Proceedings

A monthly newsletter from McGraw-Hill

December 2009 Volume 1, Issue 5

Contents

Hot Topics 2

Video Suggestions 12

Hypothetical and Ethical Dilemma 17

Teaching Tips 20

Chapter Key 23

Dear Professor,

Welcome to McGraw-Hill's December issue of *Proceedings*, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 1, Issue 5 of *Proceedings* follows the same format as previous editions of the newsletter, incorporating "hot topics" in business law, video suggestions, a hypothetical and ethical dilemma, teaching tips, and a "chapter key" cross-referencing the December 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 lack of legal assistance available to homeowners subject to foreclosure;

2. A woman who died after being severely burned in a "flash fire" during surgery, and the potential tort liability of the hospital for her death;

3. Annoyingly loud television commercials, and the proposed legislation to restrict such advertising;

4. Videos related to a) whether a twelve-year-old girl who retrieved an historic home-run baseball is the rightful owner of the baseball; and b) whether a company making debt collection calls can be held responsible for a debtor's increased blood pressure, heightened stress levels, and resulting death;

5. A "case hypothetical and ethical dilemma" related to whether a homeowner is ethically and/or legally responsible for a contractor's improvements to his/her property, when the homeowner was unaware of the improvements as they were being made; and

6. "Teaching tips" related to a) employer liability for religious discrimination and b) medical malpractice reform.

I hope this newsletter assists you greatly in completing Fall Semester 2009!

Jeffrey D. Penley, J.D.
Catawba Valley Community College
Hickory, North Carolina

The McGraw-Hill Companies

Proceedings

A monthly newsletter from McGraw-Hill

December 2009 Volume 1, Issue 5

Of Special Interest

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

1) The lack of legal assistance for homeowners facing foreclosure;

2) Medical negligence liability for a surgical "flash fire"; and

3) The constitutional right to commercial free speech as it relates to television advertising.

Hot Topics in Business Law

Article 1: "Lack of Legal Help: One More Way the Deck Is Stacked Against Homeowners"

http://www.huffingtonpost.com/arianna-huffington/lack-of-legal-help-one-mo_b_310353.html

This article contends that America's foreclosure crisis is exacerbated by the lack of legal assistance available to homeowner's experiencing the foreclosure process. According to a recent study by the Brennan Center for Justice, "the nation's massive foreclosure crisis is also, at its heart, a legal crisis," with the vast majority of homeowners facing foreclosure without the assistance of legal counsel. The article cites as an example New York's Nassau County, where in foreclosures involving subprime or non-traditional mortgages, ninety-two percent (92%) of the homeowners do not have an attorney.

As the article indicates, legal assistance can "make the difference" between individuals keeping their homes or being evicted. An attorney can stop foreclosure proceedings, or put enough pressure on lenders to get them to renegotiate the terms of a loan. A lawyer can also intervene in other ways, such as by enforcing consumer protection laws, or by identifying legal violations committed by lenders.

According to the Brennan Center for Justice, two factors keep homeowners from obtaining proper legal representation in the foreclosure process: 1) a lack of funding; and 2) legal restrictions favoring lenders. First, in terms of lack of funding, the Brennan Center for Justice reports that the Legal Services Corporation, the primary agency that provides assistance for low-income Americans in civil cases, had its budget cut by one-third in the 1990s. Today, to match the funding level the Legal Services Corporation received in the early 1980s, an additional $753 million would be required. Second, in terms of legal restrictions favoring lenders, the author of the article notes that the 1990s legislative initiative called the "Contract With America" substantially limited the ability of homeowners to obtain legal protection from "predatory lending" ("Predatory lending" consists of unscrupulous actions carried out by a lender to entice, induce, and/or assist a borrower in taking a mortgage that carries high fees, a high interest rate, strips the borrower of equity, or places the borrower in a lower credit rated loan to the benefit of the lender.) For example, homeowners represented by the Legal Services Corporation are prohibited from bringing class action lawsuits against predatory lenders, nor are they able

to make predatory lenders pay attorneys' fees, even when the law would normally allow it. Claims the Brennan Center for Justice, "the possibility of having to pay attorneys' fees provides a critical incentive to help ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the indigent client's resources." The author of the article notes that although the Obama administration has called upon the United States Congress to remove the aforementioned legal restrictions favoring lenders, its $789 billion economic stimulus plan contains <u>zero</u> funding for foreclosure-related legal help.

The author notes that foreclosure represents not only a personal problem, but a societal problem as well. According to the Brennan Center for Justice, forty (40) million homes are located next door to a foreclosed property. The value of such homes drops an average of $8,667 following a foreclosure on adjacent property, translating into a total property value loss of $352 billion. Further, vacant properties "take a heavy toll" (approximately $20,000 per foreclosure) on already cash-strapped local governments. Due to the foreclosure crises, California is estimated to have lost approximately $4 billion in tax revenue in 2008 alone.

Foreclosures can also translate into increased crime; according to the article, a one (1) percent increase in foreclosures translates into a 2.3 percent rise in violent crime.

<u>Discussion Questions</u>

1. Critics of the United States government's multi-billion-dollar economic stimulus plan (begun during the George W. Bush presidential administration, and continued during the Obama administration) have argued that too much of the stimulus plan has been devoted to "bailing out" failing/failed financial institutions, rather than individual homeowners. Such critics claim that "corporate welfare" is just as condemnable as individual welfare, and that had more federal dollars been devoted to financial assistance for homeowners, at least tens of thousands of homeowners would have effectively avoided losing their homes through foreclosure. What is your opinion?

Student opinions will likely vary in response to this question. Undoubtedly, the vast majority of economic stimulus dollars have been devoted to "bailing out" failing/failed financial institutions; many of these financial institutions would have ceased to exist were it not for federal (i.e., taxpayer) dollars. Such financial assistance has been justified by way of the "too big to fail" theory, that the government could not simply "stand by" and allow major financial institutions to fall like dominoes, at the risk of imperiling the entire economy. Several economists have argued that were it not for federal assistance to large financial institutions over the past year, all of us would now be experiencing "The Great Depression, Part II," rather than "merely" "The Great Recession." This is arguably little consolation to "pure" free market economists, many of whom believe that institutions should either "live or die" based on their own successes or failures, and that to artificially "prop up" failed financial institutions is to perhaps only postpone their inevitable collapse, and/or to essentially reward failure.

