Proceedings

A monthly newsletter from McGraw-Hill

January 2010 Volume 1, Issue 6

The McGraw-Hill Companies

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Dear Professor,

Happy New Year! Welcome to McGraw-Hill's January issue of *Proceedings*, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 1, Issue 6 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 January newsletter topics with the various McGraw-Hill business law textbooks.

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

1. A "modest proposal" from a University of Arizona law school professor encouraging "underwater" mortgagors to "walk away" from their mortgage obligations;

2. Retail chain CVS's legal "woes" regarding the sale of expired products;

3. The non-availability of traditional banking services for low- to moderate-income Americans (including many minorities) and their resulting turn to check cashing firms for financial services;

4. Videos related to a) President Obama's "pay czar's" decision to cut executive compensation at seven (7) major institutions receiving federal "bailout" monies; and b) The Home Depot's decision to terminate an employee who refused to remove a "God" button from his work clothing;

5. A "case hypothetical and ethical dilemma" related to whether property is "lost" or "abandoned," as well as the legal rights associated with lost and abandoned property; and

6. "Teaching tips" related to a) "quasi-contract" and b) "lost" versus "abandoned" property.

I hope this newsletter assists you greatly in beginning Spring Semester 2010!

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Of Special Interest

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

1) The Legal and Ethical Obligations of "Underwater" Mortgagors;

2) Retail Chain CVS's Legal Troubles Regarding Expired Products; and

3) The Availability of Banking Services for Low- and Moderate-Income Americans.

Hot Topics in Business Law

Article 1: "Professor Advises Underwater Homeowners to Walk Away From Mortgages"

www.latimes.com/classified/realestate/news/la-fi-harney29-2009nov29,0,3801270.story

This article addresses the nation's mortgage crisis, a problem that has plagued the United States for a prolonged period of time, and contributed considerably to the nation's economic downturn. For the estimated fifteen (15) million Americans who currently find themselves "underwater" on their mortgages (in other words, they owe more on their homes than their homes are worth), Brent T. White, a University of Arizona law school professor, offers bold advice: Stop paying on your mortgage if you owe more than the house is worth. Further, Professor White advises that "underwater" homeowners should not feel guilty about default, and should not believe they are doing something morally wrong. His recommendations regarding mortgage default are set forth in an academic paper entitled "Underwater and Not Walking Away: Shame, Fear and the Social Management of the Housing Crisis."

In "stiffing their lenders and taking a hike," White contends that underwater homeowners could save hundreds of thousands of dollars that they "have no reasonable prospect of recouping" in the years ahead. In terms of the penalties for mortgage default, White argues that the repercussions of walking away from a mortgage are nowhere near as painful or long-lasting as borrowers might assume. Although he acknowledges that credit scores are adversely affected upon mortgage default, White claims that as long as a borrower stays current with other creditors, "one can have a good credit rating again—meaning above 660—within two years after a foreclosure."

As the article indicates, White recommends a "strategic" default involving the purchase of all the major items a debtor will need for the next couple of years (for example, a new car, or even a new house) just before the debtor "pulls the plug" on his or her current mortgage lender.

According to White, underwater borrowers who refuse to take his advice are "woodheads"—"individuals who choose not to act in their own self-interest." Such reluctance to default is in part based on debtor concerns about feelings of shame and embarrassment after a foreclosure. Feeding these emotions is a system White labels "the social control of the housing crisis"—pressures and messages continually sent to consumers by the "social control agents," namely banks, government and the media. The mantra that these agents—all the way up to President Obama—pound into owner's heads, White says, is that "voluntarily defaulting on a mortgage is immoral."

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Yet there is an inherent imbalance in the borrower-lender relationship that makes this morality message unfair to consumers, White says: Banks set the rules during the housing boom, handing out home loans with no down payments, no income checks and inflated appraisals. Now that property values have dropped 20% to 50% in many areas, banks have been slow to modify troubled mortgages and reluctant to reduce principal debts. Only when homeowners cut through the emotional fog and default strategically in large numbers, White argues, will this inequitable situation be seriously addressed.

As might be expected, lending institutions are not pleased with White's manifesto. Officials at Fannie Mae and Freddie Mac—investors who fund the bulk of all new mortgages in the United States—dispute White's characterization of how quickly after foreclosure a defaulting borrower can obtain a new loan, claiming that the time period is actually five (5) years, absent extenuating circumstances such as medical or employment problems that caused the foreclosure. Further, according to Brian Faith of Fannie Mae, "there's a moral dimension to this as homeowners who simply abandon their homes contribute to the destabilization of their neighborhood and community."

Discussion Questions

1. From a contractual standpoint, do "underwater" borrowers have any persuasive legal arguments regarding mortgage default? If so, what are those arguments? If not, why not?

From a purely contractual standpoint, lenders clearly have the better argument here. A mortgage is a contract, and the essence of a contract is that it is a binding and enforceable agreement. If two (2) parties enter into a contract voluntarily and willingly, without evidence of fraud, undue influence or duress, the common law of contracts suggests that both parties are bound by the agreement, and will be responsible for consequential damages in the event of default. Although mortgage lenders are clearly better-versed in the "art of the deal" when compared to residential mortgage borrowers, in the sense that lenders are very familiar with such transactions and typically write the mortgage contracts, most courts would conclude that if borrowers enter into such contracts, they are binding and enforceable agreements.

The buyer's best argument here seems to be that of equity. An equitable remedy may be imposed by a court when application of law would not result in justice. Although judges typically choose to enforce the rule of law, they may choose to recognize equitable remedies if the circumstances dictate such an approach. One example of an equitable remedy is the doctrine of commercial impracticability. This argument contends that even though a contract was formed between the two (2) parties, circumstances have changed so dramatically since the deal was entered into that it would be grossly unfair to enforce such an agreement. In essence, the doctrine of commercial impracticability contends that the contract so adversely affects one party (in this discussion, the "underwater" mortgage borrower) that the deal should either not be enforced, or that it should be rewritten to promote the interests of the adversely-affected party.

