



# Proceedings

A monthly newsletter from McGraw-Hill

September 2010 Volume 2, Issue 2



The McGraw-Hill Companies

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## Dear Professor,

Welcome to McGraw-Hill's September 2010 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. I hope this newsletter finds you well-settled into the new academic year! Volume 2, Issue 2 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the September 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. A recent federal judicial decision ordering Wells Fargo to reimburse customers \$203 million for "unfair and deceptive" overdraft fees;
2. A lawsuit filed by Texas' attorney general against the Obama administration for a federally-imposed moratorium on deepwater oil drilling;
3. A call for a constitutional amendment ending "birthright" citizenship;
4. Videos related to a) Florida Attorney General Bill McCollum's proposed "Arizona-style" immigration law and b) recent litigation against USA Swimming (and other related parties) regarding sexual abuse;
5. An "ethical dilemma" related to BP's use of chemical dispersants in its response to the largest oil spill in United States history; and
6. "Teaching tips" related to Video 1 of the newsletter ("Florida Jumps Into Illegal Immigration Debate").

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) A recent federal judicial decision ordering Wells Fargo to reimburse customers \$203 million for "unfair and deceptive" overdraft fees;

2) A lawsuit filed by Texas' attorney general against the Obama administration for a federally-imposed moratorium on deepwater oil drilling; and

3) The call for a constitutional amendment ending "birthright citizenship."

## Hot Topics in Business Law

### Article 1: "Wells Fargo Overdraft Lawsuit: Bank Ordered To Pay \$203 Million In Fees Over 'Unfair' Charges"

[http://www.huffingtonpost.com/2010/08/11/wells-fargo-overdraft-law\\_n\\_679178.html](http://www.huffingtonpost.com/2010/08/11/wells-fargo-overdraft-law_n_679178.html)

According to this article, a federal judge in California ordered Wells Fargo & Co. to change what he called "unfair and deceptive business practices" that led customers into paying multiple overdraft fees, and to pay \$203 million back to customers.

In a decision handed down recently, U.S. District Judge William Alsup accused Wells Fargo of "profiteering" by changing its policies to process checks, debit card transactions and bill payments from the highest dollar amount to the lowest, rather than in the order the transactions took place. That helped drain customer bank accounts faster and drive up overdraft fees, a policy Alsup referred to as "gouging and profiteering."

The ruling detailed the experiences of two Wells Fargo customers who used their debit cards for multiple small purchases, and were then charged hundreds in overdraft fees because the order the purchases were cleared by the bank depended on the amounts. The judge found the customers, who were part of a class action, were not properly informed of the bank's policies on processing payments and were unaware the bank would allow debit purchases to go through when their accounts were overdrawn.

"Internal bank memos and e-mails leave no doubt that, overdraft revenue being a big profit center, the bank's dominant, indeed sole, motive was to maximize the number of overdrafts," Alsup wrote. That policy would "squeeze as much as possible" from customers with overdrafts, in particular from the 4 percent of customers who paid what he called "a whopping 40 percent of its total overdraft and returned-item revenue."

The judge dismissed Wells Fargo's arguments that customers wanted and benefited from the policies, and detailed evidence he said showed efforts to obscure the practices in statements and other materials. Wells Fargo's online banking system, for example, would display pending purchases in



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chronological order, "leading customers to believe that the processing would take place in that order."

"The supposed net benefit of high-to-low resequencing is utterly speculative," he wrote. "Its bone-crushing multiplication of additional overdraft penalties, however, is categorically assured."

Alsup also criticized the bank for allowing overdraft purchases after accounts had been drained by offering a "shadow line of credit" that customers were unaware existed.

The decision noted that the Federal Reserve has outlawed some of the practices detailed in the case, most notably debit card overdrafts permitted without customers agreeing to accept overdraft protection.

Judge Alsup ordered Wells Fargo to stop posting transactions in high-to-low order by November 30 and to reverse overdraft fees charged to customers from November 15, 2004, to June 30, 2008, as a result of the policy. A study cited in the decision by a Wells Fargo witness put the restitution at "close to \$203 million."

Wells Fargo spokeswoman Rochele Messick said the bank is "disappointed" with the ruling. "We don't believe the ruling is in line with the facts of this case and we plan to appeal," she said.

Messick noted that Wells Fargo changed its policies earlier this year, and customers can no longer incur more than four overdraft charges in one day.

The case, heard in the U.S. District Court for Northern California, is Gutierrez vs. Wells Fargo.

## Discussion Questions

1. Do you agree with Judge Alsup that Wells Fargo was engaged in "unfair and deceptive" business practices? If so, why? If not, why not? Explain your response.

