Proceedings

A monthly newsletter from McGraw-Hill

November 2009 Volume 1, Issue 4

The McGraw-Hill Companies

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Dear Professor,

Welcome to McGraw-Hill's November issue of *Proceedings*, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 1, Issue 4 of *Proceedings* follows the same format as previous editions of the newsletter, incorporating "hot topics" in business law, video suggestions, a hypothetical and ethical dilemma, teaching tips, and a "chapter key" cross-referencing the November newsletter topics with the various McGraw-Hill business law textbooks.

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

1. The legal effect of an amphibian in a can of Pepsi (product liability in the sale of food or drink);

2. The state of Kentucky's attempt to order dependence on God, as it relates to the "Establishment Clause" of the United States Constitution;

3. Near-monopolization of the beer industry and the market effect(s) of such a trend;

4. Videos related to a) McDonald's trademark battle against Malaysian restaurant "McCurry"; and b) state regulation of cell phone use while driving, including "text messaging";

5. A "case hypothetical and ethical dilemma" related to the reluctance of Americans to fulfill their civic duty of jury service; and

6. "Teaching Tips" related to jury service (the subject matter of the Case Hypothetical and Ethical Dilemma) and to state-by-state regulation of cell phone use while driving, including "text messaging" (the subject matter of "Video 2" in the "Video Suggestions" Section of the newsletter).

This newsletter is truly a "labor of love" for me, and I sincerely hope the information included herein will be of great benefit to you in the classroom. Go forth and educate!

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Of Special Interest

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

1) Product Liability in the Sale of Food or Drink;

2) Judicial Application of the Establishment Clause of the United States Constitution as it Relates to Kentucky's Order of Dependence on God; and

3) A Trend Toward Monopolization of the Beer Industry.

Hot Topics in Business Law

Article 1: "FDA Says Residue is Frog or Toad; How Did It Get in Pepsi Can?"

http://www.cnn.com/2009/US/09/02/frog.pepsi.can/index.html

Any discussion of product liability in the sale of food or drink usually carries with it a high "gross-out" factor, and is not for the "faint of heart!" Consider, for example, the article "FDA Says Residue is Frog or Toad; How Did It Get in Pepsi Can?" According to the article, the "disgusting" blob that Fred DeNegri's wife says she poured out of his Diet Pepsi can was probably a gutted frog or toad, in the opinion of the Food and Drug Administration (FDA). Mr. DeNegri was grilling in his backyard tiki bar in Ormond Beach, Florida when he opened a can of Diet Pepsi, took a drink and started gagging. According to his wife Amy, DeNegri then emptied the can down a sink, but something heavy remained inside the can. Mrs. DeNegri took over and shook the can over a paper plate until something resembling "pink linguini" slid out, followed by "dark stuff." The DeNegris took pictures before calling poison control and the FDA, which showed up the next day to examine the can and collect it for lab testing.

The DeNegris received a copy of the completed lab report from the FDA, and according the FDA Office of Regulatory Affairs, the foreign substance in the can appeared to be a gutted frog or toad, "lacking internal organs normally found in the abdominal and thoracic cavity." A second, closed can from the same 36-pack of Diet Pepsi the DeNegris purchased from Sam's Club, also submitted for testing, showed no abnormalities. The FDA also conducted an investigation at the local Pepsi bottling plant in Orlando and "did not find any adverse conditions or association to this problem." The FDA could not determine when or how the contamination occurred. According to Pepsi, the FDA results "affirmed" the company's confidence "in the quality of our products and the integrity of our manufacturing system."

According to Pepsi spokesperson Jeff Dahncke, "The speed of our production lines and the rigor of our quality control systems make it virtually impossible for this type of thing to happen in a production environment. In fact, there never has been even a single instance when a claim of this nature has been traced back to a manufacturing issue." When asked if Pepsi believed it was not responsible for the animal getting into the can, Dahncke said "We have

addressed the facts of the investigation and stated our position. It's not appropriate for us to comment beyond that."

The DeNegris are currently seeking legal advice to examine their options.

Discussion Questions

1. In your reasoned opinion, is Pepsi liable in this case? Why or why not?

Since the DeNegris live in the state of Florida, since the Diet Pepsi was bottled there, and since the incident happened there, Florida law would apply to the resolution of this case. There are several theories of recovery on which the DeNegris could base their lawsuit against Pepsi, including (but perhaps not limited to): 1) strict product liability; 2) negligence; and 3) breach of the implied warranty of merchantability. Strict product liability is, essentially, liability without fault. Strict liability holds a manufacturer liable for injuries sustained by a person using its product if the product is found to be unreasonably dangerous. To prove a case based on strict liability, a plaintiff must show that the manufacturer's product was in a defective condition that made it unreasonably dangerous to the user. In addition, the defect must be the proximate cause of the plaintiff's injury. The statute of limitations in Florida for product liability lawsuits based on strict liability is four years from the date of the injury. In this author's opinion, Pepsi would have a difficult time defending against product liability in this case, since: 1) Pepsi controlled the means of production; and 2) no evidence of negligence is required in a strict product liability action. Pepsi's best argument against strict product liability would be to establish that the frog/toad did not get into the can while the product was within its possession and control, but that would be its burden of proof, and absent definitive evidence that the can was tampered with after it left the possession and control of Pepsi, a jury (or other arbiter of fact) would have the right to assume that the frog/toad got into the can during the production process. In this author's opinion, Pepsi spokesperson Dahncke's assertion that "there never has been even a single instance when a claim of this nature has been traced back to a manufacturing issue" would be largely irrelevant in a strict product liability action, since a manufacturer in a strict product liability case can be held liable for a "first-time offense."

In order to recover on the basis of negligence, the plaintiff(s) must establish: 1) the defendant owed the plaintiff(s) a duty of care; 2) the defendant breached its duty of care; 3) the defendant caused harm to the plaintiff(s); and the plaintiff(s) experienced damages as a proximate result of the defendant's actions. Another way to describe negligence is that it constitutes a failure on the part of a defendant to do what another individual/organization would do under the same or similar circumstances. In the subject case, the DeNegris should argue that the doctrine of "res ipsa loquitur" applies. Literally translated, the term "res ipsa loquitur" means "the thing speaks for itself." The doctrine refers to situations when it is assumed that a person's injury was caused by the negligent action of another party because the accident was the sort that would not occur unless someone was negligent. A good example of the application of res ipsa loquitur would be post-surgery discovery of the fact that the patient has a surgical tool sewed up inside him/her. Even without additional proof of negligence, the fact that the surgical tool is inside the patient post-surgery would be enough to submit

the case to the jury on the issue of negligence. In the subject case, the fact that the frog/toad was inside the Pepsi can appears to "speak for itself" on the issue of negligence. Although Pepsi might again claim that it has never experienced a manufacturing issue of this kind, the company might still have a difficult time refuting a claim of negligence. Even if a defendant has never been involved in a car accident before, he/she can still be held liable for a crash demonstrating the defendant's failure to exercise due care; similarly, Pepsi could be liable in a negligence action for a "first-time offense."

