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Proceedings

A monthly newsletter from McGraw-Hill

September 2009 Volume 1, Issue 2

The McGraw-Hill Companies

Contents

Dear Professor,

Welcome to McGraw-Hill's September issue of *Proceedings*, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 1, Issue 2 of *Proceedings* follows the same format as the inaugural edition (offered in July/August), including "hot topics" in business law, video suggestions, a hypothetical and ethical dilemma, teaching tips, and a "chapter key" cross-referencing the September newsletter topics with the various McGraw-Hill business law textbooks.

You will find a wide range of topics in this publication, including:

1. Legislative defeat of the so-called "Thune Amendment," a law proposed by Senator John Thune (R-S.D.) that would have expanded the rights of gun owners to carry concealed weapons across state lines;

2. The United States government's declaration of legal immunity for swine flu vaccine manufacturers and federal officials;

3. A recent sexual harassment complaint involving Navy spokesperson Jeffrey Gordon and Miami Herald military reporter Carol Rosenberg;

4. Videos related to a) whether childhood obesity constitutes child abuse on the part of the parent; and b) whether the arrest of Harvard professor Henry Louis Gates, Jr. was legal;

5. A "case hypothetical and ethical dilemma" related to whether a unilateral mistake of fact affects contract enforceability; and

6. "Teaching tips" related to the "Thune Amendment" (the subject matter of Article 1) and to the legal question regarding whether childhood obesity constitutes child abuse (the subject matter of Video 1).

I sincerely hope this newsletter will be of great benefit to you in the classroom. Enjoy!

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Of Special Interest

This section of the newsletter covers three (3) topics:

1) Recent legislative efforts to expand the Second Amendment "right to bear arms;"

2) Legal immunity for swine flu vaccine producers; and

3) A recent sexual harassment complaint involving the military and the media.

Hot Topics in Business Law

Article 1: "Democrats Defeat Concealed Weapons Amendment"

http://voices.washingtonpost.com/capitol-briefing/2009/07/democrats_defeat_concealed_wea.html?wprss=capitol-briefing

The Second Amendment to the United States Constitution, passed by the United States Congress on September 25, 1789 and ratified on December 15, 1791, states that "(a) well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." This seemingly innocuous assertion of right has led to a constitutional struggle of over two hundred years in terms of whether the right to bear arms is an absolute guarantee accorded to the people, or whether such right is subject to government regulation, and if so, what the extent of that regulation should be.

As indicated in the above-referenced Washington Post article, the most recent legislative test of the Second Amendment was the so-called "Thune Amendment," a law proposed by Senator John Thune (R-S.D.) that would have allowed gun owners to carry concealed weapons across state lines without regard for stricter laws in those states, provided that they "have a valid permit or if, under their state of residence...are entitled to do so." As referenced in the article, this would have meant that someone who had a concealed-carry permit for his gun in a state like Vermont, with some of the loosest gun-control laws in the nation—could cross over into other states with their guns and not be found guilty of violating those states' tighter gun laws. According to Senator Thune, the amendment would have "ensure(d) that a state's border is not a limit to an individual's fundamental right and (would have allowed) law-abiding individuals to travel without complication throughout the forty-eight states that already permit some form of conceal and carry." In a 58-39 vote, supporters of the looser gun law (including all but two Republicans and almost twenty moderate Democrats) fell two votes short of the 60 they needed to approve the measure. Constitutional experts have claimed that even in defeat, the Thune Amendment demonstrates the continued power of the National Rifle Association and other gun rights advocates in Congress, since the Thune Amendment is considered the most far-reaching federal effort ever proposed to expand laws regarding weapons ownership, and since the Amendment did make it to the legislative stage of being presented for a "floor" vote.

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The Second Amendment debate rages on, as it has for over two hundred years, and interpretation of the right to bear arms may never be fully resolved.

Discussion Questions

1. Examine the exact language of the Second Amendment to the United States Constitution (Specifically, the Amendment states that "(a) well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.") To the best of your ability, try to disregard all of the political statements you have heard about the Second Amendment, and provide (if you can) an objective interpretation of the Second Amendment. What, exactly, does it mean, and what, exactly, does it grant in terms of constitutional rights?

It may be impossible for students to provide an objective interpretation of the meaning of the Second Amendment, as well as the constitutional rights it provides. So much of an individual's interpretation of the Second Amendment depends on an individual's subjective beliefs of the rights it provides; it has, in many respects, become a political "Rorschach Test." "Gun rights" advocates will argue, based on personal opinions formed by cultural influence and family upbringing, that the right to bear arms is an absolute right granted to the people, without reservation or qualification. Consider, for example, former actor and National Rifle Association (NRA) President Charlton Heston's assertion at the 2000 NRA Convention that a potential Al Gore presidential administration would only take away his Second Amendment rights from "(his) cold, dead hands."

Those who favor some form of gun control will argue that the language of the Second Amendment right to bear arms is prefaced on the need for a militia (and a well-regulated one, at that) to defend the nation (think "Minutemen" during the time of the American Revolution.) In other words, the right to bear arms is not so much based on individual right as it is on the need to defend the nation. Gun control advocates will also argue that while the population of the colonies was only approximately 2.5 million people in 1776, the population of the United States has grown to over 300 million people today; accordingly, with the exponential growth in population comes the need to regulate the ownership, possession and use of weapons in the United States.

