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Proceedings

A monthly newsletter from McGraw-Hill

January 2015 Volume 6, Issue 6

Contents

Dear Professor,

Happy New Year! Welcome to McGraw-Hill's January 2015 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 6, 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 2015 newsletter topics with the various McGraw-Hill business law textbooks.

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

1. The alleged wrongful prosecution of a North Carolina man for child sex offenses;

2. The alleged wrongful prosecution of an Arizona woman for her son's murder;

3. Actor Brad Pitt's dismissal from jury service in Los Angeles;

4. Videos related to a) Bank of America's liability for unfair debt collection practices in a Florida case; and b) England's decision to abandon the use of grand juries in criminal cases;

5. An "ethical dilemma" related to the Virginia Attorney General's fraud and product liability action against Trinity Industries, the maker of a widely-used guardrail system that has been blamed for severe injuries and deaths across the country; and

6. "Teaching tips" related to Video 1 ("Couple Wins $1 M Suit Against Major Bank for 'Outrageous' Robocall Harassment") and Video 2 ("Grand Juries: Why England Got Rid of Them") of the newsletter.

I wish everyone a safe, fulfilling and prosperous 2015!

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Of Special Interest

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

1) The alleged wrongful prosecution of a North Carolina man for child sex offenses;

2) The alleged wrongful prosecution of an Arizona woman for her son's murder; and

3) Actor Brad Pitt's dismissal from jury service in Los Angeles.

Hot Topics in Business Law

Article 1: "Tommy Wall Loses Job, House, Reputation After Police Wrongly Charge Him with Child Rape"

http://www.huffingtonpost.com/2014/12/04/tommy-wall-child-rape_n_6271070.html

According to the article, a North Carolina man says authorities ruined his life when they mistakenly arrested him on child sex charges, which cost him his reputation, his home and his job of 23 years.

"I served my church, was working a career and overnight it was all gone," Tommy Keith Wall said.

Wall, 50, of Willow Spring, was freed from the Harnett County jail on October 30, after more than three months behind bars on charges of first-degree rape of a child, first-degree sex offense against a child and felony conspiracy. His release, according to the dismissal statement, was prompted by further investigation of the case, which revealed the "wrong person" was charged.

"It was horrible," Wall's attorney, Fred Webb, said. "He was charged with one of the most horrible crimes and that can never be recovered from. Not only was he charged, but it was plastered all over the Internet."

The events that led to Wall's arrest were set in motion in early January, when detectives began investigating Bailey Joe Mills, 33, after an exchange of inappropriate Facebook messages with a 12-year-old girl.

Police said they located videos taken by Mills of himself sexually molesting several children between the ages of 1 and 14. Authorities said they found approximately 10,000 images of child pornography on Mills' computers, as well as 100,000 images of child erotica and adult pornography.

Mills, a convicted sex offender, was arrested on charges of first-degree rape of a child, first-degree sexual exploitation of a child, statutory rape of a child, first-degree statutory sex offense and indecent liberties with a child. In August, he pleaded guilty to one count of manufacturing child pornography, for which he is awaiting sentencing.

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Authorities also arrested five other people in the case, including Wall, a Fort Bragg soldier and Mills' wife, Elizabeth Mills.

According to Wall's attorney, authorities claimed to have two videos linking Wall to the case. One was surveillance video of Wall visiting Elizabeth Mills in 2011. Wall's attorney acknowledges his client is the man pictured in that video and said he had visited with Elizabeth Mills after he dropped off a load of lumber for his company.

Authorities told Wall's lawyer that another video showed Wall sexually assaulting a child. Wall denied any involvement, but was arrested based on the supposed child sex video, his attorney said.

Wall sat behind bars for 105 days -- fearing he'd be stabbed or worse the whole time -- before the prosecution played the supposed evidence in court. That was the moment, Wall said, that the sheriff's office and prosecutors realized they had made a big mistake.

"When they did show it, they noticed I was not the man in the video," Wall said. "I have tattoos on my back, the guy in the video did not. The voice was different, the hair was different, the glasses were different, the man had a big mole on his head -- everything was different."

Webb said the first time he was permitted to view the video was in court. He said he was shocked that authorities had not bothered to closely examine it prior to Wall's arrest.

"It was crazy," Webb said. "The detective finally admitted that he was absolutely sure it was not Mr. Wall. Well why didn't he watch it to begin with? You'd think that would be first thing they would do when arresting someone on a charge like that."

Unfortunately for Wall, the damage was already done. At the time of his release from jail, he was homeless, out of work and in debt to creditors he was unable to pay while incarcerated.

