day care program at a chemical dependence clinic in 1999 (when she weighed 400 pounds) and was fired in 2007 (when she weighed 520 pounds) based on the clinic's assertion that her weight impaired her job performance. After Ms. Harrison passed away, the EEOC advanced her charge by filing suit on behalf of her estate based on its argument that severe obesity, in and of itself, qualified as a disability. In ruling on defendant's motion for summary judgment, the court's analysis provides a roadmap for the protection of severely obese workers.

The court began with the ADA's requirement of a physical impairment to establish a disability and then turned to the EEOC's regulations for guidance on what constitutes an impairment—a physiological disorder effecting one or more enumerated body systems. Physical characteristics are excluded from the definition of impairment generally and where weight is at issue in cases where it is "within a normal range and is not the result of a physiological disorder."[57] Giving the agency's regulations "appropriate deference," the district court was persuaded that severe obesity qualifies as a disability.[58] Section 1630.2(h) indicates that severe obesity is a physical impairment because it is not normal—using metrics such as those published by the CDCP—so there is no need to consider whether it is the result of a physiological disorder. To reinforce its interpretation, the court turned to the EEOC's Compliance Manual that characterized severe obesity as an impairment. In denying the employer's motion, the court drew a clear line of demarcation that accorded with the EEOC's interpretation. For those who are heavier than normal, their weight alone qualifies as an impairment while those whose weight is normal must allege and prove an underlying physiological cause.[59]

Several district court decisions postdating the ADAAA are in line with *EEOC v. Resources for Human Development,*[60] as are two decisions from state supreme courts.[61] Furthermore, courts have readily held that an obese worker is disabled when another medical condition combines with

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[55] *Id*. at *8. *Accord* Butterfield v. N.Y. St., No. 96 Civ.5144(BDP)LMS, 1998 U.S. Dist. WL 401533, at *8 (S.D.N.Y. July 15, 1998).
[56] 827 F. Supp. 2d 688 (E. D. La., 2011).
[57] *Id*. at 693-94 (quoting 29 C.F.R. § 1630.2(h), *supra* note 9).
[58] *Id*. at 695.
[59] *Id*. *See also* Monahan, *supra* note 16, at 547 (a severely obese plaintiff need only show that weight affects one or more body systems to satisfy the actual physical impairment element of a disability claim).
[60] *See*, *e.g.,* Velez v. Cloghan Concepts, LLC, No. 3:18-cv-1901-BTM-BGS, 2019 U.S. Dist. WL 2423145, at *4 (S.D. Cal. June 10, 2019); Velez v. Il Fornaio (Am.) Corp., No. 3:18-cv-1840-CAB (MDD), 2018 U.S. Dist. WL 6446169, at *2–4 (S.D. Cal. Dec. 10, 2018); McCollum v. Livingston, No. 4:14-CV-3253, 2017 U.S. Dist. WL 608665, at *35 (S.D. Tex. Feb. 3, 2017); Whittaker v. America's Car-Mart, Inc., No. 1:13CV108 SNLJ, 2014 WL 1648816, at *2-3 (E.D. Mo. Apr. 24, 2014); *Melson*, 2009 WL 537457 , at *3.
[61] Taylor v. Burlington Northern Ry. Holdings, Inc., 444 P.3d 606, 612-18 (Wash. 2019); BNSF Ry. Co. v. Feit*,* 281 P.3d 225, 231 (Mont. 2012).

weight, though the rationale in these "obesity-plus" cases omits mention of the magnitude of weight or whether it is due to a physiological cause.[62] However, the persuasive power of these district court and state supreme court holdings has been tempered by the hostility manifested in federal appellate case law.

B. SEVERE OBESITY IS AN IMPAIRMENT ONLY IF CAUSED BY A PHYSIOLOGICAL DISORDER

In contrast to the optimism *Cook* augured for severely obese workers prior to the ADAAA, a Sixth Circuit decision handed down in 2006 cast a more ominous shadow. In *EEOC v. Watkins Motor Lines*,[63] Stephen Grindle was terminated on the ground that he was unable to safely perform the essential duties of his job as a driver/dock worker. He alleged that his firing was due to his weight (which hovered between 340 and 450 pounds).[64] After filing a charge with the EEOC alleging disability discrimination, the EEOC took up his cause by filing suit in federal court. The district court entered summary judgment for the employer based on its conclusion that obesity without a physiological cause does not constitute an impairment.[65] The court concluded that his weight was at best an abnormal physical characteristic that was no more deserving of protection then a person who was very tall or short.[66] The court feared that perceptions of abnormal conditions would invoke the "regarded as" prong of the ADA's definition of disability and would effectively transform the law into a catchall discrimination statute for people with unusual characteristics.[67] The concurring opinion emphasized a key point. Generally, severe obesity can have a physiological cause, but in the present case, the EEOC failed to provide evidence that Grindle's severe obesity was due to an underlying physiological cause or, because of its nature, that severe obesity always has a physiological cause.[68] That evidentiary infirmity notwithstanding, *Watkins Motor* set the stage for the Eighth Circuit to hand down a decision that dramatically undermined disability lawsuits filed by severely obese workers following the ADAAA.[69]

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[62] Roehling & Dulebohn, *supra* note 16, at 109. *See, e.g*., Budzban v. DuPage Cty., Regional Off. of Educ., Addison Sch. Dist. 4, No. 12 C 900, 2013 U.S. Dist. WL 147628, at *5-6 (N.D. Ill. Jan. 14, 2013) (refusing to dismiss a count alleging osteoarthritis and obesity were disabilities requiring reasonable accommodation).
[63] 463 F.3d 436 (6th Cir. 2006).
[64] *Id*. at 438-39.
[65] *Id*. at 442-43.
[66] *Id*.
[67] *Id*.
68 *Id*. at 443 (Smith Gibbons, J., concurring).
[69] The court relied on two decisions that provide tenuous grounds for requiring severely obese workers to establish a physiological cause for their weight in order to prove a physical impairment. In *Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir. 1997), police officers claimed discipline and compensation penalties imposed due to violations of weight limits and fitness standards were discriminatory. In affirming the district court's decision to dismiss the allegations, the Sixth Circuit noted that unlike the plaintiff in *Cook.*, *supra* note 48, the officers did not allege that their weight was beyond the normal range, that they suffered from a physiological disorder, or that the state perceived them to have a physical impairment under the ADA or the Rehabilitation Act. In *Francis v. City of Meriden*, 129 F.3d 281, 286-87 (2d Cir. 1997), the Second Circuit affirmed the district court's dismissal of an action filed by a firefighter who alleged discipline for failing to meet a general weight standard violated the ADA. Plaintiff did not allege his weight was beyond normal range or that it was caused by a physiological disorder. *Id*. at 284. Indeed, in discussing whether severe obesity can ever be considered an impairment, the court's dicta lends support for the argument that a disability is established in cases where an employer discriminates against a worker based on the perception that he or she is severely obese. *Id*. at 286. Both decisions have been widely cited for the proposition that severely obese workers must

In *Morriss v. BNSF Railway Company*,[70] Melvin Morriss received a job offer for machinist conditioned on successfully completing a medical examination. At his exams, he weighed 281-285 pounds (with a BMI of 40.4-40.9) but claimed that his weight did not impair his daily activities and that he was unaware of any medical conditions underlying his weight (an assertion his physician corroborated). Defendant rescinded the offer due to its policy of requiring employees in safety-sensitive positions to have a BMI of no more than 40, and Morriss filed suit under the ADA, as amended, as well as Nebraska's disability law.[71] BNSF successfully moved for summary judgment because Morriss neither claimed nor proved that his severe obesity was caused by a physical impairment, and he did not qualify as actually disabled or being regarded as such.[72]

In affirming, the Eighth Circuit began its analysis by noting that, while the ADA, as amended, did not define impairments, an EEOC regulation did (i.e., a physiological disorder effecting a major body system).[73] However, the court tacked sharply away from *EEOC v. Resources for Human Development* and its progeny in its analysis of the agency's interpretative guidelines as well as in the weight it accorded precedent predating the ADAAA. A "natural reading" of section 1630.2(h) is that weight cannot qualify as a physical impairment unless two conditions are satisfied: (1) weight is beyond the normal range; and (2) the condition is caused by a physiological disorder.[74] To buttress its analysis, the court drew on *Watkins Motor* and found its reasoning endured post-ADAAA because its interpretation of section 1630.2(h) was unaffected by that statute.[75] "Congress may have expressed an intent to apply a less rigorous standard to the question whether an impairment 'substantially limits a major life activity,' but the EEOC's hoped-for less restrictive analysis of whether an impairment exists is cut from whole cloth, for an individual must first establish that he has a qualifying impairment before the less 'extensive analysis' is applied to determine whether the impairment 'substantially limits a major life activity.'"[76] The court concluded that severe obesity must result from a physiological disorder and that the ADAAA did not command a different result.[77]

Morriss has been the touchstone for many federal courts in justifying the dismissal of complaints or granting of summary judgment in cases filed by severely obese workers.[78]

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allege a physiological cause for their weight, Roehling & Dulebohn*, supra* note 16, at 106, despite the fact that neither case involved workers who alleged that they were the victims of discrimination because they were severely obese.

[70] 817 F.3d 1104 (8th Cir. 2016).

[71] *Id*. at 1106.

[72] *Id*. at 1107.

[73] *Id*. at 1108.

[74] *Id*.

[75] *Id*. at 1110.

[76] *Id*. at 1112 (citations omitted).

[77] *Id*. at 1112-13. The court made even shorter shrift of plaintiff's perceived disability count. Because the railroad withdrew its job offer based on its perception of his physical characteristics, even one likely to lead to a physical impairment, it was within its rights since the ADA requires a perception of a physical impairment in order to regard one as disabled. *Id*. at 1113. The fact that Morriss neglected to support his argument with evidence of impairment was fatal to his case.

[78] *See, e.g*., Shell v. Burlington N. Santa Fe Ry. Co., 941 F.3d 331, 335 (7th Cir. 2019); Sturgill v. Norfolk S. Ry. Co., No. 2:18cv566, 2019 U.S. Dist. WL 1063374, at *3–4 (E.D. Va. Mar. 6, 2019); Brownwood v. Wells Trucking, LLC, No. 16-cv-01264-PAB-NYW, 2017 U.S. Dist. WL 9289453, at *6 (D. Colo. Nov. 9, 2017); Silva v. Bd. of City

Richardson v. Chicago Transit Authority[79] is emblematic. Mark Richardson was fired as a bus operator when his employer concluded that he could not safely perform his job because he weighed approximately 566 pounds and did not offer any evidence of a physiological cause for his weight.[80] In affirming summary judgment for the employer, the Seventh Circuit noted that while Congress instructed the EEOC to alter its regulations concerning the "substantially limits" and "major life activity" prongs of the statutory definition of disability, it gave no similar instruction with regard to what constitutes an "impairment"; therefore, that definition—one that required a physiological cause as *Morriss* had concluded—endured.[81] As for section 1630.2(h), plaintiff's contention that obesity qualifies as an impairment in its own right was rejected because the court viewed it as reflecting an unnatural reading of that regulation—a reading that would open floodgates to litigation by overweight workers.[82] The court transcended *Morriss* by rejecting medical research that defines obesity as a disease based on its concern that the medical community's characterization would present an almost limitless expansion of protection. "The ADA is an antidiscrimination—not a public health—statute, and Congress's desires as it relates to the ADA do not necessarily align with those of the medical community."[83]

Although a few circuits have equivocated on whether severely obese workers are impaired based solely on their weight,[84] no federal appellate court has challenged the rationale of *Watkins Motor Lines*, *Morriss* or *Richardson*.

IV. A CRITICAL ANALYSIS OF HOLDINGS THAT REQUIRE SEVERELY OBESE WORKERS TO ESTABLISH A PHYSIOLOGICAL CAUSE

The Sixth, Eighth, and Seventh Circuits erred in their rulings in *Watkins Motor Lines*, *Morriss*, and *Richardson* for at least three reasons. First, their reading of section 1630.2(h) misconstrues its

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Commissioners for the City of Roosevelt, No. 2:15-cv-1046-MCA-SMV, 2017 U.S. Dist. WL 4325769, at *7–8 (D.N.M. Sept. 26, 2017); Revolinski v. Amtrak, No. 08-C-1098, 2011U.S. Dist. WL 2037015, at *11 (E.D. Wis. May 24, 2011); Hayes v. Wal-Mart Stores, Inc., 781 F. Supp. 2d 1080, 1091-92 (D. Or. 2011); Frank v. Lawrence Union Free Sch. Dist., 688 F. Supp. 2d 160, 169 (E.D.N.Y. 2010); Ni v. Rite Aid of N.J., No. 10-1522 (AET), 2010 U.S. Dist. WL 2557523, at *3 (D.N.J. June 22, 2010); Hill v. Verizon Md., Inc., No. RDB-07-3123, 2009 U.S. Dist. WL 2060088, at *6-9 (D. Md. July 13, 2009).

[79] 926 F.3d 881 (7th Cir. 2019).

[80] *Id*. at 884-85.

[81] *Id*. at 887-90.

[82] *Id*. at 889-90.

[83] *Id*. at 891; *see also* Monahan, *supra* note 16, at 558 (several commentators are concerned that if severe obesity is allowed to be an impairment, there will be a flood of litigation.); Henry, *supra* note 6, at 1791-92 (a major concern over accepting severe obesity as a disability has to do with the possibility of increased litigation and skyrocketing costs to employers).

