



Proceedings

A monthly newsletter from McGraw-Hill

August 2011 Volume 3, Issue 1



The McGraw-Hill Companies

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Dear Professor,

Let us all celebrate the beginning of a new academic year! Welcome to McGraw-Hill's August 2011 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 3, Issue 1 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the August 2011 newsletter topics with the various McGraw-Hill business law textbooks.

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

1. the United States Court of Appeals for the Eleventh Circuit's rejection of the "individual mandate" aspect of the Patient Protection and Affordable Care Act;
2. a Pennsylvania judge's prosecution for wrongful incarceration of youths;
3. a judge's consideration of the death penalty against an Ohio serial killer;
4. Videos related to a) the legal obligation to give a promised gift in a domestic relationship; and b) tort liability for harm caused by pets;
5. an "Ethical Dilemma" related to the Food and Drug Administration's (FDA's) new graphic labeling requirements on cigarette packaging; and
6. "Teaching Tips" related to Article 3 and the Ethical Dilemma of the newsletter.

Here's to an enjoyable and enriching 2011-2012 academic year!

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Of Special Interest

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

- 1) the United States Court of Appeals for the Eleventh Circuit's rejection of the "individual mandate" aspect of the Patient Protection and Affordable Care Act;
- 2) a Pennsylvania judge's prosecution for wrongful incarceration of youths; and
- 3) a judge's consideration of the death penalty against an Ohio serial killer.

Hot Topics in Business Law

Article 1: "Health-Care Law Moves Toward Supreme Court With Appeals Ruling"

<http://www.businessweek.com/news/2011-08-13/health-care-law-moves-toward-supreme-court-with-appeals-ruling.html>

According to the article, President Barack Obama's health-care law moved closer to review by the United States Supreme Court with a federal appellate ruling that its requirement for most Americans to have insurance coverage is unconstitutional.

The 2 to 1 ruling conflicts with an earlier decision by a federal appeals panel in Cincinnati, which upheld the individual mandate. The provision exceeds Congress's power to regulate commerce, the U.S. Court of Appeals in Atlanta ruled, affirming in part a lower court in a lawsuit filed by 26 states.

"This guarantees that the Supreme Court will rule on the constitutionality of the individual mandate, and makes it very likely that the court's ruling will come by the end of June 2012," said Kevin Walsh, an assistant professor at the University of Richmond School of Law in Virginia.

The United States Supreme Court often decides to accept cases where two or more of the federal appeals courts are in disagreement. Plaintiffs in the Cincinnati case have already asked the high court to review that ruling. A third federal appeals panel in Richmond, Virginia, has heard arguments in two cases brought over the health care law and has yet to rule.

In its ruling, the majority wrote that the "mandate represents a wholly novel and potentially unbounded assertion of congressional authority." The law requires "Americans to purchase an expensive health insurance product they



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have elected not to buy, and to make them repurchase that insurance product every month for their entire lives.”

While throwing out the mandate, the panel overruled the lower court’s decision in that case to reject the entire health care law as a result.

“Excising the individual mandate from the act does not prevent the remaining provisions from being fully operative as a law,” Chief U.S. Circuit Judge Joel Dubina, a Republican appointee, and U.S. Circuit Judge Frank M. Hull, a Democratic appointee, wrote. Hull is the first judge appointed by a Democratic president to rule against the law. Dissenting in part, U.S. Circuit Judge Stanley Marcus, a Republican lower- court appointee later elevated by President Bill Clinton, said he would have upheld the act in its entirety.

Stephanie Cutter, a deputy senior adviser to Obama, said in an Internet posting that “we strongly disagree with this decision and we are confident it will not stand.”

“The individual responsibility provision -- the main part of the law at issue in these cases -- is constitutional,” Cutter said. “Those who claim this provision exceeds Congress’ power to regulate interstate commerce are incorrect.”

“The Department of Justice believes -- as the Court of Appeals for the Sixth Circuit held, and the dissenting judge in the Eleventh Circuit concluded -- that the Affordable Care Act is constitutional,” the Justice Department said in an e-mailed statement. “We strongly disagree with the court’s decision.” The government said it’s considering the “next appropriate steps.”

