# STATE JUDICIAL NOMINATION COMMISSION
# AND OFFICE OF THE GOVERNOR
# JOINT JUDICIAL APPLICATION

*Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.*

## PERSONAL INFORMATION

**1. State your full name.**

William (Bill) John Miller

**2. State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

Partner
Dorsey & Whitney LLP
801 Grand Ave., Ste. 4100
Des Moines, IA 50309

**3. State your date of birth (to determine statutory eligibility).**

March 30, 1977

**4. State your current city and county of residence.**

Des Moines, Polk County

## PROFESSIONAL AND EDUCATIONAL HISTORY

**5. List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

Drake University Law School; 1999-2002; J.D. with Legislative Practice Certificate

Augustana College (IL); 1995-1999; B.A. with majors in History, English, and Political Science and concentration in Pre-Law

I attended the Centre for Medieval and Renaissance Studies (now known as the Middlebury College-CMRS Oxford Humanities Program), Keble College, Oxford University, during summer 1998 to gain additional college credits that would have transferred to Augustana to support my progress toward my B.A. degree.

I attended Joliet Junior College during summer 1996 to gain additional college credits that would have transferred to Augustana to support my progress toward my B.A. degree.

**6. Describe in reverse chronological order all of your work experience since graduating from college, including:**

**a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.**

**b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.**

Dorsey & Whitney LLP
Associate (2006-2012); Partner (2013-present); Des Moines Trial Department Head (2021-present)
801 Grand Ave., Ste. 4100 (previously Ste. 3900)
Des Moines, IA 50309
Cristina Kuhn

Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Associate (2004- 2006)
801 Grand Ave., Ste. 3700
Des Moines, IA 50309
Jason C. Palmer

Iowa Judicial Branch
Law Clerk to the Hon. Mark S. Cady (2002-2004)
Iowa Supreme Court
1111 East Court Ave.
Des Moines, IA 50319
(The court was in the Iowa State Capitol when I started my employment but moved to the judicial branch building about midway through my clerkship.)
Hon. Marsha Ternus

United States Department of Justice, Civil Division, Appellate Section
Intern (summer 2001)
950 Pennsylvania Ave., N.W.
Room 7519
Washington, DC 20530
(I do not recall the address where I was employed during my internship. The address provided is the staff's current mailing address.)

Drake Law School
Research Assistant for Professor Thomas E. Baker, James Madison Chair in Constitutional Law and Director, Constitutional Law Center (2001–2002)
2507 University Ave, Des Moines, IA 50311
Thomas E. Baker (now teaching at Florida International University Law School)
(I believe this was a paid position but I may have been a volunteer.)

Galligan, Tully, Doyle & Reid, P.C.
Law Clerk (2000-2002)
300 Walnut St., Ste. 5
Des Moines, IA 50309
Hon. Richard H. Doyle

Intern, Legislative Service Bureau (during a portion of the 2002 school year)
Iowa State Capitol
1007 E Grand Ave.
Des Moines, IA 50319
Richard Johnson
(This was an unpaid internship completed as part of Drake Law School's Legislative Practice curriculum.)

Intern, Iowa Senate – Sen. Jeff Lamberti (during a portion of the 2001 school year)
Iowa State Capitol
1007 E Grand Ave.
Des Moines, IA 50319
Sen. Jeff Lamberti
(This was an unpaid internship completed as part of Drake Law School's Legislative Practice curriculum.)

**7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.**

Iowa; 2002-present
I am also admitted to practice in the federal courts in Iowa and the United States Court of Appeals for the Eighth Circuit with varying dates of admission subsequent to 2002.

**8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:**

**a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.**

**b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.**

**c. The approximate percentage of your practice that involved litigation in court or other tribunals.**

**d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.**

**e. The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.**

**f. The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.**

I was Justice Mark Cady's sole law clerk from approximately mid-2002 to mid-2004. In that position, I worked closely with the justice to research legal issues in all areas of the law and draft written material for his use in executing his duties. This provided me a very broad exposure to the law while honing my legal research and writing. Justice Cady was also a mentor in introducing me to the legal profession and practice.

After my clerkship, I moved into private practice. I first joined the Bradshaw law firm as an associate. In 2006, I accepted an associate position with my current firm, Dorsey & Whitney. I became a partner with the Dorsey firm in 2012 (effective January 1, 2013) and continue in that position. The nature of my practice has changed over time consistent with my titles and experience, but I have maintained a civil litigation practice throughout.

While an associate with Bradshaw, nearly all of my clients were individuals or businesses located in Iowa that either employed the firm directly or were referred or assigned to our firm by their insurer. Approximately 90% of my practice was insurance-based, either defending clients or addressing coverage issues, with approximately 10% of my practice consisting of commercial litigation involving business disputes such as breach of contract. My practice almost exclusively involved litigation in court or other tribunals in the civil area, although I believe I was involved in a small number of matters in the administrative area. Notably, while an associate at the Bradshaw firm, I personally presented oral argument to the United States Court of Appeals for the Eighth Circuit.

My initial experience as an associate with Dorsey & Whitney was similar to my experience with the Bradshaw firm except the percentages in my areas of law flipped so that

approximately 90% of my practice was commercial litigation and approximately 10% was insurance-based. Once again, my practice almost exclusively involved litigation in court or other tribunals in the civil area, although I was involved in a small number of matters in the administrative area as well.

One highlight of my time as a Dorsey associate was our representation of a manufacturing client in a complex products liability action in Mahaska County that culminated in a jury trial in 2008 that lasted five weeks and resulted in an eight-figure verdict in favor of our client. I was second chair for this trial and shared responsibility with a partner to examine multiple witnesses and complete other trial-related tasks, including extensive efforts to work with opposing counsel (Jason Palmer) and the court (Hon. Annette Scieszinski) in preparing the court's eventual jury instructions.

As my practice has developed over the years, it has also evolved in some ways. I continue to represent individuals or businesses located in Iowa, but I have many clients located elsewhere for which I have provided representation in or outside Iowa. Over time, my matters have increasingly focused on the needs of health care and public entities, including many Iowa cities across the state. The types of businesses with which I work are often, but not exclusively, in the healthcare, government, financial services, and manufacturing industries. I have also developed an employment law practice in which I primarily represent employers rather than employees. The complexity of the matters on which I work, and my responsibility for them, has increased over time to the point where I am almost exclusively the lead attorney on matters.

My present practice typically involves complex business litigation in the civil area, employment litigation, and occasional contacts with administrative and criminal areas in conjunction with my work in the other areas. Some clients also view me as their primary outside counsel or akin to a general counsel. In these circumstances, the client will consult me on matters not specifically linked to ongoing litigation, but instead to address general issues that arise or to avoid litigation. Accordingly, I would describe my present practice to include the following areas with the identified breakdown of my approximate time in each:

Complex business litigation: 65%
Employment law: 20%
Miscellaneous matters/client counseling – non-litigated: 10%
Insurance defense or coverage: 5%

I have participated in the following matters that were tried or culminated in trial-like proceedings:

| Venue | Role | Type |
|---|---|---|
| State court (Polk County) – 2022 | Lead counsel | Bench |
| State court (Polk County – small claims) – 2021 | Lead | Bench |

| | | |
|---|---|---|
| State court (Linn County) – 2020 | Lead | Bench |
| Private arbitration hearing – 2019 | Associate/assisting counsel | Tribunal |
| State (Polk) – 2018 | Lead; sole counsel at trial | Jury |
| State (Dubuque) – 2016 | Lead; sole at trial | Bench |
| Federal court (S.D. Iowa) – 2015 | Lead | Bench |
| Federal (N.D. Iowa) – 2015 | Lead | Bench |
| State (Marshall) – 2013 | Associate | Jury |
| State (Story) – 2012 | Lead | Jury |
| State (Linn) – 2012 | Associate | Jury |
| State (Polk) – 2010 | Associate | Bench |
| State (Mahaska) – 2008 | Associate | Jury |
| Federal (N.D. Iowa) – 2007 | Associate | Jury |

I have participated in the following appeals, listed in reverse chronological order by approximate date of last significant activity in the appeal and excepting matters for which a notice of appeal was filed but no significant activity ensued:

| **Appellate court** | **Underlying venue** | **Role** | **Oral argument** |
|---|---|---|---|
| Pending determination – 2022 | State (Washington County) | Lead counsel | TBD |
| Iowa Court of Appeals – 2022 | State (Linn) | Lead | Yes, but by colleague |
| Iowa Supreme Court – 2021 | Federal (S.D. Iowa) | Lead | Yes |
| Iowa Supreme Court – 2020 | State (Polk) | Lead for arguing | Yes |
| Iowa Court of Appeals – 2020 | State (Polk) | Lead | Yes |
| Undetermined – dismissed – 2019 | State (Ringgold) | Lead | No, dismissed |
| Iowa Court of Appeals – 2019 | State (Polk) | Lead | Yes, but by colleague |
| Iowa Supreme Court – 2019 | State (Polk) | Lead | Yes |
| Iowa Court of Appeals – 2018 | State (Dubuque) | Lead | Yes |
| U.S. Court of Appeals for the Eighth Circuit – 2017 | Federal (N.D. Iowa) | Lead | Yes |
| Iowa Supreme Court – 2016 | State (Polk) | Lead for arguing | Yes |
| Iowa Court of Appeals – 2016 | State (Polk) | Lead | Yes, but by colleague |

| | | | |
|---|---|---|---|
| Iowa Supreme Court – 2013 | State (Polk) | Lead | No, successful motion to dismiss |
| Iowa Court of Appeals – 2013 | State (Polk) | Lead | Yes |
| Iowa Court of Appeals – 2013 | State (Linn) | Lead | Yes |
| Iowa Court of Appeals – 2012 | State (Polk) | Lead | Yes |
| Iowa Court of Appeals – 2010 | State (Mahaska) | Lead | No, fully briefed before dismissal |
| Iowa Court of Appeals – 2008 | State (Polk) | Lead | Yes |
| Eighth Circuit – 2006 | Federal (N.D. Iowa) | Lead for arguing | Yes |

**9. Describe your pro bono work over at least the past 10 years, including:**

**a. Approximate number of pro bono cases you've handled.**

**b. Average number of hours of pro bono service per year.**

**c. Types of pro bono cases.**

Pro bono service has been a continuous part of my work throughout my career, including over the past ten years. In that timeframe, I have handled approximately thirty cases or substantive legal matters on a pro bono basis.

Some of my matters over the years have involved litigation, but I also have been involved with multiple matters in which the service involved activity before courts or administrative agencies but not necessarily in an adverse context. For instance, I have represented clients in guardianship and/or conservatorship proceedings, petitions for name changes, and defense of alleged nuisance property claims. I also served pro bono as an assistant city attorney for the City of Ames for a short period during which I was responsible for prosecuting some matters.

I have also represented pro bono clients in litigated matters, the most significant of which involved the representation of the Ape Cognition and Conservation Initiative ("ACCI"), which is the entity that succeeded to the care and work of a colony of bonobos brought to Iowa to create what was once known as the Great Ape Trust. Unfortunately, in the transition to ACCI's leadership, litigation ensued in the United States District Court for the Southern District of Iowa. I was not involved initially, but I assisted ACCI in completing the litigation, culminating in a three-day evidentiary hearing before Magistrate Judge Ross Walters in which ACCI eventually prevailed. I have continued my pro bono work with ACCI and serve in a quasi-general counsel role for the organization.

In sum, I believe I have averaged well in excess of 50 hours of pro bono a year spread across multiple types of matters and roles. I have also supplemented this service with financial support for entities such as the Polk County Bar Association – Volunteer Lawyers Project, of which I am also a former board member.

Finally, in addition to the cases or matters in which I have represented a party, I also have served as the pro bono coordinator for Dorsey & Whitney's Des Moines office since 2008, a role that involves helping my colleagues identify pro bono matters in which they can provide assistance.

In sum, I am a firm believer in our ethical obligation to provide and support pro bono work and have strived to live out that belief by making pro bono a meaningful aspect of my career.

**10. If you have ever held judicial office or served in a quasi-judicial position:**

**a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.**

N/A

**b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.**

N/A

**c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.**

N/A

**11. If you have been subject to the reporting requirements of Court Rule 22.10:**

**a. State the number of times you have failed to file timely rule 22.10 reports.**

N/A

**b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:**

**i. 120 days.**

N/A

**ii. 180 days.**

N/A

**iii. 240 days.**

N/A

**iv. One year.**

N/A

**12. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:**

**a. Title of the case and venue,**
**b. A brief summary of the substance of each matter,**
**c. A succinct statement of what you believe to be the significance of it,**
**d. The name of the party you represented, if applicable,**
**e. The nature of your participation in the case,**
**f. Dates of your involvement,**
**g. The outcome of the case,**
**h. Name(s) and address(es) [city, state] of co-counsel (if any),**
**i. Name(s) of counsel for opposing parties in the case, and**
**j. Name of the judge before whom you tried the case, if applicable.**

Matter No. 1

a. *Xenia Rural Water District v. City of Johnston, Iowa*; U.S. District Court for the Southern District of Iowa and Iowa Supreme Court

b. Claims related to the provision of water service to customers or potential customers in various locations.

c. This case is a good example of my work for municipal clients and involves both a significant potential fiscal impact for the City (Xenia has claimed damages of at least $40,000,000) as well as issues that may bear on the interests of rural water providers and cities statewide.

d. City of Johnston

e. Lead counsel, working primarily with my Dorsey colleague, Manuel Cornell, in the defense of the case, including through significant motion practice in the district court and certification of questions to the Iowa Supreme Court, resulting in the Court's opinion at 959 N.W.2d 113 (Iowa 2021).

f. 2018 to present

g. This matter is ongoing.

h. None.

i. Steven M. Harris of Doyle Harris Davis & Haughey and Frank Smith of Frank Smith Law Office.

j. This matter is scheduled for trial before the Honorable James E. Gritzner in December 2022.

Matter No. 2

a. *Kayonna Topp v. Paws & Effect*, state court (Polk County – small claims)

b. Our client, Kayonna, who is disabled, sought the return of her beloved companion, Kashi, her service dog that had been removed from her possession by Paws & Effect. We filed a lawsuit on her behalf, seeking a writ of replevin for the return of Kashi.

c. Not only was Kashi a companion, she was trained to assist and respond to Kayonna's medical conditions, including seizures. Kashi was critical to Kayonna's health and well-being, which were jeopardized by Kashi's absence.

d. We represented Kayonna pro bono.

e. I served as lead and sole counsel in this matter, although Dorsey colleagues provided some assistance.

f. 2021

g. After a short trial and post-tribal briefing, we secured a complete victory for Kayonna resulting in her being reunited with Kashi.

h. None.

i. David Luginbill, Ahlers & Cooney, P.C.

j. Hon. Jeffrey M. Lipman

Matter No. 3

a. Multiple matters for The Reserve, a Nonprofit Corporation d/b/a The Reserve on Walnut Creek ("The Reserve"). The Reserve was sued repeatedly between 2012 and 2020. Each case was brought by one or more members of The Reserve or family members or other representatives acting on the member's behalf:

- *Estate of William Raisch v. The Reserve*, Polk County Case No. LACL125314 (filed in 2012)
- *Cremer as Trustee of the Cremer Investment Trust v. The Reserve*, Polk County Case No. LACL132256 (2015)
- *Albaugh v. The Reserve*, Polk County Case No. CVCV052550 (2016)
- *Buck, et al. v. The Reserve*, Polk County Case No. CVCV052364 (2016)
- *Bergman, et al. v. The Reserve*, Polk County Case No. CVCV055304 (2017)
- *Nielsen v. The Reserve*, Polk County Case No. LACL146325 (2019)

In nearly all of these cases, The Reserve also brought cross-claims against a third party, S.X. Corporation d/b/a Essex Corporation ("Essex").

b. Each lawsuit except *Nielsen* asserted multi-count claims alleging, among other things, that The Reserve breached the Iowa Landlord Tenant Act, committed consumer fraud, breached a fiduciary duty, or committed like wrongdoing in relation to the member. *Nielsen* asserted a proposed sale of The Reserve should be enjoined based on similar alleged breaches.

c. The cases involving The Reserve and associated counseling on multiple related issues lasted for nearly eight years. One case resulted in a jury trial and appeal (the *Buck* case) and the Iowa Supreme Court resolved another (*Albaugh*). One of the theories advanced on behalf of plaintiffs was that the Iowa Landlord Tenant Act applies to continuing care retirement communities, which, if true, likely would have prompted a sea change for independent living facilities.

d. The Reserve

e. My participation in these matters was comprehensive, including arguing the successful *Albaugh* appeal and trying the *Buck* case to a jury and arguing the successful appeal.

f. 2012 to 2020, at which point the client was sold to a different entity.

g. The *Raisch*, *Cremer*, *Bergman*, and *Nielsen* cases were dismissed voluntarily. The *Albaugh* case was dismissed on summary judgment in favor of The Reserve, which was affirmed on appeal at 930 N.W.2d 676 (Iowa 2019). The *Buck* case resulted in a jury verdict against The Reserve, which was vacated by the Iowa Court of Appeals with the case dismissed in favor of The Reserve.

h. We did not have outside co-counsel. I worked with and supervised several Dorsey colleagues in these cases over the years depending on need.

i. All Plaintiffs except in the *Nielsen* case were represented by Jason Craig and his colleagues at Ahlers & Cooney, P.C. Plaintiff in the *Nielsen* case was represented by Patrick White of White Law Office, P.C.

Essex was represented throughout by Mitch Kunert of Nyemaster Goode, P.C.

j. The *Buck* case was tried to the Honorable Jeanie Vaudt before being resolved on appeal by the Iowa Court of Appeals. The Honorable Michael Huppert granted summary judgment in *Albaugh* before being affirmed by the Iowa Supreme Court. The other cases involved numerous judges in judicial district 5C who were involved in the cases at different times.

Matter No. 4

a. *Federal Deposit Insurance Corp. v. Dosland, et al.* and *Progressive Casualty Insurance Co. v. [FDIC], as Receiver of Vantus Bank*; N.D. Iowa

b. These two cases resulted from the closure of Vantus Bank, which had been based in Sioux City. The FDIC sought recovery for alleged breaches of duties on behalf of the former directors and officers of the bank. In a parallel action, the FDIC sought to enforce an insurance policy that had been purchased in relation to insuring against claims premised on the alleged conduct of the directors and officers.

c. These cases involved the only bank in Iowa that was put into receivership by the FDIC in the wake of the Great Recession. The FDIC claimed damages in the tens of millions of dollars. Multiple unique and difficult issues were presented.

d. The former directors and officers of Vantus Bank

e. I worked closely with my partner Dave Tank to lead our team to defend our clients' interests in both matters.

f. 2010-2015

g. The parties agreed to a stipulation for voluntary dismissal.

h. Daniel L. Hartnett of Crary Huff Ringgenberg, Hartnett & Storm, PC, Sioux City

i. For the FDIC: Maureen Tobin, Mark Rice, Richard Kirschman, and Stephen Marso of Whitfield & Eddy PLC; Robert L. Wainess of the FDIC; Antony S. Burt, Andrew C. Porter, Kelly M. Warner, Michael W. Ott of Schiff Hardin LLP; and Andrew Reidy, Catherine J. Serafin, and Joseph M. Saka of Lowenstein Sandler LLP

For Progressive: Lewis K. Loss and Matthew Dendinger, now with Dykema Gossett PLLC and Guy Cook of Grefe & Sidney, PLC

For Third-Party Defendant the United States of America: Jacob Schunk, Assistant U.S. Attorney

j. These cases were not tried.