Another equitable doctrine potentially available to an underwater mortgage borrower in a default scenario would be that of unconscionability. The essence of the unconscionability doctrine is that even though a contract was entered into, its enforcement would "shock the conscience" of a reasonable person. As an example, suppose that a borrower entered into a mortgage agreement for a principal amount of $200,000, at a time when the fair market value of the home was approximately $200,000. Suppose that after the agreement was entered into, the value of the home plummets to $100,000. In terms of total principal and

interest paid, it would not be unusual for a homeowner to pay $600,000 or more over the thirty-year life of such a mortgage. Would it be unconscionable in such a scenario to hold the borrower to his or her bargain?

Ask students whether they prefer the straightforward application of law to defaulting mortgage borrowers (in other words, hold borrowers responsible for consequential damages resulting from default, based on standard contract law principles), or whether they favor recognition of an equitable remedy. If students favor application of an equitable remedy, ask them if they would favor application of the "commercial impracticability" doctrine, or the doctrine of unconscionability (A judge could invoke one or both of these doctrines in recognizing equity).

Even if students choose the equitable route here, what would be the appropriate resolution of a mortgage default scenario? Allowing the debtor to "walk away" from the mortgage by simply giving the keys to the home (and title) back to the lender? Rewriting the mortgage contract by effectively reducing the principal amount and/or the interest rate?

One final note: Remind students that the more courts choose to apply equitable remedies, the less contracts and contract law matter. In other words, the application of equitable remedies arguable reduces the stability, predictability and integrity of contracts, and of contract law itself.

2. From the standpoint of morality and ethics, who has the "upper hand" in terms of mortgage default: borrowers or lenders?

Many students will likely contend that lenders have the "upper hand" here in terms of morality and ethics, since borrowers entered into their mortgage contracts, and accordingly have the obligation of "carrying through." Keep in mind, however, Professor White's reminder that during the housing boom, banks "set the rules of the game," handing out home loans with no down payments, no income checks and inflated appraisals. In discussing this issue with my Business Law I class, one student shared a personal example: During the housing boom, at a time when his total family income did not exceed $40,000 per year, he was able to qualify for a $400,000 mortgage loan! Although there is certainly a strong argument here that borrowers have an ethical obligation to fulfill contractual obligations they have entered into voluntarily and willingly, there is a persuasive argument as well that lenders were less than scrupulous in terms of their banking practices leading up to the United States mortgage default crisis.

3. As the article indicates, states such as Arizona and California provide only limited or no legal rights to lenders to pursue defaulting homeowners' assets beyond the house itself (these states are called "anti-deficiency" states). Do you support such limitations on lenders' rights? If so, why? If not, why not?

Student opinions will likely vary in response to Discussion Question Number 3. The Arizona and California anti-deficiency statutes are clearly "pro-borrower" in the sense that they provide the borrower with considerable "peace of mind" in knowing that in the event of default, should the home in which the lender has a security interest be insufficient to compensate the lender for the entire mortgage amount owed, the lender will be prohibited from pursuing other assets of the borrower. For those students who take a "pro-business" approach, the argument again would be that if the mortgage contract was entered into voluntarily and willingly, and not due to fraud, undue influence or duress, the borrower's default should allow the lender to attempt to be made whole, even if that means pursuing borrower assets above and beyond the house itself.

As a simple example, if the borrower defaults on a mortgage owing a remaining balance of $200,000 and the house itself only brings $150,000 in a foreclosure sale, the lender should be able to pursue the additional $50,000 on an unsecured basis, even if that means seizing a $20,000 car and a $30,000 boat that the borrower owns. Remind the students that the general purpose of ordinary contract law is to put the non-breaching plaintiff in the same position he or she would have been in had the contract been fully performed. In an anti-deficiency state, if the defaulting borrower owes $200,000 on a mortgage but the house only brings $150,000 in a foreclosure sale, and the lender is prohibited from pursuing recovery of the remaining $50,000 owed, has the lender really been "made whole" again?

Article 2: CVS in Court (Again) for (Even More) Expired Drugs, Milk, Eggs, and Formula

http://www.dailyfinance.com/2009/12/02/cvs-in-court-again-for-even-more-expired-drugs-milk-eggs/

This article indicates that Connecticut has become the latest state to cite CVS drugstores for selling expired products. Richard Blumenthal, the state's attorney general, filed a lawsuit against CVS, revealing that investigations his office conducted over the past year and a half determined that 44% of inspected stores sold expired over-the-counter drugs, infant formula, energy drinks, milk, eggs and yogurt.

The article indicates that other states have been battling the huge chain over the expired products issue. For example, New York settled with CVS in November 2009 for $875,000. Further, California and Nevada also took CVS to task, but California does not outlaw selling expired drugs, and Nevada merely imposed a $5,000 fine against the company

The article claims that CVS's sale of expired merchandise is not merely a local problem; instead, it appears that the practice is endemic to the chain. In 2008, Change to Win, a consumer advocacy group, surveyed more than 1,500 CVS outlets in eleven (11) states and discovered that in ten (10) states, more than 42% of stores had expired products on their shelves—more than two (2) years past their expiration dates in some cases.

Although it would seem that the federal Food and Drug Administration (FDA) would want to get involved when a large national retailer consistently sells expired and spoiled food and drugs, the article cites a FDA official who asserts that "The FDA defers to state and local authorities for enforcement action." The trouble lies in the laws surrounding expiration dates. Federal law requires manufacturers to put dates on a few items, including baby food and infant formula, but does not require stores to pull expired goods. Laws vary by state and are often enforced halfheartedly, giving CVS little impetus to regulate itself.

