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Proceedings

A monthly newsletter from McGraw-Hill

March 2010 Volume 1, Issue 8

Contents

Dear Professor,

Welcome to McGraw-Hill's March issue of *Proceedings*, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 1, Issue 8 of *Proceedings* follows the same format as previous editions of the newsletter, incorporating "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the March 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 United States Supreme Court's decision in Citizens United v. Federal Election Commission, addressing political spending by corporations (and other entities) in candidate elections;

2. Johnson & Johnson's most recent product recall of "over-the-counter" medications;

3. Two (2) alleged medical malpractice cases arising in Minnesota;

4. Videos related to a) entertainer and political commentator Rush Limbaugh's comments regarding United States relief efforts in response to the Haiti earthquake; and b) President Obama's proposal to impose a "TARP"-related fee on fifty (50) of the nation's largest financial institutions;

5. An "ethical dilemma" related to the propriety of a "non-compete" agreement in an employer-employee relationship; and

6. "Teaching tips" related to a) the application of the First Amendment to the United States Constitution to the comments of entertainer and political commentator Rush Limbaugh and his radio show; and b) "non-compete" agreements and the employer-employee relationship.

May the sun of spring shine on you soon!

Jeffrey D. Penley, J.D.
Catawba Valley Community College
Hickory, North Carolina

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Of Special Interest

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

1) The United States Supreme Court's decision in Citizens United v. Federal Election Commission regarding corporate political spending in election campaigns;

2) Johnson & Johnson's most recent product recall of over-the-counter medications; and

3) Two (2) cases of alleged medical malpractice arising in Minnesota.

Hot Topics in Business Law

Article 1: "Justices, 5-4, Reject Corporate Spending Limit"

http://www.nytimes.com/2010/01/22/us/politics/22scotus.html

This article indicates that on Thursday, January 21, 2010, a bitterly divided United States Supreme Court ruled in Citizens United v. Federal Election Commission (No. 08-205) that the government may not ban political spending by corporations in candidate elections. According to the majority, the 5-to-4 decision was a vindication of the First Amendment to the United States Constitution's most basic free speech principle—that the government has no business regulating political speech. According to the dissenting justices, allowing corporate money to flood the political "marketplace" would corrupt democracy.

The ruling represents a sharp doctrinal shift, and it will have major political and practical consequences. The decision effectively overrules two (2) important precedents about the First Amendment rights of corporations: 1) Austin v. Michigan Chamber of Commerce, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates, and 2) McConnell v. Federal Election Commission, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act (more commonly referred to as "McCain-Feingold") that restricted campaign spending by corporations and unions. McCain-Feingold had banned the broadcast, cable or satellite transmission of "electioneering communications" paid for by corporations or labor unions from their general funds in the thirty (30) days before a presidential primary and in the sixty (60) days before the general election. Specialists in campaign finance law said they expect the decision to reshape the way elections are conducted. The decision will be felt most immediately in the coming 2010 midterm elections, given that it comes just two (2) days after Democrats lost a filibuster-proof majority in the United States Senate, and as popular discontent over government bailouts and corporate bonuses continues to boil.

President Obama called the decision "a major victory for big oil, Wall Street Banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."

In justifying the decision, Justice Anthony M. Kennedy, who wrote for the majority, stated "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging

in political speech." Writing for the dissent, Justice John Paul Stevens said the majority had committed a grave error in treating corporate speech the same as that of human beings.

Eight (8) of the justices did agree that Congress can require corporations to disclose their spending and to run disclaimers with their advertisements, at least in the absence of proof of threats or reprisals. According to Justice Kennedy, "Disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way." Justice Clarence Thomas dissented on this point.

The majority opinion did not disturb bans on direct contributions to candidates, but the majority and dissenting sides of the court disagreed whether independent expenditures came close to amounting to the same thing as direct contributions to candidates. According to Justice Stevens, "The difference between selling a vote and selling access is a matter of degree, not kind, (a)nd selling access is not qualitatively different from giving special preference to those who spent money on one's behalf." In Justice Kennedy's view, "by definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."

The case originated from a documentary called "Hillary: The Movie," a ninety-minute presentation of caustic political commentary and advocacy journalism. It was produced by Citizens United, a conservative nonprofit corporation, and was released during the Democratic presidential primaries in 2008. Citizens United lost a suit that year against the Federal Election Commission, and abandoned plans to show the film on a cable video-on-demand service and to broadcast television advertisements for it. The film was shown in theaters in six (6) cities, and it remains available on DVD and the Internet.

The majority cited a number of decisions recognizing the First Amendment rights of corporations, and Justice Stevens acknowledged that "we have long since held that corporations are covered by the First Amendment." But Justice Stevens defended the restrictions struck down by the majority decision as modest and sensible. Even before the decision, he said, corporations could act through their political action committees or outside specified time windows.

