



Proceedings

A monthly newsletter from McGraw-Hill



December 2012 Volume 4, Issue 5



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Dear Professor,

Welcome to McGraw-Hill's December 2012 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 4, 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 2012 newsletter topics with the various McGraw-Hill business law textbooks.

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

1. Litigation against Cinemark USA, Inc. due to alleged negligence resulting in the July 2012 massacre at a movie theater in Aurora, Colorado;
2. Recent statistics regarding the pay differential between female and male employees;
3. A probate battle regarding the \$300 Million estate of reclusive heiress Huguette Clark;
4. Videos related to a) an 81-year-old woman who lost her life savings in a phone scam; and b) Discover Bank's agreement to refund \$200 million to over 3.5 million credit card holders due to claims of deceptive telemarketing;
5. An "ethical dilemma" related to the crime of embezzlement in the context of the attorney-client relationship; and
6. "Teaching tips" related to Video 2 ("Discover to Refund \$200 Million to Customers for Deceptive Telemarketing") of the newsletter.

I wish you the happiest of holiday seasons!

Jeffrey D. Penley, J.D.
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Of Special Interest

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

- 1) Litigation against Cinemark USA, Inc. due to alleged negligence resulting in the July 2012 massacre at a movie theater in Aurora, Colorado;
- 2) Recent statistics regarding the pay differential between female and male employees; and
- 3) A probate battle regarding the \$300 million estate of reclusive heiress Huguette Clark.

Hot Topics in Business Law

Article 1: "Cinemark Says It Had No Legal Duty to Foresee 'Dark Knight Rises' Shooting"

<http://www.hollywoodreporter.com/thr-esq/cinemark-dark-knight-rises-shooting-374973>

According to the article, Cinemark USA Inc., the owner of the movie theater in Aurora, Colorado, where a gunman killed 12 people and left dozens of others wounded at a July 20 midnight showing of *The Dark Knight Rises*, already has responded to lawsuits filed against the company recently. Usually, a defendant will take weeks and sometimes months to answer a complaint. This time, Cinemark was prepared for the litigation that was coming. The company knew that it would be defending against those who experienced the massacre at the Century 16 theater attributed to James Holmes.

One thing that Cinemark did not see coming?

"In plaintiff's view," says Cinemark in a motion to dismiss, "It is the people employed by Cinemark -- people who had never met the mass murderer and who are not trained in law enforcement or criminal pathology -- who had the legal obligation to foresee that he would commit this shocking criminal act and, because they allegedly should have foreseen it, should have had in place measures that may have prevented it."

Cinemark says that the plaintiffs, in demanding justice, want a judge and jury to punish it for not living up to an alleged "duty and burden" to have done more. "This invitation should be politely declined," the company argues, "as the fault here lies entirely with the killer."

In attempting to hold Cinemark legally responsible for what happened on one fateful night, the victims have a tough road ahead of them. The primary factor in negligence claims, such as the ones being brought by Denise Traynom, Brandon Axelrod and Joshua Nowlan is "foreseeability," and while there have been a couple of cases over the years where theater owners have been found liable for violence, the crime in this instance happened in a middle-class Denver suburb that *Forbes* ranked as the ninth-safest city in the United States based on FBI crime statistics. Some legal observers are doubtful about the probability of a win for the victims.



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In the lawsuits, the plaintiffs claim Cinemark was negligent in failing to hire extra security and failed to take care by doing things like helping evacuate the theater even after the shooting ended. On Thursday, Cinemark responded to those claims.

"The essence of the complaint is that Cinemark 'should have known' that James Holmes would commit a mass murderous assault in the Century 16 theater," it says.

The theater company continues on, pointing to all those who might share responsibility, including Warner Bros, but likewise were blind about what might happen:

"Never mind that federal, state and local law enforcement entities, trained in anticipating criminal conduct and armed with extensive resources, did not foresee -- and would not be expected to foresee -- Mr. Holmes' criminal conduct; that family members and friends who knew him personally and for multiple years did not foresee it; that a treating psychiatrist apparently did not foresee it; that personnel at the University of Colorado, who interacted with him regularly, apparently did not foresee it; that firearm and ammunition manufacturers and suppliers, who provided him with the means for mass murder, did not foresee it; that the studio that distributed the film did not foresee it; and that adult patrons in the theater on the night in question, some of whom accompanied young children under their care, did not foresee it."

The attorneys for the victims likely will present a case that even if they didn't see Holmes himself coming, they should have been prepared in general for a foreseeable shooting.

Cinemark has an answer for that too. In defense of Nowlan's lawsuit, the company says, "Plaintiff alleges no prior murderous mass assault in the theater or in any other Cinemark theater, much less one by an individual who left and returned through an exit door."

