



# Proceedings

A monthly newsletter from McGraw-Hill Education

September 2021 Volume 13, Issue 2



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## *Dear Professor,*

I hope your fall semester is off to a great start! Welcome to McGraw-Hill Education's September 2021 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 13, Issue 2 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the September 2021 newsletter topics with the various McGraw-Hill Education business law textbooks.

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

1. A recent decision by workers at a General Motors plant in Mexico to end their collective bargaining agreement;
2. The continuing legal battle between the Federal Trade Commission and Facebook;
3. The Federal Aviation Administration's recent fines of more than \$500,000 against unruly airline passengers;
4. Videos related to a) an attempt to hold The Kroger Company responsible for a security guard's fatal shooting of a customer; and b) an increase in ransomware attacks;
5. An "ethical dilemma" related to Colorado Governor Jared Polis' executive order rescinding an 1864 proclamation urging citizens to kill Native Americans in the area; and
6. "Teaching tips" related to Article 3 ("FAA Proposes More Than \$500,000 in New Fines Against Unruly Airline Passengers") and Video 1 ("Family of Man Killed Over Loud Music Seeks Justice") of the newsletter.

I wish all of you continued success in the fall semester!

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## Of Special Interest

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

- 1) A recent decision by workers at a General Motors plant in Mexico to end their collective bargaining agreement;
- 2) The continuing legal battle between the Federal Trade Commission and Facebook; and
- 3) The Federal Aviation Administration's recent fines of more than \$500,000 against unruly airline passengers.

## Hot Topics in Business Law

### Article 1: “Workers at Mexico GM Plant End Contract, Oust Union in Vote”

[https://abcnews.go.com/International/wireStory/workers-mexico-gm-plant-end-contract-oust-union-79543215?cid=clicksource\\_4380645\\_1\\_heads\\_hero\\_live\\_headlines\\_hed](https://abcnews.go.com/International/wireStory/workers-mexico-gm-plant-end-contract-oust-union-79543215?cid=clicksource_4380645_1_heads_hero_live_headlines_hed)

According to the article, workers at a General Motors plant in Mexico have voted to end a collective bargaining contract negotiated by an old guard union accused of intimidation tactics in earlier votes. It was an early display of the effectiveness of labor mechanisms negotiated under the U.S.-Mexico-Canada Trade Agreement.

Nearly 6,000 workers at the GM plant in Silao voted over two days, according to a statement from Mexico’s Labor Ministry. In the final tally, the “nos” were 3,214 to 2,623 votes in favor.

The vote means the contract is terminated, but the workers maintain the same benefits and labor conditions. The vote was a rejection of the union, part of the Confederation of Mexican Workers. A new group has been working to organize the plant’s workers.

The vote was held inside the plant with observers from the Labor Ministry, National Electoral Institute and the United Nations’ International Labor Organization.

The conditions for the vote “demonstrate the government’s commitment to union democracy and respecting the will of the workers,” the Labor Ministry said in the statement.

GM said in a statement that production at the Silao plant would continue under the terms of the current agreement until a new one is negotiated and approved by a majority vote. The Labor ministry will issue a final resolution within 20 business days.

“General Motors appreciates that the GM Silao Collective Bargaining Agreement (CBA) legitimizing process was carried out with high participation and no incidents have been reported by the Ministry of Labor,” the statement said. “For GM it is very important that employees have been able to exercise their rights in a personal, free, secret and direct form. GM also appreciates the



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collaboration of the U.S. and Mexican governments and of the independent observers who supervised the exercise.”

In May, the U.S. government filed a complaint under the USMCA after the old union was caught allegedly destroying ballots in an earlier vote.

For decades, corrupt Mexican unions signed low-wage “protection contracts” behind workers’ backs.

The “rapid response” mechanisms under the trade pact allow a panel to determine whether Mexico is enforcing labor laws that allow workers to choose their union and vote on contracts and union leadership. If Mexico is found not to be enforcing its laws, sanctions could be invoked, including prohibiting some products from entering the United States. The May complaint was the first to be filed under the USMCA.

Mexican auto workers make one-eighth to one-tenth of the wages of their U.S. counterparts, something that has spurred a massive relocation of auto plants to Mexico and a loss of U.S. jobs. For decades, union votes in Mexico were held by show of hands, or not at all. Workers at many factories in Mexico were unaware they even had a union until they saw dues deducted from their paychecks.

As part of efforts to get the USMCA, which replaced the old North American Free Trade Agreement, Mexico passed labor law reforms stating all union votes would be by secret ballot, and workers at all factories in Mexico could vote on whether to keep their current union.

It was one such vote among the 6,494 employees of GM transmission and pickup plants in Silao in April that triggered the complaint.

Workers at the plant had been asked to vote yes or no on whether to recognize the union that has long controlled the plant’s labor contract. That union is part of the Confederation of Mexican Workers, or CTM, which formed part of the party that ruled Mexico for most of the past century. Mexico’s Labor Ministry declared that vote invalid.

Generating Movement, an effort to organize workers inside the plant, celebrated the vote and said it was working to register as a union and hoped to represent the workers in the next contract negotiation.

Hector de la Cueva, a union advisor and coordinator of the Labor and Union Advisory Research Center, compared the CTM to a “zombie” and said they would try to get back.

“Now what is on the table is which union is going to sign the new collective contract?” de la Cueva said at a Generating Movement news conference in Silao. “The workers showed that there is great discontent and they rejected that CTM contract and also that union.”



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The CTM had not commented on the results of the vote.