The McCain-Feingold law contains an exception for broadcast news reports, commentaries and editorials. But according to Chief Justice John Roberts, in a concurrence joined by Justice Samuel Alito, that is "simply a matter of legislative grace."

Justice Kennedy's majority opinion said that there was no principled way to distinguish between media corporations and other corporations and that the dissent's theory would allow Congress to suppress political speech in newspapers, on television news programs, in books and on blogs. Justice Stevens responded that people who invest in media corporations know "that media outlets may seek to influence elections." He added that lawmakers might now want to consider requiring corporations to disclose how they intend to spend shareholders' money or put such spending to a shareholder vote.
According to Justice Kennedy, writing for the majority, "When a government seeks to use its full power, including the criminal law, to command where a person may get his or her information or

what distrusted source he or she may not hear, it uses censorship to control thought. "This is unlawful. The First Amendment confirms the freedom to think for ourselves."

Discussion Questions

1. In your reasoned opinion, is corporate speech equivalent to individual speech, and therefore worthy of the same First Amendment free speech protection? Why or why not? When they drafted the First Amendment to the United States Constitution, do you believe our founding fathers intended for corporate speech to be given the same free speech protection to which individuals are entitled?

Student opinions will likely vary in response to the question of whether corporate speech is equivalent to individual speech, and therefore worthy of the same First Amendment free speech protection. The first ten (10) amendments to the United States Constitution, collectively known as the Bill of Rights, include numerous references to the rights of "the people," so it may seem a bit of a "stretch" to extend the rights of "the people" to artificial entities like corporations. In defense of corporate free speech, one could argue that corporations are representative of the people who fall within their "sphere of influence," including stakeholders such as employees, stockholders, suppliers and the like. Carrying that argument a step further, a corporation could argue that its "voice" represents its stakeholders.

It is difficult to argue that our founding fathers intended for corporate speech to be given the same free speech protection to which individuals are entitled. Your author is not aware of any documented history concerning the desires of our founding fathers to extend free speech protection to corporations. Historically, commercial speech has been afforded less protection than individual speech. The United States Supreme Court's decision in Citizens United v. Federal Election Commission may represent a new trend toward the protection and advancement of corporate free speech in America.

2. As indicated in the article description, President Barack Obama reacted to the Citizens United v. Federal Election Commission ruling by stating that the decision was "a major victory for big oil, Wall Street Banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans." Evaluate President Obama's reaction to the United States Supreme Court ruling.

Student views regarding President Obama's reaction to Citizens United v. Federal Election Commission will likely be influenced by their personal political views, opinions and ideologies. The president does have the power and privilege to use the "bully pulpit" (the office of the presidency) to influence and/or respond to decision-making by the judicial and legislative branches of government. This executive power is part of our overall "checks and balances" system of government.

3. In an interview soon after the Citizens United v. Federal Election Commission decision, former Republican presidential candidate and United States Speaker of the House Newt Gingrich called the ruling, in essence, a victory for the middle class. Evaluate Mr. Gingrich's interpretation of the

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decision. (For reference, see Mr. Gingrich's January 21, 2010 interview with National Public Radio host Madeleine Brand at http://www.npr.org/templates/story/story.php?storyId=122823118.)

Citizens United v. Federal Election Commission not only "unleashes the shackles" of campaign advertising spending limits for corporations, but it also does the same for "grass roots" organizations and unions. Nevertheless, it is difficult for your author to imagine "grass roots" organizations, or even unions, being able to match the financial power of big oil, Wall Street Banks, health insurance companies and other powerful corporate interests. It would appear that in light of the Citizens United v. Federal Election Commission case, if "Mom and Pop" decide to go "head to head" against big oil, Wall Street Banks, health insurance companies and/or other powerful corporate interests, "Mom and Pop" will, in all likelihood, lose. In terms of unions, union membership as a percentage of the overall workforce population is at an all-time low in modern history, so it is hard to imagine even unions having the financial wherewithal to be able to match campaign spending by corporations. Exxon Mobil generated over $40 billion in profit in 2007 alone.

Article 2: "Tylenol Expands Recall Due to Moldy Smell, Some Users Sickened by Unusual Odor"

http://www.msnbc.msn.com/id/34877367/ns/health-more_health_news/?ns=health-more_health_news

This article indicates that pharmaceutical manufacturer Johnson & Johnson has expanded a recall of over-the-counter medications on January 15, 2010, the second time it has done so in less than a month because of a moldy smell that has made users sick. The broadening recall now includes some batches of Tylenol caplets, geltabs, arthritis treatments, rapid release, and extended relief Tylenol, as well as Motrin IB, regular and extra strength Rolaids antacids, Benadryl allergy tablets, St. Joseph aspirin, and Simply Sleep caplets.