[84] Other circuits have handed down decisions that range from halting support for classifying severe obesity per se as an impairment to tentative insistence on proof of an underlying physiological cause. *Compare* Valtierra v. Medtronics, Inc., 934 F.3d 1089, 1092 (9th Cir. 2019) (acknowledging the dispute between federal appellate cases and section 1630.2(h), the court declined to take a stand on whether severe obesity qualifies as an impairment because plaintiff was unable to show a causal relationship between his impairment and termination), *with* Lescoe v. Pa. Dep't of Corr.-SCI Frackville, 464 F.App'x 50, 53-54 (3d Cir. 2012) (noting that while other circuits have held that it is imperative for a severely obese worker to allege a physiological cause for his or her weight, it was unnecessary to join them because plaintiff failed to prove that his condition constituted a substantial impairment of a major life activity).

language as the EEOC has interpreted it. The agency's views are entitled to deference because of the EEOC's mandate to explain the ADA, as amended, based on the expertise it has gained by evaluating public comments in formulating regulations and investigating thousands of disability discrimination charges. Second, the great weight of evidence from professional medical associations, bolstered by peer-reviewed scientific research and endorsed by four federal administrative agencies, characterize obesity as a disease. A disease is a physiological disorder. Third, the circuit courts' construction of section 1630.2(h) reaches a conclusion that derogates its text while undermining its purpose. The absence of common sense in the outcomes of *Watkins Motor Lines*, *Morriss*, and *Richardson* defeats the persuasiveness of their rationale.

A. ADMINISTRATIVE EXPERTISE SUPPORTS THE CONCLUSION THAT WHEN WEIGHT EXCEEDS THE NORMAL RANGE ESTABLISHING A PHYSIOLOGICAL CAUSE IS UNNECESSARY

Under the ADA, a disability is defined, in relevant part, as a physical impairment that substantially limits one or more major life activities of such individual.[85] Neither the ADA nor the ADAAA define the term "impairment," so in the exercise of rulemaking Congress bestowed on it, the EEOC stepped in with one. An impairment is any physiological disorder that affects one or more enumerated body systems.[86] Obesity is not explicitly referred to, so additional guidance from the EEOC is called for. Section 1630.2(h) states that the definition of impairment does not include physical characteristics unless weight is within a normal range and is the result of a physiological disorder or weight is outside the normal range.[87]

The EEOC's interpretation is straightforward. If a person's weight is within a normal range and is caused by a physiological disorder (e.g., diabetes), the person's weight qualifies as an impairment. If, however, a person's weight exceeds the normal range, the conjunctive is unnecessary and no underlying physiological cause need be shown. Stated another way, if a physiological cause had to be established in all cases where weight is in issue, the term "normal range" in Section 1630.2(h) is superfluous. The grammar and context of the EEOC's guidelines make clear that severe obesity is an impairment in its own right. With all due respect to the Eighth Circuit's rationale in *Morriss*, to contend otherwise manifests a most unnatural reading of the guideline.

Federal courts should defer to the EEOC's interpretation of section 1630.2(h) because it reflects an accurate reading of its language. There is no ambiguity. Accordingly, federal judges have no need to reject the EEOC's interpretation.[88] Nevertheless, if phrasing the definition of impairment in the negative (i.e., conditions that cannot qualify as impairments rather than identifying those that are) can be construed to cloud the definition of impairment, then deference is warranted. In *Auer v. Robbins*, the Supreme Court held that courts should defer to a federal administrative agency's interpretation of its regulations where those regulations are ambiguous.[89] If the EEOC's

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[85] § 12102.
[86] 29 C.F.R. § 1630.2(h), *supra* note 9.
[87] *Id*.
[88] *See* Christensen v. Harris Cty., 529 U.S. 576, 588 (2000).
[89] 519 U.S. 452, 461-63 (1997).

position reflects its "fair and considered judgment," it should be authoritative unless shown to be plainly erroneous or inconsistent with other regulations.[90] Certitude is not a condition to *Auer* deference. An agency's interpretation of its regulations "need not be the only possible reading—or even the best one—to prevail."[91] Deference permits federal judges to benefit from an agency's substantive expertise—expertise honed from considering public comments on proposed regulations and investigating discrimination charges.[92] Congress could not conceivably address every affliction workers confront and explicitly delegated to the EEOC power to interpret the ADA, as amended, when it applies the law. Obesity is simply one such manifestation of the agency at work. In section 1630.2(h), the agency made an informed decision to protect workers whose weight exceeds the normal range—a category in which the severely obese are most extreme—without establishing an underlying physiological disorder. The EEOC's regulations carry the force and effect of law and, as such, are to be accorded controlling weight by the judges who apply them.[93]

The fact that the EEOC has made clear its interpretation of section 1630.2(h) in amicus curie briefs filed in several federal appeals since 2015 provides a clarion that its position is consistent.[94] Its message has been amplified in press releases in which it has announced substantial settlements in cases it filed on behalf of severely obese workers.[95] "The law protects morbidly obese employees and applicants from being subjected to discrimination," one release stated, "because of their obesity without the need for pleading, or proof of, a physiological cause."[96] Thus, the plain language of section 1630.2(h), reinforced by the EEOC's amicus briefs and press releases, leave little doubt that it has always considered severe obesity to be an impairment without the need to show an underlying physiological disorder.[97] The consistency and transparency of its position warrants deference if a federal judge finds that section 1630.2(h) is ambiguous.[98]

In addition to evaluating public comments on proposed regulations, the EEOC's expertise has been honed in thousands of case investigations involving millions of dollars in damages. For example, from 2009 to 2019, the EEOC received an annual average of 25,526 charges based on the ADA, found reasonable cause supporting the charge in an annual average of 1,138 cases, and

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[90] Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 208 (2011).
[91] Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 613 (2013).
[92] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019).
[93] *See* Ramsay v. Nat'l Bd. of Med. Exam'rs, 968 F.3d 251, 257 n.6 (3d Cir. 2020); Badwal v. Bd. of Tr. of Univ. of D.C., 139 F. Supp. 3d 295, 309 n.9 (D.D.C. 2015).
[94] *See* Chase Bank, *supra* note 90, at 209-11. The EEOC's amicus curie briefs filed in appellate cases involving disability discrimination claims by obese workers are publicly available. *Commission Appellate and Amicus Briefs*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/commission-appellate-and-amicus-briefs?keywords=obesity&statutes=1091&brief_type=1046&basis_discrimination=all&court=all (last visited Dec. 4, 2020).
[95] See Resources for Human Development Settles EEOC Disability Suit for $125,000, U.S. Equal Emp't Opportunity Comm'n (Apr. 10, 2012), https://www.eeoc.gov/newsroom/resources-human-development-settles-eeoc-disability-suit-125000; BAE Systems Subsidiary to Pay $55,000 to Settle EEOC Disability Discrimination Suit, U.S. Equal Emp't Opportunity Comm'n (July 24, 2012), https://www.eeoc.gov/newsroom/bae-systems-subsidiary-pay-55000-settle-eeoc-disability-discrimination-suit.
[96] BAE Systems Subsidiary to Pay $55,000 to Settle EEOC Disability Discrimination Suit, supra note 95, at 1.
[97] *See* Roehling & Dulebohn, supra note 16, at 111.
[98] *See* McDowell, supra note 6, at 86-91.

recovered an average monetary benefit (excluding sums obtained through litigation) of $109 million.[99] Assuming that a fraction of these charges involved weight discrimination,[100] the data is vast. One would be hard pressed to contend that the agency responsible for conducting so many investigations, analyzing their merit, and holding a multitude of offenders accountable lacks proficiency in recognizing discrimination against severely obese workers. From its vantage point in the trenches, the EEOC is well positioned to have learned more about weight discrimination than the federal courts could adduce from disposing of disability cases on their docket. Accordingly, the EEOC's enforcement experience well informs its interpretation of section 1630.2(h). Federal courts should defer to the EEOC's interpretation.[101]

So why have federal appellate courts cast aside the EEOC's position? One feared that the agency's position would extend the ADA's protection to all abnormal physical characteristics.[102] Another was concerned that accepting medical research qualifying obesity as a disease would automatically render that condition a physical impairment and, as such, produce a "nonrealistic result."[103] But these views reflect concern over the policy behind the law rather than the law itself. Does the protection of federal disability law extend to potentially millions of severely obese workers? The answer to that question is properly entrusted to elected legislators rather than appointed judges. It is for Congress to once again amend the ADA if it deems its expanse to have reached too far. The fact that millions of severely obese workers could benefit by receiving a reasonable accommodation if their weight impairs their ability to perform or protection from adverse employment actions seems to be precisely the type of result Congress envisaged when it passed the ADAAA.

B. MEDICAL EVIDENCE CONFIRMS THAT OBESITY IN AND OF ITSELF IS A PHYSIOLOGICAL DISORDER

Notwithstanding the fact that they dissect the language of the EEOC's regulations defining impairment, none of the cases analyzed in Part III paused to consider a pivotal definition. Assuming that a condition must have a physiological cause in order to qualify as an impairment, is obesity a physiological disorder? Physiological is "characteristic of or appropriate to an organism's healthy or normal functioning."[104] A condition that is not characteristic of a healthy human is pathological,[105] and a pathological condition is a physiological disorder. The question of

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[99] See Americans with Disabilities Act of 1990 (ADA) Charges (Charges filed with EEOC) (includes concurrent charges with Title VII, ADEA, EPA, and GINA) FY 1997- FY 2019, U.S. Equal Emp't Opportunity Comm'n, https://www.eeoc.gov/statistics/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent (last visited Nov. 24, 2020).

[100] The EEOC lists charges arising out of the ADA by impairment basis (e.g., cancer, epilepsy), but there is no category for weight. Accordingly, charges involving weight discrimination would have to be included in "Other Disabilities." From 2009 to 2019, the average charges listed as "Other Disabilities" was 8,040. *See* ADA Charge Data by Impairments/Bases-Receipts (Charges filed with EEOC) FY 1997- FY 2019, U.S. Equal Emp't Opportunity Comm'n, https://www.eeoc.gov/statistics/ada-charge-data-impairmentsbases-receipts-charges-filed-eeoc-fy-1997-fy-2019 (last visited Nov. 24, 2020).

[101] *See* Henry, *supra* note 6, at 1792.

[102] Watkins Motor Lines, 463 F.3d at 443.

[103] Richardson, 926 F.3d at 891.

[104] *Physiological*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d. ed. 1954).

[105] *Id*.

whether a condition qualifies as a physiological disorder is answered by scientists based on "objective medical evidence" gleaned from an "objective medical source."[106]

Two arguments qualify severe obesity per se as a physiological disorder. First, the conclusion staked out by professional medical associations, bolstered by peer-reviewed scientific research, and unqualifiedly accepted by three federal administrative agencies (along with the EEOC), characterizes obesity as a disease. Since a disease is uncharacteristic of a healthy individual, it is a physiological disorder. Second, assuming for the sake of argument, that obesity is not a disease by its very nature, medical science has found that obesity is often found with comorbidities such as heart disease, diabetes, and hypertension that have been determined to be physical impairments by federal courts. As such, if obesity exists along with a condition that has been judicially accepted as a disease, it falls within its penumbra as a physiological disorder.

Preeminent medical associations have concluded that obesity is a disease. In 2000, the World Health Organization (WHO) issued a report in which it announced that obesity was a prevalent, chronic disease whose impact was swiftly expanding across demographics and geography.[107] In 2013, the American Medical Association (AMA) considered a resolution dealing with the recognition of obesity as a disease.[108] In the resolution, the AMA applied longstanding criteria that define a disease (i.e., an impairment of some normal aspect of the body, possessing characteristic symptoms and causing harm) to the condition of obesity and resolved to recognize it as a disease.[109] Declarations from the WHO and AMA are buttressed by position papers published by renowned nonprofit organizations dedicated to the study and remediation of obesity.[110] The Obesity Society succinctly summarizes their position: obesity is a multi-causal chronic disease leading to physiological derangements, functional impairments, and premature mortality.[111]

Empirical studies published in peer-reviewed medical journals are in accord.[112] Although many physicians have viewed obesity as a disease for over 250 years,[113] since 1977 researchers have

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[106] *See* 20 C.F.R. § 416.921 (2017) (establishing impairments that qualify for Social Security benefits).
[107] OBESITY: PREVENTING AND MANAGING THE GLOBAL EPIDEMIC 894 (2000), https://www.who.int/nutrition/publications/obesity/WHO_TRS_894/en/.
[108] RESOLUTION BY THE AMA HOUSE OF DELEGATES RECOGNIZING OBESITY AS A DISEASE, https://www.ama-assn.org/sites/default/files/media-browser/public/hod/a13-resolutions_0.pdf.
[109] *Id*.
[110] *See* Ania M. Jastreboff et al., *Obesity As A Disease: The Obesity Society 2018 Position Statement,* 27 OBESITY 7, 7-8 (2019); Jeffrey I. Mechanick et al., *American Association Of Clinical Endocrinologists' Position Statement On Obesity And Obesity Medicine*, 18 ENDOCRINE PRAC. 642, 644-46 (2012); George A. Bray et al., *Obesity: A Chronic Relapsing Progressive Disease Process. A Position Statement of the World Obesity Federation*, 18 OBESITY REV. 715, 720 (2017).
[111] Jastreboff, *supra* note 110, at 8.
[112] *See, e.g.*, Bruce M. Wolfe et al., *Treatment of Obesity: Weight Loss And Bariatric Surgery*, 118 CIRCULATION RES. 1844, 1845 (2016); Theodore K. Kyle et al., *Regarding Obesity As A Disease*, 45 ENDOCRINOL METAB. CLIN. N. AM. 511, 512 (2016); Timothy S. Church, *Why Obesity Should Be Treated as a Disease*, 13 CURR SPORTS MED. REP. 205, 205-06 (2014); David B. Allison et al., *Obesity As A Disease: A White Paper On Evidence And Arguments Commissioned By The Council Of The Obesity Society*, 16 OBESITY 1161, 1168-72 (2008) ; Kyoung Kon Kim et al., *Effects On Weight Reduction And Safety Of Short-Term Phentermine Administration In Korean Obese People*, 47 YONSEI MED. J, 614, 614-15 (2006); George A. Bray, *Obesity Is A Chronic, Relapsing Neurochemical Disease*, 28 INTERN. J. OBESITY 34, 34-35 (2004).
[113] Mechanick, *supra* note 110, at 644.