Corporate policy would seem to indicate a commitment on the part of CVS to remove expired products from its shelves. According the article's author, an inquiry to CVS resulted in 'corporate boilerplate' stating that the company "has a clear product removal policy in place at all of its stores to help ensure that items are removed from store shelves before they reach their expiration dates," and that "the company is fully committed to maintaining inventory management practices to prevent expired products from being sold to customers." Yet a CVS employee, speaking about the New York case, acknowledged that while the chain has policies to check for expired products, pulling them off the shelves is a low priority. Further, workforce cuts can make dates impossible for managers to monitor. The employee theorized that CVS may not be aware of the time

and costs involved in policing the expired products, but it seems unlikely that a major coast-to-coast chain would not have an efficiency expert to outline how many employee-hours a store needs to police its inventory.

According to the article's author, it is likely that CVS weighed the costs of enforcement against the punishment for carrying expired products, and decided that paying employees to remove expired products is not cost-effective. For example, New York's $875,000 fine against CVS averages merely $6,162 for each of the 142 CVS stores cited by New York Attorney General Andrew Cuomo. That amounts to approximately one-half of what each store would spend to hire a minimum-wage expiration-checking employee for one year. Expressed another way, if CVS had hired one minimum-wage employee for each of the 142 offending stores during the year and a half it took to resolve the New York case, it would have spent approximately $3.2 million, making that $875,000 fine a $2.3 million discount off the cost of rectifying the problem. Factor in lost revenue from discarded inventory, and it is not difficult to see why CVS chose not to forego a massive profit.

Discussion Questions

1. If you view the issue of expired products such as over-the-counter drugs, infant formula, energy drinks, milk, eggs and yogurt to be a problem, do you view this problem as a resulting from the failings of regulatory authorities such as the FDA and state and local health officials? As between the FDA and state and local health officials, which regulatory authority do you believe deserves the most blame for the problem?

Although there are a host of parties worthy of blame in this situation (beginning with the CVS corporation itself, company executives, and even the individual store managers who are on the "front lines" of policing the issue of expired products,) part of the problem results from lax regulatory authority. As the article indicates, the FDA (the predominate food and drug regulatory authority in the United States) defers to state and local authorities for enforcement action, and yet on the state and local level, laws are only enforced halfheartedly. Perhaps this is due to the perception on the part of federal, state and local authorities that they simply do not have the resources to police the issue; however, that argument seems non-persuasive, given the high stakes of potential harm (and even death) to those who consume expired products.

Ideally, it would seem that the problem would be better addressed if the FDA and state and local health officials coordinated their resources, including personnel and finances, to combat the problem. Ultimately, responsibility for such coordination of resources and enforcement would rest with the FDA; as referenced previously, the FDA is the predominate food and drug regulatory authority in the United States.)

2. Based on the information presented in the article, do you believe that state law is sufficient to encourage retailers such as CVS to comply with product expiration guidelines? If so, why? If not, why not?

It is to difficult to imagine how anyone could argue that state law is sufficient to encourage retailers such as CVS to comply with product expiration guidelines. The "patchwork" quilt of various state laws are at present difficult to interpret and apply, and as the article indicates, state laws are often enforced only "halfheartedly." Further, penalties at the state level are often insufficient to deter inappropriate behavior (namely, violation of state law.) Using New York as an example, the "empire" state's $875,000 fine against CVS averaged merely $6,162 for each of the 142 CVS stores cited by New York Attorney General Andrew Cuomo. That amounted to approximately one-half of what each store would spend to hire a minimum-wage expiration-checking employee for one year. Expressed another way, if CVS had hired one minimum-wage employee for each of

the 142 offending stores during the year and a half it took to resolve the New York case, it would have spent approximately $3.2 million, making that $875,000 fine a $2.3 million discount off the cost of rectifying the problem. Factor in lost revenue from discarded inventory, and it is not difficult to see why CVS chose not to forego a massive profit.

The New York example illustrates an important lesson regarding the effectiveness (or ineffectiveness) of law. Despite how virtuous the law is, and despite the social value associated with a particular law, without appropriate fines/penalties related to the enforcement of law and deterrence of inappropriate behavior/actions, it is arguably "not worth the paper on which it is printed."

3. As the article indicates, federal law does not currently require retailers to remove expired goods from store shelves. Further, laws related to pulling expired goods from store shelves vary from state to state, and are often only enforced halfheartedly. Would you favor a stricter, uniform federal law mandating the removal of expired products from store shelves and setting forth the specific fine for violating the law? If so, should such a law carry with it the possibility of criminal, as well as civil, liability?

With respect to product expiration, it is easy to see the advantage of a uniform federal law. Such a law would carry with it the advantage of any uniform federal law; namely, the relative ease of its understanding, enforcement and fairness (at least compared to fifty separate state laws.)

It would seem that if the FDA chose to take the initiative, in conjunction with the United States Congress, to craft a uniform federal law regarding product expiration, such an initiative would be well within its regulatory authority and discretion. As mentioned previously, the FDA is the preeminent administrative authority in the nation regarding food and drug safety. Such a uniform standard would go a long way toward streamlining the questions of 1) what to do in the event that a major retailer such as CVS chooses to leave expired products on store shelves and 2) what punishment to mete out in the event of regulatory violations. A uniform federal law would also assist federal, state and local authorities in coordinating their collective efforts to deal with the problem, at a time when efficient use of government resources at all levels of government is arguably of the greatest importance at any time in modern United States history. In the opinion of your author, the FDA must take the initiative and lead the way regarding this issue, in order to truly effect constructive change.