Recently, the company's McNeil Consumer Healthcare Products expanded its recall to include Tylenol Arthritis Caplets. McNeil said the larger recall includes product lots that could be affected by the same problems of nausea, even though it has not received any reports from consumers. A full list of the recalled products is online at http://www.mcneilproductrecall.com/.

The latest recall applies to products sold in the Americas, the United Arab Emirates, and Fiji.

Johnson & Johnson recalled some Tylenol Arthritis Caplets in November and December 2009 due to the smell, which caused nausea, stomach pain, vomiting and diarrhea.

Johnson & Johnson says the smell is caused by small amounts of a chemical associated with the treatment of wooden pallets.

The company said it is investigating the issue and will stop shipping products with the same materials on wooden pallets. It has asked suppliers to do so as well.

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Discussion Questions

1. In your reasoned opinion, is Johnson and Johnson engaged in the above-referenced product recall because of a self-imposed ethical obligation, or for some other reason(s)?

Basic ethical principles would guide any corporation, including Johnson and Johnson, to engage in a voluntary recall of its product if there is any credible indication of a product defect. Obviously, Johnson and Johnson has commissioned the recall in order to reduce the prospects of consumer harm. In all likelihood, there is a secondary motive behind the recall, and that is to avoid legal exposure for defective products. In the opinion of your author, both motives are valid reasons for engaging in the recall, and other businesses engaged in the distribution and sales of consumer products should use the Johnson and Johnson response as a "template" for how to react in similar situations; namely, they should act as quickly as possible in the best interests of their consumers, and in their own best interests as well.

2. For those consumers who allegedly became nauseous from use of the subject pharmaceuticals, should those consumers be allowed (legally) to pursue their claims, even without additional proof of harm or loss? Why or why not?

In most jurisdictions, consumers can recover money damages for the emotional distress associated with exposure to a defective product, even if physical injuries are minimal, or even if physical injuries are non-existent. From the standpoint of legal strategy, it is always better for a plaintiff to introduce evidence of physical harm along with emotional distress; the accompanying physical harm would serve to increase the likelihood of a substantial jury verdict. Obviously, the severity of the harm (mental and/or physical), as well as the appropriate amount of money damages, would be questions for a jury to decide. In a product liability action, the plaintiff would have to decide whether to pursue an individual claim (by filing a personal lawsuit against the defendant), or whether to join together with other plaintiffs having similar claims, in the form of a class action.

3. Strict product liability is a theory of liability that allows a plaintiff to recover without proof of fault; i.e., without proof of the defendant's negligence or proof of the defendant's intent to harm. In your opinion, do the facts presented above establish a good case for strict product liability? Why or why not? Do the facts establish a good case for negligence? The doctrine of res ipsa loquitur ("the thing speaks for itself") would allow a plaintiff to establish a prima facie ("on its face") case of negligence, and thereby get to the jury, merely by introducing factual evidence that would not ordinarily occur without the defendant having committed negligence. In your opinion, do the facts presented above establish a "prima facie" case of negligence? Put another way, does the fact that Johnson and Johnson distributed over-the-counter medications with a moldy smell that made users sick establish negligence?

Based on the evidence available as of the publication of this newsletter, it would appear that a plaintiff would have a legitimate case against Johnson and Johnson on both theories of strict product liability and negligence. For those jurisdictions that recognize strict product liability, a

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plaintiff would be able to present a "prima facie" case simply by demonstrating that 1) the product was defective and 2) the plaintiff was harmed. The fact that the product smelled moldy would appear to be strong enough evidence of a defect. In terms of harm, as mentioned in response to Discussion Question 2 above, emotional distress is sufficient in and of itself to establish harm.

This also appears to be a good case to allege negligence and application of the res ipsa loquitur doctrine. Generally speaking, a product would not smell moldy if the defendant had exercised due care in the product's manufacture, storage and distribution. Obviously, negligence is a jury question to be resolved based on the unique facts and circumstances of each case.

Article 3: "Doctor Disciplined For Removing Wrong Kidney"

http://www.huffingtonpost.com/2010/01/17/erol-uke-doctor-disciplin_n_426310.html?view=screen

According to this article, a urologist has been indefinitely barred from inpatient surgery for removing the wrong kidney of one patient and taking a biopsy from another's patient's pancreas instead of a kidney. Dr. Erol Uke has signed the disciplinary ruling from the Minnesota Board of Medical Practice, agreeing that his actions justify the board's discipline.

The ruling states Dr. Uke could regain surgical privileges if the board later determines he is competent to do so.

The (Minneapolis-St. Paul) Star Tribune reported the ruling did not indicate where the errors happened, just that Uke removed the wrong kidney in March 2008 and performed the erroneous biopsy about four (4) months later.

