



# Proceedings

A monthly newsletter from McGraw-Hill

December 2010, Volume 2 Issue 5



The McGraw-Hill Companies

## Contents

Hot Topics	2
Video Suggestions	12
Ethical Dilemma	15
Teaching Tips	18
Chapter Key	20

## Dear Professor,

Welcome to McGraw-Hill's December 2010 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. The fall semester is almost complete! Volume 2, Issue 5 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the December 2010 newsletter topics with the various McGraw-Hill business law textbooks.

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

1. Whether employers can discipline and/or terminate employees for "talking politics" at work;
2. Whether prospective employers can use candidate credit checks to make hiring decisions, and if so, whether the use of credit checks in the process of selecting employees is fair in a turbulent economy;
3. The federal court injunction imposed against the file-sharing website known as "LimeWire";
4. Whether violent video games are entitled to First Amendment "free speech" protection;
5. A man who was wrongfully convicted of rape, served twenty-two years in prison, was recently released, and is now the beneficiary of an \$18.5 million verdict for wrongful conviction; and
6. An "Ethical Dilemma" addressing the issue of deceptive advertising in the "green products" industry.

I wish all of you a safe, enjoyable and restful holiday season!

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## Of Special Interest

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

1) Whether employers can discipline and/or terminate employees for "talking politics" at work;

2) Whether prospective employers can use candidate credit checks to make hiring decisions, and if so, whether the use of credit checks in the process of selecting employees is fair in a turbulent economy ; and

3) The federal court injunction imposed against the file-sharing website known as "LimeWire."

## Hot Topics in Business Law

### Article 1: "Hot-Button Issue: Discussing Politics at Work-- Appearing to Take Sides Can Be Hazardous to Your Employment"

<http://www.msnbc.msn.com/id/39673411/ns/business-careers/>

(Note: This article was published during the 2010 election season.)

According to the article, talk around the water cooler these days is probably about witches, whores and Speedos thanks to the election season.

A senatorial candidate in Delaware is touting that she's not a witch in her political ads. The aide of a candidate for governor in California called his opponent a whore. And the New York governor's race has one contender publicly expressing his fear of homosexuals in skimpy swimming trunks.

Such emotionally charged political discourse often ends up in a workplace debate, labor experts said, and that's not always a good thing. It can lead to trouble for employees who have few if any free-speech rights at work, and for employers trying to maintain harassment-free, litigation-free workplaces.

"You can't say whatever you want and expect not to be fired," said Donna Ballman, an employment attorney in Fort Lauderdale, Fla., who represents employees and has seen a growing number of them disciplined lately for expressing their political opinions. "There is no First Amendment in corporate America."

Managers are also worried appropriate conduct at work may be suffering, maintained Elise Bloom, co-chair of the labor and employment law department at Proskauer, a law firm in New York.

"We are hearing a lot more questions tied to how much people can talk about politics," she said about the firm's corporate clients' inquiries.

To make matters worse employees are not only engaging in political conversations with co-workers face to face, they're also increasingly using social networking sites such as Facebook and Twitter, or blogs, e-mail and instant messaging, to get their opinions out this political season.



# Proceedings

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The McGraw-Hill Companies

For example, the Republican gubernatorial candidate in New York Carl Paladino's comments recently about gays and Speedos became one of the top trending topics on Twitter, and that was during work hours. That meant thousands of people — probably from their offices and factories, and maybe even on a work computer — were tweeting about where they stood on Paladino's comments.

There were lots of homophobia jokes and vulgar remarks, and most of the tweets had tweeters' photos and names attached, making it possible for managers to find if they wanted to. Even if a comment is seemingly innocuous, who's to say how your boss and coworkers (not to mention customers and clients of the company you work for) will interpret it.

The First Amendment says Congress can't pass laws curtailing speech, but taking political sides or appearing to take sides can be hazardous to your employment, even if you're not doing it during work time.

Last month, a New Jersey transit worker Derek Fenton was fired two days after he burned pages from a Quran outside the site of a proposed Islamic cultural center near Ground Zero, even though he was off the clock. The transit agency said he violated its code of ethics and "his trust as a state employee."

And in August Bryan Glover, an assistant coach for a middle school near Nashville, Tenn., said he was fired from his job for distributing via email a country music song he wrote disparaging President Obama. Unfortunately, parents of students were on his email list and his song offended some.

