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Proceedings

A monthly newsletter from McGraw-Hill

October 2009 Volume 1, Issue 3

The McGraw-Hill Companies

Contents

Dear Professor,

Welcome to McGraw-Hill's October issue of *Proceedings*, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 1, Issue 3 of *Proceedings* follows the same format as previous editions of the newsletter offered in July/August and September, including "hot topics" in business law, video suggestions, a hypothetical and ethical dilemma, teaching tips, and a "chapter key" cross-referencing the October newsletter topics with the various McGraw-Hill business law textbooks.

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

1. Electronic "superstore" Best Buy's mistaken advertised price of $9.99 for a flat screen television ordinarily priced at $1,699.99;

2. An article devoted to the practice of judges "legislating from the bench";

3. A judicial "stay of execution" in Georgia for an inmate convicted in 1991;

4. Videos related to a) whether the clothing retailer Abercrombie & Fitch is liable in a certain disability-related employment discrimination lawsuit; and b) a judicial order of financial guardianship for the children of "Octomom";

5. A "case hypothetical and ethical dilemma" related to whether the federal government can be held liable in a tort (negligence) case; and

6. "Teaching tips" related to the legal effect of a mistaken advertised price (the subject matter of Article 1) and to the legal question regarding whether the federal government can be held liable in a tort (negligence) case (the subject matter of the Case Hypothetical and Ethical Dilemma).

As always, I sincerely hope this newsletter 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) The Legal Effect of a Mistaken Advertised Price;

2) The Meaning of the Phrase "Legislating From the Bench"; and

3) Judicial Review of Death Penalty Cases.

Hot Topics in Business Law

Article 1: "Best Buy's $9.99 Flat Screen TV Sale a Pricing Mistake"

http://abcnews.go.com/print?id=8311580

Are retailers legally bound to honor erroneous advertising prices? Are they ethically bound to honor such prices? These are the questions "swirling around" Best Buy Co., Inc. and its subsidiary, BestBuy.com, LLC, as the retailer attempts to manage public opinion related to an erroneous price listed on the company's web site. As indicated in the article "Best Buy's $9.99 Flat Screen TV Sale a Pricing Mistake," early on the morning of August 12, 2009, the retailer listed a Samsung 52-inch, flat-screen television for $9.99, with a shipping cost of $70. The television's "normal" price is $1,699.99. Scores of customers ordered at the $9.99 advertised price, with some ordering as many as ten (10) televisions. While some customers were able to "finalize" an order, others received messages that the site's ordering system was "temporarily unavailable." By 11:00 a.m., Best Buy updated its website to indicate the television's normal price. A spokesperson for Best Buy quickly went public with an apology, stating "There was an online pricing error on a 52-inch Samsung television this morning. We have corrected the issue and apologize for the confusion this may have caused. We will not be honoring the incorrect price and, again, apologize for the mistake." As the article indicates, the company's website sets forth a "reservation of rights" disclaimer, stating that Best Buy has "the right to revoke any stated offer and to correct any errors." The policy also states, "Prices and availability of products and services are subject to change without notice."

Although some customers threaten to boycott Best Buy in the future for its "refusal to deal" at the $9.99, the company is resolute in refusing to honor the incorrect price.

Discussion Questions

1. In your reasoned opinion, does Best Buy have a legal obligation to fulfill the $9.99 advertised price for the television? Why or why not?

Whenever I discuss the issue of whether sellers are legally bound to fulfill advertised prices and/or price quotations, I invariably receive strong responses from students who feel that the customer should prevail. The usual argument is that since the seller made the mistake, the seller should "make good" on the mistake.

The law is clearly to the contrary. Absent proof of fraud, bad faith or other misdealing on the part of the seller, the seller is not bound by a mistaken advertised price, nor is the seller bound by a mistaken price quotation (erroneously made by a sales

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representative to a prospective buyer, for example.) From a legal standpoint, an advertised price or a price quotation is not an offer; instead, it is an invitation to negotiate. In such a scenario, the customer is actually the offeror (the party making the offer) at the designated price, and the seller is the offeree (the party who receives the offer. Legally, an offeree has the privilege to accept the offer, reject it, or propose a counteroffer (which might have additional and/or different terms compared to the original offer.) Applying the law to the "Best Buy" example, the retailer was the offeree when scores of customers offered to buy the advertised television at the mistaken $9.99 price. Best Buy has indicated unequivocally that it rejects their offers to purchase the advertised television at the mistaken $9.99 price.

You will notice that earlier in my response to this question, I indicated that absent proof of fraud, bad faith, or other misdealing on the part of the seller, the seller is not bound by a mistaken advertised price. Although some prospective customers claim that Best Buy was engaged in a "sales gimmick" (which, if true, might indicate fraud, bad faith, or other misdealing on the part of the company,) the best evidence in this case seems to indicated that the $9.99 advertised price was nothing more than an honest mistake.

Best Buy has at least two (2) other legal arguments that can be used to refute contractual liability in this case:

1. As indicated in the article summary set forth previously, Best Buy's website contains a "reservation of rights" statement, proclaiming that the retailer has "the right to revoke any stated offer and to correct any errors," and further stating that "prices and availability of products and services are subject to change without notice." Although such a disclaimer would most likely not protect the company in a scenario involving fraud, bad faith, or other misdealing, this does appear to be an honest mistake; accordingly, the disclaimer would serve as further legal protection for the company (although I would recommend that Best Buy not use the word "offer" in its "reservation of rights" language; the word "terms" would be preferable, since the word "offer" insinuates that the customer has the privilege of acceptance and the concomitant power to bind Best Buy to a contract); and

2. There is a potential Statute of Frauds argument in this case. The Statute of Frauds states that certain types of contracts must be in writing in order to be enforceable; one example of a contract that must be in writing is a contract for the sale of goods valued at $500 or more. Even though the advertised price was only $9.99, well below the $500 Statute of Frauds threshold for contracts for the sale of goods transactions, the actual value of the television is considerably more than $500 (remember that the "normal" price for the television is $1,699.99.) Assuming that a contract must be in writing in order to be enforceable, the Statute of Frauds requires three (3) elements to satisfy the writing requirement:

a. The written contract must contain language indicating an agreement between the parties;

b. The written contract must contain the "essential terms" of the agreement (the best examples of essential terms are price and quantity); and

c. The written contract must be signed by the party the plaintiff is seeking to hold responsible under the contract.