**13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.**

I believe my experience as Justice Cady's law clerk provided a strong introduction to the qualities exhibited by our best judges and would assist in my transition if I was selected. As noted in prior sections, I have had the opportunity to counsel and otherwise work with clients in multiple non-litigated contexts ranging from assisting clients as a de facto general counsel to aiding clients through difficult life changes for them or a loved one. I know my exposure to the practical concerns of clients who are not litigating a matter or hoping to avoid litigation have helped me distill, discuss, and find solutions to complex litigated matters. I believe I have seen all sides of the client experience and this knowledge would carry into my role as a judge both in the analysis of the difficult issues presented and in relation to colleagues who come from a wide range of backgrounds. In sum, I believe I am a well-rounded attorney and counselor, not just a litigator.

**14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.**

N/A

**15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization**

**other than a law practice, provide the following information about your position(s) and title(s):**

**a. Name of business / organization.**
**b. Your title.**
**c. Your duties.**
**d. Dates of involvement.**

N/A

**16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.**

- Member, Polk County Bar Association
  - President (2017-2018), President Elect (2016-2017), Vice President (2015-2016), Treasurer (2013-2015)
  - Member, Board of Governors
  - Chair, Judicial Retention Committee
  - Member, Bench & Bar Committee
  - Past Member, Ethics Committee
  - Past Member, Public Relations Committee
- Member, Iowa State Bar Association
  - Member, Board of Governors
  - Member, Appellate Practice Committee
  - Member, Judicial Administration Committee
  - Member and Past Chair, Litigation Section Council
  - Member, Health Law Section Council
  - Member, Litigation, Health Law, Labor & Employment, and Probate Sections
  - Past Member, Independence of the Judiciary/Fair Courts Committee
  - Past Member and Chair, Young Lawyers Division Services to the Elderly Committee
- Life Fellow, Iowa State Bar Foundation
- Past Member, Iowa Supreme Court Jumpstart Jury Trials Task Force
- Past Member and Co-Chair, Iowa Supreme Court Advisory Committee on Rules of Civil Procedure
- Past Member, Iowa Supreme Court Commission on Continuing Legal Education
- Past Member, PCBA Volunteer Lawyers Project Board of Directors

- Member, Iowa Defense Counsel Association
- Member, Iowa Society of Healthcare Attorneys
- Member, Iowa Municipal Attorneys Association
- Past Member, American Judicature Society, National Advisory Council
    - Past Member, American Judicature Society, Amicus Committee
- Past Member, American Bar Association
- Past Member, Defense Research Institute
- Past Member, C. Edwin Moore Inn of Court

**17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.**

- Drake Law School, Board of Counselors (2021-present)
- Augustana College, President's Advisory Council (2020-present)
- Holy Trinity Church and School, lector (2016-present) and Facilities Committee (2018-2020)
- Amanda the Panda (now part of EveryStep), Board of Directors (2009-2015)
- Greater Des Moines Leadership Institute (2007-2008)
- Beaverdale Neighborhood Association, Board of Directors and President (2003-2009)

**18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.**

N/A

**19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.**

Please see the attached samples:

- Plaintiff Kayonna Topp's Post-Trial Brief (Dec. 1, 2021)

- Plaintiff / Counterclaim Defendant City of Marion, Iowa's [Proposed] Findings of Fact, Conclusions of Law, and Decree (Oct. 23, 2020)
- William J. Miller, Note, *Chipping Away at the Dam:* Anastasoff v. United States *and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 Drake L. Rev. 181 (2001)

The first two items would not have been possible without research or other assistance from my Dorsey colleagues. Colleagues on the Drake Law Review edited the third item. Notwithstanding, these items reflect my work and are the result of my efforts to draft, craft, and hone written work.

## OTHER INFORMATION

**20. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.**

N/A

**21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.**

N/A

**22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.**

- Iowa Passes New Law Related to COVID-19 Vaccination Mandates by Employers and Unemployment Insurance (Nov. 1, 2021) (Dorsey & Whitney alert/blog co-authored with Katie Ervin Carlson and Manuel Cornell)
- Iowa Supreme Court Narrowly Upholds Portion of Waterloo, Iowa's "Ban the Box" Ordinance: What Does it Mean for Other Iowa Municipalities (July 7, 2021) (Dorsey & Whitney alert/blog co-authored with Katie Ervin Carlson)
- No Vaccine Passports in Iowa (June 1, 2021) (Dorsey & Whitney alert/blog co-authored with Katie Ervin Carlson)
- SF2338: A Proposed Fix for "*Pexa*" and the Pandemic (Aug. 11, 2020) (Dorsey & Whitney alert/blog co-authored with Manuel Cornell)
- I prepared monthly "President's Letters" while I was the President of the Polk County Bar Association (2016-2017), which were distributed to the PCBA membership via our association's email newsletters

- New Eighth Circuit Opinion Likely to Increase Summary Judgments in Noncompete Litigation (Aug. 28, 2017) (Dorsey & Whitney alert/blog co-authored with JoLynn Markison)
- Part 3: Best Practices of a Governmental Body To Protect Itself in Challenges Under the Open Meetings Law After *Hutchison v. Shull* (Jan. 2017) (Dorsey & Whitney alert/blog co-authored with Alissa Smith and David Grossklaus)
- *Hutchison v. Shull*: Expanding Iowa's Open Meeting Law (Part 1) (Apr. 26, 2016) (Dorsey & Whitney alert/blog)
- Iowa Supreme Court: So-Called "Shuttle Diplomacy" May Violate Open Meeting Law (Apr. 26, 2016) (Dorsey & Whitney alert/blog)
- Medical Liability Reform – Iowa's Communication and Optimal Resolution (Candor) Bill Effective July 1, 2015 (July 23, 2015) (Dorsey & Whitney alert/blog co-authored with Alissa Smith)
- Recent Iowa Supreme Court Opinions Address Open Records Request for a Public Hospital's Internal Audits and Address Hospital Board Liability for Negligent Credentialing (Apr. 23, 2012) (Dorsey & Whitney alert/blog co-authored with Alissa Smith)
- New Iowa Supreme Court Opinion Reinforces Iowa's Peer Review Protection (Dec. 6, 2011) (Dorsey & Whitney alert/blog co-authored with Alissa Smith)
- Unpublished Opinions—New Rule Governing Their Use Could Become Effective End of the Year, The Iowa Lawyer (Apr. 2006)
- An Excellent Volume for Practitioners in Many Fields (A Review of Advance Health Care Directives: A Handbook for Professionals), The Iowa Lawyer (Dec. 2003)
- Note, *Chipping Away at the Dam:* Anastasoff v. United States *and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 Drake L. Rev. 181 (2001)

**23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.**

- Noncompete Contracts: An Overview of the Law, Tips and Holdings (copresenter); May 19, 2022; Iowa Society of Healthcare Attorneys (ISHA)
- Understanding Staffing Agency Contracts (copresenter); December 8, 2021; Iowa Health Care Association
- The Legacy of Chief Justice Mark Cady: Access to Justice (moderator); October 5, 2021; Polk County Bar Association
- Collecting Payment and Working with Difficult Family Situations (copresenter); June 22, 2021; Iowa Health Care Association

- Case Law Update (copresenter); May 13, 2021; Iowa Society of Healthcare Attorneys (ISHA)
- Strategies for Dealing with Non-Paying Residents and Difficult Family Situations (copresenter); May 4, 2021; LeadingAge of Iowa
- Coronavirus Considerations for Litigation Paralegals; September 25, 2020; Iowa Paralegal Association
- Case Law Update (copresenter); May 21, 2020; ISHA
- Coronavirus Considerations for Litigators; April 10, 2020; Iowa State Bar Association (ISBA)
- Iowa Law Update: New and Notable Legal Developments; May 31, 2019; Association of Corporate Counsel (ACC) – Iowa Chapter
- Case Law Update (copresenter); May 23, 2019; ISHA
- Working with Hospitals and HIPAA; Aug. 29, 2018; Iowa County Attorneys Association
- Case Law Update (copresenter); May 22, 2018; ISHA
- Introduction of the Iowa Supreme Court; September 19, 2017; members of the public attending oral argument at Hoover High School, Des Moines
- Case Law Update (copresenter); May 4, 2017; ISHA
- Case Law Update (copresenter); May 10, 2016; ISHA
- Case Law Update (copresenter); May 12, 2015; ISHA
- Case law update; Dec. 19, 2014; Scott County Bar Association
- Case law update; Nov. 21, 2014; ACC – Iowa Chapter
- Case Law Update (copresenter); May 13, 2014; ISHA
- Ethics (panel member); May 8, 2014; ISBA Bridge the Gap seminar
- Ethics: New and Notable (A Professional Responsibility Round Up); Dec. 19, 2013; Dorsey & Whitney colleagues
- Professional Responsibility Round Up; Nov. 15, 2012; ACC – Iowa Chapter
- Panel discussion regarding Iowa judicial system; Sept. 21, 2011; Iowa Court of Appeals
- Loss Prevention Audit and Ethics Presentation for Lawyers; Sept. 15, 2011; Dorsey & Whitney LLP colleagues
- Update on Iowa Laws Related to Healthcare Providers; Oct. 20, 2009; private presentation to client legal team
- Professional responsibility in attorney advertising; July 24, 2009; ISBA Solo and Small Firm Seminar

- Behind the Scenes of Iowa's Appellate Courts; Feb. 20, 2009; ISBA Appellate Practice committee seminar
- An Overview of Professional Responsibility in Attorney Advertising and Solicitation in Iowa; November 21, 2008; Polk County Bar Association
- Ethics: An Overview of Professional Responsibility in Attorney Advertising and Solicitation in Iowa; May 8, 2008; Iowa Society of Healthcare Attorneys
- An Overview of Attorney Advertising and Solicitation in Iowa; June 26, 2007; Dorsey & Whitney colleagues
- Case law or like update; Feb. 2, 2007; Iowa Judicial Branch
- Iowa Appellate Case Review II (2005-2006); September 29, 2006; Iowa Defense Counsel Association
- Overview of legal profession; Sept. 13, 2006; North Polk High School students
- Iowa appellate case review; September 2005; Iowa Defense Counsel Association
- I have participated in group presentations as a member of the C. Edwin Moore Inn of Court and like organizations related to the legal profession. I do not recall and I am able to reconstruct specifically when such presentations took place.

To the best of my recollection, I have not delivered any other speeches, talks, or other public presentations.

**24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.**

Twitter: Starbuck132 (private)
LinkedIn: William J. Miller

**25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.**

- Graduation from Augustana College *cum laude*; Phi Beta Kappa Society; Omicron Delta Kappa Honor Society; Mortar Board Honor Society; Sigma Tau Delta English Honor Society; Phi Alpha Theta History Honor Society; National Residence Hall Honorary; Dean's List
- Graduation from Drake Law School with highest honors; Order of the Coif; Iowa State Bar Association Graduating Senior Award; The H.G. Cartwright Law Review Award; CALI Excellence for the Future Awards in Contracts I, Conflicts of Laws, and Election Law; Dean's List
- Recognized as one of Des Moines Business Record's 2014 Forty Under 40

- Listed in Best Lawyers in America© for Commercial Litigation (2016-2022) and Litigation — Labor & Employment (2018-2022)
- Rated AV Preeminent® by Martindale-Hubbell®
- Ranked by Chambers USA, 2015-2019; 2021-2022
- Named one of "America's Leading Business Lawyers" by Chambers USA (Litigation: General Commercial), 2018-2019; 2021-2022
- Named "Up and Coming" by Chambers USA (Litigation: General Commercial), 2015-2017
- Recognized as a "Labor & Employment Star – Iowa" by Benchmark Litigation, 2021-2022
- Listed in Best Lawyers in America Employment Law Issue, 2021
- Listed in Great Plains Super Lawyers, 2021-2022
- Recognized as a "Rising Star" by Great Plains Super Lawyers, 2013-2017
- Recognized as one of Benchmark Litigation's Under 40 Hot List, 2016-2018
- Recognized as a "Future Star" by Benchmark Litigation, 2015-2016

**26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.**

- Hon. Mark S. Bennett (Ret.); 515-271-2908; I practiced in front of Judge Bennett and I have also worked with him in multiple matters in his role as a mediator or attorney.
- Rebecca Brommel; 515-699-3266; Becki is now my partner at Dorsey & Whitney but, until 2020, was a partner at another law firm and represented clients in multiple matters in which our respective clients were aligned or adverse.
- Jason Craig; 515-246-0372; Jason is a partner with Ahlers & Cooney, PC and represented clients in multiple matters against my client, The Reserve.
- Hon. Richard H. Doyle; 515-348-4700; Judge Doyle was my supervisor when he was in private practice and I was a law clerk at the Galligan firm during law school and he has remained a friend and mentor since.
- Patricia Lantz; 515-453-1418; Pat is the General Counsel of my client, the Multi-State Lottery Association.
- Michael Salvner; 515-286-3737; Mike is an Assistant Polk County Attorney who has been a close friend since 1998, including during law school.
- Douglas Sondgeroth; 312-653-7870; Doug is an attorney in Chicago who has been a close friend since 1995, including being the best man at my wedding.
- Jared Taglialatela, Ph.D.; 404-932-4682; Jared is the chair of the board of directors of my client, the Ape Cognition and Conservation Initiative.

- David A. Tank; 515-480-7098; Dave was my partner at Dorsey & Whitney and a friend, mentor, and colleague with whom I worked closely until his retirement.
- Neal Westin; 515-283-3120; Neal is a partner with Nyemaster Goode PC who has been a friend since approximately 2003, including multiple years of joint service on the board of directors of the Beaverdale Neighborhood Association.

**27. Explain why you are seeking this judicial position.**

I have felt the call to public service since I was a young man. I had excellent examples in my parents, grandparents, and other relatives, some of whom served in the military or in several other volunteer capacities. Those examples were reinforced in high school, where we were challenged to provide substantial public service as we progressed to graduation. I embraced those lessons and opportunities and found ways to serve my community in college and law school. I have continued those efforts even though my path took me into private practice, rather than into a position in the public sector, where I originally believed I would end up.

I identified the goal of being a judge early in my career. My experience as a law clerk gave me a window into the appellate court process. My time with the court gave me countless opportunities to look at the law from many angles and think about it on a minute level. My most enjoyable experiences in private practice are when I can break an issue down in this same way. My call to public service has never abated, and I believe the time is right to answer that call.

**28. Explain how your appointment would enhance the court.**

I would be a hard-working, humble, and dedicated judge and a great colleague. My practice involves complex legal work that is at the core of the modern economy. I believe my perspective from working daily with clients and colleagues in addressing challenging legal issues will aid the court in many ways, including where pragmatic considerations are in play. Further, my experience in bar association and other roles documented in this application will translate well into the collaborative work that the court must perform.

I am dedicated to the rule of law and the fair administration of justice. I care deeply about the future of the law and the legal profession. I am a cheerleader for the courts and enjoy talking with the public about the law. I will embrace these opportunities and the unique responsibility of being a judge in Iowa's legal system.

**29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.**

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed: _____ Date: Sept. 21, 2022

Printed name: William J. Miller

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

| | | |
|---|---|---|
| KAYONNA TOPP,<br><br>Plaintiff,<br><br>v.<br><br>PAWS & EFFECT,<br><br>Defendant. | ) | Case No. SCSC674437<br><br><br>**PLAINTIFF KAYONNA TOPP'S POST-TRIAL BRIEF** |

COMES NOW Plaintiff Kayonna Topp ("Kayonna") and, for her Post-Trial Brief ("Brief"), states as follows:

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* * *

## INTRODUCTION

Defendant Paws & Effect wrongfully took possession of Kayonna's service dog, Kashi, based on a dubious claim of entitlement to do so and now refuses to return Kashi because Kayonna pursued her legal rights, including seeking possession of her companion. While Paws & Effect has attempted to excuse or justify its misconduct, its defenses all fail under scrutiny. Kashi should be immediately returned to Kayonna for the reasons described in this brief.

## STATEMENT OF FACTS

The evidence submitted at trial – through the testimony of Kayonna, Ashley Anderson ("Ashley"), and Max Garcia ("Max") and the exhibits admitted by the Court – establishes the following:

Kayonna is a 44-year old graduate student who lives in Ames with her children. From September 5, 2020, to July 19, 2021, Kayonna also lived with Kashi, her service dog. Kayonna is disabled due to degenerative conditions and chronic health issues that affect her knees and ankles and cause seizures and transient ischemic attacks, i.e., mini-strokes. (*See* Trial Exhibit 2 ("Ex.")). Kashi was trained to retrieve items for Kayonna, detect her low blood sugar, and perhaps most

critically, detect seizures. Kashi made Kayonna's life a little easier and infinitely better.

Kayonna and Kashi were paired after Kayonna learned about Defendant Paws & Effect on the internet. After Kayonna's pet dog, Coconut, died in 2019, she began to explore service dog opportunities in light of her disabilities. She was impressed by Paws & Effect's mission statement of providing low to no cost service dogs to adults with disabilities.

Kayonna attended a Paws & Effect informational session hosted by Ashley in October 2019. Afterward, Kayonna submitted an application for a service dog (Ex. 1) and enthusiastically participated in four pre-placement courses with Paws & Effect. During the third session, she was introduced to Kashi, who ran right to her.

As part of the pre-placement courses, Paws & Effect provided Kayonna a manual, which contained a sample contract between Paws & Effect and a service dog recipient. (Ex. 3). On page 5 of the manual, Paws & Effect informed recipients that a service dog is "a permanent companion" for a person like Kayonna, which would enable her "to live with greater independence." (*Id.* at 5). Indeed, Kayonna believed her service dog would be her permanent companion.

In February 2020, Kayonna and Kashi were paired. Kayonna and Paws & Effect never entered into the sample contract from the manual. Instead, Kayonna paid Paws & Effect $500 and received Kashi in return. Once Kashi joined her household, Kayonna fully supported Kashi, including taking her to training, ensuring that she received veterinary care, ensuring that she was collared with a rabies vaccination tag, and of course, feeding and taking care of her other day-to-day needs. (*See* Ex. 8).