## Discussion Questions

1. Describe the U.S.-Mexico-Canada Trade Agreement.

*The U.S.-Mexico-Canada Trade Agreement (USMCA) is an updated version of the North American Free Trade Agreement (NAFTA) that became effective on July 1, 2020.*

*For a thorough explanation of the USMCA, please refer to the following internet address:*

<https://www.trade.gov/usmca>

*According to the U.S. Department of Commerce's International Trade Administration, the USMCA is a "21<sup>st</sup> century, high standard trade agreement supporting mutually beneficial trade resulting in freer markets, fairer trade, and robust economic growth in North America.*

2. Regarding labor-management relations, what is a collective bargaining agreement?

*A collective bargaining agreement is a contract between labor and management governing the specific terms of the labor-management relationship. The collective bargaining agreement typically addresses wages and salaries, benefits, working conditions, etc. Again, it is an enforceable agreement, meaning that if either side breaches the contract, they can be sued for violating the terms and/or conditions of the collective bargaining agreement.*

3. Regarding labor-management relations and the collective bargaining process, what are "intimidation tactics?"

*"Intimidations tactics" is a broad term that references any attempt by labor or management to coerce a party to act against his or her will. It could include management threatening labor, labor threatening management, or even the union threatening workers (for example, union members threatening replacement workers who cross the union picket line in order to work.) Federal law prohibits the use of intimidation tactics in labor-management relations. For example, Section 8(a)(1) of the National Labor Relations Act broadly prohibits employers from interfering with workers' labor organizing rights.*

### **Article 2: "FTC Doubles Down, Hits Facebook with Amended Antitrust Complaint"**

[https://abcnews.go.com/Technology/ftc-doubles-hits-facebook-amended-antitrust-complaint/story?id=79541588&cid=clicksource\\_4380645\\_7\\_heads\\_posts\\_headlines\\_hed](https://abcnews.go.com/Technology/ftc-doubles-hits-facebook-amended-antitrust-complaint/story?id=79541588&cid=clicksource_4380645_7_heads_posts_headlines_hed)



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According to the article, the Federal Trade Commission is not backing down in its antitrust legal battle against Facebook.

The agency filed an amended complaint against the social media giant recently -- voting 3-2 along party lines to proceed -- after a federal judge in June dismissed an initial antitrust complaint brought by the FTC.

The new complaint alleges that after Facebook failed to develop innovative mobile features for its network, the company instead opted for an "illegal buy-or-bury scheme" to maintain dominance, according to a statement from the FTC. The agency also accuses the company of "unlawfully" acquiring innovative competitors after its own failed efforts to create popular mobile features.

"Facebook lacked the business acumen and technical talent to survive the transition to mobile. After failing to compete with new innovators, Facebook illegally bought or buried them when their popularity became an existential threat," Holly Vedova, the FTC's Bureau of Competition acting director, said in a recent statement. "This conduct is no less anticompetitive than if Facebook had bribed emerging app competitors not to compete."

"The antitrust laws were enacted to prevent precisely this type of illegal activity by monopolists," Vedova added. "Facebook's actions have suppressed innovation and product quality improvements. And they have degraded the social network experience, subjecting users to lower levels of privacy and data protections and more intrusive ads."

Vedova said the FTC's latest legal move seeks to "put an end to this illegal activity and restore competition for the benefit of Americans and honest businesses alike."

Many of the arguments are along similar lines of the initial lawsuit, though the FTC said the new complaint includes additional data and evidence.

The new complaint in part focuses on the "transition period" when the emergence of smartphones and mobile internet use seemingly threatened Facebook's dominance.

The agency alleges in a statement that after Facebook suffered "significant failures during this critical transition period," the company opted instead to engage in anticompetitive behavior and buy up mobile innovators, including former rivals Instagram and WhatsApp.

The agency also takes aim at Facebook's treatment of software developers, saying that after starting its Facebook Platform as an open space for third-party software developers, it abruptly reversed course and required developers to agree to conditions that prevented successful apps from emerging as competitors.



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When he dismissed the initial antitrust complaint, District Judge James Boasberg stated that the agency's complaint "is legally insufficient and must therefore be dismissed." Boasberg said the FTC failed to provide enough facts to prove Facebook's alleged monopolistic behavior.

Lina Khan, a vocal critic of Big Tech's dominance, took the helm at the FTC earlier this year, leading many to speculate a crackdown on the industry could be looming. Facebook has petitioned for Khan to be recused from the antitrust investigation, but the agency recently dismissed the petition.

Facebook blasted the suit as "meritless" in a recent statement to the media, and noted that its acquisitions of Instagram and WhatsApp were cleared by the FTC at the time.

"It is unfortunate that despite the court's dismissal of the complaint and conclusion that it lacked the basis for a claim, the FTC has chosen to continue this meritless lawsuit. There was no valid claim that Facebook was a monopolist -- and that has not changed," a company spokesperson said. "Our acquisitions of Instagram and WhatsApp were reviewed and cleared many years ago, and our platform policies were lawful. The FTC's claims are an effort to rewrite antitrust laws and upend settled expectations of merger review, declaring to the business community that no sale is ever final. We fight to win people's time and attention every day, and we will continue vigorously defending our company."

## Discussion Questions

1. Describe "antitrust." What is the purpose of antitrust law?

*"Antitrust" is a broad term referring to legislation preventing or controlling trusts or other monopolies, with the intention of promoting competition in business.*

2. What is the Federal Trade Commission (FTC?) What is the FTC's role regarding the enforcement of antitrust law?

*The Federal Trade Commission (FTC) is a federal administrative agency broadly charged with the responsibility of protecting consumers. Since antitrust law is designed to prevent or control trusts or other monopolies with the intent of promoting competition in business and thereby benefiting consumers, the FTC is empowered to enforce antitrust law.*

*For more information regarding the FTC, please see the following internet address:*

<https://www.ftc.gov/>

3. Based on the information provided in the article, do you believe Facebook violated U.S. antitrust law? Why or why not?