Proceedings

A monthly newsletter from McGraw-Hill

December 2009 Volume 1, Issue 5

The McGraw-Hill Companies

Underlying the entire problem is a recession that does not seem to want to "go away"; for as long as "The Great Recession" lasts, financial institutions will have "foundations built on shifting sands," and homeowners will face the ominous specter of default and foreclosure.

2. Based on the "tenor" of the article, it is logical to assume that the author would favor increased federal funding for indigent homeowners to receive legal assistance in the foreclosure process. Do you support increased federal funding for legal assistance to homeowners facing foreclosure? Why or why not?

In light of the current federal budget situation (for example, a projected federal budget deficit of approximately $1.4 trillion in 2010 alone), it is difficult to imagine substantial additional allocation of federal dollars for this purpose. For years, advocates for criminal defendants have argued for substantial additional funding for criminal defense representation, and yet most of those arguments have "fallen upon deaf ears." If the federal and state governments are reluctant to allocate more dollars for criminal defendants, when issues of imprisonment or capital punishment are at hand, who can say with any degree of assurance that additional monies will be allocated for civil representation in mortgage default matters?

3. Based on the "tenor" of the article, it is also logical to assume that the author would favor changing federal law in order to give low-income homeowners represented by the Legal Services Corporation the right to file class action lawsuits against predatory lenders, as well as allow homeowners who prevail in such litigation the right to recover attorney's fees. Do you favor such changes in federal law? Why or why not?

A "class action" lawsuit typically allows a large number of people with a common interest in a matter to sue as a group. The "driving force" behind the pursuit of class action status is firm belief in the adage that there is "power in numbers." The key advantage for class action plaintiffs is the ability to pool legal and financial resources in their litigation against a common defendant.

Current federal law does seem to limit the ability of a low-income homeowner to successfully contend against a predatory lender, since it effectively isolates the individual plaintiff in his/her litigation against a predatory lender. This results in a classic "David versus Goliath" confrontation, with the individual plaintiff deprived of the power of class action. Even assuming that a low-income homeowner is able to secure the assistance of the Legal Services Corporation, the primary agency that provides help for low-income Americans in civil cases, the minimal resources available to the homeowner versus the colossal amount of resources available to a large predatory lender would seem to be a proverbial mismatch. Class action status would arguably serve to "level the playing field," since low-income homeowners would be able to pool their resources against the vast resources of a large predatory lender; in fact, class action status might attract high-skilled attorneys in private practice who might otherwise choose not to offer their services.

The main argument against any class action lawsuit is that attorneys use such methods of litigation primarily to enrich themselves. Currently, it is not unusual for attorneys to charge forty percent (40%)

or more of any recovery as attorney's fees. Add the expenses of litigation, and the attorney's "take" of any class action settlement or verdict could exceed fifty percent (50%) of the total recovery, with the actual plaintiffs collectively taking less than fifty percent (50%) of the recovery. Obviously, any legislation allowing certification of class action status in litigation against predatory lenders could also serve (by express language included in the legislation) to limit attorney's fees.

In terms of allowing homeowners who prevail in litigation against predatory lenders to recover attorney's fees, the Brennan Center for Justice's report referenced in the article says it best: "(T)he possibility of having to pay attorneys' fees provides a critical incentive to help ensure that a better funded legal adversary does not drag out proceedings in an attempt to exhaust the indigent client's resources." The prospect of having to pay a prevailing plaintiff's attorney's fees would likely incentivize the lender to negotiate settlement of the lawsuit in good faith, and to refrain from prolonging the litigation process unnecessarily, in order to avoid the risk of having to pay the winning plaintiff's attorney's fees.

Article 2: "Patient Dies After Catching Fire During Surgery"

http://www.msnbc.msn.com/id/32909833/ns/health-health_care/

This article reports the death of Janice McCall, 65, of Energy, Illinois, who died after being severely burned in a "flash fire" while undergoing surgery. Mrs. McCall died September 8, 2009 at Vanderbilt University Medical Center in Nashville, Tennessee, six (6) days after being burned on the operating table at Heartland Regional Medical Center in Marion, Illinois. The Tennessee state medical examiner's office said McCall died of complications resulting from thermal burns, and classified her death as "accidental." A "flash fire" is an unexpected, sudden and intense fire caused by the ignition of flammable solids (including dust), liquids, or gases. It is characterized by high temperature, is of short duration, and presents in the form of a rapidly moving flame front. Flash fires may occur in environments where fuel, typically flammable gas or dust, is mixed with air in concentrations conducive to combustion. In flash fire explosions, the greatest damage comes from thermal radiation and secondary fires.

Attorney Robert Howerton has requested medical records from the Marion hospital; presently, he has few details about what happened. He has declined to say why McCall was having surgery. According to Howerton, "The family is in shock and suffering their grief. Every family has an anchor, and she was it. They're really just devastated."

Heartland Regional Medical Center has issued a brief statement regarding Mrs. McCall's death, indicating that "there was an accidental flash fire in one of the hospital's operating rooms, injuring a patient before being immediately extinguished." The hospital did not say how the fire started, but did indicate that it was responding with "necessary and appropriate measures." Heartland has declined to comment further regarding the case, citing the family's request for privacy and federal laws barring the public release of patient medical information.

As the article reports, surgical flash fires are most often sparked by electric surgical tools when oxygen builds up under surgical drapes. They occur an estimated 550 to 600 time per year, represent a miniscule fraction of the millions of surgeries performed in the United States annually, and kill about one (1) or two (2) people each year. Although concern over flash fires waned after the 1970s, when highly flammable agents such as ether were replaced with safer anesthetics, worries have mounted in recent years with the increased use of electrosurgical devices and the replacement of cloth hospital drapes with those made of more flammable, disposable synthetic fabric. The ECRI Institute, a nonprofit health research agency, has recommended that anesthesiologists stop using one hundred percent (100%) oxygen and deliver only what the patient needs, perhaps by diluting the oxygen concentration with room air when surgical tools such as electronic scalpels and cauterizers that could ignite a fire are in use. Says Mark Bruley, vice president for accident and forensic investigation at the ECRI Institute, "What we've been advocating for years is that the open delivery of oxygen under the drapes essentially has to stop, with some exceptions such as cardiac pacemaker surgery or operations involving a neck artery."