eclipsed anecdotal labels with data-driven studies that apply the classic definition of a disease (i.e., an impairment of the normal functioning of some part of the body with characteristic symptoms and resulting harm). Although the explanations are dense in medical jargon, their conclusion can be simply summarized. Obesity meets the three conditions required for a disease.[114] Obesity alters the physiological state by impairing the normal functioning of several body functions,[115] symptoms include increased body fat, and harm is shown by the fact that extra-normal weight increases a person's morbidity and mortality.[116] Since obesity qualifies as a disease, the more advanced level of severe obesity easily meets that standard.[117] While some blame the severely obese for having chosen to be lazy or gluttonous,[118] most scientists agree that the disorder is due to etiological, genetic, metabolic, or hormonal causes rather than simply eating too much or moving too little.[119] As one court adroitly put it, the idea that severe obesity is a mutable condition that can be changed simply by losing weight is a suggestion that is as "insubstantial as a pitchman's promise."[120]

No less than three federal agencies join the EEOC in qualifying obesity as a disease and a fourth classifies it as an impairment resulting from physiological abnormalities.[121] In its clinical guidelines concerning overweight and obese adults, the National Institutes of Health declared that obesity is a complex multifactorial chronic disease.[122] In a 2002 revenue ruling, the Internal Revenue Service determined that medical expenses incurred in a weight loss program were deductible because obesity is a disease in its "own right."[123] In 2000, the Food and Drug Administration published a final regulation that qualifies obesity as a disease.[124] Lastly, in a policy interpretation ruling issued by the Social Security administration, obesity is classified as a "medically determinable impairment,"[125] which is defined by the agency as an impairment that results from anatomical, physiological, or psychological abnormalities.[126] Fundamental fairness dictates that courts heed conclusive medical research to hold that obesity is a disease and, as such,

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[114] *Id.*

[115] *See* Jennifer Logue et al., *Obesity Is Associated With Fatal Coronary Heart Disease Independently Of Traditional Risk Factors And Deprivation*, 9 HEART 564, 565 (2011) (cardiovascular); Mitchell A. Lazar et al., *Not A Tall Tale*, 307 SCIENCE 373, 374 (2005) (endocrine); Arin K. Greene, et al., *Lower Extremity Lymphedema And Elevated Body-Mass Index*, 366 N. ENG. J. MED. 2136, 2136-37 (2012) (lymphatic); Peter W. Lementowski & Stephen B. Zelicof, *Obesity And Osteoarthritis*, 37 AM. J. ORTHOPEDICS 148, 150-51 (2008) (musculoskeletal).

[116] Mechanick , *supra* note 110, 644-45.

[117] Wolfe, *supra* note 112, at 1844.

[118] Korn , *supra* note 18, at 235.

[119] Henry, *supra* note 6, at 1762.

[120] *Cook*, 10 F.3d at 23.

121 A fifth agency appears to be in accord. The CDCP published a research paper characterizing obesity as a chronic disease. Chloe Zera et al., *Screening For Obesity In Reproductive-Aged Women*, 8 PREV. CHRONIC DIS. A125 (2011), http://www.cdc.gov/pcd/issues/2011/nov/11_0032.htm**.** However, the subscript to the paper states that the agency does not formally adopt the findings and conclusions of the authors as its official position.

[122] NATIONAL INSTITUTE OF HEALTH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS: THE EVIDENCE REPORT, 27 (1998), https://www.ncbi.nlm.nih.gov/books/nbk2003/pdf/bookshelf_nbk2003.pdf.

[123] Rev. Rul. 2002-19 C.B. 3.

[124] Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body, 65 Fed. Reg. 1,000, 1,027 (Jan. 6, 2000) (to be codified at 21 C.F.R. pt. 101) .

125 SOCIAL SECURITY RULING, SSR 19-2P; TITLES II AND XVI: EVALUATING CASES INVOLVING OBESITY, 84 FED. REG. 97 22,294 (MAY 20, 2019).

[126] 20 C.F.R. § 416.921.

qualifies as a physiological disorder by its very nature.[127] To do otherwise tends to cater to an "anti-fat" bias flowing from an implicit belief that people are culpable for their disability.[128]

If a court was reluctant to classify severe obesity as a disability based on lower court precedent, such as *EEOC v. Resources for Human Development*, or the unequivocal support provided by medical experts,[129] the presence of another condition commonly found in individuals who are very heavy that has already been declared a disease should assuage any concern that severe obesity qualifies. The union of severe obesity with a disorder that has already been judicially determined to be a physical impairment resolves the issue.[130] Severe obesity is present in patients diagnosed with sleep apnea, diabetes, and hypertension, among other conditions.[131] Each of these comorbid conditions qualify as physical impairments covered by the ADA.[132]

C. THE HOLDINGS IN *WATKINS MOTOR LINES*, *MORRISS*, AND *RICHARDSON* MISCONSTRUE EEOC REGULATIONS WHILE RENDERING ABSURD RESULTS

Two normally contradictory approaches to statutory construction, textualism and purposivism, converge to undermine the rationale of precedent that requires proof of a physiological disorder underlying severe obesity in order to characterize that condition as a physical impairment. In addition, their convergence provides a theoretical platform to condemn the practical outcomes those holdings.

Textualism focuses its examination on the language of a statute and nothing more.[133] However, the examination in neither technical nor mechanical.[134] When administrative regulations are at issue, a more nuanced kind of textualism is called for. Regulatory textualism begins with the words of a regulation but reads them in context—deducing the public meaning of a regulation based on the statement of purpose, informed by public comment, as stated in the preamble to the regulation.[135] In this instance, the words in section 1630.2(h) provide that weight is not an impairment unless it is within normal range and is caused by physiological disorder. Recognizing that "and" is conjunctive, a physiological disorder is relevant only if weight is the normal range. If weight is beyond the normal range, as is the case with severe obesity, then the inquiry ends. The language of section 1630.2(h) is plain.

Moreover, the introduction to the appendix published with the regulations in 2011 provides

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[127] *See* Henry, *supra* note 6, at 1790; Korn, *supra* note 18, at 234.
[128] Monahan, *supra* note 16, at 551-54.
[129] One court has refused accept the medical community's acceptance of obesity as a disease because it deemed its views to be unaligned with the intent of Congress in enacting the ADA. *Richardson*, 926 F.3d at 891.
130 WHAT IS A COMORBIDITY? OBESITY COVERAGE, https://www.obesitycoverage.com/insurance-and-costs/pre-approval-process/comorbidities (last visited Dec. 14, 2020).
[131] Lalita Khaodhiar et al., *Obesity And Its Comorbid Conditions*, 2 OBESITY 17, 25-31 (1999).
[132] *See* Fraser v. Goodale, 342 F.3d 1032, 1038 (9th Cir. 2003) (diabetes); *Sturgill*, 391 F. Supp. at 606 (sleep apnea, diabetes and heart disease); Sheehan v. City of Gloucester, No. CIV.A. 96-12269-DPW, 2002 WL 389297, at *3 (D. Mass. Mar. 11, 2002) (hypertension), *aff'd*, 321 F.3d 21 (1st Cir. 2003).
[133] John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 124 (2011).
[134] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 441 (West 2012).
[135] Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 116-27 (2015).

context. The introduction unequivocally declares that the revised regulations were prompted by the EEOC's mandate to implement the ADAAA.[136] In several instances, regulations were modified (e.g., expanding the definitions of "substantially impaired" and "major body systems") but the regulation central to this analysis, section 1630.2(h), was left intact. Continuity is all the more noteworthy when one considers that the regulations were open for public comment for nearly one and a half years,[137] and during that time none of the 600 comments the agency received referred to the definition of impairment generally or to weight specifically.[138] Indeed, in the 2011 amendments to its regulations, the EEOC refers to the legislative history of the ADAAA and notes that "Congress 'expect[s] that the current regulatory definition of [physical and mental impairment] will not change.'"[139] The EEOC's interpretation of section 1630.2(h), as reflected in the language of that section and the context of its regulations, should satisfy even the most ardent textualist.

Purposivism looks beyond confusing language to take a holistic view that considers the law's objectives.[140] As with textualism, a version of purposivism applicable to administrative regulations has gained traction. Regulatory purposivism first looks to the regulation's text to determine whether an agency's interpretation is permissible and, if it is, determines whether that interpretation is consistent with the regulation's stated purpose.[141] Assuming that the regulation is confusing, and further assuming that the agency's interpretation is permissible, what is the regulation's purpose? Once again, the appendix to the regulation provides the answer—to achieve the ADAAA's purpose. Among several goals the amendments act sought to achieve, most germane to this analysis is the more worker-friendly scope of disabilities under the ADA.[142] Recall that the ADAAA made clear that whether an impairment qualifies as a disability should not demand extensive analysis.[143] The EEOC incorporated this mandate in its 2011 regulations.[144] Continuing to include extra-normal weight as an impairment, without showing an underlying physiological disorder, achieves that goal. Since the definition of a disability expanded, logic dictates that the components of that definition, such as physical impairment, must also expand. The EEOC's recognition of severe obesity as an impairment without the need to prove an underlying physiological disorder comports with the purpose of the regulations since the purpose of the regulations operationalize the expansive goal of the ADAAA.

Abstract deliberations over textualism and purposivism transcend theory where severely obese workers are the victims of discrimination. They lay a foundation for condemning the outcome of cases such as *Watkins Motor Lines*, *Morriss*, and *Richardson* whose plaintiffs, respectively,

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[136] 29 C.F.R. app. § 1630, Introduction, *supra* note 17, at 17004 ("The EEOC has amended its regulations to reflect the ADAAA's findings and purposes. The Commission believes that it is essential also to amend its appendix to the original regulations at the same time, and to reissue this interpretive guidance as amended concurrently with the issuance of the amended regulations.").
[137] *See supra* note 24 and accompanying text.
[138] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 76 Fed. Reg. 16,978, 16,979 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).
[139] *Id*., at 17,006-07 (quoting S. STATEMENT OF THE MANAGERS TO ACCOMPANY S. 3406, at 6 (2008)).
[140] *See* Manning, *supra* note 133, at 113.
[141] Kevin M. Stack, *Interpreting Regulations,* 111 MICHIGAN L. REV. 355, 391-94 (2012).
[142] § 12102(4)(A).
[143] § 12101; *See also* Mazzeo v. Color Resolutions Int'l, LLC, 746 F.3d 1264, 1268 n.2 (11th Cir. 2014) (Congress intended the ADAAA to relax the standard an individual must meet to establish a disability under the ADA).
[144] 29 C.F.R. § 1630.1(C)(4).

weighed between 340 to 450 pounds (Steven Grindle), had a BMI exceeding 40 (Melvin Morriss), and weighed approximately 566 pounds (Mark Richardson). All three workers were terminated based on their weight and, adding insult to injury, were denied the opportunity to argue their cases to a jury. Quite simply, the outcomes in these cases are absurd.

Where the application of the language of a statute or rule literally produces an absurd result, courts need not apply the language in such a fashion.[145] Absurd results are to be avoided if alternative interpretations consistent with the purpose of a law are available.[146] The absurdity doctrine has been applied to administrative regulations to preserve an agency's reasonable interpretation of rules it has created.[147]

The absurdity doctrine enables judges to reject an outcome dictated by a strict reading of a law that no reasonable person would intend. Assuming that the construction of section 1630.2(h) adopted by the Sixth, Eighth, and Seventh Circuits was accurate, would any reasonable member of Congress or EEOC administrator intend that someone weighing over 300 pounds (with a BMI exceeding 40) is physically impaired only if he or she can articulate an underlying physiological disorder? Common sense demurs. Requiring a 300 pound worker to allege and prove an underlying physiological disorder is as nonsensical as insisting that an adult who is three feet tall prove that he or she suffers from dwarfism. Anyone could see that both individuals confront a physiological disorder though they may be hard pressed to identify the cause. The EEOC's unqualified protection of severely obese workers is reasonable and realistic. As such, textualism and purposivism converge to support the agency's interpretation of section 1630.2(h). That interpretation condemns the absurd results *Watkins Motor Lines*, *Morriss*, and *Richardson* yield.

CONCLUSION

The mandate of the ADA, reinforced in the ADAAA, was to propel disabled workers into the national economy by giving them a fair chance to succeed. Notwithstanding that lofty goal, disparate holdings from the district courts and circuit courts deny severely obese workers suing for discrimination a consistent standard for establishing the physical impairment component of a statutorily protected disability. When precedents conflict commentators routinely call upon the nation's highest court for a ruling that levels the playing field. However, in this instance, a better approach would be to rectify the problem working downward. The EEOC should revise section 1630.2(h) by replacing the term "normal range" with terminology recognized by the medical community (preferably by using the CDCP's definition of obesity) as well as specifying that a person whose weight and BMI qualify them as obese suffers from a physical impairment without having to show an underlying physiological disorder. If the agency is reluctant to include all levels of obesity, it should begin by protecting severe obesity (the most extreme weight level) without qualification. Until the EEOC acts, counsel for severely obese plaintiffs should prominently allege that the condition is a disease (in its own right or as a comorbid condition) in order to establish the predicate for a physical impairment at the pleading stage. As litigation proceeds, lawyers should

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[145] U.S. v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543-49 (1940).
[146] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419-21 (2003).
[147] *See* Luschenat v. City of New Haven, No. 3:10-CV-1038 SRU, 2013 WL 452673, at *11-12 (D. Conn. Feb. 6, 2013).

enlist the expert opinions of physicians who can testify that obesity is a disease and, therefore, that it is a physiological disorder based on the unequivocal body of medical research in support. Disability discrimination cases nationwide would then be resolved by juries deliberating verdicts rather than by federal judges deciding pretrial motions.