Without such specific information about *why* Cinemark should have anticipated the tragedy, the company says the allegations amount to a "random unbalanced individual [who] randomly chose this theater on this random night at this random time to randomly murder and injure other human beings." Cinemark's lawyer Kevin Taylor looks to put that sense of randomness in a judge's head in asking for a dismissal based on a failure to state a claim upon which relief can be granted. Cinemark says, "Random acts, by definition, are not legally foreseeable."

Discussion Questions

1. In your reasoned opinion, should the defendant's motion to dismiss be granted? Why or why not?

This is an opinion question, so student responses may vary. In order for a judge to grant a motion to dismiss, the judge must conclude that even at an early stage in litigation (the filing of the complaint), there is no genuine question of fact, and the moving party (the defendant, Cinemark) is entitled to judgment as a matter of law. Most judges will at least wait until an answer is filed or discovery is



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conducted before granting a preliminary verdict (a judgment on the pleadings after the complaint and the answer are filed, or a summary judgment after discovery is conducted), but again, in order for a judge to grant a preliminary verdict, he or she must be convinced that there is no genuine question of fact, that the moving party is entitled to judgment legally. Usually, a judge will let the jury determine whether the defendant was negligent.

2. Define negligence.

Negligence is defined as the failure to do what a reasonable person would do under the same or similar circumstances. In order to prevail in a negligence case, the plaintiff must prove, by the greater weight of the evidence, the following four (4) factors:

- a. The defendant owed the plaintiff a duty of care;*
- b. The defendant breached the duty of care;*
- c. The defendant proximately caused the plaintiff harm (economic, physical or both); and*
- d. The plaintiff in fact experienced resulting damages (economic, physical or both).*

Ultimately, negligence is for a jury to determine, based on the unique facts and circumstances pertaining to a particular case.

3. In your reasoned opinion, was the defendant Cinemark negligent in this case? Why or why not?

This is an opinion question, so student responses may vary. Foreseeability is a major issue in a negligence case, and in the context of this case, the fact-finder must determine that Cinemark should have reasonably foreseen that James Holmes would commit mass murder in a Cinemark movie theater. As the article points out, the crime in this instance happened in a middle-class Denver suburb that Forbes ranked as the ninth-safest city in the United States based on FBI crime statistics. The fact that Aurora, Colorado is one of the safest areas in the nation in terms of crime might make it difficult for a jury (if the case goes to a jury) to conclude that Cinemark was negligent in this case.

Article 2: "Women Face Stubborn Wage Gap as Wages Fall for Everyone"

<http://lifeinc.today.com/news/2012/09/14/13848108-women-face-stubborn-wage-gap-as-wages-fall-for-everyone?lite>

According to the article, the gap between women's and men's pay remained about the same for the fourth straight year in 2011, as both genders got slammed by lower wages.

Women earned 77 cents for every dollar a man earned in 2011, the Census Bureau said this week as part of its extensive annual report on income and poverty.



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The female-to-male earnings ratio for full-time workers has been little changed for four years, after hitting a record high of 78 percent in 2007.

Experts say the latest figures show that women aren't making significant gains in terms of earning power – but men aren't either.

"It's not that gap is not closing," said Katherine Gallagher Robbins, senior policy analyst with the National Women's Law Center. "It's that wages are sort of flattening."

For men who work full-time and year-round, inflation-adjusted median earnings fell about 2.5 percent between 2010 and 2011, to \$48,202, according to the Census Bureau. For women working full-time, the median, or midpoint, of annual earnings also fell by about 2.5 percent, to \$37,118.

Experts say that there are other factors at work besides the lousy job market. The wage gap narrowed slowly and in fits and starts through the 1980s and 1990s, but further gains have been tough to come by.

"As a broad trend, I think we have plateaued in a way, or we may have plateaued," said Ariane Hegewisch, study director with the Institute for Women's Policy Research.

Women still face some big hurdles, especially those who want to have children and still advance in their careers, she said. Child care can be quite expensive, and some women may not be willing to put in the long hours required to make it to the top when their children are young.

The wage gap has persisted even though women have made huge inroads in traditionally male-dominated fields and positions. There have been several high-profile examples of that phenomenon, including Yahoo Inc.'s decision to appoint a pregnant Marissa Mayer to the role of chief executive.

Despite such gains, research shows that women generally take home less money each week even when they are doing the same job.

Women also now get postsecondary degrees at higher rates than men, and more education generally translates into higher earnings over the course of a lifetime. But experts note that what people study, and the fields they go into, matters as well.

"There is a huge gender segregation there," Hegewisch said. "Men get more technical (degrees) and women are in education and social work and the kind of softer sciences, and they pay less."