2. As the Washington Post article indicates, many "big city" mayors, such as New York's Michael Bloomberg, led a furious lobbying effort to try to derail the passage of the Thune Amendment. Those mayors were accompanied by several gun-victims groups, such as the families of students killed in the 2007 shootings at Virginia Tech University. Bloomberg, in a letter to Senate Majority Leader Harry Reid, noted that at least thirty-one states prohibit alcohol abusers from obtaining concealed-carry permits, at least thirty-five states bar people convicted of certain misdemeanors from becoming gun owners, and at least thirty-one states require people to complete gun-safety programs before securing a weapons permit. In your reasoned opinion, why did Mayor Bloomberg make an issue of these statistics in his letter to Senate Majority Leader Reid?

Implicit in Mayor Bloomberg's letter is the fact that if thirty-one states prohibit alcohol abusers from obtaining concealed-carry permits, nineteen states do not; that if thirty-five states bar people convicted of certain misdemeanors from becoming gun owners, fifteen do not; and that if thirty-

one states require people to complete gun-safety programs before securing a weapons permit, nineteen do not. In his effort to prevent passage of the Thune Amendment, Bloomberg is essentially arguing in favor of states' rights; i.e., if certain states desire to have more stringent gun control laws than other states, they should have the right to do so. The Thune Amendment would have essentially limited states' rights, since it would have stipulated that as long as a gun owner meets the requirements of his/her home state, all other states must honor the Second Amendment rights guaranteed in that state.

3. What is a "concealed-carry" permit? Is such a permit guaranteed by the express language of the Second Amendment to the United States Constitution? If not, is it guaranteed implicitly by the language of the Second Amendment?

In the United States, a "concealed-carry" permit is the legal authorization for a private citizen to carry a handgun (or other weapon, as designated by law) in public in a concealed manner, either on the person or in close proximity to the person. Under current law, "concealed-carry" law is predominately crafted on a state-by-state basis, with each state determining: 1) whether "concealed-carry" is allowed; 2) the requirements necessary for a citizen to obtain a "concealed-carry" permit; and 3) the nature and extent of the "concealed-carry" right. Pursuant to federal legal precedent, it is constitutional under the Second Amendment for states to have concealed-carry licensing that permits concealed carried weapons, or even not to require any permits for concealed carry weapons; for example, any legal gun owner in the state of Vermont may carry concealed weapons with no permit required.

The "concealed-carry" permit is not guaranteed by the express wording of the Second Amendment to the United States Constitution. The language of the Second Amendment is brief, stating that "(a) well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Lawmakers have inferred an implied right to carry concealed weapons as part of the more general right to bear arms.

Article 2: "Legal Immunity Set For Swine Flu Vaccine Makers"

http://www.msnbc.msn.com/id/31971355/

In the event that citizens should become seriously ill or die as a result of a new swine flu vaccine, should pharmaceutical manufacturers of the vaccine be subject to liability for the harm? This is the question addressed in the article "Legal Immunity Set For Swine Flu Vaccine Makers." In a document signed by Secretary of Health and Human Services Kathleen Sebelius in June 2009, vaccine manufacturers (and federal officials) will be immune from lawsuits that result from any new swine flu vaccine.

The decision to grant immunity to vaccine manufacturers is part of the government's reaction to a new swine flu scare, which was first identified in April 2009. According to the Centers for Disease Control and Prevention (CDC,) swine flu has so far caused about 263 deaths. Further, according to

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CDC statistics, more than 40,000 Americans have had confirmed or probable cases, and it is likely that as many as one million Americans have been sickened by the flu, many with mild cases.

The last major swine flu "scare" in the United States was in 1976, causing the government to vaccinate forty million Americans in a nationwide campaign. Your author of this newsletter was one of the forty million Americans vaccinated that year, and I remember well the rapt media attention devoted to the potential pandemic and the long lines of millions of Americans waiting for inoculation against the virus. As the article indicates, the pandemic never materialized. Some credit the government for its aggressive intervention, and claim that but for its nationwide vaccination campaign, the pandemic might have become a reality. Critics claim that the government overreacted, although in the opinion of this author, it is difficult to be critical of the government's proactive response, in light of a flu pandemic that did become a reality in 1918 and 1919, killing millions around the world.

The article indicates that as a result of the 1976 national vaccination campaign, thousands who received inoculations filed injury claims, claiming they suffered a serious nervous system disorder called Guillain-Barre Syndrome and/or other side effects as a result of the vaccine. Today, given the government's extension of immunity to pharmaceutical manufacturers who produce the swine flu vaccine, although citizens should rightfully be concerned about exposure to the virus, corporations producing the vaccine need not be concerned about legal exposure.

Discussion Questions

1. In your opinion, does it seem unusual that the federal government would grant immunity to pharmaceutical manufactures that produce the swine flu vaccine? Why or why not?

Although government recognition of legal immunity for corporations is a relatively rare occurrence, government officials claim that in light of a potential health emergency, government extension of immunity makes sense in this case. In fact, Secretary of Health and Human Services Sebelius granted such immunity pursuant to a law enacted in 2006, which provides for discretionary immunity during a public health emergency. Secretary Sebelius proceeded under the assumption that even the threat of a pandemic constitutes a public health emergency, since waiting until the threat materializes to decide the issue would be to wait to long, potentially resulting in serious illness or death for hundreds of thousands, if not millions, of Americans.

