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KELO V. CITY OF NEW LONDON: IS EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT PUBLIC USE OR PUBLIC ABUSE?

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ABSTRACT

The U.S. Supreme Court's majority opinion in the eminent domain case of Kelo v. City of New London is one that elicited public outrage, abundant commentary, and wide-spread condemnation – pun intended. In a passionate dissent, Justice Sandra Day O'Connor stated that "[a]ny property may now be taken for the benefit of another private party." Given that perceptions can be formed with virtually no information, limited information, or misinformation, and given the public's outcry over the Kelo decision, a close examination of what the case actually said might be in order. Is the alarming reaction to Kelo well-placed indignation or unwarranted hysteria?

THE FACTS

What are the facts surrounding the case and exactly who was the "private party" on whose behalf the City of New London initiated eminent domain proceedings? In 1990, after decades of economic decline, a Connecticut state agency declared the City of New London ("City") to be designated a "distressed municipality" (*Kelo v. City of New* London, 125 S.Ct. 2655, 2658 (2005)). Nevertheless, in 1998, Pfizer had begun construction of a new research facility on the outskirts of New London. The City decided to use this opportunity to reactivate the New London Development Corporation, a private entity "under the control of the city government," to consider plans to redevelop the neighborhood around the Pfizer facility.

Just who the "private party" was in the *Kelo* case is a point worth emphasizing. For seemingly lost amid all the controversy over how a "private party" benefited from the eminent domain condemnation action, it bears mentioning that in this case the "private party" was none other than New London Development Corporation, a private entity "under the control of the city government." Pfizer is often misrepresented as the private party in question. The development plan that resulted from the city's efforts divided the area to be developed into seven parcels. The city counsel [the local legislative body duly elected by the citizens of New London] approved the redevelopment plan in 2000 and authorized the New London Development Corporation ("NLDC") [the city owed and operated "private party"] to purchase property or acquire it by exercising eminent domain in the City's name (*Kelo* at 2659-2660). NLDC successfully negotiated the purchase of most of the land in the 90 acre area known as Fort Trumbell. The owners of 15 of the properties did not wish to sell to the corporation. These owners were the petitioners in this case; the lead plaintiff, Susette Kelo, owned a small home on the Thames River in the development area (*Kelo v. New London*, The Development Plan. Retrieved February 14, 2006 from http://en.wikipedia.org.wiki/Kelo_v._New_London). "The city ordered the development corporation, a private entity acting as the city's legally appointed agent, to condemn the fifteen holdout owners' lots" (*Kelo v. New London*, The Development Plan).

THE EMINENT DOMAIN PROCEEDINGS

In November 2000, the City initiated condemnation proceedings. The homeowners responded by suing the City in Connecticut state court. Plaintiff homeowners argued that economic development did not qualify as public use. The case was heard in the New London Superior Court in December, 2000. After a split decision, both sides appealed. The homeowners petitioned for writ of certiorari, which the United States Supreme Court granted. The Supreme Court had not heard a major eminent domain case since 1984. Certiorari was granted to determine whether a city's decision to take property for economic development satisfies the "public use" requirement of the Fifth Amendment.

ANALYSIS OF MAJORITY OPINION OF THE U.S. SUPREME COURT

Does the majority opinion, as Justice O'Connor asserts, really stand for the proposition that "[a]ny property may now be taken for the benefit of another private party?" Showing its respect for precedent, the majority explicitly states that "…it has long been accepted that the sovereign may not take the property of A for the *sole purpose* of transferring it to another private party B...The City would no doubt be forbidden from taking petitioners' land *for the purpose of conferring a private benefit* on a particular private party" [Emphasis Added] (*Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)). Government may, however, transfer property from one private party to another if the "purpose is for use by the public." Accordingly, in recognizing how the "purpose" of the transfer is a critical factor in eminent domain analysis and that government may not take land for the "purpose of conferring a private benefit," the majority also states "…it is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example" (*Kelo* at 2661).

What attention and respect did the majority opinion give to previous Supreme Court rulings on the scope and reach of eminent domain? In 1984 U.S. Supreme Court took up the case of *Hawaii Housing Authority v. Midkiff*, which challenged the use of eminent domain under Hawaii's Land Reform Act of 1967 ("Act"). The Hawaii Housing Authority ("HAA") had implemented the Act after the Hawaiian legislature discovered that only a small number of landowners owned the state's land. After a determination that concentrated land ownership was responsible for inflating land prices and injuring the public tranquility and welfare, the HHA held a public hearing regarding the acquisition of the landowner's property and made a statutory finding that the acquisition of property under the Act effectuated a "public purpose." The Act provided for condemnation by the state of housing development tracts, at prices set by condemnation trial or negotiation between lessors and lessees, and resale to lessees of the property. The landowners brought suit in U.S. District Court in Hawaii. The case eventually made its way to the U.S. Supreme Court. In an 8-0 decision (Justice Marshall abstaining), the Court held that the public use clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, did not prohibit the state from taking residential property from lessors and transferring it to lessees in order to reduce the land oligopoly in Hawaii. Accordingly, please keep in mind that in 1984 Justice O'Connor personally authored a unanimous Supreme Court opinion upholding the right of a duly elected legislative body to determine how a private taking served a public purpose.

