



Proceedings

A monthly newsletter from McGraw-Hill

October 2010 Volume 2, Issue 3



The McGraw-Hill Companies

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Dear Professor,

Welcome to McGraw-Hill's October 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 3 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 October 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 largest employment discrimination lawsuit in United States history, a class-action gender discrimination lawsuit filed against Wal-Mart Stores;
2. A lawsuit filed by a video game addict against the game's producer;
3. The Gulf Coast Claims Facility (GCCF), a victims' claims fund established in response to the British Petroleum (BP) oil disaster;
4. Videos related to a) the United States Supreme Court's decision to hear Snyder v. Phelps, a case involving the "free speech" and "free exercise" clauses of the United States Constitution; and b) the product liability exposure and related Food and Drug Administration (FDA) inspections of Wright County Egg and Hillandale Farms, two Iowa farms that recently recalled more than half a billion eggs after salmonella illnesses were linked to their products;
5. An "ethical dilemma" related to the degree of force a property owner can use to protect property; and
6. "Teaching tips" related to Article 3 ("BP Says It Has Paid \$399 million As It Hands Over Claims Process") and Video 2 ("Filthy Iowa Farms Linked to Contaminated Eggs") of the newsletter.

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

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Of Special Interest

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

- 1) The largest employment discrimination lawsuit in United States history, a class-action gender discrimination lawsuit filed against Wal-Mart Stores;
- 2) A lawsuit filed by a video game addict against the game's producer; and
- 3) The Gulf Coast Claims Facility (GCCF), a victims' claims fund established in response to the British Petroleum (BP) oil disaster.

Hot Topics in Business Law

Article 1: "Wal-Mart Asks Supreme Court to Hear Bias Suit"

<http://www.nytimes.com/2010/08/26/business/26walmart.html>

Wal-Mart Stores has asked the Supreme Court to review the largest employment discrimination lawsuit in American history, involving more than a million female workers, current and former, at Wal-Mart and Sam's Club stores.

Nine years after the suit was filed, the central issue before the Supreme Court will not be whether any discrimination occurred, but whether more than a million people can even make this joint claim through a class-action lawsuit, as opposed to filing claims individually or in smaller groups.

In April, the United States Court of Appeals for the Ninth Circuit in San Francisco ruled 6-5 that the lawsuit could proceed as a jumbo class action — the fourth judicial decision upholding a class action.

The stakes are huge. If the Supreme Court allows the suit to proceed as a class action, that could easily cost Wal-Mart \$1 billion or more in damages, legal experts say.

More significant, the court's ruling could set guidelines for other types of class-action suits. "This is the big one that will set the standards for all other class actions," said Robin S. Conrad, executive vice president of the National Chamber Litigation Center, an arm of the United States Chamber of Commerce, which has filed several amicus briefs backing Wal-Mart.

Meanwhile, the women at the core of the original lawsuit, known as *Dukes v. Wal-Mart*, have tried to move on with their lives. Some still work at Wal-Mart and have been promoted or received raises. One still works as a greeter there. Others have left Wal-Mart.

The case began nearly a decade ago with one woman, Stephanie Odle, who was upset to discover that the top manager at the Sam's Club where she worked as an assistant store manager had been administering a promotion test to the three male assistant store managers but not to her.



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That came after Ms. Odle discovered that a male assistant manager at a previous Sam's Club where she worked had been earning \$23,000 more a year than she was. When she complained, she said, the district manager responded, "Stephanie, that assistant manager has a family and two children to support."

"I told him, 'I'm a single mother, and I have a 6-month-old child to support,' " she recalled in an interview.

Lawyers representing the plaintiffs recruited Ms. Odle after obtaining a data showing that just a third of Wal-Mart's managers were women even though two-thirds of its employees were. The lawyers wanted to enlist a Wal-Mart employee whose complaints about pay and promotions would be a base from which to build a broader sex discrimination case.

Ms. Odle's story, along with those of six other women, became the seed of the 2001 lawsuit that accused Wal-Mart of systematic discrimination against women in pay and promotions. No one expected it to become such a drawn-out battle.

In its appeal, Wal-Mart said the Ninth Circuit's decision had contradicted earlier decisions of the Supreme Court and other appeals courts and had wrongly relieved the plaintiffs of the burden of proving individual injury.

"This conflict and confusion in class-action law is harmful for everyone — employers, employees, businesses of all types and sizes, and the civil justice system," said Theodore Boutros, a lawyer for Wal-Mart.

In its filing, Wal-Mart argued that while a class action might be appropriate for plaintiffs seeking changes to the retailer's behavior, the status was improper for seeking monetary damages.

The company said the complaints of the seven women were not typical of the more than one million women who have worked at Wal-Mart in the last decade. In a statement Wednesday, Wal-Mart said that it "has been recognized as a leader in fostering the advancement and success of women in the workplace."

Brad Seligman, a lawyer for the women, disputed Wal-Mart's legal analysis. "The ruling upholding the class in this case is well within the mainstream that courts at all levels have recognized for decades," he said in an e-mail Wednesday. "Only the size of the case is unusual, and that is a product of Wal-Mart's size and the breadth of the discrimination we documented. There is no 'too big to be liable' exception in civil rights laws."

The slow grind of the legal process has taken its toll on the plaintiffs.

Patricia Surgeson said she had quit Wal-Mart in frustration after being repeatedly denied a promotion and discovering that male employees at her store were typically paid more than women. She is now at home raising three children.



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Cleo Page resigned from the Wal-Mart store in Union City, Calif., and became a teacher for disabled students. She said she had grown angry because she was never promoted to management trainee and because the store manager had only considered men to head the sporting goods department.

Ms. Odle, who said Sam's Club had fired her because she kept speaking out against discrimination, moved to Old Navy and then to Aéropostale. At both, she said, managers threatened to fire her after discovering that she had appeared on television criticizing Wal-Mart.

Tired of worrying about dismissal, she went into business for herself. For the last five years, she has been selling country pecan pork chops and chicken and dumplings at Dishing It Up, her take-out meals shop in Norman, Okla.

"This way it's better, because now no one can fire me," Ms. Odle said.

Still, her customers frequently comment on her role in the lawsuit. "You have people who say, 'You go, girl,' and you have other people saying, 'Oh, you're that girl,' " she said. (Ms. Odle is no longer one of the named plaintiffs; that group is limited to California residents.)

David Tovar, a Wal-Mart spokesman, denied that there was any companywide discrimination, saying that conditions had steadily improved for female employees. He said 46 percent of Wal-Mart's assistant store managers were women, a position that is a pipeline to higher positions.

Mr. Tovar pointed to a company-sponsored expert study indicating that in 90 percent of its stores, there were no statistically significant pay disparities between men and women. But the plaintiffs' experts said they found sex discrimination in all 46 Wal-Mart regions.

Mr. Boutrous said that even if the seven lead plaintiffs had suffered discrimination, that did not mean there was across-the-board bias at thousands of stores nationwide. He said the women's claims should be tried individually, or if a manager discriminated against a store's 200 women employees, then perhaps as a 200-member class action for those women.

Joseph Sellers, a lawyer for the plaintiffs, said the case should be a class action because Wal-Mart had and still has a common set of personnel policies at all of its stores. "We regard them as cookie-cutter operations that are similar to each other," he said.

The seven lead plaintiffs disagree on one important matter: whether Wal-Mart has improved its policies toward women.