Discussion Questions

1. In your reasoned legal opinion, does this appear to be a case of liability on the part Heartland Regional Medical Center? Why or why not?

Negligence is the operative legal theory in this case. Negligence is defined as the failure to do what a reasonable party would do under the same or similar circumstances. It consists of four (4) elements: 1) a duty of care owed by the defendant to the plaintiff; 2) the defendant's breach of the duty of care; 3) the defendant's causation of the plaintiff's harm; and 4) proof of damages. Generally speaking, negligence is a legal determination to be made by the fact-finder (usually the jury), based on the unique facts and circumstances of a particular case.

The plaintiff's attorney (representing the estate f Janice McCall) may want to argue for application of the theory of "res ipsa loquitur" in this case. Literally meaning "the thing speaks for itself," the theory of "res ipsa loquitur" holds that an injury is due to the defendant's negligence when that which caused it was under the defendant's control or management, and the injury would not have occurred had proper management been observed. Applied to this case, the plaintiff's attorney could argue that Mrs. McCall's surgery was under Heartland Regional Medical Center's control or management, and that a "flash fire" would not have occurred had proper oversight been observed. Evidence favoring the "res ipsa loquitur" theory usually establishes the plaintiff's "prima facie" burden of proof, meaning that such evidence (and that evidence alone) is sufficient to get the plaintiff's case to the jury. As indicated previously, however, it is ultimately the jury's decision as to whether the plaintiff has proven the defendant's negligence by the greater weight of the evidence (the "greater weight of the evidence," also known as the "preponderance of evidence" standard, is the plaintiff's ultimate burden of proof in a civil case.)

2. Aside from Heartland Regional Medical Center, are other parties potentially liable in this case? What about the anesthesiologist who administered oxygen during Mrs. McCall's surgery? The attending

surgeon? The manufacturer of the electrosurgical device(s) used during the surgery? The manufacturer of the synthetic fabric hospital drapes used during the surgery (which are more flammable than cloth hospital drapes?)

Given the limited facts presently available in this case (remember that Heartland Medical Center has issued only a very general, limited statement, citing patient confidentiality), it is difficult to say with any degree of assurance whether other parties involved in Mrs. McCall's surgery are potentially liable for her death. In terms of each party listed in Discussion Question 2:

a) There is no evidence currently available to suggest that the anesthesiologist was negligent (As noted in the article description above, the ECRI Institute, a nonprofit health research agency, has recommended that anesthesiologists stop using one hundred percent (100%) oxygen and deliver only what the patient needs, perhaps by diluting the oxygen concentration with room air when surgical tools such as electronic scalpels and cauterizers that could ignite a fire are in use. As further cited in the article description, the ECRI Institute has been advocating for cessation of the "open delivery" of oxygen under surgical drapes, with some exceptions such as cardiac pacemaker surgery or operations involving a neck artery. In this case, however, there is no evidence to suggest that the attending anesthesiologist was deviating in any appreciable way from the standard of care currently recognized in the health care industry);

b) There is no evidence currently available to suggest that the attending surgeon was negligent (Just as was mentioned previously in response to the question of anesthesiologist liability, there is no evidence to suggest that the attending surgeon was deviating in any appreciable way from the standard of care currently recognized in the health care industry);

c) There is no evidence currently available to suggest that the electrosurgical device(s) used during the surgery was/were defective; and

d) There is no evidence currently available to suggest that the hospital drapes were defective (although it is interesting to note that synthetic drapes are more flammable than cloth drapes, the "standard in the industry" presently appears to be the use of synthetic drapes, since they are more sterile than their cloth counterparts.)

Obviously, the plaintiff's attorney will want to "pursue all legal avenues" in zealous representation of his client. In order to satisfy the professional standard of care that he owes his client (the estate of Janice McCall), attorney Robert Howerton will want to include all defendants in the litigation that he can (in good faith) allege were liable for Mrs. McCall's death. The discovery process of litigation, the "fact-finding mission" that occurs pre-trial, will give the plaintiff's attorney an opportunity (through the use of depositions, interrogatories, requests for production of documents, requests for admissions, etc.) to gather evidence demonstrating more specifically not only the potential liability of Heartland Regional Medical Center, but other defendants as well. Again, the ultimate determination of negligence, including which party or parties (if any) to deem responsible, is for the trial jury.

3. What is Heartland Regional Medical Center's best defense in this case?

Remember Heartland Regional Medical Center's official statement in this matter, cited in the article description. Heartland has "gone on record" as stating that "there was an accidental flash fire…, injuring a patient before being immediately extinguished." The hospital also claimed that it was responding to the incident with "necessary and appropriate measures."

Part of the value of issuing a public statement is to begin winning public favor, in the "forum of public opinion," months or even years before the trial actually begins. Keep in mind that individuals who hear Heartland's formal statement are potential jurors. The hospital's statement appears to give some insight into the institution's defense; namely, that the flash fire was purely accidental, and that hospital personnel immediately extinguished the fire (Remember, however, that a flash fire can kill in only a matter of seconds, as it did in Mrs. McCall's case). In this author's opinion, the hospital's best defense is the exercise of due care which, if accepted by the jury, will negate negligence liability. The hospital should argue that in spite of the exercise of due care, and regardless of adherence to "industry standard," freak accidents can (and do) occur. Remember the statistic cited in the article description, that surgical flash fires only occur approximately 550 to 600 times per year, involve a miniscule fraction of the millions of surgeries performed in the United States annually, and only kill about one (1) or two (2) people per year. The hospital should argue that although the incident involving Mrs. McCall was tragic, it was "merely" an accident, and nothing more. The defense attorney's closing statement at trial?: "Bad things can (and do) happen to good people, often due to no fault of others."

(As a side note, what the hospital did after the flash fire, such as immediately extinguishing the fire and responding to the incident with "necessary and appropriate measures," is largely irrelevant on the question of the hospital's negligence. From an evidentiary standpoint, the trial jury must answer the question of negligence based solely on the issue of what the hospital did (or failed to do) in the events leading up to the fire.)

