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Mickey v. Mickey: The Long-Awaited Clarification in the Landscape of Equitable Distribution of Marital Assets Comment

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Comment

MICKEY V. MICKEY: THE LONG-AWAITED CLARIFICATION IN THE LANDSCAPE OF EQUITABLE DISTRIBUTION OF MARITAL ASSETS

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Although the equitable distribution of assets during a marital dissolution proceeding is governed by Connecticut General Statutes section 46b-81, the interpretation of this statutory language has resulted in somewhat inconsistent case law, culminating in the Supreme Court of Connecticut's recent decision in Mickey v. Mickey. *This Comment traces the judicial history of equitable distribution in Connecticut by reviewing several cases preceding the* Mickey *decision. These cases have constructed a two-part test to determine whether property is equitably distributable. The asset must be either (1) a presently existing and enforceable right or (2) a contingent interest that is not too speculative. Next, this Comment discusses the manners in which other jurisdictions have equitably distributed marital assets. This Comment then analyzes the* Mickey *majority and dissenting opinions. While the dissenting opinion characterizes the party's interest as presently existing, the majority opinion describes it as an inchoate property interest that is too speculative to be equitably distributed. The* Mickey *decision is somewhat controversial because it is factually analogous to a preceding case, yet asserts a contradictory holding to it. Finally, this Comment concludes by considering where Connecticut jurisprudence stands today in regard to the equitable distribution of marital assets in light of the Court's holding in* Mickey.

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I. INTRODUCTION

All newlywed couples dream of the white picket fence and the "happily ever after." Caught up in the moment, it can be difficult to truly understand how much is at stake when one commits to marriage and with it the intertwinement of assets. Standing on the brink of a joint future, a couple looks ahead with hopes of building a comfortable lifestyle and a happy family. Over the years, as they work toward these goals, the couple intermingles their funds and makes major purchases together, such as a house, its furnishings, and cars. They conduct themselves like a typical married couple, sharing in the benefits and the burdens of joining their lives. As the years pass, however, the couple is unable to withstand the pressures of marriage. The burdens become too cumbersome for the couple to bear and the "happily ever after" begins to drift out of reach. Although the couple once functioned as a cohesive unit, their relationship begins to break down irretrievably. Arguments become more frequent over everything from the maintenance of the household and the attendant expenses to proper parenting styles.

Despite repeated efforts at salvaging their relationship, the couple ultimately decides to begin marital dissolution proceedings. Now the question becomes: how can the couple untangle all of the assets that have been tangled between them, giving each individual what is rightly his or hers? The issues seem endless. Who gets the house? How should the court address his pension? What about alimony? Child support? Who will carry the health and dental insurance for the couple and their children? Who will pay the car loans? Who will pay the credit card bills? While the extent and complexity of the intertwinement of assets varies on a case by case basis, the general dilemma remains the same: what does a couple do when their relationship falls apart?

In Connecticut, the law that governs these family matters is very much in flux. This case law is particularly important because it defines what assets are at stake and how to equitably distribute them. In the last year

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alone, the Connecticut Appellate and Supreme Courts have made some potentially precedential decisions regarding family law.[1] Whether these cases serve as clarification of the current law or a complete overhaul of the system remains to be seen. *Mickey v. Mickey*[2] is the quintessential example of the unclear effect of currently decided case law. On one hand, the case can be interpreted as nothing more than judicial manipulation, resulting in the return to a prior legal framework. On the other hand, it can be interpreted as the court's attempt at redefining one aspect of the family law regime in order to create a more functional and readily applicable set of laws.[3] The ultimate purpose of these recent cases, whether to serve as a regression or progression, will not be understood until future cases frame them. It is this case law that this Comment explores.

On July 21, 2009, the Connecticut Supreme Court ultimately held, in a 3–2 decision, that disability benefits acquired as a result of a disability incurred after a marriage had been dissolved did not constitute distributable marital property under section 46b-81 of the Connecticut General Statutes. This statute dictates that the court may assign property to either party at the time of marital dissolution.[4] In *Mickey v. Mickey*—the case before the court that July day—the marriage of the parties was dissolved on September 21, 2001, after a trial. The trial court entered judgment dissolving the parties' marriage and awarded the plaintiff wife forty percent of the defendant husband's retirement benefits under chapter 66 of the Connecticut General Statutes.[5] At the time of judgment, the defendant was employed as a corrections officer for the State of Connecticut at the Walker facility in Suffield, and was enrolled in the State Employees' Retirement System ("SERS") Tier II plan, pursuant to Connecticut law,[6] which entitled the defendant to receive certain retirement benefits upon reaching the age of sixty-five.[7] As a corrections officer, the defendant was also receiving hazardous duty credited service pursuant to Connecticut law.[8] At the time of the original dissolution trial, he had accumulated only

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[1] *See, e.g.*, Maturo v. Maturo, 995 A.2d 1, 10 (Conn. 2010) (asserting that the child support guidelines must still be followed even where the parties' combined income exceeds the threshold margin recognizing the opportunity for deviations and outside considerations); Crews v. Crews, 989 A.2d 1060, 1070 (Conn. 2010) (articulating a high threshold standard for invalidating pre-nuptial agreements).

[2] Mickey v. Mickey, 974 A.2d 641 (Conn. 2009).

[3] *See infra* Parts IV–V (discussing the debate about the interpretations of the *Mickey* decision).

[4] *Mickey*, 974 A.2d at 645 & n.2.

[5] *Id.* at 646.

[6] CONN. GEN. STAT. ANN. §§ 5-192e–x (West 2009).

[7] Under the normal Tier II plan, a member

> who has attained the age sixty-five and has completed ten or more years of vesting service may retire on his own application on the first day of any future month named in the application. Benefits shall be payable from that date provided the member is no longer in state employment.

Id. § 5-192l(a).

[8] *Id.* §§ 5-173, 5-192n.

fourteen years of credited service, which did not qualify him for hazardous duty retirement. The defendant, however, did have a vested interest in the SERS Tier II pension.

Shortly after the dissolution of marriage was finalized, the defendant was injured on the job. He intervened in a fight between two inmates in the segregation unit and sustained injuries to his neck, right shoulder, and lower back. These injuries caused the defendant to miss about seven weeks of work before they forced him into retirement. Pursuant to his employment with the state, he was enrolled in the SERS, making him eligible for both normal retirement benefits and disability retirement benefits.[9] As a result of his debilitating injury, his monthly retirement benefit payment increased substantially from $990.00 per month to approximately $2,300.00 per month, and the plaintiff continued to receive forty percent of the entire benefit received by the defendant, including the portion attributable to the post-judgment disability, retroactive to the date of retirement.[10]

On January 13, 2006, the defendant filed a motion for clarification with the trial court on two grounds: (1) that the decision, though silent on the matter, did not intend for the plaintiff to be entitled to a portion of the defendant's disability retirement pension since the court specifically noted its intentions to provide the plaintiff with a share of the defendant's Tier II pension or his hazardous duty retirement; and (2) that regardless of whether the decision intended the plaintiff to be entitled to such funds, the court was without statutory authority to assign a portion of the defendant's disability retirement pension where it was an asset acquired *subsequent* to the dissolution.[11] The defendant's motion for clarification was denied. The trial court also determined that the court had the right to distribute the defendant's disability benefits, and that he therefore was not entitled to any relief.[12] The defendant subsequently appealed the case to the appellate court. He then filed a motion to transfer the case to the Connecticut Supreme Court, which was granted. The supreme court reversed the trial court's holding and ordered that the plaintiff was only entitled to the defendant's benefits as they were at the time of the dissolution of marriage.[13] This decision placed *Mickey* at the forefront of equitable distribution law in Connecticut.[14]

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[9] *Id.*

[10] The benefit also immediately vested at the time of disability, rather than being collectible at the time of the defendant's retirement. *Mickey*, 974 A.2d at 646.

[11] *Id*. at 645.

[12] *Id.* at 647.

[13] *Id*. at 664.

[14] In response, the plaintiff filed for reconsideration en banc, which was denied. This denial suggested that *Mickey* would remain good, and relevant, law, as the court decided that there was clearly no need to rehear arguments on the issue with a second opportunity for review.

This Comment proceeds in five Parts. Part II addresses the extent of the court's jurisdiction to equitably distribute marital assets through a broad statutory mandate and traces the judicial history of equitable distribution in Connecticut by reviewing several cases preceding *Mickey*. Part III discusses the manners in which other jurisdictions have equitably distributed marital assets. Part IV analyzes the *Mickey* majority decision and the dissenting opinion. Part V addresses the future implications of the *Mickey* decision and whether it serves to overrule the court's preceding decisions on the matter. Finally, Part VI concludes by addressing the issue of where Connecticut jurisprudence stands today in regard to the equitable distribution of marital assets in light of the court's somewhat controversial and ambiguous holding in *Mickey*.