Although a completed order via the internet would likely satisfy elements (a) and (b) above (a printed order confirmation would contain basic language of an agreement, as well as the agreement's essential terms of

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price and quantity), the order would not contain an actual signature of a Best Buy representative. All three (3) of the above elements must be satisfied in order to fulfill the Statute of Frauds writing requirement.

2. In your reasoned opinion, does Best Buy have an ethical obligation to fulfill the $9.99 advertised price for the television? Why or why not?

Since ethics is commonly described as "doing the right thing," some students might feel that "doing the right thing" in this case would necessarily involve Best Buy fulfilling all customer orders submitted before correction of the advertised price. It is again important to emphasize, however, that the case does not appear to indicate any fraud, bad faith or other misdealing on the part of the retailer. As noted previously, this case does appear to indicate an honest mistake on the part of Best Buy.

3. As indicated in the article, Debra Green, a housewife from Woodlands, Texas, placed an order for the advertised television and received from Best Buy a confirmation e-mail and expected delivery date. With regard to the $9.99 advertised price, Mrs. Green states "It was either a sales gimmick or a mistake(;)…I just thought it was something you had to at least try." Mrs. Green proclaims that because the sale will not be honored, she probably won't shop at Best Buy in the future.

From the standpoint of positive publicity, customer relations and "pure business sense," should Best Buy fulfill orders made before the television price was updated on its website?

Only Mrs. Green truly knows whether she "means business," or whether she is merely bluffing in terms of her proclaimed boycott of Best Buy. Short-term, she may stand by her boycott, but long-term, she may be "lured back" by the "sirens' song" of electronics! There is no way for the company to accurately determine how many customers plan to boycott, or whether customers will actually carry through with a boycott.

This question involves "cost-benefit" analysis on the part of Best Buy. The company should determine whether, in its best assessment, the costs of fulfilling orders at the mistaken advertised price would outweigh the loss. At $1,690.00 per television (the difference between the mistaken advertised and the real price,) the loss would be considerable.

Many companies do choose to honor mistaken advertised prices and erroneous price quotations, but again, absent proof of fraud, bad faith or other misdealing, they are not legally obligated to do so. If they choose to do so, the decision would be based on a perceived ethical obligation and/or cost-benefit analysis that would favor such a decision.

Article 2: "What's Wrong with Judges Legislating from the Bench?"

http://www.time.com/time/printout/0,8816,1910714,00.html

On many occasions during his tenure as president of the United States, George W. Bush often proclaimed that he did not want judges "legislating from the bench." Just what does it mean for a judge to "legislate from the bench?" This is the topic addressed in the article "What's Wrong with Judges Legislating from the Bench?" written by Jeffrey Rosen, a law professor at George Washington University in Washington, D.C. In terms of the "balance of power" between the three (3) branches of government, the traditional view holds that the

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legislative branch of government (the United States Congress) has the responsibility to make the law, the judicial branch of government (the United States federal court system; ultimately, the United States Supreme Court) has the responsibility to interpret the law, and the executive branch of government (the United States president) has the responsibility to enforce the law. Rosen points out that during her Supreme Court confirmation hearings, Judge Sonia Sotomayor stated repeatedly that judges should simply apply the law, not legislate from the bench. According to Sotomayor in her opening statement to the United States Senate during her confirmation hearings, "My judicial philosophy (is simple): fidelity to the law. The task of a judge is not to make law. It is to apply the law." In a 2006 decision, Sotomayor wrote "The duty of a judge is to follow the law, not to question its plain terms…I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it."

In this article, Professor Rosen asserts that in reality (political "grandstanding" aside), judges often "legislate from the bench." According to Rosen, "At this point in our polarized judicial politics, it's too bad that Senators and Supreme Court nominees can't say in public what many of them recognize in private: Of course judges-both liberal and conservative-legislate from the bench, and on occasion, they even do it well."

Discussion Questions

1. Precisely what does it mean to "legislate from the bench?" Even assuming that judges and courts engage in this activity, should the public be concerned? Why or why not?

The term "legislating from the bench" refers to the judicial branch of government (the United States court system, including the United States Supreme Court, and its judges) making law, or establishing government policy, based on court decisions. If individuals are concerned about this judicial activity, the concern could be based on a "balance of power" issue. As stated in the article summary above, in terms of the "balance of power" between the three (3) branches of government, the traditional view holds that the legislative branch of government (the United States Congress) has the responsibility to make the law, the judicial branch of government (the United States federal court system; ultimately, the United States Supreme Court) has the responsibility to interpret the law, and the executive branch of government (the United States president) has the responsibility to enforce the law. Those opposed to "legislating from the bench" might argue that in making law, or establishing government policy, judges and courts are exceeding their powers in contravention of the United States Constitution.

There is a "political angle" to the term "legislating from the bench" as well. Over the years, this term has been used to express opposition to judges who make decisions contrary to the views of a particular politician. "On the stump" of a political campaign, a politician can argue that he is opposed to judges "legislating from the bench." In essence, the politician is implying that he disagrees with certain judges who have different political leanings from his own particular views. Ask yourself this question: "If a court issues an opinion consistent with the political views of a particular politician, would that politician accuse the court of 'legislating from the bench'?" The obvious answer is "no!"

