

**CONTRACTS: THE PRICE OF DIGNITY IS \$3.19:
SHOULD MUTUAL MISTAKE APPLY TO THE NEW WIC
TOBACCO RULE?—*HY-VEE FOOD STORES V. MINNESOTA*
DEPARTMENT OF HEALTH**

Jennifer Young[†]

I.	INTRODUCTION.....	1458
II.	HISTORY.....	1459
	A. <i>Contract Formation</i>	1459
	B. <i>Contract Avoidance Through Mutual Mistake</i>	1461
III.	THE <i>HY-VEE</i> DECISION.....	1464
	A. <i>The Facts</i>	1464
	B. <i>The Initial Response</i>	1465
	C. <i>The Minnesota Supreme Court Decision</i>	1466
	D. <i>The Dissent</i>	1467
IV.	ANALYSIS.....	1469
	A. <i>The Contract Analysis</i>	1470
	B. <i>The Contextual Analysis</i>	1472
	1. <i>The Federal WIC Rules</i>	1472
	a. <i>Background</i>	1472
	b. <i>Welfare Reform</i>	1473
	c. <i>The Tobacco Rule</i>	1474
	2. <i>The Rule’s Administrative History</i>	1475
	3. <i>Minnesota’s Adoption of the WIC Rules</i>	1477
	C. <i>The Meaning of “Provide”</i>	1480
	D. <i>Consequences of the Decision</i>	1481
	E. <i>The Hy-Vee Case Under a Contextual Analysis</i>	1483
	F. <i>Toward a New Federal Policy</i>	1484
V.	CONCLUSION.....	1484

† J.D. Candidate 2009, William Mitchell College of Law; Ph.D. Candidate, English, University of Minnesota; M.A., Germanic Philology, University of Minnesota, 2004; B.A., Medieval Studies, *summa cum laude*, The Ohio State University, 1994. For their input and guidance, special thanks to Professors Daniel Kleinberger, Richard Murphy, Deborah Schmedemann, and Michael Steenson, all of William Mitchell College of Law. For their great patience and support, the author wishes to thank her husband, Brian, and son, Trent.

I. INTRODUCTION

Most treatises and articles on mistake begin with a statement on the difficulty of the subject.¹ People err so frequently that the classification and rules systems cannot keep pace.² In addition, the idea that a contract may be void or unenforceable because of mistake may seem antithetical to the idea that contracts, by their very nature, allocate risk.³ Nevertheless, contract avoidance through mutual mistake remains;⁴ its permanence is likely due to the idea that neither party should be liable for risks he or she did not agree to bear.⁵

The Minnesota Supreme Court recently revisited the relationship between mutual mistake and mutual assent in contract formation in *Hy-Vee Food Stores, Inc. v. Minnesota Department of Health*.⁶ The *Hy-Vee* decision involved interpreting whether a sale of cigarettes occurred under the rules of the federally funded Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) when the parties to the sale claimed they made a mutual mistake and did not intend to exchange the cigarettes for a WIC voucher.⁷ The court decided that though the parties did not subjectively intend the exchange, the objective occurrence of a sale was sufficient for liability purposes.⁸

This note argues, however, that contract law is not the best context in which to understand the WIC rule in question. Instead, this note suggests that the Minnesota Supreme Court should have construed the rule first in light of its relationship to the other rules on vendor violations, and second in light of Minnesota case law. The differences between the contract method and the contextual

1. See, e.g., 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 4.9 (rev. ed. 1993) (“The subject of mistake is one of the most difficult in the law.”); Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL. L. REV. 1573, 1575 (2003) (“The problems raised by mistake have been a source of persistent difficulty in contract law.”).

2. See CORBIN, *supra* note 1, § 4.9.

3. See Eisenberg, *supra* note 1, at 1575.

4. *Id.*

5. See 2 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 11.1 (2d ed. 1993); see also Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663 (1998) (suggesting purposes for mutual mistake based on its history).

6. 705 N.W.2d 181 (Minn. 2005).

7. *Id.* at 186.

8. *Id.* at 190.

method for construing the rule reveal the *Hy-Vee* decision to be a harbinger of storms ahead in the welfare-reform debate.

This note first examines the history of the interchange between actual and apparent assent.⁹ It then provides an in-depth description and analysis of the Minnesota Supreme Court's holding in *Hy-Vee*¹⁰ and evaluates the decision in terms of contract law in alternate contexts.¹¹ The note concludes by pinpointing a weakness in the welfare system that the *Hy-Vee* decision highlights and suggests changes to the current WIC rules.¹²

II. HISTORY

A. Contract Formation

The subjective theory of contract formation requires “actual mental assent” of both parties before a contract can be formed.¹³ The popular phrase associated with this theory, “meeting of the minds,” originated in the mid-sixteenth century in an unresolved dispute before the Exchequer Chamber.¹⁴ The Sergeant of Law speaking for the defense defined the word “agreement” (Latin *aggreamentum*) as a compound of two words, *aggregatio* and *mentium*: a coming together, or meeting, of the minds.¹⁵ The phrase stuck. Though this false etymology often appears in American jurisprudence, the subjective theory never gained as strong a foothold here as in England.¹⁶

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. *Id.*

13. Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 525, 525 (1919). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 33–63 (1992); E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939, 943 (1967). The subjective theory conjoined with the “will” theory of contracts in the late eighteenth and nineteenth centuries. Farnsworth, *supra*, at 944. The will theory, much like the subjective theory, stated that courts should “neutral[ly] . . . carr[y] out the will of the contracting parties.” HORWITZ, *supra*, at 35.

14. Farnsworth, *supra* note 13, at 943 (citing *Reniger v. Fogossa*, 75 Eng. Rep. 1 (Ex. 1551)). Farnsworth contradicts Williston, who dates the beginning of the subjective theory to the mid-eighteenth century. See Williston, *supra* note 13, at 525.

15. Farnsworth, *supra* note 13, at 944. *Aggreamentum* does mean agreement, but “*mentum*” is a suffix used to create nouns out of verbs and has no etymological relationship to *mentium* (the genitive plural of *mens*, mind). See ALEXANDER M. BURRILL, *A NEW LAW DICTIONARY AND GLOSSARY* 54 (1850).

16. Farnsworth, *supra* note 13, at 945. Farnsworth suggests that the subjective

In the post-Civil War era, an “objective” theory replaced the “subjective” approach.¹⁷ Judge Learned Hand famously expressed the objective theory of contracts in *Hotchkiss v. National City Bank of New York*:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were some mutual mistake, or something else of the sort.¹⁸

The objective theory was eventually codified in the Restatement (First) of Contracts.¹⁹

The Minnesota Supreme Court adopted the First Restatement standard on mutual assent in *New England Mutual Life Insurance Co. v. Mannheimer Realty Co.*²⁰ In that case, the parties had been negotiating a contract that may have allowed the defendant to avoid foreclosure on his house.²¹ The trial court found, however, that the plaintiff revoked the offer before negotiations ended.²² As a result, there was no mutual assent and no contract.²³ Importantly, the court stated that “[n]ot meeting of the minds, but expression

theory held much more weight in England because the United States never had an authoritative body of case law, similar to that of England, to give the argument “practical consequences.” *Id.*

17. The “objective” theory has also been called the “classical model” of contract law. See, e.g., Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1108 (1984).

18. *Hotchkiss v. Nat’l City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911). Williston cites Judge Learned Hand’s statement approvingly: “Though Judge Hand undoubtedly overstated the matter, beginning in the middle of the 19th century, the objective theory of contracts gained a strong foothold, which to this day has not been seriously challenged.” 1 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 3.5 (4th ed. 2006). See generally the lecture by Oliver Wendell Holmes, *Contract—Void and Voidable*, in THE COMMON LAW (Mark DeWolfe Howe ed., 1963) (1881) (discussing the development of the objective theory).

19. See RESTATEMENT (FIRST) OF CONTRACTS § 19 (1932) (“The requirements of the law for the formation of an informal contract are: . . . (b) A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration for his promise, except as otherwise stated in §§ 85-94.”); WILLISTON, *supra* note 18, § 3:5.

20. 188 Minn. 511, 247 N.W. 803 (1933).

21. *Id.* at 511, 247 N.W. at 803.

22. *Id.* at 513, 247 N.W. at 804.

