businesslaw

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

The McGraw-Hill Companies

Contents

Dear Professor,

Welcome to McGraw-Hill's November 2010 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. I hope your fall semester is transpiring nicely! Volume 2, Issue 4 of Proceedings incorporates "hot topics" in business law, video suggestions, a case hypothetical and ethical dilemma, teaching tips, and a "chapter key" cross-referencing the November 2010 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 potential review of the new federal health care reform legislation;

2. United States Supreme Court Justice Antonin Scalia's controversial comments regarding Supreme Court jurisdiction over sex discrimination;

3. History's largest "rogue trading" scandal, involving ex-trader Jerome Kerviel;

4. The potential legal liability of a "Good Samaritan" and whether those who intervene to render assistance to those in need should be granted immunity from liability;

5. China's alleged regulatory devaluation of the yuan, and whether the United States should respond by imposing trade sanctions against China; and

6. A "Case Hypothetical and Ethical Dilemma" addressing the question of whether, in a product defect case, an exculpatory clause in a contract effectively eliminates the liability of a manufacture/dealer for the plaintiff's personal injury and/or economic harm.

I sincerely hope you find this newsletter to be a valuable teaching tool!

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

businesslaw

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

The McGraw-Hill Companies

Of Special Interest

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

1) The United States Supreme Court's Potential Review of the New Federal Health Care Reform Legislation;

2) United States Supreme Court Justice Antonin Scalia's Controversial Comments Regarding Supreme Court Jurisdiction over Sex Discrimination; and

3) History's Largest "Rogue Trading" Scandal, Involving Ex-Trader Jerome Kerviel.

Hot Topics in Business Law

Article 1: "Healthy Debate: Will the Supreme Court Strike Down Controversial Provisions of the New Health-Care Law?"

http://www.newsweek.com/2010/09/20/will-the-supreme-court-strike-down-health-care-reform.html

Two conservative federal judges have now voiced cautiously sympathetic views on legal challenges to the 2,400-page health-care law that President Obama signed into law in March. But such preliminary skirmishes shed little light on whether the Supreme Court will in the end strike down the law, a law that raises a completely novel legal issue: Can Congress require millions of individuals to buy a commercial product (in this case health insurance) in the name of regulating interstate commerce?

Judge Roger Vinson of the federal district court in Pensacola, Fla., suggested during a two-hour hearing on September 14 that he was unlikely to dismiss a major challenge to the law by officials of 20 states, almost all of them Republican, plus three other plaintiffs. The plaintiffs object to provisions including the new law's "individual mandate," an unprecedented requirement that people not covered by employer-based plans must buy comprehensive health insurance or face monetary penalties. It is to take effect in 2014.

The lawsuits—more than 15 so far—argue that Congress has no such power. Last month, federal district Judge Henry Hudson, of Richmond, Virginia, rejected a Justice Department motion to dismiss a similar suit by Virginia's attorney general. But some leading legal experts, especially defenders of the new law, confidently predict that if any federal appeals court strikes it down, the Supreme Court will step in to uphold it, with some predicting a margin as lopsided as 8 to 1.

Critics of the law's constitutionality scoff at such predictions. They're confident that they'll get at least the four conservative justices' votes and that they have a good shot at swing-voting Justice Anthony Kennedy. Nobody seems to doubt that the four more liberal justices will support the new law. They appear to see Congress's power to regulate interstate commerce as virtually unlimited, except by the Bill of Rights and other specific constitutional amendments.

However the case turns out, any ruling by the justices on the constitutionality of the health-care law would be the most important pronouncement on the relative powers of the federal and state governments in many decades.

The most fundamental question is whether Congress's undoubtedly broad power to regulate activities affecting interstate commerce is so sweeping as to empower the

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

government to require people who are engaged in no relevant activity at all other than living in the United States to buy health insurance. (When the Justice Department lawyer defending the new law sought to characterize a decision not to buy health insurance as commercial "activity," Judge Vinson interjected, "You're trying to turn the word upside down and say activity is really equivalent to inactivity.")

The lawsuits also challenge as an invasion of state sovereignty the new law's provisions requiring states, already strapped for cash, to spend billions of dollars expanding their Medicaid programs unless they withdraw entirely, a step widely seen as unthinkable.

Defenders of the law predict that no more than one or two of the most conservative justices would strike down the challenged provisions, which the government says are critical to effective federal regulation of a health care system that has a massive impact on interstate commerce. Walter Dellinger, a leading scholar and the acting solicitor general under President Clinton, foresees an 8-1 vote, with only arch-conservative Justice Clarence Thomas voting to strike down the new law. Tom Goldstein, another leading Supreme Court litigator, foresees a vote of at least 7-2.

"They're just parroting the party line," retorts David Rivkin, a Washington lawyer who argued the case last week on behalf of the 20 states challenging the law. He says that upholding it would obliterate all limits on the commerce power, a step that Justice Kennedy and his four more conservative colleagues have repeatedly eschewed. Such a step would cross an important line and make America less free, Rivkin and his allies stress, by empowering Congress to require even the purchase of health-club memberships or, say, cars to stimulate the economy.