Betty Dukes, the woman for whom the case is named, is not convinced that conditions are any better. She began working for Wal-Mart in Pittsburg, California, in 1994 and is still a greeter there. She said she had stayed because it was hard to find another job while in the spotlight.

Ms. Dukes originally complained that she had been repeatedly passed over for promotions and that management had not even posted openings. Moreover, she said, women were paid less than men



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for the same job. When the lawsuit was filed, she was earning \$8.44 an hour, despite nine years of service.

When the news media began covering the lawsuit and writing about her, she said, Wal-Mart grew embarrassed and raised her pay by nearly 50 percent within a year. After 16 years at Wal-Mart, Ms. Dukes said she earns about \$31,000 a year. "I'm still struggling to get by," she said.

Another plaintiff, Deborah Gunter, grew upset that she had not been promoted to photo lab or pet department manager even though she said she had considerable experience with photography and pets.

She was later denied promotions to become a tire and lube manager, she said, adding that several men she had trained were promoted over her. Her boss then cut her hours back, reducing her pay, and when she complained about that, she was fired, she said.

Edith Arana is still fuming at Wal-Mart. During her six years there, she said, she had been repeatedly passed over for promotions even though she often worked grueling hours to impress management, frequently shortchanging her children.

"There are some women who are afraid to speak up," said Ms. Arana, who now works at the Los Angeles Public Library. "Someone needs to speak up for them. I'm willing to take on the fight."

Christine Kwapnoski sees signs that the suit has had an impact.

She complained that while working at the freezer department at a Sam's Club in Concord, California, several men she had trained were promoted over her. Soon after the suit was filed, though, Sam's promoted her to assistant store manager — she believes to make the company look better in court.

"The influx of women into management after the lawsuit was brought was phenomenal," Ms. Kwapnoski said.

Ms. Odle also said opportunities for women had improved, even though the broader legal questions remained unresolved.

"We've already won because they already had to change their policies toward women because of us," Ms. Odle said.

Discussion Questions

1. In your reasoned opinion, should the United States Supreme Court allow this case to proceed as a "jumbo" class action allowing more than one million women to proceed as plaintiffs collectively, as opposed to filing claims individually or in smaller groups?



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This is an opinion question, so student responses will likely vary. In the opinion of your author, the true value of a class action lawsuit (from the plaintiffs' perspective) is that there is "power in numbers." Plaintiffs in a class action lawsuit have the ability to "pool" their resources, both from the standpoint of finances and the legal expertise of plaintiffs' counsel, and this can assist tremendously in the effective pursuit of the case. In your author's opinion, even if there are more than one million plaintiffs in a particular case, if all of the plaintiffs have legal standing to sue a particular defendant based on similar facts and similar causes of action, they should have the ability to consolidate in a class action against the defendant.

2. Evaluate the case (mentioned in the article) of Stephanie Odle, the Sam's Club assistant store manager who was upset to discover that the store's top manager had been administering a promotion test to the three male assistant store managers, but not to her. Recall that previously, Ms. Odle discovered that a male assistant manager at a previous Sam's Club where she worked had been earning \$23,000 more a year than she was. When she complained, she said, the district manager responded, "Stephanie, that assistant manager has a family and two children to support." Ms. Odle told him, 'I'm a single mother, and I have a 6-month-old child to support,' " she recalled in an interview.

A "prima facie" case of discrimination is one in which sufficient evidence exists for the jury to decide issues of liability and damages. Has Stephanie Odle presented a "prima facie" case of discrimination?

If Stephanie Odle was similarly situated in terms of relative education, skill and experience when compared to the three male assistant store managers who were considered for promotion, it would appear that she has a "prima facie" case of discrimination, meaning that her case should be considered by the jury, and it should not be subject to summary dismissal. If this lawsuit carries through to trial, and if Stephanie Odle's particular situation is presented to the jury, Sam's Club should be prepared to argue that the three male assistant store managers were more qualified than she was (in terms of education, skill and/or experience), and they should also be prepared to argue that the substance of Ms. Odle's conversation with her district manager was not as she alleges. Any managerial assumption that a male is the primary "breadwinner" for his family while a female is not is convincing evidence of gender discrimination.

3. As the article indicates, attorneys representing the plaintiffs in this case have obtained data demonstrating that just one-third of Wal-Mart's managers are women, even though females comprise two-thirds of its employee population. In your reasoned opinion, is this statistical disparity convincing evidence of discrimination? Why or why not?

In terms of discrimination liability, numbers and statistics do matter. Even without evidence of intentional ("disparate treatment") discrimination, statistical disparities in terms of hiring, pay, promotion and/or termination practices can result in unintentional ("disparate impact") discrimination liability. Although students may not be particularly alarmed by the statistical disparity mentioned in the article (only one-third of Wal-Mart's managers are women, even though females comprise two-thirds of its employee population), this is evidence a jury can use in reaching a verdict



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concluding that Wal-Mart discriminates in terms of its promotion practices. The practical lesson here is that an organization does need to be mindful of such human resource statistics, and that if the data demonstrates a significant disparity in terms of hiring, pay, promotion and/or termination practices, the organization should consider remedial measures.

Article 2: "Judge: Video Game Addiction Suit Can Go On—Player Claims He Is Unable to Bathe, Dress Himself or Wake Up in the Day due to 'Lineage II'"

http://www.msnbc.msn.com/id/38890853/ns/us_news-crime_and_courts/

A Hawaii man who says he is unable to bathe, dress himself or wake up in the day because he is addicted to the video game "Lineage II" may proceed with his suit against the game's South Korean developer, a federal judge has ruled.

The Honolulu Star-Advertiser said Craig Smallwood, 51, of Ewa Beach, Oahu, filed a lawsuit against developer NCSOFT Corp. last October with several charges including emotional distress and misrepresentation.

Smallwood says he's spent more than 20,000 hours playing the multiplayer, online role-playing game since 2004. The 51-year-old says NCSOFT Corp. never warned him about the danger of game addiction.

A Honolulu law firm that represents the company had urged that the case be dismissed, but U.S. District Judge Alan Kay in his Aug. 4 ruling allowed half of the eight counts to continue, the Star-Advertiser said.

Smallwood alleges that the 2003 release "Lineage II" caused "extreme and serious emotional distress and depression." He also alleges that he has been "unable to function independently in usually daily activities such as getting up, getting dressed, bathing or communicating with family and friends."

He claims to have been hospitalized for three weeks and that he now needs treatment and therapy three times a week because of the game.

In his August 4 decision, Kay dismissed the charges of misrepresentation/deceit, unfair and deceptive trade practices, intentional infliction of emotional distress and punitive damages.

NCSOFT still faces counts of defamation, negligence, gross negligence and negligent infliction of emotional distress.



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Oahu law firm Bronster & Hoshibata, which represents NCSOft in the case, said Smallwood "fails to properly allege facts that would support each element of the emotional distress claim. As such, Smallwood has failed to properly give notice to NCSOft of the claims levied against it."

NCSOft also claims that Smallwood was banned from his game accounts because of his involvement with real money transfers, which is forbidden by the user agreement and rules of conduct of the game.

Discussion Questions

1. Consider Judge Alan Kay's ruling regarding the eight (8) causes of action alleged against the defendant in the plaintiff's complaint. Recall that Judge Kay dismissed four (4) of the eight (8) counts alleged against the defendant (misrepresentation/deceit, unfair and deceptive trade practices, intentional infliction of emotional distress and punitive damages), while he allowed the remaining four (4) causes of action to proceed (defamation, negligence, gross negligence, and negligent infliction of emotional distress.) In your reasoned opinion, was Judge Kay correct in his ruling? If so, why? If not, why not?

