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Proceedings

A monthly newsletter from McGraw-Hill

April 2010 Volume 1, Issue 9

Contents

Dear Professor,

Welcome to McGraw-Hill's April issue of *Proceedings*, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 1, Issue 9 of *Proceedings* follows the same format as previous editions of the newsletter, incorporating "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the April newsletter topics with the various McGraw-Hill business law textbooks.

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

1. A fan's death after being hit by flying debris in a National Hot Rod Association (NHRA) crash in Arizona, whether her death was the result of negligence, and whether she "assumed the risk" by attending the event;

2. An Olympian luger's death at the 2010 Vancouver Olympics, whether his death was the result of negligence, and whether he "assumed the risk" by participating in the event;

3. The FDA's refusal to block the sale of the diabetes drug Avandia, despite considerable medical evidence indicating substantial health risks associated with the drug's use;

4. Lindsay Lohan's $100 million lawsuit against E*Trade for its "Milkaholic" commercial;

5. Changes in credit card law as established by the Credit Card Accountability, Responsibility and Disclosure Act (CARD Act); and

6. The ongoing saga of whistleblower Dimitrios Biller, former Toyota corporate attorney, as he accuses Toyota of hiding and destroying evidence of safety problems otherwise discoverable in ongoing Toyota product liability litigation.

Feel free to use the contents of this newsletter to combat the onset of "Spring Fever" in your classroom!

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Of Special Interest

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

1) A fan's death at a drag-racing event, whether her death was the result of negligence, and whether she "assumed the risk" by attending the event;

2) An Olympian luger's death at the 2010 Vancouver Olympics, whether his death was the result of negligence, and whether he "assumed the risk" by participating in the event; and

3) The FDA's refusal to block the sale of the diabetes drug Avandia, despite considerable medical evidence indicating substantial health risks associated with the drug's use.

Hot Topics in Business Law

Article 1: "Fan Dies After Being Hit By Flying Debris in NHRA Crash in Arizona"

http://www.usatoday.com/sports/motor/nhra/2010-02-21-crewmember-injury-phoenix_N.htm?csp=hf

This article indicates that a female spectator recently died after being stuck by a tire that separated from a dragster during a race at the NHRA Arizona Nationals. The dragster, driven by Antron Brown, lost its left-rear tire, sending it out of control and into the left lane of opponent Troy Buff before hitting a wall. Brown's dragster burst into flames as the loose tire bounced into the crowd and struck the spectator at Firebird International Raceway. The woman was flown by helicopter to Good Samaritan Medical Center in Phoenix and was pronounced dead several hours later.

"NHRA is investigating the incident," said a statement by the sanctioning body. "The entire NHRA community is deeply saddened by today's incident and sends its thoughts and prayers to the woman's family and friends." Said Brown, who was examined and released from Chandler Regional Medical Center, "It felt like the back end just dropped out and the car started pitching end-over-end. At that point, I was upside down, and in my mind, things were going crazy. I was just hoping I didn't go into Troy or into the other lane. The next thing I knew, I hit the wall. I saw a little burst of flame come around my head and I saw sparks. The Safety Safari guy was right there, and the next thing I knew somebody was trying to help pull me out of the car."

Brown's dragster was brought back to his pits and immediately covered with a black tarp.

Brandon Bernstein, one of Brown's closer friends and the son of drag racing legend Kenny Bernstein, was returning to the pits after losing his matchup against David Grubnic. He didn't see the incident.

"He's a great friend of mine," Bernstein said of Brown. "The first thing I want to know is, 'Is he OK?' Then it goes to another level: Why did it happen? We're in the seat, too, so we need to make sure."

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"Emotionally, it weighs on your heart. These cars are dangerous. We know that. We love to do this, but you want to make sure people are OK. That's what you think about."

"It's the worst that a fan got hurt. I know Antron; it's hurting him because it's off his race car. That's weighing on him. It's an accident, and we can't predict accidents. The bottom line is the fans are our lifeline and they love coming to watch us."

Members of Brown's team declined to comment.

Discussion Questions

1. Based upon the information available in the above-referenced article, evaluate whether each of the following parties was negligent, and whether such negligence caused the female spectator's death: a) Antron Brown (the driver of the dragster); b) Antron Brown's race team; c) Firebird International Raceway; and d) the National Hot Rod Association (NHRA).

Negligence is defined as the failure to do what a reasonable person would do under the same or similar circumstances. In order to establish negligence on the part of the defendant, the plaintiff must demonstrate, by the greater weight of the evidence, that: a) the defendant owed the plaintiff a duty of care; b) the defendant breached said duty of care; c) the defendant caused harm to the plaintiff; and d) the plaintiff sustained damages as a result.

In the instant case, without further evidence, it does not appear that Antron Brown, the Antron Brown race team, Firebird International Raceway or the NHRA was negligent. If it can be established that any of the parties mentioned violated an industry standard of care (for example, if the wall and/or fencing separating the race track from the spectator stands was not built and/or maintained in a manner consistent with industry standards, indicating a failing on the part of Firebird International Raceway), then perhaps the plaintiff could establish negligence, but again, based on the evidence available at this point, the accident does not appear to be the result of negligence.