Some of the things Kayonna did for Kashi were done with Paws & Effect and benefitted them because, for instance, the training was delivered by the organization, which charged for the service. Over time, Kayonna incurred expenses for Kashi totaling (and likely exceeding)

$4,435.35, none of which were reimbursed by Paws & Effect. (*Id.*) Months of care and companionship passed without issue, and Kashi became integral to Kayonna's well-being. (*See* Ex. 4).

In February 2021, Kayonna and Kashi were preparing for Kashi's public access test, which was anticipated to take place in April and would be her "final exam" to confirm she was a trained service dog. Without warning or explanation, Paws & Effect emailed a document that it expected Kayonna to sign before proceeding with the public access test. (*See* Ex. 5). This document was similar to the sample agreement found in the Paws & Effect training manual. (*Compare* Ex. 5, *with* Ex. 3). The document stated, in part:

> 14. I understand that my dog is at a proper weight of 60lbs and I will not allow her to lose gain more than 5 pounds either way. If I do and I cannot get her back to a proper weigh within 3 months, Paws & Effect will take my dog and place it back with a handler until she is back at her starting (and healthy) weight. . . .
>
> 26. I understand that my dog is a gift and I will do that I can to give back and pay it forward throughout my community and within Paws & Effect. . . .
>
> 29. I understand that Paws & Effect owns my dog and they can remove her at anytime if they feel Kashi is not suitable for me or is failing the service dog program. . . .
>
> This contract is the first of many. This contract expires on April 30th, 2021. Before then, I must complete my Public Access Test, evaluated by [e]ither Ashley Anderson or Max Garcia. Once completed, a new contract can be put in place until April 30th, 2022. . . .

(Ex. 5). Handwritten notes were added to the document by Ashley, including a notation that stated Kashi weighed 67.5 pounds on February 13, 2021:

> with puzzles, or doing nosework.
> 14. I understand that my dog is at a proper weight of 60lbs and I will not allow her to lose or gain more than 5 pounds either way. If I do and I cannot get her back to a proper weight within 3 months, Paws & Effect will take my dog and place it back with a handler until she is back at her starting (and healthy) weight. 67.5 on 2/13/2021

(*Id.*) Kayonna and Kashi successfully completed the public access test on April 3, 2021. No other

documents were signed by Kayonna and Paws & Effect.

In late June 2021, Ashley sent Kayonna a text and they scheduled a meeting in early July. At the meeting, Ashley and the co-founder and owner of Paws & Effect, Nicole Shumate ("Nicole"), told Kayonna that Paws & Effect expected her to get Kashi's weight down to 60 pounds before Kashi's September 2021 vet visit. Kayonna expressed concerns about this demand, and Nicole agreed it was unlikely Kayonna could get Kashi to Paws & Effect's expected weight by the time of the vet visit without the assistance of a professional trainer. Conveniently, Paws & Effect offered a professional trainer.

On July 6-7, 2021, Kayonna had seizure episodes for which Kashi rendered her aid. On July 12, Kashi accompanied Kayonna to a physical therapy appointment, where Kayonna took a couple photos of Kashi "on the job." (Exs. 6, 7). On July 17, Kayonna received a text from Ashley stating a different Paws & Effect employee "needed" a dog for an event and Paws & Effect felt it was time it took Kashi to work on her weight loss. Feeling she had no choice, on July 19, Kayonna handed over Kashi and accessories needed for her care to Paws & Effect for what she believed would be eight weeks, after which Kashi would be returned to her.

Kayonna attempted to stay in close contact with Paws & Effect regarding Kashi's weight loss and the timing for her return. Ashley did not respond to several text messages, although she did text Kayonna to ask her to pay for food for Kashi, which Kayonna promptly arranged. On September 2, 2021, Kayonna reached out to Paws & Effect in light of Kashi's impending vet appointment on September 10, to which Kayonna had planned to take Kashi. Kayonna was told it would take another couple weeks until Kashi would be down to 60 pounds. Shortly thereafter, Ashley told Kayonna that Kashi would actually need to maintain weight at 60 pounds for two more weeks, making it an additional month before Kayonna could be reunited with Kashi.

In the meantime, Paws & Effect told Kayonna that it expected her to sign a contract with it that Kayonna would draft describing how she would maintain Kashi at 60 pounds. Kayonna disagreed with this condition and demanded Kashi's return. Although Kashi was now at 60 pounds (as of no later than the middle of September 2021, according to Ashley), Paws & Effect did not return her to Kayonna.

Kayonna began to further investigate Paws & Effect and her circumstances, learning about other service dogs that had been removed in shockingly similar scenarios. *See, e.g.*, Order, *State v. Garcia*, available in the court file (Polk County Case No. SMAC392612 (Nov. 9, 2021)) (Dickinson, J.) (finding Max Garcia guilty of Theft in the Fifth Degree for the removal of Harrison, another member of Kashi's litter). When Kayonna expressed concerns, Paws & Effect, namely Nicole, a law school graduate, told Kayonna that if she had concerns she could file a complaint. Kayonna did so, submitting a complaint to the Iowa Civil Rights Commission ("ICRC").

Because Kayonna filed a complaint with the ICRC, Paws & Effect refused to return Kashi or work with her further. In fact, Ashley testified that Paws & Effect planned to give Kashi back to Kayonna until she threatened a civil rights complaint and litigation. Kayonna also hired counsel to pursue Kashi's return. Her undersigned counsel communicated with Paws & Effect to again demand Kashi's return, which Paws & Effect refused. (*See* Exs. 9, 10). Kashi remains in the possession, custody, or control of a Paws & Effect board member in Iowa. Kayonna continues to suffer in her absence.

## ARGUMENT

Although Paws & Effect claims it is Kashi's owner and always has been, this is belied by the facts and the parties' course of conduct. Kayonna is Kashi's owner, has a possessory interest

in her, and is entitled to an order that Paws & Effect immediately return Kashi under a writ of replevin. As summarized by the Iowa Court of Appeals:

> 'Replevin is a specialized statutory remedy with a narrow purpose designed to restore possession of property to the party entitled to possession.' *Roush v. Mahaska State Bank*, 605 N.W.2d 6, 9 (Iowa 2000). Though damages may be awarded, they are incidental to the purpose of a replevin action, which is to return the property to its owner. *Id.*; *see also* Iowa Code § 643.17. To succeed on this claim, the plaintiff must be able to identify the specific property, prove that it owns the property, and that the defendant is in wrongful possession of it. *See generally Flickenger v. Mark IV Apartment Ass'n*, 315 N.W.2d 794, 796-97 (Iowa 1982).

*Real Estate Title Closing & Title Servs., Inc. v. Trio Solutions, LLC*, 2015 LEXIS 83, at *10-11 (Feb. 11, 2015). The evidence in this case clearly establishes the requisite elements supporting Kayonna's replevin claim.

## I. KASHI IS THE SPECIFIC PROPERTY IN ISSUE

Pursuant to Iowa Code section 351.25, Kashi is deemed property: "All dogs under six months of age, and all dogs over said age and wearing a collar with a valid rabies vaccination tag attached to the collar, shall be deemed property." Kayonna testified that she took care to ensure that Kashi wears "a collar with a valid rabies vaccination tag attached." *Id.* Thus, while Kashi certainly is not merely property, she is the specific property at issue in this case. *See Real Estate Title Closing & Title Servs., Inc.*, 2015 LEXIS at *11.

## II. KAYONNA IS KASHI'S OWNER OR AT MINIMUM HAS A POSSESSORY INTEREST IN HER

There are a variety of ways in which the Court could look at this dispute but they ultimately lead to the same conclusion – Kayonna is entitled to Kashi's return. Any confusion regarding the precise terms under which Paws & Effect provided Kashi to Kayonna were entirely the fault of Paws & Effect and any ambiguity should be construed against Paws & Effect.

### A. KAYONNA AND PAWS & EFFECT ENTERED INTO AN ORAL CONTRACT FOR KASHI IN SEPTEMBER 2020

"The existence of an oral contract" and whether it has been breached "are ordinarily questions for the trier of fact." *Gallagher, Langlas & Gallagher v. Burco*, 587 N.W.2d 615, 617 (Iowa Ct. App. 1998). "To prove the existence of an oral contract, the terms must be sufficiently definite for a court to determine with certainty the duties of each party, the conditions relative to performance, and a reasonably certain basis for a remedy." *Id.* And "[w]here a contract appears to exist courts are reluctant to find it too uncertain to be enforceable." *Id.*

Here, Kayonna and Paws & Effect agreed to make a contract for Kashi in exchange for $500.[1] Kayonna completed her duties under the terms of that contract by paying $500 to Paws & Effect for Kashi. Paws & Effect transferred ownership of Kashi officially in September 2020 by accepting this donation and handing Kashi over to Kayonna. This was the entirety of the parties' agreement and became an enforceable contract under Iowa law. *In re Price,* 571 N.W.2d 214, 216 (Iowa 1997) (summarizing the enforceability of oral contracts). By taking Kashi from Kayonna, Paws & Effect has taken property that was rightly hers under the terms of their oral contract.

[1] Kashi, as a dog, is a "good" under Iowa Code section 554.2105 (defining "Goods" to mean "all things . . . which are moveable at the time of identification to the contract for sale"). Any contract regarding Kashi is, therefore, subject to Iowa's version of the Uniform Commercial Code and its provisions. *See* Iowa Code §§ 554.1101–5. Under the Uniform Commercial Code, "a contract for the sale of goods for the price of five hundred dollars or more" must be in writing or the contract is unenforceable. Iowa Code § 554.2201. There are, however, exceptions to the writing requirement within the statute of frauds including situations when a buyer has paid for and accepted the goods provided by the seller. *Id.*

Here, Kayonna paid $500 to Paws & Effect for Kashi. Kayonna accepted Kashi. This contract, therefore, cannot be negated by the statute of frauds because it falls within an exception to the writing requirement in the statute. *Id.*

## B. THE FEBRUARY 13, 2021 DOCUMENT IS INSUFFICIENT TO ALTER THE TERMS OF THE PARTIES' ORIGINAL CONTRACT, CANNOT BE A CONTRACT FOR KASHI, AND DOES NOT CONSTITUTE A WRITING SUMMARIZING THE TERMS OF THE ORIGINAL CONTRACT

### 1. Paws & Effect gave no consideration under the alleged contract in exchange for Kayonna giving up significant rights

For a contract to be enforceable, both parties must give some form of consideration. *Margeson v. Artis*, 776 N.W.2d 652, 657 (Iowa 2009); *see Meinchke v. Nw. Bank & Trust Co.*, 756 N.W.2d 223, 227–28 (Iowa 2008). "Generally, the element of consideration ensures the promise sought to be enforced was bargained for and given in exchange for a reciprocal promise or an act." *Margeson*, 776 N.W.2d at 657. This consideration requirement applies to both new contracts and agreements to modify an existing contract. *Id*. (explaining that contract modifications are unenforceable absent new consideration). While the value of the consideration is irrelevant, there must be some form of consideration given by both parties to make either a new contract or a contract modification enforceable. *Id.*

Paws & Effect apparently asserts that the document signed on February 13, 2021 (Ex. 5/A) either served as an alteration to the parties' original agreement or as the contract for Kashi. This alleged contract and its terms, however, are unenforceable due to a lack of consideration given by Paws & Effect. Throughout all thirty-one of the alleged contract's clauses, Kayonna promises to give up a number of rights and agrees to perform numerous tasks including participation in various trainings and attendance at multiple appointments. Nowhere in the document, however, does Paws & Effect give up anything. The document lists nothing about what Paws & Effect would provide to Kayonna under its terms. It is simply a set of unilateral promises by Kayonna in exchange for nothing—she already became the owner of Kashi months prior—and is, therefore, unenforceable either as a contract modification or an initial contract.

2. The alleged contract is not a summarization of a previous oral agreement

Parties who contract may engage in oral agreements that are later summarized in a writing or enter into agreements that are partially written and partially oral. *See, e.g., Peck v. Four Aces Farms, Inc.*, 871 N.W.2d 127, 129 (Iowa Ct. App. 2015), *Union Mortg. Co. v. Evans*, 205 N.W. 776, 776–77 (Iowa 1925). The February 13 document, however, does not qualify as either a summarization of the parties' previous agreement nor is it part of a larger contract. There is nothing in the alleged contract that contains a price term, nothing that provides what Kayonna will be getting under the contract, nothing that purports to be a written summarization of an earlier agreement, and nothing that claims to be part of a larger agreement. All in all, the alleged contract is nothing more than an unenforceable code of conduct. The Court should reject any argument that the alleged contract constituted a summarization of a previous agreement or part of a hybrid written-oral contract.

## C. IF THE FEBRUARY 13 WRITING IS ENFORCEABLE, PAWS & EFFECT IS PROHIBITED FROM ENFORCING THE WEIGHT PROVISION BECAUSE IT HAS FAILED TO PROVE THE CONDITION PRECEDENT WAS MET, AND BECAUSE THE DOCTRINES OF WAIVER AND ESTOPPEL BY ACQUIESCENCE PRECLUDE ENFORCEMENT OF THE PROVISION

1. Paws & Effect produced no evidence that Kashi was overweight on April 19

"Conditions precedent are defined as those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance." *Vista Invs., L.C. v. Iowa Office Supply, Inc.*, 884 N.W.2d 223, 224–25 (Iowa Ct. App. 2016). In this case, the alleged contract provides that if Kashi becomes overweight then Kayonna will have three months to get Kashi "back to a proper weight." Paws & Effect took Kashi from Kayonna on July 19, 2021. To give rise to any right of enforcement, Paws & Effect must prove that Kashi was overweight on April 19, 2021; a task which they have not accomplished (or even attempted). At no time has Paws & Effect ever shown documentation or produced evidence

that Kashi was overweight on April 19, therefore, its later repossession of Kashi was improper and Kashi should be returned to her rightful owner, Kayonna.

2. Paws & Effect waived its right to enforce the weight provision

Iowa law "has long held that contract rights can be waived." *In re Guardianship of Collins*, 327 N.W.2d 230, 233 (Iowa 1982). Waiver is "the voluntary or intentional relinquishment of a known right." *Travelers Indemnity Co. v. Fields*, 317 N.W.2d 176, 186 (Iowa 1982). It "can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended." *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982). "The essential elements of a waiver are the existence of a right, knowledge, actual and constructive, and an intention to relinquish such right." *Id.* No consideration is necessary to waive a contractual right. *Pond v. Anderson*, 44 N.W.2d 372, 375 (Iowa 1950).

The alleged contract unambiguously provides that Kayonna understands that Kashi "is at a proper weight of 60lbs and" that Kayonna "will not allow her to lose or gain more than 5 pounds either way." (Ex. 5). Paws & Effect wrote down Kashi's weight on the day they gave her to Kayonna as 67.5 pounds. If the 60 pounds provision does create a right for Paws & Effect, which it does not based on the lack of consideration, Paws & Effect had actual knowledge of the alleged contract term because it drafted it, read it, and signed it. *Advance Elevator Co. v. Four State Supply Co.*, 572 N.W.2d 186, 188 (Iowa Ct. App. 1997) ("[A] party is charged with notice of the terms and conditions of a contract if the party is able or has had the opportunity to read the agreement."). Paws & Effect waived this term by giving Kashi to Kayonna at a weight that violated the terms that it drafted. *Smith and Meadows*, Iowa App. LEXIS 1502, at *7–*8 (Iowa Ct. App. Oct. 21, 2009) ("Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended."). If the Court finds that the February 13

document was an enforceable contract, it should find that the weight provision was waived by Paws & Effect because it gave Kashi to Kayonna at a weight that violated its own provision.

3. Paws & Effect was prohibited from enforcing the weight requirement under the doctrine of estoppel by acquiescence

"Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right." *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005). The doctrine has a three-part test that is similar to the waiver doctrine. *Id.* First, the party who has the contractual right must have "full knowledge of his rights and the material facts." *Id.* Next, that party must remain "inactive for a considerable time." *Id.* Third, the party must behave "in a manner that leads the other party to believe the act [now complained of] has been approved." *Id.*

Here, again, Paws & Effect had full knowledge of the supposed contractual provision that would allow it to repossess Kashi due to her weight because Paws & Effect wrote it.[2] And because it handed over Kashi when she was 7.5 pounds over the contract's weight requirement, it could have enforced the contract on May 13, 2021 if Kashi was overweight at that point (of which there is no proof). Instead, Kashi's weight was not mentioned as an issue until July 6, 2021 and the supposed contractual provision was not enforced until July 19; over two months after Paws & Effect could have enforced it. By not enforcing its own provision and giving Kashi to Kayonna in a state that violated the clause they drafted, Paws & Effect acted in a manner that led Kayonna to

[2] Assuming for the sake of argument that Paws & Effect can claim any right to repossess Kashi, that action certainly could not take place in contravention of Iowa law, which recognizes the due process rights of an individual in possession of a dog like Kashi. *See, e.g.*, Iowa Code § 717B.1(14) (defining "responsible party" as a "person who owns or maintains" an animal (emphasis added)). For instance, Iowa Code section 717B.5 describes the process to be undertaken by a local authority—not a private entity exercising self-help or coercion—to rescue a threatened animal. No one with Paws & Effect could or did follow this procedure in relation to Kashi, further revealing the lack of legitimate basis for its conduct in relation to her and Kayonna.

believe that Kashi's weight was not an issue. Therefore, Paws & Effect cannot rely upon the weight provision to acquire Kashi because it is estopped from doing so and Kashi must be returned to Kayonna.

### D. EVEN IF THE FEBRUARY 13TH WRITING IS AN ENFORCEABLE CONTRACT, KASHI IS A "GIFT" THAT MUST BE RETURNED TO KAYONNA

Under the terms of the alleged contract, Kashi "is a gift" to Kayonna, but is also "owned" by Paws & Effect. A gift is "something voluntarily transferred by one person to another without compensation." *Gift*, Merriam-Webster, https://www.merriam-webster.com/dictionary/gift (last accessed Nov. 17, 2021). By definition, Kashi cannot be both a "gift" to Kayonna, but also be owned by Paws & Effect. This creates ambiguity within the February 13 document as to who owns Kashi under its terms. *See Rick v. Sprague*, 706 N.W.2d 717, 723 (Iowa 2005) ("A term is ambiguous if after all pertinent rules of interpretation have been considered, a genuine uncertainty exists concerning which of two reasonable interpretations is proper."). And "when there are ambiguities in a contract, they are strictly construed against the drafter." *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. Of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Here, this ambiguity must be strictly construed against Paws & Effect because it drafted the agreement and presented it to Kayonna to sign on the cusp of Kashi's public access test. Therefore, under the terms of the agreement, Kashi's ownership was voluntarily transferred to Kayonna and Paws & Effect had no right to take Kashi away.