Discussion Questions

1. In your reasoned opinion, are professional malpractice matters such as those described in the article summary best left to "profession-specific" regulatory authorities (in this case, organizations such as the Minnesota Board of Medical Practice, the Minnesota Medical Association, and the American Medical Association), or should cases like this be addressed in a court of law as well? Explain your answer.

Although regulatory authorities like the Minnesota Board of Medical Practice, the Minnesota Medical Association and the American Medical Association have the responsibility and authority to decide whether a health care provider should be allowed to continue to practice (and if so, what the limitations regarding continued practice should be), a court of law is indispensable in terms of deciding whether a health care provider should be held monetarily responsible for a patient's harm. In the opinion of your author, the legal system complements the professional regulatory authorities in terms of holding health care practitioners responsible for malpractice, and is an

indispensable part of truly administering justice in a medical malpractice case. With regard to medical malpractice, suspension or loss of license is not enough.

2. In light of this article, are you more or less inclined to support medical malpractice tort reform such as capping pain and suffering damages due to medical malpractice at $250,000? Explain your answer.

This article would seem to persuasively indicate that capping pain and suffering damages due to medical malpractice at $250,000 is an overly simplistic, "cookie cutter" way to address medical malpractice. Ask your students whether a $250,000 cap on pain and suffering damages would adequately compensate plaintiff-patients in all cases. Is $250,000 enough for pain and suffering if a patient's leg is amputated in error as a result of a record-keeping mistake? Is $250,000 enough for pain and suffering if a patient receives an incorrect (wrong type) blood transfusion on the operating table, resulting in the plaintiff's persistent (and permanent) vegetative state?

3. Focus on the two (2) instances of alleged malpractice described in the article, removing the wrong kidney and taking a biopsy from the wrong organ. Evaluate the plaintiff's prospects of winning these cases at trial, and give your estimate as to the value of such cases in terms of money damages.

Based on the brief facts presented, both plaintiffs have excellent prospects of recovering at trial. Both cases seem to demonstrate medical malpractice and application of the "res ipsa loquitur" doctrine (in other words, evidence that the wrong kidney was removed or that the wrong organ was biopsied would appear to indicate "in and of itself" that negligence occurred.) As far as damages, more information would be needed. For example, in each case, did the plaintiff die as a result? If the plaintiff lived, will the plaintiff ever be able to work again? If the plaintiff lived, will the plaintiff be in need of lifetime medical care as a result? The amount of money damages recoverable in each case would be a matter for the jury to determine.

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Video Suggestions

Video 1: "Rush Limbaugh—Haiti Earthquake"

http://www.youtube.com/watch?v=8mdx_eSDSM0

Purpose of video: To discuss the free speech protections afforded controversial radio entertainer and political commentator Rush Limbaugh, whether his speech is subject to reasonable "time, place and manner" restrictions, and if so, what those restrictions should be

Discussion Questions

1. Rush Limbaugh is a highly controversial entertainer and political commentator whose "AM" radio program airs three (3) hours per day, five (5) hours per week. His "stock in trade" is partisan criticism of the Democratic Party (with a particular emphasis on President Barack Obama, Speaker of the House Nancy Pelosi, and Senate Majority Leader Harry Reid) for most of each three-hour program. Limbaugh has come under heated criticism lately for his comments regarding the devastating earthquake in Haiti, particularly his expressed beliefs that President Obama is using the disaster for political gain, and that United States citizens should not be particularly concerned about donating to the Haitian relief efforts, since our tax dollars already make their way to that country in the form of foreign aid.

Are Limbaugh's comments fully protected by the First Amendment to the United States Constitution? Is he entitled to unrestricted access to the public airwaves, or is his speech subject to reasonable "time, place and manner restrictions?" Would any restriction on his speech represent censorship?

Limbaugh's best argument for First Amendment (free speech) protection would be that his comments represent political speech. Historically, political speech has received the greatest amount of constitutional protection through judicial interpretation and application of the First Amendment.

2. Consider two (2) following hypothetical examples of "time, place and manner" restrictions on Limbaugh:

a. Require Limbaugh to entertain debate and discussion of political issues on his show by allowing individuals sufficient opportunities to present competing views, thereby allowing listeners to make rational decisions, through critical analysis, regarding government policy; and

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b. Require Limbaugh to transfer his show from the public airwaves to satellite radio (for example, Sirius satellite radio), giving his listeners the continued opportunity to hear him by paying a satellite radio subscription fee (Consider the example of "shock jock" Howard Stern, who transferred his controversial radio program from the public airwaves to satellite radio in response to pressures from the Federal Communications Commission and the public-at-large).

Would either or both of the above examples serve as reasonable "time, place and manner restrictions" on Limbaugh? If so, why? If not, why not?