"It's a very bad ordeal," said Wall, now living with his mother. "I was involved in the church and youth ministry and all that came to a stop when they arrested me."

Wall said his employer of 23 years has declined to rehire him.

"When I got papers showing I was cleared of everything I sent it to the people in management," he said. "I didn't get a reply from any of them, but I did get a call from human resources saying they didn't have any position for me and good luck with my career."

Despite all he has been through, Wall said he is working hard to put his life back together and hopes to have a new job soon. He said he's considering a lawsuit against the agency that put him behind bars.

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Harnett County District Attorney Vernon Stewart, Sheriff Larry Rollins and lead investigator B.M. Byrd all declined to comment about the case.

Webb said that no matter what happens with a potential lawsuit, money is not the motivating factor.

"It's not about that," said Webb. "The money will not recover his reputation. His reputation is ruined and that's what he's trying to get back."

Discussion Questions

1. In your reasoned opinion, should the police be held individually and/or organizationally responsible for Tommy Keith Wall's wrongful arrest, charge and detention? Why or why not?

This is an opinion question, so student responses may vary. There is no "blanket immunity" for the police in terms of liability for conducting botched investigations, so the police can be held individually and/or organizationally responsible for a suspect's wrongful arrest, charge and detention, especially in cases involving gross negligence, extreme recklessness or deliberate wrongdoing in the investigative process.

2. In your reasoned opinion, should the prosecutor be held individually and/or organizationally responsible for Mr. Wall's wrongful arrest, charge and detention? Why or why not?

This is an opinion question, so student responses may vary. There is no "blanket immunity" for the prosecutor, so the prosecutor can be held individually and/or organizationally responsible for gross negligence, extreme recklessness or deliberate wrongdoing in the prosecutorial process. Usually, however, prosecutor liability is limited to cases involving deliberate wrongdoing. As an example, several years ago, Durham County, North Carolina District Attorney Michael Nifong was held personally responsible for deliberately hiding DNA evidence in the well-known "Duke Lacrosse" case.

3. In your reasoned opinion, should Mr. Wall's former employer be legally required to rehire him? Why or why not? Is Mr. Wall's former employer ethically obligated to rehire him? Why or why not?

Although student opinion may vary in terms of whether Mr. Wall's former employer should be legally required to rehire him, under current law, it has no such obligation. Student opinion may also vary in terms of whether Mr. Wall's former employer has an ethical obligation to rehire him, but as indicated in the article, the former employer claims that it does not have a position available. Whether this is due to Mr. Wall's unfortunate past, and the negative connotation associated with it despite his apparent innocence, is left to supposition.

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Article 2: "Case Tossed Vs. Woman Held 22 Years in Son's Death"

http://www.msn.com/en-us/news/crime/case-tossed-vs-woman-held-22-years-in-sons-death/ar-BBgFevt

According to the article, in a scathing critique of Arizona's criminal justice system, a state appeals court recently ordered the dismissal of murder charges against a woman who spent 22 years on death row for the killing of her 4-year-old son.

The Arizona Court of Appeals leveled harsh criticism against prosecutors over their failure to turn over evidence during Debra Jean Milke's trial about a detective with a long history of misconduct and lying. The court called prosecutors' actions "a severe stain on the Arizona justice system."

A three-judge panel of the appeals court said it agreed with Milke's argument that a retrial would amount to double jeopardy.

The failure to disclose the evidence "calls into question the integrity of the system and was highly prejudicial to Milke," the court wrote. "In these circumstances, which will hopefully remain unique in the history of Arizona law, the most potent constitutional remedy is required."

The court said the charges against Milke in the 1989 death of her son Christopher cannot be refiled, but prosecutors could appeal the ruling to the state Supreme Court.

Authorities say Milke dressed her son in his favorite outfit and told him he was going to see Santa Claus at a mall in December 1989. He was then taken into the desert near Phoenix by two men and shot in the back of the head.

Authorities say Milke's motive was that she did not want the child anymore and did not want him to live with his father.

She was convicted in 1990 and sentenced to death. The case rested largely on her purported confession to Phoenix police Detective Armando Saldate, which he did not record.

Milke, 50, was on death row for two decades, and the Arizona Supreme Court had gone so far as to issue a death warrant for Milke in 1997. The execution was delayed because she had yet to exhaust federal appeals.

The appeals court said it was not expressing an opinion on Milke's guilt or innocence, though it heavily criticized authorities for staking much of their case on a detective with credibility problems.