The article indicates that the reason for granting immunity to vaccine manufacturers is quite simple: to incentivize pharmaceutical companies to manufacture vaccines. The federal government is concerned that without such immunity, pharmaceutical companies will not be inclined to produce vaccines to combat a potential pandemic, since vaccines typically are not as profitable as other drugs.
On an interesting side note, you may want to discuss with your students an alternative to corporate immunity in this case. What about the option of the government exercising its authority, during a time of national emergency, to mandate that pharmaceutical manufacturers produce vaccines, without granting immunity? This would not be an unprecedented exercise of government power,

especially during a time of national emergency. In such a situation, vaccine production would flow, and consumers would still have the right to sue any pharmaceutical company that produced a defective product.

2. The article indicates that pursuant to the decree signed by Secretary of Health and Human Services Kathleen Sebelius in June 2009, not only will pharmaceutical manufacturers be immune from lawsuits that result from any new swine flu vaccine, but federal officials will enjoy the immunity as well. In your opinion, should federal officials be granted such immunity? Why or why not?

Governmental immunity from liability is much more common in our nation's history than corporate immunity. In fact, the concept of governmental immunity has longstanding precedent in the United States. Also known as "sovereign immunity," the concept of governmental immunity is a common law concept dating back to early English law. Based on the assumption that "the king (or queen) can do no wrong," sovereign immunity holds that the government cannot commit a legal wrong, and is therefore immune from civil and/or criminal liability. Over time, United States governmental immunity has eroded somewhat. Consider, for example, the Federal Tort Claims Act (FTCA,) which provides that the federal government can be held liable in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Even the FTCA, however, would exempt the government from liability for claims based upon the performance, or failure to perform, a "discretionary function or duty." It would seem logical to presume that a government official's decisions as to how to respond to a pandemic (or any other form of national emergency) would constitute a discretionary function or duty.

The obvious concern related to granting government officials immunity from liability would be similar to the concern surrounding corporate immunity: It would decrease the incentive for the decision-maker to act with due care.

3. What are the dangers of granting the immunity described in this article?

As indicated in response to Discussion Question 2, whether it is granted to corporations and/or government officials, immunity potentially reduces the decision-maker's incentive to act with due care. The other concern, obviously, is that a party harmed through the negligence or other wrongful act of the decision-maker will not have a sufficient opportunity (or any opportunity at all) to recover for the harm committed. Even though the article references a "special fund" that can be created by the federal government to compensate those harmed by a vaccine, it is not too difficult to envision a situation where the fund is not sufficient to satisfy the number and magnitude of claims filed against it; history seems to demonstrate that such a fund would be quickly exhausted, and claimants would only likely recover compensation sufficient to reimburse them for a small fraction of the harm sustained. As noted in the article, consider medical liability attorney Paul Pennock's advice: "(I)f you (the government)... (are) going to ask (millions of Americans to get vaccinations) for the common good, then let's make sure for the common good that these people will be taken care of if something goes wrong."

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Article 3: "Military and Media Clash In Complaint"

http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072403664_pf.html

Sexual harassment has been a topic of heightened public consciousness for the last two decades. Public awareness of sexual harassment law can be traced to 1991, when Anita Hill presented, in testimony before the United States Congress, her sexual harassment allegations against current United States Supreme Court Justice Clarence Thomas during his Supreme Court confirmation hearings. During the 1980s, Ms. Hill had first worked with Justice Thomas at the United States Department of Education (DOE,) and then as a special assistant to Justice Thomas during his tenure as chairperson of the Equal Employment Opportunity Commission (EEOC.) Hill claimed that during her employment at the DOE and at the EEOC, Justice Thomas made numerous inappropriate comments of a sexual nature to her, resulting in a "hostile work environment." Despite Ms. Hill's assertions, Justice Thomas' nomination was confirmed by a 52 to 48 vote, and he has served on the United States Supreme Court bench since. The Anita Hill-Clarence Thomas case illustrates that even without inappropriate contact of a sexual nature, and even without "quid pro quo" sexual harassment (where, for example, a supervisor might ask a subordinate for sexual favors in return for employment benefits like higher pay, a job promotion, etc.,) sexual harassment can still occur when inappropriate comments of a sexual nature (dirty jokes, sex-related language, etc.) create a "hostile work environment."

The above-referenced article, "Military and Media Clash In Complaint," is a modern-day illustration of a sexual harassment claim. As the article indicates, Navy spokesperson Jeffrey Gordon claims that he has been the victim of "multiple incidents of abusive and degrading comments of an explicitly sexual nature," with Miami Herald military reporter Carol Rosenberg the alleged transgressor. The inappropriate comments purportedly occurred during Rosenberg's coverage of the Guantanamo Bay prison (which, since September 11, 2001, has housed alleged terrorists), with Gordon serving as spokesperson for the facility. Rosenberg's journalist "beat" at Guantanamo Bay is designed to extract information from the military about the prison and the inmates who are housed there, and as the article suggests, a tension often develops in light of the media's attempt to obtain information there, as opposed to the government's attempt to tenaciously control information originating from the facility.

In a letter designed to serve as a "formal sexual harassment complaint" against Rosenberg, Gordon has asked the Miami Herald for a "thorough investigation" surrounding its employee, citing the following incidents as circumstances warranting punitive action against Rosenberg:
a. While watching September 11, 2001 co-defendant Mustafa al-Hawsawi seated on a pillow in court last year, Rosenberg told Gordon: "Have you ever had a red hot poker shoved up your (expletive)?...How would you know how it feels if it never happened to you? Admit it, you liked it."