II. THE COURT'S JURISDICTION TO EQUITABLY DISTRIBUTE MARITAL ASSETS AND THE JUDICIAL HISTORY OF EQUITABLE DISTRIBUTION IN CONNECTICUT

The Supreme Court of Connecticut noted in *Smith v. Smith* that "it is . . . well settled that '[c]ourts have no inherent power to transfer property from one spouse to another; instead, that power must rest upon an enabling statute.'"[15] As such, in the context of a dissolution of marriage action, the courts derive their authority to determine what constitutes property that is subject to equitable distribution from section 46b-81 of the Connecticut General Statutes. The relevant language of the statute is as follows:

> At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the superior court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect.[16]

The Connecticut Supreme Court has held that this statutory grant of jurisdiction extends to property "possessed during [the parties'] marriage."[17] In this respect, the overarching belief that governs the equitable distribution of marital assets is that marriage constitutes more than simply a romantic relationship, but can also be considered an

[15] Smith v. Smith, 752 A.2d 1023, 1029 (Conn. 1999) (quoting Passamano v. Passamano, 634 A.2d 891, 893 n.4 (Conn. 1993)).
[16] CONN. GEN. STAT. ANN. § 46b-81(a) (West 2009).
[17] *Smith*, 752 A.2d at 1030.

economic partnership.[18]

Over the past two decades, the Connecticut judicial system has struggled with locating a bright line that differentiates between divisible and non-divisible assets in an effort to unscramble the ownership of property during a dissolution of marriage proceeding designed to give each spouse what is equitably his or hers.

The Connecticut Supreme Court began its effort to narrow and interpret the statutory language by determining what did not constitute marital property subject to equitable distribution in *Rubin v. Rubin*.[19] In that case, the plaintiff was the residuary beneficiary of a revocable inter vivos trust created by his mother.[20] At the time of the marital dissolution action, the trust had not yet vested.

The court declined to adopt the position that a contingent award of expected property could be upheld as a property transfer sanctioned under section 46b-81.[21] It concluded that the equitable distribution of marital assets did not encompass contingent transfers of expected property and that it would not extend the statutory language in this way.[22] The court noted that it was the legislature's responsibility to amend the statute accordingly if it desired the statute to encompass such scenarios.[23] In this respect, the court stated that "[t]o uphold the award of a share of an expectancy as contingent alimony might fairly be viewed as sanctioning in a different guise an assignment of property not then within the jurisdiction of the court, which we have concluded § 46b-81 does not authorize."[24] In sum, the court concluded that it was outside the scope of the statute's control to divide property that the parties did not possess during their marriage, but that they obtained after the dissolution was finalized.[25]

Less than a decade later, the Connecticut Supreme Court was again faced with the issue of how to equitably distribute the parties' marital assets. In *Krafick v. Krafick*, the court had to determine whether vested pension benefits constituted property for the purpose of equitable distribution.[26] In that case, the couple had been married for over thirty years and had seven children.[27] The plaintiff wife was a homemaker for the majority of the marriage, eventually returning to work part-time in a

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[18] Grace Ganz Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutions: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250, 1251 (1986).

[19] 527 A.2d 1184 (Conn. 1987).

[20] *Id.* at 1186.

[21] *Id.* at 1187.

[22] *Id*. at 1188.

[23] *Id*.

[24] *Id.* at 1190.

[25] *Id.* at 1187–88.

[26] Krafick v. Krafick, 663 A.2d 365, 366 (Conn. 1995).

[27] *Id.*

bakery.[28] The defendant worked as a teacher, but retired after thirty-four years of service, shortly after the parties' marriage was dissolved.[29] As a result, the defendant's pension did not vest until after the parties' dissolution of marriage was finalized.

Since the word "property" was not defined in the relevant legislation, the court began its analysis in *Krafick* by defining it, utilizing the common understanding of the term. Relying on *Black's Law Dictionary*'s very broad definition of property, which encompassed everything that is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, the court concluded that "[n]othing in the legislative history of § 46b-81 indicates an intent to narrow the plain meaning of 'property' from its ordinarily broad and comprehensive scope. Indeed, the term 'property' has been broadly defined elsewhere in the General Statutes."[30] The court reasoned that the un-matured pension benefits were also considered property because they represented an enforceable contractual right.[31] Although it was contingent on future events, the court held that it constituted more than a mere expectancy because there was a strong likelihood that the pension would vest.[32]

After establishing that pension benefits were equitably distributable property under section 46b-81, the court turned to a public policy argument to support this finding. It reasoned that since pension benefits were widely recognized as one of the most valuable assets that parties develop over the course of their marriage, it would be unfair and contrary to the purpose of the statute to strip the non-employee spouse of the value of the retirement asset by precluding the court from evaluating its worth prior to adjudicating the property rights of the parties.[33] Based on its finding of a broad definition of property, as well as its strong policy convictions, the court concluded that the term "property," as used in section 46b-81, included a right, which is "contractual in nature, to receive vested pension benefits in the future."[34] The court found that the trial court had abused its discretion by refusing to assign an appropriate valuation to the pension benefits, and by treating the pension as a mere expectancy rather than equitably distributable property; the court remanded the case to the trial court to make such an assignment.[35]

The law of equitable distribution of contingent property during a

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[28] *Id.*

[29] *Id.* at 367.

[30] *Id.* at 371; *see also* CONN. GEN. STAT. ANN. § 52-278a (West 2009) (defining property for purposes of attachment as "any present or future interest in real or personal property, goods, chattels or choses in action, whether such is vested or contingent").

[31] *Krafick*, 663 A.2d at 372.

[32] *Id.*

[33] *Id.* at 371–72.

[34] *Id.* at. 372–73.

[35] *Id.* at 376.

dissolution of marriage proceeding continued to develop in the following years. In *Simmons v. Simmons*, the Supreme Court of Connecticut had to decide if something as intangible and invaluable as a medical degree constituted property that could be equitably distributed as a marital asset.[36] In this case, the critical problem was that the couple had few economic assets.[37] As such, "[t]he degree, with its potential for increased earning power, [was], therefore, the only thing of real economic value to the parties."[38] The defendant relied on the court's expansive interpretation of property in *Krafick* to argue that an advanced degree obtained during the marriage constituted property.[39] The plaintiff, however, argued that a medical degree could not be distributed as property because it had "no inherent value independent of the holder and [did] not fit within the statutory definition of property."[40] The court reasoned that, while it did not retreat from the definition of property espoused in *Krafick*, the term certainly had limits.[41]

The court stated that whether an interest could be considered equitably distributable property under section 46b-81 depended on whether it was presently existing or a mere expectancy, as section 46b-81 did not apply to mere expectancies.[42] The court analogized the medical degree to the interest in an anticipated inheritance, which is not considered property under section 46b-81.[43] Conversely, the court distinguished the medical degree from interests like vested pension benefits, which seem like expectancies because they are deferred compensation, yet are still presently existing, enforceable contract rights that represent more than a mere expectancy despite the fact that they are contingent on future events.[44] The court went on to note that "[t]he enforceable rights inherent in a vested pension make it distinctly different from the expectation of possible benefits afforded by an advanced degree."[45] In this respect, the medical degree did not entail a presently existing, enforceable right. Thus, the possibility of future earnings did not constitute a presently existing right, but a mere expectancy, and therefore, could not be subject to equitable distribution.

By the late 1990s, the court had begun to carve out a digestible paradigm for understanding what types of property were subject to equitable distribution during a dissolution of marriage action. The

[36] Simmons v. Simmons, 708 A.2d 949, 951 (Conn. 1998).
[37] *Id.* at 952.
[38] *Id.*
[39] *Id.* at 953–54.
[40] *Id.* at 953.
[41] *Id.*
[42] *Id.* at 953–54.
[43] *Id.* at 954.
[44] *Id.*
[45] *Id.* at 954–55.

property landscape, however, was further complicated by the Supreme Court of Connecticut's analysis in *Bornemann v. Bornemann*.[46] In that case, the defendant husband was employed full-time and had extensive employment experience in management and lobbying, while the plaintiff wife was primarily a homemaker, taking care of the parties' special needs child.[47] Not only did the defendant make a substantial salary, but he also received stock options through his employer.[48] The defendant appealed the dissolution judgment, claiming that the trial court erred in distributing the unvested fourth and fifth flights of his stock options.[49]

After reviewing its recent rationales and decisions in *Simmons* and *Krafick*, the court analogized the stock options to the unvested pension benefits, finding that the defendant's interest in the options amounted to more than a mere expectancy.[50] The defendant entered into a termination agreement with his employer that gave him the right to remain classified as an employee for a certain period of time so as to allow him to exercise the fourth and fifth flights of his stock options, which remained unvested at the time of the agreement.[51] The defendant did not have to engage in any affirmative acts in order to retain the options, but only had to refrain from certain actions for a specific period of time.[52] Although the fourth and fifth flights were not presently exercisable at the time of the dissolution, and certain circumstances could have resulted in their forfeiture, the court held that the stock options still constituted more than a mere expectancy because maintaining them only required passive activity.[53] It reasoned that under the circumstances, "the restrictions qualitatively were more closely analogous to other contingencies typically associated with deferred benefits," like pensions.[54] The court also relied on the trend in other jurisdictions, which had been to treat unvested stock options as property on the grounds that they produced a contractual right, a valuable form of intangible property.[55] In support of this reliance, the court noted that should the employer attempt to withdraw his offer, the employee would have a potential action in contract against him.[56]