The third theory of recovery available to the DeNegris is the implied warranty of merchantability, more particularly referred to in situations like this as the implied warranty in the sale of food or drink. The implied warranty in the sale of food or drink holds that a manufacturer can be held responsible if it distributes into the "stream of commerce" a food or drink product that is not fit for human consumption. Jurisdictions vary in terms of how they evaluate whether a food or drink product is "fit for human consumption," and typically apply either a "foreign/natural substance" test or a "reasonable expectation" test to resolve the issue. According to the "foreign/natural substance test," if the substance found in the food/drink is foreign to (i.e., not a natural part of) the food/drink, liability will ensue; applying the "reasonable expectation" test, if a reasonable person would not ordinarily expect what is found in the food/drink to be in the food/drink, the defendant can be held liable.

It seems clear that regardless of the test applied in this case (Florida applies the "reasonable expectation" test), Pepsi can be held liable. Frogs/toads are certainly "foreign" to Diet Pepsi, and no reasonable person would expect to find a frog/toad in a can of soda! Again, it appears that Pepsi's best defense is to argue that the frog/toad was inserted into the can of Diet Pepsi <u>after</u> the product left its control, but absent demonstrable proof of that assertion, Pepsi again would have a difficult time defending the case.

Note: One important lesson to learn here is that in a product defect action, it is important for the plaintiff to include in the complaint all possible legal theories of recovery that can be asserted in good faith. In this case, the attorney for the plaintiff(s) should allege strict liability, negligence <u>and</u> breach of the implied warranty of merchantability (in the sale of food/drink); that way, if one or more theories of recovery should fail in the litigation, perhaps the jury will accept the remaining theory/theories of recovery. One of my former law professors used to refer to the process of drafting a product liability complaint, and litigating a product liability action, as "throwing darts"; by including (throwing) as many theories of recovery (darts) as possible in the complaint and the ensuing litigation (at the dartboard), that increases the likelihood that at least one of the theories of recovery will be successful (i.e., at least one of the darts will hit the bull's-eye!)

2. In your reasoned opinion, is Sam's Club (the retailer that sold the DeNegris the Diet Pepsi) liable in this case? Why or why not?

Although most plaintiffs' attorneys will include a retailer involved in the chain of distribution of a defective product as a co-defendant in a product liability lawsuit, it is difficult to envision a jury holding Sam's Club liable in this case. Although retailers can be held liable in a product liability lawsuit, the plaintiff must demonstrate that the retailer either knew or should have known of the defect before it

sold the defective product to the plaintiff. In this case, there is no evidence (at least none yet evident) that Sam's Club either knew or should have known that the gutted frog/toad was in the can of Diet Pepsi it sold. In the opinion of this author, the "knew or should have known" standard for retailer liability makes perfect sense. If retailers were held to a standard of strict liability, that would put upon them the unreasonable burden of either: 1) inspecting every product before it was sold (envision a grocery store chain requiring its grocery store managers/clerks to open every bag of potato chips for pre-sale inspection); or 2) installing expensive imaging devices at every check-out register!

In the subject case, absent definitive proof that the can of Diet Pepsi was tampered with while in the possession and control of Sam's Club, a jury (or other arbiter of fact) would most likely not hold Sam's Club liable.

3. Assuming that a jury (or any other arbiter of fact) should find Pepsi and/or Sam's Club liable in this case, what amount of monetary damages would be appropriate to compensate the DeNegris?

The amount of damages awarded in a product liability case is primarily an issue to be decided at the discretion of the fact-finder. As I tell my students, although it is often difficult to determine what amount of money damages would be necessary to make the plaintiff in a civil action "whole again," we (as a society) put this obligation on jurors across this nation every day. In this case, if the case does make its way to a jury, the jury will have to decide what amount of money damages are necessary to make the DeNegris whole again. In terms of Mr. DeNegri, since he arguably bore the brunt of damages here (after all, he was the one who took a "big gulp" of the frog/toad-infested soda!), the jury will have to consider money damages for: 1) any "out-of-pocket" losses Mr. DeNegri experienced, including (but not necessarily limited to) medical expenses and lost pay for time out of work; and 2) Mr. DeNegri's emotional pain and suffering resulting from the "shock and horror"of consuming the defective product. In terms of Mrs. DeNegri, since she experienced similar "shock and horror" in terms of seeing a close family member (her husband) affected by such a product, she also has a claim for negligent infliction of emotional distress. A close family member (father, mother, husband, wife, son, or daughter) can assert a claim for negligent infliction of emotional distress if he/she observes a close family member injured as a result of the negligence of a third party. Since the state of Florida also recognizes a "loss of consortium" claim, Mrs. DeNegri could also seek money damages to compensate her in the event that the DeNegri's marriage has been adversely affected by Mr. DeNegri's injuries. Again, the jury would have to decide whether the loss of consortium claim has merit, and if so, what amount of damages would be necessary to compensate Mrs. DeNegri for her loss.

Article 2: "Judge: Kentucky Can't Order Dependence on God"

http://www.msnbc.msn.com/id/32581781/ns/us_news-faith/

In the opinion of at least one judge, it is one thing to trust in God, but quite another thing altogether to be ordered to rely on protection from God during national emergencies. In a decision entered on August 26, 2009, Franklin (Kentucky) Circuit Judge Thomas Wingate has ruled that references to a dependence on "Almighty God" in the law that created the Kentucky Office of Homeland Security is

akin to establishing a religion, which the government is prohibited from doing in the United States and Kentucky constitutions. The language in the 2006 legislation had been inserted by state Representative Tom Riner (D-Louisville), a pastor of Christ is King Baptist Church in Louisville. Judge Wingate's decision resulted from a lawsuit filed by ten (10) Kentucky residents and a national atheist group, with the plaintiffs requesting that the reference to dependence on "Almighty God" be stricken from the law. According to Edwin Kagin, national legal director for American Atheists, Inc., "it (the reference to dependence on "Almighty God" in the law creating the Kentucky Office of Homeland Security) is breathtakingly unconstitutional."