"The coach called me and said parents were upset that I was being politically incorrect and the song had racial overtones," Glover told Fox News Radio. "An hour and a half later I was told I was being terminated."

Glover has maintained in press reports that he lost his job because of the song's conservative lyrics and the fact that he was a staunch Republican (Glover and the school where he worked, Grassland Middle School, could not be reached for comment).

One of the major misconceptions among workers is that they have free speech rights on the job or off the clock, Ballman stressed. "You can be terminated for any of your private behavior. What you write on a blog or say on Twitter."

Few if any states have laws protecting employee free speech who work for private employers, but government employees tend to have more First Amendment rights said Risa Lieberwitz, professor of labor and employment law at Cornell University's ILR School. But, she added, "The scope of those rights has been severely limited by a series of Supreme Court cases."

Only unions, she continued, give workers the best protections because typically union contracts require that workers can only be fired or suffer any adverse job action for "just cause."



# Proceedings

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If the political chatter is not polarizing or angry, it should be allowed for the sake of workplace functionality, suggested Bruce Barry, professor of management and sociology at Vanderbilt University and the author of "Speechless: The Erosion of Free Expression in the American Workplace."

"Workers are adults. Everyone is going to talk about last night's ball game or last night's gubernatorial debate," he said. "Too many employers get too nervous about it too quickly," he said.

About one quarter of employers have written policies and 10 percent have unwritten policies regarding their employees' political activities, according to a poll done in 2008 by the Society of Human Resource Management. Among those, 5 percent have disciplined employees for not following the rules.

Clearly, political discussions can be pretty dicey undertakings for employees and managers because it can be hard for people to control their emotions, maintained Joseph Grenny, co-author of "Crucial Conversation: Tools for Talking When Stakes Are High."

He surveyed more than 600 people and found that when discussing politics "only 28 percent feel they can control their own temper and only 23 percent believe they can handle it if the other person gets upset."

In most cases, according to Grenny's research, employees shy away from such talk:

- Seventy-seven percent of people avoid discussing politics, and one in ten even report that they stay away from political banter at all costs.
- Nearly half of respondents have had bad experiences in the past when sharing their political views—and rather than risk a verbal battle, they stay silent.

Given that passions can run high when it comes to political speech, some career and labor law experts suggest employees try to keep their opinions on the down low at work, and suggested that employers should discourage too much passionate politicking.

"One person's opinion is often considered another employee's hate speech," said Chris D'Angelo, a New York employment attorney who does harassment training for employers.

Suppressing your passionate opinions may seem tough right about now given this political season's hyperbolic rhetoric. But is this election year any different, or has the expansion of the way we communicate thanks to the Internet making it look worse?

"Candidates say things on the campaign trail that they would never say in a work environment," said Philip Edward Jones, assistant professor, department of political science and international relations at the University of Delaware.



# Proceedings

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The McGraw-Hill Companies

"Whether the campaign discourse has been getting more or less offensive over time is tricky to tell. How do you measure offensiveness?" he said.

Still, today's political brawls pale in comparison to those of previous generations, Jones noted. In the bitter political campaign of 1800, Thomas Jefferson's camp "accused President Adams of having a 'hideous hermaphroditical character, which has neither the force and firmness of a man, nor the gentleness and sensibility of a woman.' In return, Adams' men called Vice President Jefferson 'a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father.'"

Can you imagine the talk around the water well pump back then?

## Discussion Questions

1. Assess the following statement made by employment law attorney Donna Ballman: "There is no First Amendment in corporate America." Do you agree or disagree with attorney Ballman? If you agree, should there be First Amendment free speech protections recognized in the workplace?

*The First Amendment to the United States Constitution states that "Congress shall make no law...abridging the freedom of speech..." The First Amendment, therefore, applies to government prohibition of speech, not business constraint on employee expression. Attorney Ballman is correct. To the extent that employees are allowed freedom of expression at work, employers grant it at their discretion. In terms of whether there should be legal recognition of First Amendment free speech protection in the workplace, student opinions will likely vary. The language of the First Amendment would have to be modified in order to extend First Amendment free speech protection to the workplace.*

2. Comment on the following two (2) cases mentioned in the article:

a. In September 2010, a New Jersey transit worker Derek Fenton was fired two days after he burned pages from a Quran outside the site of a proposed Islamic cultural center near Ground Zero, even though he was off the clock. The transit agency said he violated its code of ethics and "his trust as a state employee."

b. In August 2010, Bryan Glover, an assistant coach for a middle school near Nashville, Tenn., said he was fired from his job for distributing via email a country music song he wrote disparaging President Obama. Unfortunately, parents of students were on his email list and his song offended some.