Since this is an "opinion" question, student responses will likely vary. In your author's opinion, however, Judge Kay was correct in his ruling. In terms of the four (4) counts Judge Kay dismissed, it does not appear based on the facts presented that NCSOftCorp. engaged in misrepresentation/deceit, nor does it appear that the company committed unfair and deceptive trade practices. Further, there does not appear to be evidence of intentional infliction of emotional distress, nor justification for punitive damages (punitive damages are usually reserved for situations involving extreme and/or outrageous conduct on the part of the defendant that essentially "shocks the conscience" of the court.) In terms of the four (4) causes of action Judge Kay allowed to proceed, the facts presented in the article are not sufficient to reach a conclusion regarding defamation (Defamation is an act of communication that causes someone to be shamed, ridiculed, held in contempt, lowered in the estimation of the community, or to lose employment status or earnings or otherwise suffer a damaged reputation.) The remaining causes of action (negligence, gross negligence, and negligent infliction of emotional distress) are all "negligence-based" theories of recovery, and a determination of negligence is usually left for a trial jury.

2. In your reasoned opinion, do the facts described in this article demonstrate NCSOftCorp.'s negligence? Why or why not?

Again, since this is an "opinion" question, student responses will perhaps vary. Legally defined, negligence is the failure to do what a reasonable person would do under the same or similar circumstances, and in order to reach a determination of negligence, the court (typically, the trial jury) must find that the plaintiff established four (4) elements: 1. The defendant owed the plaintiff a duty or standard of care; 2. The defendant breached the duty of care; 3. The defendant caused the plaintiff harm; and 4. The plaintiff can establish damages resulting from the defendant's breach of the duty of care. Normally, when I discuss cases similar to the subject case of Article 2, students "scoff" at the idea of holding the defendant responsible, essentially concluding that a defendant



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video game manufacturer has not breached a duty of care in such situations, if for no other reason than the plaintiff chooses whether to play such a video game, and if so, for how long each day.

3. How might the defenses of assumption of the risk, comparative negligence and/or contributory negligence affect the outcome of this case?

"Assumption of the risk" is a key defense in many negligence actions. This argument contends that even if the defendant was negligent, there should be no liability because the plaintiff actively, voluntarily and willingly proceeded in the face of "danger," appreciating the nature and extent of the "danger." If a jury accepts the "assumption of the risk" argument, they are duty-bound to award a verdict in favor of the defendant. In comparative negligence jurisdictions, even if the defendant was negligent, the defendant's negligence liability will be reduced by the extent to which the plaintiff's own negligence contributed to the plaintiff's own harm. For example, assume a case involving \$100,000 in damages. If the defendant was sixty percent responsible for the plaintiff's harm (due to the defendant's negligence) and the plaintiff was forty percent responsible for his/her own harm (due to the plaintiff's own negligence), the plaintiff would only be entitled to recover \$60,000 (i.e., sixty percent of \$100,000). In contributory negligence jurisdictions, if the plaintiff's negligence in any way contributed to the plaintiff's harm, the plaintiff is not entitled to recover anything from the defendant. Expressed another way, contributory negligence is a complete bar to the plaintiff's recovery.

In the instant case, there are strong arguments in favor of assumption of the risk, comparative negligence and/or contributory negligence.

Article 3: "BP Says It Has Paid \$399 million As It Hands Over Claims Process"

http://www.rolandsmartin.com/blog/? V_LYW10

The Gulf Coast Claims Facility "is fully functioning and will begin to process claims for emergency payment," a statement from the agency said on Monday, the same day BP reported having paid out \$399 million in claims to date.

The independent group, headed by attorney Kenneth Feinberg, who handled the 9/11 victims' compensation fund, was established in June as part of an agreement between the Obama administration and BP to facilitate processing of the personal and business claims from those affected by the Gulf oil disaster stemming from the Deepwater Horizon explosion on April 20.

BP said last week that it was no longer accepting claims as the transition to the new entity was taking place. The oil giant, which said Monday that it has written 127,000 checks to pay \$399 million in claims so far, will continue to handle claims put in by government entities.



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BP said Monday that 27,000 claimants who filed paperwork have not yet been paid. According to the Gulf Coast Claims Facility statement, claims previously filed with the BP Claims Process have been transitioned to the new claims facility for review, evaluation and determination. However, claimants will be required to file new forms with the Gulf Coast Claims Facility to receive payments.

Feinberg, who now controls a \$20 billion escrow account established by BP to compensate for damage, said in the statement, "I want to make sure the people in the Gulf understand we will not let you go out of business or lose your home. The number one priority of the GCCF is to assist the people in the Gulf."

He added, "Now that the claim centers are open and ready for business, the goal will be to get the emergency six month payment checks out the door, within 48 hours for individuals, after receipt of the claim form and sufficient supporting documentation and no more than seven days for businesses, after receipt of claim form and supporting documentation, and help people on the path to rebuilding their lives."

To date, BP has funded \$3 billion of the \$20 billion total, ahead of its payment schedule.

In a recent conference call, Feinberg said he plans to be more generous than any court would be in determining payments. However, he said if potential claimants don't like the offer the Gulf Coast Claims Facility makes, and believe they can do better, they can file suit -- although he doesn't advise it.

"It is not in your interest to tie up you and the courts in years of uncertain, protracted litigation when there is an alternative that has been created," he said.

Feinberg stressed that his facility is independent of both the government and BP. Claimants can file online, by fax, by mail or in person. All 35 of BP's claims offices will remain open, but will be staffed with newly trained workers with the goal of quickly and efficiently answering questions, Feinberg said.

Feinberg is scheduled to hold three town hall meetings in Mississippi. Each site is also supposed to have people from the fund to help Mississippians file their claims and answer specific questions. The meetings are scheduled for Bay St. Louis, Biloxi, and Pascagoula.

Claimants can receive between one and six months' compensation without waiving their right to sue, Feinberg said. Only those who file for and receive a lump-sum payment later in the year will waive their right to litigate. Feinberg said it is still being determined whether those people will be required to release just BP, or other potential defendants, from lawsuits.

He said determining eligibility in some cases could be tricky. The farther a person or a business is from the Gulf, the less likely they are to be determined eligible. However, Feinberg said, proximity is only one factor that is being looked at. A shrimp processor located 100 miles inland that solely processes Gulf shrimp would be one example of a case where other factors come into play, he said.



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"I don't want to underestimate the importance of proximity to the Gulf, but we'll have to be looking at the nature of your industry and how dependent you are on Gulf resources," he said. "I'm going to have to draw some tough lines, but I'm hoping I'll be able to enjoy the benefit of saying, 'If I haven't found you eligible, no court will find you eligible.'"

BP has done a pretty good job of claims payment in some cases, but has not been very effective in processing business claims, he said. Under his purview, "they may not always like their answer, but they'll get their answer within seven days."

He said he anticipates "a flood of early emergency claims," but hopes the tide may be lessened by claimants' ability to file and track their claim processing online.

He said he plans to be transparent about budgets and payments, even his own compensation. A summary narrative on how adjusters will process claims has already been made public.

Asked about Florida Attorney General Bill McCollum's recent letter to Feinberg criticizing the claims process under the Gulf Coast Claims Facility, Feinberg again emphasized that the program is voluntary.