The recession of 2007-09 was so hard on male-dominated fields such as construction that some referred to it as the "mancession." With men hit so hard, 38 percent of women outearned their husbands in 2009, a 3 percentage point increase from 2008.

But as the economy began recovering in 2009, it was women who fared worse in the job market.



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The situation has since become more of a mixed bag. In August, the unemployment rate for men was 8.3 percent. For women, it was 7.8 percent.

“I think the story right now is that everyone is struggling,” Robbins said. “Often when people think about the wage gap they think about it as women as compared to men. A lot of (families) have both women and men who are working. We think of it as a family security issue.”

Discussion Questions

1. Research and describe the Equal Pay Act of 1963.

The Equal Pay Act of 1963 actually predated Title VII of the Civil Rights Act, which was enacted in 1964. The Equal Pay Act prohibits one specific kind of discrimination—pay discrimination based on gender. According to federal mandate, a female worker must be paid the same as her male counterpart, assuming comparable educational background, “skill sets,” job descriptions and productivity levels.

2. Is the pay differential between male and female workers described in this article evidence of continued gender discrimination in the workplace? Explain your response.

This is an opinion question, so student responses may vary. The “seventy-seven cents on every dollar” discrepancy would appear to be prima facie evidence of discrimination, but those who argue against the existence of continued gender discrimination in the workplace contend that other factors explain the pay discrepancy (See the response to Discussion Question Number 3 below.)

3. If, in your opinion, the pay differential between male and female workers described in this article is not evidence of continued discrimination, what accounts for the differential?

This is an opinion question, so student responses may vary. Those who argue that the pay differential is not evidence of continued discrimination might contend that it is virtually impossible to compare “apples to apples, and oranges to oranges” when it comes to male versus female pay, since workers vary considerably in terms of their educational background, “skill sets,” job descriptions and productivity levels. To the extent that there are pay differentials resulting from non-discriminatory factors, there is no gender discrimination, since the discrepancy is not based on gender. One other argument commonly presented to explain the legitimacy of the pay differential is that women typically take more time off to care for their children, resulting in a “lag” in their career advancement.



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Article 3: “Up for Grabs: The \$300 Million Estate of Reclusive Heiress Huguette Clark”

<http://openchannel.nbcnews.com/news/2012/10/04/14224537-up-for-grabs-the-300-million-estate-of-reclusive-heiress-huguette-clark>

According to the article, the stakes have been set in the battle over the wealth of copper heiress Huguette Clark. More than \$300 million is on the table as her extended family prepares for a court fight with her nurse and others for the last whispers of one of the great fortunes from America's Gilded Age.

At her death on May 24, 2011, in the New York City hospital where she had lived for 20 years, the daughter of one of the copper kings of Montana possessed about \$306.5 million, counting all her real estate, stocks, bonds, cash, trusts and personal property. The accounting was filed this week in Surrogate's Court in Manhattan by the office of the public administrator, the temporary executor of her estate.

Clark's estimated property values:

1. \$84.5 million for Bellosguardo, her California beachfront vacation home on 23.5 acres in Santa Barbara. That value was reduced to reflect \$502,000 in property tax liens.
2. \$53.0 million for her three apartments at 907 Fifth Avenue, New York City. Their values are \$24 million for apartment 12-W, which has been sold, \$19 million for apartment 8-W, which has also found a buyer, and \$10 million for apartment 8-E, still on the market. Each apartment has approximately 5,000 square feet.
3. \$14.3 million for La Beau Château, her Connecticut country home on 51.7 acres in New Canaan.
4. \$79.3 million in stocks, bonds, cash and trusts, including \$4,039 in unclaimed funds received from the state of New York.
5. \$75.4 million in personal property. Details are not given, but this includes a Monet and other paintings, jewelry, furniture and her doll collection.

The net value of the estate will be less. Federal and state estate taxes must be paid, and unpaid federal gift taxes are due to the IRS.

And the estate could increase in value if the executor is successful in efforts to claw back more than \$44 million in gifts that were given to Clark's nurses, doctors, hospital and others in her later years.



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Huguette (pronounced "u-GET") Marcelle Clark, born in Paris in 1906, inherited her fortune from William Andrews Clark (1839-1925), a U.S. senator from Montana who was among the richest men of the Gilded Age, a copper miner, banker, builder of railroads, and founder of the city of Las Vegas. His youngest daughter attracted the attention of NBC News in 2009 because of her vacant but well-manicured mansions and questions about the management of her money. She lived her last 20 years in spartan hospital rooms, dying just weeks before her 105th birthday.

Rahul Kadakia of Christie's Auction House displays jewels discovered in heiress Huguette Clark's safe deposit box, including a pink 9-carat diamond ring that could be worth up to \$15 million and a flawless Cartier diamond worth up to \$4 million.