In your reasoned opinion, did either or both of these cases merit termination of employment? Explain your answer.

*Student opinions will likely vary in response to this question. Both cases illustrate the substantial limitations on employee free speech.*



# Proceedings

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The McGraw-Hill Companies

3. According to the article, Joseph Grenny, co-author of "Crucial Conversations," offers the following advice with regard to sharing your political views with co-workers:
  - a. Look for areas of agreement. Begin by reinforcing the basic values and purposes you hold in common. Let your coworker know you share common goals, even if your preferred tactics for achieving them differ.
  - b. Avoid personal attacks. Look at the situation from your co-worker's perspective by asking yourself why a reasonable and rational person would hold that political view. While you don't have to agree with their view, you can still acknowledge their view is valid.
  - c. Focus on facts, and be tentative, not dogmatic. We've all become masters at spin detection, and none of us like when people exaggerate, twist and spin the facts.
  - d. Keep it safe by looking for signs of silence or violence. If your co-worker grows quiet or starts to become defensive, step out of the content of the discussion and restore safety. Reinforce your respect for them, and remind them of the broader purpose you both share.

Comment on Mr. Grenny's recommendations. Do you agree or disagree with his advice?

*Student opinions will likely vary in response to this question, but in the opinion of your author, employees should avoid altogether the discussion of politics in the workplace, especially since employers have the legal right to terminate workers for political reasons.*

## Article 2: "Are Credit Checks Keeping The Jobless Out of Work?"

[http://www.huffingtonpost.com/2010/10/25/credit-checks-keep-the-jobless-out-of-work\\_n\\_773754.html](http://www.huffingtonpost.com/2010/10/25/credit-checks-keep-the-jobless-out-of-work_n_773754.html)

According to the article, after working for the same railroad for fourteen (14) years, never missing a house or car payment, Sammy Bailey says he never expected his credit score to keep him out of a job. But after being laid off in March 2009, he soon found himself unable to make payments on his house and his car, and his credit took a big hit.

"My house payment was \$800 a month and my truck was \$665 a month, and I was only making about \$1200 a month on unemployment," said Bailey. "I couldn't afford to keep up with the payments, lost both the house and the car, and that's what caused my credit score to go down."

Bailey said he applied for a new job at Am-Rail in Kansas City, Missouri, recently but failed to pass the background check because of his poor credit.

"When they run a credit report on you, I guess the score is supposed to determine what kind of employee you are," he said. "I've had very few jobs in my lifetime, and every job I've had I stuck with for a very long time. Seems like they should go off of you, not your credit score."



# Proceedings

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The McGraw-Hill Companies

While the credit check has long been a routine part of the job application process, experts are wondering whether it's still a fair screening tool in the wake of a recession that has left 15 million Americans unemployed and unable to keep up with their bills.

In a meeting of the Equal Opportunity Employment Commission last week to discuss the use of credit history as a discriminatory barrier to employment, a panel of legal experts and social scientists explained how the screening practice may be harmful and unfair to American workers.

"A simple reason to oppose the use of credit history for job applications is the sheer, profound absurdity of the practice," said Chi Chi Wu, a staff attorney at the National Consumer Law Center. "Using credit history creates a grotesque conundrum. Simply put, a worker who loses her job is likely to fall behind on paying her bills due to lack of income. With the increasing use of credit reports, this worker now finds herself shut out of the job market because she's behind on her bills. This phenomenon has created concerns that the unemployed and debt-ridden could form a luckless class."

According to a survey conducted by the Society for Human Resource Management, 60 percent of all organizations polled said they conducted background checks on applicants, and 17 percent in the Northeast reported that favorable background check results are the most important factor influencing the final decision of whether to hire someone.

Considering the fact that more than half of all working adults in America have either been unemployed, taken a pay cut, had their work hours reduced or become involuntary part-time workers since the beginning of the recession, more and more job applicants are hampered by blemishes on their credit reports in the search for a steady salary.