2. Assumption of the risk is a commonly-recognized defense to negligence liability. Recognized in all states, the assumption of the risk doctrine holds that even if the defendant was negligent, if the plaintiff actively, voluntarily and willingly proceeds in the face of a known danger, the plaintiff is not entitled to recover anything from the defendant. In other words, if the jury accepts the assumption of the risk defense, it is a complete defense to negligence liability.

Did the female spectator who was killed in this case "assume the risk?" Why or why not?

Based on the evidence available at this point, it does appear that the plaintiff "assumed the risk" in terms of attending a drag race, an inherently dangerous event. Assumption of the risk is a common defense to negligence liability at sporting events. For example, if a baseball patron were to buy a game ticket on the first row adjacent to the third-base line, it is well-settled law that the fan assumes the risk that he or she might be struck by an errant ball or bat. If, however, the patron

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were to buy a ticket behind home-plate netting (behind-home-plate netting is an industry standard), the patron has the right to rely on the netting being properly maintained by the stadium owner. If a two-foot-long rip in the netting allows a foul ball to "get through" and strike the fan immediately behind home plate, it would be more difficult for a jury to conclude that the fan assumed the risk in such a situation. Ultimately, the defense of assumption of the risk is a jury question, as is the initial determination of the defendant's negligence. Even if the defendant was negligent, a jury finding of the plaintiff's assumption of the risk would serve to completely bar the plaintiff's recovery.

3. Most owners of sports venues post "on-site" a disclaimer of liability sign, stating (in essence) that if the customer is injured while attending an event at the venue, the owner will not be responsible for the damages. Such a disclaimer of liability is also printed on admission tickets to such events. Is such a disclaimer of liability conclusively determinative of the outcome of cases such as the spectator death in the subject case? Why or why not?

From a practical standpoint, it is always a good idea for the owner of such a facility to post such a disclaimer of liability. Such a disclaimer would likely "scare away" a number of parties who might otherwise seek recovery from the owner of the facility. From a technical and legal standpoint, however, a disclaimer of liability is not conclusively determinative of the issue. A sign does not constitute a contract between the parties (nor does the inclusion of such language on a game ticket.) Even if contracting parties were to include disclaimer of liability language in their agreement, courts have concluded that plaintiffs might still recover from the defendant in cases of gross negligence or extreme negligence.

Article 2: "On Legal Liability and the Vancouver Luge Tragedy"

http://blogs.wsj.com/law/2010/02/17/on-legal-liability-and-the-vancouver-luge-tragedy

This article indicates that the family of the young Georgian luge racer who was tragically killed during a practice run at the 2010 Winter Olympics in Vancouver, British Columbia, Canada has indicated that it is not interested in filing a lawsuit regarding the accident.

This article addresses the "What If?" scenario of legal liability regarding the mishap. More particularly, if the family and/or estate of Nodar Kumaritashvili did decide to file a lawsuit, would the plaintiff(s) have a legitimate cause of action?

Legal experts say that any potential lawsuit against the International Olympic Committee (IOC), the International Luge Federation, the designers of the Whistler luge track or anyone else would face significant challenges. All athletes involved in the Olympics must sign a legal liability waiver with the IOC, which says that they participate at their own risk.

Furthermore, says Doriane Coleman, a professor at Duke Law School, the law in Canada, the United States and many other nations provides that people participating in potentially dangerous sports

"assume" the risks inherent in them, and therefore are often barred from suing when they are injured.

As the article indicates, however, the assumption of the risk argument could be potentially rebutted if Kumaritashvili's family and/or the representatives from his estate can demonstrate that the track designers or others were grossly negligent or extremely reckless.

Geoffrey Rapp, a law professor at the University of Toledo and sports law expert, says that Kumaritashvili's case might be helped by establishing that the authorities in Vancouver either knew or should have known about potential problems with the track, but failed to make it safer. "Assumption of risk sets up a high bar, but not an insurmountable one," says Rapp.

"We assume normal risks, but not abnormal risks," adds Coleman. "If, for instance, it's completely abnormal for the track's wall to be below a certain height at the point of impact or if track designers always design walls so the riders cannot flip over them, then you might be able to argue that flipping over a wall and crashing into a beam is simply not a risk inherent in the activity of luging."

That authorities made changes to the track after the accident might seem to indicate an acknowledgment of fault. But Ryan Rodenberg, a lawyer who teaches sports law at Indiana University, says that for public policy reasons, such evidence would likely not be admissible in court as proof of such acknowledgment. "You don't want people shying away from corrections or improvements because they fear they'll be used against them in court," said Rodenberg.

Discussion Questions

1. In your reasoned opinion, does the information presented in the article (or from any other source you choose to reference) demonstrate negligence on the part of the International Olympic Committee (IOC), the International Luge Federation, and/or the designers of the Whistler luge track? Why or why not?