In terms of whether product expiration law(s) should lead to criminal as well as civil liability, in the opinion of your author, a violation should only result in criminal liability if significant harm to consumers was foreseeable, and such harm actually resulted. If that is the case, the corporation should be held criminally responsible. Further, corporate executives should be held criminally responsible, if they knew or had reason to know of the violations, or if they directed the violations, and harm to consumers resulted. Other corporate employees (such as store managers) should also be held criminally responsible under such circumstances.

In terms of the studies addressing CVS product expiration, the results were remarkably consistent. Recall the Connecticut State Attorney General Office's study revealing that 44% of inspected stores sold expired over-the-counter drugs, infant formula, energy drinks, milk, eggs and yogurt. Remember also that in 2008, Change to Win, a consumer advocacy group, surveyed more than 1,500 CVS outlets in eleven (11) states and discovered that in ten (10) states, more than 42% of stores had expired products on their shelves. It is hard to rationalize how the results of these studies could have been so consistent without revealing a concerted action "behind the scenes" at CVS tacitly approving of the sale of expired products. This despite the fact that

CVS "official policy" condemns such a practice. If consumers were to be injured or even killed as a proximate result of such practices, it is easy to justify criminal liability on the part of the corporation, as well as any executive and/or other employees who orchestrated the practice, or allowed it to occur "with eyes wide open."

Article 3: "Many Minorities Shun Banks"

http://www.usatoday.com/money/industries/banking/2009-12-01-underbanked_N.htm

This article indicates that more than one (1) in four (4) American households, including more than half of black households, use check cashers, payday lenders or pawnbrokers rather than a bank. This information is set forth in a report issued by the Federal Deposit Insurance Corporation (FDIC) on December 2, 2009, based on an in-depth study conducted by the FDIC.

Nearly 30 million households have no bank account or have one but also use alternate financial services at least occasionally, according to the FDIC report. The problem is most pronounced among minorities. 53% of African-American households and 43% of Hispanic households use check cashers or similar services instead of or in addition to banks.

The report indicates that buying money orders and cashing checks are the most frequent transactions. Those using check cashers and other services say they are faster, cheaper and more convenient than banks, even though they pay a fee to cash a check they could deposit in a bank account for free.

The FDIC wants banks to "win back" those customers, saying consumers should have the benefit of insured savings and be able to build a credit history. According to Martin Gruenberg, FDIC vice chairman, "There's a substantial segment of American households whose financial services needs aren't being adequately met." He calls the disproportion of minority households in the group "dramatic and troubling."

According to the report, about nine (9) million households, including twenty percent (20%) of families earning less than $30,000 per year, have no bank account at all. Households that have bank accounts but still use check-cashing services are just as likely to be moderate-income (earning up to $50,000 per year) as low-income.

The FDIC will use this data in an effort to persuade more banks to offer "starter accounts," low-cost, no-minimum checking accounts without automatic overdraft programs that can result in customers getting hit with fees if they go "in the red." One option, according to FDIC vice chairman Gruenberg, is to offer incentives to banks through the Community Reinvestment Act, which encourages banks to do business in low- and moderate-income communities.

According to the article, banks are already required to offer low- and no-cost checking, but a 2008 FDIC survey indicated that 77% of large banks use automated overdraft programs.

"It is perfectly possible to use and manage a checking account without ever incurring a dime in fees," says Carol Kaplan, spokesperson for the American Bankers Association. Yet the study shows that banks "need to become more innovative to create products that serve all types of customers. And we need to find a way to do it and still have it be profitable," states Kaplan.

According to Valerie Wilson of the National Urban League Policy Institute, which advocates for access to banks in low-income communities, profitability should not be the only criteria for seeking customers. States Wilson, "There has to be a greater responsibility for the community in which banks are located."

Discussion Questions

1. What services are typically provided by check-cashing firms? In your opinion, should check-cashing firms be as closely regulated by the government as banks? Why or why not?

Listed below, in a "question and answer," "industry-friendly" format, are the essential functions of and services provided by check cashing services (http://www.checkcashing.com/services/check_cashing.htm):

What is Check Cashing?

Check cashing businesses offer quick, convenient and personal solutions for people needing access to their personal finances. Check cashing businesses serve millions of people of all income levels, every day, all across the United States. In recent years check cashing businesses have evolved in both name and function. In addition to offering the basic service of check cashing, many check cashing stores now dub themselves as financial service centers, money service businesses, or neighborhood financial centers to reflect the diverse number and types of services they offer their customers.

What types of checks do Check Cashing Businesses cash?

- *Payroll Checks*
- *Personal Checks*
- *Tax Refund Checks*
- *Unemployment Checks*
- *Welfare Checks*
- *Social Security Checks*
- *Government Checks*
- *Official Checks*
- *Settlement Checks*
- *Insurance Checks*
- *Cashiers Checks*
- *Two Party Checks*
- *Business Checks*
- *Checks Payable to your Business.*

What other services do Check Cashing Businesses offer?

Check cashing businesses often call themselves financial service centers for good reason. These businesses tend to offer a variety of financial services that may include:

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- *Payday Loans and other Types of Loans.*
- *Money Transfers*
- *Bill Payments*
- *Money Orders*
- *P.O. Boxes*
- *Stamps, Envelopes, and Mailing Services.*
- *Notary Public*
- *Currency Exchange*
- *Prepaid Debit and Credit Cards*
- *Public Transportation Passes and Tokens.*
- *EBT Services*
- *Photocopying and Faxing Services*
- *ATM Machines.*
- *Motor Vehicle Renewal and Registration.*

Why use a Check Cashing Business?

There are many advantages that check cashing and other financial service businesses have over banks and other traditional financial institutions. Some of these advantages include:

- *Convenient hours of operation, usually open earlier and longer than banks.*
- *Quick access to cash*
- *No holds on your checks*
- *No lines*
- *Great customer service*
- *Low fees*
- *Multiple financial services.*

Who visits Check Cashing stores?