Enrique Francisco Figueroa, 40, told the *Arizona Republic* that after missing a few mortgage payments on his home while applying for a loan modification, he was rejected from a job with the Transportation Security Administration based on his credit report. Scarred by the experience, he said he has given up on applying to organizations that conduct background checks.

"Even now, I see myself applying for jobs I am way overqualified for," said Figueroa, who was laid off from his job as a commercial fire-alarm inspector in 2009. "I am applying for warehouse worker (jobs) or bus driver, stuff like that."

Despite the fact that credit checks weed out some candidates like Figueroa whose spotty credit reports are products of the recession, proponents of the screening tool told the EEOC last week that credit checks are a necessary part of the screening process.

Michael Eastman, an executive director at the U.S. Chamber of Commerce, contended that very few employers conduct credit checks at all, and those who do often take individuals' circumstances into account.





# Proceedings

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The McGraw-Hill Companies

"Not all debt is created equal in the minds of employers," he said. "The circumstances under which an \$80,000 debt in collection arose may be irrelevant to a credit score, but to an employer the circumstances matter a great deal. It is my experience that employers are much less likely to be concerned with debt that arose as a result of a medical issue, a period of unemployment, or a divorce. On the other end of the spectrum, some types of debt might raise red flags more quickly, such as gambling debt."

The EEOC meeting was the first in a series throughout the year that will examine discriminatory barriers to employment in the wake of the recession.

## Discussion Questions

1. In your reasoned opinion, should employers have the unfettered right to use the credit check as an employment screening tool? Why or why not?

*Student opinions will likely vary in response to this question. In terms of the employer's "side" of the argument, a prospective employee's credit history is relevant information in terms of judging the candidate's character and self-discipline, as well as assessing the likelihood that a candidate (if hired) will embezzle from the company. In terms of the candidate's argument, credit history information is very personal, and the revelation of a poor credit history might prohibit the candidate from getting a job that he or she desperately needs.*

2. In light of the recent (and many would argue, continuing) recession that has left fifteen (15) million Americans unemployed and unable to keep up with their bills, is the credit check a fair screening tool?

*Although student opinions will likely vary in response to this question, there is a strong argument to be made that the credit check is an unfair screening tool, since the recent and prolonged "Great Recession" has adversely affected the credit report of millions of Americans, in many respects due to no fault of their own.*

3. As the article indicates, Michael Eastman, an executive director at the U.S. Chamber of Commerce, contends that very few employers conduct credit checks at all, and those who do often take individuals' circumstances into account. Further, Mr. Eastman contends:

"Not all debt is created equal in the minds of employers. The circumstances under which an \$80,000 debt in collection arose may be irrelevant to a credit score, but to an employer the circumstances matter a great deal. It is my experience that employers are much less likely to be concerned with debt that arose as a result of a medical issue, a period of unemployment, or a divorce. On the other end of the spectrum, some types of debt might raise red flags more quickly, such as gambling debt."

Evaluate Mr. Eastman claims. Do you agree or disagree with his assertions? Explain your response.





# Proceedings

A monthly newsletter from McGraw-Hill

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The McGraw-Hill Companies

*This is an "opinion" question, so responses will vary, but in your author's opinion, it is hard to envision prospective employers taking the time to evaluate the candidates' individual circumstances that led to poor credit histories. With an anemic economy, it is definitely a "buyer's market" in terms of labor, and employers have the luxury of using credit histories as a "culling" tool to reduce the number of applicants for a particular position.*

## Article 3: "Judge Slaps Lime Wire with Permanent Injunction"

[http://news.cnet.com/8301-31001\\_3-20020786-261.html](http://news.cnet.com/8301-31001_3-20020786-261.html)

According to the article, the end of Lime Wire as it has existed for years appears to be at hand.

U.S. District Judge Kimba Wood issued an injunction today against the company that operates the long popular file-sharing software LimeWire and orders managers there to disable "the searching, downloading, uploading, file trading...and/or all functionality" of the LimeWire software, Lime Wire announced.

In May, Wood, who serves the Southern District of New York, granted summary judgment in favor of the music industry's claims that Lime Group, parent of LimeWire software maker Lime Wire, and founder Mark Gorton committed copyright infringement, engaged in unfair competition, and induced copyright infringement.

LimeWire, the software, was released 10 years ago and quickly emerged as one of the favorite ways to pass pirated music across the Web. Gorton and his company have acknowledged making millions from offering the software.