*This is an opinion question, so student responses will likely vary.*



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*The pertinent information provided in the article is the following:*

*The new (amended) complaint alleges that after Facebook failed to develop innovative mobile features for its network, the company instead opted for an "illegal buy-or-bury scheme" to maintain dominance, according to a statement from the FTC. The agency also accuses the company of "unlawfully" acquiring innovative competitors after its own failed efforts to create popular mobile features.*

*"Facebook lacked the business acumen and technical talent to survive the transition to mobile. After failing to compete with new innovators, Facebook illegally bought or buried them when their popularity became an existential threat," Holly Vedova, the FTC's Bureau of Competition acting director, said in a recent statement. "This conduct is no less anticompetitive than if Facebook had bribed emerging app competitors not to compete."*

*In your author's opinion, at this point these are merely allegations, and the FTC as plaintiff will have the burden of proving in court, by the greater weight of the evidence, that Facebook's actions violated U.S. antitrust law. In a civil action, the initial burden of proof is always on the plaintiff.*

## **Article 3: "FAA Proposes More Than \$500,000 in New Fines Against Unruly Airline Passengers"**

<https://www.cnn.com/2021/08/19/politics/faa-unruly-passengers-fines/index.html>

According to the article, federal authorities are proposing more than a half-million dollars in new fines against commercial airline passengers they say refused to wear masks, hit flight attendants, and even threw luggage across the cabin.

The Federal Aviation Administration's recent announcement of \$531,545 in fines against 34 passengers accused of being unruly on board is the single largest announcement of federal fines since the start of a nationwide crackdown earlier this year, bringing this year's total to more than \$1 million.

Of the incidents detailed by federal investigators for the first time, nearly two-thirds involve passengers accused of violating the federal transportation-wide mask mandate, which was just extended by the Transportation Security Administration to remain in place through January 18. Federal documents show that nine of the 34 incidents involve a passenger accused of touching or hitting another person on the plane, including crew members. Eight passengers are accused of illegally drinking alcohol they brought on board the plane. Half of the incidents involve flights to or from vacation destinations in Florida.



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With this announcement, the FAA has now proposed fines against nearly 80 passengers after receiving nearly 3,900 reports of incidents. The FAA said recently that based on the reports, it has opened 682 investigations into possible violations of federal laws.

House Transportation Chairman Peter DeFazio told the media this week that he would like to see punishment that's even harsher than fines, with those accused of in-flight violence facing prison time.

"The first time we take one of these jerks who is assaulting flight attendants or attempting to take an aircraft down -- and they go away for a few years and they get a massive fine-- I think that will send a message," Chairman DeFazio said.

But the FAA points out it does not have the authority to file criminal charges. Instead, it proposes civil fines that the accused violators may pay or dispute.

The largest flight attendant union, the Association of Flight Attendants, has also called for more prosecutions.

"If you interfere with a crew member's duties and put the rest of the plane in jeopardy, or assault the crew member, you're facing \$35,000 in fines for each incident and up to 20 years in prison," association President Sara Nelson said. "People need to understand there are severe consequences here."

The largest fine announced recently -- \$45,000 -- is against a passenger accused of throwing his luggage at another passenger and, while lying on the aisle floor, "grabbing a flight attendant by the ankles and putting his head up her skirt." That New York to Orlando flight was forced to land early in Virginia.

A different passenger faces a \$42,000 fine for allegedly "snorting what appeared to be cocaine from a plastic bag" in an episode that included "stabbing gestures towards certain passengers." Another passenger would not wear his face mask, the FAA, said, and "acted as though his hand was a gun and made a 'pew, pew' noise as if he was shooting a fellow passenger."

## Discussion Questions

1. Describe the FAA.

*The Federal Aviation Administration (FAA) is a federal administrative agency that is part of the United States Department of Transportation. It is charged with the responsibility of regulating the country's aerospace system.*

*Please see the following regarding the espoused mission, vision, and values of the FAA (<https://www.faa.gov/about/mission/>):*





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## ***Our Mission***

*Our continuing mission is to provide the safest, most efficient aerospace system in the world.*

## ***Our Vision***

*We strive to reach the next level of safety and efficiency and to demonstrate global leadership in how we safely integrate new users and technologies into our aviation system. We are accountable to the American public and our aviation stakeholders.*

## ***Our Values***

*Safety is our passion. We work so all air and space travelers arrive safely at their destinations.*

*Excellence is our promise. We seek results that embody professionalism, transparency and accountability.*

*Integrity is our touchstone. We perform our duties honestly, with moral soundness, and with the highest level of ethics.*

*People are our strength. Our success depends on the respect, diversity, collaboration, and commitment of our workforce.*

*Innovation is our signature. We foster creativity and vision to provide solutions beyond today's boundaries.*

*For more information regarding the FAA, please refer to the following internet address:*

<https://www.faa.gov/>

2. In your reasoned opinion, should the FAA have the authority to impose civil fines on passengers? Why or why not?

*This is an opinion question, so student responses may vary.*

*In your author's opinion, the FAA should most certainly have the authority to impose civil fines on passengers. Keep in mind that as referenced in response to Article 3, Discussion Question 1 above, the mission, vision, and values of the FAA all relate to safety, and as referenced in the article, these civil fines are imposed on passengers who imperil safety.*

3. As indicated in the article, the FAA does not have the authority to file criminal charges against unruly passengers. Why not?