People use check cashing and other financial service business for their convenience, friendly customer service, as well as their ability to cater to several financial needs all at once. It is not uncommon for a customer to cash their paycheck, pay all of their utility bills for the month, pay their car payment along with their rent or mortgage payment, and add funds to a secure prepaid Visa® or MasterCard®, all in one short visit. Check cashing companies usually offer membership programs that make these transactions even easier for returning customers. They also usually involve benefits and discounts for loyal customers.

Small business owners often take advantage of the services offered by check cashing businesses as well. Many small businesses suffer from cash flow problems due to banks placing holds on their funds. Banks may also limit the amount of cash they give to customers on a per day basis as well. If you own a small business, you are familiar with the limitations that banks have on servicing your cash needs. If you have a check payable to your business, a check cashing business can serve as a valuable tool for you success.

How much does it cost to cash a check?

Just like any other business, check cashing businesses often compete with each other in regards to what they charge their customers. So you're more than likely to find a good deal when cashing a check. Feel free to use our free Check Cashing and Payday Loan Locator to shop around for a good deal. On top of that, there are regulated sets of fees that check cashers are allowed to charge you when cashing a check or getting a loan. Make sure that the check casher discloses their fees when using their services.

In terms of whether check-cashing firms should be as closely regulated as banks, student opinion will likely vary. In the opinion of your author, if check-cashing firms offer services similar to banks, and if millions of Americans use them as alternatives to traditional banks, check-cashing firms should be heavily regulated by the government. If for no other reason, government regulation of check-cashing firms is warranted in order to reduce or eliminate the likelihood that customers will be subjected to less-than-scrupulous financial practices.

2. Should the government mandate banks to offer more financial services to low- and moderate-income individuals (for example, by requiring that banks conduct a certain percentage of their business with low- and moderate-income individuals?) Why or why not?

In response to Discussion Question 2, banks would likely argue that principles of free enterprise should allow them to decide with which socioeconomic segment(s) of the population to transact business. Further, the Civil Rights Act of 1964 does not protect low- and moderate-income individuals from discrimination (in other words, low- to moderate-income Americans do not constitute a "protected class" of individuals under anti-discrimination law.)

Although many students will likely contend that banks have an ethical obligation to extend greater financial services to individuals of modest financial means, whether that should be a government-mandated (legal) obligation is an altogether different question.

3. Do you agree with Valerie Wilson of the National Urban League Policy Institute that banks owe a social responsibility obligation to the communities in which they operate (to provide greater services to low- and moderate-income individuals?) Explain your answer.

Again, many students will likely contend that banks have an ethical obligation to extend greater financial services to individuals of modest financial means. In denying low- to moderate-income Americans the opportunity to obtain traditional banking services, such individuals often have no other alternative but to turn to check-cashing firms, the "lenders of last resort."

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Video Suggestions

Video 1: "Obama's Pay Czar Slashes Executive Compensation"

http://abcnews.go.com/Politics/Business/obamas-pay-czar-ken-feinberg-slash-executive-compensation/story?id=8887792

(Note: This video is included in an article at the above-referenced web site address. The video is accessible on the first page of the article.)

Purpose of video: To discuss "pay czar" Kenneth Feinberg's decision to cap executive compensation at seven (7) firms that have received federal "bailout" money

Discussion Questions

1. In your opinion, does the United States government have the authority to regulate executive compensation at the firms that received "bailout" money (AIG, Citigroup, Bank of America, General Motors, Chrysler, GMAC and Chrysler Financial)? Why or why not?

In the opinion of your author, it seems rational that if the federal government extended funds to these seven (7) institutions in order to keep them "afloat" financially, the government (and therefore the United States taxpayer) has a vested interest in terms of seeing to it that those companies not only survive, but flourish. In regulating executive compensation, "pay czar" Kenneth Feinberg (and by association, the Obama Administration) appears to be of the opinion that it is not appropriate for executives at these seven (7) corporations to continue to receive lavish compensation packages at a time when their firms are suffering financially (had the government not intervened, most if not all of these firms would have been forced into Chapter 7 liquidation or Chapter 11 reorganization bankruptcy.) There seems to be another message here, that in the opinion of Feinberg (and again, by association, the Obama Administration), lavish executive compensation packages helped contribute to the financial demise of these organizations.

In a best-case scenario, the federal government would have imposed executive compensation restrictions on the "front end" of the government's distribution of the billions of dollars in bailout money, as an express condition of receiving the funds. It seems that in imposing these restrictions now, after the funds have been distributed, the government is acting "after the fact."

2. In your opinion, does the United States government have the authority to regulate executive compensation at all corporations, regardless of whether they received "bailout" money? Why or why not?

Although there does seem to be a "groundswell" of public support for restricting executive compensation at all companies, Feinberg has indicated that he does "not think it wise or prudent to expand the jurisdiction of what I am doing now." Feinberg, however, would like to see what he is doing serve as a voluntary "template" for other companies in restricting executive compensation. As he states, "I'm hoping that, using these seven companies as a template or as a model, that other companies will voluntarily see the wisdom of the way we've structured compensation—less cash, more long-term stock tied to the financial future of these seven companies. Hopefully others will see the wisdom of this and follow suit voluntarily."

Perhaps Feinberg sees a mandatory expansion of these restrictions as a political risk for the Obama Administration. Were the program to be expanded to companies not receiving federal bailout dollars, his political opponents would likely further brand President Obama as an "un-American Socialist!"

3. In the United States, executive compensation (both in terms of amount and type) is set by a corporation's board of directors. As indicated in the article accompanying the video, however, President Obama has called upon the United States Congress to pass legislation giving shareholders a voice in executive pay packages. Would you favor such legislation? Why or why not?