To direct her fortune, at age 98, Huguette Clark signed two wills. The first will left \$5 million to her private-duty registered nurse, Hadassah Peri, leaving the bulk of her estate to her relatives from her father's first marriage. The family members were not named in that will, which left the estate to her "intestate distributees," legal language for the people who would inherit if she died without a will. Because Clark had been married only briefly, and had no children, her closest relatives were the descendants of her father from the first marriage. These were Huguette Clark's half great-nieces and half great-nephews, and their children. Huguette and her four half-siblings had each received one-fifth shares of W.A. Clark's empire in 1925. Huguette's mother, Anna, received Bellosguardo, which then passed down to Huguette.

Just six weeks passed before Clark signed a new will. It specified that she intentionally left no money to family, with whom the will said she had little contact. The family is claiming that this will was the product of fraud. The newer document leaves the largest share of her fortune to a museum or art foundation to be set up at her oceanfront estate in Santa Barbara. Specific bequests are made to her attorney, accountant, doctor and others, and the remainder is split among the nurse, a goddaughter and the California foundation.

Originally the temporary executors of the Clark estate were her attorney and accountant, but the court revoked the accountant's authority, and suspended the attorney from his role, leaving only the public administrator to manage the estate for now. The judge, Surrogate Kristin Booth Glen, acted after the public administrator's attorney revealed that Clark had not filed gift tax returns from 1997 through 2003, leaving her owing millions in taxes plus interest and possible penalties.

The parties have been collecting evidence in the case through depositions of witnesses. Judge Glen put the attorneys on a fast clock, saying she hoped to begin a jury trial this year, before her term ends on December 31. The judge recently acknowledged in court, however, that such an early trial date seems unlikely, leaving the case for her successor, perhaps early in 2013.

Though a criminal investigation was launched in August 2010 into the handling of Clark's finances by her attorney and accountant, no one has been charged with any crime. Both men have maintained that they did nothing more than carry out the wishes of a woman who wanted to protect her privacy. The investigation continues by the Elder Abuse Unit of the New York County District Attorney's



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Office. The investigation was prompted in part by reports by NBC News about the sale of property owned by Clark, including a Stradivarius violin and a Renoir painting.

Clark's jewelry collection was sold at auction in April for \$18.3 million. That money will be held by the estate during the contest over the wills. Her country estate in Connecticut is for sale, recently marked down to \$15.9 million. Her estate in Santa Barbara is being carefully maintained, awaiting the court's decision.

Discussion Questions

1. The article notes that Huguette Clark's estate could increase in value if the executor is successful in efforts to recover more than \$44 million in gifts that were given to Clark's nurses, doctors, hospital and others in her later years. On what legal basis could the estate recover those gifts?

In order for a gift to be valid, the following three (3) elements must be satisfied:

- a. The donor must intend to make a gratuitous (i.e., without return consideration) transfer of title to the donee;*
- b. The donor must deliver the gift to the donee; and*
- c. The donee must accept the gift.*

An "inter vivos" gift is a gift made by a living donor to a living donee, while a gift "causa mortis" is made when the donor is contemplating "imminent and impending" death (for example, the donor has been diagnosed with brain cancer, and has only a few weeks to live.)

In the instant case, the estate's best argument to recover the \$44 million in gifts would be based on lack of mental capacity on the part of the donor, Huguette Clark. In order to prevail on such an argument, however, the estate would have to prove that a) Ms. Clark had a mental defect (for example, Alzheimer's disease) at the time she made the gifts; and b) the mental defect prohibited Ms. Clark from formulating donative intent. Usually, mental incapacity is demonstrated by expert testimony (a treating psychiatrist, for example) based on evaluation(s) occurring during the time the gifts occurred; without such evidence, it would be difficult for the estate to prove mental incapacity. The fact that Ms. Clark was in her 90s when the gifts were made would not, in and of itself, establish mental incapacity.

2. The article notes that Ms. Clark signed two wills. Without evidence of fraud, which would be entitled to probate?

As a general rule of probate law, the later will (in terms of the date it was executed) is usually entitled to probate. In order to be clear, however, most estate attorneys incorporate language in the later will demonstrating testator intent for the new will to replace, supplant and revoke the earlier will.



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3. Does the article reveal any specific evidence of fraud that would justify invalidation of Ms. Clark's second will?

The article does not reveal any specific evidence of fraud that would justify invalidation of Ms. Clark's second will; such evidence, however, could be produced in the discovery process of a will challenge in probate court.