TEACHING CONSUMER LAW & ADVOCACY SKILLS WITH A JUDGE JUDY TEAM PROJECT

PERRY BINDER*

I. INTRODUCTION

No matter how many times you are knocked down, in the end the swinging of your own blows will exhaust them. Consumer Advocate Erin Brockovich

In fall 2019, the author created and first taught an elective business course, *Consumer Risk: Law & Advocacy* ("Consumer Law").[1] Students learned how to advocate for their rights with common civil disputes including landlord-tenant, medical debt, car dealership scams, and debt collection.

This article details the lessons learned in administering a "Judge Judy"[2] team project in a face-to-face Consumer Law course before the pandemic and during it in an alternative format. In a COVID-19 world where people lost jobs and faced eviction,[3] the urgency of teaching this course material has magnified. For example, a woman in Florida who owed two months of rent

> said her landlord recently taped a note to the door that said her lease would not be renewed once it expires in August [2020], and her family must leave the property or face eviction. Lorraine doesn't know where to go for help. … "We're a family that's doing everything right—at least up to now," Lorraine said, her voice cracking with emotion. "I am not a person who doesn't like to pay their bills."[4]

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[1] Syllabus on file with the author.

[2] Judy Sheindlin is a former judge who conducted small claims court trials on the television show *Judge Judy* from 1996-2021, appearing on over 7,000 episodes. *Judge Judy*, IMDB, https://www.imdb.com/title/tt0115227/ (last visited June 15, 2021). She "tackles actual, small claims cases with her no-nonsense attitude in which damages of no more than $5,000 can be awarded." *Id.*

[3] *See* J.D. Capelouto, *Eviction hearings quietly resuming across metro Atlanta*, ATLANTA J. CONST. (Aug. 6, 2020), https://www.ajc.com/news/atlanta-news/eviction-hearings-quietly-resuming-across-metro-atlanta/mxkispc4frdyrntbhcxrugtzym/; and Phil McCausland, *Evictions in South Carolina signal dire straits for renters nationwide as homelessness looms*, NBC NEWS (Aug. 10, 2020, 5:00 AM), https://www.nbcnews.com/news/us-news/evictions-south-carolina-signal-dire-straits-renters-nationwide-homelessness-looms-n1236224/ ("40 percent or more of the renters in 29 states could face eviction because of the recession triggered by the pandemic." *Id.*).

[4] Sarah Kleiner, Joe Yerardi & Pratheek Rebala, *In states like Florida, eviction filings during the pandemic impact minority, poor neighborhoods*, TAMPA BAY TIMES (July 22, 2020), https://www.tampabay.com/news/florida/2020/07/22/in-states-like-florida-eviction-filings-during-the-pandemic-impact-minority-poor-neighborhoods/. The mother of two "said her hours as a customer service representative [] were cut back in April because she didn't have a computer for the first several weeks when she was asked to work from home. She said her partner of 20 years lost his job as a cook." *Id*. In December 2020, "[a]n estimated 9.2 million

Recently, with "many students across the country . . . stuck in rental leases with owners or managers of off-campus housing that the students no longer occupy,"[5] college students need the skills to navigate contract language, negotiate fair settlements, and protect their credit.[6]

Leading up to the Judge Judy project−a scenario where the consumer contests dubious fees when turning in a leased vehicle −students are taught how to document proof, write demand letters, seek leverage before negotiating settlements, and file or defend a small claims court lawsuit.[7] They understand that the Instructor is not there to provide legal advice.[8] Instead, they learn self-help techniques on the importance of being professional, persistent, and patient, and that going to court should be a remedy of last resort.

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renters who have lost income during the pandemic are behind on rent, according to an analysis of Census data by the Center on Budget and Policy Priorities. And renter households with a job loss will owe an estimated average of $5,400 in back rent by this month, according to a report from the Federal Reserve Bank of Philadelphia." Anna Bahney, *Landlords are running out of money. 'We don't get unemployment'*, CNN (Dec. 17, 2020, 11:59 AM), https://www.cnn.com/2020/12/17/success/landlords-struggling-rent-eviction/index.html. Likewise, some landlords are suffering economically. There are "landlords who can't pay for trash removal. We're getting 'no heat' calls. They aren't paying real estate taxes. They aren't paying their mortgage." *Id. See also* Jolie Myers & Lauren Hodges, *'My Bank Account Has $4': Pandemic Has Left Millions Of Livelihoods In Limbo*, NPR (Dec. 21, 2020, 5:51 PM), https://www.npr.org/2020/12/21/946890267/-4-in-my-bank-account-pandemic-has-left-millions-of-livelihoods-in-limbo ("Nearly 8 million people have fallen into poverty since the middle of" 2020.). In August 2021, the U.S. Supreme Court ended a federal eviction moratorium imposed by the Centers for Disease Control during the pandemic. Mark Sherman, *Supreme Court allows evictions to resume during pandemic*, ASSOCIATED PRESS (Aug. 26, 2021), https://apnews.com/article/health-courts-pandemics-coronavirus-pandemic-daa34fb48a04dc9f3ddad94fb6b4cbb2. Per Census Bureau data, three to five million people face eviction, unless Congress passes a law to reinstate the moratorium. *Id.*

[5] Greta Anderson, *Stuck With Off-Campus Housing*, INSIDE HIGHER ED (May 1, 2020), https://www.insidehighered.com/news/2020/05/01/students-campus-housing-struggle-make-rent. *See also* Louis Hansen & Erin Woo, *Bay Area college students trapped in pre-coronavirus leases*, THE MERCURY NEWS (July 26, 2020, 6:00 AM, updated 3:06 PM), https://www.mercurynews.com/2020/07/26/bay-area-college-students-trapped-in-pre-coronavirus-leases/. Students at some universities "are being squeezed to pay rent for rooms they may never set foot in" because they signed leases before their respective universities declared that they converted to all or mostly online instruction and may attend remotely while living elsewhere. *Id.*

[6] Per a U.S. PIRG report, "there were 38,712 complaints [to the Consumer Financial Protection Bureau] as of July 2020, a 50% increase when compared to the same five-month period in 2019 (March to July). This surge was driven largely by credit report complaints, up by 86% during the pandemic period (March to July 2020) and accounting for 65% of the total complaint volume in July 2020." Elizabeth Gravier, *Consumer credit report complaints hit record levels during pandemic—here's what you need to know*, CNBC.COM (Nov. 16, 2020), https://www.cnbc.com/select/coronavirus-rising-credit-report-complaints/.

[7] See Appendix A for the Individual Project.

[8] The following statement appears in the author's syllabus: "Any and all legal opinions or statements as to legal matters made by the Instructor are for class discussion purposes only, and are never to be taken as dispensing legal advice. This includes any conversations with students, whether during or outside class time." Stated differently: "With many students starting businesses while still in college, there is an obvious need for them to obtain '$500 worth of law for $5.' Unfortunately, the author is unable (and unwilling) to deliver on that proposal and instead encourages the utilization of self-help legal resources." Perry Binder, *The Entrepreneurs with No Garage Project: Protecting Ownership Interests and Intellectual Property Rights on a Shoestring Budget*, 2(2) J. BUS. LAW & ETHICS PEDAGOGY 6, 7 (Winter 2019). The full quote attributed to former United States Attorney General Benjamin H. Brewster is: "A lawyer starts life giving $500 worth of law for $5, and ends giving $5 worth for $500." *Id.* at 6.

This article is divided into three parts. Sections II.A-B provide details for administering the Judge Judy project[9] and the challenges of using it in a face-to-face course versus a blended[10] course. Section II.C discusses the learning objectives of the project. Further, Section II.D offers a trial recap and student feedback. Finally, while these activities were designed for an elective course, many of them are appropriate for use in a Legal and Ethical Environment of Business course or an MBA law course. For instructors choosing to use only a portion of the material, the tasks are presented as short step-by-step modules to adapt for their classes.

II. THE JUDGE JUDY TEAM PROJECT

A. LEARNING BASIC CONSUMER LAW INFORMATION

Before students started the group project, they needed to learn about specific consumer protection laws and understand their legal rights. As a part of this process, the Instructor brought into class an attorney from the Federal Trade Commission to discuss consumer scams and legal remedies, as well as an attorney from the Legal Aid Society to talk about everyday legal issues faced by consumers, including the rise in debt collection cases.[11] Students studied a wide range of

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[9] See Appendices B-G.

[10] At the author's university, blended learning is described as follows:

> Courses taught with this model will offer some class sessions face-to-face and other sessions online. By requiring students to attend face-to-face classes less often, the format reduces population density in classrooms and on our campuses. Blended learning allows students to have access to online instructional materials while experiencing the benefit of in-person interactions with their peers and instructors. Class groupings will be divided alphabetically by students' last names.

Preparing for Fall – Getting Ready in Five Easy Steps, GSU CENTER FOR EXCELLENCE IN TEACHING & LEARNING (Aug. 2020).

[11] "The number of debt collection cases has risen significantly, according to a new report from Pew Charitable Trusts. Debt lawsuits made up about 1 in 9 civil cases in all state courts in 1993. By 2013, they accounted for 1 in 4 lawsuits and available state data since 2013 suggests that this trend has continued." Megan Leonhardt, *Debt Collectors Are Leveraging the Court System More Than Ever—and This May Have Significant Consequences for Americans*, CNBC MONEY REPORT (Jan. 12. 2021, 11:02 AM), https://www.nbcphiladelphia.com/news/business/money-report/debt-collectors-are-leveraging-the-court-system-more-than-ever-and-this-may-have-significant-consequences-for-americans/2665310/. Pew studied debt collection lawsuits and "more than 70% resulted in default judgments for the collectors — a sign that many people do not respond when sued." *Id.* "That's because many times, the average amount owed is less than $5,000 and the cost for consumers to hire a lawyer and pay court fees is usually more than that, says Erika Rickard, director of the civil legal system modernization project at Pew. Less than 10% of consumers had a lawyer represent them in debt collection lawsuits filed between 2010 and 2019." *Id.*

rights under federal statutes including the Fair Debt Collections Act[12] and the Fair Credit Reporting Act,[13] as well as under their state's Fair Business Practices Act.[14]

Once students had rudimentary knowledge of their consumer rights, they were given instructions for writing an individual project: "Think about any past or present contract dispute, landlord dispute, company dispute, auto dispute, medical dispute, dispute with a friend over a loan, or any other dispute where the recovery of money is involved."[15] Then, they each wrote a demand letter adapted from sample letters analyzed in class. In addition, they were required to consider and write a response to the following: "Assume that your texts, phone calls, and demand letters have been ignored and you've exhausted all non-litigation remedies. Would you actually consider filing a small claims action in this matter? What are the pros and cons? Be specific."[16]

The Instructor graded these letters and responses for content, spelling, and grammar, and conducted a debrief on the project in class. At this point, students had the building blocks to work on the team project, a complex set of facts concerning a person turning in a leased vehicle at the end of the lease.

B. DESCRIPTION OF THE JUDGE JUDY EXERCISE

Given that Legal Studies instructors might not have enough time in the curriculum to cover all portions of the Judge Judy Project, the author divided the exercise into distinct modules – demand

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12 15 U.S.C. §§ 1692-1692p (2010). *See generally* Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, The Debt Collection Pandemic, 11 CALIF. L. REV. 222 (May 2020); and Konrad S. Lee & Matthew I. Thue, *Teaching the Fair Debt Collection Practices Act to Legal and Ethical Environment of Business Undergraduate Students Through a Role-Play Experiential Learning Exercise*, 34(2) J. LEGAL STUD. EDUC. 207 (2017).

[13] 15 U.S.C. §§ 1681-1681x (2018). Recently, "[t]he federal government has cleared the way for collection agencies to send unlimited texts, emails and even instant messages to debtors on social media platforms. The Consumer Financial Protection Bureau … which is charged with protecting Americans from financial abuse, did not limit the number of messages collectors could send, but it did require that each message come with instructions on how to opt out. The bureau also limited the number of times collectors may call someone to seven calls per week for each debt." Irina Ivanova, *Debt collectors will soon be allowed to reach you by text or on Facebook*, CBS NEWS MONEYWATCH (Dec. 5, 2020, 5:00 PM), https://www.cbsnews.com/news/debt-collectors-unlimited-text-email-messages-consumer-financial-protection-bureau/.

[14] GA. CODE ANN. §§ 10-1-390-408 (2017). This statute contains numerous consumer protections such as a lemon law for the purchase of new vehicles, the effect of which varies by state. For a journal article that discusses lemon laws and alternative dispute resolution, see Donna M. Steslow, *My Car Is a Lemon! Use of the Better Business Bureau's Auto Line® Program as a Pedagogical Model of ADR*, 27(1) J. LEGAL STUD. EDUC. 105 (2010). For journal articles that discuss important consumer law issues, see generally Debra D. Burke, *Cruise Lines and Consumers: Troubled Waters*, 37(4) AM. BUS. L.J. 689 (2000); Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates vs. The Rent-to-Own Industry: Reaching a Reasonable Accommodation*, 34(3) AM. BUS. L.J. 385 (1997); Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47(3) AM. BUS. L.J. 361 (2010); and Ivan L. Preston & Jef I. Richards, *A Role for Consumer Belief in FTC and Lanham Act Deceptive Advertising Cases*, 31(1) AM. BUS. L.J. 1 (1993).