23. *Id.*

of mutual and final assent, is the operation that completes the making of a contract.”²⁴

Subsequent cases spun out the idea that mutual assent “must be judged objectively, not subjectively.”²⁵ In *Cederstrand v. Lutheran Brotherhood*, the plaintiff contended that she was fired contrary to her employment contract.²⁶ She understood the contract to have arisen from various actions and speeches by the president of the company over time.²⁷ The court, however, determined that the president’s speeches did not create a contract because they were given to a large group of employees, and that whole group of employees would not have understood the speech to be a contract offer as the plaintiff did.²⁸

By the time of the Second Restatement, the rigidity of the objective theory had lessened because it did not always produce results that were just, fair, or in line with public policy.²⁹ Nevertheless, it still formed the basis of contract analysis.³⁰ Additionally, when adopted by statute in Minnesota, the Uniform Commercial Code (U.C.C.) applied the objective standard to the creation of a contract for the sale of goods.³¹

B. Contract Avoidance Through Mutual Mistake

The idea that a court might void a contract for mutual mistake of the parties developed separately from the idea of objective

24. *Id.* (citations omitted).

25. *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962) (citations omitted).

26. *Id.* at 520, 117 N.W.2d at 214.

27. *Id.* at 533–34, 117 N.W.2d at 221–22.

28. *Id.* See also *Bergstrom v. Sambo’s Rests., Inc.*, 687 F.2d 1250, 1256 (8th Cir. 1982) (stating that contract formation requires a “bargain” in which there is a “manifestation of mutual assent,” and that the “expressions of mutual assent must be objective,” using the Second rather than the First Restatement).

29. See, e.g., CORBIN, *supra* note 1, § 4.12; Eisenberg, *supra* note 17, at 1111–12.

30. See RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. c (1981) (explaining that the requirement of a “manifestation of mutual assent” refers to “apparent assent” rather than a “mental reservation”). See generally GRANT GILMORE, *THE DEATH OF CONTRACT* 55–85 (1974) (describing the “fall” of the classical model through a comparison of the First and Second Restatements, yet still relying on an objective contract theory throughout); Eisenberg, *supra* note 17 (arguing that even though the classical model has been theoretically abandoned, its focus on objectivity still prevails, and proposing an alternate model).

31. See MINN. STAT. § 336.2-204(1) (2002) (“a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract”) (originally adopted in Act of May 26, 1965, ch. 811, 1965 Minn. Laws 1306).

contract formation, but it confronts many of the same issues. Mutual mistake gained prominence in the United States in the first half of the nineteenth century.³² Though mutual mistake incorporated a number of legal influences,³³ one of its early working theories was a “lack of consent” theory.³⁴ This theory assessed contract formation subjectively: it gauged the reasons why a party entered into a contract and asserted that if the object of those reasons did not actually exist, then a contract could not have been formed because the assent “is understood to be null and ineffectual.”³⁵

The Supreme Court case of *Allen v. Hammond*³⁶ in 1837 inaugurated mutual mistake as a legal doctrine. In that case, Hammond’s brig was illegally captured off the coast of Portugal.³⁷ Upon his return home, Hammond hired Allen as his agent to retrieve his ship from Portugal, promising up to one-third of the value of the ship as commission.³⁸ Unbeknownst to both, the Portuguese government had released the ship at the request of the U.S. government ten days earlier.³⁹ The Court held that both parties had entered into the contract under a mistake and likened the situation to classic examples of mutual mistake.⁴⁰ As a result, the Court declared the agreement void.⁴¹

Minnesota established its doctrine of mutual mistake in the late nineteenth century. In an early case, *Thwing v. Hall & Ducey*

32. See Ricks, *supra* note 5, at 722–38 (noting occasional references to mutual mistake at the end of the eighteenth century, but dating the origin of modern American mutual mistake to the 1820s and 1830s).

33. These include, most notably, Roman law and English Chancery decisions. On the origins of mutual mistake doctrines, see generally E. Sabbath, *Effects of Mistake in Contracts: A Study in Comparative Law*, 13 INT’L & COMP. L.Q. 798 (1964); Ricks, *supra* note 5.

34. Ricks, *supra* note 5, at 722–23.

35. *Joliffe v. Hite*, 5 Va. (1 Call) 301, 316–17 (1798) (construing *Quesnel v. Woodlief*, 10 Va. (6 Call) 218 (1796), possibly one of the first true mutual mistake cases in America), *cited in* Ricks, *supra* note 5, at 721.

36. 36 U.S. 63 (1837).

37. *Id.* at 68.

38. *Id.* at 68–69.

39. *Id.*

40. *Id.* at 70–71. For example, the Court cites a famous hypothetical example derived from Roman law: “If a horse be sold, which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration?” *Id.* See also Ricks, *supra* note 5, at 685 (explaining that this is a common American hypothetical derived from Roman law, although in Roman accounts, the horse was a dead slave).

41. *Allen*, 36 U.S. at 72.

Lumber Co.,⁴² the parties entered into a contract for the sale of timbered land, which they later discovered had no timber on it.⁴³ The court declared the contract void, stating the rule of mutual mistake as:

affirmative or defensive relief, such as is required by the circumstances, may be granted from the consequences of a mistake of any fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some positive legal duty, if there be no adequate remedy at law.⁴⁴

The three basic elements of this rule: (1) that a mistake occurred; (2) that the mistake was material; and (3) that both parties made the mistake, rather than committing fraud, misrepresentation, or some other violation, remain basically unchanged in Minnesota today.⁴⁵

Whether an element is material to an agreement is a common sticking point in mutual mistake decisions.⁴⁶ In *Gartner v. Eikill*,⁴⁷ for example, the court had to decide whether, in a sale of land, the intended use of the land is material to the contract.⁴⁸ The parties both thought that the land was zoned for manufacturing, but after the sale, the buyer discovered that it was under a building moratorium for re-zoning.⁴⁹ In the suit for contract rescission, the seller argued that the buyer was not mistaken about the contents of the purchase agreement: he signed an agreement with reference to

42. 40 Minn. 184, 41 N.W. 815 (1889).

43. *Id.* at 185, 41 N.W. at 816. The court determined that both parties were faultless and blamed the error on the man hired to do the estimate. *Id.* at 186, 41 N.W. at 816.

44. *Id.* at 187, 41 N.W. at 816.

45. See *Dubbe v. Lano Equip., Inc.*, 362 N.W.2d 353, 355 (Minn. Ct. App. 1985) (“[W]here parties enter into a contract while mutually mistaken concerning a basic assumption of fact on which the contract was made, and the mistake has a material effect on the agreed exchange, the contract is voidable by the parties adversely affected.”); RESTATEMENT (SECOND) OF CONTRACTS § 152(1) (1981) (“Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake”); see also *Ricks*, *supra* note 5, at 665–66.

46. See *Ricks*, *supra* note 5, at 666–68.

47. 319 N.W.2d 397 (Minn. 1982).

48. *Id.* at 398–99.

49. *Id.* at 398.

the land and the zoning ordinances.⁵⁰ The court held, however, that “[t]he mistake . . . ‘went to the very nature’ of the property.”⁵¹

The understanding of the parties may speak to what is material in a contract. In *Winter v. Skoglund*,⁵² the court based its invalidation of an agreement on a determination of the parties’ intent.⁵³ In that case, the Vikings’ shareholders signed an agreement binding them to a right of first refusal before selling their shares.⁵⁴ However, for agency reasons, one party was not bound.⁵⁵ The trial court determined as a finding of fact that “it was the mutual intent of the parties that unless all holders of voting stock were bound, none of them would be bound.”⁵⁶ Because all the parties were mistaken as to a basic assumption of the agreement, the court held the contract void.⁵⁷

Winter demonstrates how gauging a mutual mistake can require determining each party’s subjective understanding of the contract.⁵⁸ Tension between the subjective standard of mutual mistake and the strictly objective standard of contract formation confronted the court in *Hy-Vee Food Stores, Inc. v. Minnesota Department of Health*.

III. THE *HY-VEE* DECISION

A. *The Facts*

On April 13, 2003, the father of a WIC-enrolled child purchased eight items, totaling \$19.34, at the Windom Hy-Vee grocery store.⁵⁹ Seven of the items were WIC eligible, and the

50. *Id.*

51. *Id.* at 399 (quoting *Sherwood v. Walker*, 33 N.W. 919, 923 (Mich. 1887)). The court also held that the buyer had done his due diligence in inquiring about zoning ordinances. *Id.*

52. 404 N.W.2d 786 (Minn. 1987).

53. *Id.* at 792.

54. *Id.* at 790–92.

55. *Id.* at 790–91.

56. *Id.* at 792.

57. *Id.* at 793.

58. *See also* *Theisen’s, Inc. v. Red Owl Stores, Inc.*, 309 Minn. 60, 243 N.W.2d 145 (1976) (“A party who seeks to reform a written instrument must establish that the instrument failed to express the true intention of the parties because of mutual mistake . . .”); Eisenberg, *supra* note 1, at 1578, 1620–29 (“A mistaken factual assumption is a mistake about the world that lies outside the mind of the party who holds the assumption.”).