*Student opinions will perhaps vary in response to this question. An "unfair and deceptive" business practice is generally defined as an act or statement that has the tendency or likelihood of misleading the public. In your author's opinion, Judge Alsup's decision appears to be well-supported by the facts. Processing checks, debit card transactions and bill payments from the highest dollar amount to the lowest, rather than in the order the transactions took place, appears to be a creative way to generate more overdraft transactions, and greater overdraft fees. As the article indicates, from November 15, 2004 to June 30, 2008, Wells Fargo was able to generate approximately \$203 million in overdraft fees as a result of this practice. The facts also appear to indicate insufficient disclosure to customers of Wells Fargo's "high to low" transaction processing practice, and generally speaking, the less disclosure a business provides to customers, the more likely a court will conclude that business practices are "unfair and deceptive."*



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2. As the article indicates, Wells Fargo is "disappointed" with Judge Alsup's ruling, and the company plans to appeal. In your reasoned opinion, what is the likelihood that Wells Fargo will succeed in its appeal? Explain your response.

*In order to reverse, modify or remand (send a case back down to the lower court to be reheard either wholly or partially) a decision on appeal, the appellate court must conclude that there was an error of law and/or an abuse of discretion (decision-making authority) committed at the lower court level. Based upon your author's review of the facts in this case, there does not appear to be sufficient evidence for the appellate court to reverse, modify or remand this case. The finding of an "unfair and deceptive" trade practice is a discretionary call, and a reasonable person could conclude, based on the facts presented in this case, that Wells Fargo was engaged in an unfair and deceptive trade practice. Specific evidence to support this conclusion would be 1) not giving sufficient notice to customers of Wells Fargo's "high to low" transaction processing practice and 2) allowing overdraft purchases after accounts had been drained by offering a "shadow line of credit" that customers were unaware existed, arguably for the exclusive purpose of charging overdraft fees.*

3. Comment specifically on Wells Fargo's practice of allowing overdraft purchases after customer accounts had been drained by offering a "shadow line of credit" that customers were unaware existed. Should such a practice be illegal? Is such a practice unethical?

*As mentioned in response to Discussion Question 2 above, the practice of allowing overdraft purchases after customer accounts had been drained by offering a "shadow line of credit" that customers were unaware existed is arguably "unfair and deceptive." The key here is that customers were apparently not aware that such lines of credit were being extended. The facts do seem to demonstrate that Wells Fargo was extending these "shadow" lines of credit largely, if not exclusively, for the purpose of charging overdraft fees and interest. It is a different matter entirely to provide customers overdraft protection based on their express request for and agreement to such protection. Banking law presumes that in order for overdraft protection to exist, it must be based on the express agreement between the financial institution and the customer.*

## **Article 2: "Texas Sues Obama Administration Over 'Unjustified' Deepwater Drilling Moratorium"**

[http://www.huffingtonpost.com/2010/08/11/texas-sues-feds-deepwater-drilling-moratorium\\_n\\_679444.html](http://www.huffingtonpost.com/2010/08/11/texas-sues-feds-deepwater-drilling-moratorium_n_679444.html)

According to this article, the Texas attorney general sued the Obama administration recently over its new deep-water offshore drilling moratorium, claiming it is unjustified and federal officials did not contact the state before issuing the ban.

Attorney General Greg Abbott filed the 18-page suit in federal court in Houston against Department of the Interior Secretary Ken Salazar. The ban halted the approval of any new permits for deep-



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water projects and shut down drilling at 33 exploratory ocean wells in the wake of the BP spill in the Gulf of Mexico.

In his lawsuit, Abbott called the ban "an unjustified, arbitrary and capricious policy that will inflict harm upon coastal communities."

Also, the suit said, federal officials did not coordinate with the state or consider the economic impacts before issuing the moratorium. Texas is one of the nation's most active oil refinery states. State figures show there were 86,900 jobs in oil and natural gas extraction in April and an additional 107,800 in support industries.

Interior Department spokeswoman Kendra Barkoff defended the ban but declined to comment specifically on the Texas lawsuit.

"The Deepwater Horizon/BP oil disaster has made it clear that we need better health, safety and environmental standards for drilling operations," Barkoff said in an e-mailed statement. "The temporary pause on deep-water drilling that Secretary Salazar has put in place is simply common sense, and we continue to stand behind it."

The current moratorium replaced one that was blocked by the courts. The Interior Department says it is meant to give to give oil and gas companies time to implement adequate safety measures. The ban is in effect until November 30, unless federal officials determine deep-water drilling operations have gotten safer.

On a related matter, the Justice Department also asked a federal judge who overturned the initial moratorium to throw out that court challenge filed by several offshore service companies, arguing that it is moot now that the new ban is in place.

Company lawyers, however, claim the second moratorium is a "carbon copy" of the first and is a sham designed to circumvent U.S. District Judge Martin Feldman's earlier order by prolonging the court challenge.

The new ban does not seem to deviate much from the original moratorium in that it still targets deep-water drilling operators while defining them in a different way.

ESNCO Offshore Co. has filed a separate lawsuit challenging the new moratorium. Feldman also is presiding over that case.

Meanwhile, the Interior Department is hosting eight forums – including a Houston session in September – to gather information from experts and federal, state and local leaders about drilling safety reform, well containment and oil spill response. With that information, officials plan to consider whether to continue, end, reduce or expand the moratorium.