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*In answering this question, keep in mind that only federal and state prosecutors have the authority to file criminal charges against individuals. Expressed another way, such authority is not within the purview of the FAA, although the FAA could certainly work with prosecutors in terms of providing evidence that can be used against unruly passengers in criminal court.*



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## Video Suggestions

### Video 1: “Family of Man Killed Over Loud Music Seeks Justice”

[https://abcnews.go.com/US/family-man-allegedly-shot-loud-music-company-employed/story?id=79522379&cid=clicksource\\_4380645\\_1\\_heads\\_hero\\_1\\_ive\\_headlines\\_hed](https://abcnews.go.com/US/family-man-allegedly-shot-loud-music-company-employed/story?id=79522379&cid=clicksource_4380645_1_heads_hero_1_ive_headlines_hed)

Note: In addition to the video, please see the following article included at the above-referenced internet address:

### “Family of Man Allegedly Shot Over Loud Music Wants Company Who Employed Alleged Shooter Charged”

According to the article, the family and attorney of a Black man shot to death by a security guard, allegedly over a dispute about loud music, are demanding Kroger and the third-party security guard company it employed to also face charges.

Alvin Motley Jr., 48, was at a Kroger gas station in Memphis, Tennessee, with his girlfriend on August 7 when Gregory Livingston, who is white, allegedly approached him about the volume of music coming from their car. After the initial argument between Motley and Livingston, Motley walked toward the security guard holding a beer can and a lit cigarette asking Livingston, “Let’s talk like men,” according to the affidavit. Shortly after, Livingston shot Motley in the chest, prosecutors said.

Motley’s attorney Ben Crump and the Reverend Al Sharpton said that Kroger must be charged alongside Livingston and Allied Universal for facilitating the contract that resulted in the death of Motley. Livingston has been charged with second-degree murder.

“Kroger, you can’t pass the buck saying that this is an issue for the Motley family or the security company. It’s an issue for your company. . . . You have a duty to provide safety and have qualified employees and contractors who won’t kill Black people over loud music,” Crump said.

Crump and Sharpton called on the civil rights community to play loud music in front of Kroger grocery chain stores across the country in protest of Motley’s death.



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A Kroger spokesperson said in an email statement that after an internal review of the incident, Kroger made the decision to end its relationship with Allied Universal Security in Memphis.

“We are deeply saddened, extremely angry and horrified by this senseless violence. At Kroger, nothing is more important to us than the safety of our associates and customers, and our hearts are with the Motley family and we stand with them in their calls for justice,” a Kroger spokesperson said.

Crump and Sharpton said the shooting was racially motivated.

“I cannot imagine if the shoe was on the other foot and these were young white men listening to rock and roll or country music, nobody would say it was justified to kill them,” Crump said at Wednesday's press conference. “So if you can't justify killing them over music, you can't justify killing us over hip hop music.”

Livingston's attorney, Leslie Ballin, said that the shooting was neither racially motivated nor about loud music.

“Let it be known that we do not agree that this incident was about loud music,” Ballin said. “I don't know of any facts that would lead to the conclusion that this event was racially motivated. If there are such facts, I'm ready to be educated.”

The surveillance footage at the Kroger gas station allegedly captured the incident but has not yet been released to the family or the public. Ballin said he objects to the release of any evidence, including the video footage, in fear that it could contaminate a potential jury pool.

Livingston's attorneys requested their client's \$1.8 million bail be reduced, claiming the amount is excessive and therefore unconstitutional.

“My son was truly my best friend and I'll forever hold him in my thoughts,” Alvin Motley Sr. said during the press conference before his son's memorial Wednesday. “I just want justice for my son.”

## Discussion Questions

1. Based on the information provided in this article, do you believe Kroger should be criminally charged for Alvin Motley Jr.'s death? Why or why not?

*This is an opinion question, so student responses will likely vary.*

*In your author's opinion, there is not enough evidence presented in the article to justify a criminal charge against Kroger's in this case. To justify a criminal charge, the prosecutor should be convinced that he or she can prove the case beyond reasonable doubt against the defendant in criminal court. To hold Kroger responsible in this case, the prosecutor would have to prove that*



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*Kroger's: 1) directed the action against the victim; 2) was criminally reckless in allowing Gregory Livingston (the security guard) to be on the property; or 3) was criminally negligent in allowing Mr. Livingston to be on the property. Again, although there may be other evidence "out there" to support a criminal charge against Kroger's, there is nothing presented in the article to support such a charge.*

*Although Alvin Motley Jr.'s attorney, Ben Crump, is certainly correct in his claim that Kroger's has a duty to provide safety and have qualified employees and contractors, that duty is not absolute. There would need to be evidenced introduced and proven beyond reasonable doubt that Kroger's intentionally, recklessly, or negligently violated that duty.*

2. As indicated in the article, after an internal review of the incident, Kroger made the decision to end its relationship with Allied Universal Security in Memphis. Is this evidence of Kroger's criminal liability in this case? Why or why not?

*No, this is not evidence of Kroger's criminal liability in this case, nor is it evidence of Kroger's civil liability. Our legal system seeks to encourage defendants to improve circumstances "after-the-fact," and to do so, courts prohibit the introduction of such evidence to prove liability.*

*For further guidance regarding subsequent remedial measures, please see Rule 407 of the Federal Rules of Evidence:*

## **Rule 407. Subsequent Remedial Measures**

*When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:*

- a) negligence;
- b) culpable conduct;
- c) a defect in a product or its design; or
- d) a need for a warning or instruction.