"While this is not our ideal path, we hope to work with the music industry in moving forward," a Lime Wire spokesperson said in a statement. "We look forward to embracing necessary changes and collaborating with the entire music industry in the future."

Lime Wire continues to exist but no longer operates as a file-sharing service, the spokesperson said. Exactly what the New York-based company will do in the future is unclear. At this point, the company's chances of licensing music for Spoon appear to be small and its prospects dim.

Obviously, there is little that the court can do about software that is already released. But in her order, Wood tried to close the door on any further releases, upgrades, advertising of the software, or the creation of any comparable software in the future. She also wants Lime Wire to do its best to discourage the use of the LimeWire software already in the wild, what she called "legacy software."

"Using its best efforts," Wood wrote, "Lime Wire shall use all reasonable technological means to immediately cease and desist the current infringement of the Copyrighted Works by Legacy users



# Proceedings

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December 2010, Volume 2 Issue 5



The McGraw-Hill Companies

through the LimeWire System and Software and to prevent and inhibit future infringement of copyright works."

She ordered Gorton and employees to establish "default settings in the legacy software that block the sharing of unauthorized media files" and offer users tools to remove the software from their hard drives. Wood ordered Lime Wire to create a copyright filter that would work on legacy software. In addition, Wood required Gorton and crew to first get the permission of the music labels before building any new, legal version of LimeWire.

However Lime Wire disables their client, there are plenty of alternative file-sharing software and networks available. Indeed, BitTorrent has emerged over the last few years as a much more popular way to share files.

But for Gorton, the injunction is not the end of his or his company's troubles. The Recording Industry Association of America, which filed the copyright complaint against Gorton and Lime Wire in 2007, will now seek damages that could easily top \$1 billion. That phase of the trial is scheduled to begin in January. A group of music publishers has also filed a copyright complaint against Lime Wire.

According to music industry sources, Gorton and the RIAA were in settlement negotiations for a long time as the judge deliberated over whether to impose the injunction.

Gorton offered to license music from the top four record companies for Spoon, Lime Wire's little-known legal music service. The deal fell through after Gorton's lawyers insisted that the music labels allow LimeWire to continue to operate for a year so users could be moved over to Spoon.

The labels totally rejected the idea. RIAA lawyers have told the judge that LimeWire costs the record labels about \$500 million every month in lost revenue. They wouldn't wait a year. They wouldn't wait a month. They assert they have taken a beating from Lime Wire for too long.

"For the better part of the last decade, LimeWire and Gorton have violated the law," the RIAA said in a statement. "The court has now signed an injunction that will start to unwind the massive piracy machine that Lime Wire and Gorton used to enrich themselves immensely."

## Discussion Questions

1. What is an injunction? What is the difference between a temporary injunction and a permanent injunction?

*An injunction is a court order for a defendant to "cease and desist" from engaging in a certain activity. A temporary injunction is typically granted by a court during the course of litigation, pending the outcome of the lawsuit. A permanent injunction is a court order for the defendant to never engage in a certain activity again. The subject case involves a permanent injunction.*



# Proceedings



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The McGraw-Hill Companies

2. As the article indicates, United States District Court Judge Kimba Wood granted summary judgment in favor of the music industry's claims that the defendants committed copyright infringement, engaged in unfair competition, and induced copyright infringement. Do you agree or disagree with Judge Wood's order of summary judgment? Why or why not?

*Student opinions will likely vary in response to this question. In order for a judge to grant a request for summary judgment, he or she must be convinced that: 1) there is no dispute of a material fact pertaining to the litigation; and 2) the moving party (i.e., the party who filed the summary judgment motion) is entitled to judgment as a matter of law. In the instant case, in granting summary judgment in favor of the music industry, Judge Wood was obviously of the opinion that Lime Wire clearly committed copyright infringement.*

3. As the article indicates, the "damages" phase of this litigation is scheduled to begin in January 2011. How should monetary damages be calculated in this litigation? Would it be difficult or impossible to assess the music industry's actual damages in this case?