As indicated in response to Article 1 ("Fan Dies After Being Hit By Flying Debris in NHRA Crash in Arizona"), Discussion Question 1, negligence is defined as the failure to do what a reasonable person would do under the same or similar circumstances. In order to establish negligence on the part of the defendant, the plaintiff must demonstrate, by the greater weight of the evidence, that: a) the defendant owed the plaintiff a duty of care; b) the defendant breached said duty of care; c) the defendant caused harm to the plaintiff; and d) the plaintiff sustained damages as a result.

Although a finding of negligence is ordinarily a jury question, the instant case at least arguably involves negligence on the part of the International Olympic Committee (IOC), the International Luge Federation, and/or the designers of the Whistler luge track. An attorney representing the family of and/or estate of Nodar Kumaritashvili might argue that: a) the IOC breached its duty to properly monitor all Olympic events; b) the International Luge Federation breached its duty to appropriately oversee its sport; and c) the designers of the Whistler luge track breached their duty to properly configure the track. An attorney for the family and/or the estate of Kumaritashvili might

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further argue that the aforementioned parties jointly and severally (i.e., collectively and individually) failed to ensure that conditions and circumstances were reasonably safe for those participating in the luge events.

Negligence is a jury question to be determined on a "case-by-case" basis, based on the individual facts and circumstances of each case.

2. In your reasoned opinion, did Nodar Kumaritashvili "assume the risk" by participating in the luge event?

As indicated in Article 1 ("Fan Dies After Being Hit By Flying Debris in NHRA Crash in Arizona"), Discussion Question 2, assumption of the risk is a commonly-recognized defense to negligence liability. Recognized in all states, the assumption of the risk doctrine holds that even if the defendant was negligent, if the plaintiff actively, voluntarily and willingly proceeds in the face of a known danger, the plaintiff is not entitled to recover anything from the defendant. In other words, if the jury accepts the assumption of the risk defense, it is a complete defense to negligence liability.

In terms of whether Kumaritashvili assumed the risk in the instant case, consider the statements of Dorian Coleman (the Duke Law School professor) referenced in the article: "We assume normal risks, but not abnormal risks…If, for instance, it's completely abnormal for the track's wall to be below a certain height at the point of impact or if track designers always design walls so the riders cannot flip over them, then you might be able to argue that flipping over a wall and crashing into a beam is simply not a risk inherent in the activity of luging."

Kumaritashvili's body ascended a luge wall that was no more than three and one-half feet high (in this author's estimation), and collided with a bare metal structural support beam. If the low wall height, the absence of a wall on the turn and/or the lack of padding on the metal structural support beam represent a variation from industry standard, it would be more difficult to successfully make the argument that Kumaritashvili assumed the risk.

As is the case with negligence, assumption of the risk is a jury question to be determined on a "case-by-case" basis, based on the individual facts and circumstances of each case.

3. As the article indicates, Olympic authorities made changes to the track after the accident occurred (essentially, they modified the ice track and constructed a wall on the turn where the accident occurred). In the event of litigation, should a court admit into evidence post-accident repairs/modifications? Why or why not?

In answering this question, remember the statements (referenced in the article) of attorney and sports law professor Ryan Rodenberg, a lawyer who teaches sports law at Indiana University. Rodenberg indicated that for public policy reasons, such evidence would likely not be admissible in court as proof of fault. "You don't want people shying away from corrections or improvements because they fear they'll be used against them in court," said Rodenberg.

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Ask your students whether the current, general rule of inadmissibility is the better approach, or whether it would be preferable to admit at trial such evidence of post-accident repairs/modifications (even though such a rule might deter post-accident improvements efforts), and then leave it to the jury to determine whether such evidence proves negligence on the part of the defendant(s).

Article 3: "Senate Report Links Diabetes Drug Avandia to Heart Attacks"

http://www.cnn.com/2010/HEALTH/02/20/avandia.study/index.html?hpt=Sbin

This article indicates that according to a recent United States Senate Finance Committee report, the diabetes drug Avandia is linked with tens of thousands of heart attacks, and drugmaker GlaxoSmithKline knew of the risks for years but worked to keep those risks from the public. The report also criticized the Food and Drug Administration (FDA), saying that the agency that is principally responsible for regulating medications overlooked or overrode safety concerns found by its staff.

"Americans have a right to know there are serious health risks associated with Avandia and GlaxoSmithKline had a responsibility to tell them," said United States Senator Max Baucus, committee chairperson. "Patients trust drug companies with their health and their lives and GlaxoSmithKline abused that trust."

GlaxoSmithKline rejected any assertions that the drug is not safe.

"We disagree with the conclusions in the report," company spokeswoman Nancy Pekarek told CNN. "The FDA had reviewed the data and concluded that the drug should be on the market."

Seven clinical trials on the drug prove that it is not linked to heart attacks, Pekarek said.

"None of that data shows a statistically significant correlation between Avandia and myocardial ischemia or myocardial infarction (heart attack)," she said.

Ischemia is a condition in which blood flow and oxygen are blocked from going to certain parts of the body.