*But the court may admit this evidence for another purpose, such as impeachment or, if disputed, proving ownership, control, or the feasibility of precautionary measures.*

[https://www.law.cornell.edu/rules/fre/rule\\_407](https://www.law.cornell.edu/rules/fre/rule_407)

3. Would you recommend a civil action by the family of Alvin Motley Jr. against Kroger? Why or why not?



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*This is an opinion question, so student responses may vary.*

*In your author's opinion, although the plaintiff's prospects of prevailing against Kroger's would be better in civil court, since the burden of proof is "by the greater weight of the evidence" rather than "beyond reasonable doubt," there must still be some evidence that Kroger's was reckless or negligent in allowing Gregory Livingston (the security guard) to be on the property at the time the shooting occurred. This could include evidence of a violent past, of being aggressive against others, and/or a prior criminal record that would indicate violent propensities. Again, there is nothing in the article to indicate this, so unless there is other evidence that would prove such, a case against Kroger even in civil court would likely be unsuccessful.*

## **Video 2: "Why Ransomware Attacks Are on the Rise and How the U.S. Can Fight Them"**

<https://www.youtube.com/watch?v=Xes6ZgV1Iww>

### Discussion Questions

#### 1. What is ransomware?

*Ransomware is a form of malware (software that is specifically designed to disrupt, damage, or gain unauthorized access to a computer system) that encrypts a victim's files. The attacker then demands a ransom from the victim to restore access to the data upon payment. The perpetrator shows users instructions for how to pay a fee to get the decryption key.*

*For more information regarding ransomware, including what it is and how to remove it, please see the following internet address:*

<https://www.csoonline.com/article/3236183/what-is-ransomware-how-it-works-and-how-to-remove-it.html>

#### 2. What is a hacker?

*A hacker is a person who uses computers to gain unauthorized access to data. Hacking is both a criminal and a civil wrong, and the violator can typically be tried in both federal and state court.*

#### 3. Conduct some research and describe what law(s) are broken by hackers in their deployment of ransomware.

*The depth of research will vary among students, and for that reason, student responses will likely vary. Fundamentally, the acts of hacking and the use of ransomware can violate both federal and state law.*



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*For violations of federal law, including the Computer Fraud and Abuse Act (CFAA), please see the following internet address:*

<https://www.findlaw.com/criminal/criminal-charges/hacking-laws-and-punishments.html>

*For violations of state law, please see the following internet address:*

<https://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx>



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## Ethical Dilemma

### Of Special Interest

This section of the newsletter addresses Colorado Governor Jared Polis' executive order rescinding an 1864 proclamation urging citizens to kill Native Americans in the area.

### **“Colorado Governor Rescinds 1864 Order Encouraging the Massacre of Native Americans”**

<https://www.cnn.com/2021/08/19/us/colorado-1864-proclamation-rescinded-native-trnd/index.html>

According to the article, more than 150 years ago, leaders in Colorado issued proclamations urging citizens to kill Native Americans in the area. That order was never officially rescinded -- until now.

Recently, Colorado Governor Jared Polis signed an executive order rescinding the proclamation, ordered by Territorial Governor John Evans in 1864.

"The 1864 Proclamations were never lawful because they violated established treaty rights and federal Indian law. Further, when Colorado became a state, they never became law, as they were superseded by the Colorado Constitution, United States Constitution, and Colorado criminal code," the executive order reads.

The proclamations issued by then-Governor Evans warned that "all hostile Indians would be pursued and destroyed" unless they left their homes and gathered at certain camps. It authorized citizens of the territory to "kill and destroy ... hostile Indians" and steal the Natives' land and property, according to the executive order.

Governor Evans also supplied organized militias with arms and ammunition, according to the Sand Creek Massacre Foundation.

The 1864 proclamations led to the Sand Creek Massacre later that year, where troops killed hundreds of Cheyenne and Arapahoe people. In 2014, then-Governor John Hickenlooper formally apologized to the descendants of the victims of the massacre.

Because the proclamations were never officially rescinded, "they therefore remain as a symbol of a gross abuse of executive power during that grave period in our State's history," the executive order signed this week reads.

"When then-Governor Evans made that proclamation, he said that you can hunt Native people, just as if you could hunt a buffalo, an antelope, an elk, a deer. It was open season," said Reggie Wassana, governor of the Cheyenne





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and Arapaho Tribes, at Tuesday's ceremony. "And we do appreciate what Governor Polis has acknowledged. He wants to try to make a wrong right. And that's what we're here for today and that's what we look forward to, is that we would like to see all those wrongs that were done all those years ago come back to right."

Tribal leaders and members from the Southern Ute, Ute Mountain Ute, Cheyenne and Arapaho, and the Northern Arapaho tribes also attended the ceremony, according to the media.

The move by Polis is among one of many recent gestures that aim to at least symbolically repair the harm done to Native populations in the U.S.

Multiple sports teams in the U.S. have made moves to remove stereotypical, offensive or appropriative portrayals of Native Americans, and Interior Secretary Deb Haaland announced a new unit earlier this year within the Bureau of Indian Affairs to tackle the decades-long crisis of missing and murdered Natives.

Meanwhile, movements to reclaim Native land have also steadily gained momentum.

## Discussion Questions

1. What is an executive order?

*An executive order is a governmental directive, issued by the president of the United States at the federal level or by a governor at the state level, that manages operations of the government. Once issued, an executive order remains in force until it is canceled, revoked, adjudicated unlawful, or expires on its terms.*

2. What is a proclamation?

*A proclamation is a public or official announcement, especially one dealing with a matter of great importance. Regarding this article, the proclamation issued by Territorial Governor John Evans in 1864 had similar force and effect then as Colorado Governor Jared Polis' executive order does today. Of course, Governor Polis' executive order takes precedence over Territorial Governor Evans' proclamation, since the executive order was issued specifically to overturn the proclamation.*

3. Does it surprise you that it took over 150 years to rescind Territorial Governor John Evans' 1864 proclamation? Why or why not?

*This is an opinion question, so student responses may vary.*

*Your author is not surprised that it took over 150 years to rescind Territorial Governor Evans' proclamation, given the fact that it has taken so long for the country to come into compliance with*



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*the Civil Rights Act. In your author's opinion, it takes a much stronger leader to do the "right thing" than to do what is politically expedient.*



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## Of Special Interest

This section of the newsletter will assist you in addressing Article 3 ("FAA Proposes More Than \$500,000 in New Fines Against Unruly Airline Passengers") and Video 1 ("Family of Man Killed Over Loud Music Seeks Justice") of the newsletter.