A federal appeals court threw out Milke's first-degree murder conviction in March 2013, saying prosecutors knew about a history of misconduct by the detective but failed to disclose it. Maricopa County prosecutors were preparing for a retrial.

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Milke's appellate attorney, Lori Voepel, was ecstatic about the victory.

"We're all thrilled," Voepel said. "We still have the gag order so we can't say much more than we're all thrilled with the opinion."

Milke has been free on bail since September 2013 as she awaited retrial.

"This is really a sock in the gut, it's a cheap shot," said Arizona Milke, Christopher's father and Debra Milke's ex-husband. "She shouldn't walk free, because she's guilty."

Maricopa County Attorney Bill Montgomery, whose office is handling the case, said he plans to ask the Arizona Supreme Court to overturn the recent ruling. Montgomery said the accusations of misconduct happened well before he took over as the county's top prosecutor and would not happen today, citing safeguards such as having detectives record interviews with suspects.

Montgomery also said he would not be pursuing the case if he believed the evidence could not lead to a conviction in Christopher's killing.

"He should not be forgotten in all of this. Justice and due process for Christopher is a right that he has, too," Montgomery said. "And it's the job of prosecutors, unfortunately in situations like this, where we have to be the voice of the voiceless."

Milke has maintained her innocence and denied she ever confessed to the killing. The two men who led her child to his death in the desert were convicted of murder but refused to testify against Milke. That left jurors with Saldate's word alone that she told him about her involvement. Saldate has since retired, and the media has made repeated efforts to reach him for comment.

In its ruling overturning Milke's conviction, the 9th U.S. Circuit Court of Appeals cited numerous instances in which Saldate committed misconduct in previous cases, including lying under oath and violating suspects' rights. The federal appeals court also asked the Justice Department to investigate whether Saldate had committed civil rights violations.

Prosecutors insist Milke is guilty, but their ability to try her again was limited by the fact that Saldate said he would not testify. He fears potential federal charges based on the 9th Circuit's accusations of misconduct.

In December, Superior Court Judge Rosa Mroz granted Saldate's request to assert his Fifth Amendment right, allowing him to refuse to take the stand.

The state Court of Appeals overturned that ruling in April and said Saldate would be forced to testify at the retrial. Both county and federal authorities said they do not intend to seek charges against the detective based on any of the accusations leveled by the federal appeals court.

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Milke, whose mother was a German who married a U.S. Air Force military policeman in Berlin in the 1960s, has drawn strong support from citizens of that nation and Switzerland, neither of which has the death penalty.

Milke's mother died in Germany this year after a battle with cancer. A week before the August death, a judge had denied Milke's request for permission to travel to Germany to visit her mother.

Discussion Questions

1. According to the article, the Arizona Court of Appeals agreed with Debra Jean Milke's argument that a retrial would amount to double jeopardy. Do you agree or disagree with the Arizona Court of Appeals' ruling? Explain your response.

The Fifth Amendment to the United States Constitution states that "(n)o person shall be…subject for the same offense to be twice put in jeopardy of life or limb..." This is commonly referred to as the "Double Jeopardy" Clause. Since the Arizona Court of Appeals dismissed the murder charges against Debra Jean Milke, it would appear that a retrial would amount to double jeopardy.

2. As the article indicates, prosecutors can appeal the Arizona Court of Appeals' ruling to the Arizona Supreme Court. In your reasoned opinion, should prosecutors appeal the court of appeals' ruling? What are the prospects of prosecutors prevailing in such an appeal?

This is an opinion question, so student responses will likely vary. In your author's opinion, a prosecutorial appeal to the Arizona Supreme Court would likely be unsuccessful, since the Arizona Court of Appeals' ruling was a discretionary ruling, and since it does not appear that the Court of Appeals abused its discretion in making such a ruling. In order for a ruling to be overturned on appeal, the Arizona Supreme Court would have to conclude that the Arizona Court of Appeals committed either an abuse of discretion or an error of law in reaching its decision. In your author's opinion, the Arizona Court of Appeals committed neither an abuse of discretion nor an error of law in dismissing the murder charges against Debra Jean Milke. Students should understand that disagreeing with a judicial decision does not equate to reversible error on appeal.

3. As the article indicates, Phoenix police Detective Armando Saldate has asserted the United States Constitution's Fifth Amendment privilege against self-incrimination in this case. Give your reasoned opinion as to whether he is entitled to such constitutional protection in this case.

