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The McGraw-Hill Companies

Proceedings

A monthly newsletter from McGraw-Hill

January 2012 Volume 3, Issue 6

Contents

Dear Professor,

Happy Holidays, everyone! Welcome to McGraw-Hill's January 2012 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 3, Issue 6 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the January 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. An intellectual property dispute between Tootsie Roll Industries and a small business start-up;

2. Judicial rejection of a proposed settlement between the Securities and Exchange Commission (SEC) and Citigroup in a securities-related lawsuit;

3. An intellectual property dispute between Chick-fil-A and a small business start-up;

4. Videos related to a) an insurance fraud lawsuit involving an automobile worth $1 million; and b) the conviction of Dr. Conrad Murray for the death of pop star Michael Jackson;

5. An "ethical dilemma" related to the child molestation scandal surrounding former college football coach Jerry Sandusky, the "Second Mile" charity he founded, and Pennsylvania State University; and

6. "Teaching tips" related to Article 1 ("Tootsie Roll to Footzyrolls: See Ya in Court!"); Article 3 ("Chick-Fil-A Says Artist Bo Muller-Moore's 'Eat More Kale' Slogan Too Similar to 'Eat Mor Chikin'"); and Video 2 ("Lawyer: Murray 'Resigned,' but Fighting Sentence").

I wish everyone a safe and prosperous New Year!

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Of Special Interest

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

1) An intellectual property dispute between Tootsie Roll Industries and a small business start-up;

2) Judicial rejection of a proposed settlement between the Securities and Exchange Commission (SEC) and Citigroup in a securities-related lawsuit ; and

3) An intellectual property dispute between Chick-fil-A and a small business start-up.

Hot Topics in Business Law

Article 1: "Tootsie Roll to Footzyrolls: See Ya in Court!"

http://money.cnn.com/2011/11/18/smallbusiness/tootsie_roll_footzy_roll/index.htm?iid=GM

According to this article, a small footwear company with a cleverly named shoe brand got hit with a trademark lawsuit recently from candy giant Tootsie Roll Industries.

According to the lawsuit filed in federal court in Illinois, Rollashoe, which makes rollable ballet slippers called Footzyrolls, is infringing on the brand name of Chicago-based Tootsie Roll.

Tootsie Roll, which made $521 million in sales last year, alleged that the $2 million Footzyrolls brand will confuse and "deceive" consumers into thinking that the shoes are associated with Tootsie Roll's portfolio of products.

Calling Rollashoe's actions "willful, malicious and fraudulent," Tootsie Roll also claims that Footzyrolls, which launched in 2009, dilute, or tarnish, the value of the Tootsie Roll brand.

The candy maker further alleges that the Footzyrolls name constitutes "copying" and "counterfeiting" of the Tootsie Roll trademark.

Tootsie Roll's suit asks that the Miami Beach, Florida Rollashoe stop using the Footzyrolls name and that the candy maker be compensated by the startup for damages.

Incidentally, the head of the Small Business Administration, Karen Gordon Mills, is the daughter of the founders of Tootsie Roll. Ellen and Melvin Gordon, who have owned most of the candy maker for five decades.

"This lawsuit is completely frivolous and has no merit," Rollashoe owners Sarah Caplan, 28, and Jenifer Caplan, 34, said in a statement. "This is just another example of Tootsie Roll trying to bully a minority-owned women's small business."

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The Caplan sisters founded Rollashoe in early 2009. The idea was sparked by Sarah, whose fondness for wearing high heels was taking a toll on her feet.

"All through college I would carry a large bag with me with an extra pair of comfy shoes to change into when my feet started to burn at the end of the night," said Sarah. "My friends would make fun of me all the time."

She started to ask why no one had thought about making shoes that could conveniently fit into a small handbag.

The sisters incorporated Rollashoe in 2009. The Caplans filed for a trademark with the U.S. Patent and Trademark Office. They debuted the Footzyrolls shoe line at a trade show the same year and landed a sizeable order.

Less than a year later, Footzyrolls became a million-dollar brand featured in Oprah's magazine. The shoes are now sold in Bloomingdales and Fred Segal.

In early 2010, Tootsie Roll's lawyers opposed the Caplans' trademark application at the PTO, citing trademark infringement.