Article 3: "Hit the Mute! Why TV Commercials Are So Loud, and How That May Change"

http://www.dailyfinance.com/2009/10/08/why-are-tv-commercials-are-so-loud

This article involves a subject that is "near and dear to the heart" (and ears) of every American: annoyingly loud television commercials! Although the Federal Communications Commission (FCC) mandates that commercials can be no louder than the loudest parts of the programming they accompany, this regulation has serious limitations. As the article indicates, an action show that climaxes in a burst of gunfire is one thing, while a commercial that is as loud as a gun going off from start to finish is another. In addition to making their commercials as loud as the FCC allows, marketers also use various technological "tricks" to make them sound even louder than they actually are, such as distributing more sound energy into midrange frequencies, those frequencies to which the human ear is most sensitive.

Proceedings

A monthly newsletter from McGraw-Hill

December 2009 Volume 1, Issue 5

To address this issue, Representative Anna Eshoo (D-California) has introduced a bill currently pending in the United States Congress. Called the Commercial Advertising Loudness Mitigation Act (CALM Act), the proposed law would charge the FCC to enact regulations prohibiting commercials from being "excessively noisy or strident." Further, the Advanced Television Systems Committee, a nonprofit organization whose membership includes broadcast networks, cable operators, and electronics manufacturers, has been working to develop voluntary standards that will let broadcasters measure and effectively regulate the volume of commercials. According to Mark Richer, president of the Advanced Television Systems Committee, "We've been working for over two years to help broadcasters, cable operators, and others come up with a uniform strategy so we can minimize the subjective perception of the volume changing during commercials. Our experts have developed what we call a recommended practice, which provides guidance to broadcasters and others on how to use our standard in a way that will minimize the 'audio broadcast differential'...that is bothersome to many people. It's a little more complicated than you would think, and getting everybody to agree on how to do it was not easy."
Consumers who lack faith in legislation and/or industry self-regulation may find solace in technology.

As the article indicates, television sets featuring "Dolby Volume," a technology that automatically flattens out the sound spikes of commercials, have been on the market for two (2) years. Soon to be available as well is a device called "SRS TruVolume," a technological advance that offers an added advantage to "Dolby Volume": It distinguishes between commercials and programming, and suppresses the sound levels of commercials without affecting programming.

Discussion Questions

1. Are not television commercials protected by the free speech provision of the First Amendment to the United States Constitution ("Congress shall make no law...abridging the freedom of speech")? If commercial speech is protected by the First Amendment, would not federal law 1) mandating that commercials be no louder than the loudest parts of the programming they accompany (current FCC law) and 2) charging the FCC to enact regulations prohibiting commercials from being "excessively noisy or strident" (the proposed "CALM" Act) be unconstitutional?

Although commercial speech is protected by the First Amendment to the United States Constitution, such speech is, according to the United States Supreme Court, subject to "reasonable time, place and manner" restrictions. Given the fact that commercial speech is subject to such limitations, it is rational to conclude that 1) current federal law mandating that commercials be no louder than the loudest parts of the program they accompany and 2) proposed federal law charging the FCC to enact regulations prohibiting commercials from being "excessively noisy or strident" both constitute "reasonable manner" restrictions.

It would be a good idea to inform students that historically, the courts have protected individual speech, especially individual political speech, more than business-related commercial speech. Such a judicial "track record" lends even greater support to the notion that the above-named restrictions (both current and proposed) on television commercials meet constitutional requirements.

2. Comment on the feasibility of the Commercial Advertising Loudness Mitigation Act (CALM Act), the proposed law that would charge the FCC to enact regulations prohibiting television commercials from being "excessively noisy or strident."

As written, the Commercial Advertising Loudness Mitigation Act (CALM Act) would arguably not be efficacious in and of itself, since the phrase "excessively no i sy or strident" is worded only in the most general of terms (The word "strident" means "characterized by harsh, insistent and discordant sound," or "commanding attention by a loud or obtrusive quality.") The key here would be the FCC's development and enforcement of specific standards defining the exact meaning of "excessively noisy or strident."

You may want to "point out" to your students that it is quite common for the United States Congress and federal administrative agencies to work together in crafting and enforcing federal law. Excellent examples of such collaborative arrangements include the Equal Employment Opportunity Commission's efforts related to the Civil Rights Act of 1964, and the Occupational Safety and Health Administration's work in fulfilling the mandate of the Occupational Safety and Health Act (OSHA.)

3. Comment on the feasibility of the Advanced Television Systems Committee's voluntary standards that will allow broadcasters to measure and regulate the volume of television commercials.

Voluntary standards are just that: voluntary. History demonstrates that if left to self-regulate, businesses will not do so unless it is perceived to be in their best interests (and even still, the desire for short-term profits might cause businesses to choose not to self-regulate, even if such regulation might be in their long-term best interests.) For broadcast networks and cable operators, advertising is their predominate source of revenue; why, then, would broadcast networks and cable operators choose to self-impose advertising restrictions, especially when such self-regulation might serve to "bite the hand that feeds them?" Obviously, a loud consumer backlash (against loud advertising) might affect the decision-making process, since it might cause broadcast networks and cable operators to appreciate the fact that their revenue depends on viewership.

For those who would like to see (and hear) quieter commercials, perhaps a <u>combination</u> of the following factors will result in demonstrable change:

1. Current federal law mandating that commercials be no louder than the loudest parts of the program they accompany (this law sets the legislative mandate);

2. Proposed federal law (the CALM Act) charging the FCC to enact regulations prohibiting commercials from being "excessively noisy or strident" (this law, if it is enacted, advances the legislative mandate by charging the FCC to establish <u>specific</u> regulations prohibiting commercials from being "excessively noisy or strident");

3. The Advanced Television System Committee's voluntary regulations (which can only be as stringent or more stringent than FCC standard in response to the CALM Act, since less stringent self-regulations would violate federal law, assuming the CALM Act actually becomes federal law);

4. Consumer advocacy (including, perhaps, a boycott of broadcast networks and/or cable operators who choose not to comply with viewer requests, assuming such a boycott is feasible); and

5. Technological advances (such as "Dolby Volume" and/or "SRS TruVolume") that empower the consumer to control television commercial volume.