## **Discussion Questions**



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1. Comment on Texas Attorney General Greg Abbott's claim that the deep-water offshore drilling moratorium is "an unjustified, arbitrary and capricious policy that will inflict harm upon coastal communities." Do you agree or disagree with Mr. Abbott's assertions? Explain your response.

*The term "arbitrary" means determined by chance, whim, or impulse, and not by necessity, reason, or principle. The term "capricious" is similar, meaning characterized by or subject to whim; a capricious decision is impulsive and unpredictable. Based on the fact that the BP oil spill represents the largest environmental disaster in the history of the United States, how can Attorney General Abbott claim in good faith that such a moratorium is "arbitrary and capricious?" Consider Interior Department spokesperson Kendra Barkoff's statement regarding the moratorium: "The Deepwater Horizon/BP oil disaster has made it clear that we need better health, safety and environmental standards for drilling operations. The temporary pause on deep-water drilling that Secretary Salazar has put in place is simply common sense." Such a temporary moratorium will likely have some negative economic impact on coastal communities, but how does that negative economic impact compare to the oil disaster itself? How would it compare to not imposing a moratorium, and having one or more similar oil disasters occur in the Gulf Coast region?*

2. In his lawsuit against the Obama administration, Texas Attorney General Abbott claims federal officials did not coordinate with Texas or consider the economic impacts before issuing the moratorium. In such a situation, should the United States government "coordinate" with the state(s) affected by a proposed moratorium before declaring it? To what extent should potential negative economic impacts affect the federal government's decision to issue such a moratorium?

*Logically, Texas (or any other Gulf Coast state) might be opposed to a temporary drilling moratorium due to the negative economic impact such a moratorium might have on the region; subjectively speaking, the moratorium might be viewed as "bad" for a particular state. In your author's opinion, the federal government would be in a much better position to determine what is "good" for the entire country. Add to that the fact that the federal government has the legal obligation to enact, monitor and enforce environmental standards for the entire country, and it does appear that the federal government has acted appropriately in this case. The United States government should consult with states affected by such a moratorium before imposing it, if for no other reason than to realize the advantages of a coordinated effort in addressing a very dire environmental situation; however, it does appear that the federal government has ultimate jurisdiction and decision-making authority to impose such a moratorium.*

3. In your reasoned opinion, who will prevail in this lawsuit: the federal government, or the state of Texas (and the oil companies that would like to continue deep-water offshore drilling?) Explain your response.

*As mentioned in response to Discussion Question 2 above, the federal government has ultimate jurisdiction and decision-making authority to impose the temporary moratorium on deep-water offshore drilling. Texas Attorney General Abbott has a demanding task indeed to establish that the moratorium was "unjustified, arbitrary and capricious." Arguably, lax federal oversight and regulation of deep-water offshore drilling substantially contributed to the largest environmental*



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*disaster in the history of the United States. By imposing a moratorium, perhaps the government is "better late than never" in terms of addressing a practice that involves great long-term risk to the entire country, and to the world.*

## **Article 3: "Illegal Immigrants Bear 8% of Children Born in the U.S."**

<http://politics.blogs.foxnews.com/2010/08/11/illegal-immigrants-bear-8-children-born-us>

This article indicates that as discussion over whether to end birthright citizenship intensifies, a new study of Census Bureau data reveals that 8 percent of children born in the United States in 2008 were parented by illegal immigrants.

The Pew Hispanic Center, a project of polling organization Pew Research Center, finds that, of the 4.3 million babies born in 2008, roughly 340,000 were born to undocumented aliens. This is double the percentage of illegal immigrants in the U.S., owing in part to the fact that the illegal immigrant population is largely comprised of men and women at birthing age.

In addition, high birthrates among undocumented aliens give that population a similar share of children in the U.S. The study finds that children born to illegal immigrants account for 7 percent of the total population of people under the age of 18, or 5.1 million children. Four million, or 79 percent, of those children were born in the United States, making them U.S. citizens.

This analysis comes amid calls from some GOP members to consider ending birthright citizenship, the right enshrined in the 14th Amendment, that persons born in the United States are citizens of the country and the state in which they reside. House Minority Leader John Boehner, R-Ohio, said on NBC's "Meet The Press" this week that terminating the practice is an idea "worth considering."

Ending or revising the guarantee of birthright citizenship, Boehner said, may eliminate a major motivation for many immigrants to cross the border unlawfully. "There is a problem. To provide an incentive for illegal immigrants to come here so that their children can be U.S. citizens does, in fact, draw more people to our country," Boehner said. "I do think that it's time for us to secure our borders and enforce the law and allow this conversation about the 14th Amendment to continue."

Critics of the idea claim that the guarantee their children will be U.S. citizens is not great enough of an incentive for parents to immigrate illegally, since they would have to wait 21 years for their children to be old enough to sponsor their parents for citizenship. Additionally, such a change would require a Constitutional amendment, which two-thirds of Congress would have to approve before state legislatures consider the measure, and three-quarters of those must agree to the provision for it to become part of the Constitution. A bill that calls for such a change-the Birthright Citizenship Act of 2009-has been stalled in the House since April 2009.