Rather than determining ownership based on when the options actually vested, the court apportioned the unvested stock options according to when they were earned, ensuring that the plaintiff was entitled to fair, but not

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[46] 752 A.2d 978 (Conn. 1998).
[47] *Id.* at 982.
[48] *Id.*
[49] *Id.* at 983–84.
[50] *Id.* at 984–86.
[51] *Id.* at 985.
[52] *Id.* at 991.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 986.
[56] *Id*. at 985.

overreaching compensation.[57] Further, the court considered the purpose of the options, and whether it was to compensate the employee for past or present services, or to create an incentive for future services.[58] In this case, the unvested stock options were part of the defendant's compensation for services rendered in the past, and therefore, constituted marital property that was subject to division because, as previously noted, they served as deferred compensation which, if acquired contemporaneously with his normal compensation, would have contributed to the marital household.[59]

This decision further developed the concept of property as defined under section 46b-81, and required the court to explore and dissect the ambiguous area between mere expectancies and presently existing interests.[60] The new rule that seemed to emerge from *Bornemann* was that any property which established a contractual right, including unvested stock options, could not be considered a mere expectancy, and therefore, could be considered an interest that was sufficient to constitute property under Connecticut's equitable distribution statute.

The supreme court's next case on the issue of equitable distribution was quite complicated. In *Lopiano v. Lopiano*, the plaintiff husband had served in Vietnam and then founded his own company, which the parties later sold.[61] Over the next several years, the plaintiff battled addictions to cocaine and alcohol, had an affair with another woman, and was diagnosed with post traumatic stress disorder.[62] After being arrested and receiving in-patient care for his mental illness and addiction, he returned to the workforce as a construction worker in New York.[63] The defendant supported the plaintiff throughout his struggles, reconciling with him on at least one occasion, and helping to keep the business operating when the defendant was incapable of doing so on his own.[64]

After the plaintiff returned to work, he had an accident and sustained severe physical injuries, which resulted in his complete physical disability.[65] The plaintiff then pursued a negligence action, which he won, leaving him with an award of $800,000.[66] The defendant continued to be supportive after the accident by assisting the plaintiff with his relocation to a hospital near her, visiting and caring for him on a daily basis.[67] The trial court found that the defendant was in good health and making a decent

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[57] *Id.* at 989.
[58] *Id.* at 987–88.
[59] *Id*. at 991.
[60] *Id.* at 984–85.
[61] Lopiano v. Lopiano, 752 A.2d 1000, 1005 (Conn. 1998).
[62] *Id.*
[63] *Id.*
[64] *Id.* at 1005–06.
[65] *Id.* at 1005.
[66] *Id.*
[67] *Id.*

living as a medical office secretary, and the plaintiff survived comfortably off of Social Security disability, veteran's disability benefits, and worker's compensation benefits.[68]

The plaintiff claimed that the trial court erred in including the portion of his personal injury award received as compensation for pain and suffering and the portion that served as compensation for post-dissolution lost wages as property subject to distribution under section 46b-81.[69] The plaintiff, however, also recognized that the judgment in his personal injury case clearly amounted to a presently existing property interest in a specific award that fell within the realm of section 46b-81.[70] The court noted that there were three different approaches among the various jurisdictions that it could follow when determining how to divide personal injury judgments for the purposes of distribution in a marital dissolution proceeding.[71]

The first was to "classify any such award or settlement as the personal and entirely separate property of the injured spouse."[72] The second approach required the assessment of the purpose of the compensation in order to determine whether the property was "marital" or "personal."[73] The third approach, and the more modern trend, asserted that any award acquired during the marriage should be deemed marital property regardless of its underlying purpose.[74] None of these approaches, however, directly mirrored the way that Connecticut approached such dilemmas.

Instead, the court recognized that "[r]ather than narrow the plain meaning of the term 'property' from its ordinarily comprehensive scope, in enacting § 46b-81, 'the legislature acted to expand the range of resources subject to the trial court's power of division, and did not intend that property should be given a narrow construction.'"[75] It defined property, for purposes of section 46b-81 as:

> [T]he term commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments.[76]

Simply because the property belonged to one of the parties did not

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[68] *Id.* at 1006.
[69] *Id.*
[70] *Id.* at 1009.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 1010.
[75] *Id.* at 1008 (quoting Bornemann v. Bornemann, 752 A.2d 978, 984 (1998)).
[76] *Id.* at 1007–08 (internal quotation marks omitted).

guarantee that he or she would be the ultimate owner, as the legislature gave the court broad discretion in arriving at an equitable distribution of the marital assets.[77] In the end, the court found that it could subject the plaintiff's personal injury compensation to equitable distribution because the injury for which the award was ultimately given occurred during the parties' marriage, thereby placing it in the realm of distributable property.[78] In fact, in footnote five of the decision, the court recognized that the paramount question in determining whether an asset is distributable property is whether the interest is earned prior to or subsequent to the date of dissolution.[79] The implication from this language is quite clear: assets earned prior to the dissolution, even those representing compensation for future services, constituted marital property, while assets earned after the date of dissolution did not.

In his dissent, Justice McDonald raised an interesting point that was later used as support for the majority's finding in *Mickey*. He stated, "[i]t is difficult to conceive how compensation for pain and suffering and future lost wages can be considered *fruits* of the marriage, as they do not arise out of the marriage and are independent of it."[80] Justice Berdon, also dissenting, argued that following the court's reasoning in *Bornemann*, unvested stock options constituted marital property because they were earned prior to the date of dissolution. Further, he argued that the plaintiff in the instant case had not earned the portion of the award that pertained to his future pain and suffering, that he did not experience that anguish during the course of the marriage, and that the relevant damages were not intended to compensate him for his past agony.[81]

In the end, however, the majority found that although the plaintiff may suffer from the repercussions of the injury after the marital dissolution was finalized, the plaintiff was injured while the marriage was still intact, thereby allowing for the personal injury compensation to be considered property subject to equitable distribution because it represented a then presently existing property interest of a determinable value.[82]

The property distribution landscape was further complicated by the Connecticut Supreme Court's holding in *Smith v. Smith*. In that case, the parties held many different professional positions during their marriage. After reviewing the parties' financial affidavits, the trial court concluded that the defendant had acquired all of her assets through her own efforts and investments with the exception of $275,000 that she received in the

[77] *Id.* at 1010–11.
[78] *Id.* at 1011.
[79] *Id.* at 1009 n.5.
[80] *Id.* at 1022 (McDonald, J., dissenting) (emphasis added).
[81] *Id.* at 1019 (Berdon, J., dissenting).
[82] *Id.* at 1011.

settlement of a lawsuit against her employer.[83] Basing its decision on the fact that the parties were only married for four out of the five years of the defendant's employment from which the settlement claim arose, the trial court awarded the plaintiff $75,000 of the $275,000 total settlement received by the defendant.[84]

In reviewing the trial court's decision, the court reiterated the long standing notion that the purpose of property division pursuant to a dissolution proceeding was "to unscramble existing marital property" and provide equitable shares to each party.[85] Further, "an attempt to divide expected property [was] outside the scope of the statutes because it [did] not divide the property that the parties possessed during their marriage."[86] The court ultimately determined that the trial court reasonably found that the defendant's claim against her employer was an inchoate marital asset at the point of equitable distribution; through the defendant's work at the company, she had already earned an enforceable right to the compensation before the dissolution of marriage was finalized. The court went on to explain in dicta that the fact that the plaintiff may not have helped in the acquisition of the settlement "[did] not vitiate the fact that the right to the asset had been earned mostly during the parties' marriage,"[87] thereby making it subject to equitable distribution upon dissolution.

The court also addressed the issue of the trial court's statutory authority to divide after-acquired assets, finding that the trial court lacked the requisite statutory authority to divide assets acquired after a marriage had formally ended through a dissolution proceeding.[88] Another property dispute arose between the parties over a potential trust estate. The trial court entered an order retaining continuing jurisdiction for several years after the entry of judgment over any interest the plaintiff could have in a family trust, for the express purpose of distributing the asset if and when it was received.[89] The plaintiff appealed this decision, claiming that the trial court exceeded its jurisdiction in retaining jurisdiction over the family trust.[90] Maintaining consistency with its ruling on the defendant's employment settlement, the court reversed the decision of the trial court, reasoning that "the marital estate divisible pursuant to § 46b-81 refers to interests already acquired, not to expected or unvested interests, or to interests that the court has not yet quantified."[91]

[83] Smith v. Smith, 752 A.2d 1023, 1028 (Conn. 1999).
[84] *Id.*
[85] *Id.* at 1030.
[86] *Id.* (emphasis omitted).
[87] *Id.* at 1036.
[88] *Id.* at 1031.
[89] *Id.* at 1028.
[90] *Id.* at 1026.
[91] *Id.* at 1030.