The United States may seek a review of yesterday’ decision by the full U.S. Court of Appeals for the Eleventh Circuit, or it may petition the U.S. Supreme Court. The mandate provision is not scheduled to take effect until 2014.

Florida Attorney General Pam Bondi, a Republican, said in an e-mailed statement that the “ruling by the Eleventh Circuit Court of Appeals upholds our position that the federal health care law exceeds Congress’ power.”

The Patient Protection and Affordable Care Act was signed into law on March 23, 2010. Then-Florida Attorney General Bill McCollum sued the same day on behalf of his state and a dozen others.



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Thirteen more states signed on later. The health-care act bars insurers from denying coverage to people who are sick and from imposing lifetime limits on costs. It requires almost all Americans 18 and over to obtain coverage.

The Atlanta court upheld portions of U.S. District Judge C. Roger Vinson's ruling in Pensacola, Florida, that Congress exceeded its power in requiring that almost every American obtain insurance starting in 2014.

The U.S. has called the mandatory-coverage provision the linchpin of the statute because it will add younger and healthier people to the pool of the insured population, making the program viable for insurers.

Vinson on January 31 ruled that Congress exceeded its powers under the U.S. Constitution's commerce clause when it created the requirement. Concluding that the mandate was integral to the rest of the legislation, he invalidated the entire act.

The Obama administration appealed Vinson's ruling to the Eleventh Circuit. The panel, comprised of two judges originally nominated by Republican President Ronald Reagan and one picked by Democratic President Bill Clinton, heard argument on June 8.

"The most difficult issue in the case is the individual mandate," Dubina, first nominated to the federal bench by Reagan in 1986, said at the start of the June 8 session in Atlanta. Reagan named Marcus to the federal bench in Miami in 1985. Clinton selected him for the appellate court in 1997. Hull was a 1994 Clinton nominee.

"The question you have before you is that everyone is consuming the goods; it's about failure to pay," Acting U.S. Solicitor General Neal Katyal told the panel during the oral argument. The solicitor general is the Justice Department's top courtroom attorney.

"The Commerce Clause only gives Congress the power to regulate, not to compel," states' attorney Paul D. Clement, a solicitor general under President George W. Bush, told the court later.

Marcus, in his dissenting opinion in yesterday's decision, said that while he agreed with the majority in reversing Vinson's invalidation of the entire act, he would have upheld the mandate provision too.



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“By ignoring the close relationship between the health insurance and health care services markets, the plaintiffs and the majority seek to avoid the hard fact that the uninsured as a class are actively consuming substantial quantities of health care services now -- not just next week, next month, or next year,” Marcus wrote, making them active participants in interstate commerce subject to federal regulation.

The Cincinnati-based U.S. Court of Appeals for the Sixth Circuit, in its 2-1 ruling on June 29, became the first appellate panel to rule in favor of the law. The court affirmed a Detroit federal judge’s decision last year to throw out a challenge by the Ann Arbor, Michigan-based Thomas More Law Center, a Christian-based public interest law firm which has sought review by the U.S. Supreme Court.

“Not every intrusive law is an unconstitutionally intrusive law,” U.S. Circuit Judge Jeffrey Sutton, the first Republican-appointed judge to back the law in litigation across the country, said in the majority opinion.

Lower-court rulings have broken entirely along party lines, with federal judges appointed by Republican presidents invalidating the mandate and those appointed by Democrats upholding it.

The U.S. Court of Appeals in Richmond on May 10 heard the Obama administration’s challenge to a lower court ruling that sided with Virginia Attorney General Kenneth Cuccinelli, who filed a separate lawsuit the same day as McCollum.

U.S. District Judge Henry Hudson in Richmond, appointed by Bush, a Republican, had struck down the individual mandate as unconstitutional while leaving the rest of the act standing.

The Richmond panel also heard an appeal by Lynchburg, Virginia-based Liberty University, which sought to reverse another judge’s dismissal of its challenge to the law. That ruling was by Judge Norman K. Moon, who was appointed by Clinton.

The appellate panel hasn’t rendered a decision.