The Fifth Amendment to the United States Constitution states that "No person shall be…compelled in any criminal case to be a witness against himself..." This is known as the "privilege against self-incrimination." In terms of Detective Armando Saldate's assertion of the privilege, it is really quite simple—If Detective Saldate believes that his testimony might serve to incriminate him, he is entitled to assert the constitutional privilege.

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Article 3: "Brad Pitt 'Kicked Out of Jury Service' Because He Would Be 'Too Distracting'"

http://www.mirror.co.uk/3am/celebrity-news/brad-pitt-kicked-out-jury-4835797

According to the article, Brad Pitt was kicked off of jury service recently because his opinion could have influenced other jurors, according to a new report.

The actor arrived at a Los Angeles courtroom recently after receiving his summons, along with other potential jurors, but was reportedly dismissed because he was deemed too much of a distraction for the legal cases because he is such a huge star.

Brad was left disappointed as he was not chosen.

An attorney in the city, William R. Lively, explained jurors are selected using a random process meaning their status as a celebrity is not picked up until they arrive at court.

He said: "Like any other potential juror, Brad would have received a jury summons that required him to travel downtown and be interviewed by the judge or attorneys in what is called voir dire.

"This is a system of examination whereby both the prosecution and defense have the opportunity to object to a particular juror.

"In most cases as soon as it's discovered that a potential juror is a major celebrity, that person is dismissed, but that is not always the case."

Brad, who was attending Unbroken premieres along with his children on behalf of his poorly wife Angelina as she suffers at home from chicken pox.

Lively said that Brad's presence on a jury in a court room would definitely cause some issues.

He told MailOnline: "You just can't stick Brad Pitt in a jury box and expect 11 jurors to ignore him.

"It's only natural that those jurors would be watching to see how Brad reacts to what's being said and that they could be influenced by his opinions once the jury goes behind closed doors to render a verdict."

While a source added: "Brad was hoping he might get picked to serve on a short case, but the problem was, he would actually be required to serve for as long as it took for the case to be decided."

Discussion Questions

1. Describe *voir dire*.

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In American jurisprudence, "voir dire" is the jury selection process. The term is of French origin—"Voir" means "to see," and "dire" means "to say." Voir dire involves both plaintiff and defense counsel, giving the attorneys an opportunity to question prospective jurors in terms of their "fitness to serve." In the American adversarial legal system, "fitness to serve" really means the likelihood of deciding in favor of one's client, so during voir dire, both plaintiff and defense attorneys will attempt to select jurors who are favorable to their particular cause—The plaintiff's attorney will try to select jurors who are most likely to find in favor of the plaintiff, while the defendant's attorney will try to select jurors who are most likely to find in favor of the defendant.

During voir dire, prospective jurors may be excused from the jury in one of two ways:

a. For cause, based on the judge's decision that a prospective juror is not fit to serve; or

b. Plaintiff's or defense counsel's exercise of a peremptory challenge. A peremptory challenge is a trial attorney's right to excuse a prospective juror if the attorney decides the juror is not fit to serve—Both plaintiff and defense counsel are allotted an equal number of peremptory challenges to use during the voir dire process.

2. In your reasoned opinion, should the judge have excused Brad Pitt for cause? Should an attorney involved in the case have excused Mr. Pitt through the exercise of a peremptory challenge? Explain your responses.

These are opinion questions, so student responses may vary. As indicated in response to Article 3, Discussion Question 1 above, during voir dire, a prospective juror may be excused from the jury in one of two ways:

a. For cause, based on the judge's decision that a prospective juror is not fit to serve; or

b. Plaintiff's or defense counsel's exercise of a peremptory challenge.

The article suggests that Mr. Pitt was excused for cause, based on the judge's belief that he would have unduly influenced other jurors and that he would have been too much of a distraction, with the "media circus" surrounding his jury service subverting due process. Even if the judge chose not to dismiss Mr. Pitt for cause, he could have been dismissed through plaintiff's or defense counsel's exercise of a peremptory challenge.

3. The article indicates that Mr. Pitt was disappointed he was not allowed to serve on the jury. Should Mr. Pitt's desire to serve have made a difference in terms of his selection? Why or why not?

Although Mr. Pitt's willingness to serve on the jury and thereby fulfill his civic duty is to be commended, the ultimate question is whether he is fit to serve. As indicated in response to Article 3,

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Discussion Questions 1 and 2 above, a juror's fitness to serve is ultimately a decision for the trial attorneys and the judge to make.