McCollum said the program appears to be less generous to Floridians than the BP claims process, but "appearances are deceiving, and that is not the case," Feinberg said. He encouraged potential claimants to "test" the program and see how they will be treated.

Discussion Questions

1. What is your opinion of the Gulf Coast Claims Facility (GCCF)? In your opinion, will the establishment of the GCCF result in a "better" claims process than the one previously administered by British Petroleum (BP)? Why or why not?

Although student opinions may vary in response to these questions, there is a strong argument to be made in favor of the Gulf Coast Claims Facility (GCCF). Since the GCCF is independent of the federal government and British Petroleum (BP), it is in good position to make objective, equitable decisions regarding victim compensation. The obvious argument against the previous claims process administered by BP is that it was not objective, instead serving to advance the interests of BP in terms of denying otherwise legitimate claims, and "low-balling" (extending low offers to) legitimate claimants. The fact that GCCF is independent of the federal government and BP will likely improve the image of the settlement claims process along the Gulf Coast.

2. Appraise attorney Feinberg's statement that "It is not in your (BP claimants') interest to tie up you and the courts in years of uncertain, protracted litigation when there is an alternative (the claims process) that has been created." Do you agree or disagree with attorney Feinberg? Explain your answer.



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In your author's opinion, attorney Feinberg has made an over-generalized statement regarding the "settlement versus litigation" choice. In some instances, settlement might be preferable to the time and money it takes to litigate, while in other instances, litigation might be a better alternative. This is a judgment for the claimant to make, and the GCCF essentially acknowledges this in terms of asserting that the settlement process (in lieu of litigation) is completely voluntary. "Settlement versus litigation" is a choice for the claimant to make.

3. In your reasoned opinion, will it be possible for attorney Feinberg and the GCCF to establish, with any degree of exactitude, a) whether a party is entitled to compensation as a result of the oil spill; and b) if so, what the amount of the compensation should be? Explain your answers.

Since each claim must be resolved on a case-by-case basis, it is difficult for your author to envision a claims process that demonstrates scientific exactitude and certainty. Obviously, the GCCF must consider a host of factors in terms of reaching a settlement amount, including the nature of the claim and the claimant's proximity to the oil spill. In reaching settlements equitable to all parties involved in the worst environmental disaster in the history of the United States, attorney Feinberg and the GCCF have unenviable responsibilities.



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Video Suggestions

Video 1: "The Supreme Court to Hear Snyder v. Phelps"

<http://www.usatoday.com/video/index.htm?bctid=598913131001#/The+Supreme+Court+to+hear+Snyder+v.+Phelps/598913131001>

Note: See accompanying article, "Snyder v. Phelps—Westboro" at <http://www.ydr.com/westboro>

Purpose of Video: To discuss the limits in application of the "free speech" provision and the "free exercise" clause of the First Amendment to the United States Constitution

Discussion Questions

1. In your reasoned opinion, are Pastor Fred Phelps and Westboro Baptist Church's statements and actions protected by the "free speech" provision of the First Amendment to the United States Constitution?

The First Amendment to the United States Constitution states that "Congress shall make no law...abridging the freedom of speech." This sounds like an absolute prohibition of restrictions on speech, but over the course of our nation's history, the courts have not interpreted the free speech provision that way. Most students will be familiar with famous quote from United States Supreme Court Justice Oliver Wendell Holmes, Jr. that one cannot "falsely (shout) 'fire' in a theatre and cause a panic." Consider Justice Holmes's more elaborate statement writing for the majority in the United States Supreme Court decision Schenck v. United States: "The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic...The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The right to free speech is not absolute; in fact, none of the rights established in the Bill of Rights (the first ten amendments to the United States Constitution) have been interpreted without some restrictions.

Government can impose reasonable time, place and manner restrictions on speech, and in your author's opinion, a funeral is the "time and place" for rational restrictions on speech, if for no other reason than respect for the deceased.



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2. In your reasoned opinion, are Pastor Fred Phelps' and Westboro Baptist Church's statements and actions protected by the "free exercise" clause of the First Amendment to the United States Constitution?

The First Amendment to the United States Constitution states that "Congress shall make no law...prohibiting the free exercise (of religion)," but as indicated in response to Article 3, Discussion Question 1, none of the rights established in the Bill of Rights have been interpreted without some restrictions. Ask students whether the "free exercise" clause should allow Pastor Phelps and Westboro Baptist Church to interrupt a surgical procedure at the local hospital, air traffic control at the local airport, or kindergarten class at the local school. The "free exercise" of religion is subject to reasonable "time, place and manner" restrictions, just like "free speech" is subject to such restrictions.

3. Appraise Albert Snyder's following statement: "...This has nothing to do with free speech. It's about harassment and how much pain they've (Past Fred Phelps and Westboro Baptist Church) caused..."

By law, harassment can arise in a host of different situations. For example, it can involve repeated irritating or bothersome behavior, such as persistent telephone calls from a debt collector in violation of the Fair Debt Collection Practices Act. It can also involve behavior such as following or watching a person, and/or coming to a person's place of work or home. This behavior is commonly referred to as "stalking". Harassment can also include intentionally exposing a person to materials which the harasser knows, or has reason to know, are culturally offensive or intimidating. Arguably, the most commonly-known form of harassment is sexual harassment.

In the instant case, the actions of Fred Phelps and Westboro Baptist Church might have indeed constituted harassment. This will be a matter for the jury to determine, as the jury is ultimately responsible (at least on the trial court level) for applying the law to the facts of a particular case.

Video 2: "Filthy Iowa Farms Linked to Contaminated Eggs"

<http://abcnews.go.com/WNT/video/filthy-iowa-farms-linked-contaminated-eggs-salmonella-11518891>

Note: See accompanying article, "Rodents, Other Contamination Found at 2 Egg Farms: Rodents, Bugs, Other Unsanitary Conditions Found at 2 Iowa Farms Where Eggs Have Been Recalled," at <http://abcnews.go.com/Business/wireStory?id=11517667>

Purpose of Video: To discuss the product liability exposure and related Food and Drug Administration inspections of Wright County Egg and Hillandale Farms, two Iowa farms that recently recalled more than half a billion eggs after salmonella illnesses were linked to their products

Discussion Questions



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1. Would a massive product recall be effective in eliminating the liability of a defendant producer? Why or why not?

A massive product recall would not eliminate the liability of a defendant, since the defendant would be responsible for harm committed before the recall was announced, and for any harm that occurred after the recall if the plaintiff(s) did not know of the recall, and it is not reasonable to assume that he/she/they should have known of the recall. The primary advantages of a product recall would be a) reducing potential liability for future (post-recall) harm and b) sending a message to the public that the producer is trying, in good faith, to address the problem and minimize the overall harm to the public.

2. Does the Food and Drug Administration (FDA) investigation in this case demonstrate "clear and convincing" evidence of the defendants' liability? If so, should a judge grant summary judgment in favor of the plaintiffs? Explain your answers.

Consider some of the inspection findings of the Food and Drug Administration: a) "live mice inside egg-laying houses"; b) "live and dead maggots too numerous to count"; c) sixty-five unsealed rodent holes; and d) "liquid manure streaming out of a gap in a door." Although many students may feel that this is "clear and convincing" evidence of the defendants' liability, that should ultimately be an issue for the trial jury to decide. What if the defendants did not violate industry standard in terms of their operations? Should "industry standard" be consistent with "mega-farms," small farms, or some combination of the two? These questions cause your author to believe that summary judgment (in favor of the plaintiffs) should not be granted in this case. Let the jury decide issues related to negligence, other fault-based causes of action, and strict liability.