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b. When Gordon emerged from a shower facility in shorts and a towel last year, Rosenberg said to him and more than a dozen journalists and soldiers nearby: "Seeing him topless in tent city was the most repulsive sight I've ever seen in my lie. I wanted to vomit."

c. After dealing with a Gordon intern whom she described as "your little chick with the hot pants," Rosenberg told Gordon, in the presence of others: "I know you're hot for your interns and bring them down as your 'companions,' but seriously, if I'm going to do their work anyway, what purpose do they serve? (Gordon claims that since Rosenberg knew his intern was a male, Rosenberg was inferring that Gordon is a homosexual.)

d. Gordon alleges that Rosenberg routinely referred to his colleagues in the Office of the Secretary of Defense and Justice Department, as well as her peers in the press, as "bitches," "stupid," "lazy," "incompetent," "Nazis," "Saddam Hussein-like," etc.

It remains to be seen whether the Miami Herald will conduct a formal investigation in response to the complaint, and if so, what the outcome of the investigation will be. One thing is for sure: By all appearances, there is "no love lost" between Commander Gordon and Ms. Rosenberg.

Discussion Questions

1. This case in somewhat unusual in the sense that a male is claiming that a female sexually harassed him (The vast majority of sexual harassment cases involve a female complainant and a male aggressor; according to statistics compiled by the Equal Employment Opportunity Commission (EEOC,) from 1999-2008, females filed 85.4 percent of all sexual harassment claims, while males filed on 14.6 percent of all claims.) Should males be allowed to file sexual harassment claims against females, or should sexual harassment law be exclusively designed to protect females?

In terms of sexual harassment law and the right to file a complaint for sexual harassment, if our country is truly committed to the notion of equal protection under the law, males must be provided the same rights as females. Although it might sound unusual to some students for a male to be a plaintiff in a sexual harassment complaint, the EEOC statistics cited in Discussion Question 1 above do bear out the fact that men are the victims (or are at least claiming to be the victims) of sexual harassment. The harassment could originate from a female superior in the workplace, a female co-worker, or even another male (The United States Supreme Court has recognized a cause of action for "same-sex" sexual harassment, which could involve a male aggressor and a male victim.) The "bottom line" here is that although statistics appear to indicate that men are in the minority when it comes to being victimized by sexual harassment, they are potential victims, and accordingly should have the right to petition the court for a redress of grievances.

2. Given the fact that Commander Gordon and Ms. Rosenberg are not co-workers, should the Miami Herald (Rosenberg's employer) still conduct an investigation in response to Commander Gordon's allegations? Why or why not?

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Every employer should take every sexual harassment complaint seriously, for if the complainant does not receive "due process" on a "lower" level (such as through employer investigation of the sexual harassment allegations,) the complainant will likely be inclined to pursue due process in a court of law. An employer's potential liability for sexual harassment committed by an employee is broad and far-encompassing; It can extend to situations where: 1) a supervisor sexually harasses a subordinate; 2) a worker sexually harasses a co-worker; or 3) a worker sexually harasses a customer, or any other individual who "interfaces" with the organization. From a legal standpoint, an employer can be held liable if it has actual knowledge of sexual harassment committed by an employee, or if it "should have" known of the sexual harassment, based upon the circumstances of the case. Further, employer response to a claim of sexual harassment can also affect the outcome of litigation (both in terms of employer liability and/or damages required to be paid to the victim by the employer.) The Miami Herald should take Gordon's complaint seriously, it should thoroughly investigate the claim, and its response should befit the outcome of the investigation (For example, if the Herald's internal investigation indicates that Ms. Rosenberg sexually harassed Mr. Gordon, it should take appropriate disciplinary measures against Ms. Rosenberg.)

3. Assume that all allegations in Gordon's complaint are true. If so, did Rosenberg sexually harass Gordon? Why or why not?

Mr. Gordon's specific allegations of sexual harassment, mentioned previously in the factual summary of the article, bear repeating:

a. While watching September 11, 2001 co-defendant Mustafa al-Hawsawi seated on a pillow in court last year, Rosenberg told Gordon: "Have you ever had a red hot poker shoved up your (expletive)?...How would you know how it feels if it never happened to you? Admit it, you liked it."

b. When Gordon emerged from a shower facility in shorts and a towel last year, Rosenberg said to him and more than a dozen journalists and soldiers nearby: "Seeing him topless in tent city was the most repulsive sight I've ever seen in my lie. I wanted to vomit."

c. After dealing with a Gordon intern whom she described as "your little chick with the hot pants," Rosenberg told Gordon, in the presence of others: "I know you're hot for your interns and bring them down as your 'companions,' but seriously, if I'm going to do their work anyway, what purpose do they serve? (Gordon claims that since Rosenberg knew his intern was a male, Rosenberg was inferring that Gordon is a homosexual.)