In his eighteen-page decision, Judge Wingate explains the reasoning behind his ruling: "The statute pronounces very plainly that current citizens of the Commonwealth (of Kentucky) cannot be safe, neither now, nor in the future, without the aid of Almighty God. Even assuming that most of this nation's citizens have historically depended upon God, by choice, for their protection, this does not give the General Assembly the right to force citizens to do so now."

State Representative Riner has indicated that he plans to ask Kentucky Attorney General Jack Conway to seek a reconsideration of the order. In defense of the legislative language referencing a dependence on "Almighty God", Riner argues "They (the plaintiffs in the subject litigation) make the argument...that it has to do with a religion and promoting a religion. God is not a religion. God is God."

As the article "Judge: Kentucky Can't Order Dependence on God" indicates, the Kentucky state Office of Homeland Security was created in response to the September 11, 2001 terrorist attacks. Two (2) amendments to the law creating the Kentucky state Office of Homeland Security were at issue in the litigation. One of the amendments required that training materials include information that the General Assembly stressed a "dependence on Almighty God as being vital to the security of the Commonwealth." The other amendment required a plaque to be placed at the entrance to the state's Emergency Operations Center in Frankfort that said, in part, "The safety and security of the Commonwealth (of Kentucky) cannot be achieved apart from reliance upon Almighty God."

Although Judge Wingate noted in his decision that there are thirty-two (32) references to "God" or "Almighty God" in Kentucky state statutes and the Kentucky state constitution, the reference to "Almighty God" in the Kentucky homeland security law "places an affirmative duty to rely on Almighty God for the protection of the Commonwealth." According to Judge Wingate, "This makes the statute exceptional among thousands of others, and therefore, unconstitutional."

Kentucky state Representative Riner has indicated he is not willing to consider rewording the phrases to make them pass constitutional muster. According to Representative Riner, "This is no small matter, the understanding that God is real. There are real benefits to acknowledging Him. There was not a single founder or framer of the Constitution who didn't believe that."

Discussion Questions

1. In your reasoned opinion, is the Kentucky law referencing a dependence on "Almighty God" constitutional? Why or why not?

Make sure to get plenty of rest before discussing this issue…It is a contentious and divisive issue, one that requires a great deal of energy on the part of the professor to keep the discourse civil and focused! To begin the discussion, remind your class of the pertinent, specific language of the First Amendment to the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." More commonly referred to as the "Establishment" and "Free Exercise" clauses of the United States Constitution, many constitutional scholars have interpreted this language to mean that lawmakers must take a "balanced" approach to religion, neither favoring a particular religion, nor prohibiting individuals from worshipping as they see fit. In the event that Kentucky (or any other state) law conflicts with the express provisions of the United States Constitution, the federal law "reigns supreme" over the conflicting state law pursuant to the Supremacy Clause of the United States Constitution; accordingly, if the state law is unconstitutional, the law must either be stricken or rewritten in order to meet constitutional requirements.

Consider the specific language of the subject Kentucky law. As indicated in the article summary above, two (2) amendments to the law creating the Kentucky state Office of Homeland Security were at issue in the litigation. One of the amendments required that training materials include information that the General Assembly stressed a "dependence on Almighty God as being vital to the security of the Commonwealth." The other amendment required a plaque to be placed at the entrance to the state's Emergency Operations Center in Frankfort that said, in part, "The safety and security of the Commonwealth (of Kentucky) cannot be achieved apart from reliance upon Almighty God." According to Judge Wingate, the reference to "Almighty God" in the Kentucky homeland security law "places an affirmative duty to rely on Almighty God for the protection of the Commonwealth." Further, in Judge Wingate's legal opinion, "This makes the statute exceptional among thousands of others, and therefore, unconstitutional." It was the "dependence/reliance" language of the legislation that led Judge Wingate to conclude that the Kentucky law represents an "establishment" of religion, and is, therefore, and unconstitutional violation of the Establishment Clause.

In answering (and discussing) this question, it is also important to consider Kentucky state Representative Riner's argument. The crux of his argument is that "God" is not a religion (According to Representative Riner, "God is not a religion. God is God.") Although consideration of this argument might be best reserved for a religion or a philosophy class, law students will likely be interested in discussing Representative Riner's quote. Is "God" not a religion? Is God "only" God? Pretty "heady" material, but what would Representative Riner say to an individual who believed in the existence of God as his/her accepted religion, and nothing more?

2. In your opinion, do lawmakers include references to God in legislation in order to truly make us a more "God-like" nation, or do they do so predominately for political advantage? If (in your opinion)

politicians lead the initiative to enact such legislation for political advantage, is it acceptable for them to enjoy such political gains on the "backs" of God, Jesus Christ and/or other religious figures?

Optimists and cynics in the classroom will likely differ in their responses to these inquiries. An optimist might contend that in incorporating such references to God, lawmakers are both reaffirming our nation's longstanding belief in the "Almighty," and seeking to continue that heritage in the future. Cynics might contend that the "driving force" behind such references is political gain, and that politicians should be condemned for building political careers on the "backs" of God, Jesus Christ and/or other religious figures. There is no question that a politician who invokes such religious figures garners a certain number of votes as a result during election "season." The question that remains is whether they should be criticized or condemned for enjoying such "spoils" of political "warfare."

3. As indicated in response to Discussion Question Number 1 above, the First Amendment to the United States Constitution (part of the Bill of Rights) mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In considering Kentucky state Representative Riner's assertion that "There was not a single founder or framer of the (United States) Constitution who didn't believe that…God is real (and that)…there are real benefits to acknowledging Him", why did our founding fathers prohibit, by express constitutional language, the "establishment" of religion in the United States?

As indicated in previous McGraw-Hill Business Law newsletters, our Founding Fathers had a "healthy" distrust in government that resulted in their cautious, measured allocation of power to the government. Our Founding Fathers viewed the fledgling United States as an opportunity for intrepid individuals to escape oppressive governments in other countries and enjoy the freedoms allowed on United States soil. Part of what our Founding Fathers viewed as "oppressive" rule included the government's determination of which religion its people would practice. This led our Founding Fathers to include in the Bill of Rights (more particularly, the First Amendment to the United States Constitution) a prohibition on the "establishment" of religion, and an acknowledgment of the people's right to "freely exercise" religion as they see fit. There is a strong argument to be made that the more government does to "establish" what the people should/must believe in terms of religion, the more it takes away from the right of the people to decide what and/or who to worship, or whether to worship at all. In terms of Kentucky state Representative Riner's assertion that "There was not a single founder or framer of the (United States) Constitution who didn't believe that…God is real (and that)…there are real benefits to acknowledging Him," the author of this newsletter does not have sufficient knowledge to assert with any degree of assurance exactly what our Founding Fathers believed or did not believe in terms of the "Almighty," or whether their thoughts, actions and deeds always were consistent with their expressed words. In his "Notes on Virginia," Thomas Jefferson (arguably our nation's most noteworthy Founding Father) did state: "The legitimate powers of government extend to such acts as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."