[15] See Appendix A for the Individual Project.

[16] *Id.* In their responses, students applied this three-step analysis:

1. Do You Have a Good Case? Explain. Does the other side have a reasonable defense?
2. Can You Collect Your Money If You Win? (Is the defendant solvent?)
3. Is the dispute based on a contract which contains an attorneys' fee clause?

Id.

and response letter writing;[17] Complaint and Answer drafting;[18] and simulated trials in front of a small claims court judge (Instructor).[19] Prior to administering the project, students were divided into teams of three or four people. Ideally, there should be an equal number of teams so that one half represents the Plaintiff/Creditor while the other half represents the Defendant/Consumer. Two teams were paired with each other throughout the project. For example, Team 1 (a Plaintiff group) was matched with Team 2 (a Defendant group).

1. LETTER WRITING MODULE

Students are given a lengthy fact pattern,[20] which applies to all phases of the Judge Judy exercise. The case concerns a consumer who leases an automobile[21] and disputes end-of-lease fees (including "excess wear and tear"[22]) after returning the vehicle:

Car Lease Chronology

January 3, 2016 - Lyle Smith leased a pickup truck from Leaseco.

April 1, 2019 – Lyle turned in the vehicle at the end of the lease.

April 15, 2019 – Leaseco sent Lyle a letter stating that he owed the following:
- Turn in fee: $250
- Transportation fee: $100

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[17] See Appendix B.
[18] See Appendix C.
[19] See Appendices D and E.
[20] See Appendix B for the complete fact pattern.
[21] "About one-third of vehicles sold in the United States are leased." Josh Peter, *Car trouble: Auto lenders not letting customers return leased cars amid coronavirus crisis*, USA TODAY (Apr. 16, 2020, 2:16 PM, updated Jan. 11, 2021, 11:13 AM), https://www.usatoday.com/story/money/2020/04/16/coronavirus-lease-car-returns-tough-lenders-refuse-accept-autos/5120328002/. In class, students learn about leasing a car, along with the pros and cons of doing so. *See* David McMillin, *Pros and cons of leasing vs. buying a car*, BANKRATE (Aug. 11, 2020), https://www.bankrate.com/loans/auto-loans/leasing-vs-buying-a-car/. The benefits of leasing may include the following.

> If you're trying to keep your monthly spending in check, leasing a car tends to offer the perk of making lower payments versus buying the same car. In addition to what you pay throughout the lease, the initial sticker shock may not be as bad: You may not need to put any money down to drive off the lot. While you have the keys, you will enjoy the benefit of warranty protection, which typically lasts for the first three years or 36,000 miles.

Id. The drawbacks of leasing a car may include the following.

> Leasing may make it financially easier to put you in the driver's seat of a new car, but you won't be fully in control. Most leases come with annual mileage restrictions, typically ranging between 10,000 and 15,000 miles. If you exceed those limits, you'll pay a premium – typically around 30 cents per mile.

Id. See also Martha Michael, *Avoid these 6 pitfalls when leasing a car*, 11ALIVE MAGNIFYMONEY (Sept. 21, 2017, 11:23 AM), https://www.11alive.com/article/money/magnify-money/avoid-these-6-pitfalls-when-leasing-a-car/507-477286172.
[22] *See infra* note 44 for a discussion of wear and tear.

- Excess wear and tear: $700
  $1,050

April 25, 2019 - Lyle sent a letter to Leaseco stating that the lease mentioned nothing about a transportation fee, that the car was returned in good condition, and that Leaseco did not mention in the above letter what constituted excess wear and tear. Lyle included a check for $250 for the turn in fee.

May 1, 2019 (Project demand letter) - Leaseco acknowledged receipt of the check for $250 and demanded payment of the remaining $800 as follows:

- Transportation Fee
  - $100
- Excess wear and tear
  - Four tires = $400
  - Worn carpet = $150
  - Dent on right rear door = $150

May 15, 2019 (Project response letter) – Lyle sent Leaseco a letter and included a check for $275 as "full satisfaction of the disputed debt of $800" ($200 for two front tires / $75 for mark on door), stating:

  - The Transportation Fee was not written into the lease
  - A mechanic inspected the car before turn in and he expressed merely normal wear/tear:
    - Carpet not worn
    - Two rear tires in excellent shape / two front tires a little worn (Lyle includes photographs)
    - Slight mark on rear passenger door (Lyle includes a photograph)

June 1, 2019 – Leaseco acknowledged receipt of Lyle's check for $275 and demanded payment of the balance, $525.

Students were provided actual contract clauses in the fact pattern, including Vehicle Return Fee, Vehicle Expenses, Excess Wear and Tear, and Attorneys' Fees. Plaintiff and Defendant teams were given different evidence packets,[23] which contained witness statements, photographs, and additional facts to write their letters. They were instructed not to share this information with the other side. Plaintiff/Leaseco teams prepared the May 1, 2019 demand letter and brought two copies to class – one for the Instructor to grade and the other for the assigned Defendant teams to read and write the response letter. Defendant/Lyle teams prepared the May 15, 2019 response letter and brought two copies to class – one for the Instructor to grade and the other for the assigned Plaintiff teams to read.

2. COMPLAINT DRAFTING MODULE

[23] See Appendices F and G respectively.

In class, students studied the pleading process and the importance of meeting applicable statutes of limitation and court-imposed deadlines. Then, they were provided instructions and form pleadings[24] made available to the general public by the local small claims court. Finally, students were given properly formatted Complaints and Answers from actual cases as a guide to how these pleadings are written.

The Plaintiff teams organized their facts and cause of action for breach of contract with concise numbered paragraphs in the Complaint. Defendant teams drafted an Answer, responding to each numbered allegation and stating their defense of "accord and satisfaction."[25]

Plaintiff teams gave the Complaint to the Instructor and were told to attach their graded demand letter to the pleading. A copy of the Complaint was given to the Defendant team. Defendant teams gave the Answer to the Instructor and were told to attach their graded response letter to the pleading. A copy of the Answer was given to the Plaintiff team.

3. MOCK BENCH TRIAL MODULE

Once the Instructor graded the student Complaints and Answers, each team argued its case in front of the "Judge Judy" Instructor. The evidence packets[26] for each side contained documents that the other side had not seen and identified potential witnesses who may be called. Student teams had the freedom to determine who would be arguing the case, playing the roles of witnesses, and introducing documents into evidence.

An entire class session of seventy-five minutes was devoted to this activity. The trials were limited to ten minutes each or forty minutes for four trials. Adding another ten minutes to transition from trial to trial left twenty-five minutes for the Instructor to consider and render verdicts, provide team feedback, lead a class discussion, and have students fill out an anonymous feedback form about the project.

Before the trials began, the Instructor went over a few rules of small claims court[27] and stressed how informal the process may appear when compared to trials seen on television and in the movies. In this case, the Plaintiff/Creditor sued for an unpaid balance of $525. To counter, the

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[24] See Appendices H and I.

[25] An accord and satisfaction "allows a disputed debt to be satisfied by use of an instrument marked as payment or satisfaction in full of the debt and which is accepted by the creditor." Carter Klein & Robert J. Denicola, *Payments*, 74(4) BUS. LAW. 1243, 1260 (2019). *See also* Michael D. Floyd, *How Much Satisfaction Should You Expect From An Accord? The U.C.C. Section 3-11 Approach*, 26 Loy. U. Chi. L.J. 1, 3 (1994) (stating that "[a]n accord and satisfaction typically occurs in cases where an obligation has been disputed"); John Krahmer, *Commercial Transactions*, 2 SMU L. REV. 103, 119 (2016) ("Under both common law and the Code, a check can be used as the basis for an accord and satisfaction of a disputed debt to discharge a drawer from further liability on the debt."); and Sally Brown Richardson, *Civil Law Compromise, Common Law Accord and Satisfaction: Can the Two Doctrines Coexist in Louisiana?*, 69 LA. L. REV. 176, 187 (2008) ("[A] civil law compromise may only be made over a disputed claim; a common law accord and satisfaction may exist over a disputed or undisputed claim.").

[26] Appendices F and G.

[27] For example, "proceedings in the magistrate court shall not be subject to … [the] 'Georgia Civil Practice Act'," which is used by courts exceeding the jurisdiction of small claims court. GA. CODE ANN. § 15-10-42 (2015).

Defendant/Consumer needed to argue that payment was made in full satisfaction of the disputed debt, creating an accord and satisfaction.[28] The judge reserved ruling until after all of the cases were argued.

In Fall 2019, the class had nine teams, comprised of three or four students each.[29] Teams 1-8 were paired for the letter, pleading, and trial components, which presented a dilemma for the ninth team. For the letter and pleading, the ninth team was given a choice of being the plaintiff or defendant, and then was randomly paired with another team (the latter did not need to do duplicate work). For the trial, the Instructor asked the ninth team to co-judge the proceedings. The Instructor and co-judges conferred briefly after each trial on the verdict. An unexpected but exciting twist developed when one of the students asked to conduct the third trial. Then another co-judge asked to conduct the fourth trial. It was a proud teaching moment as students played small claims court judge, with the Instructor shifting his role to co-judge advisor. The successes and challenges of this and other experiences with the Judge Judy Project are detailed in section II.D, Trial Recap and Student Feedback.

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[28] *Supra* note 25. The facts of the case fit with this Georgia law discussed in class:

> Accord and satisfaction by use of instrument.
> (a) If a person against whom a claim is asserted proves that (i) such person in good faith tendered an instrument to the claimant as full satisfaction of the claim; (ii) the amount of the claim was unliquidated or *subject to a bona fide dispute*; and (iii) the claimant obtained payment of the instrument, then subsections (b), (c), and (d) of this Code section shall apply.
> (b) Unless subsection (c) of this Code section applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an *accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim*.
> (c) Subject to subsection (d) of this Code section, a claim is not discharged under subsection (b) of this Code section if either of the following applies:
> (1) The claimant, if an organization, proves that:
> (i) Within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place; and
> (ii) The instrument or accompanying communication was not received by that designated person, office, or place; or
> (2) The claimant, whether or not an organization, proves that *within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument* to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with subparagraph (i) of paragraph (1) of this subsection.

GA. CODE ANN. § 11-3-311(a)-(c) (2002) (emphasis supplied). For cases dealing with accord and satisfaction, see generally Progressive Cas. Ins. Co. v. Evans, 276 Ga. App. 594, 596 (2005) (holding the parties entered into a binding accord and satisfaction where the plaintiff negotiated a check containing the words "payment in full" and in an amount less than the total debt, reasoning that an accord and satisfaction arises under GA. CODE ANN. §13-4-103(b)(1) (2010) if a dispute exists as to the amount due and the creditor accepts "a check, draft, or money order marked 'payment in full'" or containing equivalent language); and Dixie Belle Mills Inc. v. Specialty Machine Co., 217 Ga. 104, 107 (1961) (stating the law in Georgia is "that if a debtor remits to the creditor a sum of money, less than the amount actually due, upon the condition, either express or implied, that it is in satisfaction of the creditor's claim, and the latter accepts and retains the money, an accord and satisfaction results, and this is true whether the demand be liquidated or unliquidated, disputed or undisputed.").

[29] In Fall 2020, students were divided into eight teams.

4. JUDGE JUDY PROJECT IN A BLENDED CONSUMER LAW COURSE

In Fall 2020, the Consumer Law course was taught in a blended format[30] with COVID-19 protocols.[31] With reduced face-to-face sessions and student absences attributed to the pandemic, the Instructor needed to make adjustments to the assignment. For example, instructions were modified for turning in the letters and pleadings:

- One team member needs to email the letter/pleading to the Instructor as a Word document with the team number in the subject line (cc: all of your teammates). The Instructor will send you the grade with feedback by replying to that email.
- Post your letter/pleading under the Assessment/Discussion Tab corresponding with your team number in our Learning Management System ("LMS"). This is how the other team will be able to read and respond to your letter/pleading.[32]

The trials were conducted in a face-to-face class session. While participation in the trial was mandatory, the Instructor feared that many students would be unable to attend for health or work-related reasons. Thus, students were given a choice to attend the trial in-person or via Zoom.[33] The virtual session proved to be challenging but somewhat manageable, without any "cat attorney" glitches.[34] The students attending in person were required to bring their laptops and log into Zoom so the entire class was together. At times, this dynamic created an echo effect on the computers when someone spoke in the classroom. In terms of introducing documents into evidence, students and the Instructor transitioned between the document camera for people in the classroom and the "share" function of Zoom for remote participants.

There are obvious limitations to holding a trial on a virtual platform, as articulated by an attorney: "So much of trying a case from the lawyers' perspective is having a feel for the courtroom and for the people in the courtroom."[35] Another attorney agreed: "When you're assessing someone's credibility you have to be in the same room as them."[36] An exacerbated Florida judge weighed in with a public letter about attorneys' demeanor during Zoom hearings,

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[30] *Supra* note 10.

[31] In Fall 2020, the classrooms for blended learning were adjusted for COVID-19 safety:

> Where possible, six feet of spacing between students is being created by eliminating seating, marking off areas and configuring furniture to allow social distancing. Classroom density is being reduced to 25 percent, with only half of the students in attendance during each class session, wherever possible. Face coverings are required to be worn while inside campus facilities.

Student Information, GEORGIA STATE UNIVERSITY (Aug. 2020).

[32] See Appendix E.

[33] Of the twenty-nine students, fourteen attended class, fourteen attended via Zoom, and one student was excused for work-related reasons.

[34] Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. TIMES (Feb. 9, 2021), https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html (attorney was "unable to figure out how to turn off the cat filter on his Zoom call during a hearing").