Proceedings

A monthly newsletter from McGraw-Hill

December 2009 Volume 1, Issue 5

The McGraw-Hill Companies

Video Suggestions

Video 1: "12-year-old Gets Historic Baseball Back, But Only After Lawsuit Filed"

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

Purpose of video: To discuss personal property law, contract law and criminal law as applied to the events surrounding Philadelphia Phillies player Ryan Howard's 200th home run baseball

Discussion Questions

1. In your reasoned legal opinion, who was the rightful owner of the baseball when 12-year-old Jennifer Valdivia retrieved it in the right field stands of Land Shark Stadium on July 16, 2009: Jennifer, Ryan Howard, the Philadelphia Phillies baseball team, the Florida Marlins baseball team, or some other party?

In the opinion of this author, the debate regarding ownership of the baseball is between two (2) potential parties: Jennifer Valdivia, and the Florida Marlins baseball club. How can Ryan Howard, the baseball player who hit the home run, claim rightful ownership? He never held title to the baseball. Neither does the Philadelphia Phillies have a legitimate claim; the Phillies did not provide the baseball. Although there is no evidence in this case that the Florida Marlins have claimed (or will claim) ownership of the ball, the rules of Major League Baseball clearly state "Before the (baseball) game begins the umpire shall…(r)eceive from the home club a supply of regulation baseballs." The Florida Marlins supplied the subject baseball, and the Marlins had title to and ownership of the baseball, at least while it was within the "field of play."

It appears that Jennifer Valdivia, the 12-year-old fan who retrieved the ball, has the superior legal claim of ownership, based on the longstanding "industry practice" of allowing fans to keep baseballs that are hit into the stands. Based on the research of this article, such a practice dates back to around the turn of the 20th century. In terms of ownership rights, young Ms. Valdivia has roughly one hundred years of baseball tradition on her side! In the event of ambiguity regarding legal rights, courts often use evidence of industry standard to resolve (i.e., "clear up") the ambiguity. Such evidence would seem to be determinative in this case, and might have been the "driving force" behind the Phillies' decision to return the baseball to Ms. Valdivia.

(Note: For further analysis regarding the ownership issue, see the J. Gordon Hylton's "blog" entitled "The 'Who Owns the Baseball' Issue Just Will Not Go Away" at http://law.marquette.edu/facultyblog/2009/10/08/the-who-owns-the-baseball%E2%80%9D-issue-just-will-not-go-away/comment-page-1/.)

2. Focus on the point at which a representative of the Philadelphia Phillies gave some cotton candy and an autographed baseball (purportedly worth $100) to Jennifer in return for "handing over" Ryan Howard's 200th home run baseball (purportedly worth thousands of dollars.) Is this exchange an enforceable contract based on the traditional elements of contract formation; namely, the making of an offer, the acceptance of the offer, and an exchange of consideration (value)? Why or why not?

If this were merely an "arm's length" transaction between two (2) adults, and assuming that the transferor has rightful title, the enforceability of the exchange would clearly be supported by the common law of contracts. The offer would be represented by the Phillies' willingness to transfer cotton candy and an autographed baseball, in return for the Ryan Howard "200th home run" baseball. The acceptance would be based on the offeree's willingness to contract on those terms. The common law contract requirement of mutual consideration would be satisfied by the exchange of property. Even though the collective value of the cotton candy and the autographed baseball would "pale in comparison" to the value of the Ryan Howard "200th home run" baseball (approximately $100 versus thousands of dollars, respectively), under normal circumstances, courts do not get involved in the process of comparing relative values in the exchange of consideration. Normally, if a contracting party makes a bad bargain, the bargain is enforceable nonetheless.

The circumstances involved in this case are different from the normal "arm's length" transaction. Jennifer Valdivia is a twelve-year-old minor. Contracts entered into by minors are voidable at the election of the minor, meaning that until reaching the "age of majority" (eighteen years old in most jurisdictions), the minor has the choice of "walking away" from the contract obligation by simply giving back whatever he/she received as consideration for the bargain (here, the autographed baseball; the cotton candy is likely in no condition to be returned!) In return, the minor is entitled to receive back the consideration he/she transferred. From the standpoint of contract law as applied to minors, Jennifer Valdivia is entitled to demand back the Ryan Howard "200th home run" baseball!

3. In your reasoned legal opinion, did the Philadelphia Phillies representative commit criminal theft, as suggested by Jennifer Valdivia's attorney, Norman Kent? Why or why not?

Criminal theft is generally defined as the generic term for all crimes in which a person intentionally and fraudulently takes personal property of another without permission or consent and with the intent to convert it to the taker's use (including potential sale). In many states, if the value of the property taken is low (for example, less than $500) the crime is "petty theft," but it is "grand theft" for larger amounts, designated misdemeanor, or felony, respectively. Theft is synonymous with "larceny."

Whether the actions of the Philadelphia Phillies representative constitute criminal theft depends on the question of whether Jennifer Valdivia (the minor) owned the ball at the time of occurrence, or whether

ownership rested with baseball player Ryan Howard (the Phillies representative was most likely acting as an agent for the club's player, Mr. Howard, in "striking a deal" with Ms. Valdivia.) As stated in response to Discussion Question 1 above, it is the opinion of this author that the best claim of ownership rests with Jennifer Valdivia; accordingly, attorney Kent's claim that his client was the victim of criminal theft is not "out in left field" (pun intended!)