The Senate committee investigation stems from concerns that Avandia and other high-profile drugs put "public safety at risk because the FDA has been too cozy with drug makers and has been regularly outmaneuvered by companies that have a financial interest in downplaying or under-exploring potential safety risks," the report states.

FDA Commissioner Margaret Hamburg said she is waiting for the recommendations of an advisory committee that will hear reports on the drug this summer.

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"Meanwhile," Hamburg said in a statement, "I am reviewing the inquiry made by (the Senate committee) and I am reaching out to ensure that I have a complete understanding and awareness of all of the data and issues involved."

The Senate report was developed over the past two (2) years by committee investigators who reviewed more than 250,000 pages of documents provided by GlaxoSmithKline, the FDA and several research institutes. Committee investigators also conducted numerous interviews and phone calls with GlaxoSmithKline, the FDA and anonymous whistleblowers.

According to the Senate report:

1) FDA scientists estimated in July 2007 that Avandia was associated with approximately 83,000 heart attacks since the drug came to market.

"Had GSK considered Avandia's potential increased cardiovascular risk more seriously when the issue was first raised in 1999 ... some of these heart attacks may have been avoided," the report states.

2) GlaxoSmithKline undertook attempts to undermine information critical of Avandia.

"GSK executives attempted to intimidate independent physicians, focused on strategies to minimize or misrepresent findings that Avandia may increase cardiovascular risk and sought ways to downplay findings that a competing drug might reduce cardiovascular risk," the report says.

As an example, committee investigators say they found that GlaxoSmithKline experts verified an outside study showing the cardiac problem, but the company publicly attacked the findings as incorrect.

3) Two FDA safety officials sounded a clear alarm in October 2008 writing, "There is strong evidence that (Avandia) confers an increased risk of (heart attacks) and heart failure compared to pioglitazone (the competing drug on market)."

GlaxoSmithKline counters that the Senate report relies on outdated information.

"In essence, the report is a compilation of information and events that took place years ago," spokeswoman Pekarek said. "There's no new data there."

The FDA has evaluated at the drug, Pekarek said, and updated product labeling in 2007 to say information on Avandia's relationship to myocardial ischemia is inconclusive.

"The FDA exists to ensure patient safety," she said. "That is their purpose."

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Avandia has been under scrutiny for years. The New England Journal of Medicine called the drug's safety into question in 2007. The Journal of the American Medical Association also questioned whether Avandia was safe in 2007.

"Among patients with impaired glucose tolerance or type 2 diabetes, (Avandia) use for at least 12 months is associated with a significantly increased risk of myocardial infarction and heart failure, without a significantly increased risk of cardiovascular mortality," the AMA journal wrote, adding that the "findings have potential regulatory and clinical implications."

"Regulatory agencies ought to re-evaluate whether (Avandia) should be allowed to remain on the market," the report said. "Health plans and physicians should not wait for regulatory actions. They should avoid using (Avandia) in patients with diabetes who are at risk of cardiovascular events, especially since safer treatment alternatives are available."

In 2007, an FDA panel recommended by a vote of twenty-two (22) to one (1) that Avandia should remain on the market despite an analysis showing links to increased risk of heart attack. The vote was not binding, but a suggestion to FDA regulators.

The panel also voted twenty (20) to (3) at the same meeting in support of data that showed Avandia increased the risk of cardiac ischemia in patients with the most common type of diabetes.

The Senate report does not address the issue of whether Avandia should be removed from the market.

Discussion Questions

1. In your reasoned opinion, why is Avandia still “on the market?”

This is an opinion question, so student responses will likely vary. From GlaxoSmithKline’s perspective, there is obviously a very powerful commercial incentive to keep Avandia on the market, but any profit GlaxoSmithKline generates from sale of the product could obviously be far outstripped by future litigation-related liabilities. In terms of government regulatory power, the Food and Drug Administration (FDA) has the ultimate “call” in terms of whether Avandia should still be available, but as the article indicates, the FDA has refused (even in light of the most recent Congressional findings) to order GlaxoSmithKline to pull its product from pharmacy shelves. In the opinion of your author, it is considerably troubling that the FDA has refused to act, despite the fact that the weight of the medical evidence appears to demonstrate significant health-related problems associated with use of the drug.

2. In the event of Avandia litigation (class action or otherwise) against GlaxoSmithKline (the manufacturers of the drug), should GlaxoSmithKline be allowed to assert as a defense to liability that the Food and Drug Administration (FDA) approved Avandia for sale? If you were a juror, would you accept this argument as a persuasive defense against liability? Why or why not?

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The fact that the FDA initially approved Avandia for sale, and continues to "green-light" the availability of the drug to consumers, is no defense to liability. The law does not allow a pharmaceutical manufacturer to use as a "shield" against liability FDA approval of a drug. Ultimately, GlaxoSmithKline's liability for Avandia will depend on whether the judicial system deems the company negligent in terms of its product offering, or whether the jurisdiction in which the case is tried recognizes the theory of strict product liability (discussed in greater detail in response to Discussion Question 3 below.)