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Video Suggestions

Video 1: "Couple Wins $1M Suit Against Major Bank for 'Outrageous' Robocall Harassment"

http://abcnews.go.com/US/couple-wins-1m-suit-major-bank-outrageous-robocall/story?id=27542208

Note: In addition to the video, please see the following article included at the above-referenced internet address:

According to the article, Bank of America is being forced to hand over more than $1 million to a Florida couple after the bank flooded them with hundreds of loan collection calls for years – the latest example of alleged behavior that has cost the bank tens of millions.

In a complaint filed in July, attorneys for Nelson and Joyce Coniglio said that the couple had been on the receiving end of "patterns of outrageous, abusive and harassing conduct" by a subsidiary of Bank of America that included 700 calls in four years, after the bank said the couple fell behind on mortgage loan payments in 2009. The Coniglios also received "threatening collection letters asserting false and misleading information," the complaint said.

The couple sent multiple letters from legal representation asking the bank to stop, but the calls -- sometimes up to five a day -- continued. The complaint describes automated calls leaving repeated pre-recorded messages.

"If I did what Bank of America did, I'd probably be behind bars," Joyce Coniglio said.

In the end, a Florida judge awarded the couple $1,051,000 -- approximately $1,500 for every call -- in addition to court costs and attorney fees.

"This judgment against Bank of America is an epic win for consumers across the country," Billy Howard, an attorney for the Coniglios said. "It's time to fight back against these 'robo-bullies'."

Bank of America initially declined to comment on the case, but recently released the following statement regarding the Coniglios case:

"Bank of America has helped 2 million homeowners avoid foreclosure. Our calls to the Coniglios were not to collect a debt, but rather to help them avoid

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foreclosure after they fell behind on their mortgage payments in 2009," Bank of America Senior Vice President Dan Frahm said. "Because our calls were not answered and our efforts to help the Coniglios avoid foreclosure were urgent, these calls continued. We are committed to help homeowners in need of assistance avoid foreclosure."

The Coniglios' case was not the first time Bank of America has faced accusations of intense harassment by phone.

In September 2013, the bank paid a record $32 million to settle a class action lawsuit with a reported 7.7 million customers who claimed they were harassed by such “robocalls.” In that case, Bank of America said it denied the allegations but settled to avoid further legal costs.

Complaints have rolled in from both credit card and mortgage loan customers of the bank, including an Indiana man who said that he and his wife received at least 600 calls even though their house was surrendered after his wife filed for bankruptcy.

“They would just constantly call,” said the man, a hospital nurse who did not want his name published due to concerns about harassment.

He said he repeatedly told the bank’s representatives that it was illegal to auto-dial his cell phone, to no avail. “It was almost like they didn’t care,” he said.

An elderly couple in California claims they got 2,000 calls from Bank of America. A woman in Arkansas said she got 350 calls.

Back in 2010, an investigation found that a Texas-based company Bank of America had contracted to make debt collection calls were using racist and obscene language to try to coax debts from customers.

“What’s up, you f---ing n----r?” said one of the collection agents in a message to 32-year-old Allen Jones of Dallas, who at the time owed $81 on his Bank of America credit card.

“This is your f---ing wake up call, man,” the debt collector said in a message left at Jones’ home at 6:30 a.m. Then another call: “You little, lazy ass bitch, get your mother f---ing ass up and go pick some mother f---ing cotton fields, bitch.”

Two days following the investigation report, Bank of America fired the debt collection agency, though the bank said the decision was not related to recent developments.

Discussion Questions

1. As the article indicates, Bank of America Senior Vice President Dan Frahm offered the following comment regarding the case:

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"Bank of America has helped 2 million homeowners avoid foreclosure. Our calls to the Coniglios were not to collect a debt, but rather to help them avoid foreclosure after they fell behind on their mortgage payments in 2009. Because our calls were not answered and our efforts to help the Coniglios avoid foreclosure were urgent, these calls continued. We are committed to help homeowners in need of assistance avoid foreclosure."

Do you accept this comment as justification for Bank of America's actions? Explain your response.

Although student opinions may vary in response to this opinion-based question, the information included in the article does not seem to suggest that Bank of America was "customer-focused" in terms of its collection efforts. If Bank of America (or its subsidiary) made 700 telephone calls to the Coniglios in 4 years, that alone would appear to constitute a violation of the Fair Debt Collection Practices Act (FDCPA).

2. As the article indicates, a Florida judge awarded the Coniglios $1,051,000 -- approximately $1,500 for every call -- in addition to court costs and attorney fees. Based on the facts described, is the award appropriate? Explain your response.