At the same time, leading centrist-to-conservative legal experts, including UCLA Law School's Eugene Volokh, doubt that the justices would or should strike down such a hugely important enactment with so vast an impact on interstate commerce. Others stress that Congress's sweeping authority to tax and spend for the general welfare—on which the somewhat analogous Social Security and Medicare taxes are based—provides ample authority for the penalty tax imposed by the new law on people who refuse to buy health insurance.

The justices have not struck down a major piece of legislation, let alone a president's signature initiative, as beyond Congress's power to regulate commerce in some 75 years.

Still, much may depend on where things stand when the issue reaches the justices. How popular or unpopular will the president's new law be then? How costly? How effective? What if the voters have by then elected a more conservative Congress that wants to repeal the law? Such factors are not supposed to influence constitutional interpretation, but sometimes they do.

Discussion Questions

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

1. Have students respond to this question (mentioned in the first paragraph of Article 1): Can Congress require millions of individuals to buy a commercial product (in this case health insurance) in the name of regulating interstate commerce?

Student responses will likely vary. Article I, Section 8, Clause 3 of the United States Constitution, commonly referred to as the "Commerce Clause," states "The Congress shall have the power... (t)o regulate commerce with foreign nations, and among the several States..." Expressed another way, all international and interstate commerce is subject to the regulation of the United States Congress. Over the decades, for "good" or for "bad," the federal government has used the Commerce Clause to grow its power, and as the article indicates, the United States Supreme Court has not struck down a major piece of legislation as beyond Congress's power to regulate commerce in approximately seventy-five (75) years.

Does health care constitute international and/or interstate commerce? Does it involve international and/or interstate commerce? Despite the fact that many people would like to think of health care as a profession, and not a business, it would be difficult to deny the fact that the health care industry is just that, an industry, involving thousands of international and interstate transactions every day, whether it be a North Carolina hospital ordering medical supplies from a foreign producer, or an elderly Floridian subscribing to a health insurance policy from an insurance company headquartered in Minnesota.

2. As the article indicates, David Rivkin, a Washington lawyer who argued the case on behalf of the twenty (20) states challenging the health care reform law, claims that upholding the health care reform law would obliterate all limits on the commerce power, make America "less free," and empower the United States Congress to require even the purchase of health-club memberships or automobiles to stimulate the economy. Do you agree or disagree with attorney Rivkin's assertions? Why or why not?

Although student responses will likely vary, it does appear (at least in your author's opinion), that attorney Rivkin is "playing politics" with the new health care reform legislation. Attorney Rivkin's claims generate numerous questions. Exactly how would the health care reform law obliterate all limits on Congress's commerce power? How would it make America "less free?" (Perhaps by allowing a poor person the "freedom" to die because he or she cannot afford a life-saving heart procedure?) Exactly how would it empower the United States Congress to require even the purchase of health-club memberships? Logically, how can attorney Rivkin argue that the health care reform law would empower Congress to require the purchase of automobiles to stimulate the economy?

In your author's opinion, United States health care is too important an issue to merely "play politics;" instead, the people of this nation deserve a serious discussion regarding the problems associated with health care, and what can (and should) be done to ameliorate or eliminate those problems.

3. As the article indicates, the ultimate outcome of this case may depend on "where things stand" when the case reaches the United States Supreme Court, including how popular or unpopular the health care reform law will be then, how costly is will be, how effective it is, and whether voters have by then elected a more conservative Congress that wants to repeal the law. Should such factors influence the United States Supreme Court's constitutional interpretation of the health care reform law? Why or why not?

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

Technically, none of the aforementioned factors should influence the United States Supreme Court's constitutional interpretation of the new health care reform legislation. The overriding issue before the Court will be whether the United States Congress has the power, pursuant to the Commerce Clause of the United States Constitution (or some other legal source), to enact health care reform legislation. Many Congressional initiatives have been "unpopular" in our nation's history; for example, scores of individuals, and a number of states, opposed the Civil Rights Act of 1964. Many Congressional initiatives in the past have been expensive; Social Security, Medicare and Medicaid have cost billions of dollars. When the issue reaches the Supreme Court, the health care reform legislation will still likely be in its "infancy" stage, and its effectiveness (at that particular point in time) will be difficult to determine. Finally, should a more conservative Congress assume power, it (as a legislative body) will control the repeal initiative. Remember, in terms of constitutional powers, the legislative branch makes the law, while the judicial branch interprets the law.

Article 2: "Justice Scalia Mouths Off on Sex Discrimination"

http://www.time.com/time/nation/article/0,8599,2020667,00.html

Leave it to Supreme Court Justice Antonin Scalia to argue that the Constitution does not, in fact, bar sex discrimination.

Even though the court has said for decades that the equal-protection clause protects women (and, for that matter, men) from sex discrimination, the outspoken, controversial Scalia claimed late last week that women's equality is entirely up to the political branches. "If the current society wants to outlaw discrimination by sex," he told an audience at the University of California's Hastings College of the Law, "you have legislatures."

To anyone who has followed Justice Scalia's career, his latest provocative statement shouldn't come entirely as a surprise. It's been more than four years since he answered a reporter's question about his impartiality in religion cases with an under-the-chin hand gesture that some commentators said was a Sicilian obscenity. (A Supreme Court spokeswoman insisted the gesture was "dismissive" but not obscene.) And it's been about as long since Justice Scalia called his refusal to recuse himself from a case about Vice President Dick Cheney's energy task force — after he had just gone on a duck-hunting trip with Cheney — the "proudest thing" he has done on the court.