## Teaching Tips

### **Teaching Tip 1 (Related to Article 3— "FAA Proposes More Than \$500,000 in New Fines Against Unruly Airline Passengers") "FAA Fines Against Disruptive Airline Passengers Tops \$1 Million Mark"**

For another article referencing the Federal Aviation Administration's (FAA's) recent decision to impose more than \$500,000 in new fines against unruly airline passengers, please refer to the following:

#### **"FAA Fines Against Disruptive Airline Passengers Tops \$1 Million Mark"**

<https://www.forbes.com/sites/tommybeer/2021/08/19/faa-fines-against-disruptive-airline-passengers-tops-1-million-mark/?sh=2ea19c129537>

According to the article, the U.S. Department of Transportation's FAA announced recently it has proposed more than \$531,000 in new fines against 34 airline passengers on commercial flights for a variety of reckless behaviors, including refusing to wear masks, pushing the total amount of proposed penalties in 2021 above \$1 million.

The FAA stated they have received approximately 3,889 reports of unruly behavior by passengers dating back to the start of the year, including about 2,867 reports of passengers refusing to comply with the federal facemask mandate. An example: A passenger on a mid-May JetBlue flight from New York to San Francisco has been assessed a \$42,000 fine for allegedly making stabbing gestures towards passengers and "snorting what appeared to be cocaine from a plastic bag."

Half of all newly reported incidents, 17 out of the 34, involve flights to or from Florida.

Dating back to 2020, there's been an alarming rise in the number of air rage incidents in which flight attendants have been assaulted or threatened. The new FFA report cites a man who allegedly threw his carry-on luggage at other passengers before "grabbing a flight attendant by the ankles and putting his head up her skirt" on a JetBlue flight from New York to Florida in late May. The FAA has proposed a \$30,000 fine for a passenger on a Jan. 3 Frontier flight from Atlanta to New York whom they accuse of trying to gain entry to



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the flight deck by physically assaulting two flight attendants and threatening to kill one of them.

"The first time we take one of these jerks who is assaulting flight attendants or attempting to take an aircraft down — and they go away for a few years and they get a massive fine— I think that will send a message," House Transportation Chairman Peter DeFazio (D-Ore.) told the media earlier this week.

In early January, the FAA announced the adoption of a Zero-Tolerance policy, with administrator Steve Dickson signing an order directing a "stricter legal enforcement policy" against unruly passengers following a spike in extreme incidents on planes and in airports. In August, the FAA sent a letter to airports requesting they work closely with local law enforcement to prosecute offenders. Although the FAA is permitted to levy civil fines against disorderly passengers, it has no authority to prosecute criminal cases. In their letter, the FAA noted their investigations determined alcohol frequently contributes to unsafe behavior. As a result, they requested airports make an effort to prevent passengers from bringing "to-go" cups of alcohol onto planes. The FAA also suggested that airports bring greater awareness to the issue through "signage, public service announcement, and concessionaire education." Earlier this week, the Transportation Security Administration said it would extend existing mask requirements for public transportation through the end of the year.

## **Teaching Tip 2 (Related to Video 1—"Family of Man Killed Over Loud Music Seeks Justice"): "Are Your Clients Exposed to Premises Liability for Third-Party Criminal Acts?: A Top-10 List to Reduce Risks"**

For an excellent article from the American Bar Association (ABA) regarding premises liability for third-party criminal acts, please see the following article:

### **"Are Your Clients Exposed to Premises Liability for Third-Party Criminal Acts?: A Top-10 List to Reduce Risks"**

[https://www.americanbar.org/groups/real\\_property\\_trust\\_estate/publications/probate-property-magazine/2016/september october 2016/2016\\_aba\\_rpte\\_pp\\_v30\\_5\\_article\\_gutmacher\\_premises liability for third party criminal acts/](https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2016/september%20october%202016/2016_aba_rpte_pp_v30_5_article_gutmacher_premises_liability_for_third_party_criminal_acts/)

On an ever more frequent basis, injured employees, customers, and invitees are suing property owners, property managers, and tenants (referred to in this article together as "Deep Pockets") for injuries arising out of criminal acts on the property in question (sometimes referred to as "premises liability") committed against them by unknown third parties. What appears to have started with a relatively isolated Washington, D.C., case in the 1970s is now occurring regularly. See *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (in action by an apartment building tenant assaulted and robbed in a common area, finding the landlord liable on the basis that the landlord knew of an increase in criminal activity on the premises).



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Consider the number of recent lawsuits arising out of shootings or other criminal activities in schools, churches, movie theaters, shopping centers, hotels, airports, and other places. In 2014 alone, the FBI indicated an estimated 1,165,383 violent crimes were reported. See Federal Bureau of Investigation, Uniform Crime Reports (2014). As these incidents and lawsuits continue to grow in frequency, it becomes more important to take steps to try to minimize both the problem and the exposure for premises liability.

Although a variety of legal theories have been proffered from state to state, the most common theory of premises liability against Deep Pockets is foreseeability of the criminal act and failure of Deep Pockets to take reasonable precautions in light of that foreseeability. Foreseeability can involve a variety of factors, including prior similar and prior violent incidents. See, e.g., *Masek v. Warren Redevelopment & Planning Corp.*, 2010-Ohio-819, ¶ 17 (Ohio Ct. App. 2010) (affirming the trial court's grant of summary judgment because the property owner was aware of only two prior incidents at the scene of the crime, which was not thought to make the incident foreseeable); and *McKown v. Simon Prop. Grp.*, 344 P.3d 661, 661 (Wash. 2015) (in which the court held that prior acts of violence on the premises must be similar in nature and location to the act that resulted in plaintiff's injury for the defendant to be liable).