Video Suggestions

Video 1: “81-Year-Old Waitress Loses Life's Savings in Phone Scam”

<http://www.cbsnews.com/video/watch/?id=7424051n&tag=cbsnewsHardNewsFDArea;fdmodule>

Please also see the following supporting article:

“Longtime Waitress at Taix Starting over After Lottery Scam”

<http://articles.latimes.com/2012/sep/30/local/la-me-0930-taix-waitress-20120930>

According to the article, Antonia Becerra, an 81-year-old Glendale, California resident, was close to retiring after more than 40 years as a waitress at the landmark French restaurant Taix in Los Angeles, but that all changed this year after she fell victim to a lottery scam that wiped out her life savings. Scam artists even conned Becerra into selling her car for the promise of getting a \$2 million prize and a new Mercedes Benz, police say.

"I sold the car and I sent them the money — I am still waiting for the package," Becerra said.

The package, police say, will never come, and there is little hope that her assets will be recovered or that the perpetrators will be caught.

Becerra must now get rides from co-workers to her job and take the bus home.

"I have to keep on working," she said. "I gotta do it. There is no way, but I know that the good Lord will help me out."

She sticks to eating pantry staples, including milk, eggs, soups and salads. Becerra lives in a modest South Glendale apartment, which she has been painstakingly clearing out in the hopes of renting one of her two bedrooms. Stacks of clothing — which she planned to sell or donate — from her late husband sat on her living room couch Thursday. Numerous bills were scattered on a coffee table, where there was a framed photograph of "Friends" star Lisa Kudrow holding a white paper sign that read "Hi Antonia."



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Even after decimating her life savings, Becerra said, scammers continue to call and harass her for money.

She has since stopped answering her phone.

Becerra was first contacted by the con artists in April. They claimed she had won a prize, which would be given to her only after she wired some cash to secure the transaction.

They sent her checks, but when she tried to deposit them, she realized they were bogus.

They even tried to persuade Becerra to sell her jewelry and give them her Social Security number, but by then, she had caught on. Becerra eventually contacted police, but she was already broke.

The scam is becoming more common because of the economic downturn, Glendale Police Sergeant Harley Wing said. Financially strapped victims, he said, fall prey to the scams because they offer the promise of quick money.

Becerra's story struck a chord with members of the Glendale Police Officers' Association, which has started collecting funds to help her get back on her feet.

On Thursday, Officer Ben Bateman, the group's treasurer, told Becerra that they had already received a \$500 donation from a Glendale businessman, and that they would be covering the equivalent of a month's rent.

"To help you to get a little bit of a leg up," he told Becerra, who was overcome with emotion.

The association is hoping to raise enough money through the Glendale Police Foundation to help pay for a new car and to cover other bills.

"If we are lucky, maybe we will get more than just one month's rent; maybe we will get a few months' rent," Officer Ryan Gunn said.

But for now, Becerra will continue serving tables and taking orders three days a week at Taix. She is doing what she's done for years, essentially starting over at the age of 81.

Fellow server Thomas Roche — "heartbroken for her" — noted that customers often pack into the restaurant's bar area to be served by Becerra.

At one of her tables Friday recently was one of her regulars, Michael Wilk, who said the waitress' wry sense of humor keeps him coming back.

"You can't rattle her," Wilk said.



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Becerra said she has no choice but to go forward.

Her job is challenging, she said, but it helps pay the bills, and her customers are loyal.

"I love my customers," Becerra said. "They always come back and ask for my tables. That makes me feel great."

Discussion Questions

1. Antonia Becerra is the victim of fraud. Define fraud.

Fraud is demonstrated by the following five (5) elements:

- a. *The defendant makes a false statement of fact;*
- b. *The defendant makes the false statement of fact with either knowledge of its falsity, or reckless indifference as to its truth;*
- c. *The defendant makes the false statement with the intent that the listener (the plaintiff) rely on the statement;*
- d. *The listener (the plaintiff) in fact relies on the false statement; and*
- e. *The listener (the plaintiff) is harmed (either economically, physically, or both) as a result.*

2. The police note that recovery of Ms. Becerra's property in this case will be difficult, and that there is little hope the perpetrators will be caught. Why?

Recovery of Ms. Becerra's property will be difficult for at least two (2) reasons:

- a. *It will be difficult to identify the perpetrators, since their contact with Ms. Becerra was limited to telephone conversations; and*
- b. *Even if the perpetrators are identified, it will be difficult to bring them to justice, since they are not likely citizens or residents of the United States. Distance alone makes application and enforcement of the law difficult.*

3. Telephone "scams" where the "winner" must send money in order to receive money are quite common. How could someone like Ms. Becerra fall victim to such a scam? Are people like Ms. Becerra victims of their own gullibility and/or greed? Explain your response.