But Justice Scalia's attack on the constitutional rights of women — and of gays, whom he also brushed off — is not just his usual mouthing off. One of his colleagues on the nation's highest court, Justice Stephen Breyer, has just come out with a book called *Making Our Democracy Work: A Judge's View*, which rightly argues that the Constitution is a living document — one that the founders intended to grow over time, to keep up with new events. Justice Scalia is roaring back in defense of "originalism," his view that the Constitution is stuck in the meaning it had when it was written in the 18th century.

businesslaw

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

The McGraw-Hill Companies

Indeed, Justice Scalia likes to present his views as highly principled — he's not against equal rights for women or anyone else; he's just giving the Constitution the strict interpretation it must be given. He focuses on the fact that the 14th Amendment was drafted after the Civil War to help lift up freed slaves to equality. "Nobody thought it was directed against sex discrimination," he told his audience.

Yet, the idea that women are protected by the equal-protection clause is hardly new — or controversial. In 1971, the Supreme Court unanimously ruled that they were protected, in an opinion by the conservative then Chief Justice Warren Burger. It is no small thing to talk about writing women out of equal protection — or Jews, or Latinos or other groups who would lose their protection by the same logic. It is nice to think that legislatures would protect these minorities from oppression by the majority, but we have a very different country when the Constitution guarantees that it is so.

And the fact that we have a very different country now from the days of the Founding Fathers is why Justice Scalia is on the wrong side of this debate. The drafters could have written the Constitution as a list of specific rules and said, "That's all, folks!" Instead, they wrote a document full of broadly written guarantees: "due process," "freedom of speech" and yes, "equal protection." As Justice Oliver Wendell Holmes explained almost a century ago, the Constitution's framers created an "organism" that was meant to grow — and to be interpreted "in the light of our whole national experience," not based on "what was said a hundred years ago."

The Constitution would be a poor set of rights if it were locked in the 1780s. The Eighth Amendment would protect us against only the sort of punishment that was deemed cruel and unusual back then. As Justice Breyer has said, "Flogging as a punishment might have been fine in the 18th century. That doesn't mean that it would be OK ... today." And how could we say that the Fourth Amendment limits government wiretapping — when the founders could not have conceived of a telephone, much less a tap?

Justice Scalia doesn't even have consistency on his side. After all, he has been happy to interpret the equal-protection clause broadly when it fits his purposes. In *Bush v. Gore*, he joined the majority that stopped the vote recount in Florida in 2000 — because they said equal protection required it. Is there really any reason to believe that the drafters — who, after all, were trying to help black people achieve equality — intended to protect President Bush's right to have the same procedures for a vote recount in Broward County as he had in Miami-Dade? (If Justice Scalia had been an equal-protection originalist in that case, he would have focused on the many black Floridians whose votes were not counted — not on the white President who wanted to stop counting votes.)

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

Even worse, while Justice Scalia argues for writing women out of the Constitution, there is another group he has been working hard to write in: corporations. The word "corporation" does not appear in the Constitution, and there is considerable evidence that the founders were worried about corporate influence. But in a landmark ruling earlier this year, Justice Scalia joined a narrow majority in striking down longstanding limits on corporate spending in federal elections, insisting that they violated the First Amendment.

It is a strange view of the Constitution to say that when it says every "person" must have "equal protection," it does not protect women, but that freedom of "speech" — something only humans were capable of in 1787 and today — guarantees corporations the right to spend unlimited amounts of money to influence elections.

Discussion Questions

1. Do you agree with Justice Scalia's proposition that the United States Constitution does not prohibit sex discrimination? Why or why not?

Section 1 of the Fourteenth Amendment to the United States Constitution states, in pertinent part, that "...No state...shall deny to any person within its jurisdiction the equal protection of the laws." This constitutional language is more commonly referred to as the "Equal Protection" Clause. The Fourteenth Amendment (including the Equal Protection Clause) was passed by the United States Congress on June 16, 1866, and ratified by Congress on July 23, 1868. In the historical sense, Justice Scalia is correct in his claim that the Equal Protection Clause was drafted after the Civil War to help "lift up" freed slaves to equality. In the legal sense, however, the language of the Equal Protection Clause is not limited to racial equality. The Clause does not say "...No state...shall deny, ***for racial reasons,****...any person...the equal protection of the laws." In your author's opinion, for that reason alone it is not much of a constitutional "stretch" for the United States Supreme Court to conclude that the Equal Protection Clause prohibits discrimination not merely on the basis of race, but on the basis of gender as well.*

2. As the article indicates, Justice Stephen Breyer contends that the United States Constitution is a "living" document, one that our "Founding Fathers" intended to grow over time to keep up with new events. Do you agree with Justice Breyer, or would you instead support Justice Scalia's defense of "originalism," a belief that the Constitution should be applied based on the meaning it had when it was written in the 18th century? Explain your answer.