59. *Hy-Vee Food Stores, Inc. v. Minn. Dep’t of Health*, 705 N.W.2d 181, 183 (Minn. 2005). The WIC Program targets low-income women who are pregnant or

eighth, a pack of cigarettes costing \$3.19, was not.⁶⁰ The father intended to pay cash for the cigarettes but asserted that his son distracted him at checkout and he forgot.⁶¹ The cashier also failed to notice the cigarettes.⁶² Thus, the cigarettes were inadvertently charged to the WIC voucher.⁶³ Fearing her own status in the program, the child's mother immediately reported the sale to her local WIC office.⁶⁴

B. The Initial Response

The Minnesota Department of Health (MDH) compliance coordinator terminated Hy-Vee's status as a WIC-approved vendor for three years because of the violation.⁶⁵ The Minnesota rule on vendor violations states, "the commissioner shall disqualify a vendor for three years if the vendor provides any . . . tobacco product in exchange for one or more vouchers."⁶⁶ On appeal, an administrative law judge found that even if the exchange were unintentional, summary disposition for MDH was appropriate because no material facts existed as to whether the transaction occurred.⁶⁷

The Minnesota Court of Appeals affirmed.⁶⁸ In its decision, the court of appeals deferred to the agency's expertise in interpreting its own rule.⁶⁹ At MDH's prompting, the federal rule from which the state rule originated was introduced to the proceedings, and the parties agreed to construe the rules as equivalent.⁷⁰ The federal rule requires state agencies to "disqualify

breast-feeding, as well as children under five years old. *Id.* WIC Program participants exchange vouchers for nutritious food, from an approved list, at the stores of authorized vendors. *Id.*

60. *Id.*

61. *Id.* at 184.

62. *Id.*

63. *Id.* at 183.

64. *Id.*

65. *Id.* at 183–84 (quoting the termination letter from MDH to Hy-Vee).

66. See MINN. R. 4617.0084, subpt. 4 (2006); *Hy-Vee*, 705 N.W.2d at 184.

67. *Hy-Vee*, 705 N.W.2d at 184. The court noted that "summary disposition is the administrative equivalent of summary judgment." *Id.* at 184 n.3.

68. *Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health*, No. A04-548, 2004 WL 2340189, at *1 (Minn. Ct. App. Oct. 19, 2004).

69. *Id.* at *1.

70. See *id.* The exact division of power between federal and state governments is uncomfortably defined. The state agency has responsibility for the management and accountability of "food delivery systems under its jurisdiction"; Food & Nutrition Services (FNS), however, may "require revision of a proposed or

a vendor for three years for ‘one incidence of the *sale* of . . . tobacco products in exchange for food instruments.’”⁷¹ The court acknowledged that neither “provide” nor “sale” is defined in state or federal rules.⁷² MDH adopted the statutory definition of sale: “a ‘sale’ consists in the passing of title from the seller to the buyer for a price.”⁷³

C. The Minnesota Supreme Court Decision

With this background, the supreme court framed the issue around the definition of the word “sale” in the WIC tobacco rule.⁷⁴ Hy-Vee argued that a sale never occurred because mutual mistake removed a fundamental assumption of the transaction—neither party intended to exchange tobacco as part of the WIC transaction.⁷⁵ Therefore the transaction should be “void and subject to rescission.”⁷⁶

The court separated the WIC tobacco rule into three elements: (1) the sale, (2) of tobacco, (3) with payment by food instruments, in this case a WIC voucher.⁷⁷ Because “sale” is not defined in the rules, the court relied on the U.C.C. definition of sale as “the passing of title from the seller to a buyer for a price.”⁷⁸ Sale, the court said, is contract formation; it requires mutual assent, which may be inferred from the parties’ conduct.⁷⁹ The court held that offering and accepting a WIC voucher as payment for cigarettes in the context of grocery check-out was sufficient objective evidence of assent to qualify as contract formation under the U.C.C.⁸⁰

operating food delivery system.” 7 C.F.R. § 246.12(a)(1), (3) (2004); *see also* 7 C.F.R. § 246.3(b) (2004) (stating that the state agency is responsible for program administration but must report to FNS).

71. *Hy-Vee*, 2004 WL 2340189, at *1 (emphasis in original) (quoting 7 C.F.R. § 246.12(1)(l)(iii)(A)).

72. *Id.* at *2.

73. *Id.* at *2 (quoting MINN. STAT. § 336.2-106(1) (2004)).

74. *Hy-Vee Food Stores, Inc., v. Minn. Dep’t of Health*, 705 N.W.2d 181, 184–85 (Minn. 2005). The court uses the phrase “WIC tobacco rule” to refer to the state and federal rules collectively. *Id.* at 183 n.1.

75. *See* Brief & Appendix of Appellant at 18–19, *Hy-Vee Food Stores, Inc. v. Minn. Dep’t of Health*, 705 N.W.2d 181 (Minn. 2005) (No. A04-0548), 2005 WL 3133785.

76. *Hy-Vee*, 705 N.W.2d at 185.

77. *Id.*

78. *Id.* (citing MINN. STAT. § 336.2-106(1) (2004)).

79. *Id.* at 185–86.

80. *Id.* at 186.

The fact that neither party intended to use the voucher mattered, not under the first element, but under the third element in the court's analysis, the payment.⁸¹ The payment method determined whether a violation occurred.⁸² Hy-Vee argued that the parties intended a legal transaction of cigarettes for cash, but that neither intended to "engage in prohibited conduct."⁸³ The court concluded, however, that "the method of payment establishes not whether a *sale* has taken place, but whether a *violation* of the rule has occurred," and that one could violate the rule without intent.⁸⁴

The court found support for the idea that one could violate the rule without intent in the companion federal rules and the federal WIC regulatory history.⁸⁵ The definition section of the federal rules specify that a WIC "vendor violation" may be "intentional or unintentional,"⁸⁶ and the Department of Agriculture (USDA), which oversees the program, stated that the sale of tobacco products is a "flagrant violation[]" of program rules.⁸⁷ Therefore the final rule required "a mandatory sanction for one incidence" of the sale of tobacco.⁸⁸ The court, therefore, held that "strict liability" applied for violation of the WIC rules in Minnesota, and that MDH acted properly in suspending Hy-Vee for three years.⁸⁹

D. *The Dissent*

Justice Hanson wrote a dissent in which Justice Page joined.⁹⁰ It countered that the WIC tobacco rule had only one unified element, not three.⁹¹ Justice Hanson emphasized that "provide"

81. *Id.* at 184. The court did not expressly address the second element, the presence of tobacco in the exchange, because neither party contested it. *Id.* at 185.

82. *Id.* at 186.

83. *Id.*

84. *Id.* (emphasis in original).

85. *See id.* at 187–90. Both the majority and dissent cited passages from the *Federal Register*, wherein FNS promulgates and explains its new rules. *See, e.g.*, WIC/Food Stamp Program Vendor Disqualification, 64 Fed. Reg. 13,311 (Mar. 18, 1999) (to be codified at 7 C.F.R. pt. 246) ("State agencies must fully implement the provisions of this rule no later than May 17, 2000.").

86. *Hy-Vee*, 705 N.W.2d at 187 (citing 7 C.F.R. § 246.2 (2005)).

87. WIC/Food Stamp Program Vendor Disqualification, 64 Fed. Reg. at 13,314.

88. *Id.* at 13,314, cited in *Hy-Vee*, 705 N.W.2d at 189 n.7.

89. *Hy-Vee*, 705 N.W.2d at 189–90.

90. *Id.* at 181.

91. *Id.* at 191 n.1 (Hanson, J., dissenting); *see supra* notes 76–79 and

was not defined in the Minnesota statute, nor was “sale” defined in the federal statute.⁹² He agreed with the majority that the intent requisite for a “sale” may be demonstrated objectively.⁹³ Justice Hanson argued, however, that the word “sale” should not be read in isolation; rather, “in the rule, ‘sale’ must be read in conjunction with the words ‘in exchange for food instruments.’”⁹⁴ If the elements are dependent rather than independent, then sale and method of payment are inter-related.⁹⁵ The question of intent relevant to a sale becomes relevant to the method of payment as well.⁹⁶ Justice Hanson concluded that whether the parties intended the legal exchange, tobacco-for-cash, or the prohibited one, tobacco-for-voucher, presented a question of fact.⁹⁷

Justice Hanson argued by analogy that the mutual mistake of fact in this case was similar to the mutual mistake framework of *Winter*.⁹⁸ In that case, the court voided a contract for mutual mistake because the involved parties were mistaken about whom was bound by the contract: changing this fundamental assumption “would materially change the bargain.”⁹⁹ Justice Hanson admitted that the *Hy-Vee* case does not conform exactly to a traditional understanding of mutual mistake because the mistake came after the acceptance of an offer; he asserted, however, “the underlying principles of the mutual mistake doctrine provide an appropriate framework” to rescind the transaction.¹⁰⁰ “[B]ecause the use of a ‘food instrument’ is the determinative fact under the WIC tobacco rule, the method of payment goes to the ‘very nature’ of the transaction,” thereby fitting into the mutual mistake framework.¹⁰¹

Justice Hanson looked to the legislative history of the WIC rules to support his argument. He asserted that holding vendors strictly liable would be unusually severe given the context of the

accompanying text discussing the majority’s analysis of the rule in three parts.