## III. PAWS & EFFECT IS WRONGFULLY IN POSSESSION OF KASHI

"Every contract contains an implied covenant of good faith and fair dealing." *Vlieger v. Farm for Profit, Research and Dev. Corp.*, 2005 Iowa App. LEXIS 858, at *4–*5 (Iowa Ct. App. 2005). "Good faith performance or enforcement of a contract emphasized faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Team Two,*

*Inc. v. City of Des Moines*, 2013 Iowa App. LEXIS 446, at *13 (Iowa Ct. App. 2013) (internal quotations and citation omitted). "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified." *Vlieger*, 2005 Iowa App. LEXIS 858, at *5. Whether the good faith covenant is breached and what remedy is appropriate for that breach is determined on a case-to-case basis. *Id.*

Paws & Effect has wrongfully refused to return Kashi, who is Kayonna's property of which she has sought return. However, even if the weight provision of the alleged contract is enforceable, Paws & Effect has acted in bad faith by failing to act in accordance with the contract, including the weight provision, and working against the spirit of the parties' agreement. Most critically, the alleged contract expired at the end of April 2021, at which point any supposed right of enforcement by Paws & Effect came to an end. Notwithstanding, it claimed a right to control Kashi's weight well past April. However, the weight provision provides that if Kayonna cannot get Kashi "back to a proper weight" then "Paws and Effect will take [Kashi] and place it back with a handler until she is back at her starting (and healthy) weight." (Ex. 5 (emphasis added)). This implies that Paws & Effect will work to get Kashi to a healthy weight and then return her to Kayonna.

Kashi was removed from Kayonna's care in July 2021, over four months ago. No veterinarian had expressed any concerns with Kashi's weight and she appeared and acted as a healthy service dog. (*See* Exs. 6, 7). Paws & Effect had no hesitation to take Kashi and use her the same day at a public event where an employee needed a dog. Subsequently, Paws & Effect provided few progress reports on Kashi's weight and generally kept Kayonna at bay (unless she was needed to pay for Kashi's food) or added new preconditions for Kashi's return. Most egregiously, when Kayonna questioned what was occurring and expressed concern about Paws & Effect's seeming pattern of conduct toward her and others, Paws & Effect blatantly retaliated

against her and refused to return Kashi.[3] These events violate the spirit of the supposed agreement, which was allegedly drafted to ensure that both Kayonna and Kashi are able to live their healthiest, safest lives. Accordingly, even if the Court concludes the parties entered into an enforceable contract, it should mandate the return of Kashi to Kayonna because Paws & Effect has acted in bad faith in executing the contract.

## CONCLUSION

Kayonna is entitled to the immediate return of Kashi. The evidence establishes that Kayonna is Kashi's owner and has a possessory right to her, as further elaborated and explained in her present brief. Paws & Effect is wrongfully in possession of Kashi, for largely inexplicable and clearly improper reasons now premised on its overt retaliation against Kayonna. The Court should correct these circumstances and reunite Kashi with her owner, Kayonna.

WHEREFORE Plaintiff Kayonna Topp respectfully requests the Court find in her favor on her Petition herein and enter an Order granting her writ for replevin for the immediate return of Kashi and awarding any other further relief the Court deems just and proper under the circumstances.

Date: December 1, 2021

/s/ William J. Miller

William J. Miller, AT0005414
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**ATTORNEYS FOR PLAINTIFF KAYONNA TOPP**

[3] Paws & Effect's retaliatory conduct toward Kayonna is perhaps the most salient evidence of its bad faith in relation to the alleged contract in issue in this case. It is also separately actionable under the Iowa Civil Rights Act and other law, which claims are not in issue in the present case but certainly will mean Paws & Effect's misconduct will impact matters beyond the supposed agreement that Paws & Effect has attempted to use to justify its actions toward Kayonna.

Original filed.

Copy to:

David H. Luginbill
Ahlers & Cooney P.C.
100 Court Avenue
Suite 600
Des Moines, Iowa 50309-2231
ATTORNEYS FOR DEFENDANT
PAWS & EFFECT

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 1, 2021 the foregoing instrument was served upon all parties to the above case and/or to each of the attorneys of record herein at their respective addresses disclosed on the pleadings:

**By:** Electronic Filing and/or
_____ U.S. Mail _____ FAX
_____ Hand Delivered _____ Overnight Courier
_____ E-mail _____ Other _____

/s/ William J. Miller

IN THE IOWA DISTRICT COURT FOR LINN COUNTY

| | | |
|---|---|---|
| CITY OF MARION, IOWA,<br><br>Plaintiff / Counterclaim-Defendant,<br><br>v.<br><br>CAPITAL COMMERCIAL DIVISION, LLC,<br><br>Defendant / Counterclaim-Plaintiff. | ) | Case No. LACV093332<br><br><br><br>**[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE** |

COMES NOW Plaintiff/Counterclaim-Defendant City of Marion, Iowa (the "City") and, in lieu of an oral closing argument, submits its proposed Findings of Fact, Conclusions of Law, and Decree:

## INTRODUCTION

On July 15, 2019, the City filed a two-count Petition against Defendant Capital Commercial Division, LLC ("CCD" or the "Company"). The City's Petition alleged breach of contract (Count I) and unjust enrichment (Count II). On September 3, 2019, CCD filed its Answer. On March 9, 2020, CCD was permitted to amend its answer to assert a single-count counterclaim for breach of contract.

Trial of the claims and counterclaim commenced on September 29, 2020. City Manager Lon Pluckhahn and attorneys William J. Miller and Manuel A. Cornell represented the City. CCD's managing member and owner, Jodi Siamis, and attorney Steven P. DeVolder represented CCD.

In lieu of oral closing arguments, the parties requested the opportunity to submit written closing arguments in the form of a proposed findings of fact, conclusions of law, and decree. Having considered the parties written closing arguments, other materials filed by the parties as reflected in the court file, and being fully advised in the premises, the Court finds as follows.

## FINDINGS OF FACT

This case centers on a proposed renovation of a property at 1000 7th Avenue—known locally as the Owen Block Building—in the Uptown Marion district of the City. In 2013, representatives of CCD approached the City regarding possible financial assistance or "incentives" to pursue the renovation. In spring 2014, CCD purchased the property. CCD financed this purchase via a mortgage and related agreements entered into with Community Savings Bank ("CSB").

On May 8, 2014, the City and CCD entered into a Development Agreement in relation to the renovation. The Development Agreement was identified and admitted into evidence at trial as Exhibit 1. Pursuant to the Development Agreement, CCD could secure from the City installments of a forgivable loan with a total potential value of $550,000 based on performance of certain benchmarks. The Development Agreement also gave rise to performance and deadline obligations for CCD related to its planned renovation. The loan was forgivable only after CCD performed in the manner specified in the Development Agreement.

Among other terms, CCD was obligated "to renovate the Project not later than December 31, 2015 and to use best efforts to promote the highest and best use of the Project throughout the term of this agreement." (Ex. 1 § A(2)). A description of some of the work to be completed as part of the Project was attached as exhibit B to the Development Agreement. Among other terms, CCD also agreed:

- "that the renovations undertaken for the Project shall be true to the historic character of the building and meet the standards necessary for a historic preservation tax credit award," (*Id.* at § A(3)); and
- "to make a total investment in the Project of $2,100,000 with completion being in substantial conformance to the documents present to the City Council and described in the Project. The Company further agrees to maintain the Project and the Property in substantial compliance during the Terms of this Agreement;" (*Id.* at § A(4));

The Development Agreement further provided:

> The Company hereby acknowledges that failure to comply with the requirements of this Section A [setting forth the Company's obligations under the agreement], will result in the City having the right to withhold Payments under Section B of this Agreement at its sole discretion, until such time as the Company has demonstrated, to the satisfaction of the City, that it has cured such non-compliance.

(*Id.* at § A(10)).

The City provided CCD installments of the forgivable loan totaling $450,000. (*Id.* at § B(6)(a)). Pursuant to the Development Agreement,

> . . . All outstanding and un-forgiven principal of the Forgivable Loan will be due and owing at maturity on July 1, 2022. Principal of the Forgivable Loan will be forgiven by the City incrementally based upon the Company's performance as follows:
>
> 1) Upon the satisfactory completion of the renovation of the building and issuance of Certificate of Occupancy - $ 100,000.
>
> 2) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2017-2018 fiscal year - $100,000.
>
> 3) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2018-2019 fiscal year - $100,000.
>
> 4) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2019-2020 fiscal year - $100,000.
>
> 5) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2020-2021 fiscal year - $100.000.
>
> 6) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2021-2022 fiscal year-$50,000.
>
> Upon the occurrence of any event of forgiveness of the Forgivable Loan, as described herein, the City will send written confirmation to the Company evidencing the date and amount of such forgiveness.

(*Id.*).

CCD did not complete the Project by December 31, 2015. On January 21, 2016, the City and CCD entered into an Extension Agreement. The Extension Agreement was identified and admitted at trial as Exhibit 2. The Extension Agreement extended CCD's deadline to complete the

Project to March 31, 2016. (Ex. 2 § 1). Among other terms, the Extension Agreement also provided:

> 2. **Project.** The Company agrees to use its best efforts to fulfill its obligations under the Agreement and to complete the Project by the Extension Date. Furthermore, the Company will affirmatively demonstrate completion to the satisfaction of the City by the Extension Date.
>
> 3. **Remedies.** Failure to comply with the provisions of Section 2 hereof will give the City the right to do any or all of the following remedies with respect to the Agreement: (l) denial of loan forgiveness; (2) cessation of remaining forgivable loan disbursements; and/or (3) acceleration of loan repayment. The rights enumerated in the preceding sentence are not exclusive of the City's right to pursue any and all breach of contract remedies available at law and in equity.

(Ex. 2 §§ 2, 3).

CCD was eventually issued a certificate of occupancy for a portion of the building, but not the entirety. As admitted by CCD's Managing Member, Siamis, multiple elements of the renovation of the building to its historic character were not finished. (*See* Development Agreement (Trial Ex. 1), Ex. B). Moreover, the state of the building precluded CCD from securing a historic preservation tax credit award. Ultimately, the Project was not completed by March 31, 2016, and the City and CCD entered into no additional extension agreements.

CCD continued to own the building after March 31, 2016. CCD attempted to complete the work that had constituted the Project and continued to pursue a historic preservation tax credit award, although it is unclear precisely what additional work CCD performed. By November 2017, circumstances had become strained between CCD and CSB for reasons that are not clear from the record. In November 2017, CCD and CSB entered into a settlement agreement. One outcome of the settlement was that CSB pursued a nonjudicial voluntary foreclosure of the Owen Block Building and became its new owner.

At the time of the foreclosure in late 2017, the work that had constituted the original Project still was not completed and no historic preservation tax credit had been awarded. Apparently, as

additional consideration for the settlement with CSB, CCD or Siamis continued to work on the property after CSB became the building owner and continued to pursue the tax credit award. While there was evidence that "conditional" approval for the tax credit award was reached after this point, Siamis testified that the State of Iowa was not satisfied with the state of the property and had not made a final determination that the renovation met the standards necessary for a tax credit award.

Other than common activities such as issuing building permits, the City was not involved in CCD's efforts to renovate the Owen Block Building subsequent to March 31, 2016. Siamis provided the City updates on her continued work in the belief doing so was appropriate, but no other agreements were entered into between CCD and the City regarding the property. On May 7, 2018, after CSB became owner of the property, the City demand repayment of the forgivable loan from CCD, which was refused. This lawsuit followed.

CCD and Siamis appear to have had a sincere desire to complete the Project as originally contemplated in the Development Agreement. However, as of the commencement of trial in September 2020, the renovation that had been the Project, as well as other requirements set forth in the agreements as described herein, still were not completed or satisfied as admitted by Siamis and further evidenced in part by the fact a historic preservation tax credit had yet to be awarded.

## CONCLUSIONS OF LAW

### I. BREACH OF CONTRACT CLAIMS

Both parties claim the other breached the Development Agreement. The City also claims CCD breached the Extension Agreement, which receives only passing reference in CCD's counterclaim. In any event, to establish a breach of contract, a party must show: (1) the existence of a contract, (2) the terms and conditions of the contract, (3) performance of all the terms and conditions required under the contract (or excuse from such performance), (4) breach of the

contract in some particular way, and (5) damage as a result of the breach. *See, e.g.*, *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010) (citing *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998)).

**A. The City's Claim**

There is no dispute that the parties entered into the Development Agreement (Exhibit 1) and Extension Agreement (Exhibit 2), which set forth "the terms and conditions of the contract[s]." *Id.* at 846. The parties performed pursuant to those terms and conditions for a period of time. Siamis testified CCD made significant expenditures toward completing the Project. In fact, the total outlay appears to have exceeded the $2,100,000 that CCD committed to invest in the Project. (Ex. 1 § A(3)). The City does not dispute that CCD made at least a $2,100,000 investment. Indeed, the City provided installments of the forgivable loan in issue totaling $450,000, presumably because of CCD successfully achieving at least some of the spending benchmarks described in the Development Agreement. (*Id.* § B(6)).

However, CCD's performance of the contracts at issue was not limited to making expenditures of $2,100,000 on the Project. CCD agreed "to renovate the Project not later than December 31, 2015 and to use best efforts to promote the highest and best use of the Project throughout the term of this agreement." (Ex. 1 § A(2)). This deadline was later extended to March 31, 2016. (Ex. 2 § 1). As Siamis admitted, CCD understood that completing the renovation might require expenditures in excess of $2,100,000. To CCD's credit, it appears to have spent in excess of $2,100,000 trying to complete the Project. However, despite those expenditures, CCD failed to complete the renovation contemplated by the Project by December 31, 2015, March 31, 2016, or even by September 29, 2020, when trial commenced. As a result, CCD failed to perform all the terms and conditions required under the Development Agreement and Extension Agreement and

breached those contracts.

Moreover, the City attempted to exercise its right to remedy CCD's breach by demanding repayment of the entire forgivable loan. CCD agreed to these remedies in the Extension Agreement:

> 3. **Remedies.** Failure to comply with the provisions of Section 2 hereof will give the City the right to do any or all of the following remedies with respect to the Agreement: (1) denial of loan forgiveness; (2) cessation of remaining forgivable loan disbursements; and/or (3) acceleration of loan repayment. The rights enumerated in the preceding sentence are not exclusive of the City's right to pursue any and all breach of contract remedies available at law and in equity.

(Ex. 2 § 3). The amount owed by CCD and its refusal to pay the same is an additional breach and establishes the City's damages in this case.

Siamis and another witness called by CCD, Marcia Correll, a former CSB loan officer who handled the CCD loan, both testified regarding CCD's attempted performance both prior to and after the March 31, 2016, deadline. CCD's witnesses attempted to explain how CCD successfully performed under the contracts, but their testimony was premised in part on a creative, but ineffective, reading of the Development Agreement and Extension Agreement.

For example, Siamis in particular was led by CCD's counsel through a lengthy examination regarding CCD's "best efforts" to perform under the agreements under the supposition that CCD exerting its best efforts was all that was required, particularly under the Extension Agreement. While not specifically articulated by CCD, this assertion is based on a reading of the following language of Extension Agreement:

> 2. **Project.** The Company agrees to use its best efforts to fulfill its obligations under the Agreement and to complete the Project by the Extension Date. Furthermore, the Company will affirmatively demonstrate completion to the satisfaction of the City by the Extension Date.

(Ex. 2 § 2). CCD's focus on this language appears to be premised on the contention "best efforts" modifies both "to fulfill its obligations under the Agreement" and "to complete the Project by the

Extension Date." In other words, as long as CCD used its "best efforts," it was immaterial if the Project was completed by the Extension Date.

CCD essentially invites the Court's to launch into a lengthy discussion of the rules of contract construction or interpretation and the legal principles applicable if a contract is ambiguous. *See Cairns v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 824 (Iowa 1987) (quoting *Fraternal Order of Eagles v. Illinois Casualty Co.*, 364 N.W.2d 218, 221 (Iowa 1985)) ("Ambiguity exists if, 'after the application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty results as to which one of two or more meanings is the proper one.'"). However, it is unnecessary for the Court to accept this invitation.

It is undisputed that the Extension Agreement was entered into to extend the deadline for the completion of the Project as originally stated in the Development Agreement. This is described plainly in the opening paragraphs of the Extension Agreement. (Ex. 2, p. 1 ("WHEREAS, the Company has [provided] assurances that due progress is being made toward the completion of the Project . . . ." (Emphasis added.)). The Development Agreement had obligated CCD "to renovate the Project not later than December 31, 2015 and to use best efforts to promote the highest and best use of the Project throughout the term of this agreement." (Ex. 1 § A(2)). The Extension Agreement tracks this language, even though the order of the obligations is switched around. (*See* Ex. 2 § 2). Additionally, CCD's attempted reading ignores the second sentence of section 2 of the Extension Agreement, which states:

> Furthermore, the Company will affirmatively demonstrate completion to the satisfaction of the City by the Extension Date.

(*Id.*). It strains credulity to argue CCD's obligation under the Extension Agreement was merely to exercise undefined "best efforts" but not to complete the Project "by the Extension Date." (*Id.*).

Not surprisingly, Siamis admitted "best efforts" under the agreements meant nothing less

than "full" performance of CCD's obligations, including completion of the Project by March 31, 2016. Moreover, both of CCD's witnesses admitted that it was CCD's understanding, as well as CSB's understanding, that the Project had a date certain for completion rather than for a mere exercise of CCD's best efforts.[1] Even if the Extension Agreement was ambiguous, which the Court concludes it was not, the extrinsic evidence of the contract's meaning is overwhelming. *See Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999) ("If the contract is ambiguous and uncertain, extrinsic evidence can be considered to help determine the intent."); *see also Oberbillig v. West Grand Towers Condo. Ass'n*, 807 N.W.2d 143, 152 (Iowa 2011) ("We can look to the conduct of the parties as placing a practical construction on the meaning of a term."). CCD was clearly obligated "to complete the Project by the Extension Date," March 31, 2016. As already found, and as admitted during cross-examination by Siamis, it failed to do so. As a result, CCD was in breach. (*Id.*).

CCD's witnesses also provided testimony relating to events that occurred prior to March 31, 2016, but this was focused on what went wrong for CCD, including what may have been faulty due diligence prior to purchasing the Owen Block Building and undertaking the Project. As Siamis admitted, CCD was permitted to do whatever due diligence it chose before it even approached the City regarding financial assistance. Moreover, the City was not involved in the due diligence. If

[1] In relation to CSB, Siamis also testified regarding an Assignment of Payments/Forgivable Loan Proceeds Under Development Agreement, which was admitted at trial as Exhibit F-1 subject to objections to the accuracy of the entire exhibit. However, the relevance of Exhibit F-1 was never explained by CCD and is not apparent to the Court. There is no dispute that the Development Agreement provided "the City hereby gives its permission that the Company's rights to receive the economic development tax increment payments hereunder may be assigned by the Company to a lender, as security, without further action on the part of the City." (Ex. 1 § C(1)). In this respect, it seems an assignment was permissible and the City did not argue otherwise. As admitted by Siamis, however, under the assignment CSB "assume[d] no liability, responsibility, duty, etc., in connection with [CCD's] obligations to the [City] under" the Development Agreement except as provided in the assignment, and no relevant exclusion was identified. (Ex. F-1).