d. Gordon alleges that Rosenberg routinely referred to his colleagues in the Office of the Secretary of Defense and Justice Department, as well as her peers in the press, as "bitches," "stupid," "lazy," "incompetent," "Nazis," "Saddam Hussein-like," etc.
In your interaction with students while dealing with this question, ask them whether Gordon should "be strong" when it comes to comments allegedly made by Rosenberg, because: 1) he is a man; and/or 2) he is "in the Navy." As indicated in response to Discussion Question 1 above, some students may feel that men should have "tougher exteriors" regarding sexual harassment simply because they are men. In terms of the "Navy" issue, some students may believe that military

culture is simply more conducive to otherwise inappropriate words and comments (ever heard the term "cursing like a sailor?!"), and that members of the military should therefore be more tolerant of such language. Ultimately, the determination of sexual harassment is a jury question (if the case should go to trial.) A finding of sexual harassment depends not only on the unique facts and circumstances of each case, but also on the individuals who have the responsibility of finding the facts and applying the law to a particular case (in civil litigation, the jury.) With respect to the Miami Herald's findings of fact in its internal investigation and/or a tribunal's potential future verdict addressing the case, one of Gordon's statements alone may not be deemed to constitute sexual harassment; however, given the pervasive nature of the comments, all statements taken together might (under what sexual harassment law refers to as the "totality of the circumstances") constitute sexual harassment.

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Video Suggestions

Video 1: "Is Childhood Obesity Child Abuse?"

http://www.cnn.com/video/#/video/bestoftv/2009/07/22/cb.obesity.crime.cnn

Purpose of video: To discuss whether parents should be held legally responsible for the obesity of their children

Discussion Questions

1. As indicated in the video, Jerri Gray, mother of fourteen-year-old, five hundred fifty-five pound Alexander, has been charged with the unlawful neglect of a child, a felony in South Carolina punishable by ten (10) years imprisonment. In your reasoned opinion, should Ms. Gray be subjected to felony prosecution? The video also indicates that in the state of New York, legal precedent would support misdemeanor prosecution in this case (A misdemeanor is a crime punishable by less than one (1) year imprisonment.) Would misdemeanor prosecution be more appropriate in this case?

Student opinions will likely vary in terms of whether Jerri Gray should be held criminally liable at all, or if so, whether the nature of the offense should give rise to either felony or misdemeanor liability. Criminal liability is based on either intent, recklessness or negligence; in this particular case, no one is claiming that Jerri Gray intended for her son to be obese; instead, the prosecutor's argument is that her negligence (the failure to do what a reasonable parent would do under the same or similar circumstances) led to her son's obesity, and that such disregard for her son's health amounted to criminal neglect.

Consider the mitigating circumstances in this case. Jerri Gray is a single parent. Like any parent, she cannot monitor her child during school hours. She is the sole "breadwinner" of her family, and must work long hours (during odd hours of the day; namely, second and third shifts) in order to "make ends meet" for her son and herself. According to her attorney, Ms. Gray also tried to seek medical treatment for her son in North Carolina, only to be turned away because her son was too obese. Based on the information available in this case, an argument could be

made that Jerri Gray is to be commended for what she has done to provide for her son, and to address his condition.

On the question of felony versus misdemeanor prosecution, even for students who support Jerri Gray's prosecution, there will likely be different opinions in terms of the severity of the punishment.

2. United States Secretary of State Hillary Rodham Clinton once famously stated that "(it) takes a village to raise a child." Along those lines, state whether any of the following individuals/organizations should be held legally responsible for Alexander Gray's morbid obesity: a) Gray's school, given the fact that he apparently ate several lunches there each day, and students were allowed to frequently provide him with food; b) the North Carolina health care facility that, by Jerri Gray's account, turned her son away because he was too obese; and/or c) food manufacturers, given the fact that their products, often high in fat and carbohydrate content, directly contributed to Gray's obesity.

Student opinions will vary. This question is designed to indicate that if blame is to be assigned for Alexander Gray's morbid obesity, the blame should arguably not rest exclusively with his mother. Gray's school did allow him to eat several lunches each day, and other students were allowed to provide him with an inordinate amount of food. If Jerri Gray's attorney is correct in his assertion, a North Carolina health care facility did turn Alexander away because of his morbid obesity. Finally, the nutritional content of many food products in the United States does leave something to be desired, and yet food manufactures nevertheless continue to "ply their wares."

3. In the video, Jerri Gray's attorney stated that if his client is prosecuted, this will set a dangerous precedent in terms of parental liability, paving the way for parental liability if their children should become anorexic, bulimic, abusive of drugs, etc. Is the potential "slippery slope" of parental liability a realistic concern regarding Jerri Gray's prosecution?

The "slippery slope" argument is a persuasive one. It does seem logical to assume that if criminal precedent is established in this case, parental liability could extend to other health problems a child might develop, including anorexia, bulimia, the effects of drug abuse, etc. If childhood obesity can result from criminal parental neglect, then it does follow that other adverse health conditions could develop from such neglect.

Video 2: "Henry Louis Gates, Jr. Arrested In His Own Home"

http://www.youtube.com/watch?v=bRcPFCTH_rQ

Purpose of video: To discuss the circumstances surrounding the arrest of Henry Louis Gates, Jr.

Discussion Questions

1. In your reasoned opinion, was the arrest of Henry Louis Gates, Jr. legal? Was it appropriate under the circumstances?

Obviously, these are difficult questions to address. Cambridge police claim they felt justified in questioning Gates when they arrived, since there was a suspected break-in in progress, and that Gates should not have verbally confronted them in terms of questioning the integrity of their motives. Gates' argument, in essence, is that his home is his "castle," and that when he demonstrated proper identification (Gates says he presented his driver's license and Harvard ID,) the police should have immediately left his property. In discussing the legality and/or propriety of Gates' arrest, remind students that he was arrested for disorderly conduct on his property (he was literally arrested on his front porch,) and that at no time did Gates physically threaten any of the officers present.