92. *Hy-Vee*, 705 N.W.2d at 190 (Hanson, J., dissenting).

93. *Id.* at 191.

94. *Id.*

95. *See id.* (noting that no regulation is violated by the mere sale of cigarettes; a violation only occurs if the sale is completed using the proscribed method of payment).

96. *Id.* at 191–92.

97. *Id.* at 190.

98. *Id.* at 191–92; *see supra* notes 53–58 and accompanying text.

99. *Hy-Vee*, 705 N.W.2d at 191–92 (Hanson, J., dissenting) (citing *Winter v. Skoglund*, 404 N.W.2d 786, 793 (Minn. 1987)).

100. *Id.* at 192 n.2.

101. *Id.* at 192 (citing *Gartner v. Eikill*, 319 N.W.2d 397, 399 (Minn. 1982)).

rest of the WIC rules.¹⁰² The WIC tobacco rule grew out of a concern about “intentional or deliberate” fraud and abuse among WIC vendors.¹⁰³ Though the statutory definition of “vendor violation” includes intentional and unintentional acts, the history of the definition is contradictory, stating that “no disqualification will result, and a vendor violation does not occur when a cashier commits a ‘minor unintentional’ error without management knowledge.”¹⁰⁴ The other WIC rules require a pattern of “equally serious violations before a mandatory disqualification is imposed.”¹⁰⁵ He asserted reluctance to “imply administrative agency authority to impose more severe sanctions where express authority to do so is not clear.”¹⁰⁶ As a result, Justice Hanson would have held that a WIC vendor may attempt to show mutual mistake as an affirmative defense for violation of the WIC tobacco rule.¹⁰⁷

IV. ANALYSIS

The *Hy-Vee* decision was the first time Minnesota courts interpreted the WIC tobacco regulations.¹⁰⁸ The discomfort that the outcome of this case caused both the majority and the dissent provides an opportunity to look beyond U.C.C. contract formation and mutual mistake to find a more suitable hermeneutic framework for the WIC tobacco rule.¹⁰⁹ Attempting to define the

102. *Id.* (citing 7 C.F.R. § 246.12(l)(iii)(B)–(F) (2005); 7 C.F.R. § 246.12(l)(iv) (2005)) (“[O]ther WIC rules require proof of a pattern or series of what appear to be regarded by USDA as equally serious violations before a mandatory disqualification is imposed.”).

103. *Id.* at 193 (quoting *Food Assistance: Efforts to Control Fraud and Abuse in the WIC Program Can Be Strengthened* (United States General Accounting Office, Report to Congressional Committees, Aug. 1999), at 19, available at <http://www.fns.usda.gov/wic/resources/efforts.pdf>).

104. *Id.* (quoting WIC: Food Delivery Systems, 64 Fed. Reg. 32,308, 32,316 (June 16, 1999) (to be codified at 7 C.F.R. pt. 246)). See also WIC: Food Delivery Systems, 83,248, 83,260 (Dec. 29, 2000) (to be codified at 7 C.F.R. pt. 246) (publishing the final rule, stating that not all vendor violations will result in vendor sanctions), quoted in *Hy-Vee*, 705 N.W.2d at 193, 194 n.3 (Hanson, J., dissenting).

105. *Id.* (citing 7 C.F.R. § 246.12(l)(iii)(B)–(F)).

106. *Id.*

107. *Id.* at 194.

108. See Brief & Appendix of Appellant at *11, *Hy-Vee*, 705 N.W.2d 181 (No. A04-0548).

109. On the court’s discomfort, see the majority’s statement, “we note that our court has recognized that there are times, in applying an administrative rule in a contested case, that the result may seem harsh,” *Hy-Vee*, 705 N.W.2d at 190, and the dissent’s statement, “[t]he facts presented here do not fit precisely within the

term “provide” used in the Minnesota rule, rather than adopting an ill-fitting U.C.C. definition of sale, demonstrates the relevance of the history of the WIC program and the structure of the WIC rules to the inquiry at hand.¹¹⁰ The problems confronting the court in *Hy-Vee* suggest a change in the federal and state rules may be appropriate.¹¹¹

A. *The Contract Analysis*

Understanding the outcome of this case requires looking at its fundamental assumptions and asking why the Minnesota Supreme Court decided the question as a matter of contract law. The starting point for the majority was whether a sale of tobacco occurred.¹¹² The federal WIC rule uses the word “sale,” and the rule adopted by MDH uses the word “provide,” as the court and both parties acknowledged.¹¹³ Neither term is defined in the WIC rules.¹¹⁴

The case moved into contract analysis because of the way the parties chose to define the terms. At the appellate level, MDH asserted that “sale” in the federal rule not only meant the same as “provide,” but that it also bore the meaning of “sale” as defined in the U.C.C.¹¹⁵ From the record, it is not clear why MDH chose to combine the wording of the federal rule with the U.C.C. definition of “sale” to explicate its own rule. The likely reason is that the U.C.C. presented an already accepted definition where MDH had not previously defined its terms.¹¹⁶ *Hy-Vee* did not object to this

mutual mistake framework because the mistaken tender of payment arguably took place after the customer had accepted *Hy-Vee*’s offer of groceries.” *Id.* at 192 (Hanson, J., dissenting).

110. *See infra* Part IV.B-C.

111. *See infra* Part IV.F.

112. *See Hy-Vee*, 705 N.W.2d at 185.

113. *See id.* at 183 n.1 (citing 7 C.F.R. § 246.12(l)(1)(iii)(A) (2004); MINN. R. 461.0084, subpt. (4) (2003)).

114. *See id.*

115. *Hy-Vee*, 705 N.W.2d at 186 (citing *Hy-Vee Food Stores, Inc. v. Minn. Dep’t of Health*, No. A04-548, 2004 WL 2340189 *2 (Minn. Ct. App. Oct. 19, 2004)).

116. *See* Brief and Appendix of Respondent at *23, *Hy-Vee Stores, Inc. v. Minn. Dep’t of Health*, 705 N.W.2d 181 (Minn. 2005) (No. A04-0548), 2005 WL 3133788. The court stated in its ruling, “[t]he terms ‘provide’ and ‘sale’ are not defined in the state or federal rules.” MDH adopted the Minnesota Statutes section 336.2-106(1) (2004) definition of “sale”: “the passing of title from the seller to the buyer for a price.” *Hy-Vee*, 2004 WL 2340189, at *1. The juxtaposition of the two sentences implies causality.

definition.¹¹⁷ At the supreme court, both parties agreed at the outset to use the word “sale” in accordance with the U.C.C. definition.¹¹⁸

The U.C.C. framework limited the court’s analytical options. Both the majority and dissent agreed that a sale occurred in the check-out lane.¹¹⁹ A strict reading of the objective standard of contract formation required this conclusion. Most reasonable people would believe that a sale of cigarettes occurred if a person went through the check-out line, put the cigarettes on the counter, offered some form of payment that was accepted, and left with the cigarettes and a receipt listing the cigarettes as purchased. Thus for the majority, a “sale” occurred and the vendor was in violation of the rule.¹²⁰ For the dissent, the contract theory of mutual mistake applied, but it applied to the method of payment, not to the exchange.¹²¹

Neither the majority nor the dissent, however, was comfortable with the outcome it proposed for this case. The majority defended Hy-Vee’s three year suspension at the conclusion of the opinion, noting that enforcement of administrative rules may “yield a harsh or undesirable result in a particular case” and still be valid.¹²² Contract law, however, abhors penalties.¹²³ At its essence, contract law allocates risk between parties.¹²⁴ The *Hy-Vee* court, however, used it to assign an administrative penalty, perhaps accounting for the incongruity of a three-year suspension for a \$3.19 sale.

The dissent’s analysis fits no more comfortably into a contract framework. Though the dissent applied the mutual mistake theory, it admitted, “[t]he facts presented here do not fit precisely within the mutual mistake framework because the mistaken tender of payment arguably took place after the customer had accepted Hy-Vee’s offer of groceries.”¹²⁵ This analysis, however, proves too much. The “use of a ‘food instrument’” is a “determinative fact”

117. *Hy-Vee*, 705 N.W.2d at 185.

118. *Id.* at 183.

119. *Id.* at 186, 191.

120. *See supra* Part III.C.

121. *See supra* Part III.D.

122. *Hy-Vee*, 705 N.W.2d at 190 (quoting *Mammenga v. State Dep’t of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989)).

123. *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981) (providing that penalties for breach of contract are unenforceable on grounds of public policy).

124. *See* Eisenberg, *supra* note 1, at 1575.