3. Based on your knowledge of a) negligence and b) strict product liability, in the event of Avandia litigation, which of these two (2) legal theories would be the best for plaintiffs to assert against GlaxoSmithKline?

Unquestionably, the preferable theory of liability for plaintiffs in the event of Avandia litigation is strict product liability theory. Negligence requires a demonstration of the defendant's fault. In order to establish negligence on the part of the defendant, the plaintiff must demonstrate, by the greater weight of the evidence, that: a) the defendant owed the plaintiff a duty of care; b) the defendant breached said duty of care; c) the defendant caused harm to the plaintiff; and d) the plaintiff sustained damages as a result. Needless to say, this can represent a difficult burden of proof for the plaintiff.

Strict product liability is liability without fault. The plaintiff need not demonstrate that the defendant intended to cause harm, or that the defendant was negligent. More particularly, in a strict product liability action, the plaintiff must only demonstrate two (2) elements in order to recover from the defendant: a) that the product offered by the defendant was defective; and b) that the plaintiff suffered damages as a result of the defect. Compared to negligence, strict product liability is a "streamlined" theory of recovery.

Given the fact that individual states determine the theories of recovery available to a plaintiff in a tort action, whether strict product liability theory can be utilized depends on the state in which the defective product case is tried (every state recognizes negligence theory.)

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Video Suggestions

Video 1: "Lohan Sues E*Trade"
http://video.be.msn.com/watch/video/lohan-sues-e-trade/m5exg4c3

(Note: For full video of the subject E*Trade commercial, see http://www.youtube.com/watch?v=lEXZ2hfD3bU)

Purpose of video: To discuss the tort of misappropriation of image/likeness and whether the tort of misappropriation of image/likeness applies in the subject case

Discussion Questions

1. In your reasoned opinion, is there sufficient evidence in this case to establish the tort of misappropriation of image/likeness? Why or why not?

The tort of misappropriation of image/likeness is one example of the general tort of invasion of privacy (The other two examples of the general tort of invasion of privacy are a) intrusion into the plaintiff's private affairs—for example, planting a microphone in an office or home; and b) public disclosure of private facts—for example disclosing private financial information, such as a business posting returned checks from customers near its cash register in a public display.)

The tort of misappropriation of image/likeness is also referred to as the "right of publicity." The elements of this tort are: a) appropriation of the plaintiff's name or likeness for the value associated with it, and not in an incidental manner or for a newsworthy purpose; b) identification of the plaintiff in the publication; and c) an advantage or benefit to the defendant. The right of publicity is designed to protect the commercial interest of celebrities in their identities.

*In the Lindsay Lohan versus E*Trade litigation, the key questions are whether a) Lohan's name or likeness has been (mis)appropriated and b) Lohan was identified in the advertisement. In the opinion of your author, the answer to both of these questions is "no." Although Ms. Lohan would like for everyone to believe that she is so popular that she has become identified simply by her first name Lindsay, similar to the first-name-only singer "Madonna," a reasonable judge and/or juror could conclude that Lohan has not yet reached that level of celebrity status. The only name reference in the commercial was to "Lindsay," and the company that produced the spot, Grey Group, claims that Lindsay is the name of an employee who works for the company.*

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Lohan further claims that since she has had troubles with alcohol, the reference to a "milkaholic" in the commercial was, in essence, a reference to her. Lohan has not yet confessed whether she has experienced trouble with overconsumption of milk!

2. Is the Lindsay Lohan/E*Trade case an example of a frivolous lawsuit? If so, does this case serve as "proof positive" of the need for tort reform in the United States legal system? Are there any procedural "checks and balances" already available in the United States legal system to terminate a case like this before it reaches a jury, or is a case like this inevitably and irrevocably "headed for trial?"

Many students will likely conclude that Lohan's case is an example of frivolous litigation, not just in terms of the legal merits of the case, but also in terms of the amount of damages requested ($100 million). Do advise your students, however, that there are a number of "checks and balances" in the legal system to address (and dismiss) frivolous lawsuits. Listed below are some procedural examples:

a. Motion for judgment on the pleadings (as determined by the pleadings filed, dismissal of plaintiff's case if there is no genuine issue of fact, and the defendant is entitled to judgment as a matter of law);

b. Motion for summary judgment (as determined by the pleadings filed and discovery conducted, dismissal of plaintiff's case if there is no genuine issue of fact, and the defendant is entitled to judgment as a matter of law);

c. Motion for directed verdict (as determined by the presentation of plaintiff's evidence at trial, dismissal of plaintiff's case if there is no genuine issue of fact, and the defendant is entitled to judgment as a matter of law);

d. Motion for judgment notwithstanding the verdict (even if the jury finds in favor of the plaintiff, the trial court judge has the discretion, upon defendant's request and if the jury committed an abuse of discretion and/or an error of law, to overturn the jury verdict and enter his or her own verdict);

e. Motion for new trial (even if the jury finds in favor of the plaintiff, the trial court judge has the discretion, upon defendant's request and if the jury committed an abuse of discretion and/or an error of law, to order a new trial); and

f. Appeal at the intermediate appellate court and/or supreme court levels (the appellate court has the right to reverse or modify the jury verdict, or remand the case for a new trial, if the appellate court concludes that the trial court committed an abuse of discretion and/or an error of law).