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Article 3: "The Big Money: Is Big Beer Drunk With Power?"

http://www.msnbc.msn.com/id/32643705/ns/busines-the_big_money/

This article illustrates the market power near-monopoly status commands in the beer industry. Both Anheuser-Busch InBev and MillerCoors, collectively referred to as "Big Beer," have decided to raise prices simultaneously, during a recession, and while beer demand is slumping. According to the author of the article, with an eighty percent (80%) market share between Anheuser-Busch InBev and MillerCoors, it appears as if "Big Beer" is testing President Obama's "tolerance" (as the nation's chief law enforcer, President Obama has the ultimate responsibility to enforce the Sherman Antitrust Act and other "anti-monopoly" laws), and the situation "almost begs" for an antitrust review of the industry. The ability of "Big Beer" to raise prices now, while their customers are hurting from a prolonged recession with no apparent end in sight, demonstrates the tremendous pricing power that has accompanied consolidation in the beer industry in recent years.

From 1947 until 1995, the number of beer companies fell by more than ninety percent (90%). Though an increase in "craft" brewers like Samuel Adams, Sierra Nevada and others followed, few of them have attempted to compete directly with "mass-market" products like Budweiser and Miller Genuine draft.

With respect to many other industries, the Obama administration is taking a "tougher line" on anti-competitive corporate behavior. The new United States Department of Justice antitrust head, Christine Varney, has even indicated a willingness to re-examine corporate deals that were approved under the previous, more permissive, Bush administration.

The article demonstrates previous United States Department of Justice oversight of the beer industry, citing three (3) examples:

1. Anheuser was the target of one of the first cases in 1958, when it purchased Miami-based American Brewing Company. The government forced Anheuser to divest the purchase and refrain from buying any other brewery for the next five (5) years without court approval;

2. A similar verdict was reached in the case of then-number two (2) Schlitz, which was challenged in court in 1966 after having bought California's third-largest brewer, Burgermeister, in 1961 and a forty percent (40%) stake in Canada's Labatt in 1964. Schlitz was ordered to sell off both holdings and refrain from acquiring new plants anywhere in the country for the next ten (10) years; and

3. In 1959, the United States Department of Justice sued to prevent the merger of Pabst, then the tenth-largest brewer, with the eighteenth-biggest, Blatz. The lawsuit was first filed in the District Court of Milwaukee but wound up in the United States Supreme Court, which in 1966 ruled the deal was anti-competitive and forced Pabst to divest Blatz. The justices' opinion noted that "if not stopped, this decline in the number of separate competitors and this rise in the share of the market controlled by the

larger beer manufacturers are bound to lead to greater and greater concentration of the beer industry into fewer and fewer hands."

In terms of United States Department of Justice reaction to Anheuser-Busch InBev and MillerCoors' concerted decision to raise beer prices, could an antitrust lawsuit soon be "brewing?!"

Discussion Questions

1. As noted in the article, certain beer company executives believe that market conditions are "favorable" for a price increase. How could they form such an opinion, given the pronounced and extended nature of "The Great Recession?"

Aside from their substantial control over market share (as the article indicates, Anheuser-Busch InBev and MillerCoors collectively control eighty percent of market share), beer company executives could be "banking" on the relative "inelasticity of demand" when it comes to beer. Although the discussion of "inelasticity of demand" would perhaps be better left to economists, the term refers to a market situation where the demand for a product remains relatively constant in spite of price increases. If demand were "elastic" for beer, a price increase would result in notably lower demand. Beer executives are likely hoping that consumers will perceive beer as an indispensable, (i.e., necessary) product to deal with the "trials and tribulations" brought on by "The Great Recession!"

2. When his company, Microsoft, was being investigated by the United States Department of Justice for alleged anticompetitive behavior in the 1990s, Bill Gates claimed that even with Microsoft's ninety-percent (90%) market share of computer operating systems, the company was still vulnerable in terms of competition, and competition could still flourish in the computer industry despite Microsoft's market share. Do you accept Gates' argument? Why or why not?

One could assume that even if a company has ninety-nine percent (99%) market share in a particular industry, there is still an opportunity for a fledgling "start-up" company to establish a "foothold" in the marketplace, and erode a colossal company's market share over time. In reality, however, the larger the existing company is, and the greater its share of the market, the more difficult it would be for a fledgling company to compete. The Sherman Antitrust Act was enacted in 1890 by the United States Congress to address anti-competitive markets. Arguably, the purpose of the Sherman Act is not to protect competitors, but rather to protect competition and the competitive landscape. As explained by the U.S. Supreme Court in Spectrum Sports, Inc. v. McQuillan, "The purpose of the (Sherman Antitrust) Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."

Microsoft itself was sued by the United States Department of Justice for alleged anti-competitive, monopolistic practices. For an excellent synopsis of United States v. Microsoft, including the "lasting lessons and deeper meanings" of the case for Microsoft, for the software and technology industries, and for antitrust law and enforcement, see http://cyber.law.harvard.edu/events/usvms.

3. In the event that the United States Department of Justice should decide to "do something" about the alleged concerted price increase on the part of Anheurser-Busch InBev and MillerCoors, what should the Department of Justice do, and why?

It must be emphasized that even if the United States Department of Justice perceives the concerted price increases of Anheuser-Busch InBev and MillerCoors to be in violation of United States antitrust law, the Department of Justice may choose to do nothing. The Department of Justice has decision-making authority when it comes to antitrust law, and if the Department perceives the case as non-essential, it may choose to focus its efforts (and limited resources) elsewhere. Based on this author's review of the history of enforcement of United States antitrust law, the Department of Justice seems to focus its attention on "essential" industries; i.e., industries producing goods and/or services that are indispensible to consumers. Although the question of whether beer is an essential product may depend on who you ask (an alcoholic versus a "teetotaler," for example), there are many other industries producing goods and/or services that are much more essential to the average consumer (consider electricity or transportation as examples).

Even if the United States Department of Justice chooses to intervene, the determination and enforcement of an appropriate remedy is difficult. Given the fact that Microsoft Corporation is a corporation headquartered in the United States (Redmond, Washington), the United States federal court system has clear jurisdiction over Bill Gates' "brainchild." If you choose to research the United States v. Microsoft case, you will discover that Judge Thomas Penfield Jackson (the presiding trial court judge) ruled that Microsoft had violated the Sherman Antitrust Act, and that the corporation must be broken into two separate units, one to produce its operating system, and one to produce its other software components. Although the case later settled, and although the court did not "carry through" on Judge Jackson's proposed remedy, it could have, since the United States federal court system has jurisdiction over corporations headquartered in the United States. Since "Big Beer" is now, for all intents and purposes, foreign-owned (see Article 3 above), the question of jurisdiction, or at least the question of whether to enforce United States laws against the foreign owners of "Big Beer," is considerably more difficult to address.