125. *Hy-Vee*, 705 N.W.2d at 192 (Hanson, J., dissenting).

under every WIC rule, not just the tobacco rule.¹²⁶ Though the dissent proposed a narrow rule, that mutual mistake may be an affirmative defense to the three-year mandatory disqualification of the WIC tobacco rule,¹²⁷ there is no reason not to extend the mutual mistake defense to all WIC transactions, or even, by analogy, all food stamp transactions. The dissent's analysis, though more equitable than the majority's, is ultimately unworkable.

B. *The Contextual Analysis*

The use of "provide" in the state rule may indicate the drafters' intention to distinguish the WIC exchange from a "sale" in the U.C.C. context.¹²⁸ This intention is supported by the context of the Minnesota rule, including the background of the federal WIC rules, the recent welfare reform movement, the regulatory history of the WIC tobacco rule, and the adoption of the Minnesota WIC rules.

1. *The Federal WIC Rules*

a. *Background*

The WIC Program provides supplemental food and nutrition education for pregnant and nursing women and for young children.¹²⁹ It developed as part of the Child Nutrition Act of 1966, which was based on Congressional findings that a lack of nutrition in early childhood interfered with physical and mental development.¹³⁰ In 2005, the year of the *Hy-Vee* decision, the WIC program "served approximately 8 million participants, including approximately 1.9 million women, 2.1 million infants, and 2 million children ages five and under."¹³¹

126. *Id.*

127. *See id.* at 194.

128. Note that the administrations changed, as did the Commissioner of Health, between 2000 when the rule was promulgated and 2005 when the case was heard; thus, the agency's position in this case is not internally inconsistent.

129. 42 U.S.C. § 1786(a) (Supp. 2005).

130. *See id.* WIC was established by an amendment to the Child Nutrition Act promulgated in 1972. OFFICE OF ANALYSIS, NUTRITION AND EVALUATION, 2005 WIC VENDOR MANAGEMENT STUDY: FINAL REPORT, Report No. WIC-06-WICVM-02, at 2 (Apr. 2007), available at <http://www.fns.usda.gov/oane/menu/published/WIC/FILES/2005WICVendor.pdf>.

131. Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv., 416 F. Supp. 2d 92, 95 (D.D.C. 2006).

2008]

HY-VEE V. DEPARTMENT OF HEALTH

1473

WIC is structured as a grant-in-aid program.¹³² Grants-in-aid, as opposed to other sorts of federal disbursements, are a mechanism by which the federal government targets “specific categories of spending, including narrowly defined sets of services or specific target populations.”¹³³ Despite its narrow focus, however, the changes which brought about the WIC tobacco rule need to be seen in light of the welfare reform movement of the mid-1990s.¹³⁴

b. Welfare Reform

The tobacco rule is one of nine specific provisions originally promulgated in 1998 with the stated purpose of standardizing state responses to WIC Program violations.¹³⁵ The impetus for the new provisions grew out of an Office of the Inspector General (OIG) audit in September 1995 that “disclosed widely inconsistent sanction policies among the States for WIC vendors who commit similar or identical WIC Program violations.”¹³⁶ USDA, the agency that both oversees WIC and was responsible for the rule change, implemented “mandatory WIC Program disqualifications” for the nine provisions enumerated in the new rule, including the tobacco

132. 42 U.S.C. § 1786(c) (2000). Section (c)(1) explains:

[t]he Secretary may carry out a special supplemental nutrition program to assist State agencies through grants-in-aid and other means to provide, through local agencies, at no cost, supplemental foods and nutrition education to low-income pregnant, postpartum, and breastfeeding women, infants, and children who satisfy the eligibility requirements specified in subsection (d) of this section.

Id.

133. Lynn A. Blewett & Michael Davern, *Distributing State Children's Health Insurance Program Funds: A Critical Review of the Design and Implementation of the Funding Formula*, 32 J. HEALTH POL. POL'Y & L. 415, 416 (2007).

134. For sources discussing welfare reform, see generally Charles Barrilleaux & Paul Brace, *Notes From the Laboratories of Democracy: State Government Enactments of Market- and State-Based Health Insurance Reforms in the 1990s*, 32 J. HEALTH POL. POL'Y & L. 655 (2007) (analyzing the changes in state policies and concluding that market-based approaches to health insurance will not solve the problem of underinsurance); Robert F. Schoeni, *What Has Welfare Reform Accomplished?: Impacts on Welfare Participation, Employment, Income, Poverty, and Family Structure* (Nat'l Bureau of Econ. Research, Working Paper No. 7627, 2000) (examining the effectiveness of welfare reforms from the early 1990s to 1996); William P. Tunell, Jr., *Welfare Reform: The Case for a Systematic Approach*, 21 J. LEGIS. 301 (1995) (urging a systemic approach to welfare reform).

135. Special Supplemental Nutrition Program for Women, Infants and Children (WIC): WIC/Food Stamp Program (FSP) Vendor Disqualification, 63 Fed. Reg. 19,415, 19,416 (Apr. 20, 1998) (codified at 7 C.F.R. § 246 (2007)).

136. *Id.* at 19,417.

violation.¹³⁷

USDA needed to standardize the implementation of the provisions so that the WIC Program could coordinate with the Food Stamp Program.¹³⁸ The key welfare reform bill of 1996, known as the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), mandated, among other things, that food vendors disqualified from the Food Stamp Program should be automatically disqualified from the WIC Program for the same time period with no judicial or administrative review.¹³⁹ The same would be true of vendors disqualified from the WIC Program; they would be reciprocally disqualified from the Food Stamp Program.¹⁴⁰ USDA thereby sought to decrease vendor violations that drained the program economically.¹⁴¹ The rule change that created the tobacco provision thus grew out of the welfare reform bill of 1996.¹⁴²

c. The Tobacco Rule

While seven of the provisions standardized in the new rule had previously been treated as violations in the WIC Program, two were new.¹⁴³ The first new rule was “trafficking,” defined as buying or selling WIC food instruments for cash, consideration other than eligible food, or for firearms, ammunition, explosives, or

137. *Id.* at 19,417–18.

138. *Id.* at 19,415–16.

139. *Id.* See also Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, § 843(g)(1), 110 Stat. 2105, 2332 (1996).

140. PRWORA § 729(j).

141. See Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Food Delivery Systems, 65 Fed. Reg. 83,248, 83,248 (Dec. 29, 2000) (codified at 7 C.F.R. § 246 (2007)) (“The rule will increase program accountability and efficiency in food delivery and related areas and decrease vendor violations of program requirements and loss of program funds.”); see also U.S. GEN. ACCOUNTING OFFICE, FOOD ASSISTANCE: EFFORTS TO CONTROL FRAUD AND ABUSE IN THE WIC PROGRAM CAN BE STRENGTHENED, NO. GAO/RCED-99-224, 22–23 (1999) (concluding that program abuse regularly went undetected costing the program significant funds), available at <http://www.fns.usda.gov/wic/resources/Efforts.pdf>.

142. For the implementation date, see Special Supplemental Nutritional Program for Women, Infants and Children (WIC): Food Delivery Systems; Delay of Implementation Date, 66 Fed. Reg. 52,849, 52,849 (Oct. 18, 2001) (codified at 7 C.F.R. § 246 (2007)).

143. See Special Supplemental Nutritional Program for Women, Infants and Children (WIC): WIC/Food Stamp Program (FSP) Vendor Disqualification, 63 Fed. Reg. 19,415, 19,416 (Apr. 20, 1998) (codified at 7 C.F.R. § 246 (2007)).

controlled substances.¹⁴⁴ The provision preventing the sale of tobacco and alcohol in exchange for WIC vouchers was the second new provision.¹⁴⁵ USDA deemed both trafficking and tobacco and alcohol sales such “serious” violations that “only one incidence warrants disqualification” because they “completely undermine program goals.”¹⁴⁶ The other provisions all require a “pattern of incidences” before the state agency determines that a violation occurred.¹⁴⁷

In setting these mandatory sanctions, USDA echoed the “fundamental values” of welfare reform: “work, responsibility, and family.”¹⁴⁸ The mandatory sanctions on tobacco, alcohol, and trafficking, USDA claimed, not only helped with the economic goals of welfare reform, they also reinforced the nutrition goals of the WIC Program by keeping pregnant mothers and young children away from alcohol and drugs.¹⁴⁹ Simultaneously, however, USDA disregarded another tenet of PRWORA: giving “States the responsibility that they have sought to reform the welfare system.”¹⁵⁰

2. *The Rule’s Administrative History*

Though there was no deviation from the original rule USDA

144. *Id.* The rule defers to the definition of “controlled substances” in 21 U.S.C. § 802(6) (2000) (defining a controlled substance as “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.”).