Meanwhile, half of respondents in a new poll support a Constitutional amendment ending automatic birthright citizenship. In a recent Fox News/Opinion Dynamics poll, 50% of respondents said they



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do not think a child born to an immigrant living in the U.S. illegally should automatically become a citizen.

The Pew study analyzed data from a March 2009 Current Population Survey, conducted by the Census Bureau.

## Discussion Questions

1. As the article indicates, House Minority Leader John Boehner claims that "birthright citizenship" provides an "incentive" for illegal immigrants to come to the United States (so that their children born in the United States can automatically be United States citizens), and that such an incentive "does, in fact, draw more people to our country." Do you agree or disagree with Mr. Boehner's assertions? Explain your response.

*In your author's opinion, the primary, overriding incentive for illegal immigration to the United States is economic opportunity. Barring a scientific poll of those who come to the United States illegally (and practically speaking, how difficult would it be to administer such a poll?!), it would be impossible to determine how many people come to the United States principally so their children can become United States citizens. Logic would seem to indicate that economic opportunity is the greatest motivating force. See the article at <http://www.migrationinformation.org/USFocus/display.cfm?ID=774> ("Increasing Evidence That Recession Has Caused Number of Unauthorized Immigrants in US to Drop"), which correlates a recent drop in the number of illegal immigrants in the United States to the recession.*

2. As the article indicates, in order for "birthright citizenship" to end, a Constitutional amendment would be necessary, and in order for such an amendment to be enacted, two-thirds of the United States Congress would have to approve; state legislatures would then consider the measure, and three-quarters of those would have to agree to the provision for it to become part of the Constitution. Why do you think our founding fathers made it so difficult to enact a Constitutional Amendment?

*Arguably, the more our Constitution changes in terms of express amendments, the less the original document itself means. Over the course of our nation's entire history, there have only been twenty-seven (27) express amendments to the United States Constitution, representing roughly one (1) amendment to the original document every ten (10) years. Our founding fathers did comprehend the potential need for express constitutional amendment; in fact, the "Bill of Rights," which establishes cherished constitutional protections for our people, collectively represented the first ten (10) amendments to the Constitution. The original document provides for express Constitutional amendment, based on the procedural requirements described in Discussion Question 2. In your author's opinion, this procedure demonstrates that although our Founding Fathers did perceive the need for a "living document" to change in order to meet the needs of our changing culture, they did not indeed for the document to be changed arbitrarily and capriciously, based on the prevailing "political winds" at a particular time in our nation's history.*





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3. The Fourteenth Amendment to the United States Constitution states, in pertinent part, that "(a)ll persons born...in the United States...are citizens of the United States and of the State wherein they reside." The Fourteenth Amendment to the United States Constitution was passed by Congress on June 16, 1866, and ratified on July 23, 1868. In your reasoned opinion, why did Congress enact this constitutional protection?

*Many students will be familiar with the words inscribed on the pedestal of the Statue of Liberty, from a poem written in 1883 by Emma Lazarus entitled "The New Colossus." The poem proclaims, in pertinent part:*

*"Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door!"*

*Symbolically, the "golden-door" represents the entrance into liberty and the freedom from oppression that is the promise of America. Whether these words were meant solely for legal immigrants, only for those who can "show their papers" and demonstrate their "entitlement" to be here, is subject to debate. In the late 1860s when the Fourteenth Amendment was enacted, the population of the United States was approximately 35 million people. In 2010, the population of the United States is almost tenfold that number, approximately 310 million people. Whether our nation can "afford" the inviting, compassionate, idealistic language inscribed on the base of the Statue of Liberty is subject to intense political debate.*



## Video Suggestions

### Video 1: "Florida Jumps Into Illegal Immigration Debate"

<http://video.foxnews.com/v/4309082/florida-jumps-into-illegal-immigration-debate/>

**Purpose of Video:** To discuss Florida Attorney General Bill McCollum's proposed "Arizona-style" immigration law

### Discussion Questions

1. Comment on Attorney General McCollum's specific proposal that a judge have the discretion to consider a criminal suspect's illegal immigrant status in setting bond. Is such a law necessary? Is it appropriate?

*Judges already have the discretion to consider "flight risk" in setting bond (i.e., in determining whether bond should be allowed, and if so, the amount of bond.) Flight risk relates to the likelihood that a criminal subject will flee the jurisdiction and not appear for trial. Flight risk can relate to whether a suspect will leave one state for another, or one country for another. Given the fact that a judge already has the discretion to consider flight risk, Attorney General McCollum's specific proposal that a judge have the discretion to consider a criminal suspect's illegal immigrant status in setting bond is not necessary, and is therefore, in your author's opinion, not appropriate.*

2. Comment on Attorney General McCollum's specific proposal that a criminal's illegal immigrant status serve as an "aggravating circumstance," thereby enhancing (i.e., increasing) his or her punishment for the commission of a particular crime. Is such a law appropriate?