Just a year later, the appellate court was faced with an issue that required it to apply the developing property distribution paradigm. After eighteen years of marriage, the parties in *Hopfer v. Hopfer* filed for a dissolution of their marriage.[92] The defendant worked at a subsidiary of Viacom and upon the company's announcement that it would be selling this subsidiary, the defendant began to worry about the security of his position under the prospect of new management.[93] The defendant's employment with a new company as the chief information officer began approximately two months before the court rendered judgment in the parties' dissolution of marriage action.[94] The defendant received a base salary as well as shares of stock, which vested at a rate of twenty-five percent per year with an initial vesting date nearly a year after their dissolution of marriage was finalized.[95]

The court began its analysis by distinguishing the Connecticut Supreme Court's holding in *Bornemann* from the instant case. The court noted that "in *Bornemann*, the stock options were found to be awarded for past services rendered."[96] Conversely, in the instant case, the court affirmed the trial court's finding that the defendant's unvested stock options were compensation for services, which would be rendered post-judgment, and were therefore not marital property subject to distribution during the marital dissolution.[97] The court concluded that it was not an error for the trial court to have excluded the options as marital property where they were an incentive for future services provided, not a reward for past services rendered.[98]

As a result of this decision and its predecessors, the cases' holdings slowly began to paint a comprehensible picture of the judicial landscape surrounding the equitable distribution of marital assets by clearly distinguishing between what did and did not constitute property under the applicable statute.

The following year, however, *Bender v. Bender* quickly muddied the seemingly clear waters of equitable distribution jurisprudence. In that case, the parties had been married for over twenty years and had four children together.[99] At the time of the dissolution, the defendant had been employed as a firefighter for nineteen years.[100] The defendant was entitled to a pension if he reached twenty-five years of service.[101] Therefore, at the

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[92] Hopfer v. Hopfer, 757 A.2d 673, 674 (Conn. App. Ct. 2000).
[93] *Id.* at 675.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 677.
[97] *Id.*
[98] *Id.*
[99] Bender v. Bender, 785 A.2d 197, 202 (Conn. 2001).
[100] *Id.* at 203.
[101] *Id.*

time of the dissolution of marriage action, his benefits were unvested, except in regards to disability. If the defendant were to leave service before the twenty-five years, and not as a result of a disability, he would receive only the contributions that he had made to the pension plan to date.[102] The Supreme Court of Connecticut granted certiorari on the issue of whether unvested pension benefits could be considered property under section 46b-81, thereby subjecting them to equitable distribution during a marital dissolution proceeding.[103]

The defendant claimed that the unvested pension benefits were not property under the applicable statute, while the plaintiff claimed that the defendant's interest in the unvested pension benefits was not a mere expectancy, but rather, constituted a presently existing property interest, thereby allowing for its subjection to equitable distribution.[104] The court first noted that equity must rely on substance rather than mere form, finding that since nineteen of the twenty-five years necessary for the vesting of the defendant's pension benefits were years in which the parties were marital partners, that the unvested pension benefits still constituted marital property subject to equitable distribution under the statute.[105] In analyzing the foregoing decisional law, the court identified the common theme in determining whether a certain interest was property subject to division: whether the party's "expectation of a benefit attached to that interest was too speculative to constitute divisible marital property."[106] The court articulated the following test:

> [I]n determining whether a certain interest is property subject to equitable distribution under § 46b-81, we look to whether a party's expectation of a benefit attached to that interest was too speculative to constitute divisible marital property. . . . In cases in which an interest was so speculative as to constitute a mere expectancy, we concluded that it was not property subject to equitable distribution; . . . whereas, in cases in which an interest was not so speculative as to constitute a mere expectancy, but rather a presently existing interest in property, we treated it as property subject to equitable distribution.[107]

Extrapolating from this test, the court held that the defendant's unvested pension benefits were not too speculative to be considered property subject to equitable distribution under the statute, explaining:

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[102] *Id.*
[103] *Id.* at 204–05.
[104] *Id.* at 205.
[105] *Id.* at 211.
[106] *Id.* at 209.
[107] *Id.*

> Our conclusion that the defendant's unvested pension benefits are not a mere expectancy is consistent with the nature of retirement benefits, and the fact that employers and employees treat retirement benefits as property in the workplace. . . . [P]ension benefits represent a form of deferred compensation for services rendered . . . . Most retirement plans permit the employee to take a reduction in present salary in exchange for increased future retirement benefits . . . . If retirement benefits were truly only [a mere expectancy], employers and employees would not treat them as a substitute for present wages.[108]

Such a movement away from precedents through the creation of a less flexible test with defined parameters was presumably grounded in productive and positive intentions. A potential rationale for such a test was to impose something of an immediate offset method, which would sever the parties' economic ties and prevent further judicial oversight of the matter. In the end, *Bender*'s legacy lived on through its establishment of a two-part test to determine equitably distributable property. Either the property must be: (1) presently existing and legally enforceable property rights; or (2) contingent or unvested property that is not too speculative in nature.[109]

In the dissent, Justice Zarella argued that the majority misconstrued both the statute and the applicable case law, which indicated that only those interests in which a party had a presently existing, enforceable right could be deemed property subject to equitable distribution under section 46b-81.[110] Further, he asserted that the case law demonstrated that if the interest was merely an expectancy, it could not be subject to equitable distribution, considering that there was a risk that the holder of the unvested or future benefits could never receive them.[111] Justice Zarella continued in his dissent to acknowledge that such expectancies should not be ignored in calculating the equitable distribution of the marital assets, but could be accounted for when considering the parties' ability to acquire income in the future.[112] As such, Justice Zarella argued that when a pension benefit became vested and was in payment status, the trial court could treat it as a changed circumstance that would warrant the alteration of the alimony award.[113] For him, the solution was not simply to change the legal framework to prevent continued judicial oversight, but to

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[108] *Id.* at 210 (citation omitted) (internal quotation marks omitted).
[109] *Id.* at 209.
[110] *Id.* at 221 (Zarella J., dissenting).
[111] *Id.* at 224–25.
[112] *Id.* at 225.
[113] *Id.* at 226.

maintain the bright line rule articulated in both the statute and the case law, a decision which could lead to future litigation down the road, but would operate harmoniously with precedent. His staunch opposition to the court's holding in this case would later serve as the catalyst to facilitate the *Mickey* majority decision, now the binding authority in Connecticut.

After a six-year lull, the Appellate Court of Connecticut found itself addressing the same issue that had plagued the Supreme Court of Connecticut for over a decade, that of the equitable distribution of marital assets. In *Czarzasty v. Czarzasty*, the parties had been married for nearly fifteen years.[114] Throughout their marriage the wife had worked for Merrill Lynch in various positions while the husband initially worked as the president of a construction company.[115] When the company dissolved, the wife helped her husband obtain a job at Merrill Lynch and the couple began to work together as an investment team, with the parties splitting their commissions seventy-thirty between the wife and husband, respectively.[116] The couple remained an investment team until 2001. At the time of the dissolution, both parties were still employed at Merrill Lynch.[117] Merrill Lynch provided various financial plans for its employees, including the investment certificate plan, a performance-based deferred compensation award in the amount of $100,000, which was awarded after ten years of employment with Merrill Lynch as long as the employee met a specific production goal during that ten-year period.[118] By the time of their marital dissolution, the wife had already received her certificate, and the defendant was projected to receive his award in two years, and was on target to meet his production goal.[119]

The trial court somewhat simplistically determined that, "because the certificate was intended to procure ten years of employment," and "because two years of that period would take place post-divorce," the certificate had been eighty percent earned.[120] In this respect, the court found that the husband's interest in the certificate was marital property subject to distribution under section 46b-81.[121] The husband subsequently appealed the court's finding.[122]

In reviewing the previous case law that had addressed this issue, the appellate court found that there was a nuanced and sometimes subtle difference between expected property, which was currently nonexistent

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[114] 922 A.2d 272, 273 (Conn. App. 2007).
[115] *Id.*
[116] *Id.* at 274.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* at 279.
[122] *Id.* at 274.

and could never exist, and a sufficiently concrete and reasonable probability that the property would vest.[123] Under a modified version of the *Bender* test, the court stated that:

> If the likelihood [wa]s not too speculative, then it [wa]s property subject to valuation and distribution. . . . [T]he trial court in this instance did not comment on whether the party had a presently existing contractual right to the future receipt of the asset in question. Rather, the court made an assessment of the probability that the defendant would, in fact, receive the asset.[124]

The appellate court deferred to the trial court's finding that the certificate was property subject to equitable distribution because it was more than a mere expectancy, as there was a strong probability that it would vest within two years.[125]

The final case that defined the equitable distribution regime in Connecticut prior to *Mickey* was decided ten weeks after *Czarzasty*. In the summer of 2007, the appellate court rendered its decision in *Ranfone v. Ranfone*.[126] In that case, the parties had been married for nearly twenty years and had one child.[127] The trial court had divided the marital assets by ordering the defendant husband to pay alimony to the plaintiff wife while also sustaining a health insurance plan for her during the period of payment.[128] Among other divisions, the court awarded the plaintiff fifty percent of the value of the defendant's pension, "valued and payable to her as of the date that he first bec[ame] eligible to begin collecting his share of the pension. . . ."[129]