In response to Discussion Question 2(a) above, The Fairness Doctrine was a policy of the United States Federal Communications Commission (FCC), introduced in 1949, that required the holders of broadcast licenses both to present controversial issues of public importance and to do so in a manner that was (in the Commission's view) honest, equitable and balanced. In 1987, the FCC abolished the Fairness Doctrine, prompting some to urge its reintroduction through either Commission policy or Congressional legislation. In the opinion of your author, Limbaugh could not be required to make a committed effort to entertain competing political views on his radio show unless The Fairness Doctrine were reinstituted through legislative and/or judicial action.

In response to Discussion Question 2(b) above, Limbaugh could not be required to transfer his show from the public airwaves to satellite radio, because he is not currently violating federal law. In the opinion of your author, the government could require Limbaugh to transfer his show from the public airwaves to satellite radio only if 1) The Fairness Doctrine (or some modern variation of it) is reinstated; and 2) after re-enactment, Limbaugh fails to adhere to The Fairness Doctrine by failing to seriously entertain competing political views on his radio show.

Although there has been some "chatter" (especially in academic circles) about reinstituting The Fairness Doctrine, your author is not aware of any serious congressional motivation on Capitol Hill to have the doctrine re-enacted.

3. When our founding fathers crafted the free speech protection of the First Amendment to the United States Constitution, do you believe they intended for such protection to extend to individuals such as Rush Limbaugh? Why or why not?

It is difficult to answer this question. Our founding fathers did believe that there should exist a free forum for political expression in the United States, even if certain political views are controversial. Eighteenth-century French philosopher and author Voltaire is attributed with the following quote: "I (may) disapprove of what you say, but I will defend to the death your right to say it." (Our founding fathers borrowed very heavily from eighteenth-century French philosophy and ideology in terms of crafting the United States Constitution and the United States system of government.) In terms of Limbaugh's comments, liberal-progressive Americans may not subscribe to Voltaire's creed, but the First Amendment to the United States Constitution very well might.

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Video 2: "Taxing Bailed-Out Banks"

http://money.cnn.com/video/news/2010/01/14/n_cmr_taxing_tarp_banks.cnnmoney/?hpt=Sbin

Purpose of video: To discuss President Obama's proposal to impose a TARP-related fee on fifty (50) of the nation's largest financial institutions

Discussion Questions

1. As the video indicates, President Obama has proposed the assessment of a "financial crisis responsibility fee", which will essentially be a tax collected by the Internal Revenue Service, on fifty (50) of the nation's largest financial institutions over the next ten (10) years. The fee will total $90 billion over the ten-year time frame, and will apply to select banks and other depositary institutions, insurance companies, and broker-dealers. Financial institutions that did not receive Troubled Asset Relief Program (TARP) fees will not be exempt from the proposal, nor will financial institutions that have already repaid TARP funds. Examples of institutions subject to the fee are AIG, Citigroup, Bank of America, and JP Morgan Chase. The program is designed to reimburse the federal government for "TARP" (Troubled Asset Relief Program) and pay down a portion of the nation's massive federal debt.

What is your opinion of the proposal?

Student opinions may vary in response to this question, but there does seem to be a groundswell of public support for the notion that the nation's largest financial institutions should be "made to pay," given the argument that their reckless practices drove the nation to the "financial precipice," imperiling our nation's economy in a manner unprecedented since the Great Depression. It would appear that the strongest arguments against the fee would come from 1) those financial institutions that never received monies under the federal "bailout" money and 2) those institutions that have already repaid, with interest, the monies they received under TARP. Here are the responses, however, to those two (2) factions: 1) TARP arguably saved the nation's financial system, benefitting even those institutions that did not directly receive bailout funds; and 2) Even for those institutions that have repaid, with interest, TARP monies received, that is not sufficient payment for helping lead the nation to the brink of "financial Armageddon."

2. Assess the response of many financial institutions, that if the fee (tax) is assessed, they will have to pass the cost along to customers and shareholders (even though institutions subject to the proposal are set to pay out tens of billions of dollars in bonuses to their executives).

In the opinion of your author, this is a "tired" argument amounting to nothing more than a "scare" tactic. It would appear that these institutions hope to gain customer and shareholder support opposing the fee through the fear that if this tax becomes a reality, customers will have to pay higher fees, and shareholders will have to suffer less dividends. As the video indicates, however, the financial institutions that are subject to the fee proposal are set to pay out tens of billions of dollars in executive bonuses, based on the assumption that these bonuses are "untouchable," and

that the executives who will receive them earned them. The following question, however, remains: Had not the government intervened and saved the nation's financial system, where would these institutions be in terms of profitability?