Shortly after the incident, President Barack Obama gave his insight, claiming that the police acted "stupidly" in arresting Gates. It is interesting to note that for approximately twelve years (1992-2004) before becoming a United States Senator, President Obama served as a constitutional law professor at the University of Chicago Law School; at least arguably, that should make him somewhat of an expert in terms of the constitutionality of specific arrest scenarios! You may want to refer students to the following video in order to gain further insight regarding President Obama's opinion (in his own words) regarding the Gates arrest:

http://www.youtube.com/watch?v=LZYsW_PxWAM

(Note: For a written article regarding the arrest of Henry Louis Gates, Jr., see "Black Scholar's Arrest Raises Profiling Questions" at ***http://abcnews.go.com/print?id=8127109.)***

2. In terms of policing in the United States, does "racial profiling" occur?

The American Civil Liberties Union (ACLU) defines "racial profiling" as "the discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion or national origin (See ***http://www.aclu.org/racialjustice/racialprofiling/21741res20051123.html****.) In the Gates case, there is an argument to be made that had a white man been involved, the police would not have acted as they did. See the video referenced in response to Discussion Question 1 above for President Obama's opinion that the United States has a "longstanding," "indisputable" history of racial profiling.*

3. Is racial profiling ever justified in any circumstances? For example, in a "post-9/11" world, is racial profiling of those of Middle Eastern descent justified in airports across America?

The strongest argument against racial profiling is that at its "core," racial profiling represents discrimination, and that discrimination is illegal and antithetical to modern American culture. In terms of airport screening, some students might try to justify racial profiling of those of Middle Eastern descent as an efficient, cost-effective way to prevent "another 9/11." The following questions remain, however:

a. What does it mean to be "of Middle Eastern descent?"

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b. Are not Caucasians capable of terrorism as well? (You might want to remind students that before the events of September 11, 2001, the most devastating terrorist act on American soil was committed by Timothy McVeigh, a white male, in Oklahoma City, Oklahoma.)

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Of Special Interest

This section of the newsletter addresses the question of:

1) whether a mistake of fact affects the legal enforceability of a contract; and

2) whether a party to a contract has an ethical obligation to give remedy to the other contracting party if the other party has made a unilateral mistake of fact pertaining to the contract.

Hypothetical and Ethical Dilemma

They say that "all good things must come to an end," and for Elizabeth Covington, the saying had unfortunately come true. After a brief illness, Elizabeth's husband Forrest had died at the age of sixty-eight. The couple had been happily married for forty-two years, and now Elizabeth was left with only her memories, and with the material belongings her husband had left behind. Her husband's funeral now complete, Elizabeth was faced with the responsibility of administering her husband's estate. As required by state law, she had only one year to "wrap up" the financial affairs of her husband's estate through the process of probate. The "clock was ticking" on the probate time limit, and Elizabeth knew that she must somehow "press on." As the sole heir of her husband's estate (Forrest had named his wife as the only beneficiary of his will,) all proceeds and property from the estate would pass to Elizabeth. That was little consolation to Elizabeth, as she would, if she somehow had the opportunity, trade all of her worldly possessions for another day with her life and soul mate.

Some time ago, Elizabeth had read that one of the best way's to cope with the loss of a deceased spouse was to rid the house of the personal belongings of the lost loved one. Along those lines, she decided to have an estate sale. Elizabeth's daughter Samantha agreed to help with the sale, with the stipulation that all of the proceeds of the sale would be used for the benefit of her mother. Samantha knew that with her mother now approaching retirement alone (Elizabeth was sixty-five years old,) she would need all of the financial support she could muster.

The date for the estate sale had arrived. All of Forrest's personal belongings had been arranged neatly in the garage. Throughout his life, Forrest had been an avid baseball fan and collector of baseball cards; although it had been his hobby, Elizabeth had not shared in his love for baseball or card collecting, so she therefore knew very little about the cards. Samantha did not know the difference between a "home run" and a "touchdown." Forrest's entire baseball card collection was displayed in the garage with his other worldly possessions, waiting for buyers.

Michael Ferrell, an eighteen-year-old who lived in the neighborhood, decided to attend the Covington estate sale. He arrived early that morning, before all other prospective customers, with a twenty-dollar, self-imposed spending limit. What first caught Michael's attention was Forrest's baseball card collection; more specifically, what appeared to be a 1952 Topps Mickey Mantle rookie baseball card in near-mint to mint condition. On the outside of the box containing the cards was a sticker indicating "All Cards $1 Each." Michael could not believe his eyes. He meandered for several

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minutes through Forrest's old dress shirts, golf clubs and electronic equipment, with butterflies in his stomach and with the Mantle baseball card in his hand. Michael debated with himself about whether he should disclose the real value of this treasure to Mrs. Covington (he had heard that a similar Mantle card had sold in 2006 for over $72,000!); remembering something about "discretion being the better part of valor," however, Michael paid Elizabeth the $1, left the estate sale, and returned home with his treasure.