“I think this makes Supreme Court review inevitable,” A. Christopher Bryant, a University of Cincinnati law professor, said yesterday in a phone interview. “It’s almost impossible to imagine a situation in which it would not eventually come about.”



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With decisions by six U.S. appeals court judges -- three ruling to invalidate the mandate and three others voting to uphold the statutory structure -- and four lower-court judges having issued divergent opinions on the act's merits, Bryant said pressure is mounting for the Supreme Court to act.

"There's enough division of authority that there's going to need to be authoritative resolution," he said.

Stephen Presser, a professor of law at Northwestern University in Chicago agreed, saying it was "inconceivable" that the high court would not take the case.

"It all boils down to one very, very simple point," he said in a phone interview. "If the federal government can do this, can they do everything?"

The case is State of Florida v. U.S. Department of Health and Human Services, 11-11021, U.S. Court of Appeals for the Eleventh Circuit (Atlanta).

Discussion Questions

1. As the article indicates, lower court rulings regarding this case have broken entirely along party lines, with federal judges appointed by Republican presidents invalidating the mandate and those appointed by Democrats upholding it. Comment on the apparent effect political partisanship is having on judicial decision-making in this case.

Indisputably, political partisanship has had a demonstrable effect on the health care reform debate. Whether lawmakers will ever transcend this partisanship in order to craft meaningful health care reform remains to be seen, but this seems doubtful, based on the previous "track record" of the legislature and the judiciary.

2. As the article indicates, this case pits a slim majority of the states (26) against the federal government. Comment on the "balance of power" aspect of this case.

Health care reform represents a "textbook" example of the struggle for power between the states and the federal government. If the twenty-six (26) states who have filed suit against the federal government in the health care debate prevail, states' rights advocates will have garnered a substantial, meaningful victory.

3. The United States Supreme Court does not accept for review each and every case that is appealed to it. In fact, the Supreme Court only accepts a small percentage of cases for review. In your reasoned opinion, should the Supreme Court accept this case for review? Why or why not?



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In your author's opinion, the United States should and will accept the issue of health care reform on appeal. The federal government has used the Commerce Clause of the United States Constitution as constitutional grounds for health care reform, based on the logic that health care involves interstate commerce, thereby triggering the justification for federal regulation. Health care reform involves a substantial constitutional question, and the United States Supreme Court is the final arbiter regarding matters of federal government powers.

Article 2: "Former Judge Gets 28 years for Scheme to Unjustly Jail Youth"

<http://www.cnn.com/2011/CRIME/08/12/pennsylvania.judge.sentenced/index.html?hpt=hp>

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According to the article, a former Pennsylvania juvenile judge was sentenced to 28 years in prison recently after being convicted for a scheme to make millions off unjustly incarcerating young people, court officials said.

Former Luzerne County Judge Mark Ciavarella was also ordered by a federal judge in Pennsylvania to pay about \$1 million in restitution.

The sentence was four times the 87 months sentence that Ciavarella and federal prosecutors had agreed to when he pleaded guilty to charges in 2009.

But that plea deal was thrown out by a federal judge and the case went to trial.

Ciavarella was found guilty in February of 12 of 39 racketeering and fraud charges for accepting millions of dollars in bribes from friends who owned detention centers to which he sent juveniles.

The case made national headlines when Ciavarella was confronted by a distraught mother outside a courtroom after his conviction.

Sandy Fonzo's 17-year-old son, Edward Kenzakowski, spent six months in a detention center after Ciavarella sentenced him for possession of drug paraphernalia.

According to Fonzo, her son, who had no prior record, was never able to recover and eventually took his own life.

"He (Ciavarella) killed his spirit," Fonzo said at the time, "He crushed him, and he didn't help him." Fonzo said her son was full of resentment and pent-up anger after being sent to the detention center.

"He was just never the same," Fonzo said.



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Discussion Questions

1. As the article indicates, Mark Ciavarella was also ordered to pay about \$1 million in restitution. What is "restitution?"