*This is an opinion question, so student responses will likely vary. You may want to ask students the following question: For two (2) criminals who commit the same crime, why should their punishment vary depending on whether they are legally or illegally in the United States? Those who favor illegal immigrant status as an "aggravating circumstance" might argue 1) illegal immigrants do not deserve equality with legal immigrants and United States citizens under United States law and 2) such a "get-tough" approach to illegal immigrants might serve to deter others from illegally entering the United States. Those who do not favor such a distinction will likely contend that in the final analysis, only the crime and punishment for the crime*



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*matter, not whether the perpetrator is legally or illegally in the United States at the time the crime is committed.*

3. Comment on Attorney General McCollum's specific proposal that the state attorney general be given the authority to intervene against "sanctuary cities" that "assist and protect" illegal immigrants. Is such a law necessary? Is it appropriate?

*In your author's opinion, determining whether a city is a "sanctuary city" (in other words, a city that provides "aid and comfort" to illegal immigrants) might result in nothing more than a "witch hunt." How would a state attorney general determine, with any degree of accuracy or authenticity, whether a city is in fact a "sanctuary city?" Even if a state attorney general were to appropriately make such a determination, who would be punished? Select city officials? The city itself? What would be the nature and extent of the punishment? In your author's opinion, immigration law is more appropriately enforced against illegal immigrants and their United States employers than against townships and municipalities.*

## **Video 2: "USA Swimming Hit With Another Sexual Abuse Lawsuit"**

<http://abcnews.go.com/Blotter/Swimming/usa-swimming-sexual-abuse-olympic-hopeful-swimmer-files/story?id=11378627>

(Note: This video consists of two parts, and both parts are accessible at the above-referenced internet address. Feel free to have your students review both parts of the video; however, all of the following questions can be addressed after a review of only "Part 1.")

**Purpose of Video:** To address recent litigation against USA Swimming (and other related parties) regarding sexual abuse

### **Discussion Questions**

1. In your reasoned opinion, should USA Swimming be held responsible in situations involving sexual misconduct by swim coaches? Why or why not?

*Student opinions may vary in response to this question, but USA Swimming is the supreme governing body of competitive swimming organizations across the United States. In your author's opinion, given the fact that it is the supreme governing authority, USA Swimming should be a party potentially charged with responsibility in a situation involving sexual misconduct by a swim coach, especially in a situation where the organization has reason to know of the coach's sexual misconduct, but fails to do anything of import in terms of remedying the situation.*

2. In your reasoned opinion, should local swim organizations ("clubs") be held responsible in situations involving sexual misconduct by their swim coaches? Why or why not?



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*Again, student opinions may vary, but local swim organizations are "closer" to their coaches (for example, the local swim organization typically makes the hiring decisions), and therefore arguably even more responsible for failure to select an appropriate candidate. Local swim organizations have an obligation to investigate the suitability of a particular coach, and if the organization fails to conduct an investigation that would have revealed a history of past sexual misconduct by a particular coach and hires that person, the organization can be held liable. Even for a coach with no prior history of sexual misconduct, the local swim organization has a duty to monitor the coach, and address any improprieties in conduct.*

3. Andy King was one of the swim coaches covered in the video who was convicted of sexual abuse. His defense attorney, Jamie Harley, argues that parents were partially to blame for the sexual abuse, claiming that parents were not "minding the store," that "had they been...watching what was going on with their own children, this opportunity (the sexual abuse) could have never presented itself." Do you agree or disagree with Ms. Harley's assertions? In your reasoned opinion, should lack of parental oversight serve to lessen the liability of a coach who sexually abuses a child athlete? Should it affect the liability of the local swim organization? Should it lessen the liability of USA Swimming?

*In your author's opinion, Ms. Harley is merely fulfilling her role as an advocate for her client. Parents have the right to assume 1) a coach will act appropriately, 2) the local swim organization will "mind the store" adequately, and 3) USA Swimming will exercise its oversight authority responsibly. Ms. Harley's argument will likely "fall on deaf ears" for those outside of the courtroom, just as it did for those jurors who decided Mr. King's fate (As the video indicates, Mr. King was sentenced to forty years in prison for his sexual misconduct.)*



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## Of Special Interest

This section of the newsletter addresses the ethical issues related to BP's use of chemical dispersants in its response to the largest oil spill in United States history.

## Ethical Dilemma

Note: This month's "Ethical Dilemma" is based on the following article:

### **"NOAA, FDA to Test Seafood for Dispersants: Agencies Hope to Reassure Public, but Some Scientists Remain Skeptical"**

[http://www.msnbc.msn.com/id/38694358/ns/us\\_news-environment/](http://www.msnbc.msn.com/id/38694358/ns/us_news-environment/)

According to this article, amid undying criticism over the large-scale use of Corexit in the Deepwater Horizon response, NOAA and the Food and Drug Administration are developing a lab test to detect traces of the chemical dispersant in seafood. The test, they hope, will finally put to rest concerns that poisons from the compounds used to break up the oil will linger in the food chain.

"They don't expect to find dispersant in fish but are operating out of an abundance of caution," says Christine Patrick, a spokeswoman for fisheries programs at the National Oceanographic and Atmospheric Administration. "It's because people need more reassurance and confidence ... (which are) not as controllable as you would hope."