Over the past year and a half, the Caplans said they've spent thousands of dollars in legal fees even as their business has grown and is expected to cross $3 million in sales next year.

Discussion Questions

1. What legal protections are available to a trademark holder?

A trademark holder has the "right of exclusivity," which means the trademark holder can control the use of the trademarked name, term, sign or symbol. If trademark infringement occurs, the trademark holder can file a civil lawsuit seeking: 1) an injunction; and 2) money damages.

An injunction is a court order mandating that the defendant "cease and desist" from violating the plaintiff's intellectual property rights. An injunction is usually temporary at first, pending the outcome of the litigation. If the plaintiff is successful in a trademark infringement lawsuit, the presiding judge will convert the temporary injunction into a permanent one.

Money damages in a trademark infringement lawsuit are based on either 1) profits lost by the plaintiff due to the defendant's violation of the plaintiff's intellectual property rights; or 2) profits gained by the defendant due to the defendant's violation of the plaintiff's intellectual property rights. It is the plaintiff's burden of proof in terms of money damages.

2. In your reasoned opinion, is Footzyrolls in violation of Tootsie Rolls' trademark?

Although this is an opinion question, since the names "Footzyrolls" and "Tootsie Roll" are not identical, a defendant in a trademark infringement lawsuit will be liable if the defendant's name, term, sign or symbol is either identical to or substantially similar to one that is already trademark-protected. Obviously, there is an argument to be made in this case that the names "Footzyrolls" and "Tootsie Roll" are "substantially similar."

3. As the article indicates, Tootsie Roll made $521 million in sales last year, while Footzyrolls made only $2 million. Given the fact that Footzyrolls is a much smaller company, should Tootsie Roll end its lawsuit? Why or why not?

In your author's opinion, the relative sizes of the corporate litigants should have no influence whatsoever on Tootsie Roll's decision to proceed with litigation. A trademark holder has an obligation to police the business environment, determine whether anyone is violating the trademark, and take steps to stop such violation(s). If a trademark holder does not exercise "due diligence" in terms of policing the business environment, the subject name, term, sign or symbol may become generic, part of the "public domain," and freely useable by anyone who chooses to do so. "Thermos," "Raisin Bran," "escalator," and "Frisbee" are a few examples of formerly-trademarked names that became generic terms because the trademark holders did not exercise due diligence in protecting their intellectual property rights.

Article 2: "NYC Judge Rejects $285M SEC-Citigroup Agreement"

http://www.cbsnews.com/8301-505245_162-57332100/nyc-judge-rejects-$285m-sec-citigroup-agreement/?tag=stack

According to the article, a federal judge recently struck down a $285 million settlement that Citigroup reached with the Securities and Exchange Commission (SEC), saying he could not tell whether the deal was fair and criticizing regulators for shielding the public from the details of what the firm did wrong.

U.S. District Judge Jed Rakoff said the public has a right to know what happens in cases that touch on "the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives." In such cases, the SEC has a responsibility to ensure that the truth emerges, he wrote.

Rakoff said he had spent hours trying to assess the settlement but concluded that he had not been given "any proven or admitted facts upon which to exercise even a modest degree of independent judgment." He called the settlement "neither fair, nor reasonable, nor adequate, nor in the public interest."

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The SEC had accused the bank of betting against a complex mortgage investment in 2007 -- making $160 million in the process -- while investors lost millions. The settlement would have imposed penalties on Citigroup even as it allowed the company to deny allegations that it misled investors.

The SEC allowed the consent judgment settling the case to be filed the same day it filed its lawsuit against Citigroup, the judge noted.

"It is harder to discern from the limited information before the court what the SEC is getting from this settlement other than a quick headline," the judge wrote.

"In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers," Rakoff said. "Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the SEC, of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if it fails to do so, this court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances."

According to legal analysts, the rejection doesn't necessarily mean the deal is dead. But it does mean that both sides will have to offer more information, and Citibank may have to admit to more than it was previously willing to admit.

Cohen says this is bad news for Citigroup, which now has to prepare for trial -- Rakoff set a date for July 18 -- or figure out settlement language that satisfies this judge, and it is bad news for the SEC, which will have to work harder in this case and in similar white-collar cases to secure settlements that can withstand judicial scrutiny.