In many respects, shareholders in United States corporations have been "boxed out" of the executive compensation decision. In the opinion of your author, that seems regrettable, since shareholders are, by definition, the owners of a corporation. It would seem that if shareholders were given more say in setting executive compensation, such involvement would serve as a greater and even more effective restriction on executive pay than federal government intervention. Complicating matters is whether a Board of Directors truly takes the best interests of the corporation to heart and mind when it sets executive compensation. Board members are not typically the owners of a firm, so when they set executive compensation, it is not their money that they are spending!

(Note: For another interesting article to accompany this video, see "Bank of America to Repay TARP, Raise Cash: Move Would Remove Executive Pay Restrictions As Institution Looks for a New CEO" at http://www.msnbc.msn.com/id/34245560/ns/business-us_business/ In essence, the article suggests that Bank of America plans to repay its $45 billion in government bailout funds in order to free itself from TARP restrictions, including the cap on executive compensation. Ask students these questions: 1) Why would Bank of America pay back $45 billion early just to attract a new chief executive officer? 2) Is Bank of America's decision to repay the funds early solely about executive compensation and the ability to pay a CEO as the company deems appropriate, or might there be other factors driving the bank's decision?)

Video 2: "Worker: I Was Fired For Wearing 'God' Button"

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

(Note: For an accompanying article, see www.msnbc.msn.com/id/33505354/ns/business-local_business/.)

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Purpose of Video: To discuss an employer's legal obligation to accommodate the religious practices and beliefs of employees, and to discuss whether Home Depot violated its obligation in terms of firing employee Trevor Keezer

Discussion Questions

1. Specifically what legal obligation(s) does an employer owe in terms of employee religious practices and beliefs? Did the employer violate its legal obligation(s) in this case?

The Civil Rights Act of 1964, which applies to the employment setting, prohibits an employer from discriminating against an employee on the basis of race, gender, culture, national origin, or religion. Over the years, the standard as it relates to religion requires an employer to "reasonably accommodate" an employee's religious beliefs and practices, unless an "undue hardship" would result. Even though the standard sounds clear, it is a non-exacting standard that is subject to interpretation. For example, what constitutes a "reasonable accommodation?" What constitutes an "undue hardship?"

In terms of answering the question "Did the employer violate its legal obligation(s) in this case?", student opinion will likely be influence by their own personal religious beliefs. It would be wise to point out to students that in deciding cases based on allegations of religious discrimination, it is the responsibility of judges and jurors to dismiss their own personal beliefs in favor of an objective standard. Even though this is a stated responsibility, however, it may be impossible to fulfill in reality. Realistically, all of us are influenced by our own personal opinions and beliefs.

2. At the time of the events surrounding this case, Home Depot had the following policy in effect:

The Home Depot

Associate Dress Code and Apron Etiquette

The badges, buttons and pins on our aprons are awarded to our associates for customer service achievements, store accomplishments, years of service and company efforts or milestones. Our dress code policy states that we do not allow non-company buttons, regardless of their message or content, to be worn on aprons or other clothing to ensure a consistent policy for all associates. While we respect the beliefs of all of our associates, they are expected to abide by the company dress code during work hours.

Does this policy affect in any way your decision regarding the outcome of this case? If so, how?

Home Depot's dress code policy as it pertains to "apron etiquette" is unambiguous in the sense that it clearly does not allow non-company buttons, regardless of their message or content, to be worn on aprons or other clothing. Judging from the clear language of the policy, it would appear that employee Trevor Keezer has violated the store's dress code. Whether religion should effectively "trump" Home Depot's dress code may be for a court to decide.
You may want to ask students whether Keezer's button message is truly a religious message, or whether the "predominate purpose" of the message is political. The button has a depiction of the American flag as its background, along with the words "…one nation, under God…INDIVISIBLE." If the predominate purpose of the message is political, Home Depot would have the right to regulate the content and delivery of the

message, since free speech (even political speech) is not an absolute right in the workplace. If the predominate purpose of the message is religion, that would trigger the employee right (but not absolute right) of religious accommodation pursuant to The Civil Rights Act of 1964. In reality, the button has both a political and religious message, in the sense that it combines "God and Country."

Student opinions will likely vary in terms of whether the actual Home Depot policy affects their interpretation of the case.

3. Suppose that a Home Depot employee had chosen to wear a button on his apron proclaiming "…one nation, under Satan…INDIVISIBLE." Upon inquiry from his supervisor, the employee proclaims that Satan is his lord and master, that he had been dutifully worshipping Satan for the past five (5) years, and that all Americans should come to know Satan in the same way. The employee further asserts that as part of his Satanic faith, he must openly proclaim his beliefs and win others "over to" Satan. Would this scenario change your opinion in terms of whether employers should be required to allow employees to freely express their religious beliefs at work? Why or why not?

Discussion of this scenario may make students uncomfortable and/or angry, especially if they consider such a message "sacrilegious!" Ask students whether an atheist would feel similar emotions in reaction to the button Trevor Keezer wore. Even religious individuals may disagree with Keezer's message, in the sense that the United States is the most religiously diverse nation in the world, and as a result, is not unified in terms of three hundred million Americans' interpretations of the Creator. If anything, Discussion Question Number 3 should impress upon students the fact that there must be some rational restrictions to religious practices and beliefs in the workplace. What those specific restrictions should be are arguably best left to the federal courts to decide, and judicial efforts regarding religious accommodation in the workplace will constantly be a "work in progress!"

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Of Special Interest

This section of the newsletter addresses the questions of 1) what constitutes abandoned property and 2) if property is abandoned, who is entitled to claim ownership of the property?

Hypothetical and Ethical Dilemma

Rachel Woods was a huge fan of the popular television show "Pimp My House." Airing on Tuesday evenings at 9:00 p.m. on the Real Estate Channel, each episode of the show was devoted to the renovation of a subject house for the purposes of 1) increasing the quality of life for its owner and 2) increasing the home's fair market value for eventual resale.