Restitution is a judicial remedy mandating that a defendant reimburse a plaintiff for the losses the plaintiff sustained as a result of the defendant's wrongful actions. It is a remedy designed to, as much as possible, make the plaintiff whole again. Of course, it is debatable in this case whether \$1 million is sufficient to make those wrongfully convicted truly whole again, or whether former judge Ciavarella will ever be able to pay the restitution damages.

2. As the article indicates, Ciavarella and federal prosecutors had reached a plea deal, but that deal was thrown out by a federal judge and the case went to trial, where Ciavarella received a much stricter sentence. Should a federal judge have the power and authority to reject a plea deal agreed to by prosecutor and defendant? Why or why not?

Although this question is certainly debatable, judges do have the authority to reject a plea deal. Such a decision would be based on the judge's opinion that the plea deal is not in the best interests of justice. As a general rule, judges readily accept plea arrangements, since such deals "keep the wheels of justice" turning in terms of processing the massive number of cases our criminal justice system faces.

3. Does this case affect your opinion on whether judges should have substantial discretion in sentencing? If so, how?

This is an opinion question, so student responses will vary. For years, legal experts have debated whether judges should have substantial discretion in sentencing. In situations where a jury has returned with a guilty verdict, most states and the federal government have adopted "structured sentencing" guidelines, which dictate the range of sentencing from which a judge can issue punishment. These guidelines are designed to promote fairness and uniformity in our criminal justice system, and to avoid the situation where a criminal defendant's punishment is dependent upon the sentencing judge's ideology (i.e., whether the judge is conservative or liberal).

Structured sentencing does not really affect whether a judge is willing to accept a plea deal. In this case, the defendant's punishment was substantially greater because the sentence for a guilty verdict was much greater than the judge-rejected plea deal reached between the prosecution and the defense.



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Article 3: "Ohio Serial Killer Sowell Gets Death Penalty"

<http://www.reuters.com/article/2011/08/12/us-crime-sowell-idUSTRE77B62520110812>

A judge recently sentenced Ohio serial killer Anthony Sowell to death and set his execution date, accepting the recommendation of the jury that convicted the ex-Marine.

Sowell was convicted last month of murdering 11 women over a two-year-period and dumping their bodies around his Cleveland home.

Earlier, the jury recommended he be put to death for the crimes -- a recommendation Judge Dick Ambrose could have set aside.

Instead, Ambrose agreed with the panel -- which asked to be in the courtroom for Friday's sentencing -- and ordered that Sowell die by lethal injection on October 29, 2012.

Police discovered the remains of the 11 victims in the fall of 2009, when they went to Sowell's home to investigate rape and assault charges.

Sowell, handcuffed and shackled, had his eyes closed as the sentence was imposed.

He was unresponsive as the judge asked if he understood his responsibility as a sex offender and his right to automatic appeal.

Before sentencing, defense attorney John Parker asked Ambrose to "consider all the mitigation evidence" and to take into account that Sowell attempted to plead guilty before the trial began.

Family members of the dead, and two surviving victims, spoke in open court before the sentence was delivered.

Some family members, like Jim Allen, the father of victim Leshanda Long, said they forgave Sowell.

"Love conquers hate," Allen said. "It is a hollow victory. There is no winner and no loser today." But many others spoke of judgment and retribution.

One family member even yelled, "dead man walking" as she left the podium.

"You are going to hell for your actions. You are an animal and hell awaits you," said Donnita Carmichael, mother of Barbara Carmichael, one of Sowell's victim.

Defense attorney Rufus Sims told reporters the defense plans on asking for a new trial based on comments jurors made to the press shortly after delivering their verdict.



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Ohio has sent 152 people to death row since re-establishing capital punishment in 1999. The average time from sentencing to execution is 14 years, 6 months.

Sowell's 11 victims were Diane Turner, Telacia Fortson, Janice Webb, Nancy Cobbs, Tishana Culver, Amelda Hunter, Michelle Mason, Crystal Dozier and Kim Smith as well as Long and Carmichael.

Many of the victims had histories of drug problems or were transients, and their disappearances were not always immediately reported to police.

Sowell, who had a previous conviction for raping a pregnant woman, had claimed that bad smells in the area came from a nearby sausage factory.