SEC Enforcement Director Robert Khuzami said in a recent statement that Rakoff made too much out of the fact that Citigroup was not required to admit any wrongful conduct in the deal. Khuzami said forcing Citigroup to give up its profits and the imposition of financial penalties and mandatory business reforms outweigh the absence of an admission.

In the civil lawsuit, the SEC said Citigroup Inc. traders discussed the possibility of buying financial instruments to essentially bet on the failure of the mortgage assets. Rating agencies downgraded most of the investments just as many troubled homeowners stopped paying their mortgages in late 2007. That pushed the investment into default and cost its buyers' -- hedge funds and investment managers -- several hundred million dollars in losses.

In November, Rakoff staged a hearing in which he asked lawyers on both sides to defend the settlement.

At the hearing, Rakoff questioned whether freeing Citigroup of any admission of liability could undermine private claims by investors who stand to recover only $95 million in penalties on total losses of $700 million.

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This was not the first time that the judge struck down an SEC settlement with a bank, and he has made no secret of his disdain for settlements between the government agency and banks for paltry sums and no admission of guilt.

"The SEC's longstanding policy -- hallowed by history, but not by reason -- of allowing defendants to enter into consent judgments without admitting or denying the underlying allegations, deprives the court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact," he wrote in Monday's decision.

In 2009, Rakoff rejected a $33 million settlement between the SEC and Bank of America Corp. calling it a breach of "justice and morality." The deal was over civil charges accusing the bank of misleading shareholders when it acquired Merrill Lynch during the height of the financial crisis in 2008 by failing to disclose it was paying up to $5.8 billion in bonuses to employees even as it recorded a $27.6 billion yearly loss.

In February 2010, he approved an amended settlement for over four times the original amount, but was caustic in his comments about the $150 million pact, calling it "half-baked justice at best." He said the court approved it "while shaking its head."

Citigroup's $285 million would represent the largest amount to be paid by a Wall Street firm accused of misleading investors since Goldman Sachs & Co. agreed to pay $550 million to settle similar charges last year. JPMorgan Chase & Co. resolved similar charges in June and paid $153.6 million. All the cases have involved complex investments called collateralized debt obligations. Those are securities that are backed by pools of other assets, such as mortgages.

Rakoff's recent ruling was the latest in a series of setbacks for the SEC under the leadership of Chairman Mary Schapiro. Rakoff has said he doesn't believe the agency has been sufficiently tough in its enforcement deals with Wall Street banks over their conduct prior to the financial crisis.

The SEC told Rakoff recently that $285 million was a fair penalty, which will go to investors harmed by Citigroup's conduct, and that it was close to what the agency would have won in a trial.

Discussion Questions

1. In your reasoned opinion, should a judge have the authority to reject a settlement agreement between litigants? Why or why not?

In your author's opinion, since the judge has the ultimate authority and responsibility to determine whether justice has been served in a case, the judge should have the right to determine whether a settlement promotes the interests of justice. Usually, however, a judge will defer to the litigants in terms of deciding whether the terms of a particular settlement agreement are fair, and approve the settlement agreement presented by the litigants. Keep in mind that if a case is resolved by way of a settlement agreement, that is one less case a court will be required to litigate!

2. The subject settlement involved two (2) relatively sophisticated (i.e., aware of and able to interpret complex issues) parties: the Securities and Exchange Commission (SEC) and Citigroup. Should the relative sophistication of the parties affect judicial willingness to accept a settlement agreement? Why or why not?

Usually, the relative sophistication of the parties will affect judicial willingness to accept a settlement agreement. For example, a judge would be much more likely to accept a settlement agreement between two (2) competent adults than one between an insurance company and a minor (although when a minor is involved in litigation, the court will appoint a guardian to represent and promote the best interests of the child).

In the subject case, the litigants are extremely sophisticated: The Securities and Exchange Commission (SEC) is a federal administrative agency charged with the responsibility of monitoring the issuance and sale of securities (e.g., stock), while Citigroup is a large, multinational corporation. If there were no other factors to consider, the judge should have arguably approved of the settlement agreement based solely on the sophistication of the parties in negotiating favorable settlement terms through the "art of the deal."