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

Based on Article V of the United States Constitution, it would appear that even our "Founding Fathers" envisioned the need to change the Constitution from time to time. Article V of the Constitution sets forth a procedure for the federal government to follow for expressly amending the Constitution. Included as follows is the pertinent Article V language:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislature of two thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States..."

Admittedly, this "express" method of amending the Constitution should be used cautiously, and it has been over the years, with only twenty-seven (27) amendments enacted by Congress since our nation was founded. If there were instead 270 express amendments to the Constitution, the original document would arguably have much less legal significance.

Over the course of our nation's history, the Constitution has also been amended by judicial interpretation (For example, the United States Supreme Court's decided in Roe v. Wade to imply a privacy right in the Constitution, and to apply this right to a woman's body and to a woman's restricted right to choose to have an abortion) and by practice (For example, President George Washington refused to make treaties by and with the consent of the Senate, as required by the Constitution; instead, Washington began the practice of the president negotiating a treaty with a foreign country and then submitting it to the Senate for approval. Since then, United States presidents have followed this practice.)

Even though all of us would likely agree that the United States Constitution is the best governing document enacted in the history of mankind, even our Founding Fathers confessed upon its passage that the Constitution was not perfect. This would seem to support a cautious, "living document" interpretation of the Constitution.

3. Assess the following quote from the article: "It is a strange view of the Constitution to say that when it says every "person" must have "equal protection," it does not protect women, but that freedom of "speech" — something only humans were capable of in 1787 and today — guarantees corporations the right to spend unlimited amounts of money to influence elections." Do you agree or disagree with this statement? Explain your answer.

businesslaw

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

The McGraw-Hill Companies

This is an opinion question, so student responses will likely vary. However, it does seem obvious to your author that constitutional interpretation and elaboration (a "living document" approach) is necessary to conclude that: 1) a corporation (an artificial entity that exists only by legal creation and acknowledgement) is entitled to constitutional rights similar to a "living, breathing" human being, such as the right to freedom of speech; and 2) a corporation's free speech right extends to the corporation's decision to spend vast amounts of money to influence elections. In your author's opinion, it is disingenuous for someone to be an "originalist" with respect to certain constitutional issues, and a "living document" theorist with respect to other constitutional issues.

Article 3: "Jerome Kerviel, Convicted Rogue Trader, Says He's Paying For His Bank's Mistakes"

http://www.huffingtonpost.com/2010/10/06/jerome-kerviel-convicted-_n_752202.html

Ex-trader Jerome Kerviel, speaking for the first time recently about his tough sentencing in history's biggest rogue trading scandal, insisted he is a scapegoat for his former bank and compared the penalty to getting "hit on the head with a club."

The 33-year-old was convicted, sentenced to three years in prison and ordered to pay Societe Generale, his former employer, damages of euro4.9 billion ($6.7 billion) – the equivalent of 20 Airbus A380 superjumbo jets.

"I'm starting to digest it, but I'm nonetheless crushed by the weight of the sanction and the weight of responsibility the ruling places on me," Kerviel told Europe-1 radio.

As some observers began calling for the bank to forgive Kerviel's astronomical debt, Societe Generale said it doesn't expect to get all its money back.

"There's no question of asking one man to pay such a sum," bank spokeswoman Caroline Guillaumin told French radio station France Info.

She said the bank was "open to finding a solution that's in the interests of our shareholders and employees, and that takes into account Jerome Kerviel's situation."

Earlier in the day, government spokesman Luc Chatel told French radio RMC that this was a "gesture" the bank might consider.

"I responded very clearly that it wasn't up to the government, it was Societe Generale's decision to eventually make a gesture, but it wasn't our responsibility," Chatel told reporters after the government's weekly Cabinet meeting.

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

Kerviel maintained in court that the bank and his bosses tolerated his massive risk-taking as long as it made money – a claim the bank strongly denied, saying he took great pains to cover up his actions.

"I have the feeling they wanted to make me pay for everybody and that Societe Generale had to be saved," he said.

Of the verdict, he said: "It's difficult, obviously, when you get hit on the head with a club that way."

Kerviel is appealing the ruling and says he hopes in the new trial "to prove once and for all that I wasn't the only one in the boat."

The bank says Kerviel made bets of up to euro50 billion – more than the bank's total market value – on futures contracts on three European equity indices, and that he masked the size of his bets by recording fictitious offsetting transactions.

The euro4.9 billion figure is the sum that the bank says it lost unwinding Kerviel's complex positions in January 2008. It's a sum nobody realistically expects him to repay. He would not have to pay anything until the legal process runs its course.

Kerviel said he is currently making about euro900 ($1,245) a month working part-time as a computer consultant – he reduced his hours to concentrate on the trial.

Discussion Questions

1. Comment on Kerviel's likening of the criminal penalty ($6.7 billion) in this case to getting "hit on the head with a club."

Perhaps Kerviel's analogy is accurate, but some students in your class may feel that the court should have used a real club! Kerviel's actions are representative of a "white-collar" crime, a crime that involves harm to individual victims and society-at-large, even though it typically does not involve the use of force, fear, or violence. Over the years, courts have been "cracking down" on such crimes, in response to public opinion in favor of a "get-tough" approach to white-collar criminals, and with the realization that white-collar crimes can involve a massive amount of harm, even without the use of force, fear, or violence.