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Students may strongly believe that the United States litigation system is in need of tort reform, but they should at least know that numerous checks and balances are already "built into" our judicial system to address frivolous lawsuits.

3. The video refers to Lindsay Lohan requesting an "injunction" against E*Trade, pending prosecution of the case. What is the nature and purpose of an injunction? Why did Lohan's attorney request an injunction in this case?

An injunction is a court order requesting that the defendant cease and desist in engaging in a certain act, at least until the court can address the issue of whether the defendant has engaged in wrongdoing. A temporary injunction is designed to have the defendant refrain from engaging in a certain act until the case is litigated, while a permanent injunction is based on the plaintiff's victory at trial, and requires the defendant to forevermore refrain from engaging in the wrongful act.

Lohan's request for a temporary injunction pending litigation could be used as a "bargaining chip" in settlement negotiations; as of the publication of this newsletter, however, the court has not granted Lohan's request for an injunction.

Video 2: "New Credit Rules Take Effect"

http://www.youtube.com/watch?v=e-ws_Cy9Ptw

Purpose of video: To discuss certain changes in credit card law as established by the Credit Card Accountability, Responsibility and Disclosure Act (CARD Act)

Discussion Questions

1. This video focuses on three (3) specific provisions of the CARD Act, as described below:

a. A ban on "universal default" (in other words, a credit card company raising your interest rate on a certain account if you default on a different account);

b. A restriction on interest rate increases for a period of one (1) year after a customer opens a credit card account; and

c. A requirement that an account statement be provided to the customer at least twenty-one (21) days before the bill is due (up from fourteen days).

In your opinion, are these restrictions reasonable, rational and necessary, or do these restrictions represent the federal government's over-regulation of the credit card industry? Explain your answer.

This is an opinion question, so student responses will likely vary. In the opinion of your author, there is such an inequality of bargaining power between credit card companies and credit card holders that the government should make an effort to craft restrictions that give cardholders at

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least a "fighting chance" in terms of accruing and servicing credit card debt. Listed below, in order, are arguments as to why the three (3) noted provisions of the CARD Act are reasonable, rational and necessary:

a. If a credit card customer is in default on a particular account but not in default on another, it would not be fair to impose a higher interest rate on the latter account, since there is no breach of contract with respect to the latter account.

b. "Teaser" interest rates unfairly lure customers into credit card agreements, since credit card companies publicize heavily the "teaser" rate and the customer relies on the teaser rate as part of his or her decision to open a credit card account, only to discover that the rate has been increased only a short period of time (six months, for example) after the account has been opened. The one-year interest rate increase prohibition at least gives the cardholder "room to breathe," time to acclimate to the credit card arrangement before the rate (and the monthly payments) increase.

c. The twenty-one day account statement notification period gives the cardholder a greater opportunity to plan for the upcoming payment, and perhaps even avoid an interest charge by paying the principal amount in a timely manner.

2. The video indicates that the average American household owes over $8,000 in credit card debt, and that each year, Americans pay over $15 billion in penalty fees associated with credit card accounts. Also included in the video were the opinions of two (2) credit card customers, who said "One thing that bothers me in life is being 'nickeled and dimed,' and the credit card companies are experts at it" and "There's gotta be something done (in terms of the fees charged by credit card companies), because it's just not fair and it's not right." Do such facts and opinions justify additional regulation of the credit card industry by the federal government? Why or why not?

As indicated in response to Discussion Question 1 above, perhaps the best argument for additional regulation of the credit card industry by the federal government is the gross inequality of bargaining power between credit card issuers and holders. No one should begrudge credit card companies the right to earn profits (they are, after all, businesses!), but the question remains as to whether $15 billion in annual penalty fees represents a fair profit, particularly in light of credit card companies' willingness to offer "easy" credit (especially before the "financial meltdown" beginning in 2008).

Ask your students what will likely happen to the United States economy if credit card debt defaults approximate the level and magnitude of mortgage debt defaults from 2008-2010. The potential consequences of such a default would make any rational person shudder.

3. Consumer advocates warn that in light of the additional restrictions imposed by the CARD Act, cardholders should look out for new fees charged by credit card companies that are not specifically prohibited by the CARD Act, including annual fees charged on cards where no annual fees were charged before, as well as processing and inactive card/account fees. Do these new, potential fees render the CARD Act ineffectual? In your reasoned opinion, why were such new, potential fees addressed (and restricted) in the CARD Act?