The defendant appealed the trial court's decision, arguing that the court did not err in dividing the pension benefits, but that it should have only included contributions made until the date of the marital dissolution; therefore, the court improperly awarded the plaintiff too much of the defendant's pension benefits.[130] The defendant further cited *Bornemann* in arguing that assets must be earned during the marriage to constitute marital property subject to equitable distribution during a dissolution proceeding.[131]

Relying on the Connecticut Supreme Court's previous holding in *Bender*, the appellate court upheld the trial court's holding, stating that the

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[123] *Id.* at 276–78.
[124] *Id.* at 278.
[125] *Id.* at 278–79.
[126] Ranfone v. Ranfone, 928 A.2d 575 (Conn. App. 2007).
[127] *Id.* at 576.
[128] *Id.*
[129] *Id.* at 577.
[130] *Id.*
[131] *Id.*

case law interpreting what could properly be considered marital property pursuant to section 46b-81 considered the "equitable purpose of [the] statutory distribution scheme, rather than . . . mechanically applied rules of property law."[132] Therefore, although there were undeniable differences between the situation in *Bender* and that in the instant case, as the *Bender* court would presumably have ruled in the opposite manner by only awarding the plaintiff the part of the pension that coincided with the marriage, the court analogized the cases and noted that the broad language of *Bender* allowed for judicial discretion in determining what constituted marital property.[133] This decision opened the door for some major changes in the dissolution of marriage arena, and it would only take a matter of a few years for them to come to fruition.

III. OTHER JURISDICTIONS' TREATMENT OF DISABILITY BENEFITS

Most jurisdictions have attempted to create bright line rules to guide the equitable distribution of marital assets.[134] Due to advanced technology and unanticipated types of property, however, maintaining a universally applicable standard has been nearly impossible. The Rhode Island Supreme Court held in *Thompson v. Thompson* that since disability benefits serve as compensation for loss of future earning capacity, they should not constitute a marital asset subject to equitable distribution.[135] In that case, the two parties filed for divorce after a long-term marriage.[136] Throughout their marriage, the plaintiff was a homemaker while the defendant worked as a firefighter until obtaining subsequent employment after a work-related disability.[137] The trial court initially awarded the plaintiff sixty-five percent of the marital assets, including sixty-five percent of the defendant's disability pension.[138] The supreme court held that because disability benefits compensate a wage earner for lost earning capacity, the benefits do not constitute part of the marital estate.[139] The court further held, however, that the lower courts may consider disability benefits as income for the purposes of determining alimony and child support awards.[140] Academics have criticized the court's holding in *Thompson* on the grounds that the determination of what constitutes property subject to equitable distribution during a marital dissolution action should be assessed on a case-by-case basis, rather than by creating

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[132] *Id.* at 580.
[133] *Id.*
[134] This Comment will consider decisions from the highest courts in Rhode Island and New York.
[135] Thompson v. Thompson, 642 A.2d 1160, 1163 (R.I. 1994).
[136] *Id.* at 1161.
[137] *Id.*
[138] *Id.*
[139] *Id.* at 1163.
[140] *Id.* at 1164.

generally applicable rules.[141] This case is analogous to the Supreme Court of Connecticut's holding in *Mickey*.

Another Rhode Island Supreme Court ruling a few years later further advanced the law of equitable distribution of marital assets. In *Giha v. Giha*, the court held that lottery ticket winnings that arose during the interlocutory period of a divorce were subject to equitable distribution as a marital asset.[142] Since the final dissolution decree had not been officially ordered, the court held that the parties were still legally married and therefore obligated to disclose changes in financial circumstances.[143] Academics have applauded this decision because it "protects spouses from nondisclosure and ensures that lottery [winnings] occurring prior to the final divorce decree are marital assets subject to . . . equitable distribution. . . ."[144] The holding created a bright-line rule that any assets obtained prior to the dissolution of marriage could be subject to equitable distribution, while those obtained after dissolution presumably were not. *Mickey* also seems to create something of a bright-line rule for the application of the statute through the court's use of the "fruits of the marriage" language.[145]

Only a few states away, the New York Court of Appeals was also faced with the issue of equitable distribution in *DeLuca v. DeLuca*.[146] In that case, the parties had been married for over thirty years.[147] The husband worked for the New York City Police Department (NYPD), advancing to the rank of Detective, First Grade, while the wife was a homemaker.[148] Before the dissolution of marriage judgment was issued, the husband retired from the NYPD, after thirty-one years of service, and began receiving both his regular pension benefits and his Police Superior Officer's Variable Supplement Fund (PSOVSF) benefits.[149] The appellate division found that only the husband's regular pension benefits were marital property subject to distribution.[150] The New York courts had previously stated that, "[i]n the context of marital property, pensions have been described as 'contract rights of value, received in lieu of higher

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[141] Janet A. Mesrobian, Comment, *Disabling Equitable Distribution: Disability Pension Not Subject to Equitable Distribution as Marital Asset*—Thompson v. Thompson, 642 A.2d 1160 (R.I. 1994), 29 SUFFOLK U. L. REV. 631, 634 (1995).

[142] 609 A.2d 945, 949 (R.I. 1992).

[143] *Id.* at 948–49. The court reasoned that the parties remained husband and wife until the entry of the final divorce decree; the interlocutory order did not sever the matrimonial or economic ties between the parties. *Id.* at 948.

[144] Kimberly D. Goodman, *Lottery Ticket Obtained During Interlocutory Period of Divorce a Marital Asset*—Giha v. Giha, 609 A.2d 945 (R.I. 1992), 27 SUFFOLK U. L. REV. 536, 539 (1993).

[145] Mickey v. Mickey, 974 A.2d 641, 663 (Conn. 2009) (citation omitted).

[146] 762 N.E.2d 337 (N.Y. 2001).

[147] *Id.* at 338.

[148] *Id.*

[149] *Id.*

[150] *Id.*

compensation, which would otherwise have enhanced either marital assets or the marital standard of living.'"[151] In the instant case, however, the appellate division reasoned that the PSOVSF benefits were not the type that accrued over time nor were they received in lieu of higher compensation which would have enhanced the marital assets or standard of living.[152] Instead, they were the type that became available only upon the occurrence of two conditions: (1) an officer had to be a member of the benefit fund, and (2) he or she had to retire after at least twenty years of service.[153]

On appeal, the court of appeals reversed the appellate division's decision, instead holding that a non-pension supplemental benefit received by a New York police officer was marital property subject to equitable distribution in a divorce settlement, notwithstanding the fact that the officer did not become eligible to receive the benefit until after the divorce action commenced.[154] The court reasoned that in light of the broad conception of marital property, "vesting" was not a determinative factor.[155] Further, the court noted that, based on previous cases, compensation obtained after the marital dissolution for services rendered during the marriage was deemed marital property.[156] Although this benefit was not related to a pension, it was awarded to the husband for past services rendered. Therefore, rather than following the traditional rule that benefits are not divisible unless they have vested, the court adopted a new standard that if benefits could be interpreted as compensation for past services that were rendered during the marriage, at least a portion would be subject to equitable distribution regardless of the vesting date. Interestingly, the court's opinion in *DeLuca*, although not mandatory authority, operates harmoniously with the Connecticut Supreme Court's decision in *Mickey*, as the defendant's disability benefits were not compensation for past services rendered but rather functioned as payment for future lost wages resulting from his post-dissolution debilitating injury.

IV. ANALYZING THE *MICKEY* MAJORITY DECISION AND THE DISSENTING OPINION

At the time that *Mickey* entered the judicial landscape, the statutory grant of jurisdiction under Connecticut General Statutes section 46b-81 extended to property "possessed during [the] marriage"[157] and to property

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[151] DeLuca v. DeLuca, 718 N.Y.S.2d 364, 366 (App. Div. 2000) (quoting Majauskas v. Majauskas, 463 N.E.2d 15, 20–21 (N.Y. 1984)), *rev'd*, 762 N.E.2d 337 (N.Y. 2001).

[152] *Id.* at 368.

[153] *Id.* at 366.

[154] *DeLuca*, 762 N.E.2d at 341–42.

[155] *Id.* at 340 (internal quotation marks omitted).

[156] *Id.* (citation omitted).