Family members of some victims have filed suit against the city, complaining about the police's handling of the case. The father of one of the victims said his concerns were dismissed by police because of his daughter's history of drug use.

Discussion Questions

1. As the article indicates, the trial judge in a criminal case must decide whether to impose the death penalty. In terms of imposition of the "ultimate punishment" (the death penalty), should the final decision rest with judge or jury? Explain your response.

This is an opinion question, so student responses will vary. The death penalty is a volatile, emotionally-charged topic, which will likely evoke lively debate in your classroom.

2. Availability of the death penalty as a punitive option for murder is a decision for the individual states to make. In your reasoned opinion, should the death penalty be standardized at the federal government level (For example, in terms of establishing uniform federal standards addressing the method or manner by which the death penalty is carried out?) Explain your response.

Again, this is an opinion question, so student responses will vary.

3. Aside from your response to Discussion Question 2 above, does this case affect your opinion regarding the death penalty in any way? If so, how?

Again, this is an opinion question, so student responses will vary.



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Video Suggestions

Video 1: "George Soros' Ex, Brazilian Actress Adriana Ferreyr, Sues for \$50 M; Claims Billionaire Hit Her, Didn't Give Manhattan Apartment"

<http://abcnews.go.com/Entertainment/george-soros-girlfriend-adriana-ferreyr-sues-50-million/story?id=14287341>

Note: Before answering the three (3) Discussion Questions below, please see the following article accompanying the video:

"George Soros' Ex, Brazilian Actress Adriana Ferreyr, Sues for \$50 M; Claims Billionaire Hit Her, Didn't Give Manhattan Apartment"

A 28-year-old former Brazilian soap opera actress is suing her billionaire ex-lover, George Soros, for \$50 million, claiming the 80-year-old financier reneged on a promise to give her a Manhattan apartment.

The lawsuit filed by Adriana Ferreyr also claims an argument over a \$2-million apartment escalated into physical abuse.

"They were lying in bed when ... Soros bluntly informed her that he had given the apartment to another woman and an argument ensued," the lawsuit states, continuing: "Soros slapped Ferreyr across the face and proceeded to put his hands around her neck in (an) attempt to choke her." Soros denies the allegations.

In a police report, Ferreyr alleged Soros attempted to hit her with a lamp. Ferreyr says she became extremely traumatized. She claims they later made up but he reneged a second time on a promise to buy her an apartment.

Speaking of the lawsuit, her attorney Robert Hantman said:

"Some people are going to look at this lawsuit and say \$50 million ... give me a break, what do you say to that? There's the fraud, the intentional infliction



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of emotional distress ... quite frankly this is the last thing she wanted to be involved in ... we were hoping it would be resolved."

Soros is a philanthropist who gives away \$800 million a year to charity. He is a major contributor to liberal and democratic causes.

Soros' attorney, William Zabel, said the lawsuit was an "attempt to extract money from my client who is known to be a very wealthy man. Police investigated the August 2010 incident and concluded that no assault occurred."

William Beslow, a legal expert not connected with the case, weighed in on suit.

"Husbands and wives, boyfriends and girlfriends breaking promises, sure people's feelings are hurt but you can't sue for that," he said.

"Soros' camp tells me that she's a gold-digger," Ferreyr's attorney, Hantman, said. "I'm not surprised by what they said. Is Adriana a gold-digger? This is not a typical party girl, this is not someone who runs around from person to person ... she was committed to him."

Discussion Questions

1. Based on your analysis of the facts of this case, is there an enforceable contract between Soros and Ferreyr in terms of Soros' alleged promise regarding the Manhattan apartment? Why or why not?

In your author's opinion, based on the facts presented, there is no enforceable contract in this case. In terms of the common law of contracts, a promise to make a gift is generally unenforceable, since the donee gives no consideration for a gift. In order for a contract to be enforceable, both parties to the contract must give something of value.

2. In terms of the legal analysis of this case, is it relevant that Soros is a philanthropist who gives away \$800 million a year to charity? Why or why not?