[35] Zoe Schiffer, *The jury is still out on zoom trials*, THE VERGE (Apr. 22, 2020, 2:58 PM), https://www.theverge.com/2020/4/22/21230022/jury-zoom-trials-court-hearings-justice-system-virtual-transparency.

[36] *Id.*

> after seeing a male lawyer show up shirtless and a female attorney make an appearance while still in bed. "And putting on a beach cover-up won't cover up you're poolside in a bathing suit," the letter reads. "So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not."[37]

While there were no shirtless, bedroom, or poolside moments in the blended classroom trials in 2020, the face-to-face trials in 2019 served as a more effective learning environment for the Instructor and students, as detailed in II.D.

C. LEARNING OBJECTIVES

The Judge Judy Project was designed for students to achieve the following objectives:

- communicate effectively about legal issues by using oral and written conventions.
- collaborate on a task with diverse peers.
- evaluate legal arguments and evidence and apply legal doctrine to solve consumer problems.
- explain how laws can be used strategically as a tool to reduce or manage consumer risk.
- be more aware of the complexity and unpredictability of the law.
- impact society in a positive manner by assisting others with everyday consumer law problems.

Student teams were given two writing assignments, which were graded by the Instructor. They were required to meet in teams and discuss each aspect of the written work in class. Next, they had to assign roles for a trial presentation without straying from the fact pattern presented to them. In doing so, they used critical thinking and analytical skills in working with peers toward conducting a trial. This multi-layered exercise is an example of "active student engagement as the students progress from lower to higher orders of learning both in the knowledge dimension and cognitive process domain of Bloom's revised taxonomy of learning."[38]

Further, students needed to understand how statutes and legal doctrines such as accord and satisfaction impact consumer law issues. In doing so, they recognized, assessed, and analyzed murky case problems such as what constitutes "excess wear and tear"[39] on a leased vehicle. More specifically, they applied legal principles concerning a common David and Goliath consumer problem – an individual's car contract dispute with a corporation. Students advocated a position throughout the dispute by documenting proof, learning how to file a small claims court lawsuit, and arguing a case. The ultimate goal is for them to use these tools to avoid future legal problems

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[37] *Id.*
[38] Cheryl L. Black & Susan L. Willey, *Are Employer Social Media Policies Out of the Spotlight? A Class Exercise to Introduce Changes to the NLRB's Legal Standard for Evaluating Workplace Rules*, 37(2) J. LEGAL STUD. EDUC. 161, 170 (2020). The journal article identifies the four levels of knowledge dimension (factual, conceptual, procedural, and metacognitive), revised and renamed as remember, understand, apply, analyze, evaluate, and create. *Id.* at 170, note 29, *citing* Hugh M. Cannon & Andrew Hale Feinstein, *Bloom Beyond Bloom: Using the Revised Taxonomy to Develop Experiential Learning Strategies*, 32 DEVS. BUS. SIMULATION & EXPERIENTIAL LEARNING 348, 352 (2005).
[39] *Infra* note 44.

before they occur, and participate more effectively in resolving disputes that do arise.

The above outcomes are described in section II.B of this article, culminating with the complexity and unpredictability of the law detailed in the Trial Recap portion of section II.D. Finally, there is a loftier objective of the project and the Consumer Law course. The Association to Advance Collegiate Schools of Business (AACSB International) Standard 9.1 states that business schools should demonstrate "positive societal impact through internal and external initiatives and/or activities, consistent with the school's mission, strategies, and expected outcomes."[40] Once students gain expertise in handling their own consumer problems, one of the class themes is for them to pay this knowledge forward by helping those faced with similar consumer problems.

D. TRIAL RECAP AND STUDENT FEEDBACK

While the written components for the Judge Judy Project were graded,[41] the author did not tie a grade to the trial proceedings since the main objectives were to have a fun learning experience and not to induce students' anxiety.[42] The verdicts rendered in each trial differed somewhat based on the evidence presented by student teams. As a recap of the facts, Leaseco acknowledged receipt of Lyle's check for $250 (vehicle turn in fee), with a demand to pay the remaining $800 as detailed in Plaintiff's evidence packet:[43] Leaseco's $100 Transportation Fee (which was not written in the lease); and excess wear and tear,[44] including four tires ($400), worn carpet ($150), and a dent on

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[40] ASS'N TO ADVANCE COLLEGIATE SCH. OF BUS., *2020 Guiding Principles and Standards for Business Accreditation* (effective July 28, 2020) 55, https://www.aacsb.edu/-/media/aacsb/docs/accreditation/business/standards-and-tables/2020%20business%20accreditation%20standards.ashx?la=en&hash=E4B7D8348A6860B3AA9804567F02C68960281DA2 (last visited June 15, 2021). "Societal impact refers to how a school makes a positive impact on the betterment of society, as identified in the school's mission and strategic plan. Societal impact can be at a local, regional, national, or international level." *Id.* At the author's business school, Goal 3 of its five-year strategic plan states in part: "We engage the members of our community to grow the productive capabilities of each individual so that they can positively impact Atlanta, the state of Georgia, the nation and the world." ROBINSON COLLEGE OF BUS., *Advancing Vision 2020*, https://robinson.gsu.edu/advancing-vision-2020/#1502826239047-c0dc2801-7d77 (last visited June 15, 2021). Strategy 3 of the strategic plan states: "Launch efforts that demonstrate how business leadership skills can be used to improve the Atlanta and global community." *Id.*

[41] See Appendix J for the Grading Rubric.

[42] Students who want to abolish "in-class presentations argue that forcing students with anxiety to present in front of their peers is not only unfair because they are bound to underperform and receive a lower grade, but it can also cause long-term stress and harm." Taylor Lorenz, *Teens Are Protesting In-Class Presentations*, THE ATLANTIC (Sept. 12, 2018), https://www.theatlantic.com/education/archive/2018/09/teens-think-they-shouldnt-have-to-speak-in-front-of-the-class/570061/, cited in Perry Binder, *The Entrepreneurs with No Garage Project: Protecting Ownership Interests and Intellectual Property on a Shoestring Budget*, 2(2) J. BUS. LAW & ETHICS PEDAGOGY 6, 19 n.70 (Winter 2019).

[43] See Appendix F.

[44] The leasing company "will contact you to let you know your lease contract is coming to an end. It will then contact you to set up an appointment for an inspection. Any damage that's going to cost more than an average amount of money to refurbish is called excessive wear and tear." Ronald Montoya, *How to Return a Car at the End of a Lease*, EDMUNDS (Sept. 18, 2020), https://www.edmunds.com/car-leasing/how-to-return-your-leased-car.html. Consumers can dispute excess wear and tear fees. In one instance, an attorney disputed charges of $1,194 and got the fees waived two months after filing a lawsuit. David A. Wood, *Nissan lease wear and tear fee lawsuit dismissed*, CARCOMPLAINTS.COM, https://www.carcomplaints.com/news/2020/nissan-lease-wear-and-tear-fee-lawsuit-dismissed.shtml (last visited June 15, 2021). Since the automaker defendant waived the fee, that case was dismissed as there was no longer an "ascertainable loss" as required by the New Jersey Consumer Fraud Act. *See*

rear passenger-side door ($150). Per the Lease Agreement,[45] excess wear and tear was defined as follows:

> **EXCESS WEAR AND TEAR.** Normal wear and tear is anticipated during the term of this Lease. However, I will pay the estimated cost for all damage to the vehicle that is not normal wear and tear. Examples of excess wear and tear include:
> - Tires: unmatched, unsafe, or have less than 1/8 inch of remaining tread in any place;
> - Body panels that are broken, mismatched, chipped, scratched, pitted, cracked, dented, or rusted; and
> - Interior rips, stains, burns, or worn areas.

Lyle sent Leaseco a detailed response contesting the above fees with facts found in Defendant's evidence packet.[46] Lyle tendered a check for $275 with a letter, which stated conspicuously the words "in full satisfaction of the disputed debt"[47] of $800, representing $200 for two tires and $75 for a mark on the rear door. Leaseco's Complaint then sought $525 from Lyle ($800 minus $275).

The evidence packets for each party contained documents, witness statements, and Lyle's photographs of the four tires and the alleged dent on the rear passenger-side door. Students

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Hoffman v. Nissan-Infiniti LT, 2020 WL 2847756, *6–11 (D.N.J. 2020). For other cases dealing with fees when returning a leased vehicle, see Robinson v. Point One Toyota, Evanston, 984 N.E.2d 508, 523–24 (Ill. App. Ct. 1st Dist. 2012) (discussing the lessee's obligation to pay only the disclosed amounts set forth under the agreement and since the agreement did not include excess mileage and excess wear and tear charges then they are not owed); and Hansche v. Jepson, 2017 WL 104482, at *1 (Cal. App. Ct. 4th Dist. 2017) (holding the lessee cannot seek damages for the "diminished value" of the vehicle if the damage is repaired and returned to the lessor without any charges attributed to the lessee). For journal articles that discuss deceptive practices in the automotive industry, see Michael Flynn, *"You Know, It's Just Marketing" – Unfair and Deceptive Trade Practices in Car Dealer Buy-Back Offers*, 42 U. DAYTON L. REV. 11, 18–22 (2017) (discussing buy-back offers as violations of the Federal Trade Commission Act's policy against unconscionable trade practices); Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 WASH. & LEE L. REV. 535, 597–601 (2012) (examining the realities of title lending and laws that can regulate title loans by requiring disclosures of title costs and risks of repossession and rollovers or capping loan amounts or prices); Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 GEO. L J. 1257, 1289–1305 (2020) (analyzing issues with auto lending, such as "supracompetitive pricing" of auto loans, discretionary dealer markups that allow for discriminatory terms of credit for borrowers, upselling the consumer on add-on products, and spot delivery); Chris O'Brien, *The CFPB's Endaround*, 67 CATH. U.L. REV. 365, 371–74 (2018) ("Section 1029 of [the] Dodd-Frank [Act] excludes auto dealers from the CFPB's authority," but the Federal Reserve Board and FTC can regulate motor vehicle dealers and prescribe unfair or deceptive trade practice rules protecting consumers from fraudulent practice regarding the condition and financing of used cars); and Jennifer Pope, *Preventing Predatory Practices: Indirect Auto Lending in the Motor City*, 95 U. DET. MERCY L. REV. 487, 492–515 (2018) (discussing the predatory loan issues that are not remedied by federal consumer protection laws, such as the Truth in Lending Act or the Equal Credit Opportunity Act, Michigan's state law, and other legal issues, such as spot deliveries, loan packing, and dealer reserves).

[45] See Appendix B.

[46] See Appendix G.

[47] *Supra* note 28. For a liquidated claim, it must be "subject to a bona fide dispute." GA. CODE ANN. § 11-3-311(a) (2002). In addition, "the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim." GA. CODE ANN. § 11-3-311(b) (2002).

introduced this evidence at trial in order to prove their respective cases. While the rules of evidence may be relaxed in small claims court,[48] participants were instructed that the judge would only rule on evidence introduced and legal arguments presented. The Defendant/Consumer teams may argue that their check for $275 represented an accord and satisfaction, in which case the judge could render a defense verdict.

Different judges could come up with varied ruling in this case. The following represents the Instructor's interpretation of the evidence and legal arguments. Some Defendant teams failed to mention that the $100 Transportation Fee was not contained in the contract. Defendant teams were able to argue successfully that two tires had only normal (and not excess) wear and tear based on the testimony and photographs. However, students were purposely provided with conflicting testimony and evidence about the condition of the carpeting. No photographs of the carpet were available, so the judge could split the difference at $75. Thus, the Defendant teams that did not argue the accord and satisfaction defense either had a verdict of $175 for the plaintiff ($100 for failing to argue the transportation fee plus $75 for the carpet) or a verdict of $75 (for the carpet). Further, the facts indicated that the Lease Agreement contained an attorneys' fees clause,[49] and the plaintiff requested such fees in its Complaint. If Leaseco won the case for $175 or $75 and was represented by counsel,[50] the judge had the discretion to award attorneys' fees. These fees could be thousands of dollars, making this is a critical topic discussed several times in class as a possible reason for a consumer to avoid taking a case to trial.

After all of the trials were completed, the Instructor rendered the verdicts and explained to each team what went well and what could have been done differently. An enthusiastic class conversation ensued, which included an interesting suggestion to have simulated mediations.[51] When the discussion was completed, the Instructor collected Anonymous Peer Evaluations[52] completed by

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[48] "Proceedings in the magistrate court shall not be subject to Chapter 11 of Title 9, the 'Georgia Civil Practice Act.'" O.C.G.A. § 15-10-42 (2010). "This does not mean, however, that there are no rules in Magistrate Court. As discussed above, magistrate court does have a procedural scheme, albeit one that is somewhat simplified from the 'higher courts.' Moreover, the rules of evidence are not contained within the Civil Practice Act and are therefore supposed to be applied by the Magistrate Judge." *Georgia's Magistrate Courts: A Different Playing Field,* Martindale (Mar. 1, 2010), https://www.martindale.com/legal-news/article_drew-eckl-farnham-llp_921368.htm (last visited June 15, 2021).
[49] See Appendix B.
[50] In Georgia, "[l]awyers can appear on behalf of small claims plaintiffs or claimants." Cara O'Neill, *Georgia Small Claims in Magistrate Court: An Overview*, NOLO, https://www.nolo.com/legal-encyclopedia/georgia-small-claims-court-31687.html (last visited June 15, 2021). Alternatively, a business may designate a non-attorney agent for representation under the Georgia Uniform Magistrate Court Rules. In a civil action, "[a]ny officer or full-time employee of a corporation, sole proprietorship, partnership or unincorporated association may be designated by such entity as agent for purposes of representing it in civil actions to which it is a party in magistrate court." Ga. Unif. Magis. Ct. R. 31 (2015).
[51] In mediation proceedings, the mediator "helps people in a dispute to communicate with one another, to understand each other, and if possible, to reach agreements that satisfy everyone's needs. The mediator does not take sides or decide who was right or wrong in the past." *Mediation and Alternative Dispute Resolution*, MAGIS. CT. OF FULTON CTY., https://www.magistratefulton.org/149/Mediation-Alternative-Dispute-Resolution (last visited June 15, 2021). Free services may be available through approved community dispute resolution centers. *Id.*
[52] See Appendix K.

students outside of class and then distributed Anonymous Project Feedback forms[53] for students to answer and hand in before leaving class. The questions on the latter document included:

1- What are the most important things you learned by doing the project?
2- How will you apply what you learned from the project in your personal life and/or your future profession?
3- What area/s of the project would you improve, if any?