Other antitrust options available to the government include price controls, or general governmental regulatory control over an industry and all of the businesses competing in that particular industry. The use of such regulatory tools is not unprecedented; consider, for example, that the federal (and state) governments often regulate pricing in the electricity industry. In my home state of North Carolina, for example, a certain electricity provider is allowed to exist as a virtual monopoly in providing electricity to enormous numbers of North Carolina residents; as a regulated monopoly, however, the company must seek approval from the government for any proposed electricity price increase.

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Video Suggestions

Video 1: "McDonald's Loses Trademark Battle to McCurry"

http://www.timesnow.tv/McDonalds-loses-trademark-battle-to-McCurry/videoshow/4326939.cms

(Note: For an accompanying article, see http://www.usatoday.com/money/industries/food/2009-09-08-mccurry_N.htm; to visit the McCurry Restaurant web site, see http://mccurryrecipe.com/)

Purpose of video: To discuss intellectual property law (more specifically, trademark law) as it applies to McDonald's litigation against the Malaysian restaurant "McCurry"

Discussion Questions

1. In your reasoned legal opinion, was the Malaysian federal court's dismissal of McDonald's lawsuit against McCurry a sound decision? Why or why not?

Student opinions may vary in response to whether the Malaysian federal court's dismissal of McDonald's lawsuit against McCurry was a sound decision. As the video "McDonald's Loses Trademark Fight Against McCurry" and the accompanying article indicate, the Malaysian restaurant's name, "McCurry," is an abbreviation for "Malaysian Chicken Curry." McCurry Restaurant serves only Malaysian and Indian food, a menu entirely different from that of McDonald's. Further, as the McCurry website (http://mccurryrecipe.com/) demonstrates, the physical layout of the Malaysian restaurant bears no resemblance to the typical McDonald's store. No customer would likely confuse McDonald's and McCurry in terms of their respective menus or in terms of their physical layout, and this argument certainly supports the court's decision. In this author's opinion, McDonald's strongest argument in its intellectual property litigation against McCurry rests on the prefix "Mc," and the question of whether the use of that prefix by McCurry Restaurant constitutes trademark infringement. The "Mc-prefix" argument will be addressed in response to Discussion Question 2 below.

2. Visit http://mccurryrecipe.com/ and carefully examine the McCurry restaurant sign (Pictures and videos of the McCurry restaurant sign are available via the "About McCurry" section of the web site.) Compare the McCurry restaurant sign to the ubiquitous McDonald's sign. Based on your comparison of the two signs, has McCurry committed a trademark violation?

Why or why not? Should McDonald's have an exclusive right to the "Mc" prefix? Why or why not?

Based on this author's comparison of the two (2) signs, although there are some similarities between the signs, the differences are quite substantial and determinative of the issue as to whether McCurry committed trademark infringement. First, the similarities: 1) Both signs use the prefix "Mc"; 2) Both signs incorporate a red background; and 3) Both signs use a similar (although not identical) text style. In terms of the differences: 1) The name "McCurry," taken as a whole, is substantially different from the name "McDonald's; 2) The McCurry symbol is entirely different from the "Golden Arches" of McDonald's, depicting a chicken along with the words "Malaysian Chicken Curry," which would seem to explain the use of the prefix "Mc"; 3) The McCurry sign incorporates the word "Restoran" (Restaurant), as well as what appears to be pictures of the restaurant's menu items; and 4) The McCurry sign incorporates contact information for the restaurant, including its address and telephone number. Taken as a whole, it would seem that no reasonable customer would confuse the two signs.

In terms of whether McDonald's should have an exclusive right to the "Mc" prefix, the opinion of this author is "no!" The prefix "Mc" is generic, and should not be controlled by any individual corporation/business. Would McDonald's present the same prefix-related argument against a restaurant named "McGuffey's?" In the case Harley-Davidson v. Grottanelli, 164 F3d 806 (2d Cir 1999), Harley-Davidson tried to assert the right of exclusivity (in other words, the right to exclusive trademark protection) in the word "hog." The United States federal court concluded that since "hog" is a generic term, Harley-Davidson was not entitled to trademark protection for that particular word. To do so would effectively take the word "hog" out of vernacular "circulation!" The same unfair result would occur if a court concluded that McDonald's was entitled to exclusive rights to the prefix "Mc."

3. According to the web site http://www.mcdonalds.ca/en/aboutus/faq.aspx, McDonald's is an enormous multinational corporation, operating over 31,000 restaurants in more than 119 countries on six (6) continents. In your opinion, why would McDonald's choose to engage in a protracted (eight-year) legal battle with a relatively small Malaysian restaurant operating only 137 outlets solely in Malaysia?

If one were to assume that McDonald's is entitled to the right of exclusive use of the prefix "Mc," then it could be argued that McDonald's has an affirmative duty to monitor the business environment in order to determine whether its trademark is being violated, and then to take corrective (legal) action to remedy (stop) the violation. Intellectual property law dictates that if a trademark owner does not take steps to enforce the right of exclusivity, the trademark owner will at some point lose that right of exclusivity. History is "littered" with examples of formerly trademark-protected names (yo-yo, aspirin, thermos, etc.) that have become part of the "public domain" due to the trademark holder's less-than-aggressive approach in asserting intellectual property rights. Once a word becomes part of the "public domain," anyone can use it without fear of legal ramification. Even though the McCurry-McDonald's litigation would appear to be a "David versus Goliath" type of legal confrontation, there is an argument to be made here that McDonald's was simply doing that which the law requires: vigorously attempting to enforce intellectual property rights, at the risk of otherwise losing those rights.

Proceedings

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Video 2: "Cops, Lawmakers Send Message: Dnt Txt & Drive"

http://www.msnbc.msn.com/id/21134540/vp/32184212#32184212

(Note: For an accompanying article, see http://www.msnbc.msn.com/id/32584570/ns/technology_and_science-tech_and_gadgets/)

Purpose of video: To discuss government regulation of cell phone use while driving, particularly "text-messaging"

Discussion Questions

1. In your opinion, is "texting while driving" merely a moral issue, or should it also be a legal issue? If you believe that "texting while driving" is a legal issue as well as a moral issue, should individual states determine whether the practice violates the law (and if so, what the civil liability and/or criminal punishment should be), or should such a determination be made at the federal level?