Punishment for white-collar crimes can include imprisonment as well as the imposition of a criminal fine, with both forms of punishment being handed down in this case.

2. As the article indicates, Kerviel is now earning only about $1,245 per month working part-time as a computer consultant. In light of Kerviel's diminished earning capacity, should the appeals court reduce the amount of the criminal penalty? Why or why not?

Arguably, no. The amount of the criminal penalty ($6.7 billion) equates to the sum the bank claims it lost "unwinding" Kerviel's complex financial positions. In that sense, the amount of the criminal fine represents the

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

bank's actual loss. Kerviel's earning capacity should be irrelevant. As the article indicates, it is an amount no one realistically expects him to repay.

3. On appeal, should the court grant Kerviel a new trial? Why or why not?

Given the substantial resources (time, money and court personnel) committed to the prosecution of a criminal trial, and the uncertainty as to whether a new trial would result in "better" justice, a request for a new trial is very rarely granted. On appeal, Kerviel should only be granted a new trial if he can demonstrate, to the satisfaction of the court, that there was: 1) an error of law committed by the trial court; and/or 2) an abuse of discretion committed by trial court personnel, such as the judge and/or the jury. There is no evidence in this article to support the granting of a new trial.

businesslaw

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

The McGraw-Hill Companies

Video Suggestions

Video 1: "Good Samaritan Describes Chase That Led to Girl's Freedom"

http://www.cnn.com/2010/CRIME/10/06/california.child.samaritan/index.html?hpt=Sbin

Discussion Questions

1. Laws in some states hold that people in peril who receive voluntary aid from others cannot hold those offering aid liable for negligence. These laws, commonly called "Good Samaritan" statutes, attempt to encourage selfless and courageous behavior by removing the threat of liability. Should all states adopt "Good Samaritan" statutes? Why or why not?

This is an opinion question, so student answers may vary. Many students will likely agree that Good Samaritans should be shielded from liability for negligence, if for no other reason than to encourage individuals to be Good Samaritans. You should remind your students, however, that even without legal immunity from liability, a Good Samaritan will likely be favored by a jury, and the jury will be inclined to disregard minimal evidence of the Good Samaritan's negligence. Even without immunity for those who intervene to render assistance to those in need, a jury will, in all likelihood, only hold a Good Samaritan liable in a case of gross negligence or extreme recklessness.

2. Assume that the main case referenced in the video had not ended favorably; for example, assume that Victor Perez's intervention resulted in the criminal harming or killing the abducted eight-year-old girl. Would such a scenario in any way change your response to Discussion Question Number 1 above? Explain your answer.

Even if Victor Perez's intervention had resulted in the criminal harming or killing of the abducted girl, such intervention would not automatically result in a finding of negligence on Perez's part. The jury would still have to determine that Perez owed a duty of care to the girl, he breached this duty of care, and his breach caused the girl's harm. Obviously, causation would be the "tricky" issue in this scenario, since there is a convincing argument to be made that the criminal's wrongful actions represented the "proximate" (i.e., near) cause of the girl's injury/death. Obviously, if Good Samaritans were legally immune from liability, none of these issues would have to be resolved by a jury.

3. Research the existence or non-existence of a Good Samaritan law in your home state. If your home state has a Good Samaritan law, describe the content of the law.

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

Student answers will vary in response to this exercise, given the variation in Good Samaritan laws from state to state.

Video 2: "China-U.S. Trade War's Impact on Your Wallet"

http://video.foxbusiness.com/v/4350998/china-us-trade-wars-impact-on-your-wallet--/

Discussion Questions

1. As the video indicates, China does not allow the value of its currency (the yuan) to be based on purely "free market" principles (The unregulated interaction of the supply and demand of the yuan with the supply and demand of other currencies.) Instead, according to allegations made by the United States and other countries, China suppresses the value of its currency by flooding the international currency market with the yuan when its value gets too high. In your reasoned opinion, is this an unfair international trade practice? If so, what should the United States and other countries do in response to China's artificial devaluation of the yuan? Would you support United States-imposed tariffs on imported Chinese goods? Why or why not?

In response to Discussion Question Number 1, there is a strong argument to be made that if China indeed artificially suppresses the value of its currency, such a practice represents an unfair international trade practice. In a truly free market, the value of a nation's currency would be based purely on the unregulated interaction of the supply and demand of that nation's currency with the supply and demand of other nations' currencies. The "devil is in the details" of what, specifically, to do in response to China's artificial suppression of the value of its yuan. The United States could deem China in violation of free trade agreements between the two countries and impose sanctions (such as tariffs) on the importation of Chinese goods. This is easier said than done, however, for at least four (4) reasons: 1) United States consumers have grown increasingly dependent on inexpensive Chinese-manufactured goods; 2) The United States has grown dependent on the very nature of Chinese goods imported (for example, some evidence indicates that the United States even purchases necessary component parts for weapons from China, such as electronic "brains" for U.S. "smart" bombs!); and 3) If the United States responds with trade sanctions, China will likely respond in kind, resulting in a trade war; and 4) Far-ranging political and diplomatic relations between the two countries will suffer from trade-related economic disagreements between the two countries. Whether for good or for bad, both the United States and China must admit that we have grown extremely (inextricably?) dependent on each other.