Critics who urged more thorough testing before fishing areas were opened say the move is positive, if belated.

"It's very late (to start this testing), and it's premature to open those fishing grounds while they are still developing the test," says Susan Shaw, a toxicologist at the Maine Environmental Research Institute. "I know that they are trying to inspire confidence in the seafood and some scientists actually do think that is OK, but I am not one of those scientists."

It is unclear when the test will be ready. Creating a reliable test can be a lengthy process, Patrick says.

Until a few weeks ago, detecting dispersants in seafood was left to NOAA and FDA professional seafood assessors who are trained to detect adulterants by smelling samples of fish. When interviewed by msnbc.com at the testing lab in Pascagoula, NOAA officials said they were not focused on finding dispersants because "the FDA has concluded the dispersant itself ... is not a public health risk."



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NOAA and the FDA stand by that assessment. Although the use of the dispersant was unprecedented in scale and application — BP used more than 1.8 million gallons of the dispersants, pumping it deep into the sea as well as spraying it over the surface — they point out that the dispersant degrades more rapidly than oil. BP stopped using dispersants after July 18.

Patrick also points to scientific studies that show fish and other types of sea creatures do metabolize and excrete poisons found in oil and dispersants — that they do not accumulate in the tissue. She compares it to the way humans metabolize alcohol. The testing would help determine how quickly that process takes place, especially in shrimp, shellfish and crabs, she says.

“It’s definitely unprecedented use; no one is challenging that,” says Patrick, adding that NOAA has “real concerns” about how dispersants will affect reproduction of fish stocks and development of larvae exposed to the chemicals.

“They are vulnerable. But that’s not the same thing as seafood safety,” she says. “You don’t eat them. You eat the big ones, which have the ability to metabolize and excrete” the poisons.

In June, the Environmental Protection Agency ordered BP to switch to a less poisonous dispersant, but the company continued using the one it had on hand in large quantities — two different formulations of Corexit, produced by Naperville, Ill.-based Nalco Co.

Later, they were ordered to make public the formulation of the dispersants, but scientists said some of the ingredients listed — such as “derivatives” and “petroleum distillates” — were general, keeping specific compounds under wraps.

“They really should be disclosing all of these,” says Shaw. Some of the chemicals “may be more persistent in tissue than the ones that we know. We still have the problem of those ingredients.”

The use of dispersants has been subject of great debate. Sen. Frank Lautenberg, a member of the Appropriations subcommittee on water development, has introduced the Safe Dispersants Act, which would require better testing to determine long-term effects on human and marine health, and better disclosure.

Groups of commercial fishermen, including the Louisiana Shrimp Association, are also calling for testing of dispersants and questioning the reopening of fishing grounds.

The nonprofit group Public Employees for Environmental Responsibility sent a legal petition to the FDA on August 4 calling for screening of dispersants in seafood. The FDA has five (5) months to respond.

## Discussion Questions



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1. In your reasoned opinion, did BP act ethically in terms of using chemical dispersants to address its massive oil spill? Explain your answer.

*This question should spark vigorous debate in your classroom. In terms of the argument that BP did act appropriately in terms of using chemical dispersants, one can contend that under the circumstances, BP had no choice. Facing the largest oil "spill" ("volcanic hemorrhage?") in the history of the United States, the company had to use the tools it had available to address the situation. In terms of the argument that BP did not act ethically, one can argue that before BP used the dispersants, the company should have determined that the chemicals were actually safer than the oil they are designed to dissipate. Apparently, no scientific conclusion has been reached regarding the relative safety of chemical dispersants.*

2. In your reasoned opinion, did the federal government act appropriately in reopening Gulf of Mexico fishing grounds before conducting further studies on the long-term effects of chemical dispersants on human and marine health? Why or why not?

*This question should again spark vigorous debate in your classroom. Admittedly, the federal government had a difficult decision: either reopen Gulf of Mexico fishing grounds and risk potentially calamitous effects on the safety of the seafood-consuming public, or continue the moratorium on Gulf fishing and risk potentially calamitous effects on the local economy. In the opinion of your author, the economy should take a "back seat" to public safety in this situation, especially since the federal government is charged with the responsibility of maintaining and advancing public safety.*

3. Comment on the propriety of Senator Frank Lautenberg's proposed Safe Dispersants Act. Under the circumstances, is such a law "fitting and appropriate?"

*In your author's opinion, Senator Lautenberg's proposed Safe Dispersants Act sounds not only fitting and appropriate, but also necessary. Your students may be shocked by the fact that none of the parties involved (the federal government, the Food and Drug Administration, Nalco Co., or BP) has yet conducted studies sufficient to determine the nature and extent of the long-term effects of the dispersants on human and marine health.*



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## Of Special Interest

This section of the newsletter will assist you in covering Video 1 ("Florida Jumps Into Illegal Immigration Debate").