Given the results of the new study (referenced in the video) indicating that "texting while driving" makes the driver twenty-three (23) times more likely to be involved in an accident, and that the practice is arguably just as dangerous (if not more dangerous) than driving while intoxicated, it is difficult to frame this issue purely in moral terms. If "texting while driving" makes the driver just as likely, if not more likely, to be involved in an accident, it would be difficult to rationalize the act of driving while intoxicated as illegal, while "intextication" as merely immoral.

In terms of the source of law (state versus federal) issue, there is a strong argument to be made here that a uniform federal law would make sense, especially in terms of the ease of applicability and fairness of a federal law. The video indicates that fourteen (14) states (Alaska, Arkansas, California, Colorado, Connecticut, Louisiana, Maryland, Minnesota, New Jersey, North Carolina, Tennessee, Vermont, Virginia, Washington) and the District of Columbia currently ban the practice of texting while driving; the "flip side" of that statistic is that thirty-six (36) states currently do not declare the practice illegal. If the federal government chose to act in passing a uniform federal law, it could do so by enticing states to adopt the federal standard through the use of financial incentives, or by threatening financial punishment if states chose not to adopt the standard (As empirical examples, think of the federal government's threat to withdraw highway funding if states chose not to adopt the fifty-five mile-per-hour speed limit in the 1970s, or the federal government's similar threat with respect to the twenty-one-year-old minimum drinking age in the 1980s.) As an authoritative basis for enacting a federal prohibition on texting while driving, the federal government could also arguably invoke the Commerce Clause of the United States Constitution, since so much driving involves interstate commerce ("Interstate commerce" triggers federal authority under the Commerce Clause of the United States Constitution.)

2. As the article accompanying the video indicates, Utah has taken one of the toughest stances regarding "texting while driving," with its state legislature passing a law that imposes a criminal penalty

of up to fifteen (15) years in prison on texting drivers who cause an accident that kills someone. In your opinion, is the Utah law acceptable/favorable, or does such a law constitute "cruel and unusual" punishment?

Whether you favor or oppose Utah's law criminalizing the practice of texting while driving, such a law would seem to justify the implementation of a uniform federal standard. Again, a uniform federal standard would not only be easier to interpret and apply, but it would also arguably be fairer to those who seek protection under the law, as well as those subject to prosecution for violation of the law. Although fifteen (15) years of imprisonment for a texting driver who caused an accident that killed someone might seem excessive, there are legal grounds for declaring such an act criminal, and for assessing considerable punishment for such a criminal act. Such an act arguably rises to the level of a criminal wrong, since it constitutes a wrong against society as a whole (by imperiling those innocent parties who choose to use our primary form of transportation, automobiles), as well as a wrong against the actual victim(s). Furthermore, a strong argument could be made that "texting while driving" constitutes either criminal negligence or criminal recklessness; considerable legal authority holds that negligence or recklessness that "shocks the conscience of" the jury can satisfy the "mental state" requirement for criminal liability, even if the defendant did not specifically intend to harm anyone. If one accepts the premise that "texting while driving" is just as dangerous as, if not more dangerous than, driving while intoxicated, it is relatively easy to justify not only criminalizing the act, but also imposing strict punishment for violation of the associated criminal law.

3. The video illustrates at least two (2) examples of drivers who were involved in "texting"-related accidents while working. Are employers liable for "texting"-related accidents in which their employees are at fault? If so, is it acceptable/favorable to impose such a legal burden on employers?

Under the doctrine of "respondeat superior," an employer is liable for any acts committed by an employee within the "course and scope" of his/her employment. "Course and scope" of employment indicates that the activity the employee was engaged in at the time of the plaintiff's injury was related to carrying out the employer's business and/or fulfilling the employee's ordinary work responsibilities. The video depicts a bus driver and a train operator who were involved in "texting"-related accidents, both of whom were operating their employers' forms of transportation when they were involved in their accidents. Clearly, the actions of both the bus driver and the train operator occurred within the "course and scope" of employment, and the employer is liable for any injuries proximately caused by such negligence/recklessness. Although it is debatable where such a standard of liability is fair to employers, "the law is the law," and both employers and employees must be cognizant of such a standard of liability. Practically speaking, all employers should ban, as a matter of policy, employee "texting while driving"; even though such a policy might not fully immunize the employer from liability should an employee violate the policy, it might reduce the likelihood that a considerable number of employees would engage in such a practice. Remember, violation of company policy carries with it the very real threat of termination of employment!

Proceedings

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Of Special Interest

This section of the newsletter addresses the "gathering storm" that directly threatens the longstanding American tradition of jury trials: the reluctance of individuals to satisfy their civic duty of jury service.

Hypothetical and Ethical Dilemma

Thomas Lee was most definitely not a "happy camper." He had been called to serve on jury duty, and he now found himself sitting in the jury box in a Hamilton County District Court (Civil Division) courtroom, with the judge, the plaintiff's attorney and the defense attorney ready to engage the prospective twelve (12) jurors in the "voir dire" process (A French term, "voir" means "to see" and dire means "to say"; in the context of litigation, the term refers to the jury selection process, where plaintiff and defense counsel have the opportunity to engage the prospective jurors in a "question and answer" session, with the attorneys having input in terms of deciding which twelve prospective jurors will ultimately serve as the trial jury.)

Thomas detested all things associated with the jury process. Five (years) previously, his brother James had been convicted of armed robbery; James was currently serving time in a Hamilton County prison. In Thomas' opinion, his brother had been wrongfully convicted, as James' defense attorney had not even prepared his case before trial; nevertheless, the appeals court had upheld James' conviction, and as a result, Thomas was convinced that the judicial system was incompetent at best, and corrupt at worst.

Thomas operated his own heating and air conditioning business. He was proud of the fact that he had built his business "from the ground up," and he had become quite successful. He had eight (8) employees, and he generated enough business in the community to keep himself, as well as his workers, continuously busy.

Not only did Thomas believe that the judicial system was incompetent and/or corrupt, he was also insulted by the "going rate" for jury service in Hamilton County: Individual juror compensation amounted to fifteen dollars ($15) per day for the first three (3) days of jury service, and thirty dollars ($30) per day for every day thereafter. For an entrepreneur who earned $95,000 in personal income the previous year, Thomas felt that Hamilton County's financial gesture for jury service was a degrading "slap in the face."