Later that month, Elizabeth was in her living room watching her favorite public television show, "Antiques Circus." To her surprise, her young neighbor Michael was on the show, asking an antiques expert to estimate the value of the 1952 Mantle card. The expert, well-trained in the art and science of baseball card collecting, said that even in a tough economy, the card would likely bring $80,000 at public auction. Elizabeth was heartbroken; not only had she sold her husband's personal belongings (which she had come to regret,) but she knew that this one card could have "paved the way" for a more financially secure retirement. If only she had known…

From a legal standpoint, is Michael Ferrell obligated to return the card to Elizabeth Covington (in return for the original price he paid, $1?) Alternatively, does Elizabeth have the legal right to recover the true value of the card ($80,000?) Ethically, should Michael either return the card to Elizabeth, or pay her its true value?

From a legal standpoint, Elizabeth would have a difficult time either recovering the card or its true value. All of the elements of contract formation are present in this case: 1) When Michael presented the $1 to Elizabeth, he was essentially making her an offer; 2) When Elizabeth took the $1, she essentially accepted the offer; and 3) There was an exchange of consideration here (money for property,) therefore meeting the contractual requirement of mutual consideration. Since the contract price for this "goods" transaction does not exceed $500, there is no Statute of Frauds writing requirement; furthermore, Michael's receipt of the card and Elizabeth's receipt of payment demonstrate the existence of a contract between them.

In terms of legal analysis of the case, Elizabeth is also faced with the general rule that a unilateral mistake of fact does not void a contract. Michael is not mistaken about the value of the card; in fact, he has a good idea as to its true value. If any party is mistaken it is Elizabeth, and ordinarily, a unilateral (i.e., "one-sided") mistake does not void a contract. Additionally, there is no fraud in this case, as Michael did not make any false statements of fact to Elizabeth; as the case study indicates, all he did was pay Elizabeth the "asking price" of $1.)

In some jurisdictions, there is developing authority that one of the following conditions would permit a court to invalidate a contract on the grounds of unilateral mistake:

1. One party made a mistake about a material fact and the other party either knew or had reason to know about the mistake; or
2. The mistake was so serious that the contract is "unconscionable;" i.e., the contract is so unreasonable that it is outrageous, and therefore "shocks the conscience" of the court.

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It must be emphasized that in conservative jurisdictions that follow the "common" (traditional) law, neither of the above arguments would likely be successful. A conservative judge would likely say that a bad bargain is a bargain nevertheless, and therefore an enforceable contract. Even in jurisdictions that recognize equitable relief for a party on the grounds of unconscionability, the judge presiding over the case would have to decide whether justice dictates setting aside the general rule that "bad bargains are still enforceable contracts" in order to promote ultimate fairness in the case. Keep in mind that for every situation where a contract is "set aside" through the imposition of equitable relief, the general rule that contracts are enforceable agreements is compromised.

The ethical question in this case is also very interesting. Many students will likely conclude that Michael has an ethical obligation to either return the card or pay Mrs. Covington its fair value. This judgment would likely result from recognition of the fact that Michael is young and relatively knowledgeable of the subject matter of the sale, while Elizabeth is older and relatively ignorant of the subject matter.

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Of Special Interest

This section of the newsletter will assist you in covering:

1) Article 1 of the "Hot Topics in Business Law" Section ("Democrats Defeat Concealed Weapons Amendment"); and

2) Video 1 of the "Video Suggestions" Section ("Is Childhood Obesity Child Abuse?").

Teaching Tips

Teaching Tip 1:

In terms of Article 1 ("Democrats Defeat Concealed Weapons Amendment",) the Second Amendment to the United States Constitution is a contentious, politically-charged issue that is likely to stoke the emotions of students. From a political standpoint it is most definitely a "wedge" issue, dividing the population into adverse segments, with some of the population favoring an absolute right to bear arms, and others favoring a more restricted right. In fifteen (15) years of teaching, I have never experienced a student with the opinion that there is no individual right to bear arms guaranteed by the Second Amendment; instead, the issue usually comes down to whether the right is absolute, or whether it is subject to restrictions. For those who favor restrictions, there is also considerable debate as to what the nature and extent of the restrictions should be.

Before discussing Article 1, "Democrats Defeat Concealed Weapons Amendment," I recommend that you ask for student opinions regarding whether the Second Amendment: 1) guarantees an absolute, unrestricted right to citizens to bear arms; or 2) guarantees citizens a restricted right to bear arms, subject to reasonable regulation by the state and federal governments. Once you have solicited the opinions of students, make them argue the opposite side of the Second Amendment issue; for example, request that a staunch Second Amendment advocate argue for the government-regulated right to bear arms. Through the course of this exercise, it will be interesting to see whether any "hearts and minds" are changed through cognizance and expression of the opposite side of the issue!

Note: In my teaching experience, I have found that once a student has formed an opinion of the Second Amendment, it is highly unlikely that the student's opinion will change. In 2007, the Virginia Tech massacre occurred after my Business Law I class had covered the Second Amendment in the textbook chapter addressing the United States Constitution. During our initial coverage of the Second Amendment, several students in my class expressed staunch advocacy for an absolute right to bear arms. After Virginia Tech, the same students argued that the massacre was clear and convincing evidence that students, faculty and staff should have the right to bear arms on campus and in the classroom, and that the possession of weapons by the innocent victims would have

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effectively countered the aggression of the madman who committed unspeakable acts of violence that day. In a faint attempt at humor, I responded that if students were granted the right to bear arms in the classroom, my "grading curve" would most definitely be more generous! For staunch Second Amendment advocates, the right to bear arms bears no limits.