Although student opinions may vary in response to this opinion-based question, in your author's opinion the award is not excessive, especially if the award included punitive damages—Damages designed to punish the defendant for egregious behavior.

3. In the cases described in the article, it was Bank of America's subsidiary or contractor that made the inappropriate calls. Should the use of a subsidiary or contractor immunize Bank of America from liability, or should the company be held responsible for its subsidiary's or contractor's actions? Explain your response.

If Bank of America either knew or should have known that its subsidiary or contractor was making inappropriate calls, or if Bank of America directed its subsidiary or contractor to make such calls, the company is responsible. The use of a subsidiary or contractor does not completely immunize a principal from liability. In situations where the principal directs such actions, the principal can be held liable.

Video 2: "Grand Juries: Why England Got Rid of Them"

http://www.msnbc.com/the-last-word/watch/grand-juries--why-england-got-rid-of-them-373100611509

Discussion Questions

1. What is a grand jury?

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A grand jury is a panel of citizens convened by a court to decide whether it is appropriate for the government to indict (in other words, proceed with a prosecution against) someone suspected of having committed a crime.

At the federal level, the involvement of a grand jury in criminal proceedings is required by the Fifth Amendment to the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury…" At the state level, individual states decide whether to use a grand jury in criminal proceedings, and whether grand jury approval is required for a prosecutor to try a defendant.

2. In your reasoned opinion, should a grand jury have the power to indict (or not indict), or should such a decision rest with the prosecution? Explain your response.

These are opinion questions, so student responses will likely vary. In terms of arguing for the involvement of a grand jury, a grand jury can serve as a "check or balance" on an overly oppressive government or reveal the incompetency or ill intentions of the prosecution. In terms of arguing against the involvement of a grand jury, the prosecutor represents the people and society as a whole, and is arguably in the best position to protect and advance those interests. Even without the involvement of a grand jury, the defendant nevertheless has substantial due process guarantees before trial (pre-trial proceedings aid both the prosecution and the defense in preparing for trial and give the involved parties the opportunity to pursue "plea deal" settlement options), during trial (where the prosecution must prove the defendant's guilt beyond reasonable doubt) and through the appellate process (where the jury verdict will be reviewed to determine whether there was an error of law and/or an abuse of discretion in the jury's rendering of the verdict).

3. In your reasoned opinion, was England wise to abandon the involvement of grand juries in criminal cases? Would you support a similar decision by the United States criminal justice system? Explain your responses.

These are opinion questions, so student responses will likely vary. Please refer to the response to Video 2, Discussion Question 2 for arguments for and against the use of a grand jury.

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Of Special Interest

This section of the newsletter addresses the Virginia Attorney General's fraud and product liability action against Trinity industries, the maker of a widely-used guardrail system that has been blamed for severe injuries and deaths across the country.

Ethical Dilemma

"Virginia Sues Guardrail Maker for Fraud Amid Urgent Safety Tests"

http://abcnews.go.com/US/virginia-sues-guardrail-maker-fraud-amid-urgent-safety/story?id=27544480

Note: In addition to the article, please see the video included at the above-referenced internet address.

According to the article, in an unflinching, scathing complaint containing accusations of fraud and deceit surrounding what he calls a "defective" product, the Virginia Attorney General recently filed a lawsuit against the maker of a widely-used guardrail system that has been blamed for severe injuries and deaths across the country.

Virginia AG Mark Herring said Texas-based Trinity Industries "sold the Commonwealth thousands of unapproved products that had not been properly tested to ensure they would keep motorists safe."

"It is shocking that a company would think they could secretly modify a safety device in a way that may actually pose a threat to Virginia motorists," Herring said in a statement.

Herring was referring to several modifications made to the end of Trinity's guardrail system, at a piece called the end terminal, in 2005 -- changes that were not disclosed to federal or state transportation officials until years later. The modified version of the guardrail end terminal, called the ET-Plus, was the subject of an investigation that looked into gruesome injuries and deaths that critics blamed on the modified guardrail.

The critics, including accident survivors, allege that the modifications can cause the guardrails to "lock up" when hit from the front with a vehicle. Rather than ribboning out as designed, the guardrail instead spears straight through the vehicle, severing limbs or even killing the vehicle's occupants.

The media obtained an internal Trinity e-mail in which a Trinity official estimated that making one of the 2005 modifications -- reducing a piece of metal in the end terminal from five inches to four -- would save the company $2 per end terminal, or $50,000 a year.