145. WIC: WIC/Food Stamp Program (FSP) Vendor Disqualification, 63 Fed. Reg. at 19,416.

146. Special Supplemental Nutrition Program for Women, Infants and Children (WIC): WIC/Food Stamp Program (FSP) Vendor Disqualification, 64 Fed. Reg. 13,311, 13,314 (Mar. 18, 1999) (codified at 7 C.F.R. § 246 (2007)). *See also* Hy-Vee Food Stores, Inc. v. Minn. Dep’t of Health, 705 N.W.2d 181, 189 n.7 (Minn. 2005) (quoting the same language of USDA).

147. WIC: WIC/Food Stamp Program (FSP) Vendor Disqualification, 64 Fed. Reg. at 13,314.

148. Press Release, The White House, President Statement on Welfare Reform Bill (Aug. 22, 1996), 1996 WL 475378.

149. *See* Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Food Delivery Systems, 65 Fed. Reg. 83,248, 83,248 (Dec. 29, 2000) (codified at 7 C.F.R. § 246 (2007)) (“The rule will increase program accountability and efficiency in food delivery and related areas and decrease vendor violations of program requirements and loss of program funds.”); WIC: WIC/Food Stamp Program (FSP) Vendor Disqualification, 64 Fed. Reg. at 13,315 (considering the potential damage done to the fetus by alcohol and illicit drugs).

150. Press Release, The White House, *supra* note 148.

Food and Nutrition Service (FNS) proposed,¹⁵¹ the history of the rule demonstrates considerable confusion over the intent standard requisite for a vendor violation. The final rule defines “vendor violation” as “any intentional or unintentional action of a vendor’s current owners, officers, managers, agents, or employees (with or without the knowledge of management) that violates the vendor agreement or Federal or State statutes, regulations, policies, or procedures governing the Program.”¹⁵² The majority in *Hy-Vee* relied on this definition.¹⁵³ By contrast, the dissent cited the “contradictory” history of the definition of a vendor violation, in which USDA stated that a “minor, unintentional error” of a cashier would not be considered a violation.¹⁵⁴

Oddly enough, the textual basis of both arguments stems from the same passage in the *Federal Register*—the definition of vendor violation.¹⁵⁵ The full passage explains the role of intent vendor violations:

“Vendor violation” is proposed to be defined as any intentional or unintentional action of a vendor (with or without management knowledge) which violates the Program statute or regulations or State agency policies or procedures. This definition would clarify that vendors should be held accountable for violations, whether they are deliberate attempts to violate program regulations, or inadvertent errors, since both ultimately result in increased food costs and fewer participants being served. This definition clarifies that it would not be necessary for the State agency to ascertain the intent behind an action which, whether inadvertent or deliberate, has the same negative effect on the Program. The Department acknowledges that the inherent complexity of the WIC transaction is such that, even with training and

151. See Special Supplemental Nutrition for Women, Infants and Children (WIC): Food Delivery Systems, 64 Fed. Reg. 32,308, 32,316 (June 16, 1999); 7 C.F.R. § 246.2 (2007). FNS is the division of USDA responsible for promulgating WIC rules. See 7 C.F.R. § 246.2 (delegating administration of the WIC Program within USDA to FNS).

152. 7 C.F.R. § 246.2.

153. *Hy-Vee Food Stores, Inc. v. Minn. Dep’t of Health*, 705 N.W.2d 181, 187 (Minn. 2005).

154. *Id.* at 193 (Hanson, J., dissenting) (citing Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Food Delivery Systems, 64 Fed. Reg. 32,308, 32,316 (June 16, 1999)); *supra* text accompanying note 104.

155. See WIC: Food Delivery Systems, 64 Fed. Reg. at 32,316. This definition is reiterated and slightly expanded in WIC: Food Delivery Systems, 65 Fed. Reg. 83,248, 83,260 (Dec. 29, 2000) (codified at 7 C.F.R. § 246 (2007)).

supervision, cashiers may occasionally make unintentional errors. While this definition would include both intentional and unintentional actions (with or without management knowledge), this does not mean that a minor unintentional action by a cashier without management knowledge would result in disqualification. State agencies have a wide range of actions that they may take as a result of a vendor violation, including assessing a claim, requiring increased training, identifying the vendor as a high-risk vendor subject to monitoring,¹⁵⁶ assessing administrative fines, and imposing a sanction.¹⁵⁷

Later, USDA reiterated these ideas specifically in response to a query about the “mandatory” nature of vendor sanctions.¹⁵⁷

The *Hy-Vee* court wrestled with this passage because it conflated the ideas of purpose and outcome in its definition of intent.¹⁵⁸ The definition clarifies that intentional violations are “deliberate attempts to violate program regulations,”¹⁵⁹ a purpose-based standard. However, the program is most concerned with violations, intentional or not, which “ultimately result in increased food costs and fewer participants being served”:¹⁶⁰ an outcome-based standard.

The explanation indicates an exception for “minor unintentional action by a cashier” even within a rubric forbidding “intentional” and “unintentional” violations.¹⁶¹ These actions are still violations, but here the lack of purpose to violate the rule and the overall lack of harm to the program are mitigating factors, resulting in lesser penalties, certainly not disqualifications.

3. Minnesota’s Adoption of the WIC Rules

The State Commissioner of Health (Commissioner) has authority to “make such reasonable rules as may be necessary” to carry out the responsibilities granted along with the federal aid for maternal and child welfare services.¹⁶² In doing so, the

156. WIC: Food Delivery Systems, 64 Fed. Reg. at 32,316.

157. See WIC: Food Delivery Systems, 65 Fed. Reg. at 83,260.

158. See, e.g., *Hy-Vee*, 705 N.W.2d at 189 (asserting that the history of the vendor violation standard is clear and purposeful); see also *id.* at 193 (Hanson, J., dissenting) (arguing that the same history is contradictory and case specific).

159. WIC: Food Delivery Systems, 64 Fed. Reg. at 32,216.

160. *Id.*

161. *Id.*

162. MINN. STAT. § 144.11 (2006). See also 7 C.F.R. § 246.12(a)(1) (2006) (delegating responsibility for fiscal management and food delivery systems to state

Commissioner must design Minnesota rules to garner as much federal funding as possible.¹⁶³ The companion federal rules delegate the administration of the WIC Program to the state,¹⁶⁴ but they require that all plans must follow federal guidelines and be approved by FNS.¹⁶⁵ Within this structure, the Commissioner retains some discretion in program design so long as the state rules comport with the purpose of the federal rules.

Accordingly, MDH promulgated its Statement of Need and Reasonableness (SONAR) concerning the proposed state rules in April of 2000.¹⁶⁶ MDH exercised its discretion in, among other things, defining what constitutes a “pattern” of violations,¹⁶⁷ in defining “vendor,”¹⁶⁸ and in changing the federal language “a pattern of receiving, transacting and/or redeeming food instruments outside of authorized channels” into “laundering vouchers.”¹⁶⁹ While the SONAR discussed most of its changes to the federal guidelines at length,¹⁷⁰ it did not comment on choosing the word “provide” instead of the word “sale” in the tobacco rule.¹⁷¹

agencies).

163. MINN. STAT. § 144.10 (2006) (“Such plans shall be designed to secure for the state the maximum amount of federal aid which is possible to be secured on the basis of the available state, county, and local appropriations for such purposes.”).

164. 7 C.F.R. § 246.3(b) (2006) (“The State agency is responsible for the effective and efficient administration of the Program.”).

165. 7 C.F.R. § 246.4 (2006) (laying out the requirements that the state must follow in order to receive FNS approval).

166. See Minnesota Department of Health, “WIC Vendor Rules SONAR Dated 4/3/00,” in Brief of Appellant at Appendix, *Hy-Vee Food Stores, Inc. v. Minn. Dep’t of Health*, 705 N.W.2d 181 (Minn. 2005) (No. A04-0548).

167. *Id.* at 47 (“proposing a rule that deals with each type of violation separately, and . . . proposing how many violations result in disqualification based on the severity of the violation.”).

168. *Id.* at 49 (explaining that because in Minnesota vendors are stores and not persons, and because only persons can be criminally convicted, the rule permanently disqualifying vendors criminally convicted of trafficking will need to be modified).

169. *Id.* at 51 (proposing to use the federal language to define the term “launder”).

170. See, e.g., the explanation of subpts. 5 & 6 in *id.* at 50–51 (regarding violations for redeeming vouchers in excess of inventory and laundering vouchers).

171. *Id.* at 50 (“three-year disqualification of a vendor that provides any alcohol or tobacco in exchange for a voucher.”). USDA Food and Nutrition Service has oversight of the state rules and may require revision if the rules are not satisfactory. See 7 C.F.R. § 246.12(a)(3) (2006). This oversight may account for MDH’s decision to explain the more substantial changes but not the more subtle tobacco rule change.