Video 2: "Did Collection Calls Contribute to Floridian's Death?"

http://www.wtsp.com/video/default.aspx?maven_playerid=immersiveplayer&maven_referralObject=1254058088

(Note: For an accompanying article, see http://current.com/12gfu4c)

Purpose of video: To discuss the potential legal liability of debt collectors for violating state and federal laws regarding debt collection

Discussion Questions

1. In your reasoned legal opinion, is the debt collection agency responsible for Stanley McLeod's death? Why or why not?

As the video and the accompanying article indicate, this is a "first-of-its-kind" lawsuit; perhaps the reason this lawsuit is a "matter of first impression" is due to the difficulty the plaintiff's attorney will have in establishing causation. In order to prevail in a tort action, the plaintiff must establish, by the preponderance of evidence, that the defendant caused the plaintiff's harm. In this case, the plaintiff's attorney will have to establish that his client's death was proximately caused by the wrongful actions of the defendant. Although it would appear in this case that the defendant's actions were wrongful, in the sense that the debt collector's telephone comments likely violated state and federal debt collection law, the legal "hurdle" here will be to convince the jury that such comments were a substantial contributing factor to the plaintiff's death. Stanley McLeod experienced severe heart problems before the debt collection calls ever occurred. He had experienced a "massive" heart attack and had quit his job for heart-related reasons before the debt collection calls (related to non-payment of his mortgage) were made. At trial, the plaintiff would benefit in the sense that a jury would likely personalize the events surrounding Stanley McLeod, and might favor the person (McLeod) rather than the corporation (the debt collection agency).

2. Had Stanley McLeod lived, would he have had any legal rights against the debt collection agency?

Aside from the specific statutory damages, allowed under state and federal law, mentioned in the accompanying article (for example, a judge can require the debt collector to pay up to $1,000, even if the debtor cannot prove that he/she suffered actual damages), the legal theory of intentional infliction of emotional distress would potentially apply to the scenario described in Discussion Question 2. The tort of intentional infliction of emotional distress allows a plaintiff to recover monetary damages for the plaintiff's emotional distress resulting from the defendant's outrageous conduct. It would be the jury's

responsibility to decide whether: 1) the defendant's conduct was outrageous; 2) the plaintiff experienced emotional distress as a result of the defendant's outrageous conduct; 3) the nature and the extent of the plaintiff's emotional distress; and 4) a monetary award that would be sufficient to compensate the plaintiff for his/her emotional distress.

3. As indicated in the article accompanying this video, Florida law is clear when it comes to what debt collectors can and cannot do in terms of the process of debt collection. Florida law requires debt collectors to:

- Send a written notice to the debtor within five days after the debtor is first contacted, telling the debtor the amount of money he/she owes. The notice must also specify the name of the creditor to whom the debtor owes the money and what action the debtor should take if the debtor believes he/she does not owe the money.
- Limit their calls to reasonable times, such as before 8 a.m. or after 9 p.m., unless the debtor agrees to a different time.
- Stop contacting the debtor if he/she writes a letter to the agency telling them to stop. Once the agency receives the debtor's letter, the agency may not contact the debtor again except to say there will be no further contact, or to notify the debtor if the debt collector or the creditor intends to take some specific action, such as file a lawsuit.
- Stop contacting the debtor if the debtor indicates that he/she does not owe the money, unless they send proof of the debt, such as a copy of the bill.

Further, Florida law prohibits debt collection abuse/harassment of anyone. Debt collectors cannot:

- Use threats of violence against the person, property or reputation.
- Use obscene or profane language.
- Advertise the debt.
- Repeatedly or continuously make telephone calls with the intent to harass or abuse the person at the called number.
- Tell the debtor that he/she will be arrested if he/she does not pay; that they will seize, garnish, attach, or sell the debtor's property or wages unless the collection agency or creditor intends to do so and has a legal right to do so; or that a lawsuit will be filed against the debtor, when they have no legal right to file or do not intend to file such a suit.

Florida law regarding debt collection is similar to those in place nationally under the Fair Debt Collection Practices Act.

In light of such stringent and specific law, why (in your opinion) do debt collectors still choose to engage in such abusive and harassing practices?

Student opinion will likely vary in response to this question. Why does anyone choose to violate the law? In this instance, although creditors are likely aware of the federal Fair Debt Collection Practices Act and accompanying state law, creditors are perhaps willing to take the risk of "flying in the face" of

federal and state law. Such a decision is likely made through "risk versus reward" analysis. Collection agencies themselves are either directly or indirectly compensated based on their success in recovery, so their aggressive tactics are likely driven by the desire to "get paid." Keep in mind that for every one person who complains about unfair collection methods, perhaps one hundred cases or more go unreported.

Proceedings

A monthly newsletter from McGraw-Hill

December 2009 Volume 1, Issue 5

The McGraw-Hill Companies

Of Special Interest

This section of the newsletter addresses the question of whether a homeowner is liable for improvements to his/her property resulting from a contractor's mistake.

Hypothetical and Ethical Dilemma

Jonathon Harrington was feeling relaxed as he headed north on Interstate 95 on a sunny Sunday afternoon. Harrington had just spent two weeks at Walt Disney World in Orlando, Florida with his wife Melissa and their two children, Amy (age 8) and Jonathon, Junior (age 3). In many respects, Harrington felt that his latest family outing had been the best vacation in the brief history of the Harrington clan, as it gave them time to "bond" and relax.

Upon arriving at his residential address in Charlotte, North Carolina, Jonathon noticed immediately that his house was not "quite right," that there appeared to be a new tile roof on his home. One thing was for certain: He had most definitely not ordered a new roof, since his "old" roof was only ten (10) years old, and since by his best estimate, the "old" roof had at least ten (10) more years of "life." Harrington knew that his next-door neighbor, Kent Jameson, had talked about getting a new roof for months, but upon examination of Jameson's house, Harrington saw the same roof that had been there since he had moved into the neighborhood ten (10) years ago.
Harrington paid a visit to his neighbor. Upon opening the door and recognizing who was there, Jameson looked bewildered and became animated immediately, saying "They really screwed up, Jon…They really screwed up!" Upon calming his neighbor somewhat, Harrington was able to hear the following story:

On Monday of the previous week, Jameson had entered into a contract with "Up on the Roof" Roofing Services, Inc. to install a new tile roof on his home at a price of $15,000. Jameson had entered into the contract with the owner of "Up on the Roof," Roderick Talley. On Wednesday of the previous week, Talley had sent his roofing crew to perform the work, but the crew stopped at Harrington's home by mistake. Jameson was away at work at the time. When he arrived home at 8:00 p.m. that evening, Jameson noticed a truck with the "Up on the Roof" logo parked beside the curb in front of Harrington's home. He further noticed that the crew was "finishing up" their work at Harrington's home, and he had inquired why they were working at Harrington's address. Looking perplexed, the crew leader had said "We just installed the roof. You'll have to speak with Mr. Talley."