## Teaching Tips

### Teaching Tip 1:

As a follow-up to Video 1 ("Florida Jumps Into Illegal Immigration Debate"), I encourage you to have your students read the following article and address the following Discussion Questions:

#### **"McDonnell Pursues Deal to Give Virginia Troopers Immigration Enforcement Power"**

<http://www.foxnews.com/politics/2010/08/04/mcdonnell-pursues-deal-virginia-troopers-immigration-enforcement-power/>

According to this article, Virginia Gov. Bob McDonnell is pursuing a deal with federal officials that would allow state troopers to enforce immigration law, effectively expanding statewide a program that a handful of Virginia counties have implemented.

The move comes as state Attorney General Ken Cuccinelli issued a legal opinion saying state police officers can check the immigration status of anyone they stop or arrest.

Though the decision prompted a call for the governor to codify that decision in state law, McDonnell's office said he is already working toward giving state police new enforcement powers.

"He just feels there's been a breakdown at the federal government to enforce our ... immigration laws and protect our borders. This is just trying to make sure that Virginians are kept safe," McDonnell spokeswoman Stacey Johnson told FoxNews.com.

She said the governor has been talking to federal officials about the idea for the past couple months and that the details of the arrangement "will be announced in the coming weeks."

McDonnell is trying to expand authority through a program known as "287g," an agreement dozens of localities across the country have forged with Immigration and Customs Enforcement that trains local officers in immigration enforcement. The program allows the officers to carry out some of those duties under ICE supervision.





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ICE would not comment on the negotiations with Virginia. If the deal is sealed, McDonnell's state would join several others in implementing the partnership for state law enforcement.

It's unclear whether the governor would take any action to codify Cuccinelli's decision or if he would even need to. McDonnell described the ruling as "nothing new."

Cuccinelli described his opinion as a clarification of the law. He explained that Virginia law allows state law enforcement to check immigration status but does not require it -- the section of the Arizona law that mandated the immigration checks was blocked by a federal judge recently, pending litigation.

Virginia is pursuing tougher immigration policies on several fronts, with officials claiming their actions will be able to withstand legal challenge.

"We're very prudent, we take our time -- measured responses," said state Republican Delegate Robert Marshall, who originally requested the ruling from Cuccinelli.

Prince William Board of County Supervisors Chairman Corey Stewart is pushing a separate statewide bill that would bring an Arizona-style system to Virginia. The proposal would require police to check the immigration status of anyone they stop or arrest. Stewart, who claims his proposal avoids the legal pitfalls that have tripped up Arizona, has launched a political action committee to raise money for a public campaign in support of the bill and has started a website where he is trying to collect 100,000 signatures.

Senate Democratic Leader Richard Saslaw, though, said the proposal doesn't stand a chance. He also cast doubt on whether Cuccinelli's ruling would have any impact on Virginia police operations.

Should a deal be struck with ICE, Virginia would join Alabama, Arizona, Colorado, Georgia, Florida, Minnesota, Rhode Island and Tennessee in extending the program to state police.

Several Virginia counties already have the 287g program, including three separate departments in Prince William County.

## Discussion Questions

1. Who has the power to control immigration: the United States government, or the individual states? Explain your answer.

*Ideally, the power to control immigration should be shared between the federal government and state governments. Immigration regulation should (and must?) be a collaborative effort. The federal government's authority to regulate immigration derives from its constitutional immigration and police powers. States also have the right to be involved, based on authority over their respective jurisdictions. In the event of conflict between the federal government and the individual states in terms of immigration law, the federal government should arguably prevail based on the*



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*Supremacy Clause of the United States Constitution (the Supremacy Clause proclaims that in the event of conflict between federal law and state law, federal law "reigns supreme.")*

2. In your reasoned opinion, which of the following statements is preferable in terms of state law enforcement officers addressing illegal immigration?

a. State law enforcement officers should not be allowed to check the immigration status of anyone they stop or arrest; instead, such inquiry is best left to federal authorities;

b. State law enforcement officers should be allowed (but not required) to check the immigration status of anyone they stop or arrest; or

c. State law enforcement officers should be required to check the immigration status of anyone they stop or arrest.

*Option "a." sounds impracticable; although federal authorities do have a substantial presence in border regions, states have a greater presence in interior regions of the country. Arguably, the federal government does not have enough personnel and resources to fully enforce immigration law alone, even if it wanted exclusive jurisdiction.*

*Option "b." also has potential problems if the individual officer is empowered with the discretion to check the immigration status of anyone they stop or arrest, since this could result in "racial profiling."*

*Option "c." may be the best option of the three (3) alternatives, since all detainees are treated equally, but some may argue that this approach is overly burdensome. You may want to discuss with your students whether a national identification card might be a desirable way to efficiently address issues like this, but some may argue that a national identification card represents an unreasonable intrusion on privacy.*

## **Teaching Tip 2:**

As further follow-up to Video 1 ("Florida Jumps Into Illegal Immigration Debate"), I encourage you to have your students read the following article and address the following Discussion Questions:

### **"Arizona Immigration Law Ruling: The Details"**

<http://www.myfoxphoenix.com/dpp/news/immigration/apx-az-immigration-law-ruling-details-07292010>

According to this article, United States District Judge Susan Bolton recently prohibited from taking effect the following controversial provisions of Arizona's new immigration law:



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1. A requirement that police, while enforcing other laws, question people's immigration status if officers have reasonable suspicion they're in the country illegally;
2. A requirement that authorities verify the status of all arrested people before their release from jail;
3. A requirement that immigrants obtain or carry immigration registration papers;
4. A ban on illegal immigrants from soliciting work in public places; and
5. A provision that allows for warrantless arrests when people commit crimes that can result in their deportation.