*As the article indicates, the Recording Industry Association of America (RIAA) will seek damages that could "easily" exceed \$1 billion. In the damages phase of litigation, the music industry (as plaintiff) has the burden of proof (The plaintiff also has the burden of proof in the "liability" phase of a lawsuit.) In satisfying its burden of proof regarding damages, the music industry will seek to demonstrate that it lost a quantifiable amount of revenue as a result of Lime Wire and its software; since users could download music for free via LimeWire, they refrained from making purchases.*



## Video Suggestions

### Video 1: "High Court Case on Violent Games Tests Limits on Speech"

[http://www.usatoday.com/tech/gaming/2010-10-28-1Violentvideogames28\\_CV\\_N.htm?loc=interstitialskip](http://www.usatoday.com/tech/gaming/2010-10-28-1Violentvideogames28_CV_N.htm?loc=interstitialskip)

(Note: Please see accompanying article at same web address)

#### Discussion Questions

1. In your reasoned opinion, are video games entitled to First Amendment free speech protection? Is this the type of "speech" our Founding Fathers envisioned when they crafted the First Amendment to the United States Constitution?

*This is an "opinion" question, so student responses will likely vary. In your author's opinion, even though our Founding Fathers obviously could not envision all future scenarios that might involve application of First Amendment free speech protection, the constitutional language regarding free speech is couched in broad terms ("Congress shall make no law...abridging the freedom of speech.") Video games are a form of artistic (and commercial) expression, and therefore deserving of some degree of free speech protection.*

2. Comment on the propriety of the California law banning the sale of "violent" video games to minors. Do you agree or disagree with the California law?

*Student opinions will likely vary in response to this question. Those who believe it "takes a village" (including the government) to raise a child will perhaps support the California law, while those who view this as more of an issue of personal and/or parental responsibility might oppose the law. Focus on the word "violent"—how can it be determined, with any degree of exactitude or certainty, what constitutes violence?*

3. As mentioned in the video, a voluntary ratings system has been adopted by video game manufacturers, displaying on the video game package a rating based on the level of sex, violence and bad language depicted in the product. In your reasoned opinion, is the ratings system alone enough to "protect" minors? As a society, should we even be concerned about



# Proceedings

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The McGraw-Hill Companies

protecting the best interests of minors when it comes to playing video games? Explain your responses.

*Without a specific law banning the sale of violent video games, the ratings system is arguably nothing more than a guide. Admittedly, the ratings system might deter some consumers (parents, perhaps) from purchasing violent video games, but for a juvenile, an "extreme" rating might cause the youngster to be even more inclined to make a purchase! In your author's opinion, the ratings system alone is not enough to protect minors. The real issues here are: 1) whether we (as a society) should be concerned about protecting the "best interests" of minors, and 2) whether violent video games are contrary to the "best interests" of minors.*

## **Video 2: "A False Rape Conviction, 22 years in Prison--and Now an \$18.5 Million Award"**

[http://www.msnbc.msn.com/id/39760576/ns/us\\_news-crime\\_and\\_courts/](http://www.msnbc.msn.com/id/39760576/ns/us_news-crime_and_courts/)

(Note: Please see accompanying article at same web address)

### **Discussion Questions**

1. Comment on the work of The Innocence Project (As the article accompanying the video indicates, The Innocence Project is a nonprofit legal clinic that works to exonerate wrongfully convicted people through DNA testing-- the Clinic pursued Alan Newton's case and helped win his release.) Do you support or do you oppose the work of The Innocence Project? Explain your response.

*How could one not support the work of The Innocence Project? Even though evidence of wrongful prosecution might compromise the perceived integrity (and justice) of our legal system, should any of us be able to rest knowing that an innocent person might be wrongfully serving time in prison? In your author's opinion, The Innocence Project "sheds revealing light" on the United States legal system, and aids substantially in correcting the injustices that do occur in our legal system more frequently than we would like to admit.*

2. In your reasoned opinion, why did it take twenty-two (22) years to exonerate Alan Newton?

*Most likely, this was due to Alan Newton's inability to afford adequate legal representation.*

3. Comment on the \$18.5 million verdict awarded in this case (As the article accompanying the video indicates, a federal jury in Manhattan recently ordered the city of New York to pay Mr. Newton \$18.5 million for "botching" his case, concluding that the city had violated Newton's constitutional rights and that two police officers had failed to produce Newton's evidence when requested.) Do you support or do you oppose such a verdict in this case? Explain your response.