This is an "opinion" question, so student responses may vary. Ms. Becerra is eighty-one years old—That fact alone might cause many students to feel sympathy for her, and want law enforcers to make a special effort to bring those who transgressed her to justice. Whether Ms. Becerra was "greedy" is subject to opinion, but it does appear that she has lived her life modestly, and she has worked diligently in her employment as a waitress. Like many others, Ms. Becerra hopes for a secure retirement; for many retirees, such hope is not realized.



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Video 2: “Discover Forced to Pay \$200 Million in Refunds”

<http://www.youtube.com/watch?v=SGCSTuCtpP8>

Please also see the following supporting article:

“Discover to Refund \$200 Million to Customers for Deceptive Telemarketing”

http://money.cnn.com/2012/09/24/pf/discover-penalty-telemarketing/index.html?source=cnn_bin

According to the article, Discover Bank has agreed to refund \$200 million to more than 3.5 million cardholders over claims of deceptive telemarketing.

The Consumer Financial Protection Bureau and the Federal Deposit Insurance Corporation announced the agreement recently, following a joint investigation that found Discover's telemarketing and sales strategies misled consumers about additional products that can be bought when opening credit cards.

In addition to refunding customers, Discover Bank, a subsidiary of Discover Financial Services, will pay a \$14 million penalty that will be split between the two regulators.

The agencies said Discover telemarketers used deceptive language to convince cardholders to pay for identity theft protection, credit score tracking, wallet protection, and payment protection, which lets certain cardholders defer credit card payments for up to two years.

"Discover's telemarketing scripts contained many misrepresentations, implying that these products were free of charge and simply 'added benefits,'" said CFPB director Richard Cordra. "[Investigators from the CFPB and FDIC] listened to numerous recorded sales calls where Discover's telemarketers spoke unusually fast when explaining the cost and product terms, and even processed purchases without the consent of consumers."

The CFPB and FDIC also found that in some cases, sales representatives were paid incentives when they enrolled customers in these products

The \$200 million will be given to cardholders who purchased credit protection products over the phone from December 2007 to August 2011, with customers receiving an average refund of roughly \$57 for the fees they paid.

Fees for Discover's credit products varied, with the credit score tracker costing \$7.99 a month and the identity theft protection costing \$9.99 a month, the agencies said. The amount each customer will be refunded depends on what the product was, when it was purchased and how long the customer had it.



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Customers will be refunded at least 90 days' worth of fees they were charged for the products, and the refunds will be automatically credited to their accounts. Customers who no longer have a Discover account will receive checks in the mail, or have any outstanding Discover balance reduced by the refunded amount. All customers should receive their refunds by early 2013, according to the CFPB and FDIC.

Discover has also agreed to make changes to its telemarketing practices to put a stop to deceptive sales tactics, and its compliance will be subject to an independent auditor.

"We have worked hard to earn the loyalty of our card members, and we are committed to marketing our products responsibly," said David Nelms, chairman and chief executive officer of Discover, in a statement about the agreement.

Of the \$14 million penalty imposed by the two regulators, the \$7 million allotted for the FDIC will go to the U.S. Treasury, and the other \$7 million will go to the CFPB's Civil Penalty Fund.

The settlement comes on the heels of the CFPB's first public enforcement action taken in July against Capital One. The CFPB announced that Capital One would refund \$140 million to customers and pay an additional \$25 million penalty, also for using deceptive marketing tactics to mislead cardholders into buying extra products.

Given these recent actions, the CFPB published a compliance bulletin as a warning for other companies.

"[W]e are signaling as clearly as we can that other financial institutions should review their marketing practices to ensure that they are not deceiving or misleading consumers into purchasing financial products or services," Cordray said.

Discussion Questions

1. What is the Consumer Financial Protection Bureau (CFPB)?

According to the Consumer Financial Protection Bureau's website (see <http://www.consumerfinance.gov/the-bureau/>), the central mission of the CFPB is to "make markets for consumer financial products and services work for Americans — whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products." Further, according to the website:

Congress established the CFPB to protect consumers by carrying out Federal consumer financial laws. Among other things, (the CFPB):

- 1. Conducts rule-making, supervision, and enforcement for Federal consumer financial protection laws;*



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2. *Restricts unfair, deceptive, or abusive acts or practices;*
3. *Takes consumer complaints;*
4. *Promotes financial education;*
5. *Researches consumer behavior;*
6. *Monitors financial markets for new risks to consumers; and*
7. *Enforces laws that outlaw discrimination and other unfair treatment in consumer finance*

2. As the article indicates, the CFPB and the Federal Deposit Insurance Corporation (FDIC) have accused Discover Bank of “deceptive” telemarketing. From a legal standpoint, is deception the same as fraud? Explain your response.