In terms of constitutional interpretation and applicability, a "strict constructionist" might also oppose "legislating from the bench." A "strict constructionist" believes that the United States Constitution is "set in stone," and should not be modified over the passage of time, except perhaps through constitutional amendment, which would be the responsibility of the United States Congress. A prime example of a United

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States Supreme Court decision contrary to the "strict constructionist view" is the Roe v. Wade decision of 1973, which gave women the limited right to an abortion. The Roe v. Wade decision was based on the United States Supreme Court's interpretation of an implied right to privacy in the United States Constitution, and a judicial extension of that implied right to privacy to women and the limited right to choose an abortion. Those who oppose "legislating from the bench" (especially those of conservative political leanings) would likely portray the Roe v. Wade decision as a principal example of judicial law-making "gone awry."

2. Can you think of any specific examples of cases where judges have "legislated from the bench?" In your reasoned opinion, are these cases good examples of why judges should be engaged in the function of government policy-making, rather than leave the function of policy-making exclusively with the legislative branch of government (the United States Congress)?

There are countless examples of cases involving courts and judges engaged in law-making. As one example, consider the Roe v. Wade decision, mentioned in response to "Discussion Question" 1 above, wherein the United States Supreme Court interpreted an implied right to privacy in the United States Constitution, and extended that implied right to privacy to women in terms of their limited right to choose an abortion. Consider this: 1) The language of the United States Constitution does not specifically mention an individual right to privacy; and 2) The language of the United States Constitution most certainly does not mention the limited right to choose an abortion. Had the United States Congress been accorded the exclusive right to determine whether a woman has the right to choose, it might have never even considered the issue, given the political volatility of abortion. Again, whether you agree or disagree with "legislating from the bench" most likely depends on whether you agree with a particular court decision that makes law or government policy; if you agree with the court's mandate, you would probably deem it "sound, necessary decision-making," but if you disagree with the court's decision, you would probably dismiss it as inappropriate, unconstitutional "legislating from the bench."

3. In reality, is it actually possible for courts and judges to completely avoid "legislating from the bench?" Why or why not?

In the opinion of this author, it is not possible, nor is it realistic, for courts and judges to completely avoid law-making and the establishment of government policy. Consider as a prime example The Americans With Disabilities Act (ADA), enacted by the United States Congress in 1990. In general terms, the ADA holds that an employer (or an entity that makes its facilities available to the public, such as a college or university) has an obligation to make "reasonable accommodations" to individuals with physical and/or mental disabilities, unless an "undue hardship" would result. For employers, the employment candidate or employee must be "otherwise qualified" to do the work. In its passage of the ADA, the United States Congress set forth the general proposition that individuals with disabilities deserve a "fair opportunity" in terms of employment and facilities access, but numerous questions remain in consideration of the language of the ADA:

a. What particular physical and/or mental conditions are covered by the Act?

b. What particular physical and/or mental conditions are not covered by the Act?

c. What specifically is a "reasonable accommodation?"

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d. What specifically constitutes an "undue hardship?"

e. What specifically does it mean to say that an employment candidate or employee is "otherwise qualified" to perform assigned work duties?

Over the nineteen (19) years since enactment of the ADA, federal courts have been "filling around the edges" of the language of the act, answering questions (a) through (e) above, as well as a host of other questions related to the Act's application in fact-specific cases. As examples:

a. The judiciary has decided that clinically-diagnosed depression is a disability covered by the Act;

b. The judiciary has decided that Acquired Immune Deficiency Syndrome, or AIDS, is a disability covered by the Act;

c. The judiciary has decided that left-handedness is not a disability covered by the Act;

d. The judiciary has decided that obesity within the control of the individual affected is not a disability covered by the Act; and

e. In the PGA Tour, Inc. v. Martin case, the United States Supreme Court decided that as a specific example of "reasonable accommodation," golfer Casey Martin, who suffers from a degenerative circulatory disorder that prevents him from walking golf courses, is entitled to ride a cart between holes

and shots (previously, the PGA Tour had prevented all golfers from riding a golf cart, requiring golfers instead to walk between holes and shots).

None of these ADA-related questions and issues would have been resolved by the language of the congressionally-written Act; instead, resolution has depended on judicial "legislating from the bench!" Remember Professor Rosen's quote from the article: "At this point in our polarized judicial politics, it's too bad that Senators and Supreme Court nominees can't say in public what many of them recognize in private: Of course judges-both liberal and conservative-legislate from the bench, and on occasion, they even do it well."

Article 3: "Justices Grant Georgia Inmate's Request to Delay Execution"

http://www.cnn.com/2009/CRIME/08/17/georgia.scotus.troy.davis/index.html

This article indicates that the United States Supreme Court has granted a condemned Georgia inmate's request that his execution be delayed as he attempts to prove his innocence. The inmate, Troy Davis, claims that he did not murder a Savannah police office nearly two (2) decades ago. Davis has always maintained his innocence in the 1989 killing of Office Mark MacPhail. Witnesses claimed Davis, then 19, and two (2) other individuals were harassing a homeless man in a Burger King restaurant parking lot when the off-duty officer arrived to assist the man. Witnesses testified at trial that Davis then shot MacPhail twice and fled.

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As referenced in the article, since his 1991 conviction, seven (7) of the nine (9) witnesses against Davis have recanted their testimony. No physical evidence was presented at trial linking Davis to the killing of the police officer.

United States Supreme Court Justice John Paul Stevens has ordered a federal judge to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at trial clearly establishes petitioner's innocence." Stevens said the risk of putting a potentially innocent man to death "provides adequate justification" for another evidentiary hearing. Justices Ruth Bader Ginsburg and Stephen Breyer supported the decision.

Justices Antonin Scalia and Clarence Thomas objected to the court's decision, calling it a "fool's errand." Stated Scalia: "Petitioner's claim is a sure loser…Transferring his petition to the (federal) District Court is a confusing exercise that can serve no purpose except to delay the state's execution of its lawful criminal judgment."

Discussion Questions

1. Officer MacPhail's murder occurred twenty (20) years ago. Troy Davis' conviction occurred in 1991, eighteen (18) years ago. What do you think accounts for the fact that Davis still sits on death row, almost an entire generation after the murder took place, without having been put to death?