3. Aside from the litigants, who else would be affected by the proposed settlement? Should the fact that non-litigants might be affected by a proposed settlement affect judicial decision-making in accepting or rejecting a settlement? Why or why not?

As the article indicates, the judge is concerned about promoting the public interest in this case. In rejecting the settlement agreement, Judge Rakoff was concerned that settlement itself would hide from the public the questionable investment practices Citigroup had engaged in that led to SEC charges and investigation in the first place.

In your author's opinion, the fact that non-litigants might be affected by a proposed settlement should affect judicial decision-making in accepting or rejecting a settlement. Without such consideration, third parties affected by a settlement agreement would have no say in deciding whether a settlement promotes justice.

Article 3: "Chick-Fil-A Says Artist Bo Muller-Moore's 'Eat More Kale' Slogan Too Similar to 'Eat Mor Chikin'"

http://www.huffingtonpost.com/2011/11/28/chick-fil-a-eat-more-kale_n_1116695.html?icid=maing-grid7%7Cmain5%7Cdl1%7Csec1_lnk3%7C116142

According to this article, a folk artist expanding his home business built around the words "eat more kale" says he is ready to fight root-to-feather to protect his phrase from what he sees as an assault by Chick-fil-A, which holds the trademark to the phrase "eat mor chikin."

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Bo Muller-Moore uses a hand silkscreen machine to apply his phrase, which he calls an expression of the benefits of local agriculture, on T-shirts and sweatshirts. But his effort to protect his business from copycats drew the attention of Chick-fil-A, the Atlanta-based fast-food chain that uses ads with images of cows that can't spell displaying their own phrase on message boards.

In a letter, a lawyer for Chick-fil-A said Muller-Moore's effort to expand the use of his "eat more kale" message "is likely to cause confusion of the public and dilutes the distinctiveness of Chick-fil-A's intellectual property and diminishes its value."

Chick-fil-A, which trails only Louisville, Ky.-based KFC in market share in the chicken restaurant chain industry, has a long history of guarding its trademark, and the letter listed 30 examples of attempts by others to co-opt the use of the "eat more" phrase that were withdrawn after Chick-fil-A protested. The October 4 letter ordered Muller-Moore to stop using the phrase and turn over his website, eatmorekale.com, to Chick-fil-A.

Muller-Moore, 38, of Montpelier, says he will not do that.

"Our plan is to not back down. This feels like David versus Goliath. I know what it's like to protect what's yours in business," he said.

So he has enlisted the help of Montpelier lawyer Daniel Richardson and the intellectual property clinic at the University of New Hampshire School of Law's Intellectual Property and Transaction Clinic.

"Bo's is a very different statement. It's more of a philosophical statement about local agriculture and community-supported farmers markets," Richardson said. "At the end of the day, I don't think anyone will step forward and say they bought an `eat more kale' shirt thinking it was a Chick-fil-A product."

Chick-fil-A spokesman Don Perry said the company does not comment on pending legal matters. Muller-Moore, who describes himself as a folk artist who earns a living working as a foster parent for an adult with special needs, said he started using the phrase "eat more kale" in 2000. A farmer friend who grows kale, a leafy vegetable that grows well in Vermont and is known for its nutritional value, asked Muller-Moore to make three T-shirts containing the phrase for his family for $10 each. A few weeks later, the friend told Muller-Moore that people kept asking for the shirts. The phrase helped him get his silkscreen business going, which he later expanded through the Internet. Now, he prints "eat more kale" on hooded sweatshirts too. And he has the words printed on bumper stickers that are common throughout central Vermont.

Five years ago, Muller-Moore said, he received a similar cease-and-desist letter from Chick-fil-A, telling him to stop using the phase. A pro bono lawyer traded a handful of letters with Chick-fil-A on

his behalf. After the letters stopped, Muller-Moore assumed the issue had been decided in his favor and kept making the products.

But as his business grew, Muller-Moore decided to protect the phrase that became his unofficial trademark. He filed an application last summer with the U.S. Patent and Trademark Office to protect "eat more kale." The application is pending.

Vermont Law School professor Oliver Goodenough, who specializes in intellectual and property law, said the kale versus "chikin" fight reminded him of a case two years ago, when a Morrisville microbrewer that makes a beer called "Vermonster" ran afoul of the Monster energy drink company. That case was settled when the makers of Vermonster agreed never to go into the energy drink business.