3. As the video indicates, in order for it to become a reality, President Obama's fee proposal is entirely dependent on Congressional enactment. In your opinion, what is the likelihood that Congress will enact the "financial crisis responsibility fee"?

As the video indicates, the fee proposal has not only policy implications, but political ramifications as well. Given the groundswell of public support for holding these institutions accountable for almost sinking our nation into the next "Great Depression," one would think that such a fee would be a "no-brainer." The political implications, however, may result in such a fee not becoming a reality. What would be the political risk of a politician voting for such a fee? In the next election, the incumbent's opponent would proclaim that he or she voted to "raise your taxes," using the pronoun "your" in the loosest possible sense of the word!

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Of Special Interest

This section of the newsletter addresses the questions of 1) whether it is practical and appropriate to require an employee to execute a "non-compete" agreement; and 2) if so, how such an agreement should be drafted in order to meet legal requirements.

Hypothetical and Ethical Dilemma

Arthur Harrington was the personification of the "American Dream." Born to a working-class family, he had studied hard, graduated with an accounting degree from the state university, and earned his "certified public accountant" (CPA) professional credentials. Over the years, Arthur had built a successful accounting business; so successful, in fact that he had more business than he could possibly handle himself. Earlier in his practice, only the months of March and April (tax season) had been particularly busy, but as he had taken on a number of "year-round" clients, every month of the year had kept him more than occupied in terms of his work.

In May 2006, Arthur had hired a recent graduate of state university, Kimberly Pierce, to assist him in his practice. Pierce was a sharp accountant and she had assisted him tremendously in his business, until she left in December 2007 to assume her own practice. In fact, Pierce had leased a building in the office park where Arthur engaged in his practice. Pierce had taken several of Arthur's clients with her, and although Arthur had more than enough business without these clients, it still "stung" him to realize that had he not given Pierce her first employment opportunity, and had she not met those clients at Arthur's business, she would have never received those individuals' accounts. Arthur estimates that the value of the business Pierce took amounts to $15,000 annually.

Arthur would like to hire another recent college graduate, but he is concerned that history will repeat itself, and he is reminded of the old adage "Fool me once, shame on you, but fool me twice, shame on me." He would like your advice regarding how he can better protect his business interests, should he choose to hire another employee. What recommendation(s) do you have for Arthur?

Competition from former employees is a common problem faced by businesses ranging from sole proprietorships to Fortune 500 companies. Arthur has a legitimate concern in this case, and from the standpoint of his business prosperity, he should at least consider his options in terms of preventing previous employees from competing with him. The commonly-accepted approach for Arthur would be for him to require his new hire to sign a "non-compete" agreement as a condition of employment. Such an agreement would essentially indicate that upon termination of employment, the employee covenants not to compete with his/her former employer within a certain geographic region, and for a specified period of time.
Courts have predominately upheld the enforceability of non-compete agreements, provided that the agreement is reasonable in terms of

geographic coverage and time frame. For example, if an employer has its operations located in Asheville, North Carolina, it would generally be permissible for the employer to bind its employees to a non-compete agreement for a period of one (1) year in the Western North Carolina region. There is no scientific test to determine whether a non-compete agreement is reasonable in terms of geographic coverage and time frame, so courts are often called upon to resolve various non-compete provisions on a "case-by-case" basis. Courts have enforced non-compete agreements as a "pre-condition" to employment, as a condition of continued existing employment, and as a condition related to termination of employment (provided that the employer provides some consideration for the non-compete agreement signed upon termination of employment).

In discussing this issue with my students, I find that students almost invariably side with the interests of employees on the issue of non-compete clauses. Many claim that such an agreement is unfair because the employer has the "upper hand" in negotiating employment contract provisions. Others claim that such a provision is anathema to free enterprise, which encourages unfettered competition. In the interests of critical thinking, however, have your students at least try to appreciate the employer's position. Employers invest considerable hours and money in orienting employees to their particular business, and giving employees the skills they need to succeed. Should employers not accordingly have the right to include a contractual provision that honors and acknowledges such a commitment?

For an example of a non-compete agreement, see Teaching Tip 2 listed below.

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Of Special Interest

This section of the newsletter will assist you in covering:

1) Video 1 ("Rush Limbaugh—Haiti Earthquake") presented earlier in this newsletter; and

2) The Case Hypothetical and Ethical Dilemma, also presented earlier in this newsletter.

Teaching Tips

Teaching Tip 1

This "teaching tip" relates to Video 1: "Rush Limbaugh—Haiti Earthquake." To add "fuel to the fire" regarding the Rush Limbaugh "free speech" discussion have your students view the video "Barack the Magic Negro" at http://www.youtube.com/watch?v=8-Bao4VUQmI. After viewing this video, again ask your students the questions presented in the "Video Suggestions" Section, reprinted below:

1. Are Limbaugh's comments fully protected by the First Amendment to the United States Constitution? Is he entitled to unrestricted access to the public airwaves, or is his speech subject to reasonable "time, place and manner restrictions?" Would any restriction on his speech represent censorship?