CCD's due diligence led it to purchase the Owen Block Building and pursue the Project, but it turned out that this was not a profitable enterprise, the only party to blame is CCD.

Finally, CCD also asserted that the City failed to pay one potential loan installment of $100,000, and claims that this either was a breach of the Development Agreement or somehow caused CCD's inability to perform. On the latter point, Siamis admitted CCD had no difficulty expending amounts well in excess of $2,100,000 toward completion of the Project. While CCD may have assumed it would receive the final $100,000 installment when it did its due diligence, it hardly can be said to have been material when CCD spent well in excess of $2,100,000 and still did not complete the Project by March 31, 2016.

More critically, however, it is clear that the City was under no obligation to pay the remaining installment pursuant to the Development Agreement, which provided,

> The Company hereby acknowledges that failure to comply with the requirements of this Section A [setting forth the Company's obligations under the agreement], will result in the City having the right to withhold Payments under Section B of this Agreement at its sole discretion, until such time as the Company has demonstrated, to the satisfaction of the City, that it has cured such non-compliance.

(*Id.* at § A(10)). Moreover, pursuant to the Extension Agreement, the City was permitted to cease remaining loan disbursement and deny loan forgiveness. (Ex. 2 § 3). Notably, Siamis admitted that CCD understood the installment could be withheld and not paid by the City. Even if the City had an obligation to pay a final installment, it would have been excused from doing so under the circumstances. The Court concludes the fact one $100,000 installment was not made is immaterial in this case and does not constitute a breach of contract by the City.

It appears that CCD's evidence regarding its attempt to complete the Project before and after March 31, 2016, was aimed at excusing CCD's lack of performance or convincing the Court to award CCD for its good-faith efforts after March 31, 2016. While the Court has no doubt that CCD attempted to perform, it simply was not successful. As to the City's breach of contract claim,

actions after March 31, 2016, are not relevant. *See Vicorp Restaurants, Inc. v. Bader*, 590 N.W.2d 518, 524–25 (Iowa 1999); *see also Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 241 (Iowa 2001) ("[T]o further comply with the contract requirements where the other party has repudiated the contract would be a useless act, and the law does not require the doing of a useless act." (citing 13 Williston § 39:37, at 666–67 and Restatement (Second) of Contracts § 255)). Indeed, it seems CCD's actions after March 31, 2016, have no relevance to the claims in this suit unless that relevance is derived in relation to CCD's counterclaim.

**B. CCD's Counterclaim**

The precise bases for CCD's counterclaim are a bit difficult to detect. In its Trial Brief, CCD claimed, "that it met all of the conditions for forgiveness as to each of the four loan installments."[2] (CCD's Trial Brief, at 1). According to CCD, "that constitutes a material breach by the city precluding its recovery. This is the first aspect of Capital's counterclaim for breach—that the contract required the $450,000 installment loans at issue to be completely forgiven." (*Id.*). However, it seems CCD is conflating the concept of an affirmative defense of failure to perform that might preclude the City's recovery with an affirmative counterclaim for breach of contract. This may be a distinction without a difference here because CCD would have the burden to prove

[2] In its Trial Brief, CCD's full argument was "that it met all of the conditions for forgiveness as to each of the four loan installments (and certainly met the conditions for installment issuance)—and to the extent any such condition was not met (which would have had to been a tax assessment condition set forth in the agreement)—that assessment amount was changed not by Capital but by an assignee or successor of Capital (as permitted—indeed, contemplated by the agreement) and in that assignee's working in conjunction with the city (and against the agreement's terms) to so change the assessment." (CCD's Trial Brief, at 1). However, there was no "tax assessment condition" related to "installment issuance." (*See* Ex. 1 § B(6)(a)). Moreover, CCD offered no admissible evidence regarding the activities of an assignee or successor regarding any "change [in] the assessment." For both reasons, the Court disregards this argument beyond the bare allegation CCD "met all of the conditions for forgiveness as to each of the four loan installments."

its theory under either paradigm and it failed to carry that burden.

The "conditions for forgiveness" in issue were set forth in the Development Agreement:

> All outstanding and un-forgiven principal of the Forgivable Loan will be due and owing at maturity on July 1, 2022. Principal of the Forgivable Loan will be forgiven by the City incrementally based upon the Company's performance as follows:
>
> 1) Upon the satisfactory completion of the renovation of the building and issuance of Certificate of Occupancy - $ 100,000.
>
> 2) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2017-2018 fiscal year - $100,000.
>
> 3) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2018-2019 fiscal year - $100,000.
>
> 4) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2019-2020 fiscal year - $100,000.
>
> 5) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2020-2021 fiscal year - $100.000.
>
> 6) Upon the City's full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation in its 2021-2022 fiscal year-$50,000.
>
> Upon the occurrence of any event of forgiveness of the Forgivable Loan, as described herein, the City will send written confirmation to the Company evidencing the date and amount of such forgiveness.

(*Id.* at § B(6)(a)). As previously discussed, CCD was issued a certificate of occupancy for a portion of the building, but not the entirety. In any event, CCD never achieved "the satisfactory completion of the renovation of the building." (*Id.*). Accordingly, the first condition was never satisfied.

There was reference at trial to the City receiving some property tax revenues in one fiscal year, but CCD did not establish the City obtained the "full receipt of Incremental Property Tax Revenues relative to the Minimum Valuation"[3] of the property in any fiscal year, and there was

[3] Siamis testified regarding an eventual reduction of the assessed value of the property that occurred after CSB foreclosed and became the owner of the property. The relevance of this testimony is unclear. CCD had agreed to complete the Project by March 31, 2016 and failed to do so. A post-breach reduction in the assessed value has no relevance in this case. *See Vicorp Restaurants, Inc.*, 590 N.W.2d at 524–25.

no evidence "the City [sent] written confirmation to [CCD] evidencing the date and amount of such forgiveness." (*Id.*). Moreover, the Project was not completed by March 31, 2016, and CCD was in breach. Pursuant to the Extension Agreement, the City was permitted to deny loan forgiveness. (Ex. 2 § 3). In sum, CCD failed to show "that it met all of the conditions for forgiveness as to each of the four loan installments," and thus this claim is rejected as either a basis to deny the City's recovery or proof of an alleged breach by the City. (CCD's Trial Brief, at 1).

In its Trial Brief, CCD goes on to argue, "[t]he second aspect of Capital's claim for breach is the city, and contrary to the terms of the agreement, failed to issue the fifth and final forgivable installment loan to Capital in the amount of $100,000 . . . ." (CCD's Trial Brief at 1–2). This claim was already discussed and rejected.

Finally, the third aspect of Capital's claim for breach is apparently that the City's "breach foreseeably resulted in Capital's losing a second phase of historic tax credits that otherwise would have issued to or on Capital's behalf—and those credits would have been worth some $1.8 million (at that's at the minimum; the actual amount likely would have been as high as $2.2 million)."(CCD's Trial Brief at 2). This claim fails due to the combination of the factors dooming CCD's first and second assertions. Not only did CCD fail to offer evidence to support a factual basis for this claim or the amount in issue, the evidence established that there was no breach by the City at any point. To the extent there were issues experienced by CCD surrounding the historic preservation tax credit award, they arose separate from the City, were based on CCD's own conduct, or occurred after March 31, 2016, by which time CCD was already in breach of its agreements with the City.

In sum, CCD failed to prove its counterclaim, just as it failed to prove any defense against the City's breach of contract claim.

## II. UNJUST ENRICHMENT

The City also claims CCD was unjustly enriched under the circumstances. To establish a claim of unjust enrichment, the following must be established: (1) the City has conferred a benefit upon CCD to its own detriment; (2) CCD has an appreciation of receiving the benefit; (3) CCD accepted and retains the benefit under circumstances making it inequitable for there to be no return payment for its value; and (4) there is no at-law remedy that can appropriately address the claim. *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154–55 (Iowa 2001) (citing *Credit Bureau Enters., Inc. v. Pelo*, 608 N.W.2d 20, 25 (Iowa 2000); *West Branch State Bank v. Gates*, 477 N.W.2d 848, 851–52 (Iowa 1991)).

The Court agrees that each of these elements are established under the facts of this case as already set forth. The City provided a benefit to CCD in the form of money paid in the total amount of $450,000. The benefit the City provided enriched CCD at the City's expense. Unfortunately, CCD squandered this benefit when it failed to complete the Project, CSB later foreclosed, and CCD did not ultimately complete the renovation and secure a historic preservation tax credit award. However, CCD squandering these opportunities is not the fault of the City. CCD has failed to pay or refund the City the money it paid to CCD. It would be unjust to allow CCD to retain the benefit of that money. For these reasons, the City has also proved its unjust enrichment claim.

## DECREE

Based on the evidence, the City is entitled to a judgment in is favor to recover the entire amount loaned under the Development Agreement (Ex. 1) and Extension Agreement (Ex. 2) to CCD and not repaid, namely $450,000. In addition, interest shall run on this amount from the date of breach of the Extension Agreement—March 31, 2016—through the date payment is made at a rate of "five percent per annum, compounded, as provided in Iowa Code section 535.2." *Ehlers v.*

*Schimmelpfennig*, 641 N.W.2d 814, 816 (Iowa 2002). The City is, of course, entitled to only one recovery of its damages under its alternative theories.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that judgment is entered in favor of Plaintiff City of Marion, Iowa and against Defendant Capital Commercial Division, LLC on the breach of contract claim and unjust enrichment claim alleged in the Petition in the amount of $450,000.

It is further **ORDERED** that Defendant Capital Commercial Division, LLC's counterclaim for breach of contract is denied in its entirety.

It is further **ORDERED** that interest on the stated monetary judgment of $450,000 in favor of Plaintiff City of Marion, Iowa shall run from March 31, 2016 through the date payment at a rate of five percent per annum, compounded.

It is further **ORDERED** that the monetary judgment in favor of Plaintiff City of Marion, Iowa under each of the counts of its Petition is alternative, not cumulative, and therefore the City shall only be entitled to one recovery of its damages under the two counts on which Defendant Capital Commercial Division, LLC has been found liable in this case.

It is further **ORDERED** that costs are taxed to Defendant Capital Commercial Division, LLC and shall be assessed by the Clerk of Court pursuant to Iowa Code chapter 625 (2019).

**IT IS SO ORDERED.**

_____

**JUDGE, SIXTH JUDICIAL DISTRICT OF IOWA**

Prepared and respectfully submitted by:

/s/ William J. Miller

Date: October 23, 2020

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on October 23, 2020, the foregoing instrument was served upon all parties to the above case and/or to each of the attorneys of record herein at their respective addresses disclosed on the pleadings:

By: Electronic Service and/or

| | | | |
|---|---|---|---|
| _____ | U.S. Mail | _____ | FAX |
| _____ | Hand Delivered | _____ | Overnight Courier |
| _____ | E-mail | _____ | Other _____ |

/s/ William J. Miller

# CHIPPING AWAY AT THE DAM: *ANASTASOFF V. UNITED STATES* AND THE FUTURE OF UNPUBLISHED OPINIONS IN THE UNITED STATES COURTS OF APPEALS AND BEYOND

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## I. INTRODUCTION

The disposition of cases by unpublished opinions in the United States Courts of Appeals has had broad effects on the appellate system, especially during the last half of the twentieth century. It would be difficult to find a single attorney, judge, or other member of the legal profession who has not somehow dealt with an unpublished opinion. For judges, the unpublished opinion has

necessary reform and vilified by others as a deprivation of important legal rights.[1] Attorneys regularly find opinions marked "unpublished," often barring use of the opinion due to rules that effectively limit citation and destroy the opinion's precedential worth.[2] These same theoretical and practical considerations affect others as well, whether they are the support staff of a judge or attorney, or another member of the legal community who is otherwise affected when an opinion is marked "unpublished."

Not only has the disposition of cases in this manner had a broad effect in recent judicial history, but, by all indications, the practice will continue to be influential in the new century.[3] In 1999 alone, seventy-eight percent of the 26,727 dispositions of the federal courts of appeals were by unpublished opinions.[4] A simple calculation of these numbers reveals that approximately 21,000 opinions in the courts of appeals were disposed of by unpublished opinions in that year alone.[5] The effect this staggering amount of unpublished opinions has on the judicial system takes on a new level of urgency considering the result created when a court of appeals labels an opinion unpublished.

In the majority of the courts of appeals, circuit rules restrict the citation of unpublished opinions, rendering the opinions nonprecedential beyond the context of the intraparty conflict.[6] The practical effects of these restrictions are numerous, and will be discussed in more detail in the course of this Note.[7] This restriction has caused tension, as well as dissension, among members of the judiciary, and outright concern among some commentators.[8] As one commentator has noted, "judges themselves do not agree on the propriety of selective publication and citations" and "[c]ommentators are likewise divided."[9] However, despite the tension between the supporters and detractors of unpublished opinions, the arguments between the two groups, volleyed in both judicial opinions and legal scholarship, until recently, had amounted to a stalemate. Both sides acknowledged the valid arguments on the alternative side of the issue but could offer no prevailing argument; the impasse rested for want

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1. *See* discussion *infra* Part III.
2. *See* discussion *infra* Part II.
3. *See* Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 535 (1995) [hereinafter Arnold, *Federal Courts*] (reporting that the litigation explosion has yet to reach its end).
4. *Table S-3, U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs*, 1999 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999: ANNUAL REPORT OF THE DIRECTOR 49.
5. *Id.*
6. *See infra* notes 33-39 and accompanying text.
7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Part III.
9. Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913, 932 (1995) (footnote omitted).

of an agreeable solution.[10]

Recently, the issue took an entirely new turn. On August 22, 2000, the Eighth Circuit Court of Appeals handed down its opinion in *Anastasoff v. United States*.[11] In *Anastasoff*, a somewhat unremarkable tax case hinging upon the proper application of the mailbox rule, a panel led by Chief Judge Richard Arnold bypassed the impasse, ruling that the Eighth Circuit's rule limiting citation of unpublished opinions is outright unconstitutional because it violates Article III of the United States Constitution.[12] In the wake of *Anastasoff*, entirely new dimensions to the issues surrounding unpublished opinions have been introduced.

For supporters and detractors alike, a crack in the dam limiting the use of unpublished opinions appeared. Those who support unpublished opinions waited nervously to see if the force of a single panel's opinion was enough to burst the dam and bring about the difficulties warned against in countless papers and studies in support of unpublished opinions.[13] For critics of the current rules, a victory was achieved, but the same concerns lingered.[14] The crack in the dam threatened an appellate system that had not been challenged by the changes that would come, at the very least in the Eighth Circuit, due to the proclaimed unconstitutionality of the rule. Four months later, the crack created by *Anastasoff* was patched.[15] Yet, as with any great force held back by a temporary brace, the unpublished opinion debate simply waits to burst forth again. For those without a distinct opinion on the issue, both threatened but perhaps excited by the possibilities presented in the aftermath of *Anastasoff*, what does *Anastasoff* mean?

This Note will chart the development of the role of unpublished opinions, the arguments for and against the courts' rules limiting their citation and precedential value, and the future of unpublished opinions and the rules limiting citation post-*Anastasoff*. Part I of the Note provides a short overview of the

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10. *See id.* at 939 (discussing possible variations of a general rule to satisfy the concerns of critics on both sides of the issue).

11. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).

12. *Id.* at 900; *see* U.S. CONST. art. III, § 1, cl. 1 ("The judicial Power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."). The court found the rule would allow the court to avoid the precedential effect of prior decisions thereby expanding judicial power beyond Article III. Anastasoff v. United States, 223 F.3d at 900.

13. *See* discussion *infra* Part III.A.

14. *See* discussion *infra* Part III.B.

15. *See* Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (en banc) *vacating as moot* 223 F.3d 898 (8th Cir.) (holding the court would not pass judgment as to its previous finding that the rule against the use of unpublished opinions is unconstitutional because the case was moot).

historical progression of the use of written, recorded opinions and the subsequent development of unpublished opinions and rules dictating their use. Part II focuses on the controversy surrounding these rules. With a proper context set, Part III describes the disposition of *Anastasoff v. United States*,[16] the latest and most important statement on the issue made by the judicial branch. Finally, the last part of the Note offers some thoughts on the future of the issue, a future that is wide open. The author hopes this Note will provide a context for the debate as well as insight into its future.

## II. THE HISTORICAL RISE AND ONGOING ROLE OF UNPUBLISHED OPINIONS

As a proper beginning to this discussion, it is best to chart the development of the role of the unpublished opinion and the rules that have carved their place in the courts of appeals and, subsequently, other courts. Concern over the volume of judicial dispositions has vexed the bar, the bench, and commentators for centuries, and perhaps even longer.[17] According to one commentator, one of the first warnings came from England through Lord Coke.[18] "Faced with roughly thirty volumes of reported decisions in 1777 . . . [, he] warned judges not to report all decisions."[19] Whether Coke's prescient advice was heeded is unrecorded. Across the ocean, similar concerns over the volume of reported opinions had yet to begin because formal reporting was not the standard.[20]

Recordation of opinions in the United States began developing slowly sometime after Coke's admonition.[21] In 1894, the *Federal Reporter* began reporting the cases of the United States Courts of Appeals.[22] Not surprisingly, by 1915, "[s]imilar concerns about the growing wealth of case law appeared on this side of the Atlantic Ocean."[23] Unlike England, the United States had no individual such as Lord Coke to warn the bench to slow its reported output, but did have the Judicial Conference of the United States,[24] which soon found that a response was needed to the mounting concern over the number of published

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16. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).

17. Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 121 (1994).

18. *Id.* (citing 2 Coke's Rep. iii-iv (1777)).

19. *Id.* (citing 2 Coke's Rep. iii-iv (1777)).

20. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 34 (1959).

21. *Id.*

22. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 184 (1999).

23. Martineau, *supra* note 17, at 121 (citing Maurice A. Young, *The Unofficially Reported Case as Authority*, 1 OHIO ST. L.J. 135, 136-37 (1935)).