As mentioned previously in response to Video 1 (“81-Year-Old Waitress Loses Life's Savings in Phone Scam”), Discussion Question 1, fraud is demonstrated by the following five (5) elements:

- a. *The defendant makes a false statement of fact;*
- b. *The defendant makes the false statement of fact with either knowledge of its falsity, or reckless indifference as to its truth;*
- c. *The defendant makes the false statement with the intent that the listener (the plaintiff) rely on the statement;*
- d. *The listener (the plaintiff) in fact relies on the false statement; and*
- e. *The listener (the plaintiff) is harmed (either economically, physically, or both) as a result.*

Deception is distinguishable from fraud in the sense that it is easier to prove. More specifically, in order to prove deception, the plaintiff need not prove that the defendant made the false statement with the intent that the listener (the plaintiff) rely on the statement, or that the listener (the plaintiff) in fact relied on the false statement. Rather, all the plaintiff need prove is that the false statement had the “tendency or likelihood” to mislead the listener. This lower standard of proof makes it easier for federal and state authorities to “crack down” on deceptive marketing practices.

3. In your reasoned opinion, is the type of action undertaken by the CFPB and the FDIC an example of “good” government regulation? Explain your response.

This is an opinion question, so student responses will likely vary. In your author’s opinion, not all government regulation is “bad.” Government regulation that seeks to “level the playing field” for consumers is arguably “good” government regulation, since many consumers are not sophisticated in terms of the “art of the deal.”



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Of Special Interest

This section addresses the crime of embezzlement in the context of the attorney-client relationship.

Ethical Dilemma

"Corporate Lawyer Douglas Arntsen Admits Stealing \$10 Million from Clients"

<http://usnews.nbcnews.com/news/2012/10/03/14196449-corporate-lawyer-douglas-arntsen-admits-stealing-10-million-from-clients?lite>

According to the article, a Manhattan corporate lawyer pleaded guilty recently to stealing more than \$10 million in clients' money, which prosecutors said he spent on pricey restaurants, strip clubs and buying businesses.

The plea ends a year-long legal saga that began last September when Douglas Arntsen flew to Hong Kong -- a day after the Manhattan district attorney's office notified his law firm, Crowell & Moring, that he was the subject of a criminal probe.

Prosecutors later accused Arntsen, 34, of embezzling millions in escrow funds starting in 2009, when he allegedly began siphoning money into bank accounts he controlled.

Arntsen has been held without bail since federal authorities returned him to the United States in January to face the charges.

Prosecutors accused him of fleeing to avoid arrest. His lawyer, Alan Lewis, has said Arntsen was taking a planned trip.

Recently, Arntsen pleaded guilty in a Manhattan courtroom to several counts of grand larceny and scheme to defraud.

"He's always indicated his intention to accept responsibility, and he did today," Lewis said after the court appearance.

He will be sentenced and faces 4 to 12 years in prison, although prosecutors are concerned that Arntsen wants to go to a prison boot camp called Shock Incarceration where inmates can be released after six months.

In a statement, Manhattan District Attorney Cyrus Vance said that the "trust between attorney and client is sacred."



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“This defendant utterly betrayed that trust by stealing large amounts of money from his clients before fleeing to Hong Kong. Today’s conviction holds him accountable for fraudulent conduct that violated the law, abused his clients’ trust, and cost them millions of dollars,” he added.

The statement said Arntsen “began using the funds to support a lavish lifestyle that included visits to expensive restaurants, sporting events, and strip clubs. Arntsen also used the money to purchase businesses for himself, friends, and family members.”

Prosecutors launched an investigation last fall after one of Arntsen's clients, Regal Real Estate, was unable to account for the money in its escrow accounts.

Regal's managing partner, William Punch, told Reuters that when he confronted Arntsen about \$4 million in missing funds on September 12, 2011, the lawyer broke down and admitted he had used some of the money. Arntsen resigned from his firm that day.

Two days later, he boarded a plane to Hong Kong.

Arntsen's former firm has settled three civil lawsuits brought in connection with Arntsen's fraud, all by real estate companies -- including Regal -- that claimed the lawyer stole funds from their accounts.

"We regret the harm caused by Douglas Arntsen to our clients and our firm and are pleased Mr. Arntsen has acknowledged his crimes with a guilty plea," said Crowell managing partner Ellen Dwyer.

Discussion Questions

1. Define embezzlement.

Embezzlement is defined as the wrongful misappropriation of property that has been entrusted to the defendant. Essentially, embezzlement constitutes larceny plus a violation of trust, and since a defendant who embezzles violates property rights as well as trust, he or she is typically subject to greater punishment than a mere larcenist.