Goodenough said there was little likelihood consumers would confuse kale with chicken.

"This looks a bit like an example of over-enthusiasm for brand protection," he said. "There are (law) firms in the United States that take this over-enthusiasm for brand protection seriously and believe the more they can scare away the better. If folks aren't deeply committed to this and it's a funny byproduct, maybe they won't fight it."

Discussion Questions

1. In your reasoned opinion, is Bo Muller-Moore in violation of Chick-fil-A's trademark? Why or why not?

Although this is an opinion question, since the sayings "Eat More Kale" and "Eat Mor Chickin" are not identical, a defendant in a trademark infringement lawsuit will be liable if the defendant's name, term, sign or symbol is either identical to or substantially similar to one that is already trademark-protected. Obviously, there is an argument to be made in this case that the sayings "Eat More Kale" and "Eat Mor Chikin" are "substantially similar."

2. Should the fact that Mr. Muller-Moore is a small business owner affect how vigorously Chick-fil-A asserts its trademark rights? Why or why not?

Consistent with the response to Article 1("Tootsie Roll to Footzyrolls: See Ya in Court!"), Discussion Question 3 above, the relative sizes of the corporate litigants should have no influence whatsoever on Chick-fil-A's decision to proceed with litigation. A trademark holder has an obligation to police the business environment, determine whether anyone is violating the trademark, and take steps to stop such violation(s). If a trademark holder does not exercise "due diligence" in terms of police the business environment, the subject name, term, sign or symbol may become generic, part of the "public domain," and freely useable by anyone who chooses to do so. "Thermos," "Raisin Bran," "escalator," and "Frisbee" are a few examples of formerly-

trademarked names that became generic terms because the trademark holders did not exercise due diligence in protecting their intellectual property rights.

3. If a court deems Mr. Muller-Moore to be in violation of Chick-fil-A's trademark, what specific remedies are available to Chick-fil-A?

Chick-fil-A can request a permanent injunction, a court order requiring Mr. Muller-Moore to never use the phrase "Eat More Kale" again. Further, Chick-fil-A can request money damages, either based on profits Chick-fil-A lost due to Mr. Muller-Moore's trademark violation, or profits Mr. Muller-Moore gained while violating Chick-fil-A's trademark. As plaintiff, Chick-fil-A would have the burden of proving monetary damages resulting from Mr. Muller-Moore's trademark violation.

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Video Suggestions

Video 1: "Case of the Drowned Million-Dollar Car to Go to Trial"

http://usnews.msnbc.msn.com/_news/2011/11/30/9123493-case-of-the-drowned-million-dollar-car-to-go-to-trial

Note: In addition to the video presented at the foregoing web site, please also review the following, related article:

"Case of the Drowned Million-Dollar Car to Go to Trial"

Remember the guy who drove that million-dollar car into a Texas swamp a couple of years ago? A jury will have to decide whether he was trying to scam an insurance company to double his money on it.

A video of the incident on YouTube has drawn more than 2.6 million people eager to watch Andy House, an auto dealer in Lufkin, Texas, drive the $1 million French-built Bugatti Veyron — one of only 300 ever made — into a lagoon in LaMarque, near Galveston, in November 2009:

Since then, the insurance company, Philadelphia Indemnity of Bala Cynwyd, Pennsylvania, has sued, claiming insurance fraud, and the federal magistrate's judge hearing the suit has decided he's not qualified to sort out the "quizzical factual circumstances" in the bizarre case.

The insurance company claims House borrowed $1 million from a friend to buy the car and then bought insurance on it as a collector's vehicle, valuing it at more than $2 million. It says he drove it into the swamp to collect the insurance, which was supposed to go to the friend who lent him the purchase money. That man, Lloyd Gillespie, is also a defendant in the suit.

House says he swerved off the road to avoid hitting a pelican, but the insurance company says there's no pelican in the video. Plus, it says it went to the scene and found no skid marks, and it further alleges that House "left the vehicle running for over fifteen minutes while it was submerged until it died on its own causing unnecessary damage to the vehicle's engine."