According to statistics gathered by the state of Florida, with regard to inmates executed in Florida after the death penalty was reinstated there in 1979, an inmate spends an average of 12.31 years on "Death Row" prior to execution. Further, on average, 13.94 years pass between the time of the offense and the time of execution.

(http://www.dc.state.fl.us/oth/deathrow/#Statistics)

Considering these statistics, Troy Davis' eighteen (18) years on "Death Row," as well as the twenty (20) years that have passed since the time of the murder, are not wildly outside the range of possibilities when it comes to execution. (Interested students might be inclined to research similar statistics complied in other states, including the state of Davis' conviction, Georgia). Many critics consider the time that convicted criminal defendants sit on "Death Row" a travesty of justice; in the opinion of critics, there is no plausible reason why it should take so many years for a case to "wind its way" through the appeals process, or for capital punishment to be "meted out." Do keep in mind, however, that the appeals process can be very complicated and time-consuming, due to the elaborate nature of the appellate court system, and especially in cases involving imposition of the most serious punishment, the death penalty. Troy Davis was first convicted in a Georgia trial court. The right to "due process," a fundamental right set forth twice in the United States Constitution (the Fifth and the Fourteenth Amendments), accords a criminal defendant the right to due process. The right to due process includes the right to an appeal, and when the case involves invocation of the death penalty, the defendant's due process rights include petitioning the state intermediate and appellate courts, as well as the United States Court of Appeals and the United States Supreme Court, with a request to overturn the murder conviction and/or the death penalty itself. Admittedly, our appeals process in the United States is complicated and time-consuming, but arguably, if we are truly serious about "due process" in the United States, our court system must provide a convicted criminal defendant with the opportunity to have his/her conviction reviewed,

in order to determine whether an error of law and/or an abuse of discretion occurred on the lower court level. Again, this is of the highest importance when the convicted defendant faces imposition of the death penalty.

2. Remember that United States Supreme Court Justices Antonin Scalia and Clarence Thomas objected to the court's decision ordering a delay in Davis' execution pending a hearing on the question of Davis' claimed innocence. More specifically, recall their reference to the court's decision as a "fool's errand," and Justice Scalia's statement that "Petitioner's claim is a sure loser...Transferring his petition to the (federal) District Court is a confusing exercise that can serve no purpose except to delay the state's execution of its lawful criminal judgment." Is it appropriate for dissenting justices to use such language in expressing disapproval of the majority decision/court order?

Obviously, United States Supreme Court justices have the right to "dissent"; in other words, justices have the right to disagree with the majority opinion and the resulting Supreme Court order. Whether the particular language used by Scalia and Thomas was "fitting and appropriate" is subject to debate. For example, when Scalia and Thomas referred to the court's decision (delaying Davis' execution pending a hearing on the question of Davis' claimed innocence) as a "fool's errand," were they implying that the justices siding with the majority are fools? In writing the Supreme Court order for a federal judge to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at trial clearly establishes petitioner's innocence," Justice John Paul Stevens described why he believed a post-conviction hearing is warranted, claiming that the risk of putting a potentially innocent man to death "provides adequate justification" for another hearing. Keep in mind that seven (7) of the nine (9) witnesses testifying against Davis at trial have recanted their testimony, and that no physical evidence was presented at trial linking Davis to the killing of the police officer. In the opinion of this author, although Justices Scalia and Thomas have every right to disagree with the majority opinion, they should exercise decorum in terms of expressing their opposition; after all, if they show blatant contempt for the Supreme Court's decision, how can they expect the general public to respect the decision?

3. When our founding fathers crafted the United States Constitution and the Bill of Rights (the first ten amendments to the Constitution), they included many "pro-defendant" rights, including (but not limited to) the right to petition the government for a "redress of grievances" (the First Amendment), "double jeopardy" protection (the Fifth Amendment), the privilege against self-incrimination" (the Fifth Amendment), due process (the Fifth Amendment), and the prohibition of "cruel and unusual" punishment. Some individuals presently claim that these constitutional protections have resulted in a criminal justice system that favors the criminal defendant, rather than the victims of crime and their families. In your reasoned opinion, why were our founding fathers so concerned about the rights of criminal defendants? Do you agree with the proposition that our criminal justice system actually favors the criminal defendant, rather than the victims of crime and their families? If so, should the rights of criminal defendants, as set forth in the United States Constitution and the Bill of Rights, be "scaled back?"

This question should make for very intriguing class discussion! Obviously, our Founding Fathers had a pronounced distrust of government. In large part, this was likely based on what they perceived to be oppressive rule of the colonies by the English government. In "breaking away" from England, the Founding Fathers sought to incorporate a "healthy skepticism" of government in our country's charter, the United States Constitution.

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For those students who do perceive the United States Constitution and the Bill of Rights as too "pro-defendant," ask them specifically which constitutional rights should be "scaled back": Should it be the right to petition the government for a redress of grievances? "Double jeopardy" protection? The privilege against self-incrimination? Due process? The prohibition against "cruel and unusual" punishment? In the teaching experience of this author, I have found that although many students are generally of the opinion that the criminal justice system "coddles" criminal defendants in terms of constitutional rights and protections, they often hesitate when it comes to identifying particular rights and protections that should be reduced or eliminated. Remember also that "beauty is often in the eye of the beholder" when it comes to the constitutional rights of criminal defendants. Along those lines, ask students to take the perspective of a criminal defendant accused of a crime (perhaps some students have been so accused in reality, but I don't always like to know!) Constitutional protections are very precious indeed when confined to a jail/prison cell!

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Video Suggestions

Video 1: "Disabled Student Suing Abercrombie"

http://www.youtube.com/watch?v=CMLfRxbnRUw

Purpose of video: To evaluate a disability-related employment discrimination lawsuit filed against Abercrombie & Fitch

Discussion Questions

1. In your reasoned opinion, are you convinced that this case demonstrates disability-related employment discrimination against the twenty-two year-old plaintiff, Riam Dean (use your knowledge of United States employment discrimination law to answer this question, even though the case was filed in London, England)?