3. Does it surprise you that the FDA did not conduct mandatory inspections of the nation's largest egg-producing farms before this case occurred? Explain your answer.

The fact that the FDA did not conduct mandatory inspections of the nation's largest egg-producing farms before this case occurred may be the most shocking realization of all in this case, but this is a direct reflection of the lack of resources available to a federal regulatory authority like the FDA. The truth of the matter is that the FDA, and many other regulatory authorities like it (consider, as examples, the United States Department of Agriculture and the Occupational Safety and Health Administration), do not have the financial and human resources available to conduct inspections on even a moderate scale. Until more financial and human resources are devoted to product inspections, the problems associated with a lack of comprehensive and effective oversight will likely persist.



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Of Special Interest

This section of the newsletter addresses the question of what degree of force a property owner can use to protect property.

Hypothetical and Ethical Dilemma

Warren Delaney believed that his home was his "castle," and during the summer months every year, his "castle" was a tiny cabin nestled in the woods of upstate New York. Delaney was an Economics professor at a small college in Florida, and for him, there was no better way to "rest and recharge" after a hectic academic year than to head north for the cozy confines of his cabin.

For several consecutive years, Warren's cabin had been vandalized and/or burglarized during the winter months while he was in Florida. During the winter of 2006, several windows had been shattered. In the winter of 2007, several pieces of furniture had been stolen. At some point during the winter of 2008, the bedroom mattress had been ripped apart for some unexplained reason, with foam and fabric scattered about the bedroom floor. On each of these occasions, the perpetrator had forced the front door lock open, and had entered the cabin through the front door.

Warren envisioned a way to stop the criminal(s) responsible for these violations. He spring-loaded a shotgun in the living room of the cabin, and pointed it directly at the front door. The shotgun was configured so that if someone opened the front door while he was away, it would fire at the intruder.

Warren returned to his cabin in May 2010 and came upon a grisly scene. The front door had been opened, and at the threshold was the partially-decomposed body of what appeared to be a middle-aged man, dead of a shotgun blast to the chest. Warren immediately called the local sheriff, Officer Brian Mulholland. Upon arriving at the scene and briefly questioning Warren, Officer Mulholland arrested him.

Discussion Questions

1. Was the arrest valid?

It does appear that Officer Brian Mulholland validly arrested Warren Delaney, since Officer Mulholland can reasonably conclude, based on evidence gathered at the scene, that Warren used unreasonable force in taking the intruder's life. More particularly, Officer Mulholland had reason to believe that Warren used deadly force to protect property. Ordinarily, the use of deadly force to protect property is a violation of law.

2. Did Warren use justifiable force in this situation?



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Warren cannot successfully assert self-defense in this case, since he was not protecting himself or others; instead, he used deadly force to protect property. As a general rule, a person cannot inflict serious bodily harm on another person, nor can he or she use deadly force, merely to protect property.

3. Did Warren Delaney commit first-degree murder?

First-degree murder is defined as the premeditated and deliberated, unlawful killing of another human being. Although a finding of first-degree murder is for a trial jury to determine, it does appear that Warren has committed first-degree murder in this case. He premeditated and deliberated the killing of another person, establishing and executing a careful plan to take the intruder's life. Further, as mentioned previously, self-defense is not an available defense in this case.



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Of Special Interest

This section of the newsletter will assist you in covering:

- 1) Article 3 of the "Hot Topics in Business Law" Section ("BP Says It Has Paid \$399 million As It Hands Over Claims Process"); and
- 2) Video 2 of the "Video Suggestions" Section ("Filthy Iowa Farms Linked to Contaminated Eggs".)

Teaching Tips

Teaching Tip 1:

Note: As a follow-up to Article 3, you may want to have your students review the following article and Discussion Questions regarding the background of Kenneth Feinberg, the Independent Claims Process Administrator for the BP Oil Disaster:

"What I've Learned: Kenneth Feinberg--A DC Lawyer Was Asked to Put a Price on Each of the Thousands of Lives Lost in Two of America's Greatest Tragedies. Here's How He Did It—And the Lessons He Came Away With."

<http://www.washingtonian.com/articles/people/6731.html>

Kenneth Feinberg didn't know any of the victims of the 9/11 terrorist attacks, but they changed his life. And now so too have the victims of the mass shooting at Virginia Tech.

When the Twin Towers fell and the Pentagon burned on September 11, 2001, then-attorney general John Ashcroft asked Feinberg, a Washington lawyer and compensation expert, to set up and head a congressionally mandated victim's-compensation fund. Working pro bono, Feinberg and his law-firm staff devoted 33 months to investigating claims and deciding benefits. Feinberg personally conducted most of the 1,500 hearings with survivors and victims' families.

When the job was done, Feinberg presented his report to President Bush. Bush and Ashcroft sent him a photo inscribed "Thanks from a grateful nation." Feinberg wrote a book, *What Is Life Worth?*, describing the experience. He thought his dealings with mass tragedy were over.

Then last April, a young gunman from Centreville killed 32 people at Virginia Tech in Blacksburg. Feinberg got a call asking him to lead the university's effort to compensate victims. "My wife, Dede, said, 'You want to do this—do it,'" he recalls. Once again Feinberg took an unpaid position placing him in the center of an emotional storm.

This kind of work was not what Feinberg envisioned growing up in working-class Brockton, Massachusetts. Now 62, Feinberg wanted to be an actor when he was young. But his tire-merchant father worried that his son would



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end up a New York waiter instead of a Broadway star. "Why not use your acting skills in the courtroom?" he suggested.

Feinberg began his legal career as an assistant US attorney in New York, where his colleagues included young lawyers Rudy Giuliani and Michael Mukasey. Feinberg then made his way to Capitol Hill, where he wound up as a special counsel to the Judiciary Committee and chief of staff for Democratic senator Ted Kennedy. Later, as a court-appointed mediator in private practice, Feinberg helped resolve some of the nation's biggest damage cases involving asbestos, the Dalkon Shield, and Agent Orange.

When he got the call after 9/11, Feinberg says, he assumed the Bush administration figured that his longstanding Hill connections provided the bipartisan political traction needed to satisfy Congress. "It helped absolutely that I knew Washington and had allies," he says. But nothing could have prepared him for what lay ahead.

It's been more than six years since 9/11. What have you learned?

I doubt Congress will ever use a 9/11-type fund to provide such generous compensation to people. It certainly wasn't replicated after Hurricane Katrina. The public-policy response to the 9/11 tragedy is unique to an unprecedented historical event. And people should not read into it that when there is another disaster, tragedy, or terrorist attack, Congress will respond the same way.

Why not?

Because it runs counter to the way the American system works. People should read some e-mails I received during the 9/11-fund work. "Dear Mr. Feinberg: My son died in Oklahoma City. Where's my check?" "Dear Mr. Feinberg: My son died on the USS *Cole* in Yemen fighting terrorism. How come I'm not eligible?"

How do you carve out the very special, generous use of public taxpayer money for just a small group of victims of life's misfortune? You know, misfortune befalls us all the time. But you don't see that type of public generosity when others suffer similar loss; you don't receive an average of \$2 million.