24. Martineau, *supra* note 17, at 121 (citing the 1964 Report of the Proceedings of the Judicial Conference of the United States 11).

opinions in the United States.[25]

This growing concern prompted the Judicial Conference to convene in the mid-1960s with unpublished opinions as one item on its agenda.[26] The precise impetus for the consideration of the issue is difficult to determine because the number of unpublished opinions produced before 1964 is unknown.[27] However, with a mounting case load and mounting opinion production, the Judicial Conference convened in 1964 and resolved "[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct."[28] Gradually, the suggestion of the Judicial Conference was implemented within the circuits by the development of "procedures for reducing the number of published opinions."[29]

Unfortunately, the initial attempts at regulation proved insufficient to stem the tide of publication.[30] This prompted the Federal Judicial Center to recommend the Judicial Conference request "each circuit to review its publication practices and make modifications aimed at reducing the number of opinions published and restricting citation of unpublished decisions."[31] Meanwhile, the Advisory Council on Appellate Jurisdiction, a related arm of the Center, presented a report entitled *Standards for Publication of Judicial Opinions*.[32] This report laid out a number of criteria by which courts could decide the merits of publishing a particular opinion.[33] In tandem, the initial Judicial Conference resolution and subsequent action by the Federal Judicial Center inspired the development of various criteria to guide judicial decision-making on publication and, later, the development of various rules regarding the

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25. *See* Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals*, FED. JUD. CTR. at 6 (1985).

26. *See id.* (citing William L. Reynolds & William M. Richman, *The Nonprecedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168-69 nn.12-13 (1978)).

27. *See* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990) (reporting the general assumption that the total was "relatively small").

28. Martin, *supra* note 22, at 184 (quoting *Reports of the Proceedings of the Judicial Conference of the United States*, JUD. CONF. U.S. 11 (1964)).

29. Songer, *supra* note 27, at 308.

30. *Id.*

31. Stienstra, *supra* note 25, at 6-7 (citing *Recommendation and Report to the April 1972 Session of the Judicial Conference of the United States on the Publication of Courts of Appeals Opinions*, BOARD FED. JUD. CTR. (1972)).

32. *Id.* at 7 (citing *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice*, FED. JUD. CTR. (1973)).

33. *Id.*

subsequent use of the opinions within the circuits.[34]

The rules promulgated by the circuits split in directions matching the character of their respective circuits and the needs and opinions of the legal community within them.[35] However, general areas of difference can clearly be observed. In nine of the thirteen circuits, full and open citation to unpublished opinions is barred by the rules.[36] In two additional circuits, citation also is limited unless the opinion is of a very specific type.[37] Of these eleven circuits, nine allow the use of unpublished opinions to establish res judicata or collateral estoppel or if the subsequent case otherwise relates back to the earlier case.[38]

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34. Songer, *supra* note 27, at 308.

35. Stienstra, *supra* note 25, at 8.

36. *See* 1ST CIR. R. 36(a); *see also* 1ST CIR. R. 36.2(b)(6) (providing citations to unpublished opinions are proper in related cases, but barring citation to an unpublished opinion in all other cases); 3D CIR. I.O.P. 5.3 (providing an unreported opinion will be designated as "not precedential" on the face of the opinion); 4TH CIR. R. 36(c) (providing citation to unpublished opinions should only be used to establish res judicata, estoppel, the law of the case, or if the unpublished opinion has precedential value to a material issue and "there is no published opinion that would serve as well"); 6TH CIR. R. 28(g) (providing citation to unpublished opinions should only be used to establish res judicata, estoppel, the law of the case, or if the unpublished opinion has precedential value to a material issue and "there is no published opinion that would serve as well"); 8TH CIR. R. 28A(i) (providing citation to unpublished opinions should only be used to establish res judicata, estoppel, the law of the case, or if the unpublished opinion has precedential value to a material issue and "there is no published opinion that would serve as well"); 9TH CIR. R. 36-3 (barring citations to unpublished opinions unless used for "doctrines of law of the case, res judicata, or collateral estoppel"); 10TH CIR. R. 36.3 (providing citations to unpublished opinions are only binding for law of the case, res judicata, and collateral estoppel, but the unpublished opinion may be cited if it has persuasive value for a material issue that has not been addressed in a published opinion and "it would assist the court in its disposition"); 11TH CIR. R. 36-2 (providing unpublished opinions have no binding precedent, but "[t]hey may be cited as persuasive authority"); FED. CIR. R. 47.6(b) (providing nonprecedential opinions must not be cited as precedent, but can be cited for issue preclusion, judicial estoppel, or law of the case).

37. *See* 7TH CIR. R. 53(b)(1)(iii), (b)(2)(iv) (creating a distinction in definition and citation of court opinions—published and precedential—as opposed to court orders—unpublished and not precedential); *compare* 5TH CIR. R. 47.5.3 (stating that opinions decided before January 1, 1996 are precedent), *with* 5TH CIR. R. 47.5.4 (providing unpublished opinions decided after January 1, 1996 are not precedent).

38. *See* 1ST CIR. R. 36(a), 36.2(b)(6) (providing citations to unpublished opinions are proper in related cases); 4TH CIR. R. 36(c) (providing citations to unpublished opinions shall only be allowed in limited circumstances, including res judicata and collateral estoppel); 6TH CIR. R. 28(g) (providing citations to unpublished opinions shall only be allowed in limited circumstances, including res judicata and collateral estoppel); 8TH CIR. R. 28A(i) (providing citations to unpublished opinions shall only be allowed in limited circumstances, including res judicata and collateral estoppel); 9TH CIR. R. 36-3 (barring citations to unpublished opinions unless used for "doctrines of law of the case, res judicata, or collateral estoppel"); 10TH CIR. R. 36.3 (providing citations to unpublished opinions are binding only in limited circumstances, including res judicata and collateral estoppel); FED. CIR. R. 47.6(b) (providing nonprecedential opinions must not be cited as precedent, but can be cited for issue preclusion, judicial estoppel, or law of the case). In

This rule effectively limits the use of unpublished opinions to only those situations in which the opinion serves as evidence of a prior disposition. In addition, six of the eleven circuits also allow the use of unpublished opinions to be used as persuasive authority or in the absence of another opinion stating the appropriate precedent.[39] Although this rule allows broader use, it still bars the full use of the opinion or otherwise limits its use to contexts in which the opinion can only apply as an example of the precedent.[40] Finally, two circuits have no rule limiting citation—silence that may be interpreted as allowing full citation.[41] Except for these two circuits, the circuit rules bar full citation of unpublished opinions except for very limited, enumerated situations.

## III. THE ARGUMENTS SURROUNDING THE RULES ON UNPUBLISHED OPINIONS

The arguments for and against the rules limiting citation of unpublished opinions are plentiful and have been discussed in a number of different contexts by a multitude of judges and commentators.[42] A short overview of these positions will be helpful to set the overall context in which the debate has

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addition, for those opinions the circuit considers unpublished, both the Fifth and Seventh Circuits also subscribe to the rule that citation to unpublished opinions should be limited. *See* 5TH CIR. R. 47.5.3, .5.4 (providing unpublished opinions issued before January 1, 1996 are precedent, but should normally be cited only in limited circumstances, including res judicata and collateral estoppel and unpublished opinions decided after January 1, 1996 are only precedent for res judicata, collateral estoppel, or law of the case); 7TH CIR. R. 53(b)(1)(iii), (b)(2)(iv) (providing unpublished opinion may only be cited for res judicata, collateral estoppel, or law of the case).

39. *See* 4TH CIR. R. 36(c) (providing citations to unpublished opinions may be used if the unpublished opinion has precedential value to a material issue in a case and "there is no published opinion that would serve as well"); 5TH CIR. R. 47.5.4 ("An unpublished opinion may, however, be persuasive."); 6TH CIR. R. 28(g) (providing citations to unpublished opinions may be used if the unpublished opinion has precedential value to a material issue in a case and "there is no published opinion that would serve as well"); 8TH CIR. R. 28A(i) (providing citations to unpublished opinions may be used if the unpublished opinion has precedential value to a material issue in a case and "there is no published opinion that would serve as well"); 10TH CIR. R. 36.3(B)(1) (providing citations to unpublished opinions may be used if the unpublished opinion has persuasive value for a material issue that has not been addressed in a published opinion); 11TH CIR. R. 36-2 (providing unpublished opinions "may be cited as persuasive authority").

40. *See* rules cited *supra* note 38.

41. The Court of Appeals for the District of Columbia rules provide for the circulation of unpublished opinions but do not reference citation to them. *See* D.C. CIR. R. 36. The Second Circuit no longer has a rule augmenting the Federal Rules of Appellate Procedure regarding unpublished opinions. *See* Stienstra, *supra* note 25, at 8 (discussing the previous Second Circuit rule restricting citation as well as other instances when the absence of a circuit rule was interpreted to allow full citation to unpublished opinions).

42. *See generally* William L. Reynolds & William M. Richman, *The Nonprecedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1167 (1978) (providing one of the first and most comprehensive discussions of the arguments on both sides of the issue of citing unpublished opinions).

developed, especially because many of these arguments reappear in the background of the *Anastasoff* panel opinion.[43] At least three key justifications for the use of unpublished opinions and the rules related to them have developed through the literature.

### A. *The Arguments in Favor of Limiting Citation of Unpublished Opinions*

One commentator traced the historical justifications for limiting citation to unpublished opinions to reducing costs and avoiding unfairness.[44] This theory focuses on two concerns.[45] The first concern is that a market for unpublished opinions will develop if such opinions are given precedential value, thereby hindering judicial efficiency and access to the judicial system by those persons who cannot afford to take part in the new publication scheme.[46] The theory rests on the presumption that if unpublished opinions can be openly cited, some source may be compelled to ensure that the opinions are formally published, accessible, and cross-referenced like the current system of regional or specialized reporters.[47] As the system is now, both public and private libraries striving to remain current are required to spend significant amounts of money.[48] Creating even more publications to add to the shelves and update regularly would create a substantial burden on these outlets.[49]

The second concern of this theory, directly related to the first, is that allowing citation to unpublished opinions may promote unfairness.[50] This view foresees that "[p]rohibiting citation benefits the parties and attorneys by saving time and resources because repeat litigants may develop a library."[51] On the other hand, those persons who are not repeat litigants might be faced with expending additional time and resources in an effort to keep pace with a repeat

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43. *See generally* Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (discussing various arguments concerning unpublished opinions).

44. Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 242 (1998).

45. *Id.*

46. *See id.* (suggesting citation to unpublished opinions would destroy the advantages of selective publication giving repeat litigants an unfair advantage over less sophisticated parties).

47. Elizabeth M. Horton, Note, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 U.C.L.A. L. REV. 1691, 1694 (1995) (citing Alice I. Youmans et al., *Questions & Answers*, 83 L. LIBR. J. 195, 204 (1991)).

48. Phillip Nichols, Jr., *Introduction to Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 916 (1986) (discussing the "rabbit-like multiplication" of reporters on library shelves, and the refusal of publishers like West to publish unofficial reporters).

49. *Id.* at 916.

50. Carpenter, *supra* note 44, at 242.

51. *Id.*

litigant's ability to access otherwise unpublished opinions.[52] A potential perpetrator of such a scheme would be the federal government, particularly federal agencies, which would be able to develop its own system of cataloging unpublished opinions to the detriment of its opponents.[53]

Every supporter or critic of the role of unpublished opinions balances the needs of the system against the fairness to the litigants. The "access" line of supporters, namely those previously discussed, exemplifies a view placing utmost importance on fairness.[54] Another voice in support of the rules comes from the judiciary itself. Support for the judiciary's principal argument for the rules rests primarily upon the needs of the system.[55]

The judiciary's first-hand experience with the rules leads many to tip the scale in favor of maintaining the integrity of the system despite sacrificing a body of law that could otherwise be used by litigants.[56] Many "judges assert that the development of the law is not impeded when redundant, straightforward, or unimportant cases are unaccompanied by full, published opinions."[57] In the judicial argument view, opinions which are marked unpublished are so marked in accordance with guidelines devised to block the publication of routine cases with unspectacular issues in favor of emphasizing relatively novel cases which truly deserve publication and continued citation.[58] As one judge has stated the matter:

> The true reason behind the selective publication policy is that it is wrong to ask publishers to publish, libraries to collect, and scholars to read opinions that merely labor the obvious, so far as they deal with the law at all, rehashing conclusions already reached in authoritative decisions of the same court or the Supreme Court.[59]

One final, less cited source for support of the rules blends the views of commentators and members of the judiciary.[60] This argument proposes that if the system does not "discourage citations to unpublished opinions, then we are creating a type of second-class precedent."[61] This theory predicts that a failure to

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52. *See id.* at 252.

53. *See id.* at 252-53 (providing an example of the potential advantage of federal agencies in developing a collection of unpublished opinions).

54. *See, e.g., id.* (discussing one facet of the fairness debate).

55. Nichols, *supra* note 48, at 916.

56. *Id.*

57. Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 789-90 (1995).

58. Martin, *supra* note 22, at 191.

59. Nichols, *supra* note 48, at 916.

60. *See* Martin, *supra* note 22, at 193 (arguing that unpublished opinions should be published but not cited to).

61. *Id.* at 193-94.

view unpublished opinions as nonprecedential would create a second-class form of precedent hampered by the inherent pressures of the burdened appellate system.[62] A general fear, stated by many commentators, is that because judicial resources are stretched, unpublished opinions receive less attention than opinions that are destined to be published.[63] This may result in opinions that are not fully reasoned and not well written.[64] Removing the rules limiting citation to such opinions may not alleviate the problem. Judges may feel additional scrutiny as more published opinions are produced more quickly, causing exceptional published opinions and unexceptional unpublished opinions to be averaged into a body of inferior precedents. Although this is far from an assured outcome, some judges admit to concentrating a greater amount of time on opinions set for publication.[65] Depending on one's viewpoint, this may be an admirable or a deplorable practice. Either way, removing the barriers to citation may cause a general decline in the quality of written opinions and the precedents therein.

Ultimately, the arguments in support of the rules fall into three general categories: access, quantity, and quality. By suppressing citation, the rules as developed have alleviated these three concerns, making dispositions nonprecedential and all but worthless to anyone other than the parties involved in the particular case or statisticians studying the issue.[66] Access is preserved because the current networks for publication, although costly, can reasonably handle the number of published opinions while maintaining their current cost.[67] Quantity is naturally alleviated because there are simply fewer full-opinion dispositions that can be cited, reflecting the system's lack of concern for full consideration of "settled" issues.[68] Finally, quality is maintained because those opinions that are published receive the utmost attention.[69] Whether each of these values outweighs the arguments against the rules for citation is a battle that will continue in the aftermath of the *Anastasoff* disposition.

### B. *The Arguments in Opposition to Limiting Citation of Unpublished Opinions*

Indeed, there are also a number of critics of the development of the rules relating to publication and the prevention of citation. The criticisms are plentiful,

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62. *See id.*
63. Horton, *supra* note 47, at 1700.
64. *Id.*
65. Martin, *supra* note 22, at 190.
66. *Id.*
67. *Id.* at 191.
68. *Id.* at 190.
69. *Id.*

as is shown by one commentator's list of at least twelve different concerns.[70] Some of the most vocal criticisms of the rules have come from the bench itself as judges have posited arguments incorporating this galaxy of concerns. As one judge opined, "despite the policy in the majority of the Circuits, I remain convinced of the unsoundness of the no-citation rule."[71]

As noted previously, one of the principal arguments in support of unpublished opinions and the rules limiting citation is centered on accessibility and fairness to litigants.[72] Two primary arguments are advanced to counter these concerns. First, although increased expenses may hamper accessibility and fairness or create increased competitive advantages for repeat litigants, such inequities are already present in the system and are no excuse for limiting the use of unpublished opinions.[73] Moreover, any alteration in the current balance between cost and access is unlikely to make a vital difference.[74] This argument does not posit a solution to what many might consider a larger defect inherent in the publication system—it merely acknowledges the nature of the system and otherwise welcomes the change that increased access to unpublished opinions would create.

The second argument also does not provide an absolute solution, but it does provide an explanation showing that there is a measure of hope for equalizing access. This argument considers expanding informational technologies as the key to increasing access among litigants.[75] Although technologies such as Westlaw and LEXIS may be costly, new mediums of communication, whether they are other competing publishers, the Internet, CD-ROMs, or other media, force prices down and thereby increase access.[76] Ultimately, this argument foresees that access problems may become a thing of

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70. *See* Carpenter, *supra* note 44, at 236 (listing secrecy in the judicial branch of government, judicial precedent as a foundation of the common law, quality of analyses in deciding cases, creation of a "shadow body of law," the accountability of appellate courts to the bar and the public, the accountability of trial courts to the appellate courts, the bar, and the public, equal access to the common law, freedom of speech, the right to petition the judicial branch for redress of grievances, the nature and function of the United States Constitution, and consistency in deciding cases).

71. *In re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 38, n.4 (10th Cir. 1992) (Holloway, C.J., dissenting).

72. *See* discussion *supra* Part III.A.

73. *See generally* Dragich, *supra* note 57, at 787 (observing the effects on the cost of litigation resulting from the rules relating to unpublished opinions).

74. *See generally id.* (noting the inability of mere rules dictating the use of unpublished opinions to alleviate inequities in the system).

75. *See* Martineau, *supra* note 17, at 144-45 (describing the growing influence of commercial electronic database programs such as Westlaw and LEXIS to the point that "computer based systems have to a large degree destroyed the effectiveness of rules restricting publication").

76. *See id.*

the past based upon the strength of technology in the future.[77]

Another of the principal arguments in favor of the rules—that the courts should not repeat dispositions of cases that are all but identical—is countered by the reality that almost no single case is truly identical to one previously considered.[78] Nearly every case has some twist of procedure or facts that could potentially apply in future cases in which the current rules would bar its precedential value.[79] Those same nuances can also play an important role in showing litigants and commentators the courts' views on particular areas of the law.[80] Although unpublished opinions are rarely not published in some form, the possibility that opinions can slip through the cracks may deprive court watchers of the opportunity to determine the courts' view on a particular law or area of law. As one judge observed:

> To be sure, there are many cases that look like previous cases, and that are almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law.[81]

Opponents of the rules limiting citation also counter arguments in favor of quantity and quality.[82] Just as some of the principal defenders of the rules on those grounds are members of the judiciary, some of the principal detractors are as well. As one judge reflected,

> Those in favor of this shortcut argue that the pressure of appeals requires it. I think the practice of not publishing these opinions is deleterious because it may lead to a sloppiness in analysis in the appellate courts: counsel are not present to suggest corrections, and the absence of the discipline of writing and rewriting may lead the panel, which is not conversant with the day-to-day details of a litigation, to overlook certain practical aspects of the problem.[83]

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77. *See id.*

78. Richard S. Arnold, *Unpublished Decisions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222-23 (1999) [hereinafter Arnold, *Unpublished Decisions*].

79. *Id.*

80. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Decisions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 947-48 (1989).

81. Arnold, *Unpublished Decisions*, *supra* note 78, at 222. This comment was made by Richard S. Arnold, United States Circuit Judge for the Eighth Circuit. *Id.* at 219.

82. *See* Dragich, *supra* note 57, at 787 (arguing that selective publication does not solve the problem of too much law).