Both sides asked Judge John R. Froeschner to dismiss the case in their favor on November 10, but he refused in an order filed recently.

"In the humble opinion of this court, this case involves quizzical factual circumstances that compel credibility determinations which this court may not make at the summary judgment stage," he wrote.

No date was set for the trial.

Discussion Questions

1. Although this video depicts only one example of alleged insurance fraud, do you believe that fraud is a significant problem in the insurance industry? If so, what measures should insurance companies take to ameliorate fraud?

Certainly, insurance companies contend that insurance fraud is a significant problem in their industry, and in discussing this video case, students will likely share insurance fraud stories of which they have heard. Insurance companies should (if for no other reason than self-preservation) take steps to lessen the occurrence and impact of insurance fraud, and such steps should include active monitoring and investigation of insurance claims.

2. In your reasoned opinion, does the video conclusively demonstrate insurance fraud?

Although many viewers believe that the video related to this case conclusively demonstrates fraud ("Pelican? What pelican?!), automobile dealer Andy House's attorney will likely attempt to dispel that notion!

3. Is insurance fraud a civil matter or a criminal matter? Explain your response.

Insurance fraud is both a civil matter and a criminal matter. Likely other instances of fraud, those victimized by the fraud have the right to seek money damages from the defendant in civil court, while the government has the right to seek a criminal conviction against the defendant as well. Expressed another way, fraud represents a wrong against the individual victims (a civil wrong), and it also represents a wrong against society as a whole (a criminal wrong.)

Video 2: "Lawyer: Murray 'Resigned," but Fighting Sentence"

http://www.cbsnews.com/8301-500202_162-57333569/lawyer-murray-resigned-but-fighting-sentence/?tag=cbsnewsSectionContent.0

Note: In addition to the video presented at the foregoing web site, please also review the following, related article:

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"Lawyer: Murray 'Resigned,' but Fighting Sentence"

One of Dr. Conrad Murray's defense lawyers, Michael Flanagan, said recently that his client is doing "OK" since he received the maximum sentence -- four years in prison -- for his involuntary manslaughter conviction in the death of pop star Michael Jackson.

"(Murray's) resigned himself to his position and he'll come through it," Flanagan said.

Murray got a stern lecture from the judge in addition to his sentence. In a blistering rebuke, Judge Michael Pastor called Murray's actions a disgrace to his profession, giving Jackson the powerful anesthetic propofol in exchange for $150,000 per month.

"Dr. Murray became involved in a cycle of horrible medicine," said Pastor. "Some may feel this was a medical malpractice case. It wasn't. It was and is a criminal homicide case."

Flanagan deemed Pastor's treatment of Murray "very harsh."

"He acted like it's an intentional act done by Dr. Murray," Flanagan said. "At the best-case scenario or worst-case scenario, depending upon how you're looking at it, it was an unintentional accident."

Discussion Questions

1. Based on your knowledge of the death of Michael Jackson, does the case demonstrate involuntary manslaughter on the part of Jackson's physician, Dr. Conrad Murray? Why or why not?

Involuntary manslaughter involves the death of another person resulting from the defendant's unintentional, but grossly negligent or extremely reckless, actions. In your author's opinion, there is a strong argument that this case does demonstrate involuntary manslaughter on the part of Dr. Conrad Murray, since Dr. Murray administered a highly-dangerous anesthetic, Propofol, in a non-surgical setting (Propofol is typically administered as a surgical anesthetic). Further, there was evidence in this case that after administering the Propofol to Michael Jackson as a sleep agent, Dr. Murray did not monitor his patient. Doctors who administer Propofol to their patients typically closely monitor their patients.

2. As the video and accompanying article indicate, Dr. Murray received the maximum sentence for involuntary manslaughter in California—four (4) years. As between judge and jury, who decides whether a defendant receives the maximum sentence for conviction of a crime? In your reasoned opinion, who should decide criminal sentencing—the trial court judge, or the jury?

Although a jury typically decides the issue of guilt or innocence and makes recommendations to the presiding court judge regarding appropriate sentence length, the judge ultimately decides whether a defendant is to receive the maximum sentence (In establishing "structured sentencing" guidelines,

the legislature typically decides what the potential sentence range is, including minimum and maximum sentencing.)