"The undisclosed modifications to the old ET-PLUS were not harmless improvements or enhancements," the 18-page Virginia complaint reads.

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"Many accidents involving the modified ET-PLUS units have resulted in serious injuries and fatalities, when the ET-PLUS units malfunctioned. This loss of life and limb did not occur before Trinity made the undisclosed modifications."

Earlier this year a federal case against Trinity brought by a competitor of the guardrail company. In that case, Trinity was found by a jury to have defrauded the government on similar grounds as Herring's, and was ordered to pay $175 million, a figure expected to triple by statutory mandate. Both sides have been ordered into mediation before the end of the year.

The Virginia complaint also slams the company for not disclosing five crash tests in 2005-2006 in which the ET-Plus fails each time, including spearing the vehicle or flipping it over.

Trinity has said that those tests were performed on an "experimental" guardrail system, and therefore the results did not require disclosure to the government. The company also has maintained that the modified guardrails on the roads are safe and said that ongoing safety tests, ordered by the federal government the Texas decision, will prove it.

The state is seeking damages to cover the cost of removing and replacing every modified ET-Plus currently installed on Virginia roads as well as penalties.

"Trinity ... made millions in revenue from this defective, unapproved and improperly tested product at the expense of Virginia and her taxpayers," the complaint reads. "[Virginia Department of Transportation] is preparing a contingency plan to identify and replace these products if necessary and appropriate testing and analysis shows them to be unsafe. If any replacements must occur, we're going to make sure that Trinity, not Virginia taxpayers, pay the bill."

Trinity flatly denied it had committed fraud against the state.

"We are surprised and deeply disappointed the Commonwealth of Virginia chose the lawsuit path," a statement from Trinity said. "We are in the process of conducting the eight tests requested by the FHWA, which includes the two tests specifically requested by Virginia. We have given them all the data they have requested. We will continue to work with them. We will defend ourselves fully against these allegations."

Virginia was the first state to announce it would be removing the ET-Plus from its roadways, contingent on new information about the guardrail system, and a spokesperson for VDOT said it has called for contracting bids to potentially replace the devices. The bid process is expected to take through the end of January, with the intent of replacing end terminals found on the state's high-speed highways first.

The Virginia action was announced the day after long-awaited crash tests got underway in San Antonio.

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Eight crash tests of the modified, 4-inch ET-Plus, were requested by the Federal Highway Administration after the verdict in the federal whistleblower case and a growing number of states announcing they would no longer install the end terminal on highways. Currently, more than 40 states have halted use of the 4-inch ET-Plus, many waiting until results of the crash tests are released.

A test in which a pickup truck hits the end of the guardrail at a fifteen degree angle at 62 miles per hour, was conducted with a group of observers from federal and state transportation departments. Observers were kept at a distance of about 150 yards from the test guardrail. Upon impact, the end of the guardrail folded to the side, allowing the truck to continue on, parallel to the guardrail, before coming to a stop at a tree nearby.

An FHWA observer briefing the media afterward said the ET-Plus appeared to have performed as expected, saying "nothing remarkable" occurred and that it "looked like it passed and moved exactly as you expect it to."

"We will still have to wait for all of the results to come back in," said Tony Furst, Associate Administrator for Safety at the FHWA. "We're not going to make any conclusions or base any determinations just on the visual data itself."

Furst was also pressed about why the dimensions of the ET-Plus units being tested have not been disclosed to the public. The media was denied access to the end terminals in order to measure them and requests to see the units closely before testing were also turned down.

Although the crash tests have been shrouded in secrecy - amid high security and a requirement that the limited number of observers shed all cell phones or any recording devices - a local news helicopter still managed to capture the fifteen-second test from above, giving the public a long-awaited view of the infamous ET-Plus in action.

Discussion Questions

1. As the article indicates, the Virginia Attorney General recently filed a lawsuit against Trinity Industries for its widely-used guardrail system that has been blamed for severe injuries and deaths across the country. Does the attorney general have standing to sue in such a situation? Why not instead require persons harmed by the guardrail system to sue in an individual capacity or on a class-action basis?

In terms of violation of federal and state consumer protection laws, the Attorney General of the United States and/or state attorneys general have standing to sue for violations of such laws. An action by an attorney general is essentially a collective action on behalf of the people for a defendant's harm to society as a whole. In addition to actions by the Attorney General of the United States and state attorneys general, persons harmed by a defendant for the manufacture and/or sale of

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a defective product have the right to sue the defendant, in an individual capacity or on a class-action basis, for violation of consumer protection law(s).