What is there about a big terrorist attack that makes it different?

I don't think there is a valid distinction between terrorism victims at the Pentagon and hurricane victims in New Orleans. But there's a big distinction between the way the American people rallied around the victims of 9/11, a foreign attack unprecedented in scope, and the way the public failed to act similarly with Katrina or any other disaster. The 9/11 fund, I believe, was the right thing to do because it was a patriotic act by the American people to come to the rescue of these people in need.

Should it be repeated if there is another major terrorist attack?



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If Congress had asked me, “Well, what do you think of this program?” I would say don’t do it again. Here in Washington, if a car bomb goes off, do not set up a victim-compensation program. Or if you’re going to do it again, next time make it much simpler. Have a person with the authority simply dole out the same amount to families of all of the dead. Don’t ask one person to act like Solomon and try to calculate the value of lives. To be judge, jury, accountant, lawyer, rabbi, et cetera is very, very difficult.

You described painful e-mails from other victims. Has anyone confronted you in person?

Not confrontation. But I had a few people from Oklahoma City meet with me and inquire. And I said I found it very, very difficult not to compensate them. But the statute limited my authority to 9/11, and their complaint would be better addressed to Congress than to me.

How did you feel about saying that?

Very stressed. You’re trying to explain to people basically how life is unfair. It’s not just a question of some people getting compensated and not others. It’s also a question of why some people died but not others.

People were in the Pentagon for the first time in their lives that day and died. Other people would have been in the offices that were incinerated—only that day they were ill or they had to take their kid to school.

The people on 9/11 who said perfunctory goodbyes after breakfast—and you never saw them again. Vaporized, not even a body to bury. It’s just unbelievable the serendipitous nature of life and death, which can paralyze you if you think about it too much.

And the same at Virginia Tech?

In sending their child to college in Blacksburg, far from any urban area, who in their wildest dreams would have anticipated that they would lose a loved one because of a deranged killer? I mean, one thing I’ve learned is when your number is up, there’s not much you can do.

What can you say to the families and students at Virginia Tech?

Sometimes what you don’t say is as important as what you do say. Yes, I could say to families at Virginia Tech when I met with them, “I cannot explain this tragedy, Mrs. Jones. Life is unfair.” But here’s another lesson from 9/11: Do not say to grieving families, “I know how you feel.” I learned a good lesson there.

In Crystal City, the father of a servicewoman came up to ask me questions about compensation and discuss how difficult for the family the death of their daughter and sister was. And I said, “I know how you must feel.” His face dropped. He looked at me and said, “Mr. Feinberg, believe me, you



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don't know how I feel. Please don't say that." I never, ever said it again to these families. Because he was right.

How has the experience affected you?

In doing what I did, you become a bit more fatalistic about planning your future. When my Georgetown law students come to me and say, "If I go to this law firm, can I become a partner in seven years?" I tell them that seven years is an awful long time. Don't plan more than two years out. And even there, you're stretching it.

How has it affected your plans?

You don't plan trips too far into the future. Simply procrastinate and delay in making decisions about your personal life. You don't plan retirement too far into the future.

As soon as the 9/11 compensation was over, I downsized my firm. I had 30 people. Now I have seven. I just didn't want to practice the same law anymore.

I teach a lot more as a result of 9/11. I thought it was therapeutic. I just thought explaining to young law students the 9/11 fund and what we learned from it, how we went about making decisions and designing the program, was a more valuable use of my time than simply representing clients, mediating and arbitrating commercial cases. It was a decision I made—that life's too short and you want to do other things.

Do you ever think, "This could have happened to my family"?

I had a daughter at Georgetown and a son at NYU about a mile from the World Trade Center on 9/11. We were extremely concerned. My wife called them within minutes when the plane hit the World Trade Center. We heard quickly that they were both okay.

I think a tragedy like 9/11 tells all Americans, including me, how lucky we are. I had been in the World Trade Center hundreds of times. And that's a day I could have been there. You never know. Like those poor kids at Virginia Tech.

You can't help but realize there's a lot of uncertainty in life and that you're calculating awards for individuals who were in the wrong place at the wrong time. To me, it's a lot about fatalism. It doesn't matter if you're in the World Trade Center in a city with 10 million people or the town of Blacksburg. You cannot immunize yourself from tragedy.

You worked very closely with the 9/11 families. Do you stay in touch with any?

Out of 5,300 people that received 9/11 compensation, I hear from one family each anniversary. One. And that's the way it should be. I am not interested in hearing from these families. I don't think they should be interested in maintaining contact with me. The program is over. A



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congressman once wrote me before the anniversary date of 9/11 suggesting that he would host a reunion of the families in his district with me. And I disabused him of that notion.

That sounds harsh. Why?

Because no purpose would be served. The families—I respect their privacy and effort to move on. This compensation fund was a surrogate for a horrible personal tragedy, and they should put it behind them as best they can and try and get on with their lives. I don't think a reunion or maintaining contact with me would serve any useful purpose. It's not harsh.

Do you go to commemorations, or are they too painful?

I've respectfully refused. It is painful. But I view 9/11 now through a historical lens. Every year that goes by, it's becoming more a part of history books, not current affairs. And I think it's time to treat it as such. I, like many of the families, commemorate 9/11 in my personal way. But it's not through public expressions.

I commemorate 9/11 by reflecting on what happened, what I was asked to do by the Attorney General, the President, and Congress—and what we accomplished. I just think about how many thousands of people the fund was able to help. And I'm very proud of that.

Because military pay is much lower, how did you value the life of a high-powered DC lawyer in comparison to a young Pentagon victim?

For all of the military dead and injured, we calculated awards based on military pay and assumptions about compensation. We had a separate calculation—battle pay, travel allowances. Families said, "I lost my son. He was 34, an officer in the Army. At the age of 42, he would have left the Army and gone into the private sector as a consultant at a defense contractor and made more money. You should calculate based on those assumptions."

It's safe to say the military claimants did not receive as much as the stockbroker or the bond trader because we looked at annual earnings past, present, and future.

You must have seen how the prospect of money can affect people's lives.

One of the things I've learned from the 9/11 fund and Virginia Tech is that when people complain to me, argue, or demand more money, I don't believe it has anything to do with greed. It has to do with grief. Valuing a lost loved one—a life that won't be fulfilled, a future that will never be realized.

Some of the 9/11 widows and widowers were seen as very attractive catches. Did you include any cautions while disbursing the money?

Absolutely. Every person who received money from the fund, before we gave them the money, was told they could receive free financial consulting, investment advice. Only a handful of claimants



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accepted that offer. It concerned me that vulnerable families in grief would not wisely invest the money they received.

Some people didn't file by the deadline because they were so troubled by their loss that they couldn't deal with money.

There were about 11 families so clinically depressed about 9/11 that they never filed a claim to the fund. Never filed a lawsuit. They did nothing. I met with some of those families and begged them not to miss the deadline: "Mrs. Jones, I'll help you fill out the form. Sign it. You can set up a foundation in your son's memory." She looked at me: "Go away, Mr. Feinberg. Leave the application on the kitchen table. I can't even get out of bed."

That was my biggest disappointment in administering the fund: my inability to convince people in grief not to miss the statutory deadline.

Does it still weigh on you?

You feel powerless in the face of overwhelming grief. It still does weigh on me that these 11 families, who would have received on average \$2 million each tax-free, never could even sign the application—even though I was willing to sit with them, fill it out for them with their help. I realized that grief can paralyze people.