83. Jack B. Weinstein, *Factors in Determining the Degree of Public Availability of Judicial Opinions*, 2 N.Y.U. ENVTL. L.J. 244, 245 (1993). This comment was made by Jack B.

Thus, the overloaded nature of the judicial system creates a benefit: increased scrutiny leading to better developed opinions and more lasting contributions to the legal canon. This same benefit "leads to better, more consistent opinions because it holds judges accountable to the public which they serve. This accountability, in turn, dispels the perception of the judiciary as a self-regulating, secret society, and it legitimizes the judicial branch of the government in the eyes of its citizens."[84]

Finally, there is one less often cited argument in opposition to the rules that ties directly to two other previously mentioned detractions. As one commentator observed, "[s]tability, certainty, and predictability are prerequisites to the consent of the public to be governed by law, including judge-made law."[85] As noted, unpublished opinions and rules limiting the citation of such opinions remove a good measure of accountability from the system.[86] Litigants, commentators, and judges may be barred from revisiting and reanalyzing previously considered areas that are in need of revision. The rules on unpublished opinions remove the stability, certainty, and predictability which otherwise ensure continued efficiency and functionality within the system.[87]

Those commentators opposed to citation of unpublished opinions thus present a network of counterarguments to the arguments advanced in favor of the rules. Access to the system may not be affected because a market for all opinions, published or unpublished, already exists whether by print or electronic media.[88] Despite the growing cost of such services, the system as a whole maintains these services, and all litigants face the costs associated with their use.[89] Concerns about access are ultimately issues to be taken up in another context, not within a debate over published and unpublished opinions that have similar accessibility for all parties. Quality and quantity concerns are countered by arguments that consider the evil of an overloaded system to be a virtue that forces judges to be more deliberate in their dispositions.[90] Again, these arguments remain even after *Anastasoff*. Yet understanding the milieu created by the arguments supporting and opposing the rules properly sets the stage for the Eighth Circuit's *Anastasoff* disposition.

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Weinstein, Senior Judge for the United States District Court for the Eastern District of New York. *Id.* at 244.

84. Carpenter, *supra* note 44, at 248.

85. Dragich, *supra* note 57, at 777.

86. *See* discussion *supra* Part III.

87. Dragich, *supra* note 57, at 777.

88. *See supra* text accompanying notes 62-67.

89. *Id.*

90. *See* Weinstein, *supra* note 83, at 245 (observing the absence of the discipline of writing may lead to sloppiness in appellate courts' analyses).

## IV. A CRACK IN THE DAM: *ANASTASOFF v. UNITED STATES*

### A. *The Panel Opinion*

In May 2000, a panel of three judges of the United States Court of Appeals for the Eighth Circuit heard oral arguments in *Anastasoff v. United States*,[91] an appeal from the United States District Court for the Eastern District of Missouri.[92] At issue in the case was the operation of the mailbox rule[93] within the context of a tax filing.[94] Faye Anastasoff, a taxpayer seeking a refund of taxes she had overpaid in 1993, mailed her claim filing before the three-year deadline imposed under the relevant United States Code section.[95] The rule typically "saves claims like Ms. Anastasoff's that would have been timely if received when mailed; they are deemed received when postmarked."[96] However, the Internal Revenue Service (IRS) did not process Ms. Anastasoff's filing until one day after the deadline imposed by the Code.[97] For this reason, her claim was precluded and she was barred from recovering her overpaid taxes.[98]

In response to the denial of her claim, Ms. Anastasoff filed suit, claiming her filing was timely by operation of the mailbox rule.[99] The district court disagreed.[100] Not surprisingly, the decision was appealed.[101] Her appeal was assigned to a three-judge panel that included Judge Richard Arnold, one of a number of judges on record as opposing unpublished opinions.[102]

Although the oral argument in the *Anastasoff* case was apparently relatively standard, one event stuck out. In the midst of the questions posed to the attorney for Ms. Anastasoff, Gregory Hewett, Judge Arnold presented an unexpected query.[103] Judge Arnold's question focused on *Christie v. United States*,[104] an unpublished opinion produced by another Eighth Circuit panel.[105] In

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91. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).
92. *Id.* at 899.
93. 26 U.S.C. § 7502 (1994) (providing the postmark date is the date of delivery for certain provisions of internal revenue laws).
94. Anastasoff v. United States, 223 F.3d at 899.
95. *Id.* (citing 26 U.S.C. § 7502 (1994)).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *See id.*; Arnold, *supra* note 3, at 538; *see also* discussion *supra* Part III.B.
103. Tony Mauro, *Stealth Decisions Under Fire*, LEGAL TIMES, Sept. 4, 2000, at 6.
104. Christie v. United States, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, at *1 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished opinion).
105. *Id.*; *see* Mauro, *supra* note 103, at 6. Judge Arnold asked Hewett how his position squared with the *Christie* decision. *Id.*

*Christie*, the panel rejected the argument, now advanced by Ms. Anastasoff, that the mailbox rule should apply to "fulfill its remedial purpose, [that is], to save taxpayers from the vagaries of the postal system."[106] Hewett was apparently somewhat stunned by Judge Arnold's question.[107] He cautiously reminded Judge Arnold that *Christie* was an unpublished opinion and by rule of the Circuit was "'not binding on [the] court.'"[108] Judge Arnold was not satisfied with such a technicality. He stated his disagreement with Hewett's answer, at the same time disagreeing with the Eighth Circuit's rule limiting citation.[109] After this short diversion, the oral argument continued normally.[110]

Three months later, the panel rendered its opinion, deciding in favor of the United States "[b]ecause of the unpublished *Christie* precedent that favored the IRS position."[111] The opinion rested on a masterful exposition of the pratfalls, dangers, and, ultimately, unconstitutionality, of unpublished opinions.[112] Not surprisingly, Judge Arnold wrote the opinion of the court.[113] The opinion allocated approximately 225 words to the task of deciding the actual case at hand, finding that, because of the *Christie* precedent, Ms. Anastasoff's claim was properly found invalid, affirming the earlier opinions of the district court and the IRS.[114] The rest of the opinion, nearly 2900 words, focused on the constitutionality of the rules limiting the citation of unpublished opinions and, more specifically, a direct repudiation of the Eighth Circuit rule.[115]

Judge Arnold's argument focused on Article III of the Constitution and the powers delegated to the judgeships it authorizes.[116] The opinion also considered the doctrine of precedent at length: its derivation, its history, and its importance to the legal system.[117] Melding these two points together, Judge Arnold began by observing that "[t]he doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. . . . [I]t was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past

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106. Anastasoff v. United States, 223 F.3d at 899 (citing Christie v. United States, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, *1 (per curiam) (unpublished opinion)).

107. *See* Mauro, *supra* note 103, at 6 (presenting the discussion between Hewett and Judge Arnold).

108. *Id.*

109. *Id.* Judge Arnold stated that the practice of a court deciding a case one day and ignoring its holding the next day was unconstitutional. *Id.*

110. *Id.*

111. *Id.*; *see* Anastasoff v. United States, 223 F.3d at 898-905.

112. Mauro, *supra* note 103, at 6; *see* Anastasoff v. United States, 223 F.3d at 898-905.

113. Anastasoff v. United States, 223 F.3d at 898-905.

114. *Id.* at 899.

115. *See id.*

116. *Id.*; *see* U.S. CONST. art. III, § 1, cl. 1.

117. Anastasoff v. United States, 223 F.3d at 900.

struggles for liberty."[118] As Judge Arnold explained, precedent was the backbone of the judicial process, the lifeblood of the first judges observing and applying the law and every judge since them.[119] Most importantly, adherence to precedent was a principal impliedly codified in Article III because "[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases."[120] To not apply those opinions in subsequent cases was "a dangerous union with the legislative power."[121] Judge Arnold detected such a dangerous union in the rules regulating the use of unpublished opinions.[122] For that reason, the *Anastasoff* panel concluded that any rule lessening the precedential value of an opinion of an Article III judge violated Article III and was unconstitutional.[123]

However, Judge Arnold was careful to describe some limits to the panel's statement.[124] With these limitations, Judge Arnold appeared to be making a preemptive strike against those critics who might conclude that the panel opinion went too far in its consideration of the rules limiting citation.[125] First, he acknowledged that there were legitimate reasons for courts to continue labeling opinions as unpublished and not physically publishing the opinions in one of the standard regional or subject matter reporters.[126] The opinion was not focused on the failure to print opinions, but instead on the failure to properly value opinions whether marked "for publication" or "not for publication."[127] With this point, Judge Arnold countered any argument that the *Anastasoff* rule would only exacerbate the crisis of volume plaguing the federal court system.[128]

On a second, perhaps lesser point, Judge Arnold sought to sooth any accusation that the opinion was an indictment of a secret judicial society.[129] In Judge Arnold's view, the presumption that such a secret society existed was inaccurate.[130] The panel opinion was not responding to such an inaccuracy.[131] Instead, the panel was simply recognizing the precedential value of all judicial

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118. *Id.* (citations omitted).
119. *Id.*
120. *Id.* at 902.
121. *Id.* at 903.
122. *Id.*
123. *Id.* at 905.
124. *Id.* at 904-05.
125. *See id.*
126. *Id.* at 904.
127. *See id.* (distinguishing unpublished from secret).
128. Arnold, *Unpublished Decisions*, *supra* note 78, at 221-22.
129. *See* Anastasoff v. United States, 223 F.3d at 904 (stressing that appellate court decisions are available to the public).
130. *See id.*
131. *See id.*

opinions.[132]

Third, and perhaps most importantly, Judge Arnold made the bold assertion that those who argue, "it is simply unrealistic to ascribe precedential value to every decision" should no longer fall back on such an excuse.[133] The solution to this problem was to create additional judgeships or for judges "to take enough time to do a competent job with each case."[134] Whereas Judge Arnold sought to alleviate concerns in his other points, this third point was a clear indictment of what many considered the true source of much of the unpublished opinion controversy: the lack of judges to counteract the crisis of volume.[135] Judge Arnold stated what many thought: the best, truest solution to the problem is for Congress to add additional judgeships.[136] Perhaps then, some of the pressures upon judges to rush their opinions or simply stamp them "unpublished" might dissipate.

Finally, Judge Arnold assured that the court did not intend to create "some rigid doctrine of eternal adherence to precedents."[137] Instead, "[i]f the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed."[138] *Anastasoff* did not stand for undying adherence to precedent; it stood for undying respect for precedent if the precedent was still valid.[139]

### B. *The Immediate Aftermath of the Panel Opinion*

The *Anastasoff* opinion was subject to almost immediate attention.[140] Most of this attention came in the form of praise for Judge Arnold's willingness to consider the constitutionality of unpublished opinions and the rules limiting citation and pinpoint some of the fundamental flaws of the system.[141] The first, and perhaps the best, compliment stated in response to Judge Arnold's opinion was a concurrence, written by his colleague on the panel, Circuit Judge Gerald Heaney.[142] Judge Heaney observed that Judge Arnold's opinion "has done the

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132. *See id.* (stressing that some cases can and should be overruled but it is the role of the en banc court, not a single panel).

133. *Id.*

134. *Id.*

135. Arnold, *Federal Courts*, *supra* note 3, at 542.

136. Anastasoff v. United States, 223 F.3d at 904. "We do not have enough time to do a decent enough job, the argument runs . . . . [T]he remedy is not to create an underground body of law . . . . [It] is to create enough judgeships to handle the volume . . . ." *Id.*

137. *Id.*

138. *Id.* at 904-05.

139. *See id.*

140. Mauro, *supra* note 103, at 6.

141. *See id.*

142. Anastasoff v. United States, 223 F.3d at 905 (Heaney, J., concurring).

public, the court, and the bar a great service by writing so fully and cogently on the precedential effect of unpublished decisions."[143] Additional reactions to the *Anastasoff* opinion soon followed and were typically glowing.

One commentator hailed the opinion as "a brilliant and very important opinion that captures the crux of what is wrong with unpublished opinions" and predicted that "[i]t will have a huge impact nationwide."[144] As another commentator stated, the reasoning in the opinion "calls into question every federal district or circuit rule that purports to relegate some decisions to nonprecedential status."[145] Still another commentator concluded that the opinion was "exactly the right step forward necessary in improving the accountability of the courts."[146] Perhaps of paramount importance, "[i]t would be a foolhardy lawyer in the [Eighth] Circuit—or other circuits—who did not go through the unpublished opinions from now on."[147]

Those opposing the rules limiting the citation of unpublished opinions seemed to have won out. The opinion of the panel constitutionalized the issue in a way that had not previously been explored.[148] Judge Arnold's careful opinion laid out a cogent argument for the fundamental unconstitutionality of preventing the use of unpublished opinions as precedent.[149] A crack in the dam had appeared. All that was left was for the pressure of subsequent citations of the *Anastasoff* opinion on the federal appellate, federal district, and state court levels to burst any lingering impediment to full and open use of unpublished opinions.

Such citations came relatively fast and furious. As of October 1, 2001, *Anastasoff* has been cited by at least thirty-five courts in any number of broad contexts.[150] However, despite its quick use by a number of courts, en banc

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143. *Id.* (Heaney, J., concurring).

144. Mauro, *supra* note 103, at 6 (quoting Arthur Bryant, Executive Director of Trial Lawyers for Public Justice).

145. John Borger & Chad Oldfather, *The Uncertain Status of Unpublished Opinions*, 57 BENCH & B. MINNESOTA 36, 37 (2000).

146. Donald Alpin & Michael Triplett, *Litigation: Attorneys Say Unpublished Opinions Ruling Will Have Effect on Employment Law Practice*, DAILY LAB. REP., Aug. 29, 2000, at B-1 (quoting Professor Michael E. Tigar).

147. Mauro, *supra* note 103, at 6 (quoting Professor William Reynolds of the University of Maryland Law School).

148. *See* Anastasoff v. United States, 223 F.3d at 899-904.

149. *See id.*

150. *See* Andrews v. Neer, 253 F.3d 1052, 1057 n.3 (8th Cir. 2001) (citing *Anastasoff* but noting that the Eighth Circuit's rule against citation "continues to govern in this Circuit, and we urge the parties appearing before this Court to comply with its terms"); Hart v. Massanari, No. 99-56472, 2001 WL 1111647, at *1 (9th Cir. Sept. 24, 2001) (disagreeing with *Anastasoff* but acknowledging that the opinion, "while vacated, continues to have persuasive force"); Lederman v. Cragun's Pine Beach Resort, 247 F.3d 812, 816 n.3 (8th Cir. 2001) (citing *Anastasoff* but declining to fully consider the Minnesota rule barring citation to unpublished opinions); Rogerson v. Hot

Springs Adver. & Promotion Comm'n, 237 F.3d 929, 931 n.2 (8th Cir. 2001) (Arnold, J.) (finding the court had "no occasion here to apply the specific rationale" of the *Anastasoff* opinion because the parties had not briefed the issue and the court refused to "raise the issue on [its] own motion"); Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 260 (5th Cir. 2001) (Smith, J., dissenting) (using *Anastasoff* to support the argument that the denial of rehearing en banc deprived the court of the "opportunity to revisit the questionable practice of denying precedential status to unpublished opinions"); United States v. Goldman, 228 F.3d 942, 944 (8th Cir. 2000) (citing *Anastasoff* for the proposition that a "panel must follow [an unpublished opinion] as precedent"); *In re* Arzt, 252 B.R. 138, 143 (B.A.P. 8th Cir. 2000) (applying the *Anastasoff* decision merely seven days after it was rendered); Amgen, Inc. v. Hoechst Marion Roussel, Inc., 126 F. Supp. 2d 69, 135-36 n.40 (D. Mass. 2001) (citing *Anastasoff* to support the court's citation of unpublished opinions); Bechtold v. Massanari, 152 F. Supp. 2d 1340, 1346 n.6 (M.D. Fla. 2001) (citing *Anastasoff* as evidence of "the propriety of citing unpublished decisions"); Berthoff v. United States, 140 F. Supp. 2d 50, 53 n.4 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Doe v. Baxter Healthcare Corp., No. CIV. 4-96-CV-10738, CIV. 4-96-CV-10843, 2001 WL 740112, at *5 n.10 (S.D. Iowa March 19, 2001) (unpublished opinion) (citing *Anastasoff* to explain the court's choice to introduce the case context with an unpublished opinion); Gonzalez v. United States, 135 F. Supp. 2d 112, 122 n.10 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Holland v. Horn, 150 F. Supp. 2d 706, 719 n.8 (E.D. Pa. 2001) (recognizing the Eighth Circuit's consideration of the unpublished opinion issue in *Anastasoff*, but observing that the Third Circuit "has yet to raise such an issue regarding unpublished decisions"); Lewis v. Rosenfeld, 145 F. Supp. 2d 341, 345 n.8 (S.D.N.Y. 2001) (refusing to allow the use of an unpublished opinion despite the defendant's citation of *Anastasoff*); MacNeill Eng'g Co. v. Trisport, Ltd., 126 F. Supp. 2d 51, 58-59 n.3 (D. Mass. 2001) (citing *Anastasoff* "for the propriety of citing an unpublished opinion"); McGuinness v. Pepe, 150 F. Supp. 2d 227, 235 n.16 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Musto v. Halter, 135 F. Supp. 2d 220, 232 n.8 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Newell v. Rolling Hills Apartments, 134 F. Supp. 2d 1026, 1040-41 (N.D. Iowa 2001) (implying that an unpublished opinion could still be used as precedent even though the *Anastasoff* panel decision was vacated); Schmier v. United States Court of Appeals for the Ninth Circuit, 136 F. Supp. 2d 1048, 1052 (N.D. Cal. 2001) (rebuking a challenge to the Ninth Circuit's rule against full citation to unpublished opinions by citing the *Anastasoff* description of the required standing for such a challenge); Suboh v. City of Revere, 141 F. Supp. 2d 124, 143 n.18 (D. Mass. 2001) (citing *Anastasoff* as support for citing unpublished opinions); Alvarenga-Villalobos v. Reno, 133 F. Supp. 2d 1164, 1168 (N.D. Cal. 2000) (referring to *Anastasoff* while discussing the "simmering controversy about the constitutionality of prohibitions against citation to unpublished opinions"); Cmty. Visual Communications, Inc. v. City of San Antonio, 148 F. Supp. 2d 764, 773-76 (W.D. Tex. 2000) (providing a long discussion about the *Anastasoff* opinion to support the observation that "this Court notes the beginning of a possible trend and finds the discussion of the issue worth consideration by this circuit"); Conant v. City of Hibbing, 131 F. Supp. 2d 1129, 1135 n.2 (D. Minn. 2000) (citing *Anastasoff* in support of citing a Table Decision); Encore Video, Inc. v. City of San Antonio, No. CIV.A.SA-97-CA1139FB, 2000 WL 33348240, at *8-10 (W.D. Tex. Oct. 2, 2000) (unpublished opinion) (providing a long discussion about the *Anastasoff* opinion to support the observation that "this Court notes the beginning of a possible trend and finds the discussion of the issue worth consideration by this circuit"); Gordon v. Ottumwa Cmty. Sch. Dist., 115 F. Supp. 2d 1077, 1087 n.9 (S.D. Iowa 2000) (inferring that the Iowa Supreme Court might consider an unpublished opinion as more than simply persuasive under Iowa Rule of Appellate Procedure 14(e), based on the *Anastasoff* precedent); Luciano v. United States, No. 00-CV-1725(FB), 2000 WL 1597771, at *1 (E.D.N.Y. Oct. 23, 2000) (unpublished opinion) (citing *Anastasoff* as authority

review, and perhaps even Supreme Court review, loomed large over the opinion.[151] Not only was the portion of the opinion considering precedent groundbreaking, the core of the case—the issue raised by Ms. Anastasoff and previously decided in the *Christie* case—was likewise contentious.[152] In fact, the same complimentary concurrence produced by Judge Heaney was prompted in part by his plea for en banc consideration of the core mailbox rule issue.[153] Not surprisingly, en banc review was granted.[154]