Thomas had several friends and family members who had successfully avoided jury service in the past. His sister Rebecca ("Becky") had been excused just last year. Becky is a single mom with two (2) children who works forty-five (45) hours per week and attends evening classes at the local community college in pursuit of an associate's degree. The judge had taken sympathy on Becky, and he had released her from jury service summarily. Additionally, Thomas' friend Juan had been excused from jury service the year before. Juan had told the judge "point blank" that he believed that plaintiffs' attorneys' were "money-grubbing bottom-feeders"

and that he could never find in favor of a plaintiff as a result; the judge had excused Juan even before the plaintiff's attorney had the opportunity to exercise a peremptory challenge against him (A peremptory challenge allows plaintiff or defense counsel the opportunity to excuse a prospective juror from serving on the trial jury, usually due to the attorney's determination during the "voir dire" process that the prospective juror will not likely entertain the notion of finding in favor of the attorney's client.) When Thomas told Juan that he had been called to jury service, Juan said "Just say something that shocks the judge and the lawyers during jury selection, Tommy, and you will be out of there (the courtroom) in no time!"

Thomas has a plan. In order to avoid jury service, he will announce to the judge his true feelings about the judicial system, that it is "incompetent at best and corrupt at worst." He also plans to misrepresent to the judge his work demands, and claim that he is indispensable to his business in terms of the "day-to-day" work. In reality, since he has eight (8) employees, they could "cover" for him for approximately two (2) weeks without any appreciable impact on the business. The judge has already announced that the trial will take approximately two to three days to complete.

Evaluate the propriety/impropriety of Thomas' planned course of action.

Jury service is a civic obligation necessary for the survival of our judicial system in its current, constitutional form. The Sixth and Seventh Amendments to the United States Constitution, part of the "Bill of Rights," guarantee the right to a jury trial in both criminal and civil cases; therefore, in order to meet constitutional requirements, court systems (both state and federal) across the nation summon scores of citizens to fulfill their civic duty.

Although jury service is a civic obligation, Americans more and more have "soured" on the notion of such service. Most of us are busier now than we ever have been, with commitments to family, one (1) or more jobs, continuing education, and/or community obligations. American culture seems to demand that we "burn our candles at both ends." If we need to look to find one (1) or more excuses in terms of jury service, we need not look too far.

In terms of the reasons presented to him/her for not being able to serve on a jury, the judge has a discretionary "call" to make. Ultimately, it is the judge's decision as to whether to excuse a prospective juror under such circumstances, and in considering the individual's proffered excuse, the judge must evaluate the legitimacy of the excuse as to whether it truly makes the prospective juror's service extremely difficult or impossible.

Based on the information presented in this Case Hypothetical and Ethical Dilemma, Thomas should serve his civic duty if the attorneys should decide to make him part of the trial jury. In terms of his opinion that the judicial system is "incompetent at best and corrupt at worst," he should try his best to put that opinion aside in the interests of service. Keep in mind that although he is upset (to say the least) about his brother James' conviction, Thomas is being called upon to serve on a <u>civil</u> jury; students should know that in every jurisdiction there are two (2) distinguishable courts, with civil courts deciding cases based on claimed wrongs against individuals (with money damages typically awarded in

cases of determined liability), and with criminal courts deciding cases based on claimed wrongs against society as a whole (with imprisonment typically imposed against the defendant in cases of determined guilt). Thomas has had no exposure to the civil court system, so he should at least be open-minded in terms of whether justice can be served in civil court.

Although his monetary objections to service are well-founded, Thomas should again remind himself that it is his civic duty to serve on the jury, financial considerations aside. All of us would likely agree that the compensation awarded by Hamilton County for jury service is trivial (in the Case Hypothetical and Ethical Dilemma, the compensation for jury service cited is representative of court systems across the nation), but what is the alternative: Higher taxes so that compensation for jury service can be raised? Reduction of the number of jurors required on a trial jury (the traditional number is twelve jurors)? Abolition of the jury system? Thomas should be thankful of the fact that his employees can likely "cover" for him while he is in court, and that the trial will only last two to three days. With his employees covering for him, Thomas will likely not see any discernible impact on his income.

As a side note, students should be reminded that Thomas is considering misrepresenting to the judge his indispensability at work; more specifically, Thomas plans to claim that his business cannot "get by" without him, this despite the fact that the trial is only projected to take two to three days to complete, and since any one or more of his eight (8) employees can cover for him while he is gone. It is not a good idea for Thomas (or anyone else, for that matter) to lie to a judge! If Thomas should make such a misrepresentation, and if the judge should discover the fact that it is a lie, Thomas can be held in contempt of court (a criminal violation.)

Notice how Becky's situation differs dramatically from the personal and professional circumstances surrounding Thomas. Thomas' sister is overburdened in terms of her personal and professional commitments; as stated in the Case Hypothetical and Ethical Dilemma, Becky is a single mom with two (2) children who works forty-five (45) hours per week and attends evening classes at the local community college in pursuit of an associate's degree. Even two to three days of jury service would present a substantial hardship for Becky and her children, and that is why the judge excused her from jury service. Thomas faces no comparable difficulties; again, although he might object to his time away from work, the facts presented in the Case Hypothetical and Ethical Dilemma demonstrate that Thomas' employees can "make do" in his two to three-day absence.

More and more, judges are becoming skeptical of assertions similar to those that Thomas' friend Juan made (Remember that to avoid jury service, Juan had told the judge "point blank" that he believed that plaintiffs' attorneys' were "money-grubbing bottom-feeders" and that he could never find in favor of a plaintiff as a result). Although the judge in the Case Hypothetical and Ethical Dilemma excused Juan for that reason, other judges may not excuse similar jurors "for cause"; instead, a judge in a comparable situation may leave it up to the litigating attorneys (most likely, the plaintiff's attorney) to decide whether to excuse such a juror by using a "peremptory challenge."
As a final discussion point, consider Thomas' belief that the judicial system is "incompetent at best and corrupt at worst." Assume that Thomas makes such an assertion during the jury selection process, and that the judge decides, nevertheless, not to excuse him from service. Ask your students to assume

that they are either plaintiff's or defense counsel in such a situation. Would they exercise a peremptory challenge in such a situation (Remember that a peremptory challenge allows plaintiff or defense counsel the opportunity to excuse a prospective juror from serving on the trial jury, usually due to the attorney's determination during the "voir dire" process that the prospective juror will not likely entertain the notion of finding in favor of the attorney's client?) Why or why not?