# Proceedings

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The McGraw-Hill Companies

*Student opinions will likely vary in response to this question. Although some students may disagree with the amount of the award, most students will generally agree that if a defendant has been wrongfully convicted and served time in prison, he or she should receive some amount of compensation. Remind students that taxpayers will "foot the bill" for any amount of compensation awarded for wrongful conviction.*



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The McGraw-Hill Companies

## Of Special Interest

This section of the newsletter addresses the issue of deceptive advertising in the "green products" industry.

## Ethical Dilemma

Note: This Ethical Dilemma is based on the article "Report: 'Green' Product Claims Are Often Misleading," available at the following web address:

<http://content.usatoday.com/communities/greenhouse/post/2010/10/green-product-claims/1?loc=interstitialskip>

According to the article, more than 95% of consumer products marketed as "green," including all toys surveyed, make misleading or inaccurate claims, claims a recent report.

The number of products claiming to be green increased 73% since 2009, according to a survey by TerraChoice, an Ottawa-based marketing firm owned mostly by Underwriters Laboratory of Canada. The UL network does independent product testing and certification.

"The biggest sin is making claims without any proof," says Scot Case of UL Environment, adding that companies want consumers to "just trust them." The report finds "vagueness" is the second-leading problem (a shampoo claimed it was "mother-earth approved") in "greenwashing" -- a term that refers to misleading, false or unproved green claims.

The report comes as the Federal Trade Commission is proposing stricter advertising rules. In updating its Green Guides, last revised in 1998, it warns companies not to make blanket claims such as "eco-friendly" or cite unqualified certifications (a paper towel product once claimed it "fights global warming.")

"Consumers should look for more specificity," says James Kohm of FTC's Bureau of Consumer Protection. He says general claims are difficult to prove.

For its "Sins of Greenwashing" report, TerraChoice visited 34 stores in the U.S. and Canada from March to May and surveyed 5,296 products that make environmental claims. The products included toys, baby care items, building materials, housewares, consumer electronics and health goods.

A skyrocketing share of products claim to be free of phthalates, chemicals used to make plastics, and BPA or bisphenol A, an estrogen-like chemical.





# Proceedings

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The McGraw-Hill Companies

The report also found:

- A small but rising share of products make accurate green claims-- 4.5% this year, up from 2% in 2009 and 1% in 2007, when the first survey was done.
- "Big box" retailers are more apt to sell products with accurate claims than boutique stores. They may have more influence on their suppliers, Case says.
- Products such as building materials and office goods that have more experience in the green marketplace make fewer misleading claims than those such as toys and baby products that are new to it.

"Those in the environmental space for a while are learning from their mistakes," Case says.

The report shows progress, however slight, is occurring, says Thomas Lyon, director of the Erb Institute for Sustainable Enterprise at the University of Michigan.

Still, he says the growing green marketplace is tricky for consumers. "There are all these fake labels," Lyon says. "You still have to do your homework."

The report finds that 30.9% of the products surveyed had fake labels, whereas 67.3% had vague claims and 70.1% made claims without proof. It notes there are many legitimate third-party green certifiers including EcoLogo, Fair Trade Certified, FSC (Forest Stewardship Council), Green Guard, Green Seal, Rainforest Alliance, UL Environment, Water Sense and USDA Organic.

## Discussion Questions

1. The article references a survey report by TerraChoice, an Ottawa-based marketing firm, that the number of products claiming to be "green" has increased 73% since 2009. Assuming that this is an accurate survey/percentage, what do you believe accounts for the dramatic increase in the number of products claiming to be "green?"

*Product manufacturers typically seek any marketing advantage they can, and there are a number of consumers who respond favorably to "green" products.*

2. Consider the following two (2) actual advertising examples mentioned in the article:

- a. A shampoo once claimed it was "mother-earth approved;" and
- b. A paper towel product once claimed it "fights global warming."

Are these statements merely "sales puffery," (i.e. sales talk), or are they instead "unfair and deceptive" advertisements?

*In your author's opinion, both of these examples include "unfair and deceptive" advertisements. How can a seller possibly demonstrate that shampoo is "mother-earth approved," or that paper*



# Proceedings



A monthly newsletter from McGraw-Hill

December 2010, Volume 2 Issue 5

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*towels "fight global warming?" Both represent (at best) vague claims without demonstrative proof of accuracy.*

3. As the article indicates, the Federal Trade Commission (FTC) is considering stricter advertising rules for "green" products. Do you support or oppose more stringent oversight of "green" product advertising by the FTC? Explain your response.