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for citation of an unpublished opinion); Massachusetts Hous. Fin. Agency v. Evora, 255 B.R. 336, 343 n.3 (D. Mass. 2000) (citing *Anastasoff* as a source "[f]or the propriety of citing an unpublished opinion"); Snell v. Allianz Life Ins. Co. of N. Am., No. Civ. 97-2784 RLE, 2000 WL 1336640, at *7 n.8 (D. Minn. Sept. 8, 2000) (citing *Anastasoff* for "invalidating [Eighth] Circuit Rule 28(A)(I) [sic], which authorizes the issuance of unpublished opinions as nonprecedential, and extending precedential weight to a prior, unpublished opinion"); United States v. Carrillo, 123 F. Supp. 2d 1223, 1247 n.4 (D. Colo. 2000) (noting Tenth Circuit Rule 36.3 was analogous to the Eighth Circuit rule which had been struck down in *Anastasoff*); *In re* Mays, 256 B.R. 555, 558 n.6, (Bankr. D.N.J. 2000) (citing *Anastasoff* in the court's proclamation that "[i]n the absence of any local rules prohibiting otherwise, attorneys may rely on unpublished opinions"); *In re* Norkus, 256 B.R. 298, 305 n.8 (Bankr. S.D. Iowa 2000) (citing *Anastasoff* as authority to cite an unpublished per curiam opinion as a method for establishing precedent); Griffy's Landscape Maint., LLC v. United States, No. 01-309C, 2001 WL 945389, at *7 (Fed. Cl. Aug. 17, 2001) (citing *Anastasoff* for the proposition that "[b]oth the propriety and the need for [unpublished opinion] rules have recently come into question"); Geske v. Marcolina, 624 N.W.2d 813, 818 n.4 (Minn. Ct. App. 2001) (citing *Anastasoff* for its discussion of the precedential value of unpublished opinions); Weyerhauser Co. v. Commercial Union Ins. Co., No. 67694-1, 2000 WL 1867610, at *12 n.12 (Wash. Dec. 21, 2000) (en banc) (noting *Anastasoff* as support for finding the reasoning of two unpublished opinions compelling) [Author's note: The Washington Supreme Court cited *Anastasoff* in the original version of its opinion in *Weyerhauser*, found at the Westlaw citation provided. However, the court's subsequent, amended opinion eliminated the citation to *Anastasoff*. Weyerhauser Co. v. Commercial Union Ins. Co., 15 P.3d 115, 129 (Wash. 2000). A citation to the original opinion is included here to notify the reader that the Washington Supreme Court has cited *Anastasoff* favorably in at least one context.]; Dwyer v. J. I. Kislak Mortgage Corp., 13 P.3d 240, 244 (Wash. Ct. App. 2000) (citing, but not applying, *Anastasoff* in consideration of Washington Rule of Appellate Procedure 10.4(h)). For another survey of these cases, see Jason B. Binimow, *Precedential Effect of Unpublished Decisions*, 2000 A.L.R. 5th 17 (2000). Iowa practioners should note that, although not cited explicitly, it is quite likely that *Anastasoff* prompted the recent softening of Iowa Supreme Court Rule 10. *In re* Iowa Rules of Appellate Procedure 14, 21 & 25 & Supreme Court Rule 10 (Aug. 31, 2001), *available at* http://www.judicial.state.ia.us/orders/orders/citation_of_unpublished_opinions_-_rule_amendments.doc.

151. Mauro, *supra* note 103, at 6.

152. Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000); *see* Christie v. United States, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, at *5-7 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished opinion) (holding the physical delivery rule applied to the Christie's failed claim for a return).

153. Anastasoff v. United States, 223 F.3d at 905 (Heaney, J., concurring).

154. *See* Anastasoff v. United States, 235 F.3d 1054 (8th Cir.) (en banc).

### C. *The En Banc Opinion*

Despite the well-written exposition on precedent and unpublished opinions and the determination that a rule limiting their citation was unconstitutional, the en banc court negated the *Anastasoff* principle.[155] As he had with the panel opinion, Judge Arnold authored the en banc statement of the Circuit.[156] Explaining that the panel was faced with two conflicting circuit courts' precedents in its initial disposition, Judge Arnold first noted that the earlier panel had considered that the opinion stating the proper application of the mailbox rule was one to be made by the en banc court.[157] In the meantime, the United States had agreed to pay back Ms. Anastasoff the money she lost due to her late claim, and the IRS adopted the rule of another case contradicting *Christie*.[158]

The question now posed for the court was whether the appeal was moot.[159] Ms. Anastasoff argued it was not, first and foremost because "the issue of the status of unpublished opinions is of great importance to the bar and bench."[160] On the second part, there was the important issue of the availability of attorney's fees.[161] Unfortunately for Ms. Anastasoff, her arguments were not persuasive. The en banc court decided that the case was moot.[162]

In the opinion, however, Judge Arnold carefully chiseled around the issue of unpublished opinions to avoid an absolute repudiation of the argument earlier advanced by the panel.[163] He first observed that there was no longer a dispute over the overpaid taxes owed to Ms. Anastasoff or the rule to apply in subsequent mailbox rule situations.[164] Further, any claim for attorney's fees could be made in the district court on remand.[165] The core controversy in Ms. Anastasoff's case had disappeared.[166] As far as the role of unpublished opinions, Judge Arnold was unequivocal:

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155. *See id.*
156. *See id.*
157. *Id.* at 1055; *compare* Christie v. United States, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, at *1 (per curiam) (unpublished opinion) (holding the mailbox rule only applies to taxes filed timely and not refunds for overpayment filed late), *with* Weisbart v. United States, 222 F.3d 93 (2d Cir. 2000) (holding the tax refunds enjoyed the benefit of the mailbox rule).
158. Anastasoff v. United States, 235 F.3d at 1055-56 (citing Weisbart v. United States, 222 F.3d at 93).
159. *Id.* at 1056.
160. *Id.*
161. *Id.*
162. *Id.*
163. *See id.*
164. *Id.*
165. *Id.*
166. *See id.*

> The controversy over the status of unpublished opinions is, to be sure, of great interest and importance, but this sort of factor will not save a case from becoming moot. We sit to decide cases, not issues, and whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax refund case.[167]

In the same way he had boldly asserted the unconstitutionality of the Eighth Circuit rule in the panel decision, Judge Arnold likewise made a bold retreat from the issue.[168] Yet, in his actual disposition—finding the case moot, vacating and remanding the panel opinion, and requesting the district court also declare the case moot—Judge Arnold left one glimmer of hope: "The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit."[169] Ultimately, the court left the door open for future considerations of the issue, maintaining its viability and fostering ongoing debate.

## V. AFTER *ANASTASOFF*: WHAT IS THE FUTURE OF UNPUBLISHED OPINIONS?

### A. *The Reverberating Effect of* Anastasoff

Although the en banc court vacated the *Anastasoff* panel opinion, the debate over unpublished opinions and citation to those opinions is ongoing. For this reason, it is important to conclude with some thoughts on the debate to inform future considerations of the issue. Certainly the issue remains viable in the Eighth Circuit.[170] The almost immediate citation of the *Anastasoff* panel statement shows that it already had impact in the Eighth Circuit just days after its disposition.[171] Luckily, Judge Arnold's en banc opinion did not bury the question of the constitutionality of the rules limiting citation. Instead, the opinion effectively sent a signal for future cases, acknowledging that the issue is still open. This leaves a tantalizing opportunity for the issue to be revisited soon. If it is, the arguments for and against the Eighth Circuit rule raised by Judge Arnold and other judges and commentators might serve as a blueprint for countering arguments for or against the rule.

Moreover, additional citations to the opinion by other courts suggest that a number of courts were also clinging to the *Anastasoff* opinion as a foundation for striking at rules limiting the use of unpublished opinions.[172] Some of these courts

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167. *Id.*
168. *Id.*
169. *Id.*
170. *See id.*
171. *See In re* Arzt, 252 B.R. 138, 143 (B.A.P. 8th Cir. 2000) (applying *Anastasoff* a mere seven days after the opinion); *see also supra* note 145.
172. *See supra* note 150.

cited *Anastasoff* for the rule it provided, some courts used it as a basis for their own repudiations of their circuit or court rules, and some simply cited it for the persuasive argument presented, acknowledging the authoritativeness of Judge Arnold's opinion.[173] Although the *Anastasoff* panel opinion has no precedential value, the opinion and the statement found within the opinion maintain their importance in the long term beyond any effect as a precedential rule.

Indeed, given time and effect, it is possible the crack in the dam created by *Anastasoff* was sufficient to undermine and perhaps eliminate rules limiting the precedential value of unpublished opinions. The rules of eleven circuits and countless additional courts might still be considered threatened.[174] Other judges, in contexts beyond written opinions, have stated skepticism over the rules limiting citation.[175] As with the Eighth Circuit, Judge Arnold's blueprint might also be used as ammunition against additional courts' rules limiting citation.

Of course, there remain still lingering doubts over the propriety of lifting restrictions on the citation of unpublished opinions. Despite the positive reaction to *Anastasoff*, many of the arguments in favor of the rules limiting citation remain.[176] Moreover, those in favor of upholding rules limiting full citation continue to hold a hard line against any change. Just as quickly as others rushed to support the opinion, at least one commentator replied with a bevy of criticism leveled at Judge Arnold's panel opinion.[177] Undoubtedly, the debate surrounding unpublished opinions is alive and well.

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173. *See, e.g.*, Gordon v. Ottumwa Cmty. Sch. Dist., 115 F. Supp. 2d 1077, 1087 n.9 (S.D. Iowa 2000) (inferring that the Iowa Supreme Court might consider an unpublished opinion as more than simply persuasive under its own rule of appellate procedure, Rule 14(c), from the *Anastasoff* opinion); Massachusetts Hous. Fin. Agency v. Evora, 255 B.R. 336, 343 n.3 (D. Mass. 2000) (citing *Anastasoff* as a source "[f]or the propriety of citing an unpublished opinion"); Dwyer v. J. I. Kislak Mortgage Corp., 13 P.3d 240, 244 (Wash. Ct. App. 2000) (citing, but not applying, *Anastasoff*, in consideration of Washington Rule of Appellate Procedure 10.4(h)).

174. *See supra* notes 36-39 and accompanying text.

175. *See* Weinstein, *supra* note 83, at 244. In his article on judicial opinions, Judge Weinstein, Senior Judge for the Eastern District of New York, suggests spending time polishing some opinions for publication is inefficient and unpublished opinions facilitate negotiation and settlement. *Id.* *In re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36 (10th Cir. 1992).

176. *See* discussion *supra* Part III.A.

177. *See* Evan P. Schultz, *Gone Hunting – Judge Richard Arnold of the 8th Circuit Has Taken Aim at Unpublished Opinions, But Missed His Mark*, LEGAL TIMES, September 11, 2000, at 78 (arguing the *Anastasoff* panel opinion was faulty in that Judge Arnold failed to consider the distinction between cases at law and equity, the similarity between the rules relating to unpublished opinions and those relating to citation of United States Supreme Court denials of *certiorari*, and the difference between opinions which are simply marked unpublished as opposed to truly unpublished opinions).

### B. *Lingering Arguments: Strengthening the* Anastasoff *Argument*

Between the two extremes of hearty support and heartfelt detraction is the argument that, despite the well-reasoned *Anastasoff* opinion, it did not consider all of the other arguments, especially other constitutional arguments, for or against the non-citation rules. One key argument focuses on the due process guarantees extended by the Fifth and Fourteenth Amendments.[178] As one commentator observed, "the Supreme Court has frequently held" these clauses "forbid any governmental statutes, laws, rules, or policies from being so vague and uncertain that persons of ordinary intelligence cannot determine what conduct is required or prohibited."[179]

Arguably, the rules limiting citation violate due process in addition to Article III because they remove necessary certainty from the law by restricting their effectiveness as precedent.[180] The opinions might be accessed, but those opinions cannot be depended upon as the law. An individual citizen, or perhaps an individual practitioner, may have difficulty determining "what conduct is required or prohibited" because the precedent may be vague.[181] This result contravenes the due process guarantee.[182]

### C. *Unpublished Opinions in the United States Supreme Court*

Additional speculation may be had into what result might come from a consideration of the unpublished opinions debate by the United States Supreme Court. The *Anastasoff* opinion came perilously close to being presented for the Court's consideration. Save the IRS' willingness to pay Ms. Anastasoff despite her late filing, the issue very well might have been presented for certiorari.[183] If the issue were to reach the Supreme Court, what would be the likely outcome?

Obviously, there is no clear way to pinpoint what result the Supreme Court

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178. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

179. George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 487 (1986); *see also* Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001) (discussing fully the due process concerns raised by the rules relating to unpublished decisions).

180. *See* Weaver, *supra* note 179, at 488 (discussing vague laws and how they violate due process because "it is like a secret law to which no one has access").

181. *Id.* at 487.

182. *Id.* at 488.

183. The IRS' willingness to settle the claim very well may have been due to the much-ballyhooed attempts at making the IRS more "customer friendly." *See, e.g.*, Jeanne Sahadi, *A Kinder, Gentler IRS? New Reforms Benefit the Consumer, But Experts Say It's Only the Beginning*, (March 7, 1999), *available at* http://cnnfn.cnn.com/1999/03/07/taxes/irs_reform/. One's mind boggles at the interesting outcomes that might have resulted had the IRS maintained its stereotypical hard-line stance in this particular case.

might reach. However, there are some clues that assist in making a reasoned prediction. First, there are two cases where the Court has been faced with the issue but avoided making any opinion.[184] In both cases, the Court could have effectively disposed of the issue yet failed to do so for unknown reasons. In the absence of any case-based consideration, any speculation must focus on the views of the individual Justices.

Justice John Paul Stevens made the clearest statement by a current Justice on the issue in his dissent in *County of Los Angeles v. Kling*.[185] In *Kling*, Justice Stevens took to task the Ninth Circuit Court of Appeals, which had previously disposed of an issue before it in a very brief statement because "the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be 'cited [in accordance with the Circuit's rules.]'"[186] In response to this action, Justice Stevens replied, "the decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong."[187] Although such a statement does not guarantee that Justice Stevens would be opposed to any rule relating to unpublished opinions brought before the Court today, it does indicate he has some reservations in regards to any rules limiting citation.

On the other side of the issue, Justice Ruth Bader Ginsburg, while she was still a judge on Court of Appeals for the District of Columbia Circuit, argued that, although judges have an obligation to reason why they decide as they do, such an obligation does not preclude sound arguments for restricting the use of unpublished opinions.[188] Again, Justice Ginsburg's opinion, presented over fifteen years ago, is far from a clear statement in favor of the rules within the context of a Court opinion. However, this statement indicates that at least one of the Justices may be more likely to uphold a rule limiting citation at issue.

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184. In *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1978), the Supreme Court "did not mention the no-citation question, although it had granted certiorari [sic] on the issue." *In re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 37 n.1 (10th Cir. 1992). In *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976), the Court "denied leave for the petitioners to file petitions for writs of mandamus and prohibition after the Seventh Circuit struck the petitioners' citation of an unpublished decision." *Id.*

185. County of Los Angeles v. Kling, 474 U.S. 936 (1985) (Stevens, J., dissenting). Although the late Justice Brennan is not a member of the current Court, it is interesting to observe that he joined Stevens' dissent "substantially for the reasons stated by Justice Stevens." *Id.* at 941 (Brennan, J., dissenting).

186. *Id.* at 938 (quoting App. to Pet. for Cert. at A-2 n.**).

187. *Id.* at 938 n.1.

188. *See generally* Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 221 (1985) (discussing the rules related to unpublished opinions and stating both support and criticism).

### D. *Is There a Way to Compromise?*

Perhaps the best solution to the debate over the role of unpublished opinions would be to develop a general rule for all courts. Yet, the development of a uniform, constitutional rule to satisfy all critics is as contentious as the rules currently in effect. One commentator has argued that "[t]he best rule . . . appears to be the free citation of unpublished opinions as persuasive authority. Those rules that prohibit only the citation of unpublished opinions as precedent are the most desirable."[189] Another commentator has posited that "[a]n optimum uniform rule would create a presumption in favor of publication and would require that a nonpublication choice be panel-unanimous. It would also list an objective set of criteria for mandatory publication."[190] Again, as with the general debate over the rules limiting the citation of unpublished opinions, at least two sides of the issue appear. Moreover, some might argue that the system already has erected checks upon the publication decision by way of various courts' chosen publication criteria.[191] Arguably, these factors are an effective compromise that provides independent factors upon which to make a reasoned publication decision. Clearly, the possibility of a general rule is as contentious as the current debate over the role of unpublished opinions and is likely to prompt even greater debate as myriad courts and viewpoints fight to attain representation in any resulting rule.

## VI. CONCLUSION

Ultimately, perhaps the greatest benefit of the *Anastasoff* case is that it has reawakened an interesting and important debate about an issue that has a broad effect on judges, practitioners, and anyone else having even the most minor role in the court system. Although the crack in the dam was a relatively minor one, and one that was quickly patched, the debate has been stirred and is sure to remain at issue again for some time. Perhaps the issue will have to be resolved by the Supreme Court. Perhaps it will simply simmer and fade into the background as it has in the past. Either way, some will continue to chip away at the dam while their opponents come along behind and try to patch any cracks created.

*William J. Miller*

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189. Weaver, *supra* note 179, at 492.

190. *See* Baker, *supra* note 9, at 939 (discussing possible variations of a general rule to satisfy the concerns of critics on both sides of the issue).

191. *See* Songer, *supra* note 27, at 308-09 (discussing various criteria developed to aid the publication decision).