Historically, although many courts have judged foreseeability based on similar, violent criminal acts on the property site that "should" have placed Deep Pockets on notice of possible criminal activity, some recent cases do not require a showing of either prior on-site criminal activity or prior on-site violent conduct. In 1991, the Alabama Supreme Court held that the murder of a tenant was foreseeable even though there were no prior occurrences on the property. *Brock v. Watts Realty Co.*, 582 So. 2d 438 (Ala. 1991). Today, to determine Deep Pockets' foreseeability, courts may look to nearby off-site incidents, which may or may not be violent in nature, and the "totality of the circumstances."

In addition to potential liability under the common law, Deep Pockets can be liable for third-party criminal acts under various statutes. Violation of a statute or ordinance could result in "strict liability" for Deep Pockets.

State landlord-tenant laws and regulations are a source for imposing safety obligations. For example, the Ohio Revised Code obligates residential property landlords to "[c]omply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety" and to keep "all common areas of the premises in a safe and sanitary condition[.]" Ohio Rev. Code § 5321.04(A)(1), (3). Courts are divided, however, as to whether these statutory warranties create tort liability. Compare *Isbell v. Commercial Inv. Assocs., Inc.*, 614, 644 S.E.2d 72, 76 (Va. 2007) (rejecting tenant's claim that duties imposed on landlord by state's statute created a statutory cause of action in tort) with *Newton v. Magill*, 872 P.2d 1213, 1216–18 (Alaska 1994) ("it would be inconsistent with a landlord's continuing duty to repair premises imposed under the URLTA to exempt from tort liability a landlord who fails in this duty").



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State employment laws also can come into play and require an employer to provide a safe place of employment. See, e.g., Ohio Rev. Code § 4101.12 (providing, in part, that “[n]o employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe”).

Laws relating to safety at the local (municipal) level are also relevant. For example, Chapter 767 of the City of Euclid, Ohio, Ordinances requires the owners of larger apartment complexes to have security guards. Ordinance 767.01 provides, in part, that any apartment building or complex that “contains 400 or more dwelling units with a private parking lot for use by the tenants therein, shall provide one private policeman or security guard to patrol the buildings and private parking lot(s) 24 hours a day, with one additional private policeman or security guard on weekdays between the hours of 5:00 p.m. and 1:00 a.m. of the following day, and between the hours of 7:00 p.m. and 3:00 a.m. of the following day on Friday and Saturday.”

Counsel can use a variety of strategies and techniques to help Deep Pockets reduce their risk of liability for third-party criminal acts on their properties. My top ten strategies are as follows:

1. Consider the possible ramifications of reducing existing levels of security at the property. It is tempting, for a variety of reasons, to reduce levels of security. For example, replacing a 24-hour security guard with a video camera can reduce costs. Reducing the level of security, however, can expose Deep Pockets to a detrimental-reliance claim by a tenant or customer who moved in or was a customer when a higher level of security was in place. In addition, if there is a criminal incident and the victim sues Deep Pockets, admitting that it reduced security for cost considerations is unlikely to go over well in the courtroom. See, e.g., *Perez v. DNT Global Star, L.L.C.*, 339 S.W.3d 692, 701 (Tex. App. 2011) (in which an expert witness testified that the property owner should have “collected the relevant crime data from the neighborhood and shared it with its residents, created a neighborhood watch, and hired a dedicated patrol for the property”).

2. Deep Pockets should not use fake (nonworking) security devices, such as imitation video cameras. Imitation security devices, in theory, operate like scarecrows to deter criminal activities. Here is the problem: *scarecrows don't work when it comes to security*. In practice, if there is a criminal incident, the victim can allege that he relied, to his detriment, on the fake security device and did not realize that it was not a real, working device. The fake device also can serve as evidence of an underlying problem that was not properly addressed. See, e.g., *Ericson v. Fed. Express Corp.*, 77 Cal. Rptr. 3d, 1, 4 (Ct. App. 2008) (plaintiff was “never told that the cameras and guards were not there for [his] protection” and it was “undisputed that the camera system was inoperative when [the victim] was attacked”).

3. Deep Pockets should maintain all security systems and devices in good operating condition and repair. Broken or deactivated door or window locks, damaged security cameras, inoperative alarms, and other similar problems increase the risk of criminal activity and the liability potential for Deep



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Pockets. Deep Pockets who want to keep their pockets deep should promptly investigate reports of broken or malfunctioning security devices and promptly repair or replace them. See, e.g., *Ambriz v. Kelegian*, 53 Cal. Rptr. 3d 700, 713 (Ct. App. 2007) (describing “that it was more probable than not that the rapist gained entry through an improperly maintained door rather than by any of the alternative methods”).

4. Deep Pockets should speak with the local police department to determine if particular or recurring crimes happen in the area, especially violent crimes. If so, Deep Pockets should consider upgrading their security measures to proactively deal with these issues. See, e.g., *Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902, 943 (D.C. Cir. 2006) (reversing the trial court’s grant of summary judgment for a property owner since plaintiffs “proffered testimony from the club’s security guards . . . that fights occurred in the club [regularly]”). Deep Pockets should not allow security measures at their properties to fall below the levels generally maintained by other businesses in the area or other similar situated businesses.

5. Deep Pockets should educate all property managers, employees, and tenants on safety techniques and the importance of reporting and following up on suspicious activities. The local police or a security consultant can speak with the landlord’s property manager, employees, and tenants on how to reduce the risk of violent crimes. See, e.g., *McKenna v. AlliedBarton Sec. Servs., LLC*, 35 N.E.3d 1007, 1016 (Ill. App. Ct. 2015) (explaining that the trial court improperly dismissed claims against the property owner because the owner failed to follow specific recommendations of security consultants).