Kent had called Mr. Talley, and Talley had dejectedly admitted that his crew had made a mistake. Talley agreed to install a roof for Kent the following Friday, charging only his cost of $10,000 to account for Kent's trouble, and for the delay. Talley is now on the phone with Harrington. Although he admits that last Wednesday's work was a mistake, he wants Harrington to pay for the cost of installing the new tile roof on his home. States Mr. Talley, "With all due respect, Mr.

Harrington, I know that my crew made a mistake, but you and I both know that the new tile roof you now have on your home has improved the market value of your property. In fact, I have an appraiser friend who knows your neighborhood well. He told me that your home is now worth $30,000 more than before my crew performed the work. All I am asking is that you reimburse me for my cost of materials, $10,000. If you don't pay me the $10,000, I'm going to fire the crew members that botched the job, and my business might be in jeopardy. I'm just a small business owner, Mr. Harrington, and $10,000 is a fortune to me."

From an ethical standpoint, is Harrington obligated to pay Talley the $10,000? From a legal standpoint, is he obligated to pay?

Student opinion may vary in terms of whether Harrington has a perceived ethical obligation to pay Tally the $10,000. If Talley is to be believed (and there is no reason to believe that his assertions are false), his business, and the jobs of several of his crew members, will be at risk if the $10,000 in material costs is not recouped. There is no evidence of fraud here; rather, the facts demonstrate nothing more than an "innocent mistake" on the part of "Up on the Roof" crew members. The work has increased the fair market value of Harrington's property by approximately $30,000; if he pays $10,000 for Talley's cost of materials, he would enjoy a "net gain" of $20,000. These facts would support the argument that Harrington has at least an ethical obligation to pay Talley the $10,000.

On the other side of the ethical argument, Harrington is truly an innocent party here. He was on vacation when the mistake "played out"; in no way was he aware of the mistake before it was too late to intervene. As between the truly innocent homeowner and a business owner who should have arguably exercised more oversight of his employees in order to avoid a potential mistake, there is a strong argument that from an ethical standpoint, the homeowner should prevail in this case.

In terms of contract law, the homeowner (Harrington) would likely prevail. There is no express or implied contract in this situation. An express contract is defined as an agreement (indicating an offer and an acceptance) that is demonstrated by words, either spoken or written, exchanged between the contracting parties. There is no express contract here, since Harrington never accepted the performance of roofing work on his home. An implied contract is defined as an agreement (indicating an offer and an acceptance) that is demonstrated by the actions or conduct of the contracting parties. There is no implied contract here, since Harrington never demonstrated, through his actions or conduct, acceptance of roofing work on his home. The only other potentially applicable legal remedy here is that of "quasi-contract." A "quasi-contract" is not a legal contract (in this context, "quasi-" means "seemingly, but not really.") This theory is invoked on an ethical basis in order to do justice in a particular case, when no legal remedy is available to the plaintiff. As indicated previously, there is no legal remedy available to "Up on the Roof," since no express or implied contract was formed between Talley and Harrington. Although the theory of "quasi-contract" is applied on a "case-by-case" basis, with the trial judge having the ultimate discretion in deciding whether to apply the theory, it would be difficult to imagine a judge applying the "quasi-contract" theory in this factual scenario. Again, Harrington was not aware of the improvements as they were being made, and he did not have an opportunity to object to performance of the roofing work until it was too late. Arguably, a completely

innocent homeowner should not be required to "pay" for a business mistake. In holding a business owner to a higher standard, the decision-maker should emphasize the fact that the business made the mistake, and the business owner should put safeguards into effect to reduce the likelihood that similar mistakes are not made in the future.

Proceedings

A monthly newsletter from McGraw-Hill

December 2009 Volume 1, Issue 5

The McGraw-Hill Companies

Of Special Interest

This section of the newsletter will assist you in covering:

1) **Video 1** ("Video Suggestions" Section) of the October edition of the McGraw-Hill Business Law Newsletter; and

2) **Teaching Tip 2** ("Teaching Tips" Section) of the October edition of the McGraw-Hill Business Law Newsletter.

Teaching Tips

Teaching Tip 1:

In the October edition of the McGraw-Hill Business Law Newsletter (more particularly, Video 1: "Disabled Student Suing Abercrombie"—reference http://www.youtube.com/watch?v=CMLfRxbnRUw), the case of twenty-two year-old plaintiff Riam Dean was described. In her lawsuit (filed in Great Britain) against retailer Abercrombie & Fitch, Dean claimed that she was discriminated against on the basis of her disability (she has only one arm); more particularly, she claimed that she was made to work in the stockroom, rather than in the customer shopping area, because she did not fit Abercrombie's "look." Dean had argued that she should be allowed to wear a cardigan sweater (to cover her prosthetic arm) and be allowed to work in the customer shopping area, but Dean alleged that Abercrombie denied her that accommodation. On August 13, 2009, a British employment tribunal ruled that Abercrombie & Fitch unlawfully harassed Ms. Dean when it refused to allow her to wear a cardigan to cover her prosthetic arm, saying the sweater violated the store's "look policy." Although the court awarded Ms. Dean the British pound equivalent of $15,000 in compensation for injured feelings, lost earnings and wrongful dismissal, it rejected Dean's claim that she was discriminated against due to her disability.)

As a follow-up to the Riam Dean litigation, have your students read the article "Abercrombie & Fitch Sued Over Head Scarf" at http://www.cbsnews.com/stories/2009/09/18/national/main5320868.shtml. This article references a new discrimination claim filed against the retailer; more particularly, a Muslim teenage claims in a federal lawsuit filed in the United States that she was denied a job at an Abercrombie & Fitch clothing store at a Tulsa, Oklahoma mall because she wore a head scarf.

As indicated in the article, seventeen-year-old Samantha Elauf alleges that she applied for a sales position at the Abercrombie Kids store in the Woodland Hills Mall in June 2008. The teenager, who wears a hijab in accordance with her religious beliefs, claims the manager told her the head scarf violates the store's "look policy." An attorney for the Equal Employment Opportunity Commission (the EEOC has initiated litigation on behalf of Ms. Elauf) claims the company violated Title VII of the Civil Rights Act of 1964, which protects workers from discrimination based upon religion in hiring. The lawsuit seeks back pay for Ms. Elauf and a permanent injunction against the retailer from participating in what the EEOC describes as discriminatory employment practices. The lawsuit seeks undisclosed monetary and non-monetary losses resulting from "emotional pain, suffering, anxiety, loss of enjoyment of life, humiliation and inconvenience," and further seeks punitive

damages against the company for its "malice or reckless indifference to her federally protected rights."