This is an opinion question, so student responses will likely vary. Applying United States law to the case, disability discrimination in employment is strictly prohibited. For example, as it relates to employment, the Americans With Disabilities Act (ADA) states that a disabled employee who is "otherwise qualified" to do the work must be given a "reasonable accommodation" unless an "undue hardship" on the employer would result. Clearly, Ms. Dean does have a physical disability, and there is no evidence in this case that she is not "otherwise qualified" to fulfill the responsibilities of a clothing store clerk. In the United States, no reasonable jury applying the ADA would conclude that a "reasonable accommodation" represents consigning Ms. Dean to the stockroom, far from the eyes of customers.

In terms of United States civil rights law, one defense available to an employer in response to a discrimination claim is to argue "bona fide occupational qualification" ("BFOQ"), defined as an "act or requirement reasonably necessary for the performance of a particular job, or for the overall success of a particular business." In the opinion of this author, no reasonable jury would accept such a defense, since it seems absurd to assume that confinement of disabled employees to stockroom duties, far from the eyes of customers, would be "reasonably necessary" for the success of a clothing store. In fact, there is a strong argument to be made that by truly accommodating diversity, a company grows stronger in terms of public opinion.

2. On August 13, 2009, a British employment tribunal ruled that Abercrombie & Fitch unlawfully harassed Ms. Dean when it refused to allow her to wear a cardigan to cover her prosthetic arm, saying the sweater violated the store's "look policy." Although the court awarded Ms. Dean the British pound equivalent of $15,000 in compensation for injured feelings, lost earnings and wrongful dismissal, it rejected Dean's claim that she

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was discriminated against due to her disability. In your opinion, was the court's verdict a sound one?

The court's decision was a partial victory for both Riam Dean and Abercrombie & Fitch. It was a "win" for Ms. Dean in the sense that the employment tribunal concluded that the company had harassed her, and it did accordingly award her $15,000 in compensation for injured feelings, lost earnings and wrongful dismissal. The case was also a victory for Abercrombie & Fitch, however, in the sense that the court rejected Dean's claim that she was discriminated against due to her disability.

Applying United States law to the case, there should have been no distinction between "harassment" and "discrimination," and the damage award would likely have been higher had the case been tried in the United States. In the opinion of this author, consider this verdict to be predominately a victory for Abercrombie & Fitch.

3. Visit http://www.abercrombie.com/anf/careers/diversity.html, part of Abercrombie & Fitch's website, where you will find an entire section of the website devoted to the company's commitment to diversity. Listed below are some of the statements you will find there:

"Diversity and inclusion are key to our organization's success. We are determined to have a diverse culture, throughout our organization, that benefits from the perspectives of each individual."

"Our Commitment: At Abercrombie & Fitch we are committed to increasing and leveraging the diversity of our associates and management across the organization. Those differences will be supported by a culture of inclusion, so that we better understand our customers, enhance our organizational effectiveness, capitalize on the talents of our workforce and represent the communities in which we do business."

"Our Strategy: Our strategy for creating a more diverse and inclusive culture is focused on the elements and drivers of organizational change, including: Leadership, Communication, Employee Involvement, Education & Training, Measurement and Accountability & Policy and System Integration. Helping to support and implement this strategy is the Executive Diversity Council…that is comprised of senior leaders from several business units across the organization."

"Internal Initiatives: Developed and launched a comprehensive training curriculum. It includes e-learning based programs focused on diversity awareness and skill building, as well as, an innovative and provocative approach to education that we call reality-based learning. This approach is unique in that we base the learning on real-life issues that may take place in our store environment and reflects our work culture. The training scene is enacted by actors/inclusion experts during the training program, so that we can generate an interactive dialogue about how to solve relevant management issues."

"External Initiatives: Creating and solidifying alignments between our strategic partners…and our store recruiters. Specifically, the senior recruiters "own" a relationship and are responsible for managing all aspects of that partnership. This "best practice" approach to recruitment affords us the opportunity to cascade the responsibility throughout the recruitment process and throughout the organization. It also gives our partners a consistent point of contact."

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Based on your review of Abercrombie & Fitch's acknowledgement of diversity and inclusion as "key" to the organization's success, its professed commitment to diversity, its strategy for creating a diverse and inclusive culture, and its related internal and external initiatives, are you convinced that Abercrombie & Fitch is truly committed to a corporate culture of diversity? Why or why not?

There can be a dramatic difference between a company's stated policy of non-discrimination and an actual "day-to-day" corporate culture of non-discrimination. A wise person once said that "actions speak louder than words." Of course, determining whether Abercrombie & Fitch is truly committed to a corporate culture of diversity is largely a matter of individual opinion. Although Abercrombie & Fitch can largely consider the Riam Dean case a victory for the corporation (based on the court's non-finding of discrimination, and its relatively minimal verdict for "harassment" damages), public opinion is often formulated by "high-profile" cases such as this one, and positive public perception is vital in terms of corporate success.

In 2005, Abercrombie & Fitch paid $50 million to settle a race, ethnic and gender class-action lawsuit (See http://www.afjustice.com/ for details concerning this lawsuit). Although settlement of a class-action lawsuit (or any other lawsuit) is not a legal admission of liability, it is further proof for critics of Abercrombie & Fitch that the company is engaged in "patterns and practices" of discrimination.

Video 2: "Judge Orders Guardian for Octuplets' Finances"

http://www.youtube.com/watch?v=E_D4VinhUIo

Purpose of video: To discuss the circumstances dictating guardianship of a minor

Discussion Questions

1. In your opinion, why did the California judge appoint a guardian in this case? Should not the parent(s) determine what is in the "best interests of the child?"