While watching the show one particular Tuesday evening, Rachel decided that home improvement truly begins at home. She devised a plan for certain renovations of the ranch-style home she had owned for the past five (5) years. Part of the renovation plan involved expanding the main bathroom in the house, which necessitated the removal of a wall. The following week, Rachel made contractual arrangements with contractor Robert Walls for such improvements. Robert was a longstanding friend of Rachel's, and they had maintained their close friendship since graduating from high school together twenty (20) years ago.

Rachel was away at work when Robert began the bathroom wall demolition. He used a hammer to begin the sheet rock removal, and expected to see insulation in the wall interior. Instead, he saw a large metal box. Perplexed and curious about this unusual occurrence, he removed the box from the wall and inspected it. Inside the box was a considerable amount of currency, in $20, $50 and $100 denominations. He proceeded to count the currency, and came to a final tally of $182,000. The currency dated from the 1920s and early 1930s, and Robert surmised that the currency had rested in the wall for over seven decades. Robert immediately called Rachel and told her of his "Tutankhamun-esque" discovery. Rachel immediately took an early lunch and left work for home.

In Rachel's living room, the two friends discussed the implications of Robert's discovery. Rachel proposed to pay ten percent (10%) of the find to Robert as a reward, in addition to his contractual compensation for making improvements to the home. Rachel also proposed that the deal be kept confidential, as she did not want to disclose the find to anyone, especially the heirs of George O'Leary. O'Leary had died five (5) years ago at the age 101 after having owned the home and living in it continuously since 1927. Rachel had purchased the home from the O'Leary estate. Robert demanded forty percent (40%) of the find as his share, and Rachel refused. Their friendship dissolved immediately.

Robert has filed suit against Rachel, demanding the entire amount of the find, $182,000. Rachel has answered the complaint, alleging that she is entitled to the entire amount. George O'Leary's five (5) known heirs have intervened in the litigation, demanding that the $182,000 be awarded entirely to them, to be equally divided into five (5) shares. Decide the case.

This Case Hypothetical and Ethical Dilemma will likely spark lively classroom discussion; after all, who would not get excited about the prospects of discovering a $182,000 "treasure trove!" All parties involved in the litigation have legitimate arguments to make in terms of entitlement to the money. Robert can argue that he found abandoned property, and that as the "finder" of such property, he is entitled to it to the exclusion of everyone else in the world. The common law states that if property is abandoned, meaning that its owner has left it behind with no intent to continue to assert ownership, the finder is truly the "keeper." Robert should contend that given the dates on the bills (from the 1920s to the early 1930s,) and given the fact that the money has rested undisturbed for approximately seven (7) decades since George O'Leary left it there and for five (5) years since its death, the money was effectively abandoned. Rachel should contend that as owner of the house, she is entitled to not only the home itself, but also its contents. George O'Leary's heirs should argue that no one in his or her "right" mind would abandon $182,000 in cash, so the finder (Robert) is not entitled to it. Further, they should contend that Rachel is not entitled to the money, since title to personal property is not transferred in a sale of real estate, unless 1) such an arrangement is expressed in the real estate contract or 2) the personal property has become a "fixture." By definition, a fixture is property that has lost its personal property characteristics since it has become so firmly affixed to the real property that it is to be considered part of the real property. In determining whether personal property has become a fixture to real estate, courts generally use the "damage" test; in other words, would the real estate be significantly damaged if the personal property is removed from it? O'Leary's heirs can argue that there is essentially no resulting damage from removal of the $182,000 from the wall, since the wall was being demolished anyway. This Case Hypothetical and Ethical Dilemma is based on an actual case that arose in Cleveland, Ohio in 2008, and is discussed further in Teaching Tip 2. Based on personal experience in the classroom, I can assure you that students will love discussing this Case Hypothetical and Ethical Dilemma, as well as the actual case on which it is based!

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Of Special Interest

This section of the newsletter will assist you in covering:

1) a comparison of the "Hypothetical and Ethical Dilemma" presented in the December newsletter with an actual case; and

2) a comparison of the "Hypothetical and Ethical Dilemma" presented in this newsletter with the actual case on which it was based.

Teaching Tips

Teaching Tip 1:

Recall that in the Case Hypothetical and Ethical Dilemma of the December McGraw-Hill Newsletter, the Harrington family had returned from Disney World to their home in Charlotte, North Carolina, only to find that their house had been re-roofed by mistake by "Up on the Roof" Roofing Services, Inc. The questions presented in the December Case Hypothetical and Ethical Dilemma were 1) from an ethical standpoint, whether John Harrington (the head of the household) was obligated to pay Talley (the owner of "Up on the Roof" Roofing Services, Inc.) $10,000 (the cost of the roofing materials) and/or 2) from a legal standpoint, whether Harrington was obligated to pay. The conclusion reached in the newsletter response to the December Case Hypothetical and Ethical Dilemma was that Harrington was neither ethically nor legally bound to pay Talley any amount. First, from an ethical standpoint, Harrington was away when the mistake and the improvements were made, and he was therefore an innocent party. Second, from a legal standpoint, no express or implied contract existed between Harrington and "Up on the Roof" Roofing Services, Inc., and a quasi-contractual remedy would arguably not be appropriate, since again, Harrington was an innocent party.

Ask your students to compare the December Case Hypothetical and Ethical Dilemma to an actual case that can be found at http://weblogs.sun-sentinel.com/news/specials/weirdflorida/blog/2009/09/anybody_seen_this_guys_roof_it_1.html. The blog is brief enough to set forth, in its entirety, below:

Anybody seen this guy's roof? It went missing.

SunSentinel.com

David Fischer's vacation was cut short this summer with a phone call from a roofing company representative.

It wasn't good news.

"Oops, we accidentally ripped off your roof," he was told.