[157] Smith v. Smith, 752 A.2d 1023, 1030 (Conn. 1999).

interests that were not "too speculative to constitute divisible marital property."[158] In other words, section 46b-81 applied to interests that were more than mere expectancies, but that were not necessarily currently vested entities. The case law prior to *Bender* seemed to consistently establish the general rule that assets earned prior to the date of dissolution, even those representing compensation for future services, constituted marital property that was subject to distribution, while assets earned after the date of dissolution did not.[159] *Bender*, however, quickly turned this easily applicable standard on its head, and seemed to create a second step for consideration based on the speculative nature of the contingent asset.[160] After the decision in *Mickey*, the looming question remained whether the "too speculative" rule that was memorialized in *Bender* was still good law. In the *Mickey* decision, the Connecticut Supreme Court appeared to revert to the same analytical framework that it had used in *Lopiano* and the other related cases prior to *Bender*. In this respect, it was not surprising that the author of the majority opinion for *Mickey*, Justice Zarella, was also the author of the dissenting opinion in *Bender*.[161]

The plaintiff in *Mickey* first relied on the court's holding in a previous case, *Travelers Insurance Co. v. Pondi-Salik*,[162] to assert that the defendant's disability benefits were subject to equitable distribution in accordance with section 46b-81, thereby serving as a dispositive precedent.[163] In response, the court articulated the integral differences between *Pondi-Salik* and the instant case.[164] It noted that, although the disability retirement-benefit statute at issue was the same in both cases, the "significant factual and procedural differences between the two cases render[ed] *Pondi-Salik* inapposite."[165] *Pondi-Salik* lacked any discussion of the speculative nature of disability benefits or the characterization of such benefits prior to a disability.[166] Therefore, *Pondi-Salik* was not dispositive and the court was able to assess the legitimacy of the defendant's other claims before rendering a decision.[167]

After describing the relevant statutes, the applicable terminology, and the overarching principles that guide equitable-distribution jurisprudence, the court turned to the defendant's argument that his disability benefits were too speculative to be considered marital property subject to equitable distribution under section 46b-81. The defendant asserted that the

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[158] Bender v. Bender, 785 A.2d 197, 209 (Conn. 2001).
[159] *See supra* Part II.
[160] *See supra* text accompanying notes 90–98.
[161] Mickey v. Mickey, 974 A.2d 641, 645 (Conn. 2009).
[162] 817 A.2d 663 (Conn. 2003).
[163] *Mickey*, 974 A.2d at 651.
[164] *Id.* at 651–52.
[165] *Id.* at 652.
[166] *Id.*
[167] *Id.*

disability benefits were not marital property because they were not acquired until after the dissolution of marriage, and because they functioned as compensation for lost wages, which were attributable to services that would be performed post-dissolution.[168] The court began by assessing the judicial history, particularly in terms of its characterization of property. It noted that the initial framework created a stark division between presently existing property and mere expectancies—the former as distributable and the latter as immune from statutory subjection.[169]

After providing a brief overview of the factual background and procedural posture of *Mickey*'s predecessors, the court turned to its decision in *Bender*—which did not on its face seem to abide by the same scheme—stating that the decision "updated this traditional, fairly rigid dichotomy by establishing a more nuanced approach to defining property interests under § 46b-81."[170] Going further in its explanation of *Bender*, the court added:

> Consistent with our time-honored approach, we reiterated that presently enforceable rights, based on either property or contract principles, are *sufficient* to cause property to be divisible. Where *Bender* broke new ground was in its recognition that such rights are not the "sine qua non of 'property' under § 46b-81." In building on our prior cases, we expanded our notion of property under § 46b-81, recognizing that there is a spectrum of interests that do not fit comfortably into our traditional scheme and yet should be available in equity for courts to distribute.[171]

Arguably, the court's commentary could be interpreted as an excuse for its betrayal of the well-ingrained decisional framework for determining distributable property, as the court's decision in *Mickey* arguably overruled rather than supplemented its decision in *Bender*. As such, one could find that the court used this language to create a smokescreen of harmony between the arguably contradictory holdings, which hid *Mickey*'s underlying function of overruling *Bender*. On the other hand, one could also argue that *Mickey* served to further develop the *Bender* test. Part V will further analyze this debate.

Regardless of outside interpretation, the court claimed to rely on the two-part test that was set forth in *Bender*, which preserved the traditional definition of property, while also "carving out a middle ground, encompassing some inchoate property interests that would have been

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[168] *Id.*
[169] *Id.* at 656.
[170] *Id.* at 659.
[171] *Id.* at 659–60 (citation omitted).

excluded from the definition of distributable property under the older regime."[172] This "inchoate property" referred to the consideration of contingent unmatured interests that were not too speculative in nature.[173] The court asserted that the addition of a second step provided a measure of flexibility that would prevent unfair results.[174] To clarify, in *Bender*, the court found that although the defendant's unvested pension benefits were contingent, they were "sufficiently certain to constitute divisible property" because they could be quantified.[175] In its attempt to reconcile *Bender* and *Mickey*, the court went on to explain that *Bender* articulated the second step of the property test, whereby the speculative nature of the property interest had to be assessed in conjunction with other factors—like, for instance, in *Bender*, the fact that such benefits normally were treated as property because they constituted a trade-off for higher wages—to determine if the property was subject to distribution under section 46b-81.[176]

After the court explained its rationale for extending the definition of property beyond the statutory language to create an even broader interpretation, it applied the analysis to *Mickey*. Justice Zarella quickly dismissed the possibility that the defendant's disability benefits were property under the first step of the test, in which the interest must be a "presently existing, enforceable right," noting that the defendant "had no concrete, enforceable right to those benefits unless and until" he was in a disabling accident.[177] Further, Justice Zarella added that the legislature could have modified or terminated the defendant's rights to the benefits at its discretion,[178] thereby making his right to the benefits even more illusory and demonstrating that he had no enforceable right to anything until he suffered a disability. This is dissimilar from previous cases where an enforceable contract right was created with a private employer. As such, Justice Zarella concluded that to attempt to define the defendant's right as "presently existing[] [and] enforceable" would be to "stretch the meaning of these words beyond the breaking point."[179]

Although the existence of a presently existing, legally enforceable right is sufficient to constitute equitably distributable property under section 46b-81, it is not necessary.[180] Therefore, the court turned to the second step of the test and analyzed the nature of the contingency to

[172] *Id.* at 660.
[173] *Id.*
[174] *Id.* at 662.
[175] *Id.* at 661 (citing Bender v. Bender, 785 A.2d 197, 207 (Conn. 2001)).
[176] *Id.*
[177] *Id.* at 662.
[178] *Id.*
[179] *Id.* (emphasis omitted).
[180] *Id.*

determine if it was sufficiently probable to constitute property.[181] In assessing the existence of this step, the court stated:

> A potential disability is, by its very nature, an accidental event that every employee and employer strives to avoid. It is difficult to perceive how a property interest tied to such an occurrence is "sufficiently concrete, reasonable and justifiable"; to treat any benefits that might accrue, if the accident eventually occurs and is serious enough to cause permanent disability, as a presently existing property interest eligible for equitable distribution at the time of dissolution.[182]

The court compared the situation in the instant case to the precedents, finding that these disability benefits were more unpredictable and less certain than the income expected to result from the obtainment of a medical degree in *Simmons*, for instance.[183]

In an unexpected turn, the Court seemed to unknowingly add another step to the two-step test. Justice Zarella added that even if the disability benefits were sufficiently concrete to constitute distributable property, it would still not be classified as such due to the particular facts of the case.[184] He then appeared to assert the newly created third step, stating: "A benefit derived from an injury occurring years after dissolution, meant solely to compensate for the loss of future wages, simply does not represent the 'fruits' of the marital partnership that § 46b-81 is designed to equitably parse."[185] This statement seems to suggest that the court created an additional step that must be satisfied to constitute marital property subject to distribution, a standard that will fittingly be referred to as the "fruits of the marriage" requirement. This step arguably relies on two main considerations: (1) the temporal relationship between the property and the marriage, and (2) the ultimate purpose of the property.

The court concluded its opinion by finding that the portion of the defendant's retirement benefit attributable to his years of service was subject to equitable distribution.[186] It found that such a decision conformed to the court's holding in *Bender* that pension benefits served as deferred compensation earned during the marriage, which was reasonably quantifiable.[187] On the other hand, the court found that the portion of the defendant's benefit attributable to his disability was too speculative to constitute marital property and too unpredictable to be considered deferred

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[181] *Id.* at 662–63.
[182] *Id.* (emphasis omitted) (citation omitted).
[183] *Id.* at 663.
[184] *Id.*
[185] *Id.* (citing Krafick v. Krafick, 663 A.2d 365, 371–72 (Conn. 1995)).
[186] *Id.* at 663–64.
[187] *Id.* at 663.

income, yet served as compensation for future lost wages.[188] Ultimately, the court concluded that the plaintiff was entitled to forty percent of the defendant's regular retirement benefits and none of his disability benefits.[189]

The dissenters, Justices Norcott and Katz, argued that the decision should not have even proceeded beyond the first step of the *Bender* test because it was a presently existing and legally enforceable right.[190] Citing the statutory language relevant to the defendant's benefits, Connecticut General Statutes section 5-192p, the dissent argued that even though the actual retrieval of the benefits was contingent on him becoming disabled, he had a vested right to them from his first day of employment with the State of Connecticut, which the legislature could not simply revoke at its discretion.[191] The dissenters drew the distinction in the application of the rule, stating that "presently existing and [legally] enforceable" did not also mean that the party had to have the right to immediate "receipt and enjoyment of the benefit, or even an unconditional guarantee that the benefit w[ould] be received at all."[192] Relying on *Mickey*'s precedents, the dissent noted that those holdings indicated that interests were not reduced to mere expectancies as long as the party had an enforceable right in the event that the contingent condition did occur.[193] In the dissent's interpretation of the judicial history, the likelihood of the occurrence of the condition was immaterial.[194]