The judge's order directing the appointment of an attorney to serve as guardian for the minor children in this case would seem to indicate the judge's belief that the mother, Nadya Suleman (more commonly referred to by the media as "Octomom,") will not necessarily make decisions in the best interests of her children. It appears that the judge is concerned about the children (Suleman has fourteen children, including the octuplets) both from a labor law standpoint (in terms of the number of hours they will be required to be "on set" during the fall reality television series) and from the standpoint of what is done with the money earned from the show. Since the Fair Labor Standards Act was enacted by the United States Congress in 1938, the federal government has enforced child labor laws restricting the number of hours minors can work, as well as the conditions of their employment. Even though labor laws affecting child entertainers are less stringent that for "regular" child laborers, there are restrictions nonetheless, and the judge in this case wants to be sure that those restrictions are followed (Examples of these restrictions include limits on the number of hours child actors can work each week, and for school-age children, regulations ensuring their formal education.)

Perhaps the biggest concern here is that of money. United States entertainment industry history is filled with examples of child actors who made fortunes during their "working years," (many child actors are not successful as adult actors,) only to see those fortunes squandered by their parents due to poor management

and/or outright embezzlement. It would appear that by appointing a "second set of eyes" in terms of an attorney guardian, the judge in this case is trying to reduce or eliminate the possibility that such an unfortunate situation would result.

2. As the video indicates, former Disney "Mouseketeer" Paul Petersen filed a petition in this case on behalf of Nadya Suleman's octuplets. In your opinion, what do you believe drove Peterson to become an advocate for kids involved in the entertainment business? More specifically, what do you believe led him to file a petition in the Nadya Suleman "Octomom" case?

Paul Petersen has been an advocate for child actors for many years. In 1990, following the suicide of former child star Rusty Hamer, Petersen founded a child-actor support group, A Minor Consideration (AMC,) to improve working conditions for child actors and to assist in the transition between working as a child actor and adult life, whether in acting or in other professions. Peterson describes his non-profit organization as follows: "A Minor Consideration" is a non-profit, tax-deductible foundation formed to give guidance and support to young performers, (p)ast, (p)resent and (f)uture. Child Stars must pick their parents with care. Family (e)ducation is the key ingredient to a productive future. The members of AMC are always "on call" to assist parents and their professional children on a '(n)o (c)ost basis.' By providing a strong emphasis on education and character development, plus helping to preserve the money these children generate, the members of AMC are always available to help with the tricky (t)ransition issues that for many kid stars prove to be so troubling. We've "been there, done that." Our lessons were earned, not imagined."

The AMC website is located at http://www.minorcon.org/index.html.

As a former child actor himself, Mr. Peterson is obviously in a unique position to be able to fully understand the potential "perils and pitfalls" facing child actors. In terms of his interest in the "Octomom" case, AMC's website reveals Mr. Peterson's concern about the "media frenzy" surrounding the case, and his skepticism as to whether Nadya Suleman truly has the "best interests of her children" at heart. He points out that although Ms. Suleman's website has already generated approximately $2.5 million in donations, and although virtually every personal appearance by Ms. Suleman is a "commercial endeavor" (i.e., she is charging a fee for her appearance,) there is little indication that those monies are being used to directly benefit her children.

3. In your opinion, is it ethical for parents to lead their minor children into the entertainment business? Why or why not?

This is most certainly an "opinion" question. Although his personal story is one involving sports instead of acting, consider the example of Eldrick Tont "Tiger" Woods. Tiger Woods began playing golf at the age of two (2,) and his father Earl "pushed and prodded" his child to become the best golfer in the world. Last year, Woods earned approximately $110 million in golf prize money and professional endorsements. Do you believe that Woods regrets his father's drive and determination to make his son the best golfer in the world?

In the opinion of this author, so long as applicable labor laws are adhered to, and provided that earnings are held in trust for the benefit of the child (allowing a reasonable allowance for the parents in terms of their involvement in managing the lives of their professional children,) it is not unethical for parents to lead their minor children into the entertainment business. Obviously, if these guidelines are not adhered to, the ethics question becomes a legal question as well, and judicial intervention may be necessary.

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Of Special Interest

This section of the newsletter addresses the question of whether the United States government can be held liable in a tort (negligence) action.

Hypothetical and Ethical Dilemma

Ruth Scarborough and her husband Robert were looking forward to long and fulfilling retirement. Ruth and Robert, both sixty-five (65) years old, have been married for forty (40) years. Having both left their jobs in Charlotte, North Carolina at the end of last year, the couple decided to purchase a permanent residence at Elk Gardens, a private residential neighborhood adjacent to Blue Ridge Parkway property in Boone, North Carolina. Blue Ridge Parkway property is owned and maintained by the United States government.

The Scarboroughs were determined to establish an everyday routine to replace the regimented structure of their former "workaday world." Part of that daily routine involved the physical activity of venturing onto Blue Ridge Parkway property adjacent to their retirement home, and walking the three-mile "loop" trail established on Parkway property. Ruth and Robert hated nothing more than the idea of a "rocking-chair" retirement, and they both knew how important physical activity would be to their long-term physical and emotional health.

One Friday, while walking on a wooden bridge that led over a stream on the three-mile "loop" trail, Ruth fell when a plank snapped under her weight (Ruth weighs one hundred and ten pounds.) Although she was fortunate not to fall completely through the bridge to the stream thirty (30) feet below, Ruth experienced a compound fracture to her left femur a result of the fall. Ruth's medical prognosis is not good. Doctors have expressed skepticism as to whether she will ever regain the full use of her left leg, and are accordingly doubtful if she will ever be able to walk without the assistance of a cane or walker. One of her treating physicians even believes that Ruth will be confined to a wheelchair for the rest of her life.

Inspection of the bridge has revealed numerous rotted planks. In fact, the subject broken plank itself was in a rotted condition when Ruth experienced her accident. The Scarboroughs have filed a lawsuit against the United States of America, as owner of the Blue Ridge Parkway property, claiming negligence on the part of the federal government in failing to maintain the bridge in proper condition. Mrs. Scarborough is claiming damages for her medical expenses, the physical and emotional pain and suffering associated with the accident and her resulting injuries, and the permanent disability associated with her injuries. Mr. Scarborough's claim relates to "loss of consortium," based the contention that he will never be able to enjoy the full company of his wife again, given her permanent disability (for example, they will never be able to enjoy long walks together again.)