The company, Bossler Roofing Incorporated, says it was simply a mistake.

And how.

Instead of doing work on Fisher's 2-story home, the company was supposed to replace the roof on his neighbor's one-story home, two doors down, reports wptv.com

It's not only the mix-up that burns Fisher. It's that two months later his roof still has no tiles.

Now, his insurance company is threatening to cancel his policy if the roof isn't replaced and he claims Bossler refuses to do the work.

Fisher, 76, says, "My feeling is they're just playing games trying to take advantage because I'm an old person."

Bossler wants to give Fischer a new roof. All he'll have to pay is his insurance deductible.

But Fisher isn't compromising. "Finish it! Put the tile on and finish," he demands.

What do you say?

Ask your students to evaluate the ethical and legal outcome of this case. In the opinion of your author, the homeowner owes no ethical or legal obligation to Bossler Roofing Incorporated. From an ethical standpoint, Fisher was away when the roofing company committed the mistake and initiated the work based on the mistake; therefore, he is not ethically obligated to pay anything (not even his insurance deductible.) From a legal standpoint, even though there was no express or implied contract between Fisher (the homeowner) and Bossler Roofing Incorporated, the roofing company still owed Fisher a duty of care, breached that duty of care when they began roofing Fisher's house by mistake, and should therefore be responsible for Fisher's resulting damages, including any insurance deductible. If called upon, a judge should issue the same decree to the roofing company that Fisher has already set forth: "Finish it (the roof)! Put the tile on and finish it!" Either that, or pay an amount of money necessary to restore Fisher to the same position as he was in before, when he actually had a roof! It is also within Bossler's best interests to install the roof at their expense as soon as possible, as Florida does experience inclement weather from time to time, and Bossler could be held responsible for any consequential damages resulting from the exposure of Fisher's property to the elements!

Teaching Tip 2:

During your discussion of the Case Hypothetical and Ethical Dilemma, it would be a good idea to refer students to an article describing the actual case on which it was based. This article, entitled "Cash Found Inside Walls Becomes Nightmare," can be found at www.msnbc.msn.com/id/27608773. As mentioned previously in this newsletter, the case arose out of Cleveland, Ohio. A contractor, Bob Kitts, was tearing the bathroom walls out of an 83-year-old home near Lake Erie in 2006 when he discovered two (2) green metal lockboxes suspended inside a wall, hanging from a wire. Inside were white envelopes with the return address of "P. Dunne News Agency." According to Kitts, "I ripped the corner off of one (of the envelopes). I saw a 50 (dollar bill) and got a little dizzy." He called Amanda Reece, the owner of the home and a former high school classmate who had hired him for a remodeling project. They counted the cash, which totaled $182,000 in Depression-era currency. Reece offered Kitts ten percent (10%) of the cash, Kitts demanded forty percent (40%), and as the article indicates, "from there things went sour."
After finding out about the dispute, twenty-one (21) descendants of Patrick Dunne—the wealthy businessman who stashed the money that was minted in a time of bank collapses and joblessness—sued for the right to the money.

In a deposition relating to the litigation, Reece testified that she spent about $14,000 of the find on a trip to Hawaii, and had sold some of the rare 1920s bills. She also claimed that approximately $60,000 of the money was stolen from a shoe box in her closet, although she never reported the theft to the police.

The outcome of the litigation? No party involved experienced a satisfactory outcome. The court awarded Kitt only a few thousand dollars, and the twenty-one (21) descendants of Patrick Dunn received only a mere fraction of the find. Reece has considered filing for bankruptcy, and a bank recently foreclosed on one of her properties.

After referencing the article and describing the actual case to your students, ask them to consider whether it would have been ethical for Reece (the homeowner) and Kitts (the contractor) to have reached a secretive agreement regarding a division of the currency without notifying the heirs of Patrick Dunn of the discovery. If my presentation of this case in the classroom is any indication, students will be more than willing to offer their opinions! As discussed in the Case Hypothetical and Ethical Dilemma, the three (3) competing factions (the contractor, the homeowner, and the heirs) all have persuasive legal arguments regarding their entitlement to the money: 1) The contractor can argue that he is the finder of abandoned property; 2) The homeowner can argue that she has title to the real estate, and therefore title to anything that is located in or on it; and 3) Patrick Dunn's heirs can argue that the property was never abandoned by their ancestor, as no reasonable person would conclude that anyone of sufficient mental capacity would voluntarily relinquish ownership to $182,000. I suppose if students are completely "above-board" in terms of the ethics question, they will conclude that both the homeowner and the contractor had a good faith obligation to notify anyone with a conceivable claim to the currency. It is worthy to note that their failure to reach an amicable, secretive settlement led to the lack of a satisfactory outcome for both Reece and Kitts.

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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 13, 45 and 49	Chapters 5, 39 and 43	Chapters 48 and 49	Chapters 13, 48 and 49
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 6, 7 and 25	Chapters 4, 21 and 24	Chapter 6	Chapters 6 and 7
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 9, 28 and 48	Chapters 3, 43 and 51	Chapters 23 and 24	Chapters 18, 23 and 24
Barnes et al., Law for Business, 10th Edition	Chapters 9, 34 and 46	Chapters 4, 25 and 29	Chapters 33 and 34	Chapters 9, 33 and 34
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 7, 20, 23 and 31	Chapters 2, 35 and 39	Chapters 21 and 23	Chapters 7, 21 and 23
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 7, 8 and 17	Chapters 6, 14 and 20	Chapter 7	Chapters 7 and 8
McAdams et al., Law, Business & Society, 9th Edition	Chapters 6 and 15	Chapters 5, 8, 9 and 13	Chapter 7	Chapters 6 and 7

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)
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Reed et al., The Legal and Regulatory Environment of Business, 15th Edition, 2010© (007337766X)