Opinions will vary in terms of whether the trial court judge or the jury should decide criminal sentencing.

3. Comment on Dr. Murray's prospects of having either his conviction for involuntary manslaughter overturned on appeal, or his prison sentence reduced.

In your author's opinion, Dr. Murray's appellate prospects appear dim in terms of either having his conviction for involuntary manslaughter overturned, or his prison sentence reduced. An appellate court will only overturn a conviction or reduce a sentence if it is convinced that an error of law or an abuse of discretion (power) occurred at the trial court level, and based on your author's opinion, there were no such glaring mistakes at the trial court level. Dr. Murray's conviction and sentence will likely be upheld on appeal.

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Of Special Interest

This section of the newsletter addresses the child molestation scandal surrounding former college football coach Jerry Sandusky, the "Second Mile" charity he founded, and Pennsylvania State University.

Ethical Dilemma

"Sandusky, Penn State Facing First Civil Suit"

http://collegefootballtalk.nbcsports.com/2011/11/30/sandusky-penn-state-facing-first-civil-suit/related/

One of myriad repercussions alleged pedophile Jerry Sandusky specifically and Penn State in general were expected to face as a result of the child-sex abuse scandal that's rocked the school were civil lawsuits.

Recently, both entities began the process of paying the civil piper.

According to multiple media sources, a man identified only as "John Doe A" recently filed a civil lawsuit in the Philadelphia County Court of Common Pleas. In addition to Sandusky and Penn State, the Second Mile, the charity founded by the former Nittany Lions defensive coordinator that was alleged by a grand jury indictment to have served as a recruiting ground for victims, is also named as a defendant.

"John Doe A" is not one of the eight victims identified by a grand jury in their forty-count indictment of Sandusky.

In the suit, it is alleged Sandusky met "John Doe A" in 1992 when the latter was 10 years old "through the Second Mile and recruited, groomed and coerced plaintiff, showering him with gifts, travel and privileges." The alleged victim claims he was sexually abused by Sandusky "over 100 times" from 1992 through 1996 and that the alleged sexual abuse occurred in multiple locations, including "in the facilities of Penn State, particularly the football coach's locker room" and "at facilities out of state connected with a Penn State bowl game."

The suit goes on to state that the "molestation was enabled by the negligent oversight of Sandusky by Second Mile and Penn State."

As a result of the alleged misconduct on the part of Sandusky and alleged negligence on the part of Penn State and the Second Mile, "Plaintiff has suffered, and continues to suffer great pain of mind and body, shock, emotional distress, physical manifestations of emotional distress, embarrassment, loss of self-esteem, disgrace, humiliation" and "demands judgment for compensatory and punitive damages against [the] Defendants…

in an amount in excess of Fifty Thousand Dollars ($50,000), together with interest, costs, and any other appropriate relief."

In addition to the lawsuit, the alleged victim released a statement:

"*I am the man in this lawsuit and I'm writing this statement and taking this action because I don't want other kids to be hurt and abused by Jerry Sandusky or anybody like Penn State to allow people like him to do it—rape kids! I never told anybody what he did to me over 100 times at all kinds of places until the newspapers reported that he had abused other kids and the people at Penn State and Second Mile didn't do the things they should have to protect me and the other kids. I am hurting and have been for a long time because of what happened but feel now even more tormented that I have learned of so many other kids were abused after me. Now that I have told and done something about it I am feeling better and going to get help and work with the police. I want other people who have been hurt to know they can come forward and get help and help protect others in the future."*

Discussion Questions

1. Comment on the Second Mile's potential liability in this case.

Although Second Mile is a non-profit organization, even non-profits have an obligation to exercise due care, and can be liable for negligence if they do not exercise such care. In seeking to hold Second Mile liable for negligence, the plaintiffs will likely argue that Second Mile owed a duty of care to them, and that such duty of care was violated in terms of not properly monitoring Mr. Sandusky's actions. Remember that "negligence" is defined as the failure to do what a reasonable person would do under the same or similar circumstances, and that to prove a negligence case, the plaintiff must establish, by the greater weight of the evidence, the following four (4) elements:

a. The defendant owed the plaintiff a duty of care;
b. The defendant breached said duty of care;
c. The defendant's breach of duty caused the plaintiff harm; and
d. The plaintiff experienced damages (physical, economic, or both) as a result of the defendant's breach of duty.