2. What are the advantages and disadvantages of responding to China's devaluation of its currency?

In terms of advantages, if a United States response would result in the appreciation of the Chinese yuan, this might increase Chinese demand for U.S.-manufactured goods, since U.S. goods would become relatively less expensive for Chinese consumers (This assumes, of course, no Chinese cultural or consumer-related boycott of U.S.-manufactured goods.) If Chinese demand for U.S.-manufactured goods increases, this will improve our trade balance with China, and reduce our balance-of-payments deficit with China (Currently, because of our massive trade deficit with China, our nation sends billions of net dollars to China, commonly referred to as an "exportation of wealth.")

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

In terms of disadvantages, if the value of the United States dollar depreciates relative to the Chinese yuan, product prices for United States consumers will likely increase. See also the other risks of United States intervention presented in response to Discussion Question Number 1 above.

3. Should the United States "respond in kind" by manipulating (i.e., lowering) the value of the dollar? Why or why not?

As stated previously, if the United States dollar is lowered in value relative to the Chinese yuan, this might improve our balance-of-trade and balance-of-payments relationship with China, but United States consumers would likely face higher product prices.

businesslaw

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

The McGraw-Hill Companies

Of Special Interest

This section of the newsletter addresses the question of whether, in a product defect case, an exculpatory clause in a contract effectively eliminates the liability of a manufacture/dealer for the plaintiff's personal injury and/or economic harm.

Hypothetical and Ethical Dilemma

Before her recent accident, eighty-two-year-old Lily Ledbetter was her own chauffeur. She used to drive an automobile to fulfill her once-active senior lifestyle, including outings for bridge tournaments, water aerobics, grocery shopping, bill-paying, and family get-togethers.

One day, Lily decided to purchase a new automobile. Although her fifty-year-old son Ron suggested that he accompany her to the car dealership, she refused, reminding him that she was fully capable of taking care of her own responsibilities. With the "wind of independence at her back," Lily entered the dealership, Bjorn Fjord Motors, alone. After negotiating her best deal and signing a contract for the purchase of a new Fjord Mastodon sedan, Lily drove away in her rapidly-depreciating asset. Five miles down the road, the steering wheel detached from the steering column (the steering wheel literally came off in her hands) and Lily crashed into a culvert. She sustained severe personal injuries, including (but not limited to) a broken left leg, a broken pelvis, a collapsed lung, and numerous lacerations to her face. Her attending physicians agree that Lily will never be able to drive an automobile again.

Lily has since sued Fjord Motors, Inc. (the manufacturer of the sedan) and Bjorn Fjord Motors, Inc. (the dealership) for personal injury. Both companies have filed answers denying liability on the basis of an exculpatory clause included in Lily's purchase contract. The exculpatory clause states that neither Fjord Motor, Inc. nor Bjorn Fjord Motors, Inc. is responsible to a customer or any other third party for a defect in the Fjord Mastodon that results in personal injury and/or economic harm. Both companies have also filed motions for judgment on the pleadings, requesting that the court summarily dismiss both causes of action against Fjord Motors, Inc. and Bjorn Fjord Motors, Inc. on the basis of the contract's exculpatory clause.

Discussion Questions

1. Should the court grant the defendants' requests for judgment on the pleadings?

The court should not grant the defendants' requests for judgment on the pleadings, since the exculpatory clause may not be enforceable against Lily Ledbetter. An exculpatory clause attempts to release one of the contracting parties from all liability, regardless of who is at fault or what injury is suffered. Because tort law attempts to return the wronged party to a state he or she was in before the wrong occurred, anything preventing this corrective mechanism is arguably against public policy. It does not benefit society to allow some parties to get away with not having to pay for wrongs they commit simply because they state they will not be liable in various contracts. In fact, the patently unfair nature of an exculpatory clause is closely tied to the idea of unconscionable contracts. In this case, the liability of Fjord Motors, Inc. and Bjorn Fjord

Proceedings

A monthly newsletter from McGraw-Hill **November 2010** Volume 2, Issue 4

The McGraw-Hill Companies

Motors Inc. will be a matter for the jury to determine, based on legal theories such as breach of warranty, negligence, strict tort liability, etc.

2. Legally, is the exculpatory clause enforceable against Lily Ledbetter?

As stated in response to Discussion Question Number 1 above, the exculpatory clause may not be enforceable against Lily Ledbetter, especially because it attempts to disclaim liability for personal injury without regard for the defendants' wrongful actions (for example, the defendants' negligence.)

3. Is an exculpatory clause ethical?

As stated in response to Discussion Question Number 1 above, because tort law attempts to return the wronged party to a state he or she was in before the wrong occurred, anything preventing this corrective mechanism is arguably against public policy. Anything against public policy is arguably unethical. Again, it does not benefit society to allow some parties to get away with not having to pay for wrongs they commit simply because they state they will not be liable in various contracts.

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

Of Special Interest

This section of the newsletter will assist you in covering Article 1 of the newsletter ("Healthy Debate: Will the Supreme Court Strike Down Controversial Provisions of the New Health-Care Law?"