2. Consider two (2) following hypothetical examples of "time, place and manner" restrictions on Limbaugh:

a. Require Limbaugh to entertain debate and discussion of political issues on his show by allowing individuals sufficient opportunities to present competing views, thereby allowing listeners to make rational decisions, through critical analysis, regarding politics, politicians, and government policy; and

b. Require Limbaugh to transfer his show from the public airwaves to satellite radio (for example, Sirius satellite radio), giving his listeners the continued opportunity to hear him by paying a satellite radio subscription fee (Consider the example of "shock jock" Howard Stern, who transferred his controversial radio program from the public airwaves to satellite radio in response to pressures from the Federal Communications Commission and the public-at-large).

Would either or both of the above examples serve as reasonable "time, place and manner restrictions" on Limbaugh? If so, why? If not, why not?

3. When our founding fathers crafted the free speech protection of the First Amendment to the United States Constitution, do you believe they intended for such protection to extend to individuals such as Rush Limbaugh? Why or why not?

Teaching Tip 2:

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In relation to the Case Hypothetical and Ethical Dilemma set forth earlier in this newsletter, refer students to the "Sample Confidentiality and Non-Competition Agreement" listed below. The non-compete clause itself is listed in Section 6 of the agreement, and is italicized for easy reference. Ask your students the following questions related to the Sample Confidentiality and Non-Competition Agreement:

1. Is a one-year period (the time period specified in the agreement) reasonable in terms of its duration? Does the answer to this question depend upon the nature of the industry in which the business operates and the employee works, as well as the "skill set" of the employee who is asked to sign the agreement?

2. Note that the non-compete provision in the agreement does not specify a geographic scope/limitation. Is this fatal to the enforceability of the agreement, or again, does the answer to this question depend upon the nature of the industry in which the business operates and the employee works, as well as the "skill set" of the employee who is asked to sign the agreement?

This sample agreement can also be found at the following web address:

http://smallbusiness.findlaw.com/business-forms-contracts/business-forms-contracts-a-to-z/form1-26.html

Sample Confidentiality and Non-Competition Agreement

In consideration of my employment or continued employment by [Name of Company] (the "Company"), together with its affiliates and subsidiaries, and any subsidiaries or affiliates which hereafter may be formed or acquired and in recognition of the fact that as an employee of the Company I will have access to the Company's customers and to confidential and valuable business information of the Company and of its parent company, [specify], together with its affiliates and subsidiaries, and any subsidiaries or affiliates which hereafter may be formed or acquired, I hereby agree as follows:

1. The Company's Business. The Company is [specify] a consulting firm. The Company is committed to quality and service in every aspect of its business. I understand that the Company looks to and expects from its employees a high level of competence, cooperation, loyalty, integrity, initiative, and resourcefulness. I understand that as an employee of the Company, I will have substantial contact with the Company's customers and potential customers.

I further understand that all business and fees including insurance, bond, risk management, self insurance, insurance consulting and other services produced or transacted through my efforts shall be the sole property of the Company, and that I shall have no right to share in any commission or fee resulting from the conduct of such business other than as compensation referred to in paragraph 3 hereof. All checks or bank drafts received by me

from any customer or account shall be made payable to the Company, and all premiums, commissions or fees that I may collect shall be in the name of and on behalf of the Company.

2. Duties Of Employee. I shall comply with all Company rules, procedures and standards governing the conduct of employees and their access to and use of the Company's property, equipment and facilities. I understand that the Company will make reasonable efforts to inform me of the rules, standards and procedures which are in effect from time to time and which apply to me.

3. Compensation And Benefits. I shall receive the compensation as is mutually agreed upon, which may be adjusted from time to time, as full compensation for services performed under this Agreement. In addition, I may participate in such employee benefit plans and receive such other fringe benefits, subject to the same eligibility requirements, as are afforded other Company employees in my job classification. I understand that these employee benefit plans and fringe benefits may be amended, enlarged, or diminished by the Company from time to time, at its discretion.

4. Management Of The Company. The Company may manage and direct its business affairs as it sees fit, including, without limitation, the assignment of sales territories, notwithstanding any employee's individual interest in or expectation regarding a particular business location or customer account.

5. Termination Of Employment. My employment may be terminated by the Company or me at any time, with or without notice or cause. Upon termination of my employment, I shall be entitled to receive incentive payments in accordance with the provisions of the Company's Incentive Plan, as it may be modified by the Company from time to time, less any adjustments for amounts owed by me to the Company. I understand that I may also receive additional compensation at the discretion of the Company and in accordance with the published Company Personnel Policy on Termination Pay.