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Although it is difficult for legislators to anticipate fully how creative those subject to the law might be in terms of circumventing the law, it is difficult to justify why legislators could not envision these circumventions. Annual credit card fees (charged to the cardholder as a lump sum fee each year simply for the privilege of holding the card) is a "quick and easy" way to generate revenue. Processing fees (charged to the cardholder either as a lump sum fee or per transaction) would also be an easy, virtually automatic source of income. Although it sounds unusual to your author for cardholders to be assessed fees for card inactivity (based on the customer's non-use of the card for a particular period of time), such fees are not prohibited by law. Time will tell whether these circumventions are attempted, and whether lawmakers choose to address such efforts by revisiting the CARD Act and modifying the law in order to address new fee assessments. In your author's opinion, such circumventions do not render the CARD Act ineffectual; instead, they indicate the need for constant legislative oversight of the law to determine whether the purpose of the law is being fulfilled, and if not, whether a change in the law is necessary.

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Of Special Interest

This section of the newsletter addresses the plight of whistleblower Dimitrios Biller, former Toyota corporate attorney, as he accuses Toyota of hiding and destroying evidence of safety problems otherwise discoverable in ongoing Toyota product liability litigation.

Ethical Dilemma

(Note: This ethical dilemma addresses the ongoing and well-known Toyota product recall saga, with a focus on "whistleblower" Dimitrios Biller, a former Toyota corporate attorney. Before discussing this section of the newsletter with students, have them view the video "Toyota Lawyer Accuses Company of Deceit" at http://autos.aol.com/article/toyota-documents-subpoenaed. For further reference regarding this ethical dilemma, see the article "Was Toyota Bragging When It Saved $100 Million in Recall?" at the same web address.)

In the video "Toyota Lawyer Accuses Company of Deceit," former Toyota "in-house" attorney Dimitrios Biller (a whistleblower who recently responded to the United States Congress' request for documents related to Toyota's ongoing product recall saga) describes Toyota's corporate culture as one of "hypocrisy and deception." Biller accuses Toyota of hiding and destroying evidence of safety problems otherwise discoverable in ongoing Toyota product liability litigation, obstructing justice, committing mail and wire fraud, as well as engaging in conspiracy to commit all of the aforementioned acts. As an example, Biller claims that Toyota withheld evidence of head clearance and roof strength in litigation related to sport-utility vehicle rollover accidents, based on Toyota's request that Biller, as its corporate attorney, withhold evidence in response to the plaintiffs' discovery requests (For an attorney, withholding such evidence in response to litigation-related discovery requests is unethical, and in violation of the Rules of Professional Conduct governing attorneys.) Biller recounts that one day while in his office preparing responses to such discovery, his boss walked into his office and said that Biller was forbidden to produce any of the discovery material. Biller's boss referred to the "Golden Rule": Protect the client (Toyota) at all costs (including the withholding of otherwise discoverable evidence), even if the client has committed illegal, criminal acts.

Biller claims that over a three-year period, his employment at Toyota made him increasingly "anxious, frustrated and upset," resulting in depression. Biller has sued Toyota for his work-related emotional injuries, and Toyota has also sued Biller (claiming he improperly revealed company secrets). Toyota claims, in essence, that Biller is "crazy" and is not to be believed. Biller acknowledges that he did suffer a mental breakdown, and that he accordingly sought psychiatric help, but that he is not crazy, and is to be believed.

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Biller claims Toyota (headquartered in Japan) has "no respect" for the United States legal system, has no respect for United States law, and that although the company sells cars in the United States, they do not believe they must adhere to United States law. He accuses Toyota of having a "pervasive corporate arrogance."

Discussion Questions

1. This ethical dilemma is a perfect representation of the "plight of the whistleblower." If you were in a situation similar to Dimitrios Biller, would you be willing to "blow the whistle" on your corporate employer? Why or why not?

No one truly knows how he or she would act in a situation like this unless truly faced with such a situation. When I teach Business Ethics, students invariably claim that they would be willing to "blow the whistle" to report ethical violations on the part of their corporate employers, but there is obviously a "high price to pay" in terms of reporting such violations. Blowing the whistle anonymously is certainly the preferable option, but in many cases (such as the situation facing Dimitrios Biller) anonymity may not be possible. If the whistleblower's identity is known, a corporate employer can obviously be very creative in terms of providing "quasi-legitimate" explanations as to why the whistleblower was sanctioned and/or terminated. I practiced insurance defense law in the 1990s, specializing in workers' compensation cases, and I cannot recount the number of times I visited the facilities of corporate employers to investigate claims, only to find the injured worker no longer employed due to the fact that the former employee was "not a team player," or "not productive enough." Although state and federal laws are designed to protect whistleblowers, many who choose to "do the right thing" suffer repercussions for years, or for a lifetime.

2. As between the whistleblower and the corporation, who do you believe (on average) a jury and/or the public-at-large is more likely to believe? Explain your response.

Jurors are people. They bring their subjectivities and biases to the courtroom, and although they are asked by our judicial system to "check their predispositions at the (courtroom) door," it is pragmatically difficult to do so. Most likely, whether rightfully or wrongfully so, jurors would be predisposed to believe the whistleblower. Although this may result in the jury accepting the whistleblower's "version of the truth," the whistleblower may still have an overwhelming, personal "price to pay" in terms of coming forward.