Further, striking down the majority's emphasis on the time of retrieval, the dissent argued that "whether an asset is marital property turns on the time at which an enforceable right to the particular benefit was obtained, and *not* on whether the benefits associated with the interest were received during the marriage."[195] Therefore, the dissenters concluded that whether the benefits were received prior to the marital dissolution and whether they partially served as compensation for future lost wages were irrelevant considerations in their determination that the disability benefits were marital assets that should have been subject to equitable distribution.[196]

The dissent's opinion completely contradicts the majority decision in *Bender* and misinterprets the two-step test. The Connecticut Supreme Court held that property had to be either (1) a presently existing and legally enforceable right (the traditional notion of property) or (2) an unvested

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[188] *Id.* at 663–64.
[189] *Id.* at 664.
[190] *Id.* at 665 (Norcott, J., concurring and dissenting).
[191] *Id.* at 665.
[192] *Id.* (emphasis omitted).
[193] *Id.*
[194] *Id.* at 666.
[195] *Id.* at 669.
[196] *Id.*

benefit that was not too speculative.[197] Despite the fact that the plaintiff would receive compensation in the event of a debilitating work-related injury, he did not arguably have any present right to those benefits at the time of the divorce, and the dissent's attempt to portray them as such is erroneous. The disability benefits did not constitute property under the first step of the *Bender* test because the plaintiff lacked a presently existing and legally enforceable right to them. This was a conditional right that was only triggered in the event of a debilitating injury.

A better way to understand the plaintiff's lack of a presently existing and legally enforceable right to the disability benefits is to alter the scenario. If the plaintiff had never been injured, how would the parties have divided this unvested benefit? It is unlikely that such a benefit could or should be monetized. Therefore, although still somewhat unclear, disability benefits are better portrayed as unvested, conditional benefits. Since the court determined that the condition under which these benefits could be obtained was too speculative in nature, it refused to equitably divide them as part of the dissolution proceeding.[198] To heed the dissent's stance would overrule the very framework that the court used to characterize property, as it clearly assessed such unvested benefits under the second step, which focused on the property's speculative nature.

V. FUTURE IMPLICATIONS OF THE *MICKEY* DECISION: IS *BENDER* STILL GOOD LAW?

Mickey changed the equitable distribution landscape by expanding the test for determining whether an asset was subject to section 46b-81. Not only did the majority opinion expressly indicate that *Bender* created a second decisional step, it arguably also added a third step of determining whether the asset constituted "fruits of the marriage." This nondescript language will undoubtedly open the door to more complicated litigation, as it could encompass most elements of a marital partnership. Although the court narrowed this step's application based on its holding in *Mickey*, so that future benefits which do not constitute deferred compensation and which vest after the finalization of the marital dissolution do not fall within the "fruits of the marriage" step, the potential creation of an additional requirement still serves as an elaboration of the already complex statutory definitions. It could also further complicate the equitable distribution arena, which already has an extensive judicial history filled with somewhat haphazard decisions.[199]

It is likely that the repercussions of this decision will be far-reaching.

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[197] Bender v. Bender, 785 A.2d 197, 222–23 n.6 (Conn. 2001) (citing Simmons v. Simmons, 708 A.2d 949, 954 (Conn. 1998)).

[198] *Mickey*, 974 A.2d at 663.

[199] *See supra* Part II.

Any asset that the parties own, whether individually or jointly, could be construed as "fruits of the marriage." In this context, "fruits" can be considered the result or the outcome of the marriage, which appears to create limitless opportunities for judicial discretion and expansive interpretations of the concept. By only paring the breadth of the phrase's expanse down through its limited application in *Mickey*, the court has further complicated the already clouded arena of equitable distribution.

Many questions arise from this language, especially relating to its extension and analogy to other similar scenarios. For instance, does *Mickey* also extend to worker's compensation? If so, does the court's decision on this issue depend on whether the worker's compensation served as deferred compensation during the marriage? What about the role of time? Is the opposing party barred from collecting any money if the compensated party is injured the day after the dissolution of marriage is finalized? Should *Mickey* be construed so strictly or does such a narrow construction give rise to injustice?

Considering the fact that worker's compensation is, like disability, something that people try to avoid, should its receipt always be considered too speculative to constitute a marital asset subject to equitable distribution? In this respect, is it possible to argue that *Mickey* turned on the fact that there were years between the injury and the divorce? Does the injury become more likely and less of an expectancy based on the time between divorce and compensation, or does its sheer undesirability bar it from being defined in this way? All of these questions remain unanswered. While *Mickey* was intended to clarify this contentious part of the law, it seems to have instead created more questions than answers as to how it will be applied to future cases and how the arguably new third step will be addressed and utilized in upcoming disputes.

On the other hand, it is also possible that "fruits of the marriage" could simply be interpreted as dicta that does not constitute the creation of an additional requirement. Under this interpretation, in the future, the court should only utilize the two-step test asserted in *Bender* when making its determination of what constitutes property under section 46b-81.

The "fruits of the marriage" language could also serve as support for the court's notion that time is an integral element in determining whether property is distributable as a marital asset.[200] Therefore, this language could memorialize the court's finding that property obtained before the finalization of the dissolution of marriage in *Mickey* constituted marital property, while any assets obtained after this finalization were not.[201] Unfortunately, the purpose and role of this language are very much unknown, as the *Mickey* decision, and its impact, is still in its infancy. It is

[200] *See supra* notes 175–80 and accompanying text.
[201] *Mickey*, 974 A.2d at 652.

going to take further litigation to determine whether the court intended for this language to constitute another standard for property or whether it is merely an extrapolation or interpretation of the already defined statutory limitations on equitable distribution.

Although it is nearly impossible to predict the impact that this arguably peripheral language will have on future cases, based on precedent, it is likely that the "fruits of the marriage" phrase will become an additional step in the *Bender* test. Prior to the *Mickey* decision, the court championed a broad notion of property, as evidenced by its intentionally expansive definition of the term in *Krafick*.[202] *Mickey*, however, narrowed the realm of equitable distribution by finding that disability benefits were too speculative.[203] The lower courts are likely to interpret this decision as the supreme court's purposeful contraction of equitable distribution. As such, they will probably be inclined to utilize the "fruits of the marriage" language as another requirement that would achieve this narrowing function, rather than to dismiss it as inconsequential dicta.

In light of this somewhat flexible and ambiguous language, is there any room left to argue that *Bender* is no longer good law? There seem to be three distinct ways to analyze the status of *Bender* post-*Mickey*: (1) completely overruled through the court's later analysis; (2) still entirely relevant in light of its superficial gloss over and facial integration of the two-step test; or (3) reconcilable due to the Court's implicit acknowledgement of a meaningful difference between unvested pension benefits and disability benefits.

As to the first argument, *Mickey* appears to extend *Bender* to its breaking point. This position would lament that, based on the existing test, *Bender* and *Mickey* should have both resulted in the same decision, and it would assert that the court's failure to rule in the same fashion constituted a per se overruling of *Bender*. In analyzing the facts in *Mickey*, both sides of the argument would presumably agree that *Mickey* did not comply with the first step of the *Bender* test. The defendant's disability benefits were not a presently existing, legally enforceable right at the time of the dissolution of marriage. At the time of the dissolution proceeding, it would have been outrageous to award the plaintiff part of the defendant's disability benefits, requiring him to pay for something that he himself had not yet received and may never receive. In that respect, it is clear that the benefit was not legally enforceable at the time of the finalization of the parties' divorce, as the defendant had no right to the proceeds until the unfortunate disabling event occurred, and it would be patently unfair to label it as such.

It is the second step of the test that is highly contentious between the

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[202] Krafick v. Krafick, 663 A.2d 365, 370–73 (Conn. 1995).
[203] *Mickey*, 974 A.2d at 663.

two positions. Those that assert that *Mickey* overruled *Bender* would note that the court should have treated *Mickey* the same way as it treated *Bender*, that both benefits were not too speculative to constitute marital property subject to distribution due to their undeniable similarities. They would fail to draw a strong and defining distinction between the two benefits and the facts surrounding the cases, which would ultimately warrant the court's making an opposite finding. In terms of this side's opinion of the "fruits of the marriage" language, it would probably assert that these words could constitute an entirely new test under section 46b-81, since *Mickey* itself serves to overrule the well-established equitable distribution law in Connecticut.

As to the second argument, while one might correctly assert that the facts in *Bender* are extremely analogous to those in *Mickey*, the court makes a very slim distinction between the type of benefits at issue in *Mickey* and those in *Bender*. There is, however, one important difference between how their applicability to section 46b-81 plays out in practice, which ultimately decided the cases. The cases are distinct enough to warrant different holdings. The fact that retirement pension benefits ultimately serve as deferred compensation, while disability benefits serve as future compensation,[204] coupled with one's likely effort to avoid the vesting of a disability benefit with the opposite being true for a retirement benefit, further increases the former's speculative nature and decreases the latter's. In this respect, *Mickey* and *Bender* operate harmoniously under the same framework of a two-step test and assert the same premise that the level of expectancy and the asset's function rules the world of inchoate property interests.