In your author's opinion, the fact that Soros is a philanthropist who donates \$800 million a year to charity is entirely irrelevant in this case. As explained in response to Discussion Question Number 1 above, a promise to make a gift is legally unenforceable, since contract recognition and enforcement requires mutual consideration. By the very definition of a gift, the donee gives nothing of value in return for the gift.



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3. Robert Hantman, Ferreyr's attorney, alleges that Soros committed the torts of fraud and intentional infliction of emotional distress in this case. Does the information currently available support Hantman's allegations? Why or why not?

The facts presented do not appear to establish, by the greater weight of the evidence, the torts of fraud and intentional infliction of emotional distress. To prove a fraud case, the plaintiff must establish:

- a. the defendant made a false statement of a material fact;*
- b. the defendant made the false statement with knowledge of its falsity or with reckless indifference as to its truth;*
- c. the defendant intended that the plaintiff rely on the false statement;*
- d. the plaintiff actually relied on the false statement; and*
- e. the plaintiff was harmed (economically, physically, or both).*

To prove an intentional infliction of emotional distress case, the plaintiff must prove:

- a. the defendant made outrageous statements and/or engaged in outrageous conduct;*
- b. with the intent that the plaintiff experience severe emotional distress; and*
- c. the plaintiff in fact experienced severe emotional distress.*

Perhaps the discovery (fact-finding) stage of litigation will reveal more in terms of proof of the alleged torts, but in your author's opinion, the plaintiff's initial allegations of fraud and intentional infliction of emotional distress appear weak.

Video 2: "Reports: Pet Pit Bull Mauls Pregnant California Woman to Death"

http://www.msnbc.msn.com/id/44118383/ns/us_news-life/

Note: Before answering the three (3) Discussion Questions below, please see the following article accompanying the video:

"Reports: Pet Pit Bull Mauls Pregnant California Woman to Death"

A pregnant northern California woman was mauled to death by her pet pit bull, which was later shot and killed, reports say.

The body of Darla Napora, 32, was found at her home in Pacifica, said police Captain Dave Bertini.



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The victim's husband found his wife around noon, with one of the family's pit bulls standing over her body. He was able to get the dog into the backyard before police arrived, but the animal escaped, charging the officers later.

Police fired three shots, killing the dog. The family's second pit bull, which was not believed to be involved in the incident, was removed and taken to the Peninsula Humane Society as a precaution.

A neighbor said that she saw Napora's distraught husband outside the house before authorities arrived on the scene.

"He was in the driveway all frantic, yelling," Kathy Carlson told the newspaper. "He had blood on his hands, blood on his shirt and blood down his pants."

A sign reading "Beware of the Dog" hung from a fence that wraps around the home.

Darold Larson of Yakima, Washington, said that his daughter was athletic and had a great sense of humor. She and her husband Greg had been married for two years.

"She lived her own life, no matter what anyone else said...She was an individual."

Local residents said they had not sensed any previous problem with the animals.

"They are not barking dogs. They seemed friendly," Carlson said of the two dogs owned by the Naporas. "I have a pit also, and he's an absolute angel. It's just really sad."

Napora worked as a saleswoman for a local wine brokerage. The owner of the brokerage, Shannon Burke, said that Darla Napora was at least six months along in her pregnancy.

"It's a big loss," Burke said. "She was very much loved."

Investigators will perform a necropsy on the dog to determine whether it was sick in any way.



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Discussion Questions

1. For the purposes of this Discussion Question, assume the pit bull killed a third party (a neighbor, for example) instead of its owner, Darla Napora. What would have been the potential liability of the Naporas for the third party's death?

In terms of tort liability, pet owners do have potential liability for injuries caused to other parties, especially if the pet has "dangerous propensities." Since pit bulls are legally deemed inherently dangerous animals (despite protestations by many pit bull owners to the contrary), had the pit bull killed a third party, the owner would likely have been legally responsible for the death.

2. For the purposes of this Discussion Question, again assume the pit bull killed a third party instead of its owner. Would the Naporas' "Beware of Dog" sign on their property have affected (i.e., lessened or eliminated) their legal liability? Explain your response.