2. As the article indicates, the media obtained an internal Trinity e-mail in which a Trinity official estimated that making one of the 2005 guardrail modifications -- reducing a piece of metal in the end terminal from five inches to four -- would save the company $2 per end terminal, or $50,000 a year. Comment on the evidentiary value of this e-mail in establishing a product defect in the guardrail system.

If a jury should determine that reducing a piece of metal in the guardrail end terminal from five inches to four made the guardrail defective, this can be damning evidence against the defendant Trinity Industries, particularly since the evidence suggests that the modification was a cost-saving decision. In litigation, a plaintiff's attorney could suggest that Trinity Industries was willing to imperil human life merely to save money.

3. As the article indicates, in a 2014 federal case against Trinity brought by a competitor of the guardrail company, Trinity was found by a jury to have defrauded the government under similar circumstances and was ordered to pay $175 million. Why does a competitor have standing to sue in such a case?

In order to have "standing" to sue, a plaintiff must establish that he/she/it was adversely affected by the wrongful actions of the defendant. If Trinity's competitor can establish that it lost federal government contracts due to Trinity's alleged nondisclosures/misrepresentations, the competitor would have standing to sue Trinity.

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Of Special Interest

This section of the newsletter will assist you in addressing Video 1 ("Couple Wins $1 M Suit Against Major Bank for 'Outrageous' Robocall Harassment") and Video 2 ("Grand Juries: Why England Got Rid of Them") of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Video 1—"Couple Wins $1M Suit Against Major Bank for 'Outrageous' Robocall Harassment")

For consumer information regarding debt collection and the Fair Debt Collection Practices Act (FDCPA), please reference the following Federal Trade Commission (FTC) internet address:

http://www.consumer.ftc.gov/articles/0149-debt-collection

Teaching Tip 1 (Related to Video 2—"Grand Juries: Why England Got Rid of Them")

Reference the following internet address maintained by the National Center for State Courts (NCSC) for a "Grand Juries Resource Guide," including links to several online resources related to the use, powers and responsibilities of federal and state grand juries:

http://www.ncsc.org/Topics/Jury/Grand-Juries/Resource-Guide.aspx

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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 7	Chapters 7 and 45	Chapters 2 and 45	Chapters 7 and 45
Kubasek et al., Dynamic Business Law: Summarized Cases	Chapters 3 and 7	Chapters 7 and 45	Chapters 2 and 45	Chapters 7 and 45
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 2 and 5	Chapters 5 and 25	Chapters 1 and 25	Chapters 5 and 25
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment	Chapters 2 and 5	Chapters 5 and 48	Chapters 4 and 48	Chapters 5 and 48
Barnes et al., Law for Business	Chapters 2 and 5	Chapters 5 and 46	Chapters 3 and 46	Chapters 5 and 46
Brown et al., Business Law with UCC Applications	Chapters 3 and 5	Chapters 5 and 15	Chapters 1 and 15	Chapters 5 and 15
Reed et al., The Legal and Regulatory Environment of Business	Chapters 4 and 13	Chapters 13 and 18	Chapters 2 and 18	Chapters 13 and 18
McAdams et al., Law, Business & Society	Chapter 4	Chapters 4 and 15	Chapters 2 and 15	Chapters 4 and 15
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 3 and 23	Chapters 22 and 23	Chapters 5 and 22	Chapters 22 and 23
Bennett-Alexander & Harrison, The Legal, Ethical, and Regulatory Environment of Business in a Diverse Society	Chapters 3 and 8	Chapter 8	Chapter 1	Chapter 8

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This Newsletter Supports the Following Business Law Texts:

Barnes et al., Law for Business, 12th Edition 2015© (0078023815)
Bennett-Alexander et al., The Legal Environment of Business in A Diverse Society, 1st Edition 2012© (0073524921)
Brown et al., Business Law with UCC Applications Student Edition, 13th Edition 2013© (0073524956)
Kubasek et al., Dynamic Business Law, 3rd Edition 2015© (0078023785)
Kubasek et al., Dynamic Business Law: The Essentials, 2nd Edition 2013© (0073524972)
Kubasek et al., Dynamic Business Law: Summarized Cases, 1st Edition 2013© (0078023777)
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 15th Edition 2013© (0073377643)
Melvin, The Legal Environment of Business: A Managerial Approach, 2nd edition 2015© (0078023807)
McAdams et al., Law, Business & Society, 10th Edition 2012© (0073525006)
Reed et al., The Legal and Regulatory Environment of Business, 16th Edition 2013© (0073524999)