The Instructor conducted the trials in an impatient manner, often interrupting the parties to get the heart of the issue quickly, just as many small claim court judges like Judge Judy conduct hearings. Student responses to the "most important things you learned" question included "very fast paced and not as structured as you would see in regular court" and "[t]he hearing shocked me . . . [I] didn't know [the] judge could intervene like that." The author was gratified to read comments about students being wary of an attorneys' fees clause, needing a strong command of the facts, experiencing how cases proceed in real life, and avoiding trial if possible might be the best course of action. For the question about what things students would apply in their personal or professional life, statements included documenting everything, writing effective demand letters, taking pictures, securing witnesses, avoiding others taking advantage of you, and being aware of what you are getting into before signing a contract.

The most instructive student feedback for the author revolved around what students would do to improve the Judge Judy Project. These responses became his "lessons learned" and provided future guidance on how to administer the exercise. For example, while the Instructor discussed in class what the trial experience would be like, a student pointed out that he failed to provide a YouTube video to show students a sample small claims court case.[54]

Students offered that Lyle had more interesting facts and more witnesses than Leaseco. The Instructor could add another witness for Leaseco concerning the "wear and tear" issue, but typically the creditor has a more cut and dry case as it moves to enforce the terms of a contract. Other students expressed that the Instructor should define concrete and balanced roles for each student. The Instructor left it up to the teams to figure out their roles as an exercise in team dynamics. It is true that some students had a greater role, such as playing the plaintiff or defendant in the scenario. Students were given the freedom to decide what everyone should do, including the possibility of splitting up the role of each party. The disparity in roles is another reason why the Instructor did not tie a grading component to the trials.

Further feedback recommended that the Instructor should create four different fact patterns for the four pairs of teams, as the trials got redundant after the first two or three. This was a valid point

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[53] See Appendix L. In Fall 2019, students filled out handwritten forms and returned them to the Instructor before the end of class. In Fall 2020, all students completed the survey in the university's LMS before the end of class, whether they attended in person or remotely.

[54] See Appendix D for a YouTube video of Judge Judy's television show added to the assignment. One student suggested that the Instructor should record the classroom trials so that they can be used to guide future students. The author appreciated the response but is hesitant to do so out of respect for student privacy and not wanting students to be self-conscious of being filmed.

but one that would require a lot more work and planning. In addition, there was value with a singular fact pattern and four trials. As each trial unfolded, student teams adapted, made clearer legal arguments, and started to get the hang of small claims court. Each trial was a building block for the next as students attempted to try a case. The Instructor purposely rendered the verdicts at the end of all trials, though, so that students conducting the later trials would not learn too much about how to proceed.

One student noted that the team project was too lengthy, as it spanned many weeks during the semester. They discussed each detail of the project in class, analyzed how to improve upon their letters done for the Individual Project, wrote a demand letter and waited on a response letter, drafted a Complaint and waited on an Answer, discussed trial strategies, and conducted a trial. The prior sentence alone confirms the student's comment. Thus, the author proposes two solutions. First, Legal Studies instructors should consider doing only one or two components of the project, as described in section II.B, and presented as separate modules in Appendices B-D. The second suggestion addresses the next student comment, which might have a profound effect on how the project will be administered going forward.

In Fall 2019, students consistently commented that it was difficult to write a quality Complaint or Answer even though they were given guidance in class and sample forms. The Instructor agreed and communicated that he understood the students' frustration with the task. While their demand and response letters were well written, the quality of the pleadings was varied, some of which served to confuse the other team. For example, the allegations in two student Complaints had facts and statements that were not found in the project hypothetical, and the defense of accord and satisfaction was missing in two Answers. In hindsight, the Instructor may have been too ambitious with this assignment and needed reminding that business schools are not training future lawyers but future clients of lawyers. Thus, in fall 2020 students were only asked to fill out template forms provided by the court instead of writing their own pleadings.[55] The Instructor still graded the pleadings and created a model Complaint for Leaseco and a model Answer and Affirmative Defenses for Lyle.[56] He uploaded the files to the students' LMS, as everyone used these uniform pleadings at trial. This assignment revision worked well, prompting the Instructor to consider using the same instructions for the project in the future.

Finally, a student in fall 2020 accurately commented that COVID-19 made it impossible to have the whole class physically present at trial and that the exercise was likely less effective than the one implemented in fall 2019. However, as students and instructors are now more proficient at using virtual platforms, the Judge Judy Project could be implemented effectively if *Consumer Risk: Law & Advocacy* is taught fully online in the future.

III. CONCLUSION

[55] See Appendices H and I.

[56] The Model Complaint and Model Answer are on file with the author. They are too voluminous to include in the Appendix.

Consumer advocate Erin Brockovich recently stated: "We must be our own superheroes."[57] Whether one faces erroneous double-billings for a streaming service[58] or a $17,000 electric bill shocker,[59] students need the tools to question, document, and dispute inaccurate or false information, and then advocate positions with persuasive evidence. Hopefully, the Judge Judy Project served to move students one step closer to consumer hero status, as they shed the fear of confronting a person or business infringing on their legal rights and remedies.

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[57] Mara Siegler, *Erin Brockovich says 'we must be our own superheroes,'* N.Y. POST PAGESIX (Aug. 18, 2020), https://pagesix.com/2020/08/18/erin-brockovich-says-we-must-be-our-own-superheroes/ (comment made in the context of uniting communities for safe drinking water).

[58] Teresa Dixon Murray, *Man double-billed for TV-streaming service, misses deadline to dispute charges: Money Matters*, THE PLAIN DEALER (Sept. 4, 2019), https://www.cleveland.com/moneymatters/2019/09/man-double-billed-for-tv-streaming-service-misses-deadline-to-dispute-charges-money-matters.html.

[59] Jonathan Ponciano, *$17,000 Electric Bill? A Deregulated Power Grid Leads To Wild Prices For Texans*, FORBES (Feb. 20, 2021, 2:58 PM), https://www.forbes.com/sites/jonathanponciano/2021/02/20/17000-electric-bill-deregulated-power-grid-texas-griddy/?sh=742901a658ba.

APPENDIX A

Consumer Law Individual Project – Demand Letter Exercise

Think about any past or present contract dispute, landlord dispute, company dispute, auto dispute, medical dispute, dispute with a friend over a loan, or any other dispute where the recovery of money is involved. To respect your privacy, do not divulge any personal information.

Instructions

Part I
Write a polished demand letter using the Chronology approach (see Sample Demand Letter in the university's LMS. Remember to be as detailed as possible on names, dates, and facts. Have you kept careful documentation? Refer to everything in your letter.

In grading your letter, I want it to be as good as the sample letter I provide.

Part II

A. Assume that your texts, phone calls, and demand letters have been ignored and you've exhausted all non-litigation remedies. Would you consider filing a small claims action in this matter? What are the pros and cons? Be specific.

As you think on Part II.A., apply these three steps:
1. Do You Have a Good Case? Explain. Does the other side have a reasonable defense?
2. Can You Collect Your Money If You Win? (Is the defendant solvent?)
3. Is the dispute based on a contract which contains an attorneys' fee clause?

B. How confident do you feel about utilizing the small claims court process in this case? Explain. What are your biggest fears (if any) about pursuing the matter in court?

Parts II.A. and II.B. combined must be 2 full pages double spaced.

APPENDIX B

Judge Judy Team Project - Hypothetical Facts and Demand/Response Letter Writing Exercise

Plaintiff teams and Defendant teams will receive separate fact and evidence packets. Do not share that information with the other side.

The Consumer/Defendant in this case leased an automobile and is now in a dispute over fees, including the "excess wear and tear" of the vehicle, after he returned the car to the dealer.

On January 3, 2016, Lyle Smith, a DeKalb County Georgia resident, signed a 36-month lease at a Fulton County Georgia car dealership for a 2016 Pickup Truck (additional charges for mileage over 45,000 miles and "excess wear and tear" on the vehicle if turned in at the end of the lease without purchase). Per the lease, Lyle was permitted to keep the vehicle for more than 36 months, tendering the same monthly payment (maximum of six months per the lease).

Lease Excerpts:
12. VEHICLE RETURN FEE. $250 if you do not purchase the car.
13. VEHICLE EXPENSES. I will pay all expenses for Vehicle use and operation, including maintenance, repair, gasoline, oil, tires, and other expenses. At my expense, I will have the Vehicle serviced in accordance with the manufacturer's minimum recommendations, have the service validated, and be able to provide proof that such service has been performed. When I return the Vehicle, it will have all parts and accessories in good running order. I will pay the costs of all repairs to the Vehicle that are not the result of normal wear and tear.
14. EXCESS WEAR AND TEAR. Normal wear and tear is anticipated during the term of this Lease. However, I will pay the estimated cost for all damage to the vehicle that is not normal wear and tear. Examples of excess wear and tear include:

- Tires: unmatched, unsafe, or have less than 1/8 inch of remaining tread in any place;
- Body panels that are broken, mismatched, chipped, scratched, pitted, cracked, dented, or rusted; and
- Interior rips, stains, burns, or worn areas.

15. ATTORNEYS' FEES. In the event of litigation and appeals, the prevailing party shall recover reasonable attorneys' fees and costs.

On April 1, 2019 (39 months after signing the lease), Lyle turned the vehicle in at the dealership with 43,000 miles.

On April 15, 2019, the car leasing company (Leaseco – owned by a Florida corporation (XYZ, Inc.) doing business in Georgia, sent Lyle a letter stating he owed the following:

- Turn in fee: $250
- Transportation fee: $100
- Excess wear and tear: $700

$1,050 due and owing

On April 25, 2019, Lyle sent a letter to Leaseco stating that the lease mentioned nothing about a transportation fee, that the car was returned in good condition, and that Leaseco did not mention in the above letter what constituted "excess wear and tear." Lyle included a check for **$250** for the Turn in fee.

(This is the end of the facts provided to both sides)

Due dates:

Plaintiff's demand letter: _____

- One copy for Instructor
- One copy for Defendant Team

Defendant's response letter: _____

- One copy for Instructor
- One copy for Plaintiff Team

Instructions for the Project

Your written project will be graded on the following items:

a. how much thought went the format and organization of your letter and Complaint or Answer and Affirmative Defenses
b. whether your information is factually correct and your legal arguments are sound, logical and well-reasoned, based on the Topics
c. how well you follow instructions for the case
d. spelling and grammar

APPENDIX C

Complaint/Answer Writing Exercise

Due Dates:

Plaintiff's Complaint (see sample Complaint in LMS): _____

- One copy for Instructor (Attach your graded demand letter to your Complaint)
- One copy for Defendant Team

Defendant's Answer (see sample Answer in LMS): _____

- One copy for Instructor (Attach your graded reply letter to your Answer)
- One copy for Plaintiff Team

Instructions for the Project

Your written project will be graded on the following items:

a. how much thought went the format and organization of your letter and Complaint or Answer and Affirmative Defenses
b. whether your information is factually correct and your legal arguments are sound, logical and well-reasoned, based on the Topics
c. how well you follow instructions for the case
d. spelling and grammar

APPENDIX D

Mock Small Claims Court Exercise

Trial Date/s: _____

How do you prepare for the trial?

Start deciding the role/s for each teammate, such as dividing up the attorney roles. Also, Plaintiff, Leaseco needs one student as a witness, and Defendant, Lyle needs two student witnesses. There is no discovery so both sides are unaware of some of the other side's evidence.

Understand all documents referenced in the team project and your evidence packet to help prove your case. Make reference to documents with dates and people mentioned in the document. If you refer to an item of evidence, the Instructor will display it on the classroom document camera as well as on Zoom's Share Screen, so that people attending remotely can see the evidence.

The plaintiff and defendant may question each other's witnesses (via direct and cross examination) during the hearing. The judge (Instructor) will ask the plaintiff to put a case on first, and then "rest." Then the defendant puts on a case. At that point, plaintiff may not bring in new evidence unless it is used to impeach (contradict) the testimony of a defense witness.

The judge has the discretion to interrupt and ask questions throughout the trial. The rules of evidence do not apply (e.g., no need to authenticate documents); however, if you have an objection to something, go ahead and make it to the judge who will ask you to elaborate and then make a ruling. Do not stray from the facts in the team project or your evidence packet. If you do, the judge will not consider it and will exclude it from evidence.

When both parties have completed their presentations (after the defendant rests), the class will move on to the next trial. The judge will render a judgment on each case after all of the trials are finished. The results may vary depending on how evidence is presented or not presented. The judge's verdict may range from granting an award of full or partial monetary damages to the plaintiff, to dismissing the case with prejudice in favor of the defendant.

Watch this video to get a sense of how small claims court trials proceed and to understand the importance of witnesses and documents to prove your case (For example, what additional proof did the defendant need?):

JUDGE JUDTH SCHEINDLIN, Judge Judy
https://www.youtube.com/watch?v=IUL-yi2fsoc

APPENDIX E
Additional Instructions for Blended Course Format

Four (4) Teams will represent Leaseco and four (4) teams will represent Lyle.