The following provisions of Arizona's new immigration law have taken effect:

1. A prohibition on state and local government agencies from restricting the enforcement of federal immigration law. Any Arizonan can file a lawsuit to challenge agencies that have a policy of restricting such enforcement;
2. A ban on state and local agencies from restricting the sharing of information on people's immigration status for determining eligibility of a public benefit, verifying a claim of residence and determining whether an immigrant has complied with federal registration laws;
3. A new addition to Arizona's nearly 5-year-old ban on immigrant smuggling that lets officers pull over drivers if officers have reasonable suspicion they have broken traffic laws;
4. A ban on blocking traffic when people seek or offer day-labor services on streets;
5. A prohibition on driving or harboring illegal immigrants in furtherance of their illegal presence. It also requires impoundment of vehicles when the driver is furthering the illegal presence of an illegal immigrant;
6. Two additions to a 2007 state law prohibiting employers from knowingly hiring illegal immigrants. Although one change established an entrapment defense for employers accused of knowingly hiring illegal immigrants, it opens up the door for police to use stings to catch violators. The other change requires employers to retain records of employment eligibility checks that state law already requires of new hires; and
7. The creation of a new state fund for the state police's immigrant squad and for reimbursing county jails for the costs of incarcerating illegal immigrants.



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## Discussion Questions

1. In your reasoned opinion, why did Judge Bolton prohibit the first five (5) provisions (of Arizona's new immigration law) described in the article from taking effect?

*Arguably, the biggest controversy surrounding Arizona's new immigration law (and the first provision mentioned in the article that Judge Bolton prohibited from taking effect) is the provision requiring that Arizona state police, while enforcing other laws, question people's immigration status if officers have a "reasonable suspicion" that they are in the country illegally. What constitutes "reasonable suspicion"—that someone "looks" like they are from Mexico? "Reasonable suspicion" is not clearly defined in Arizona's new immigration law, and Judge Bolton was concerned that such a subjective standard would perhaps result in racial profiling.*

*Have your students give their opinions regarding whether the other four (4) provisions that Judge Bolton prohibited from taking effect are patently unreasonable, or acceptable in a society that presumes innocence and honors privacy.*

2. In your reasoned opinion, why did Judge Bolton allow the last seven (7) provisions (of Arizona's new immigration law) described in the article to take effect?

*In your author's opinion, all of the seven (7) provisions of Arizona's new immigration law that Judge Bolton allowed to take effect are patently reasonable. Focus particularly on the sixth provision, which advances state provisions restricting employers from knowingly hiring illegal immigrants. In your author's opinion, the best way to control illegal immigration is to strictly enforce these "anti-hire" provisions against employers. Arguably, the greatest incentive for illegal immigration is economic opportunity, and if less opportunity (in terms of employment) is available, the number of illegal immigrants in the United States is likely to decline. What better way to lessen such economic opportunity than to sanction employers who illegally provide it?*



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## Chapter Key for McGraw-Hill/Irwin Business Law texts

	Hot Topics	Video Suggestions	Hypothetical or Ethical Dilemmas	Teaching Tips
<b>Kubasek et al., Dynamic Business Law</b>	Chapters 5, 29, 45, and 46	Chapters 5, 7 and 8	Chapter 46	Chapters 5, 7 and 42
<b>Kubasek et al., Dynamic Business Law: The Essentials</b>	Chapters 1, 4 and 25	Chapters 2, 4 and 5	Chapter 1	Chapters 2, 4 and 24
<b>Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition</b>	Chapters 3, 34, 48 and 52	Chapters 3, 5 and 7	Chapter 52	Chapters 3, 5 and 51
<b>Barnes et al., Law for Business, 10th Edition</b>	Chapters 4, 41, 46 and 47	Chapters 4, 5 and 7	Chapter 47	Chapters 4, 5 and 25
<b>Brown et al., Business Law with UCC Applications Student Edition, 12th Edition</b>	Chapters 2, 20, 29 and 40	Chapters 2, 5 and 6	Chapter 40	Chapters 2, 5 and 35
<b>Reed et al., The Legal and Regulatory Environment of Business, 15th Edition</b>	Chapters 6, 17 and 18	Chapters 6, 10 and 12	Chapter 18	Chapters 6, 12 and 19
<b>McAdams et al., Law, Business &amp; Society, 9th Edition</b>	Chapters 5, 15 and 17	Chapters 4, 5 And 7	Chapter 17	Chapters 4, 5 and 12

## This Newsletter Supports the Following Business Law Texts

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