Although many pet owners display such a sign, it would have little effect on the liability question. A "Beware of Dog" sign would not immunize a dog owner from liability for injury or death to a third party. The ultimate question for a jury is whether the pet owner took reasonable precautions to see to it that a third party (even a trespasser) was not injured or killed by a pet with dangerous propensities.

3. For the purposes of this Discussion Question, again assume the pit bull killed a third party instead of its owner. Would the fact that the Naporas had not experienced any previous problems with their pet have affected (i.e., lessened or eliminated) their legal liability? Explain your response.

If the dog were a poodle, perhaps, but not if it were a pit bull! Many jurisdictions have a "one free bite" rule with respect to pets that are not inherently dangerous, meaning that if that if the owner has no previous knowledge of his or her docile pet attacking a third party, the owner is not responsible for the "first bite." This rule does not, however, apply to inherently dangerous animals such as pit bulls. Even if an owner's pit bull has never bitten a human before, the owner is responsible for the "first bite." Such is the risk of owning a breed of animal that is deemed by law to be "inherently dangerous."



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Of Special Interest

This section of the newsletter addresses the ethical obligations of tobacco companies in terms of warning consumers of the dangerous effects of their products.

Ethical Dilemma

"Big Tobacco Sues Feds over Graphic Warnings on Cigarette Labels"

<http://www.msnbc.msn.com/id/44171861/ns/health-cancer/t/big-tobacco-sues-feds-over-graphic-warnings-cigarette-labels/>

Tobacco companies want a judge to put a stop to new graphic cigarette labels that include the sewn-up corpse of a smoker and pictures of diseased lungs, saying they unfairly urge adults to shun their legal products and will cost millions to produce.

Four of the five largest U.S. tobacco companies recently sued the federal government, saying the warnings violate their free speech rights.

"Never before in the United States have producers of a lawful product been required to use their own packaging and advertising to convey an emotionally-charged government message urging adult consumers to shun their products," the companies wrote in the lawsuit filed in federal court in Washington.

The companies, led by R.J. Reynolds Tobacco Co., Lorillard Tobacco Co., said the warnings no longer simply convey facts to allow people to make a decision on whether to smoke. They instead force them to put government anti-smoking advocacy more prominently on their packs than their own brands, the companies say. They want a judge to stop the labels.

The FDA refused to comment, saying the agency does not discuss pending litigation. But when she announced the new labels in June, Health and Human Services Secretary Kathleen Sebelius called them frank and honest warnings about the dangers of smoking.



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The FDA approved nine new warnings to rotate on cigarette packs. They will be printed on the entire top half, front and back, of the packaging. The new warnings also must constitute 20 percent of any cigarette advertising. They also all include a number for a stop-smoking hotline.

One warning label is a picture of a corpse with its chest sewed up and the words: "Smoking can kill you." Another label has a picture of a healthy pair of lungs beside a yellow and black pair with a warning that smoking causes fatal lung disease.

The lawsuit said the images were manipulated to be especially emotional. The tobacco companies said the corpse photo is actually an actor with a fake scar, while the healthy lungs were sanitized to make the diseased organ look worse.

The companies also said the new labels will cost them millions of dollars for new equipment so they can frequently change from warning to warning and designers to make sure the labels meet federal requirements while maintaining some distinction among brands.

Joining R.J. Reynolds and Lorillard in the suit are Commonwealth Brands Inc., Liggett Group LLC and Santa Fe Natural Tobacco Company Inc. Altria Group Inc., parent company of the nation's largest cigarette maker, Philip Morris USA, is not a part of the lawsuit.

The free speech lawsuit is a different action than a suit by several of the same companies over the Family Smoking Prevention and Tobacco Control Act.

The law, which took effect two years ago, cleared the way for the more graphic warning labels, but also allowed the FDA to limit nicotine.

The law also banned tobacco companies from sponsoring athletic or social events and prevented them from giving away free samples or branded merchandise.

A federal judge upheld many parts of the law, but the companies are appealing.



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Discussion Questions

1. In your reasoned opinion, do tobacco companies have an ethical obligation to put graphic warning labels on cigarette packages? Why or why not?