The way you turn in the letter/pleading:

- One team member needs to email the letter/pleading to the Instructor as a Word document with the team number in the subject line (cc: all of your teammates). The Instructor will send you the grade with feedback by replying to that email.
- Post your letter/pleading under the Assessment/Discussion Tab corresponding with your team number in our LMS. This is how the other team will be able to read and respond to your letter/pleading.

For example, Team 1 will be Leaseco. Team 2 will be Lyle which will read Leaseco's letter, reply, and turn in the letter as referenced above.

There are different evidence packets for Leaseco and Lyle which will be emailed to you. DO not share this packet with the other side. You will use this evidence packet for trial, as you figure out who will be the attorney/s and witnesses.

Read the Leaseco Complaint and Lyle Answer & Affirmative Defenses posted in our LMS – these pleadings contain the legal arguments of both parties which you will need to prepare for trial. The trial component of the project is not graded – I want it to be a stress-free educational experience. There will be four (4) bench trials before your Judge Judy Instructor.

Your trial date is set for _____. It will be conducted in-person with a Zoom component. Stay tuned for details.

For other Instructions, carefully read the Team Project assignment.

In-Person/Zoom Trial

As some students may be unable to attend class in person, we will conduct the trial simultaneously in-person and via Zoom. In a perfect world, both sides in a case would approach the judge's bench (Instructor's desk) to present evidence. However, all students present in the classroom need to stay in their assigned socially distanced seats. For the people attending in person, you must wear your facemask and bring your laptop or device to log into Zoom during the trial.

Team members will receive the same grade on the project. Your participation at trial is mandatory, whether in-person or via Zoom. Ten (10) will be points deducted from your individual grade unless you have an excused absence from the Instructor.

APPENDIX F

Plaintiff Evidence Packet

HYPOTHETICAL FACTS FOR PLAINTIFF, LEASECO

Plaintiff teams and Defendant teams will receive separate fact and evidence packets. Do not share this information with the other side.

Part I. Leaseco needs to send Lyle Smith a letter dated May 1, 2019, acknowledging receipt of the check for $250 (turn in fee) with a demand to pay the remaining $800 for the following:

- While not detailed in the lease, it is customary practice in the leasing industry to charge the lessee for transporting the vehicle from the dealership to Leaseco
    - $100
- The excess wear and tear includes the following:
    - Four tires = $400
    - Worn carpet = $150
    - Dent on right rear door = $150

Give Lyle seven days to respond. Remind him that failure to pay could lead to bad credit; the matter could be sent to collections; and a lawsuit will be filed. In that event, there will be additional court costs, interest, and attorneys' fees that Lyle will owe.

Part II – After receiving Lyle Letter dated May 15, 2019, prepare a Breach of Contract Complaint in the format used in the LMS. Reference the Lease and allege all elements of Breach of Contract. Make sure that your case style is accurate and that the Prayer for Relief contains all important words.

Part III – Trial

Documents

The only things you have are the Lease contract, correspondence, and a letter from a Leaseco employee stating that s/he inspected the car after turn in, and recommended the $700 for excess wear and tear.

Witness

Leaseco employee referenced above (she has no photographs)

APPENDIX G

Defendant Evidence Packet

HYPOTHETICAL FACTS FOR DEFENDANT, LYLE

Plaintiff teams and Defendant teams will receive separate fact and evidence packets. Do not share this information with the other side.

The Consumer/Defendant in this case leased an automobile and is in a dispute over the fee for the "wear and tear" of the vehicle, after s/he returned the car to the dealer.

Part I. After Leaseco sends Lyle a demand letter for $800, Lyle needs to send a detailed response letter dated May 15, 2019 to contest

- Transportation fee
- Excess wear and tear
    - Had the car for 39 not 36 months, so excess wear and tear should be looked at through a 39 month lens
    - A mechanic inspected car before turn in – expressed merely normal wear/tear
        - Carpet not worn
        - Two rear tires in excellent shape / two front tires a little worn/refer to the lease saying all four tires have more "than 1/8 inch of remaining tread" in all places
        - Slight mark on rear passenger door
            - I have photographs

Show of good faith – $200 for two tires / $75 for mark on door

Overall good experience with the car and lease/Close this account/assure my credit is fine/I'll do the fair thing for both sides / enclosed check for **$275** "in full satisfaction of this disputed debt" (stated in a conspicuous place in the letter)/ any statements in this letter are for settlement purposes only and not as evidence if dispute is unresolved

Part II – After receiving Leaseco's Breach of Contract Complaint, prepare an Answer and Affirmative Defenses in the format used in the LMS. Make sure that the Prayer for Relief contains all important words.

Part III – Trial

Documents
Signed handwritten note from dealership sales consultant (Note: This person is not an agent of Leaseco)
Photographs taken by your best friend on the day you turned the car in to the dealer

Witnesses
Your best friend who was with you when you turned the car in to the dealer
Mechanic friend who looked at your tires, car body, and car interior about two months before turning the car in

Signed Handwritten Note Prepared by Lyle

April 1, 2019

I looked at the exterior and interior of Lyle Smith's car – the condition is excellent and has only normal wear and tear.

Signature

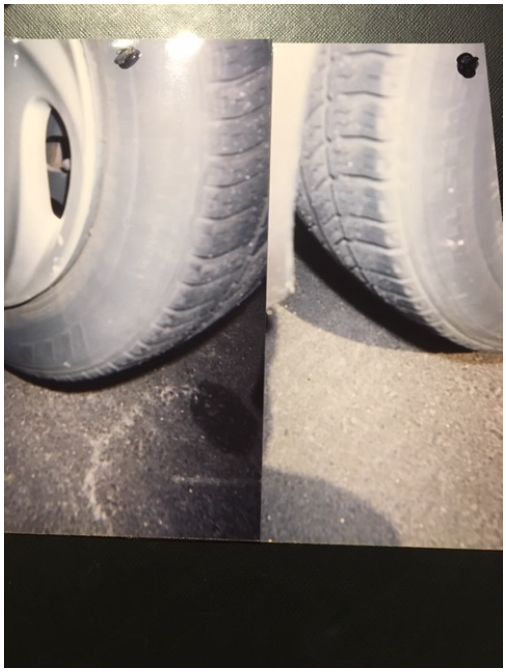
Jean Jones
Sales Consultant
Car Dealership

-

PHOTOGRAPHS

REAR PASSENGER DOOR

FRONT TIRES



REAR TIRES

APPENDIX H

Small Claims Court Complaint Form from County Website

MAGISTRATE COURT OF FULTON COUNTY, GEORGIA

DATE FILED **STATEMENT OF CLAIM** **CASE NO.**

_____

_____

_____ vs.

Plaintiff's Name & Address

_____ _____

_____ _____

_____ _____

Defendant's Name & Address Defendant's Name & Address (If two Defendants)

_____

_____[ ] Suit on Note [ ] Suit on Account [ ] Other:

_____

1. The Court has jurisdiction over the defendant(s) [ ] the Defendant(s) is a resident of _____County;

[ ] other (please specify)

_____

2. Plaintiff(s) claims the Defendant(s) is indebted to the Plaintiff(s) as follows (You must include a brief statement giving reasonable notice of the basis for each claim contained in the Statement of Claim):

3. That said claim is in the amount of $_____, principal $_____ interest, plus _____ costs to date, and all future costs of this suit.

State of Georgia, _____ County:

_____ being duly sworn on oath says the foregoing is a just and true statement the amount owing by defendant(s) to plaintiff(s), exclusive of all set-offs and just grounds of defense.

Sworn and subscribed before me this
_____ day of _____ 20_____

_____
Plaintiff(s) or Agent
(If Agent, Title or Capacity)_____

_____
Daytime Phone Number

_____
Notary Public/Attesting Official

NOTICE AND SUMMONS

TO: All Defendant(s) You are hereby notified that the above named Plaintiff(s) has/have made a claim and is requesting judgment against you in the sum shown by the foregoing statement. YOU ARE REQUIRED TO FILE or PRESENT AN ANSWER (answer forms can be obtained at https://georgiamagistratecouncil.com/forms or from the clerk's office) TO THIS CLAIM WITHIN 30 DAYS AFTER SERVICE OF THIS CLAIM UPON YOU. IF YOU DO NOT ANSWER, *JUDGMENT BY DEFAULT* WILL BE ENTERED AGAINST YOU. YOUR ANSWER MAY BE FILED IN WRITING OR MAY BE GIVEN ORALLY TO THE JUDGE OR CLERK. If you choose to file your answer orally, it MUST BE IN PERSON and within the 30 day period. NO TELEPHONE ANSWERS ARE PERMITTED. The court will hold a hearing on this claim at a time to be scheduled after your answer is filed. You may come to court with or without an attorney. If you have witnesses, books, receipts, or other writings bearing on this claim, you should bring them to court at the time of your hearing. If you want witnesses or documents subpoenaed, see a staff person in the Clerk's office for assistance. If you have a claim against the Plaintiff(s), you should notify the court by immediately filing an answer and counterclaim. If you admit to the Plaintiffs' claim but need additional time to pay, you must come to the hearing in person and tell the court your financial circumstances. Your answer must be RECEIVED by the clerk within 30 days of the date of service. If you are uncertain whether your answer will timely arrive by mail, file your answer in person at the clerk's office during normal business hours.

This _____ day of _____, 20 ___ _____

APPENDIX I

Answer & Counterclaim Form from County Website

IN THE MAGISTRATE COURT OF FULTON COUNTY
STATE OF GEORGIA

_____
_____ Civil Action No:
_____
Plaintiff(s) Name, Address

vs.

ANSWER AND/OR COUNTERCLAIM OF DEFENDANT
(ANSWER MUST BE RECEIVED BY OR ON YOUR
DEFAULT DATE AT 5:00 PM)

_____
_____
_____
Defendant(s) Name, Address

Check all that apply:

[ ] Defendant admits the claim of the Plaintiff.

[ ] Defendant is not indebted to Plaintiff in any amount.

[ ] Defendant is not indebted to the Plaintiff in the amount claimed, but is indebted to plaintiff in the amount of $ _____

[ ] Defendant paid the sum of $ _____on the _____day of _____, 20_____ in full settlement of Plaintiff's claim.

[ ] The debt claimed by the Plaintiff was discharged in bankruptcy on the _____ day of _____, 20_____ , Bankruptcy case number _____ . [ ]

Other:
_____

[ ] COUNTER-CLAIM: The Plaintiff is indebted to me as follows:
_____
_____

_____
_____
_____

State of Georgia, Fulton County
_____ (Notary will print your name) being duly sworn on oath, says the facts set forth in the foregoing Answer are true and correct.

Sworn and subscribed before me

This_____ day of _____, 20_____ .

_____
Defendant's Printed Name

_____
Defendant's Signature

_____
Notary Public/ Clerk/ Deputy Clerk
(Notary Seal)

NOTE: The Clerk's Office cannot provide legal advice. Please consult an attorney if you require assistance in filing your claim.

APPENDIX J

Grading Rubric – Letters/Pleadings

	Needs Improvement	Good	Excellent
Followed Project Instructions			
Addressed all issues presented			
Drafted required documents			
Organization			
Professional format			
"Readability"			
Writing Quality			
Correct and appropriate use of grammar, spelling, punctuation, etc.			
Careful proofreading with no typographical errors, omissions, and/or additions			
Content			
Overall Quality of Letter and Complaint or Answer			
Overall Comments			

Recommended Allocation:

	Possible Points	Actual Earned
Instructions	**10**	
Organization	**10**	
Writing	**30**	
Content	**50**	
	Total	

APPENDIX K

Anonymous Peer Evaluation

Your Name _____

On a 1-10 scale (with 10 being 100% effort), rate the quality and extent of **<u>your contribution</u>** to the project _____

Complete this form <u>for each team member below</u>. *Responses will be kept confidential.*

1. Name of team member being evaluated _____

Rate this team member on the following items (5 is highest, 3 is average and 1 is lowest).

- Did fair share of the work.	5	4	3	2	1
- Cooperated with other team members and was willing to compromise.	5	4	3	2	1
- Completed tasks on schedule.	5	4	3	2	1
- I would work with this person in the future	5	4	3	2	1

On a 1-10 scale (with 10 being 100% effort),

- rate this quality and extent of this team member's contribution _____

2. Name of team member being evaluated _____

Rate this team member on the following items (5 is highest, 3 is average and 1 is lowest).

- Did fair share of the work.	5	4	3	2	1
- Cooperated with other team members and was willing to compromise.	5	4	3	2	1
- Completed tasks on schedule.	5	4	3	2	1
- I would work with this person in the future	5	4	3	2	1

On a 1-10 scale (with 10 being 100% effort),

- rate this quality and extent of this team member's contribution _____

3. Name of team member being evaluated _____

Rate this team member on the following items (5 is highest, 3 is average and 1 is lowest).

- Did fair share of the work.	5	4	3	2	1
- Cooperated with other team members and was willing to compromise.	5	4	3	2	1
- Completed tasks on schedule.	5	4	3	2	1
- I would work with this person in the future	5	4	3	2	1

On a 1-10 scale (with 10 being 100% effort),

- rate this quality and extent of this team member's contribution _____

Supplemental Comments, if any:

APPENDIX L

Anonymous Project Feedback

Face-to-Face Course Instructions (Fall 2019): Please fill out a form and hand in to Instructor separate from the Project.

Blended Course Instructions (Fall 2020): Please complete survey in LMS under Assessments/Surveys tab.

1- What are the most important things you learned by doing the project?

2- How will you apply what you learned from the project in your personal life and/or your future profession?

3- What area/s of the project would you improve, if any?