Teaching Tips

Teaching Tip 1:

Note: In covering Article 1 ("Healthy Debate: Will the Supreme Court Strike Down Controversial Provisions of the New Health-Care Law?") with students, you might find the following supplemental article helpful:

"U.S. Health Care Ranks Low Among Developed Nations: Report--Despite High Cost, It Delivers Too Little to Patients, Commonwealth Fund Says"

http://www.businessweek.com/lifestyle/content/healthday/640404.html

Compared with six other industrialized nations, the United States ranks last when it comes to many measures of quality health care, a new report concludes.

Despite having the costliest health care system in the world, the United States is last or next-to-last in quality, efficiency, access to care, equity and the ability of its citizens to lead long, healthy, productive lives, according to a new report from the Commonwealth Fund, a Washington, D.C.-based private foundation focused on improving health care.

"On many measures of health system performance, the U.S. has a long way to go to perform as well as other countries that spend far less than we do on healthcare, yet cover everyone," the Commonwealth Fund's president, Karen Davis, said during a recent teleconference.

"It is disappointing, but not surprising, that despite our significant investment in health care, the U.S. continues to lag behind other countries," she added.

However, Davis believes new health care reform legislation -- when fully enacted in 2014 -- will go a long way to improving the current system. "Our hope and expectation is that when the law is fully enacted, we will match and even exceed the performance of other countries," she said.

The report compares the performance of the American health care system with those of Australia, Canada, Germany, the Netherlands, New Zealand and the United Kingdom.

According to 2007 data included in the report, the U.S. spends the most on health care, at $7,290 per capita per year. That's almost twice the amount spent in Canada and nearly three times the rate of New Zealand, which spends the least.

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

The Netherlands, which has the highest-ranked health care system on the Commonwealth Fund list, spends only $3,837 per capita.

Despite higher spending, the U.S. ranks last or next to last in all categories, Davis said, and scored "particularly poorly on measures of access, efficiency, equity and long, healthy and productive lives."

The U.S. ranks in the middle of the pack in measures of effective and patient-centered care, she added.

Overall, the Netherlands came in first on the list, followed by the United Kingdom and Australia. Canada and the United States ranked sixth and seventh, Davis noted.

Speaking at the teleconference, Cathy Schoen, senior vice president at the Commonwealth Fund, pointed out that in 2008, 14 percent of U.S. patients with chronic conditions had been given the wrong medication or the wrong dose. That's twice the error rate observed in Germany and the Netherlands, she noted.

"Adults in the United States [also] reported delays in being notified about abnormal test results or given the wrong results at relatively high rates," Schoen said. "Indeed, the rates were three times higher than in Germany and the Netherlands."

"As a result we rank last in safety and do poorly on several dimensions of quality," Schoen said.

In addition, many Americans are still going without medical care because of cost, she said. "We also do surprisingly poorly on access to primary care and access to after-hours care given our overall resources and spending," Schoen said.

In fact, 54 percent of people with chronic conditions reported going without needed care in 2008, compared with 13 percent in Great Britain and 7 percent in the Netherlands, she said.

The United States also ranked last in efficiency, Schoen said. There are too many duplicate tests, too much paperwork, high administrative costs and too many patients using emergency rooms as doctor's offices. In addition, poverty appears to be a big factor in whether Americans have access to care, the report found.

The United States also performed worst in terms of the number of people who die early, in levels of infant mortality, and for healthy life expectancy among older adults, Schoen said.

Dr. David Katz, director of the Prevention Research Center at Yale University School of Medicine, commented that "as a physician and public health practitioner, I have routinely spoken out in favor of health care reform in the U.S. The responses evoked have not always been kind. Prominent among the counterarguments has been: 'You should see what health care is like in other countries.'"

"This report utterly belies the notion that the former status quo for health care delivery in the U.S. was as good as it gets. Others have been doing better and we can, and should, too," he said.

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

However, at least one expert doesn't believe that health care reform, as it now stands, will solve these problems.

Dr. Steffie Woolhandler, a professor of medicine at Harvard Medical School and co-founder of Physicians for a National Health Program, said that "the U.S. has the worst health care system among the seven countries studied, and arguably the worst in the developed world."

"Unfortunately, the U.S. will almost certainly continue in last place, since the recently passed health reform will leave 23 million Americans without coverage while enlarging the role of the private insurance industry, which obstructs care and drives up costs," she said.

Teaching Tip 2:

Note: In covering Article 1 ("Healthy Debate: Will the Supreme Court Strike Down Controversial Provisions of the New Health-Care Law?") with students, you might find the following supplemental article helpful:

"Key Provisions (of Health Care Reform) That Take Effect Immediately"

http://www.healthreform.gov/reports/keyprovisions.html

1. SMALL BUSINESS TAX CREDITS—Offers tax credits to small businesses to make employee coverage more affordable. Tax credits of up to 35 percent of premiums will be available to firms that choose to offer coverage. *Effective beginning calendar year 2010.* (Beginning in 2014, the small business tax credits will cover 50 percent of premiums.)

2. NO DISCRIMINATION AGAINST CHILDREN WITH PRE-EXISTING CONDITIONS—Prohibits new health plans in all markets plus grandfathered group health plans from denying coverage to children with pre-existing conditions. *Effective 6 months after enactment.* (Beginning in 2014, this prohibition would apply to all persons.)