This is an opinion question, so student responses will likely vary. Regardless of varying opinions regarding the ethical obligation of tobacco companies to engage in such advertising, all students will likely agree that without federal government regulation, tobacco companies would not voluntarily put such warnings on their product packaging. These warnings, in essence, are a form of "anti-marketing," since they seek to discourage consumption.

2. Should the federal government impose a legal obligation on tobacco companies to put graphic warning labels on cigarette packages? Why or why not?

Student opinions will likely vary in response to this question. One likely response—If the tobacco industry is required to do this, why not the alcohol industry and/or the fast-food industry? If the court approves of this form of regulation, the decision could serve as precedent for stricter government control of alcohol and fast food marketing.

3. Do you believe the federal court will uphold the graphic labeling requirements imposed by the Food and Drug Administration? Why or why not?

Obviously, this remains to be seen, and there is no way to predict with accuracy how the federal court will decide. Even though corporations do have a free speech right protected by the First Amendment to the United States Constitution, courts have traditionally imposed reasonable "time, place and manner restrictions" on corporate speech, and corporations have traditionally received less free speech protection than individuals. Further, since tobacco companies engage in interstate and international commerce, the federal government has the right to regulate the industry by way of the Commerce Clause to the Constitution. The question for the court will be whether such a regulation is reasonable, in light of the competing interests of the tobacco industry and its consumers.



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Of Special Interest

This section of the newsletter will assist you in covering:

- 1) Article 3 (Judge Weighs Death Penalty for Ohio Serial Killer”); and
- 2) The Ethical Dilemma (“Big Tobacco Sues Feds over Graphic Warnings on Cigarette Labels.”)

Teaching Tips

Teaching Tip 1 (Related to Article 3—“Judge Weighs Death Penalty for Ohio Serial Killer”):

See the associated videos at:

http://www.msnbc.msn.com/id/44119637/ns/us_news-crime_and_courts/

Teaching Tip 2 (Related to the Ethical Dilemma—“Big Tobacco Sues Feds over Graphic Warnings on Cigarette Labels”):

Have students review the nine (9) graphic warning labels on cigarette packaging at:

<http://www.msnbc.msn.com/id/44171861/ns/health-cancer/t/big-tobacco-sues-feds-over-graphic-warnings-cigarette-labels/>.



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The McGraw-Hill Companies

Chapter Key for McGraw-Hill/Irwin Business Law Texts

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 5 and 7	Chapters 9, 15 and 48	Chapter 45	Chapters 7 and 45
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 2 and 4	Chapters 5 and 8	Chapter 25	Chapters 2 and 25
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 3 and 5	Chapters 7 and 12	Chapter 48	Chapters 5 and 48
Barnes et al., Law for Business, 11th Edition	Chapters 4 and 5	Chapters 7 and 12	Chapter 46	Chapters 5 and 46
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 2 and 5	Chapters 6 and 11	Chapter 20	Chapters 5 and 20
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 6 and 12	Chapters 8 and 10	Chapter 17	Chapters 12 and 17
McAdams et al., Law, Business & Society, 9th Edition	Chapters 4 and 5	Chapters 6 and 7	Chapter 15	Chapters 4 and 15
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 2 and 22	Chapters 6 and 9	Chapter 21	Chapters 21 and 22

This Newsletter Supports the Following Business Law Texts:

- Barnes et al., Law for Business, 11th Edition, 2009© (0073377716)
- Brown et al., Business Law with UCC Applications Student Edition, 12th Edition, 2009© (0073524948)
- Kubasek et al., Dynamic Business Law, 2nd Edition, 2012© (0073377678)
- Kubasek et al., Dynamic Business Law: The Essentials, 2010© (0073377686)
- Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition, 2010© (0073377643)
- McAdams et al., Law, Business & Society, 9th Edition, 2009© (0073377651)
- Reed et al., The Legal and Regulatory Environment of Business, 15th Edition, 2010© (007337766X)
- Melvin, The Legal Environment of Business: A Managerial Approach, 2011© (0073377694)
- Bennett-Alexander & Harrison, The Legal, Ethical, and Regulatory Environment of Business in a Diverse Society, 2012© (0073524921)