6. Make certain that common areas, such as parking lots, garages, elevators, stairways, hallways, refuse disposal areas, and laundry rooms are well-lit at all times. Outdoor parking areas should remain well-lit for a reasonable period of time after the last employee, tenant, or customer leaves the building, area, or shopping center. A poorly lit area (particularly one with broken lights) has significant potential for personal attacks. See, e.g., *Castaneda v. Olsher*, 162 P.3d 610, 623 (Cal. 2007) (plaintiff unsuccessfully argued, as part of the premises liability claim, that “[t]he lights in the mobilehome [sic] park were constantly being broken”).

7. Review Deep Pockets’s leases and promotional materials for references to security, because these references can create an implied warranty or contract for security and form the basis for claims of detrimental reliance and breach of contract. An apartment or office brochure that indicates 24-hour security can be interpreted as a contractual obligation. See, e.g., *Mitchell v. Brandon Mill Assocs. Ltd.*, No. 05-96-00688-CV, 1998 WL 548822, at \*7 (Tex. App. Aug. 31, 1998) (explaining that, “[c]ontrary to many of these assurances, the record indicates that [property owner] did not provide the high degree of security it promised”).

8. Deep Pockets should make certain that complaints and incidents regarding criminal activity are documented, including what was done in response thereto. Advise Deep Pockets that, if there are serious, numerous, or repeated incidents, then Deep Pockets should consider retaining a security consultant to review existing security practices. See, e.g., *McKown*, 344 P.3d at 670 (holding that



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“when a landowner or possessor’s duty to protect business invitees from third party criminal conduct arises from his prior experience, that duty generally requires a history of prior similar incidents on the business premises within the prior experience of the landowner or possessor’s business”).

9. Discuss with Deep Pockets’ insurance agent whether the insurance coverage should be written on an “occurrence” basis or a “claims made” basis. If Deep Pockets are switching insurance coverage types, then “gap” or “tail” insurance coverage for historic incidents may be advisable.

10. When considering constructing or leasing a new facility, investigate what types of criminal activities have occurred and what security measures are or should be put into effect. The design stage for new space is when it will be most cost-effective to implement security measures. An ounce of prevention is worth a pound of cure.

Property owners, managers, and tenants are well advised to proactively plan for third-party criminal conduct on their properties. By investigating crimes and trends in the area, documenting incidents, maintaining lighting, doors, windows, security cameras, and other security devices, and employing reliable security personnel and techniques, owners, tenants, and managers can reduce the risk of criminal activity giving rise to possible high-cost litigation. Liability for third-party criminal acts may not be completely avoidable, but by knowing what the law requires and the history of criminal and violent activities in the area, appropriate security measures can be implemented to reduce risk, not only for the property owner, manager, or tenant, but also for employees, customers, and other invitees.





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## Chapter Key for McGraw-Hill Education Business Law Texts:

	<b>Hot Topics</b>	<b>Video Suggestions</b>	<b>Ethical Dilemma</b>	<b>Teaching Tips</b>
<b>Barnes et al., Law for Business</b>	Chapters 25, 45, and 46	Chapters 5 and 7	Chapter 3	Chapters 7 and 46
<b>Bennett-Alexander &amp; Hartman, Employment Law for Business</b>	Chapter 15	N/A	N/A	N/A
<b>Kubasek et al., Dynamic Business Law</b>	Chapters 42, 44, and 47	Chapters 7 and 9	Chapter 2	Chapters 9 and 44
<b>Kubasek et al., Dynamic Business Law: The Essentials</b>	Chapters 24 and 25	Chapters 6 and 7	Chapter 2	Chapters 7 and 25
<b>Liuzzo, Essentials of Business Law</b>	Chapters 6 and 33	Chapters 3 and 4	Chapter 2	Chapters 4 and 6
<b>McAdams et al., Law, Business &amp; Society</b>	Chapters 8, 10, 11, 12, 14, and 15	Chapters 7 and 18	Chapter 2	Chapters 7, 8, and 15
<b>Melvin, et al., Business Law and Strategy</b>	Chapters 40, 43, and 44	Chapters 42 and 45	Chapter 2	Chapters 42, 43, and 44
<b>Melvin, The Legal Environment of Business: A Managerial Approach</b>	Chapters 11, 19, and 21	Chapters 9 and 22	Chapter 5	Chapters 9 and 21
<b>Pagnattaro et al., The Legal and Regulatory Environment of Business</b>	Chapters 15, 16, 18, 21, and 22	Chapters 10 and 13	Chapter 2	Chapters 10, 15, and 18
<b>Prekert et al., Business Law: The Ethical, Global, and Digital Environment</b>	Chapters 47, 48, 49, and 51	Chapters 5 and 7	Chapter 4	Chapters 7, 47, and 48
<b>Sukys, Business Law with UCC Applications</b>	Chapters 23, 28, and 33	Chapters 5, 6, and 33	Chapter 1	Chapters 6 and 28



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## This Newsletter Supports the Following Business Law Texts:

Barnes et al., Law for Business, 14<sup>th</sup> Edition ©2021 (1260354660)

Bennett-Alexander et al., Employment Law for Business, 10<sup>th</sup> Edition Employment Law for Business Employment Law for Business ©2022 (1264126077)

Kubasek et al., Dynamic Business Law, 5<sup>th</sup> Edition ©2021 (1260354687)

Kubasek et al., Dynamic Business Law: The Essentials, 5<sup>th</sup> Edition ©2020 (1260354717)

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McAdams et al., Law, Business, and Society, 13<sup>th</sup> Edition ©2022 (1260354733)

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Pagnattaro et al., The Legal and Regulatory Environment of Business, 19<sup>th</sup> Edition ©2022 (1264125801)

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Sukys, Business Law with UCC Applications, 15<sup>th</sup> Edition ©2020 (1260204162)