Another way to understand the argument that *Mickey* did not overrule *Bender* is to consider what the result would have been if the decisions applied retroactively, or if *Bender* had been decided after *Mickey*. The rationale for the court potentially asserting that the *Bender* retirement pension benefits were "too speculative" based on the *Mickey* rhetoric would look something like the following. Although the court concluded in *Mickey* that individuals want to avoid an unfortunate accident which results in disability, it could just as easily be argued that someone would want to avoid losing their retirement benefits at all costs. In this respect, one could assert that obtaining disability is too speculative because one acts in ways that encourage prevention, while one could similarly find that obtaining retirement benefits is a near certainty because the requirements to do so are fairly mechanical. Disability, just like the *failure* to receive retirement benefits, requires the occurrence of an event that is outside of the course of one's normal activities, thereby making it too speculative to constitute

[204] *Id.* at 663–64.

property.

Individuals who believe that *Mickey* followed the *Bender* precedent would probably define the "fruits of the marriage" language as mere dicta, maintaining that the two step test has remained untouched and unexpanded by the court's finding in *Mickey*. In their opinion, this language, if anything, would serve to narrow and define the two-step test so as not to create an expansive blanket of discretion for the courts. It could also function as a temporal restraint, constraining one's property interests to the time of marriage, which is not a novel limitation.

As to the third argument, it is possible to find harmony among the seemingly contradictory decisions in *Mickey* and *Bender* by identifying a fundamental and meaningful difference between pension benefits and disability benefits, which would render the former foreseeable and divisible and the latter speculative and non-divisible. From this perspective, the equitable distribution of marital assets is intended to furnish the spouses with their legitimate expectations arising from their partnership. When parties begin to comingle their assets and plan for the future, they presumably intend to rely on the pension benefits as a means of financial stability during retirement, and the deferred compensation through pension benefits, as *Krafick* noted, become one of the parties' most valuable assets.[205] When parties envision their lives together, however, neither of their views of the future include compensation through disability benefits, presumably because a debilitating injury is both unforeseeable and undesirable. If the ultimate goal of equitable distribution is to provide parties with their legitimate expectations of the marriage, dividing disability benefits is contrary to this objective because it furnishes the uninjured party with compensation that he or she did not rely on, expect, or foresee. Parties expect to utilize pension benefits in the future because they are valuable assets that result from deferred compensation, money which could have provided a more stable lifestyle over the years, but was purposefully set aside for retirement. Parties do not expect to receive disability benefits, however, because they are not the type of interest that has been earned in the same way that pension benefits have, and they are not the result of the same long-term sacrifice. As such, pension benefits and disability benefits should be treated differently during the equitable distribution process. While the majority in *Mickey* acknowledges the inherent difference between pension and disability benefits by describing disability as an unfortunate accident that people try to avoid,[206] it does not articulate the effect of this distinction on the ultimate holding of the case. One way to interpret the seemingly contrary decisions in *Mickey* and *Bender*, however, is to find that equitably

[205] *Krafick*, 663 A.2d at 371.
[206] *Mickey*, 974 A.2d at 662.

distributable property should be determined by the parties' legitimate expectations of their marital partnership.

Despite the three aforementioned rationales, there remains some difficulty in reconciling the *Bender* and *Mickey* decisions, a direct result of Justice Zarella's potential underlying agenda. As the author of the dissent in *Bender*, it was clear that he believed that unvested pension benefits should have been considered too speculative because there was no guarantee that the benefit holder would ever receive them.[207] One could argue that *Mickey* was decided as it was because Justice Zarella merely wanted to overrule what he believed was the court's misstep in *Bender*. In this respect, despite the fact that he articulates one, Justice Zarella does not seem to believe that there is any material difference between pension benefits and disability benefits that would ultimately warrant treating them differently under the law. It is undeniable that Justice Zarella supports the *Bender* two-step test. It is also evident, however, despite his brief discussion of the differences between pension benefits and disability benefits, that he believes that all unvested benefits should be treated as too speculative to divide, regardless of the parties' expectations or the purpose that the benefits ultimately serve.

Therefore, I believe that the second argument is the most accurate conceptualization of *Mickey*'s relationship to *Bender*. *Mickey* seems to dismantle *Bender*'s precedent without outwardly overruling *Bender*, thereby serving as a de facto overruling, masked by flowery language. Nonetheless, this somewhat simplistic interpretation of *Mickey*'s position in relation to *Bender* does not seem to fully account for the complexities of the benefits at issue. One cannot deny that there are unique attributes to disability and pension benefits that disallow them from being interpreted synonymously. Therefore, an interpretation that treats them as interchangeable entities would be presumptively inaccurate.

Similarly, without context, the third argument, which carved out a meaningful difference between unvested pension benefits and disability benefits, seems completely palatable. Justice Zarella's position, however, as the author of both the majority opinion in *Mickey* and the dissenting opinion in *Bender* makes this interpretation unlikely. Justice Zarella's dissent seems to advocate for an equitable distribution scheme in which unvested benefits are universally interpreted as too contingent to constitute property subject to distribution.[208] Although a meaningful difference can certainly be extracted from the two categories of benefits, this was

[207] *See* Bender v. Bender, 785 A.2d 197, 224 (Conn. 2001) (Zarella, J., dissenting) (observing that "the employee spouse exclusively shoulders the risk that the unvested pension may never vest and may never become an enforceable interest while the nonemployee spouse receives existing property at the time of the dissolution").

[208] *Id.* at 218, 220–21, 226.

arguably not Justice Zarella's intent. The inherent ideological conflict between Justice Zarella's opinions in *Bender* and *Mickey* is too obvious to ignore and too intentional to deny.

As such, the second argument is the most likely interpretation of the court's purpose in *Mickey*. Justice Zarella had the opportunity to revert back to the regime that he had unsuccessfully advocated for in the *Bender* dissent, and he took it. Rather than couching *Mickey* in terms of its complete evisceration of *Bender*, Justice Zarella eloquently formulated a passable distinction between the purposes of the two categories of benefits that permitted other justices to agree with his analysis and holding. Under this interpretation of *Mickey*, the "fruits of the marriage" language should be interpreted as dicta rather than the addition of a third prong to the *Bender* test because Justice Zarella's opinion preserved the *Bender* two-prong test as good law and the governing standard for equitable distribution of property during a marital dissolution. In this respect, the *Mickey* opinion only changed the application of that test. Whether or not the relationship between the two cases proves relevant in the future, however, remains to be seen.

Regardless of one's interpretation of *Mickey*'s effect on *Bender*, what is most important is that the court's jurisprudence continues to evolve at a fairly commendable speed. Embracing this growth, the court noted that the *Bender* decision "expanded [the] notion of property under § 46b-81[] [to] recogniz[e that] that there is a spectrum of interests that do not fit comfortably into our traditional scheme and yet should be available in equity for courts to distribute."[209] In this respect, until *Bender*, the court was operating under a set of rules that had not upgraded with the advancements of the world, particularly concerning the inclusion of fringe benefits in employment contracts. Property no longer could be described solely in terms of material belongings, as the traditional regime had operated; technological advances created the option of liquid assets in the form of benefits programs and stock options. As usual, the law operated well behind the changing times until *Bender*. As such, *Bender* served to revolutionize and update the world of equitable distribution by accounting for the new property interests, many of which are inchoate, while *Mickey* was able to narrow this scope so as to begin to define the realm of mere expectancy that was too speculative to constitute equitably distributable property.

VI. CONCLUSION: WHERE DO WE STAND TODAY?

All that is clear for now is that *Mickey* is the governing law in Connecticut. As such, it seems safe to assert that the *Bender* two-step test

[209] *Mickey*, 974 A.2d at 659–60.

is alive and well. Therefore, when determining if assets are subject to equitable distribution under section 46b-81, an attorney must first analyze the traditional notions of property, and decide whether the asset constitutes a presently existing and legally enforceable right. If the asset does not seem to fit comfortably within this definition due to its inchoate nature, he must then determine whether the property constitutes a contingent, unmatured interest *that is not too speculative*.

Based on the court's previous holdings, it is clear that if the asset serves as deferred compensation, it will typically be considered property because it would have served as additional compensation during the marriage to increase the parties' quality of life if the benefit system was not in place. Further, benefits like those for disability, which an individual strives to avoid, could be deemed too speculative to constitute marital property subject to distribution because of this desire for prevention. The final factor that the court seems to elucidate is the importance of time. If the vesting event is a "fruit of the marriage" and occurred during the marriage, it will probably constitute equitably distributable property, while events that occurred after the finalization of the dissolution of marriage will not. It must be noted, however, that the court never proposes the "fruits of the marriage" language as an additional requirement for the *Bender* two-step test nor does it assert that this language serves as an expansion or narrowing of the current law under *Bender*. Therefore, the purpose and application of this ambiguous language will remain a mystery until its limits are tested in the judicial arena. For now, the governing stance in Connecticut is that the *Mickey* decision did nothing more than supplement the well-established *Bender* two-step test framework.