The government's defense to liability is twofold. First, it argues that the case does not demonstrate negligence on behalf of the government. Even assuming negligence in the

case, the government's second argument is based on the doctrine of sovereign immunity. In essence, the United States contends that since it is the government, it should not be held liable in situations where other parties (such as individuals or corporations) might otherwise be held liable for negligence.

From a legal standpoint, are the Scarboroughs entitled to recover? From an ethical standpoint, should the government compensate the Scarboroughs for their damages?

From a legal standpoint, the question of whether the federal government was negligent in its maintenance of government-owned property is a jury question. Remember that to prove a negligence case, the plaintiff (the Scarboroughs in this case) must prove four elements: 1) duty; 2) breach of duty; 3) causation of harm; and 4) proof of damages. The real question here is that of breach of duty (element "2" above); namely, whether the federal government breached its duty of care in terms of allowing the bridge to deteriorate to the point where even the weight of a one hundred and ten-pound woman like Mrs. Scarborough could not be supported. In terms of breach of duty, the government's position would be that it cannot be an absolute insurer of all government-owned property, and given the limitations of it resources, financial and otherwise (especially during difficult economic times), it cannot be expected to continuously monitor and upkeep all of the property within its ownership.

Another way to define negligence is the failure to do what a reasonable person would do under the same or similar circumstances. The government's argument again would be that no reasonable person, under similar circumstances, could be expected to be an absolute insurer of his/her property, and with limited resources, no reasonable person could be expected to continuously monitor and upkeep all of the property within his/her ownership.

In this author's opinion, in spite of the government arguments presented above, this does appear to be negligence on the part of the federal government. To support my conclusion, suppose that an individual has lost his job and has no substantial means of income. Suppose further that due to a lack of income, he fails to properly maintain his brakes, and that as a result, he has a "rear-end" collision with a car driven by another individual. Would a jury accept his argument that he was not negligent because he did not have the money to repair his brakes? Although negligence is a jury question, most jurors would likely conclude that he was, despite his lack of income, negligent.

In terms of "sovereign immunity," as indicated in the September edition (Volume 1, Issue 2) of the McGraw-Hill Business Law Newsletter, in response to Article 2 ("Legal Immunity Set For Swine Flu Vaccine Makers"), Discussion Question 2, the concept of governmental immunity has longstanding precedent in the United States. Also known as "sovereign immunity," the concept of governmental immunity is a common law concept dating back to early English law. Based on the assumption that "the king (or queen) can do no wrong," sovereign immunity holds that the government cannot commit a legal wrong, and is therefore immune from civil and/or criminal liability. However, over time, United States governmental immunity has eroded somewhat. Consider, for example, the Federal Tort Claims Act (FTCA,) which provides that the federal government can be held liable in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." In this hypothetical, had an individual, private property owner been involved, the law of premises liability would have applied. In North Carolina (where the accident occurred,) a private property owner owes a high duty to an

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"invitee." An "invitee" is an individual who comes onto property with the express or implied invitation of the private property owner. In the case hypothetical, had an individual, private property owner been involved, Mrs. Scarborough would have been an invitee, present on the property with either the express or implied invitation of the landowner. An individual, private property owner has a duty to inspect his/her property for the benefit of invitees, and must either warn the invitee of the defect (the minimal obligation) or repair the defect. Remember, as stated previously, that the Federal Tort Claims Act (FTCA) provides that the federal government can be held liable in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Applying that standard to the case hypothetical, the "sovereign immunity" defense would not appear to be applicable or effective.

As a side note, on the issue of Mr. Scarborough's "loss of consortium" claim, certain jurisdictions (including the state involved in this case hypothetical, North Carolina) do allow a spouse affected by injuries to or death of his/her spouse to pursue an independent cause of action against the tortfeasor. A loss of consortium claim is based the contention that due to injuries to a spouse caused by the defendant, the affected spouse is no longer able to enjoy the full benefits of the marital relationship (Diminished sexual relations is one potential aspect of a loss of consortium claim, and can make for embarrassing deposition questions and answers; your author has served as a defense attorney in a negligence case involving loss of consortium, so I can speak personally in terms of the embarrassment!) In short, if the jurisdiction in which the case is tried recognizes a loss of consortium claim, then the plaintiff can pursue such a claim. In the case hypothetical, since there is no federal tort law, the law of the state of North Carolina would apply, and since North Carolina recognizes a loss of consortium claim, Mr. Scarborough would be allowed to pursue such a claim. Ultimately, a jury would have to decide whether the facts indicate loss of the full benefits of the marital relationship.

In terms of a perceived ethical obligation on the part of the government to "make good" to the Scarboroughs for their damages, student opinions will likely vary. Some students will likely point out that consideration should be given to the United States taxpayer, for if the federal government compensates the Scarboroughs, the taxpayer will be required to "pick up the tab." As an interesting, "taxpayer burden"-related example, consider the current health care debate gripping the United States. Although approximately forty-six (46) million Americans are uninsured, the vast majority of them uninsured due to the fact that they have lost their jobs or are otherwise unable to pay for health care insurance, and although ethical and religious teachings implore society to take care of "the least among us," many Americans oppose universal health care, fearing that it will create too heavy a burden on taxpayers, and/or that it will result in a "Socialist" America. In the case hypothetical, barring a legal determination of liability, the government would most likely not compensate the Scarboroughs on purely ethical grounds.

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Of Special Interest

This section of the newsletter will assist you in covering:

1) Article 1 of the **"Hot Topics in Business Law"** Section (**"Best Buy's $9.99 Flat Screen TV Sale a Pricing Mistake"**); and

2) the **"Hypothetical and Ethical Dilemma"** presented earlier in this newsletter.