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Of Special Interest

This section of the newsletter will assist you in covering:

1) the **"Hypothetical and Ethical Dilemma"** presented earlier in this newsletter; and

2) Video 2 of the **"Video Suggestions"** Section (**"Cops, Lawmakers Send Message: Dnt Txt & Drive."**)

Teaching Tips

Teaching Tip 1:

For supplementary material regarding the jury selection process (the topic addressed in this newsletter's "Case Hypothetical and Ethical Dilemma,") have your students reference the article "Call to Jury Duty Strikes Fear of Financial Ruin" at http://www.nytimes.com/2009/09/02/us/02jury.html (Note: Students will have to register with The New York Times in order to access this article. Registration is free, without obligation, and only takes a minute). This article describes the adverse effect that "The Great Recession" is having on the jury selection process, with many prospective jurors claiming that they cannot afford to serve on a jury. For example, the article describes the plight of Chemelle Charles, a nurse, whose husband was laid off in July. When asked by Judge Robert A. Rosenberg whether serving on a trail of four (4) to five (5) weeks would constitute a hardship for her, she described that it definitely would. Judge Rosenberg dismissed Mrs. Charles, along with more than one-half of the eighty (80) potential jurors he interviewed, many of them for economic-related reasons.

Jane Hybarger, the jury administrator for the United States District Court in Las Vegas, relates the desperate pleas she hears from jurors who wish to be excused from service: "Now I'm hearing (from) people who are living day to day, who are months behind in their mortgage," Ms. Hybarger states. "There's (sic) tears in their voices—they don't know how they're going to put food on the table."

The article notes that given current economic conditions, a greater number of employers are refusing to compensate their employees for jury service. Further, despite laws that protect jurors from being fired for their service, employees whose companies have experienced rounds of layoffs worry about the impact on them of several days (or weeks) away from the office.

As "Call to Jury Duty Strikes Fear of Financial Ruin" indicates, one recommendation for addressing the problem of reluctance to serve is to pay jurors more. According to Patricia Lee Refo, a lawyer in Phoenix, we should pay jurors more, since jury service is "a critically important civic service." In Ms. Refo's opinion, "we should pay (jurors) in accordance with the importance of their work." Although juror compensation varies from jurisdiction to jurisdiction, the rate of compensation cited in the article (that of Orange

County, Florida) is fairly representative: $15 per day for the first three (3) days, and $30 for each day thereafter.

There is one "bright spot" in terms of jury service and "The Great Recession?" Some unemployed citizens are happy to get the work. According to Norman Goodman, the county clerk for Manhattan, "If somebody's out of work, I guess jury service is a paying job (The daily rate for jury service in Manhattan is $40.) It's not going to get you into Tiffany's, but it's something."

Ask your students if raising juror compensation will address the dilemma noted in this article. In the opinion of this author, increased juror compensation is a potentially viable solution, but 1) it would come at a cost, since increased tax dollars would have to be allocated to "the cause," and most jurisdictions are "cash-strapped" already due to the current recession; and 2) even if the per diem rate for jury service was increased, that would still not address the "environment of fear" many employees currently experience, wondering whether their absence from work will cause employers to view them as expendable. Again, even though it is illegal to terminate an employee for jury service, "the imagination is the only limit" in terms of employer articulation of the reason(s) purportedly justifying termination of employment.

Teaching Tip 2:

As a supplement to Video 2, "Cops, Lawmakers Send Message: Dnt Txt & Drive," students will likely find interesting a summary of the cell phone driving laws for all fifty (50) states at http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html. This information is promulgated by the Governor's Highway Safety Association (GHSA), and is effective as of October 2009. As the site indicates, current state cell phone driving law highlights include the following:

1. There is a handheld cell phone ban in effect for all drivers in six (6) states (California, Connecticut, New Jersey, New York, Oregon and Washington). The District of Columbia and the Virgin Islands prohibit all drivers from talking on handheld cell phones while driving. With the exception of Washington State, these laws are all "primary enforcement," meaning that an officer may ticket a driver for using a handheld cell phone while driving without any other traffic offense taking place;

2. No state completely bans all types of cell phone use (handheld and hands-free) for all drivers, but many prohibit cell phone use by certain segments of the population. For example, twenty-one (21) states and the District of Columbia ban all cell phone use by novice drivers. Additionally, in seventeen (17) states and the District of Columbia, school bus drivers are prohibited from all cell phone use when passengers are present;

3. Eighteen (18) states and the District of Columbia now ban text messaging for all drivers. Nine (9) states prohibit text messaging by novice drivers, and one (1) state restricts school bus drivers from texting while driving;

4. Eight (8) states have laws that prohibit local jurisdictions from enacting restrictions. In six (6) other states, localities are allowed to ban cell phone use; and

5. Some states, such as Maine, New Hampshire and Utah, treat cell phone use as a larger distracted driving issue. Utah considers speaking on a cell phone to be an offense *only* if a driver is also committing some other moving violation (other than speeding).

Students will likely find it most interesting (and practical) to research cell phone driving laws in their particular state of residence. To use the author's state of residence, North Carolina, as an example, the following laws apply:

1. There is no absolute cell phone ban while driving;

2. School bus drivers are subject to an "all cell phone" ban while driving;

3. Drivers of less than eighteen (18) years of age are subject to an "all cell phone" ban while driving;

4. Effective December 2009, all drivers are prohibited from text messaging while driving; and

5. All cell phone violations are subject to "primary enforcement," meaning that an officer may ticket a driver for using a handheld cell phone while driving without any other traffic offense taking place.

Since cell phones have become virtual "appendages" of the younger generation (and most of the other segments of the United States population), this topic should make for lively discussion and debate!

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Chapter Key for McGraw-Hill/Irwin Business Law texts

	Hot Topics	Video Suggestions	Hypothetical or Ethical Dilemma	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 5, 10, 25 and 47	Chapters 9 and 12	Chapter 3	Chapters 3 and 9
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 4 and 14	Chapters 5 and 6	Chapter 3	Chapters 3 and 5
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 3, 20 and 49	Chapters 7 and 8	Chapter 2	Chapters 2 and 7
Barnes et al., Law for Business, 10th Edition	Chapters 4, 20 and 45	Chapters 7 and 8	Chapter 2	Chapters 2 and 7
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 2, 19 and 40	Chapters 6 and 21	Chapter 3	Chapters 3 and 6
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 6, 16 and 17	Chapters 10 and 11	Chapter 4	Chapters 4 and 10
McAdams et al., Law, Business & Society, 9th Edition	Chapters 5, 7 and 11	Chapters 7 and 16	Chapter 4	Chapters 4 and 7

This Newsletter Supports the Following Business Law Texts

Barnes et al., Law for Business, 10th Edition, 2009© (007352493X)
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition, 2009© (0073524948)
Kubasek et al., Dynamic Business Law, 2009© (0073524913)
Kubasek et al., Dynamic Business Law: The Essentials, 2010© (0073377686)
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)