Listed below are recommendations regarding incorporation of the Elauf case in your classroom discussion:

1. Let your students know that with regard to employment discrimination law, the standard for accommodating a religious belief/practice in the workplace is very similar to the standard for incorporating a disability; namely, the employer must "reasonably accommodate" the religious practice/belief for an "otherwise qualified" employee, unless to do so would constitute "undue hardship" on the part of the employer. Ask your students whether allowing Ms. Elauf to wear a hijab (head scarf) in the workplace would be a "reasonable accommodation." Further, ask your students whether allowing Ms. Elauf to wear a hijab would constitute an "undue hardship" for the employer. In the opinion of your author, allowing Ms. Elauf to wear a head scarf at work would be a perfect example of a "reasonable accommodation," and would not constitute an "undue hardship" on Abercrombie & Fitch.

2. As mentioned previously, Abercrombie & Fitch has experienced in its history other discrimination claims. The Riam Dean physical disability discrimination claim is mentioned above, as well as in the October edition of the McGraw-Hill Business Law newsletter. Further, in the October edition, I noted that in 2005, Abercrombie & Fitch paid $50 million to settle a race, ethnic and gender class-action lawsuit (See http://www.afjustice.com/ for details concerning this lawsuit). Ask your students whether these three (3) cases, taken together, represent a "pattern or practice" of discrimination on the part of Abercrombie. In all fairness, remind your students of the following: 1) In the Dean case, although a British employment tribunal ruled that Abercrombie & Fitch unlawfully harassed Ms. Dean when it refused to allow her to wear a cardigan to cover her prosthetic arm, saying the sweater violated the store's "look policy," and although the court awarded Ms. Dean the British pound equivalent of $15,000 in compensation for injured feelings, lost earnings and wrongful dismissal, it rejected Dean's claim that she was discriminated against due to her disability; 2) In the 2005 class-action case, the $50 million dollar settlement for ethnic and gender discrimination did not represent an admission of liability on the part of Abercrombie, nor did the court enter a final determination (i.e., a verdict) of liability; and 3) No settlement or verdict has been reached in the Elauf religious discrimination case.

3. Ask your students whether Abercrombie & Fitch should abandon its "look policy," given the legal "headaches" surrounding such a policy.

Teaching Tip 2:

In the October edition of the McGraw-Hill Business Law newsletter, the issue of medical malpractice tort reform was briefly mentioned in the "Teaching Tip 2"section. For follow-up regarding the issue of medical malpractice tort reform, have your students review the Time magazine article "Spotlight—Malpractice Reform" at http://www.time.com/time/magazine/article/0,9171,1924501,00.html. The online and traditional print versions of this article include excellent facts and other statistics that can serve as excellent bases for in-class debate regarding whether medical malpractice tort reform is

necessary and appropriate, and if so, what the details of the reform should look like (for example, should monetary damages for "pain and suffering" be capped at $250,000, as proposed by former president George W. Bush?) Emphasize the following facts/statistics to your students (some of which are available in the online version of the article, and some of which are available only in the traditional print version):

1. Malpractice insurance costs vary widely from city to city, and from state to state. In 2008, for example, malpractice insurance premiums for obstetricians were $20,000 in Minneapolis, $80,000 in Los Angeles, and $200,000 in Miami;

2. Only forty (40) cents of every dollar spent on malpractice insurance premiums goes toward awards; insurers spend much of the rest on legal fees;

3. The average malpractice award in the United States in 2008 was $326,931;

4. Ninety-seven percent (97%) of malpractice cases are settled out of court, while three percent (3%) are determined in court;

5. Malpractice premiums make up less than one percent (1%) of United States health care spending;

6. Texas has not seen health care spending drop since instituting award caps in 2003;

7. The Congressional Budget Office stated in 2008 that it had "not found sufficient evidence to conclude that practicing defensive medicine has a significant effect" on spending (Defensive medicine consists of medical practices designed to avert the future possibility of malpractice suits. In defensive medicine, responses are undertaken primarily to avoid liability rather than to benefit the patient. Doctors may order tests, procedures, or visits, or avoid high-risk patients or procedures primarily, but not necessarily solely, to reduce their exposure to malpractice liability); and

8. Studies demonstrate that when doctors tell patients they erred and are sorry, litigation is much less likely. For example, since launching a program in which doctors admit errors and offer payments out of court, the University of Michigan Health System has cut claims in half.

Ask your students whether the facts/statistics included in the article collectively present a case for medical malpractice tort reform. If so, what should the details of the medical malpractice tort reform look like? If, in the opinion of students, medical malpractice tort reform is not necessary, why not? In the experience of your author, few issues invite such vibrant in-class discussion as medical malpractice tort reform!

Proceedings

A monthly newsletter from McGraw-Hill

December 2009 Volume 1, Issue 5

Chapter Key for McGraw-Hill/Irwin Business Law texts

	Hot Topics	Video Suggestions	Hypothetical or Ethical Dilemmas	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 3, 5 and 9	Chapters 8, 9 and 48	Chapter 13	Chapters 9 and and 43
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 3, 4 and 5	Chapter 5	Chapter 7	Chapters 5 and 24
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 2, 3 and 7	Chapters 6, 7 and 23	Chapter 16	Chapters 7 and 51
Barnes et al., Law for Business, 10th Edition	Chapters 2, 4 and 7	Chapters 6, 7 and 33	Chapter 9	Chapters 7 and 25
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 2, 3 and 6	Chapters 6 and 21	Chapter 7	Chapters 6 and 35
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 4, 6 and 10	Chapters 7 and 10	Chapter 8	Chapters 10 and 20
McAdams et al., Law, Business & Society, 9th Edition	Chapters 4, 5 and 7	Chapter 7	Chapter 6	Chapters 7 and 13

This Newsletter Supports the Following Business Law Texts

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