3. There are numerous state and federal laws designed to protect whistleblowers from corporate/employer retaliation. In your reasoned opinion, are such safeguards adequate to protect whistleblowers? Why or why not?

Whenever I discuss this issue with students, students invariably state that such laws are not adequate to protect whistleblowers, that there is a vast difference between having the safeguards "in writing," and having those laws "translate" into practical, "real world" protections. As indicated in response to Discussion Question 1 above, if the whistleblower's identity is known, a corporate

employer can be very creative in terms of providing "quasi-legitimate" explanations as to why the whistleblower was sanctioned and/or terminated. Although state and federal laws are designed to protect whistleblowers, many who choose to "do the right thing" suffer repercussions for years, or for a lifetime.

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Of Special Interest

This section of the newsletter will assist you in covering:

1) The **Ethical Dilemma** previously set forth in this newsletter; and

2) Video 2 (**"New Credit Rules Take Effect"**), also previously set forth in this newsletter.

Teaching Tips

Teaching Tip 1:

As a follow-up to the Ethical Dilemma (set forth earlier in this newsletter) regarding Toyota product safety issues, you may want to have your students read the article "U.S. Launches Criminal Probe into Toyota Safety" at http://www.msnbc.msn.com/id/35520628/. This article discusses the prospects of Toyota executives and the company itself being held criminally responsible for product safety issues. Federal prosecutors have launched a criminal investigation into Toyota's safety problems, and the Securities and Exchange Commission (SEC) is trying to determine what the automaker told investors (criminal liability can result from misrepresentations to investors.) The article indicates that these developments create new public relations challenges for Toyota, plus the prospects of large federal fines or even indictments against executives in the United States and Japan. As the article notes, the criminal investigations complicate Toyota's ability to discuss details underlying its recall of 8.5 million vehicles, because anything executives say could be used against them and/ or the company in criminal court.

I would use the article to discuss two (2) main issues with students:

1. The fact that both a corporation and its executives can be held criminally responsible for corporate wrongdoing (the corporation, by way of a criminal fine, and executives, by way of fines and/or imprisonment); and

2. Given the fact that criminal as well as civil liability is "in play" here for Toyota and its executives, company officials will have to decide how much information to volunteer in an effort to address the product recall scandal that is likely to plague Toyota for years, while being mindful of the fact that any information the company and its executives disclose can be used against both in criminal court. No matter how one evaluates the choice, it is indeed a "Sophie's Choice."

Teaching Tip 2:

This teaching tip relates to Video 2 (referenced earlier in this newsletter and entitled "New Credit Rules Take Effect") regarding the changes in credit card law as established by the Credit Card Accountability, Responsibility and Disclosure Act (CARD Act). Have your students reference the article "Credit Card Reform: Here's How You're Getting Hosed" at http://moneywatch.bnet.com/economic-news/blog/financial-decoder/credit-

card-reform-heres-how-youre-getting-hosed/1322/. This article discusses other details regarding the CARD Act, including:

1. Credit card companies now have to provide a late payment warning, and they have to tell the cardholder about any additional fees and higher interest rates that could occur as a result of a late payment;

2. Credit card companies will still be able to raise interest rates in some cases, such as when the cardholder is more than sixty (60) days late paying his or her bill or when an introductory rate expires after six (6) months;

3. Credit card companies must disclose the interest rates for different types of transactions, the balances subject to each interest rate and the amount of interest charged for each transaction;

4. Credit card companies must provide the cardholder with an estimate of how long it could take to pay off his or her balance if the cardholder makes only the minimum payment each month; the estimate must also include how much the cardholder must pay to eliminate his or her balance in three (3) years;

5. Credit card companies must disclose the total amount the cardholder has paid in fees and interest charges for the current year;

6. It will be more difficult for an individual under the age of twenty-one (21) to qualify for a card, unless the individual has a cosigner over the age of twenty-one (21).

As I suggested in response to Video 2 ("New Credit Rules Take Effect"), it would be a good idea to discuss with students whether these restrictions are reasonable, rational and necessary, or whether they represent the federal government's over-regulation of the credit card industry. My prediction is that most students will deem these regulations not only reasonable, rational and necessary, but also long overdue.

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Chapter Key for McGraw-Hill/Irwin Business Law texts

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 9 and 10	Chapters 8 and 45	Chapter 2	Chapters 7 and 45
Kubasek et al., Dynamic Business Law: The Essentials	Chapter 5	Chapters 5 and 25	Chapter 2	Chapters 2 and 25
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 7 and 20	Chapters 6 and 48	Chapter 4	Chapters 5 and 48
Barnes et al., Law for Business, 10th Edition	Chapters 7 and 20	Chapters 6 and 46	Chapter 3	Chapters 5 and 46
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 6 and 19	Chapters 6 and 20	Chapter 1	Chapters 5 and 20
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapter 10	Chapters 10 and 17	Chapter 2	Chapters 12 and 17
McAdams et al., Law, Business & Society, 9th Edition	Chapter 7	Chapters 7 and 15	Chapter 2	Chapters 4 and 15

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)
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