Ultimately, negligence is a jury question.

2. Comment on Pennsylvania State University's potential liability in this case.

Consistent with the response to Discussion Question Number 1 above, although Pennsylvania State University (Penn State) is a non-profit organization, even non-profits have an obligation to exercise due care, and can be liable for negligence if they do not exercise such care. In seeking to hold Penn State liable for negligence, the plaintiffs will likely argue that the university owed a duty of care to them, and that such duty of care was violated in terms of not properly monitoring Mr. Sandusky's actions. Remember that "negligence" is defined as the failure to do what a reasonable person would

do under the same or similar circumstances, and that to prove a negligence case, the plaintiff must establish, by the greater weight of the evidence, the following four (4) elements:

a. The defendant owed the plaintiff a duty of care;
b. The defendant breached said duty of care;
c. The defendant's breach of duty caused the plaintiff harm; and
d. The plaintiff experienced damages (physical, economic, or both) as a result of the defendant's breach of duty.

Ultimately, negligence is a jury question.

3. Should alleged victims in a case like this be allowed to release comments to the media prior to trial? Why or why not? Should the defendant be allowed to do so? Why or why not?

Answering this question is difficult, since the First Amendment to the United States Constitution promotes and protects free speech. The concern here, however, is that such comments will adversely influence the trial juries that will likely decide the lawsuits filed in this case (barring settlement). With a high-profile case such as this one, publicity (and the comments surrounding such publicity) can cause members of the public, many of whom will be called upon to serve as jurors, to have preconceived notions about guilt or innocence, and liability or non-liability.

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Of Special Interest

This section of the newsletter will assist you in covering:

1) Article 1 ("Tootsie Roll to Footzyrolls: See Ya in Court!");

2) Article 3 ("Chick-Fil-A Says Artist Bo Muller-Moore's 'Eat More Kale' Slogan Too Similar to 'Eat Mor Chikin'"); and

3) Video 2 ("Lawyer: Murray 'Resigned,' but Fighting Sentence").

Teaching Tips

Teaching Tip 1 (Related to Articles 1 and 3):

See the United States Patent and Trademark Office website at **http://www.uspto.gov/**, including the "Trademark Basics" Section at **http://www.uspto.gov/trademarks/basics/index.jsp**

Teaching Tip 2 (Related to Video 2):

See a description of "involuntary manslaughter" at **http://www.shouselaw.com/involuntary_manslaughter.html**

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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 3 and 12	Chapter 7	Chapters 2 and 9	Chapters 7 and 12
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 3 and 6	Chapter 2	Chapters 2 and 5	Chapters 2 and 6
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 2 and 8	Chapter 5	Chapters 4 and 7	Chapters 5 and 8
Barnes et al., Law for Business, 11th Edition	Chapters 2 and 8	Chapter 5	Chapters 3 and 7	Chapters 5 and 8
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 3 and 21	Chapter 5	Chapters 1 and 6	Chapters 5 and 21
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 4 and 11	Chapter 12	Chapters 2 and 10	Chapters 11 and 12
McAdams et al., Law, Business & Society, 9th Edition	Chapters 4 and 16	Chapter 4	Chapters 2 and 7	Chapters 4 and 16
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 4 and 24	Chapter 22	Chapters 5 and 9	Chapters 22 and 24
Bennett-Alexander & Harrison, The Legal, Ethical, and Regulatory Environment of Business in a Diverse Society	Chapters 3 and 15	Chapter 8	Chapters 1 and 6	Chapters 8 and 15

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This Newsletter Supports the Following Business Law Texts

Barnes et al., Law for Business, 10th Edition, 2009© (007352493X)
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition, 2009© (0073524948)
Kubasek et al., Dynamic Business Law, 2009© (0073524913)
Kubasek et al., Dynamic Business Law: The Essentials, 2010© (0073377686)
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition, 2010© (0073377643)
McAdams et al., Law, Business & Society, 9th Edition, 2009© (0073377651)
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition, 2010© (007337766X)
Melvin, The Legal Environment of Business: A Managerial Approach, 2011© (0073377694)