Did you conduct things differently at Virginia Tech than after 9/11?

With Virginia Tech I was not constrained by a statute, so I was able to give every family—32 who lost a loved one—the exact same amount of money, a little over \$200,000 each; the injured received a graduated range based on days of hospitalization. I didn't have to calculate, like Solomon, different awards for each student and faculty member who died.

Having to value different individual claims in the 9/11 fund was guaranteed to fuel divisiveness from family to family, whereas at Virginia Tech I didn't have to worry about that.

Is it hard to shed the role of lawyer?

I think being a lawyer and administering the 9/11 fund was at best a wash—and actually may have been a hindrance. It's been said that perhaps a better qualification to do what I did with 9/11 and Virginia Tech is divinity school rather than law school. You certainly become more of a psychologist and a rabbi or a priest than a lawyer. It has made me a better listener.

Do people, not knowing that you volunteered your services, ever accuse you of making money off of tragedy?

Not with Virginia Tech. We made that clear. At the beginning with 9/11, some families accused me of making money off the dead. But once they learned otherwise, that ended.



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Was part of your job in these tragedies to serve as a lightning rod? Did people take out their emotions on you?

I think that's human nature. With 9/11, I was the representative of the US government. With Virginia Tech, I was the representative of the university. And in both cases at the beginning, there was a fair amount of anger directed at me as a surrogate.

When I would have these town-hall meetings, people would say, "Mr. Feinberg, we know you're not responsible for the 9/11 tragedy, but you're the only one we can direct our invective at." "Mr. Feinberg, Virginia Tech—you weren't there, we know. But the Virginia Tech administration was negligent in allowing this to happen, and we can only vent at you."

Is it tough to take, people blaming you for the tragedies?

No. You expect it, understand whence it comes. You can't get angry at these people. They lost loved ones. You're pleased when you have a meeting where it doesn't occur, but you fully expect it when you walk into the room.

What were your impressions from the Virginia Tech town-hall meetings?

I learned a lot about the community reinforcement of these people. There really is something to the "Hokie spirit." It was much less combative than 9/11.

Is that togetherness something we usually don't think of in Washington?

The closest example I can tell you about community cohesiveness in Washington was exhibited at the Pentagon following 9/11. The reinforcement of how the soldiers and military families supported me, the 9/11 fund, and supported each other is very similar to the Hokie spirit. I found it very uplifting.

What have you learned about what life is worth?

I've learned the reaction to tragedy is almost unlimited, limited only by the vagaries of human nature. It is unbelievable. Families would meet me and express anger, frustration, sadness, joy that somebody would listen. Families met with me expressing newfound belief in religion. Others would express the view that there is no God that could allow this to happen. The mosaic of human emotion is incredible.

You've now faced this emotion twice in horrific, world-gripping tragedies. We hope nothing will happen, but are you ready to do this work again if called on?

Of course. You don't say no to the Attorney General of the United States or the president of Virginia Tech.



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Despite the personal impact on me emotionally, I'd do it again. So would millions of Americans. If you can make some small contribution to the healing process, that justifies your involvement in coping with tragedies.

Discussion Questions

1. In your reasoned opinion, was it appropriate/advisable for the federal government to establish a "victims' compensation fund" for the survivors and families of the September 11, 2001 terrorist attacks? Why or why not?

This is more of an "ethics" question than it is a "legal" question, since it would be a "bit of a stretch" to anticipate that a court might hold the United States of America partially at fault for the events of September 11, 2001. Some students will contend that compensating 9/11 survivors and families is the "right thing to do" in terms of sharing the burden of the losses that occurred that day. Other students may evaluate the issue from the standpoint of fiscal responsibility of the federal government, and argue that United States taxpayers should not pay for the criminal actions of the nineteen terrorists involved in 9/11.

2. In your reasoned opinion, was it appropriate/advisable for Virginia Polytechnic Institute and State University (Virginia Tech) to establish a "victims' compensation fund" for the survivors and families of the Virginia Tech massacre of April 16, 2007?

Again, this may be more of an "ethics" question than a "legal" question, although some students may contend that Virginia Tech was at least partially to blame for what happened on April 16, 2007, since it is foreseeable that such an event could occur, and since the university arguably (emphasize arguably) did not exercise enough precautions to reduce the likelihood of such an event's occurrence. From an ethical standpoint, students might contend (just as they might argue in response to Teaching Tip 1, Discussion Question 1 above) that compensating survivors and families is the "right thing to do" in terms of sharing the burden of the losses that occurred that day. Obviously, such a "victim's compensation fund" would divert university resources away from other endeavors. The ultimate question is whether such a fund is a fitting and appropriate allocation of university resources, and I anticipate that many students will respond with a resounding "yes."

3. Is Kenneth Feinberg the "right person for the job" in terms of serving as the Independent Claims Process Administrator for the British Petroleum (BP) oil disaster? Why or why not?

Kenneth Feinberg is, arguably, the person for the job, since he has a host of experience in administering similar victim's funds. Mr. Feinberg has earned a positive reputation in administering the 9/11 and Virginia Tech victims' compensation funds, and his experience and reputation will likely serve him well in fulfilling his responsibilities as the Independent Claims Process Administrator for the BP oil disaster. Obviously, the key to the success of the oil disaster victims' claims process



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will be transparency, equity and neutrality, and the person selected to administering this fund is key in terms of fulfilling such objectives.

Teaching Tip 2:

Note: As a follow-up to Video 2, you may want to have your students review the following article and Discussion Questions regarding the product liability exposure and related Food and Drug Administration inspections of Wright County Egg and Hillandale Farms, two Iowa farms that recently recalled more than half a billion eggs after salmonella illnesses were linked to their products. This article was written by John W. Boyd, Jr. founder and president of the National Black Farmers Association. An active farmer in southern Virginia, Boyd was a poultry farmer for 14 years.

“The Egg Recall Was a Disaster Waiting to Happen”

http://www.huffingtonpost.com/john-w-boyd-jr/the-egg-recall-was-a-disa_b_698298.html

The price of unregulated mega-farming will be more public health crises to come

If my experience is any guide, the people who are least surprised to hear of the appalling conditions that led to the egg recall that began on August 13 were my fellow small and mid-sized farmers. Many of us have watched with alarm the changes in the poultry industry over the past several decades and warned of its likely consequences.

I have been a farmer for more than two decades and a poultry farmer for the majority of that time. Since founding the National Black Farmers Association in 1995, I have spoken out many times about how the rise of industrial mega-farms has increased the risk of widespread food problems.

In May, I submitted public comment to a joint Department of Justice-USDA workshop on agricultural regulation held in Huntsville, Alabama. The event, part of an ongoing investigation focused on Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy, was chaired by Attorney General Eric Holder and Agriculture Secretary Tom Vilsack. In my testimony I spoke of the problems mega-farms have created and urge regulators to support small producers. Unfortunately, prior to the current recall, momentum for reform was not strong enough.

In the wake of the public health crisis, people are waking up to a troubling reality. Today, a few hundred mega-farms produce the majority of our country's eggs. The intensive industrial operations on these farms represent a fundamental change in the industry from the time when chickens grew cage-free in the chicken houses of small and mid-sized operations. This change is one that presents a significant threat to public health.