Teaching Tips

Teaching Tip 1:

In terms of Article 1 ("Best Buy's $9.99 Flat Screen TV Sale a Pricing Mistake"), remember that from a legal standpoint, Best Buy is most likely not responsible for the television pricing error, for at least three (3) reasons:

1. From a contractual standpoint, the customer is ordinarily considered the offeror, and the seller is ordinarily considered the offeree, with the privilege to reject any offers customers might make (Best Buy contends that it has effectively rejected all customer offers to purchase the television at the mistaken $9.99 advertised price);

2. The Best Buy website (on which the mistaken price was listed, and customers made their orders) contains a "reservation of rights" disclaimer, stating that the retailer has "the right to revoke any stated offer and to correct any errors," and that "prices and availability of products and services are subject to change without notice"; and

3. There is a potential "Statute of Frauds" defense in this case, given the fact that the television is worth closer to the actual price of $1,699.99 than the erroneous price of $9.99, and since the Statute of Frauds requires that contracts for the sale of goods valued at $500 or more must be in writing in order to be enforceable. Even though the sales order might be some evidence of a writing, Best Buy (the party customers want to hold responsible) has not signed the writing, one of the technical requirements necessary to satisfy the statute of frauds writing requirement).

It would be interesting to discuss with students specific scenarios where, in spite of the foregoing three (3) legal defenses, Best Buy (or any other seller) would be responsible to customers for such an advertised price. On several occasions in my proposed answers to the Discussion Questions presented in conjunction with Article 1, I indicated that absent proof of fraud, bad faith or other misdealing on the part of the seller, the seller is not bound by a mistaken advertised price. There are, of course, numerous scenarios which might lead a court (or any other arbiter of fact) to conclude that the seller has committed some type of fraud, bad faith or other misdealing, resulting in seller liability. One scenario would be intentionally advertising the television at a ridiculously low price simply to spark customer interest, when in fact there are no televisions at that price in stock, and the seller is not willing to issue a "raincheck" at the advertised price. This might be done to "catch" the prospective customer's attention, with the hope that when the customer learns that the seller has no televisions in stock at that price, he/she will order another television at a higher price. Another similar scenario might involve a "bait and switch" tactic. In a "bait and switch," the seller might in fact have a ridiculously low number of televisions in stock at the advertised price. The seller's hope is to quickly exhaust the one or two televisions in stock at the

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advertised price, then to convince all subsequent customers to purchase more expensive televisions that are in stock, purportedly because they are of a more reputable name brand, are of higher quality, and/or have more attractive features. In terms of both federal and state law, fraud, bad faith or other misdealing on the part of the seller is strictly prohibited.

Again, in the Best Buy case, it must be emphasized that in spite of customer allegations to the contrary, there does not appear to be any substantial proof of fraud, bad faith or other misdealing on the part of the retailer. Instead, the case seems to be one of an unfortunate, innocent mistake on the seller's behalf.

Teaching Tip 2:

During the eight (8) years of the George W. Bush presidential administration, there was a great deal of discussion about the need for tort reform in America. Former president Bush himself led the tort reform initiative during his two (2) terms in office, claiming that the United States needs to rid its judicial system of "frivolous" lawsuits. Although former president Bush usually spoke of tort reform in terms of medical malpractice cases (on September 6, 2004, he famously stated that because of "frivolous" lawsuits, "(t)oo many OB-GYNs (obstetrician-gynecologists) aren't able to practice their love with women all across this country"), it would be interesting to see how many students would favor, as a tort reform initiative, the complete restoration of sovereign immunity in this country. The concept of sovereign immunity was discussed in response to the "Case Hypothetical and Ethical Dilemma" presented earlier in this newsletter. Remember that the doctrine of sovereign immunity, a common law concept dating back to early English law, has longstanding precedent in the United States. It is based on the assumption that "the king (or queen) can do no wrong." Sovereign immunity holds that the government cannot commit a legal wrong, and is therefore immune from civil and/or criminal liability. Only in modern American history has the doctrine of sovereign immunity been reduced in its application and effect, in large part due to the Federal Tort Claims Act (FTCA,) which provides that the federal government can be held liable in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Students who might favor the complete restoration of sovereign immunity in the United States would likely be attracted to the immediate effects of sovereign immunity on litigants and the judicial system itself. Unquestionably, the complete restoration of sovereign immunity would reduce the number of lawsuits filed, and it would reduce taxpayer liability (both in terms of lower costs associated with maintaining the judicial system itself, due to the reduced number of cases filed, and in terms of lesser taxpayer liability for government-induced damages.)

Those who oppose the complete restoration of sovereign immunity in the United States are likely attracted to the primary rationale for the Federal Tort Claims Act (FTCA.) Again, the FTCA provides that the federal government can be held liable in "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The reasoning behind the FTCA is this: If an individual can be held liable for wrongdoing, why should not the government be liable under similar circumstances? Even acknowledging the fact that taxpayers must "foot the bill" for government liabilities, the reasoning behind limiting sovereign immunity appears, at least in the opinion of this author, logical. After all, regardless of whether we would like to admit it, the government acts as our agent in all that it does!

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Chapter Key for McGraw-Hill/Irwin Business Law texts

	Hot Topics	Video Suggestions	Hypothetical or Ethical Dilemmas	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 3, 5, 7 and 14	Chapters 16, 42 and 43	Chapters 8 and 9	Chapters 3, 8, 9 and 14
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 2, 3, 4 and 7	Chapters 9 and 24	Chapter 5	Chapters 3, 5 and 7
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 2, 3, 5 and 10	Chapters 14 and 51	Chapter 7	Chapters 2, 7 and 10
Barnes et al., Law for Business, 10th Edition	Chapters 2, 4, 5 and 10	Chapters 13 and 25	Chapter 7	Chapters 2, 7 and 10
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 2, 3, 5 and 8	Chapters 10 and 35	Chapter 6	Chapters 3, 6 and 8
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 3, 4, 6 8 and 12	Chapters 8 and 20	Chapter 10	Chapters 3, 4, 8 and 10
McAdams et al., Law, Business & Society, 9th Edition	Chapters 4, 5 and 6	Chapters 6, 12 and 13	Chapter 7	Chapters 4, 6 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)

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