Teaching Tip 2:

As you will recall, Video 1 ("Is Childhood Obesity Child Abuse?") addresses the question of whether a parent should be held criminally responsible for the neglect of a child. I suggest expanding the discussion into two (2) additional areas:

1. Whether students would favor allowing a child to hold his/her parents civilly responsible for neglect; and

2. Whether students favor holding parents responsible for the crimes and torts their children commit, and whether students favor holding parents responsible for the contracts their children enter into.

In response to "additional area 1" above, when I was in law school in the 1980s, the prevailing precedent held that children could not hold their parents civilly responsible for neglect. This was in accordance with the longstanding common-law doctrine of "parental immunity," which held that absent evidence of "willful and wanton" misconduct, children may not sue their parents for mere negligence within the scope of the parental relationship (negligence being defined as the failure to do what a reasonable person would do under the same or similar circumstances.) In recent years, however, the protection of parental immunity has eroded somewhat, with instances occurring where parents have been held civilly responsible for their negligence, resulting in harm to their children. The most common example of this is parental liability for injuries to a child in an automobile accident, where the negligence of the parent driver results in injury to the child passenger. Ask your students whether parental civil liability for negligence is "worth it" in terms of the potentially disruptive effect this could have on the parent-child relationship. Do we really want a scenario where "Junior versus Father" cases fill the court docket?

With regard to "additional area 2" above, the judicial trend is to allow third parties to sue parents for the crimes and torts their children commit, and for the contracts their children enter into. Currently, however, there are limitations to this liability. First, in order for a parent to be responsible for the crime/tort committed by his/her child, it must be established that the parent knew or had reason to know that the child would likely commit the crime/tort. In other words, "foreseeability" is the key. For example, assume that a twelve-year-old child has become quite a pyromaniac in his formative years; in fact, on two occasions he was able to successfully ignite his bedroom, only to have his parents eliminate the fire with a fire extinguisher on the first occasion, and the local fire department extinguish the fire on the second occasion. Assume that the child again sets his bedroom on fire, this time resulting in the total destruction of his parent's home, as well as the adjoining neighbor's home. In this instance, the neighbor would likely be able to recover civil damages from the parents of the "pyro prodigy," since a subsequent, more harmful

fire was foreseeable, and since the parents did not take reasonable safeguards to insure that the more harmful fire would not occur.

As a parent of two children, I must confess that I am concerned about the judicial trend allowing third parties to sue parents for the crimes and torts their children commit. I suppose the lesson here is to "teach your children well," actively intervene in threatening situations involving your children as the perpetrator, and hope for the best!

In terms of parental liability for contracts their children enter into, the common-law rule still holds that parents are not responsible for such contracts entered into by their minor children, unless the contract is for "necessaries." ("Necessaries" are items necessary for the sustenance of life, such as food and shelter.) If a child enters into a contract and he/she is eighteen years of age or older, the parent is not liable, since the child is "of the age of majority." The exception, of course, applies if the parent co-signs the contract with the child; in such a case, the parent is not responsible in a parental capacity, but in a co-signer capacity.

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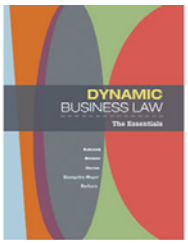
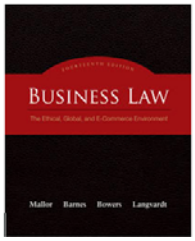
Chapter Key for McGraw-Hill/Irwin Business Law texts

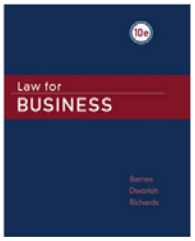
	Hot Topics	Video Suggestions	Hypothetical or Ethical Dilemmas	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 5, 8 and 43	Chapters 5, 7 and 8	Chapter 17	Chapters 5, 7 and 8
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 4, 5 and 24	Chapters 2, 4 and 5	Chapter 10	Chapters 2, 4 and 5
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 3, 7 and 51	Chapters 3, 5 and 7	Chapter 13	Chapters 3, 5 and 7
Barnes et al., Law for Business, 10th Edition	Chapters 4, 7 and 25	Chapters 4, 5 and 7	Chapter 14	Chapters 4, 5 and 7
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 2, 6 and 35	Chapters 2, 5 and 6	Chapter 9	Chapters 2, 5 and 6
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 6, 10 and 20	Chapters 6, 10 and 12	Chapter 8	Chapters 6, 10 and 12
McAdams et al., Law, Business & Society, 9th Edition	Chapters 5, 7 and 13	Chapters 4, 5 and 7	Chapter 6	Chapters 4, 5 and 7

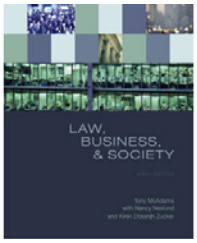
This Newsletter Supports the Following Business Law Texts

Barnes et al., Law for Business, 10th Edition, 2009© (007352493X)
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition, 2009© (0073524948)
Kubasek et al., Dynamic Business Law, 2009© (0073524913)
Kubasek et al., Dynamic Business Law: The Essentials, 2010© (0073377686)
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition, 2010© (0073377643)
McAdams et al., Law, Business & Society, 9th Edition, 2009© (0073377651)
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition, 2010© (007337766X)









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