*In your author's opinion, stricter regulation in this area would be a "step in the right direction." Just as the FTC has exercised stricter oversight over other commercial products (cereal, toys, weight-loss products, etc.), so also should the FTC more closely regulate "green" products.*



# Proceedings

A monthly newsletter from McGraw-Hill

December 2010, Volume 2 Issue 5



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## Of Special Interest

This section of the newsletter will assist you in covering "Video 1," presented earlier in this newsletter.

## Teaching Tips

### **Teaching Tip 1 (Related to Video 1):**

Students will likely find it interesting to access the "Game Ratings and Descriptor Guide" promulgated by the Entertainment Software Rating Board (ESRB). This guide can be located at the following web address:

[http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp)

The above-referenced web address describes the purpose and methodology of the game ratings system as follows:

"The Entertainment Software Rating Board (ESRB) ratings are designed to provide concise and impartial information about the content in computer and video games so consumers, especially parents, can make an informed purchase decision. ESRB ratings have two equal parts: rating symbols suggest age appropriateness for the game and content descriptors indicate elements in a game that may have triggered a particular rating and/or may be of interest or concern."

For further information, see also the "Frequently Asked Questions" section of the ESRB web site at <http://www.esrb.org/ratings/faq.jsp>

### **Teaching Tip 2 (Related to Video 1):**

Students will likely also find it interesting to access the Parents Television Council (PTC) web site, which describes the organization's "Violent Video Game Campaign" at the following web address:

<http://www.parentstv.org/ptc/videogames/main.asp>

According to its web site, the PTC is a "non-partisan education organization advocating responsible entertainment." The organization describes its reason for existence as follows:

"The players of today's video games find themselves assuming the role of the most despicable people to walk the earth by carrying out mind-altering tasks with realistic graphics. (T)hese games reward and encourage violent criminal conduct and, under current laws, retailers are not obligated to impose restrictions on the sale of video games to minors. A ten-year-old can purchase an Adult Only (AO rated) video game.



# Proceedings

A monthly newsletter from McGraw-Hill

December 2010, Volume 2 Issue 5



The McGraw-Hill Companies

For more than fifty years, social scientists have insisted that exposure to violent media products leads to aggressive behavior in children. (T)he US military agrees, and uses simulators that are similar to first-person shooter video games to desensitize soldiers to violence and mentally prepare them to kill.

Allowing higher rated video games to only be sold to adults will have no affect on the ability for this industry to pursue its profit and its "art" amongst adult consumers. When graphic sex, extreme violence, and the glamorization and codification of disrespect for the most basic of norms that make up human decency are involved in a product that children can use and learn from, parents need to be a part of the decision making process. In the face of scientific proof that there is potential for irrevocable damage when children play violent video games, as a society we would be grossly derelict to not enforce the standards that the video game industry itself has said are prudent and necessary.

The PTC is pushing for legislation to enforce the ESRB ratings guides for purchase of games backed by financial penalties for those who do not follow the law."



# Proceedings

A monthly newsletter from McGraw-Hill

December 2010, Volume 2 Issue 5



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## Chapter Key for McGraw-Hill/Irwin Business Law Texts

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
<b>Kubasek et al., Dynamic Business Law</b>	Chapters 5, 12 and 43	Chapters 5 and 7	Chapter 45	Chapter 5
<b>Kubasek et al., Dynamic Business Law: The Essentials</b>	Chapters 4, 6 and 24	Chapters 2 and 4	Chapter 25	Chapter 4
<b>Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition</b>	Chapters 3, 8 and 51	Chapters 3 and 5	Chapter 48	Chapter 3
<b>Barnes et al., Law for Business, 10th Edition</b>	Chapters 4, 8 and 25	Chapters 4 and 5	Chapter 46	Chapter 4
<b>Brown et al., Business Law with UCC Applications Student Edition, 12th Edition</b>	Chapters 2, 21 and 35	Chapters 2 and 5	Chapter 20	Chapter 2
<b>Reed et al., The Legal and Regulatory Environment of Business, 15th Edition</b>	Chapters 6, 11 and 20	Chapters 6 and 12	Chapter 17	Chapter 6
<b>McAdams et al., Law, Business &amp; Society, 9th Edition</b>	Chapters 5, 12, 13, 16 and 18	Chapters 4 and 5	Chapter 15	Chapter 5

## 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)