6. Agreement Not To Compete With The Company.

A. As long as I am employed by the Company, I shall not participate directly or indirectly, in any capacity, in any business or activity that is in competition with the Company.

B. In consideration of my employment rights under this Agreement and in recognition of the fact that I will have access to the confidential information of the Company and that the Company's relationships with their customers and potential customers constitute a substantial part of their good will, I agree that for One (1) year from and after termination of my employment, for any reason, unless acting with the Company's express prior written consent, I shall not, directly or indirectly, in any capacity, solicit or accept business from,

provide consulting services of any kind to, or perform any of the services offered by the Company for, any of the Company's customers or prospects with whom I had business dealings in the year next preceding the termination of my employment.

7. Unauthorized Disclosure Of Confidential Information. While employed by the Company and thereafter, I shall not, directly or indirectly, disclose to anyone outside of the Company any Confidential Information or use any confidential Information (as hereinafter defined) other than pursuant to my employment by and for the benefit of the Company.

The term "Confidential Information" as used throughout this Agreement means any and all trade secrets and any and all data or information not generally known outside of the Company whether prepared or developed by or for the Company or received by the Company from any outside source. Without limiting the scope of this definition, Confidential Information includes any customer files, customer lists, any business, marketing, financial or sales record, data, plan, or survey; and any other record or information relating to the present or future business, product or service of the Company. All Confidential Information and copies thereof are the sole property of the Company.

Notwithstanding the foregoing, the term Confidential Information shall not apply to information that the Company has voluntarily disclosed to the public without restriction, or which has otherwise lawfully entered the public domain.

8. Prior Obligations. I have informed the Company in writing of any and all continuing obligations that require me not to disclose to the Company any information or that limit my opportunity or capacity to compete with any previous employer.

9. Employee's Obligation To Cooperate. At any time upon request of the Company (and at the Company's expense), I shall execute all documents and perform all lawful acts the Company considers necessary or advisable to secure its rights hereunder and to carry out the intent of this Agreement.

10. Return Of Property. At any time upon request of the Company, and upon termination of my employment, I shall return promptly to the Company, including all copies of all Confidential Information or Developments, and all records, files, blanks, forms, materials, supplies, and any other materials furnished, used or generated by me during the course of my employment, and any copies of the foregoing, all of which I recognize to be the sole property of the Company.

11. Special Remedies. I recognize that money damages alone would not adequately compensate the Company in the event of breach by me of this Agreement, and I therefore agree that, in addition to all other remedies available to the Company at law or in equity, the Company shall be entitled to injunctive relief for the enforcement hereof. Failure by the Company to insist upon strict compliance with any of the terms, covenants, or conditions

hereof shall not be deemed a waiver of such terms, covenants or conditions.

12. Miscellaneous Provisions. This Agreement contains the entire and only agreement between me and the Company respecting the subject matter hereof and supersedes all prior agreements and understandings between us as to the subject matter hereof; and no modification shall be binding upon me or the Company unless made in writing and signed by me and an authorized officer of the Company.

My obligations under this Agreement shall survive the termination of my employment with the Company regardless of the manner of or reasons for such termination, and regardless of whether such termination constitutes a breach of this Agreement or of any other agreement I may have with the Company. If any provisions of this Agreement are held or deemed unenforceable or too broad to permit enforcement of such provision to its full extent, then such provision shall be enforced to the maximum extent permitted by law. If any of the provisions of this Agreement shall be construed to be illegal or invalid, the validity of any other provision hereof shall not be affected thereby.

This Agreement shall be governed and construed according to the laws of [specify State], and shall be deemed to be effective as of the first day of my employment by the Company.

BY SIGNING THIS AGREEMENT, I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTOOD ALL OF ITS PROVISIONS AND THAT I AGREE TO BE FULLY BOUND BY THE SAME.

_____ _____

Employee Date

_____ _____

Accepted By
(Name and Title of Officer) Date

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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 5, 9 and 10	Chapters 2 and 5	Chapter 42	Chapters 5 and 42
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 4 and 5	Chapters 2 and 4	Chapter 24	Chapters 4 and 24
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 3, 7 and 20	Chapters 3 and 4	Chapter 51	Chapters 3 and 51
Barnes et al., Law for Business, 10th Edition	Chapters 4, 7 and 20	Chapters 3 and 4	Chapter 25	Chapters 4 and 25
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 2 and 6	Chapters 1 and 2	Chapter 35	Chapters 2 and 35
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 6 and 10	Chapters 2 and 6	Chapter 19	Chapters 6 and 19
McAdams et al., Law, Business & Society, 9th Edition	Chapters 5 and 7	Chapters 2 and 5	Chapter 12	Chapters 5 and 12

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)