When the Minnesota version of the WIC tobacco rule is read in the context of the rest of the Minnesota WIC rules, however, the change from “sale” to “provide” indicates an emphasis on the non-commercial aspect of the exchange.¹⁷² Table 1 compares the federal WIC regulations on vendor violations to the Minnesota rules adopted from those regulations.¹⁷³ In most cases, when the federal regulations use the word “sale,” or some variation thereof, the Minnesota rules do the same.¹⁷⁴ When the federal regulations use the word “provide,” the Minnesota rules do as well.¹⁷⁵ The only significant deviation from this pattern is when the Minnesota rules address providing alcohol or tobacco in exchange for food instruments.¹⁷⁶

In its SONAR, MDH acknowledged that the federal regulation said “sale,” but it adopted the word “provide” nonetheless:

Subp. 4. **Providing alcohol or tobacco.** This proposed subpart requires (except as provided in subparts 15 and 16) a three-year disqualification of a vendor that provides any alcohol or tobacco in exchange for a voucher. This sanction is mandated by the new federal regulations, which state: “The State agency shall disqualify a vendor for three years for: (A) One incidence of the sale of alcohol or alcoholic beverages or tobacco products in exchange for food instruments.”¹⁷⁷

The *Hy-Vee* court and both parties to the case considered the parallelism in this proposed rule to indicate that MDH considered the Minnesota tobacco rule and the federal tobacco rule to have a similar meaning.¹⁷⁸ Both terms, however, are undefined, especially the broad term “provide” in the Minnesota rule, which has no

172. On the objective test for “sale,” see *supra* notes 77–80 and accompanying text.

173. See *infra* Table 1 (comparing 7 C.F.R. § 246.12 (1) (2006) and MINN. R. 4617.0084 subpts. (2)–(9) (2006)).

174. See *id.* at MINN. R. 4617.0084 subpts. (2), (3), (5).

175. See *id.* at subpts. (7), (9).

176. *Id.* at subpt. (4). The change from “receiving, transacting, or redeeming food instrument outside of authorized channels” to “laundering” is not a significant change because Minnesota defines laundering by the terms of the federal rule. See *supra* note 169 and accompanying text.

177. Minnesota Department of Health, “WIC Vendor Rules SONAR Dated 4/3/00,” in Brief of Appellant at Appendix 56, *Hy-Vee Food Stores, Inc. v. Minn. Dep’t of Health*, 705 N.W.2d 181 (Minn. 2005) (No. A04-0548) (quoting WIC/Food Stamp Program Vendor Disqualification, 64 Fed. Reg. 13,311, 13,323 (Mar. 18 1999) (to be codified at 7 C.F.R. § 246.12(k)(1)(iii)(A))).

178. See *supra* note 70 and accompanying text.

commercial meaning.¹⁷⁹

C. *The Meaning of “Provide”*

Moving the interpretation of the rule outside the context of contract law forces the court to examine the statute as a whole to determine its meaning and application. Analogies to other areas of law demonstrate the feasibility of using “sale” and “provide” non-commercially. The definitions of the remaining vendor violations in the WIC rules supply a context in which to consider its application.

Tort law suggests one method of defining “provide” in a non-commercial context.¹⁸⁰ Minnesota’s social host statute, for example, prohibits “knowingly or recklessly” permitting the consumption of alcohol by persons under twenty-one years of age on one’s property.¹⁸¹ Liability attaches to adults who “sold, bartered, or furnished or gave to, or purchased for a person under the age of 21” alcohol that caused that person’s intoxication.¹⁸² Case law on the statute condenses those five verbs—sold, bartered, furnished, gave to, and purchased—into one, stating that the defendant “provided” the alcohol to the minor.¹⁸³

Looking to the rest of the WIC vendor violation rules demonstrates that “sale” and “provide” are used in similar but distinct contexts.¹⁸⁴ The Minnesota rules use “sale” when referring to monetary transactions. Subparts (2), (3), and (5) make up this group: (2) “selling vouchers for *cash*”; (3) “sells vouchers for *cash*” and; (5) “claims *reimbursement* for the sale.”¹⁸⁵ The Minnesota rules use “provide” when referring to the exchange of vouchers for items other than money. Subparts (4), (7), and (9) make up this group: (4) “provides alcohol . . . or tobacco product *in exchange* for . . .

179. See *supra* note 116 and accompanying text.

180. I do not mean to suggest that Hy-Vee’s alleged violation was a tort; it was a violation of an administrative rule.

181. MINN. STAT. § 340A.90 subdiv. (1)(a)(1) (2006).

182. *Id.* at subdiv. (1)(a)(2).

183. See, e.g., *Christianson v. Univ. of Minn. Bd. of Regents*, 733 N.W.2d 156, 157 (Minn. Ct. App. 2007) (“a social host who provided alcohol to a minor”); *Wollan v. Jahnz*, 656 N.W.2d 416, 417 (Minn. Ct. App. 2003) (“for providing alcohol to a minor”).

184. See *infra* Table 1 (citing MINN. R. § 4671.0084, subpts. (2)–(9)).

185. MINN. R. 4617.0084 subpts. (2), (3), (5) (emphasis added). The only exception to this is “selling firearms, ammunition, explosives, or controlled substances in exchange for a food instrument,” found in MINN. R. 4617.0084, subpt. (2).

vouchers; (7) “provides credit . . . or other nonfood item . . . *in exchange* for a voucher; (9) “providing unauthorized food in exchange . . . for voucher.”¹⁸⁶

The federal vendor violations rules, by contrast, use verbs to demonstrate that the rules are ordered from most severe to least severe.¹⁸⁷ The rule at the top of the list, criminal trafficking, requires permanent disqualification.¹⁸⁸ The next three rules, including the tobacco rule, involve the verb selling or sale.¹⁸⁹ These rules are sub-ranked by penalty; non-criminal trafficking earns a mandatory six-year disqualification;¹⁹⁰ selling alcohol or tobacco earns a mandatory three year disqualification;¹⁹¹ and claiming reimbursement for sales above documented inventory requires a pattern before a three year disqualification.¹⁹² The four rules at the bottom half of the chart use various verbs, including “provide,” and require a pattern of bad behavior before disqualification.

By changing the verb in the tobacco rule, the Minnesota rules break up the pattern of severity that the federal rules create. Providing alcohol and tobacco becomes linked with providing a nonfood item in subpart (7)¹⁹³ and providing unauthorized food in subpart (9).¹⁹⁴ Both of these rules require a pattern of offenses before imposing disqualification. Thus, a minor revision re-contextualizes only one of two rules with a penalty of mandatory disqualification.

D. Consequences of the Decision

The history of the WIC Program demonstrates its purpose of promoting public health.¹⁹⁵ The changes to the rules in the late 1990s worked to make the program more economically efficient, but they still operated within the program’s purpose.¹⁹⁶ Consistent with this purpose, the administrative history of the vendor violation rules indicates that FNS intended an exception for “minor

186. MINN. R. 4617.0084 subpts. (4), (7), (9) (emphasis added).

187. See *infra* Table 1 (citing 7 C.F.R. § 246.12(l)(1)(i)–(iv) (2006)).

188. 7 C.F.R. § 246.12(l)(i).

189. *Id.* § 246.12(l)(ii)–(iv).

190. *Id.* § 246.12(l)(1)(ii)(A)–(B).

191. *Id.* § 246.12(l)(1)(iii)(A).

192. *Id.* § 246.12(l)(1)(iii)(B).

193. MINN. R. 4617.0084, subpt. 7 (West, Westlaw through 2007 amendments).

194. *Id.* 4617.0084, subpt. 9.

195. See *supra* Part IV.B.1.a.

196. See *supra* Part IV.B.1.b–c.

unintentional action[s]” even though it defines a vendor violation as an intentional or an unintentional action.¹⁹⁷ The Minnesota rules arguably attempt to codify this exception by changing the verb in the tobacco rule in order to encourage comparison with the other rules.¹⁹⁸ Strict liability for vendors under the WIC tobacco rule may also result in negative consequences for WIC participants and state administrators.

First, inefficiency may result in the WIC system.¹⁹⁹ The *Hy-Vee* majority argued that it would be unwieldy to hold trials for determining each party’s subjective intent.²⁰⁰ The greater inefficiency, however, would be to hinder the day-to-day commonality of grocery shopping: because of the severe penalty for one violation, grocers are more likely to over-check and hassle WIC customers to avoid the sale of prohibited products.²⁰¹ If a mistake is made, the customer and the store are more likely to react out of fear of government repercussions and may feel restricted in their actions.²⁰²

Second, the *Hy-Vee* decision risks upsetting the federal-state balance in WIC administration. WIC is a federal grant-in-aid program “for which Congress authorizes a specific amount of funding each year for program operations.”²⁰³ As such, federal regulations limit states’ discretion in adoption and enforcement of

197. WIC: Food Delivery Systems, 64 Fed. Reg. 32308-01, 32,316 (June 16, 1999) (codified at 7 C.F.R. pt. 246); *see supra* Part IV.C.