2. As the article indicates, Manhattan District Attorney Cyrus Vance contends that the "trust between attorney and client is sacred." In your opinion, what does Mr. Vance mean by such a statement?

Although this quote is subject to interpretation, trust between attorney and client is “sacred” for at least two (2) reasons:

a. Trust between attorney and client is essential to effective legal representation, since the client must work closely with his or her attorney in order effect the best legal strategy for the client; and



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b. Trust between attorney and client is essential to the reputation of the legal profession.

3. As the article indicates, for his punishment, Douglas Arnsten may be interested in a prison boot camp called “Shock Incarceration” where inmates can be released after six months. In your opinion, should such a punishment alternative be possible for Arnsten, as opposed to the four (4) to twelve (12) years of prison time he would otherwise serve for his wrongdoing? Is even a four (4) to twelve (12) year sentence punishment enough for the gravity of Arnsten’s offense? Explain your response.

This is an opinion question, so student responses may vary. In your author’s opinion, even with the considerable “shock” associated with “Shock Incarceration,” such a punishment alternative seems too lenient in light of the gravity of the offense (Remember, if the allegations are true, Arnsten embezzled more than \$10 million of his client’s money). Even a four (4) to twelve (12) year prison sentence may seem too lenient to those who want the criminal justice system to “get tough” on crime.



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Of Special Interest

This section of the newsletter will assist you in covering Video 2 (“Discover to Refund \$200 Million to Customers for Deceptive Telemarketing”) of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Video 2: “Discover to Refund \$200 Million to Customers for Deceptive Telemarketing”)--Consumer Financial Protection Bureau (CFPB) Video

Have students review the video “What Is the CFPB” at the following internet address to learn more about the Consumer Financial Protection Bureau (CFPB):

http://money.cnn.com/2012/09/24/pf/discover-penalty-telemarketing/index.html?source=cnn_bin

Teaching Tip 2 (Related to Video 2: “Discover to Refund \$200 Million to Customers for Deceptive Telemarketing”)--Consumer Financial Protection Bureau (CFPB) Facebook Page

Have students “log in” to Facebook at www.facebook.com and type in “Consumer Financial Protection Bureau” in the search engine to review the Consumer Financial Protection Bureau (CFPB) Facebook page.



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

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 9, 43 and 53	Chapters 7 and 45	Chapters 2 and 7	Chapters 7 and 45
Kubasek et al., Dynamic Business Law: Summarized Cases	Chapters 9, 43 and 53	Chapters 7 and 45	Chapters 2 and 7	Chapters 7 and 45
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 6, 7 and 24	Chapters 5 and 25	Chapters 1 and 5	Chapters 5 and 25
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment	Chapters 7, 26 and 51	Chapters 5 and 48	Chapters 4 and 5	Chapters 5 and 48
Barnes et al., Law for Business	Chapters 7, 25 and 36	Chapters 5 and 46	Chapters 3 and 5	Chapters 5 and 46
Brown et al., Business Law with UCC Applications	Chapters 6, 23 and 31	Chapters 5 and 15	Chapters 1 and 5	Chapters 5 and 15
Reed et al., The Legal and Regulatory Environment of Business	Chapters 7, 10 and 20	Chapters 13 and 18	Chapters 2 and 13	Chapters 13 and 18
McAdams et al., Law, Business & Society	Chapters 7 and 13	Chapters 4 and 15	Chapters 2 and 4	Chapters 4 and 15
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 9, 12 and 23	Chapters 21 and 22	Chapters 5 and 22	Chapters 21 and 22
Bennett-Alexander & Harrison, The Legal, Ethical, and Regulatory Environment of Business in a Diverse Society	Chapters 6, 7 and 11	Chapters 4 and 8	Chapters 1 and 8	Chapters 4 and 8



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This Newsletter Supports the Following Business Law Texts:

- Barnes et al., Law for Business, 11th Edition 2012© (0073377716)
- Bennett-Alexander et al., The Legal Environment of Business in A Diverse Society, 1st Edition 2012© (0073524921)
- Brown et al., Business Law with UCC Applications Student Edition, 13th Edition 2013© (0073524956)
- Kubasek et al., Dynamic Business Law, 2nd Edition 2012© (0073377678)
- Kubasek et al., Dynamic Business Law: The Essentials, 2nd Edition 2013© (0073524972)
- Kubasek et al., Dynamic Business Law: Summarized Cases, 1st Edition 2013© (0078023777)
- Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 15th Edition 2013© (0073377643)
- McAdams et al., Law, Business & Society, 10th Edition 2012© (0073525006)
- Reed et al., The Legal and Regulatory Environment of Business, 16th Edition 2013© (0073524999)
- Melvin, The Legal Environment of Business: A Managerial Approach 2011© (0073377694)