The reason is simple: A small farmer can look at an individual chicken and see whether that bird is healthy or sick. If you are in the chicken house every day, you can tell whether a chicken is



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behaving normally or constantly sitting--a sign of trouble. Small farmers have the ability to keep their farms clean, to promptly take out dead animals, and to make sure that there is enough room for the others. Small farmers are better able to control the sources of disease, such as rodents and decaying livestock. And we as consumers and a society should support the nation's small and mid-size farms for this and many other reasons.

At the National Black Farmers Association, we do not support the raising of chickens in cages. We support keeping birds in chicken houses and giving them enough room to grow. We believe that if you allow chickens to move in and out of their nests to lay their eggs, it produces a superior product. If you create the space to separate chickens, manure, and eggs--rather than concentrating these in an industrial-style facility--it produces food that is safer and healthier to eat.

In the facility where I worked, we had 15,000 chickens, which laid roughly 7,000 eggs a day. That might sound like a lot, but it pales in comparison with industrial operations which house an astonishing number of birds and produce an astonishing number of eggs per day. Remember, more than half a billion eggs were recalled and they were all from a few producers.

The bigger these huge corporate facilities get, the more you run into problems with cleanliness. As experts have pointed out, a few decades ago salmonella in eggs was not a widespread problem. It was when the mega-producers began to dominate - a situation I experienced firsthand - when this issue emerged.

While smaller farms are not immune from these challenges, it was only with the rise of massive industrial operations that our country created a system in which salmonella contamination could affect thousands of people nationwide.

Industry spokespeople want you to focus on the fact the recall to date has affected only a portion of all U.S. eggs. But that glosses over the reality of the situation. This current egg recall is the largest in American history. It affects not only whole eggs being sold in the supermarket but also eggs used in products sold nationwide. While the industry's savvy public relations efforts were keeping some criticism at bay before this recall, they cannot hide the enormity of this problem.

The solution is rethinking the way the food we eat is produced.

That starts with tighter oversight. Other countries that have very strict salmonella programs have done a much better job than we have at eliminating contamination not only from eggs, but also from chickens available at the market.

Doing that requires more inspections. When I was active in poultry, I took pride in that work and welcomed people to come walk through the chicken house. Industrial operations should be held to the same high standards of cleanliness and transparency.



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If there is one advantage of consolidation, it is that it makes the job of inspectors easier. Since there are only a few hundred facilities producing the bulk of our eggs, making regular visits to each of them should not be too difficult.

It is promising to hear the recent news report that the Obama Administration may soon announce that --starting in September and building through the end of the year--the FDA will visit and inspect 600 large egg farms responsible for the majority of egg production across the nation. The announcement that Congress will hold hearings on this issue in a few weeks is also welcome.

We must also address labeling. Currently, hundreds of companies purchase eggs from the mega-farms, then re-label the eggs as their own. In this manner, the industry is able to hide from consumers the true nature of egg production in America.

As a step toward some of these changes, the Senate is currently considering legislation called the FDA Modernization Act, a version of which has already passed the House. It would strengthen government oversight and increase penalties for companies that sell contaminated products.

The FDA Modernization Act would be a good start, but more must be done. Large agribusiness has been consistently fighting against regulation for the last 20 years. We are now paying the price. Our food is never going to be without imperfections. But industry opposition to reform has meant that a lot of people have been sickened for no good reason. All while this unchecked industry has continued to squeeze small and mid-size farms.

These are facts that America's small and mid-size farmers find hard to tolerate. And that is why we are speaking out.

Discussion Questions

1. Appraise Mr. Boyd's proclamation that *"(t)he price of unregulated mega-farming will be more public health crises to come."*

Students may agree or disagree with Mr. Boyd's proclamation, but his warning is based on two factors: a) the lack of appropriate government regulation; and b) the perceived perils of "mega-farming." Mr. Boyd is obviously of the opinion that government regulation of farming (especially mega-farming) is crucial, since regulation might eliminate problems before they occur or ameliorate the effects of such problems on public health and safety. Mr. Boyd also believes that mega-farming creates greater problems than small or mid-sized farming, if for no other reason that the sheer scale of health risks associated with large-scale farming operations.

Students who favor "big business" might contend that Mr. Boyd is biased in his opinion since his personal experience relates only to small farming, and that Mr. Boyd might be unrealistically nostalgic in terms of wanting to "return to the days of yesteryear" when small-scale farming was



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the norm. Consistent with this view would be the argument that large-scale farming operations offer economies of scale that translate into lower product prices for consumers and provide the United States with an overabundance of agricultural products that can literally "feed the world."

2. In your opinion, are the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA) failing in their regulatory responsibilities in terms of guaranteeing consumer safety of agricultural products? Why or why not?

Regulation requires money. The Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA) may indeed be failing in their regulatory responsibilities, but such failure is likely a direct result of inadequate human and financial resources. Based on current resources, the FDA and the USDA could not inspect every food-production facility and agricultural product, even if these agencies wanted to. As a society, we (collectively) must make "value choices" in terms of how we distribute our resources, and if we truly value effective regulation of agricultural products, that will most likely involve greater resources devoted to these regulatory agencies. Money does not cure all societal ills, but it certainly helps.

3. As the article indicates, in May, Mr. Boyd submitted a public comment to a joint Department of Justice-USDA workshop on agricultural regulation held in Huntsville, Alabama. The event, part of an ongoing investigation focused on Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy, was chaired by Attorney General Eric Holder and Agriculture Secretary Tom Vilsack. In his testimony, Mr. Boyd spoke of the problems mega-farms have created and urged regulators to support small producers.

Specifically how can the federal government "support small producers?" In your opinion, would such support be advisable?

Support of small producers can occur in one or both of the following ways: a) greater subsidies to small producers (in terms of direct financial support and/or tax breaks); and/or b) fewer subsidies to large producers. Essentially, these policy decisions can make small producers more competitive. Whether to support small farmers, mega-farmers or both is a "judgment call" our federal government must make, with the ultimate question being "What is best for our economy and for consumers?"



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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, 4, 8, 9 and 43	Chapters 5 and 10	Chapters 8 and 9	Chapters 3, 4 and 10
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 3, 5 and 24	Chapters 4 and 5	Chapters 2 and 5	Chapters 3 and 5
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 2, 6, 7 and 51	Chapters 3 and 20	Chapters 5 and 6	Chapters 2 and 20
Barnes et al., Law for Business, 10th Edition	Chapters 2, 6, 7 and 25	Chapters 4 and 20	Chapters 5 and 6	Chapters 2 and 20
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 3, 4, 6 and 35	Chapters 2 and 19	Chapters 5 and 6	Chapters 3, 4 and 19
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 4, 5, 10 and 20	Chapters 6 and 10	Chapters 10 and 12	Chapters 4, 5 and 10
McAdams et al., Law, Business & Society, 9th Edition	Chapters 4, 7 and 13	Chapters 5 and 7	Chapters 4 and 7	Chapters 4 and 7

This Newsletter Supports the Following Business Law Texts

- Barnes et al., Law for Business, 10th Edition, 2009© (007352493X)
- Brown et al., Business Law with UCC Applications Student Edition, 12th Edition, 2009© (0073524948)
- Kubasek et al., Dynamic Business Law, 2009© (0073524913)
- Kubasek et al., Dynamic Business Law: The Essentials, 2010© (0073377686)
- Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition, 2010© (0073377643)
- McAdams et al., Law, Business & Society, 9th Edition, 2009© (0073377651)
- Reed et al., The Legal and Regulatory Environment of Business, 15th Edition, 2010© (007337766X)