3. HELP FOR UNINSURED AMERICANS WITH PRE-EXISTING CONDITIONS UNTIL EXCHANGE IS AVAILABLE (INTERIM HIGH-RISK POOL)—Provides access to affordable insurance for Americans who

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

are uninsured because of a pre-existing condition through a temporary subsidized high-risk pool.

Effective in 2010.

4. ENDS RESCISSIONS—Bans insurance companies from dropping people from coverage when they get sick. *Effective 6 months after enactment.*

5. BEGINS TO CLOSE THE MEDICARE PART D DONUT HOLE—Provides a $250 rebate to Medicare beneficiaries who hit the donut hole in 2010. *Effective for calendar year 2010.* (Beginning in 2011, institutes a 50% discount on prescription drugs in the donut hole; also completely closes the donut hole by 2020.)

6. FREE PREVENTIVE CARE UNDER MEDICARE—Eliminates co-payments for preventive services and exempts preventive services from deductibles under the Medicare program. *Effective beginning January 1, 2011.*

7. EXTENDS COVERAGE FOR YOUNG PEOPLE UP TO 26TH BIRTHDAY THROUGH PARENTS' INSURANCE—Requires new health plans and certain grandfathered plans to allow young people up to their 26th birthday to remain on their parents' insurance policy, at the parents' choice. *Effective 6 months after enactment.*

8. HELP FOR EARLY RETIREES—Creates a temporary re-insurance program (until the Exchanges are available) to help offset the costs of expensive premiums for employers and retirees for health benefits for retirees age 55-64. *Effective in 2010.*

9. BANS LIFETIME LIMITS ON COVERAGE—Prohibits health insurance companies from placing lifetime caps on coverage. *Effective 6 months after enactment.*

10. BANS RESTRICTIVE ANNUAL LIMITS ON COVERAGE—Tightly restricts the use of annual limits to ensure access to needed care in all new plans and grandfathered group health plans. These tight restrictions will be defined by HHS. *Effective 6 months after enactment.* (Beginning in 2014, the use of any annual limits would be prohibited for all new plans and grandfathered group health plans.)

11. FREE PREVENTIVE CARE UNDER NEW PRIVATE PLANS—Requires new private plans to cover preventive services with no co-payments and with preventive services being exempt from deductibles.

    Effective 6 months after enactment.

12. NEW, INDEPENDENT APPEALS PROCESS—Ensures consumers in new plans have access to an effective internal and external appeals process to appeal decisions by their health insurance plan. *Effective 6 months after enactment.*

13. ENSURES VALUE FOR PREMIUM PAYMENTS—Requires plans in the individual and small group market to spend 80 percent of premium dollars on medical services, and plans in the large group market to spend 85 percent. Insurers that do not meet these thresholds must provide rebates to policyholders. *Effective on January 1, 2011.*

14. COMMUNITY HEALTH CENTERS—Increases funding for Community Health Centers to allow for nearly a doubling of the number of patients seen by the centers over the next 5 years. *Effective beginning in fiscal year 2011.*

15. INCREASES THE NUMBER OF PRIMARY CARE PRACTITIONERS—Provides new investments to increase the number of primary care practitioners, including doctors, nurses, nurse practitioners, and physician assistants. *Effective beginning in fiscal year 2011.*

16. PROHIBITS DISCRIMINATION BASED ON SALARY—Prohibits new group health plans from establishing any eligibility rules for health care coverage that have the effect of discriminating in favor of higher wage employees. *Effective 6 months after enactment.*

17. HEALTH INSURANCE CONSUMER INFORMATION—Provides aid to states in establishing offices of health insurance consumer assistance in order to help individuals with the filing of complaints and appeals. *Effective beginning in fiscal year 2010.*

18. HOLDS INSURANCE COMPANIES ACCOUNTABLE FOR UNREASONABLE RATE HIKES—Creates a grant program to support States in requiring health insurance companies to submit justification for all requested premium increases, and insurance companies with excessive or unjustified premium exchanges may not be able to participate in the new Health Insurance Exchanges. *Starting in plan year 2011.*

businessLaw

Proceedings

A monthly newsletter from McGraw-Hill

November 2010 Volume 2, Issue 4

The McGraw-Hill Companies

Chapter Key for McGraw-Hill/Irwin Business Law texts

	Hot Topics	Video Suggestions	Hypothetical and Ethical Dilemmas	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 5 and 7	Chapters 6 and 8	Chapter 16	Chapter 5
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 2 and 4	Chapters 1 and 5	Chapter 9	Chapter 4
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 3 and 5	Chapters 3 and 7	Chapter 15	Chapter 3
Barnes et al., Law for Business, 10th Edition	Chapters 4 and 5	Chapters 4 and 7	Chapter 15	Chapter 4
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 2 and 5	Chapters 6 and 43	Chapter 12	Chapter 2
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 6 and 12	Chapters 10 and 13	Chapter 8	Chapter 6
McAdams et al., Law, Business & Society, 9th Edition	Chapters 2 and 5	Chapters 7 and 16	Chapter 6	Chapter 5

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)