198. *See supra* notes 190–91 and accompanying text.

199. *See, e.g.*, Eisenberg, *supra* note 1, at 1584–87.

200. *Hy-Vee Food Stores, Inc. v. Minn. Dep’t of Health*, 705 N.W.2d 181, 190 n.8 (Minn. 2005).

201. *See Eisenberg, supra* note 1, at 1585.

202. *Hy-Vee* argued that the sale should be rescinded because it easily could have been at the time. *See* Brief & Appendix of Appellant, *supra* note 75, at 19. The argument continued, however, that under a strict liability regime, *Hy-Vee* would still be suspended for three years, even if the cigarettes were returned, because they had been recorded on the voucher. *Id.* at 27–28. Thus, merchants would have no incentive to take back products purchased by mistake by WIC customers. *See id.* For her part, the WIC participant immediately called the local WIC agency out of fear that her WIC status would be endangered. *See supra* note 64 and accompanying text.

203. USDA, WIC: THE SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN, INFANTS AND CHILDREN I (2006), <http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf>. By contrast, an entitlement program would fund everyone who met the eligibility requirements. *Id.* WIC is not a block-grant program either. *See* Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL’Y REV. 297, 300 (1996) (defining a block grant as, among other things, authorizing federal aid for “a wide range of activities within a broadly defined functional area.”).

WIC rules.²⁰⁴ Federal grant-in-aid programs, however, are designed to strike a balance between federal and state power.²⁰⁵ But in the case of WIC, USDA must approve all the rules, and may review and revoke rules that are already in force.²⁰⁶ Minnesota is the first to interpret the WIC tobacco rule since its promulgation in 2002. The court's complete deference to the federal version of the rule, demonstrated by using the federal rule's language rather than trying to define the state's own term, sets a precedent for other states that may further upset the federal-state balance in aid programs.²⁰⁷

E. The Hy-Vee Case Under a Contextual Analysis

Stepping away from the U.C.C. analysis of the rule and looking to the wording of the Minnesota tobacco rule required an examination of the context of the Minnesota rule: its history, enactment, and structure. This context may be marshaled to create an argument that both the federal and state rules intended a lesser penalty than a three year suspension for minor, unintentional errors of a cashier.

The dissent to the *Hy-Vee* decision, in fact, made a similar argument. Justice Hanson looked to the other WIC rules that "require proof of a pattern or series of what appear to be regarded by USDA as equally serious violations before a mandatory disqualification [can be] imposed."²⁰⁸ He concluded that he was "reluctant to imply administrative agency authority to impose more severe sanctions where express authority to do so is not clear."²⁰⁹

The problem remains, however, that neither the federal nor the state rules provide any explicit alternatives for the exceptional

204. See 7 C.F.R. § 246.4 (2007) (giving USDA power to accept or reject a state's WIC oversight plan and instituting reporting procedures).

205. See Bruce J. Casino, *Federal Grants-in-Aid: Evolution, Crisis, and Future*, 20 URB. LAW. 25, 65 (1988) (explaining how grants-in-aid appeal to American preferences for services at the local level and yet how national political agreements and trends affect what type of and what amount of grants an area will get).

206. See 7 C.F.R. §§ 246.19–21 (2007) (establishing guidelines for FNS review, audits, and investigations of state agencies).

207. See Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 RUTGERS L. REV. 451, 510 (2005) (discussing the fair and equitable application of administrative rules); David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2562–79 (2005).

208. *Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health*, 705 N.W.2d 181, 192 (Minn. 2005) (citing 7 C.F.R. § 246.12(1)(1)(iii)(B)–(F)).

209. *Id.*

cases. Even if the language of the Minnesota statute points to its context, that context can serve only as an aide to interpretation; it cannot overrule the explicit language of the statute.²¹⁰

Trying the case under the Minnesota rule, using the word “provide,” therefore, might look different because of the analysis of “provide” within the context of the rule, but it would come to the same result. Hy-Vee would still be suspended as a WIC vendor for three years. Under the tobacco rule as it is currently written, there is no avoiding strict liability for vendors.

F. Toward a New Federal Policy

The case of *Hy-Vee* demonstrates how leaving states with little discretion over certain federal WIC regulations has pitted the states against their own populations. The solution is to bring the WIC rule in-line with the other vendor violations. Requiring a pattern of violations, even as few as two violations, before disqualifying a vendor would have several benefits.²¹¹ First, the increased hostility toward WIC customers would be lessened because strict liability will no longer apply.²¹² In addition, vendors would get a warning after their first violation.²¹³ This would not only give them a chance to retrain their employees, but it would also lessen the frequency of litigation on the matter.²¹⁴ If they have been given a chance to rectify the situation, a penalty after the second infraction will come as less of a surprise and seem less severe.²¹⁵

V. CONCLUSION

The afterlife of *Hy-Vee* thus far has been limited. It has been cited for its statements on when to defer to administrative agencies²¹⁶ and for its reliance on an objective standard for sales

210. See MINN. STAT. § 645.16 (2006) (stating as a canon of construction that “the letter of the law shall not be disregarded under the pretext of pursuing the spirit”).

211. See *Hy-Vee*, 705 N.W.2d at 192 (Hanson, J., dissenting) (suggesting a reluctance to impose disqualification for one violation where other WIC rules require a pattern).

212. See *supra* notes 201–202 and accompanying text.

213. This is standard procedure for most vendor violations. MINN. R. 4617.0084, subpt. 18 (West, Westlaw through 2007 amendments).

214. This was a concern of the majority. See *Hy-Vee*, 705 N.W.2d at 190 n.8.

215. See generally Cimini, *supra* note 207.

216. See, e.g., *Wolter v. Dep’t of Human Servs.*, No. A06-1139, 2007 WL 1470437, at *2 (Minn. Ct. App. May 22, 2007).

2008]

HY-VEE V. DEPARTMENT OF HEALTH

1485

contracts.²¹⁷ But the *Hy-Vee* decision and the pendant difficulties in striking a balance between federal and state regulation is a symptom of a growing problem in the national welfare system.

Scholars generally agree that a balance between federal and state regulation is the best outcome for the federal welfare system.²¹⁸ Since PRWORA, however, the trend has been to give the states broad discretion in spending with little federal oversight.²¹⁹ At the same time, requirements for grants-in-aid programs, such as WIC, have become more specific and demanding.²²⁰ The problems with the WIC tobacco rule are an indicator that the regulation of the federal welfare system needs a systemic examination.

217. See, e.g., *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 233 (Minn. Ct. App. 2006) (“[F]ormation of a sales contract requires the *mutual* assent of the parties . . .”).

218. See *Casino*, *supra* note 205, at 65.

219. See *Cimini*, *supra* note 207, at 452–56.

220. See *Super*, *supra* note 207, at 2590.

Table 1. Comparison of Minnesota WIC Vendor Disqualification Rules and Parallel Federal Rules

subpt.	MINN. R. 4617.0084 text	pt.	7 C.F.R. § 246.12 text	Penalty
(2)	criminally convicted of buying or selling vouchers for cash; or selling firearms . . .	(1) (i)	Vendor criminally convicted for trafficking	Permanent disqualification
(3)	buys or sells vouchers for cash; or sells any firearms . . .	(1) (ii) (A)&(B)	buying or selling food instruments for cash (trafficking); or selling firearms . . .	Six-year disqualification
(4)	provides any alcohol or tobacco	(1) (iii) (A)	the sale of alcohol or tobacco	Three-year disqualification
(5)	claims reimbursement for the sale of food item that exceeds the store's documented inventory of that item (pattern = twice w/in a 2 year period)	(1) (iii) (B)	pattern of claiming reimbursement for the sale of food item which exceeds documented inventory	Three-year disqualification

2008]

HY-VEE V. DEPARTMENT OF HEALTH

1487

subpt.	MINN. R. 4617.0084 text	pt.	7 C.F.R. § 246.12 text	Penalty
(6)	launders one or more vouchers (pattern = twice w/in a 2 yr period)	(1) (iii) (D)	pattern of receiving, transacting and/or redeeming food instruments outside of authorized channels	Three-year disqualification
(7)	provides credit . . . or provides a non food item (pattern = twice w/in a 2 yr period)	(1) (iii) (F)	pattern of providing credit or non-food items	Three-year disqualification
(8)	a vendor overcharge ; and charging for WIC-allowed food not received by a WIC customer (pattern differs based on severity)	(1) (iii) (C)&(E)	pattern of vendor overcharges ; charging for supplemental food not received by participant	Three-year disqualification
(9)	[V]endor shall not provide unauthorized food (pattern differs based on food exchanged)	(1) (iv)	pattern of providing unauthorized food	One-year disqualification