RESPECT FOR PRECEDENT

What have previous Supreme Court rulings said about the meaning of the phrase "public use" as it appears in the eminent domain clause of the Fifth Amendment? The Supreme Court "long ago rejected any literal requirement that condemned property be put into use for the . . . public"

(*Kelo*, citing *Midkiff* at 244). "Rather, it has embraced the broader and more natural interpretation of public purpose as 'public use'" (*Kelo*, citing *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158-164). The Supreme Court has, without exception, defined the concept of "public use" broadly.

In *Berman v. Parker*, the District of Columbia Redevelopment Act ("Redevelopment Act") was a legislative determination that certain areas of the District of Columbia were injurious to public health (*Berman v. Parker*, 368 U.S. 26 (1954)). Pursuant to the Redevelopment Act, a project was launched to redevelop an entire area of the District of Columbia. The project required acquisition of all land rights in a particular area. The main purpose of the project was to rid the area of housing that was in extremely poor condition. A challenge to the project was made by property owners who owned land upon which a department store was located. They argued that their property could not be constitutionally taken for the project because it was commercial, not residential. They further argued that the project was under management of a private, not a public, agency and redeveloped for private, not public, use (*Berman* at 31). Moreover, the property owners maintained that merely upgrading or improving property was in and of itself not a sufficient "public purpose." The Supreme Court disagreed.

The precedent of the U.S. Supreme Court makes clear that "public use" need not be for the use of the "general" public (*Midkiff* at 244). "Public purpose" is broadly interpreted. Economic development by a private developer can achieve a "public purpose" and "a state may transfer property from one private party to another if future 'use by the public' is the purpose of the taking" (*Kelo* at 2661). Since the close of the 19th century, states and the Supreme Court have embraced the broader and more natural interpretation of public use as "public purpose" (*Kelo at* 2662, citing *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158-164 (1896)).

The homeowners in the *Kelo* case wanted the Supreme Court to engage in judicial activism and create a new bright-line rule that economic development does not qualify as public use (*Kelo* at 2665). This case was a clear example of the U.S. Supreme Court following precedent. This was no "activist" decision and should not have surprised anyone. For over a century, "public purpose" has been broadly interpreted. For over twenty years, state and local governments have been using eminent domain for economic development purposes.

FEDERALISM AND DEFERANCE TO STATE LEGISLATURES

What deference, if any, did the court give to federalism and the legislative branch in addressing what is permissible in the context of eminent domain proceedings? As noted, the decision to proceed with the New London redevelopment project at issue in Kelo and to initiate condemnation proceedings in furtherance of that redevelopment project in was undertaken by the duly elected City Council, i.e., the elected local legislators for the City of New London. Accordingly, the majority opinion in Kelo shows great respect for the right of elected local legislators to determine local needs. The majority is also unwilling to impose its determination, over that of elected local legislators, as to what constitutes a "public purpose," and, accordingly, adopts a hand-off approach.

The majority opinion in *Kelo* is a testament to federalism and deference to the legislature branch. Far from judicial activism, the *Kelo* case is a classic example of judicial restraint, with the majority unwilling to insinuate itself into the process of making judgments properly left to local officials. The majority fully realize that local officials are in a better position to assess local needs and that federalism requires recognition of how the needs of society vary in different parts of the country and evolve over time (*Kelo* at 2664).

O'CONNOR'S DISSENT: FAIR WARNING OR HYPERBOLE?

How does Justice O'Connor's well publicized dissent compare to a previous Supreme Court decision on eminent domain that she authored? Justice O'Connor wrote the principle dissent in *Kelo*, a stinging rebuke of the majority opinion that ignited public indignation. She suggested that the majority's interpretation of eminent domain would spawn a reverse Robin Hood effect (i.e., take from the poor, give to the rich) (*Kelo v. New London*, The Development Plan). Justice O'Connor further opined that the majority's decision eliminated any distinction between public and private use of the property and that the words "for public use" have been effectively removed from the Takings Clause of the Fifth Amendment. Curiously, however, Justice O'Connor seems to disregard her own rationale from the 1984 Supreme Court case of *Hawaii Housing Authority v. Midkiff*, discussed above, in which she opined that forcibly taking property from the lessors and selling it to lessees constituted a "public use." No doubt mindful of *Hawaii Housing Authority v. Midkiff*, O'Connor's dissent tries mightily to distinguish both the *Berman* and *Midkiff* cases. How?

O'Connor's rationale suggests that eminent domain analysis may somehow be subject to a Supreme Court review of those who are so rich that they may pose a harm to society, along with a parallel Supreme Court review of those who are so poor that they may pose a harm to society. Those in the middle – Mrs. Kelo and her neighbors – are purportedly middle class. Since, according to O'Connor's reasoning, the handful of hold-outs in Kelo are apparently neither too rich not too poor to be harmful under her eminent domain analysis, they should be permitted to block a redevelopment project to benefit the entire City – a redevelopment project the elected local legislators of New London deemed helpful to revive their "distressed municipality." The purported logic of O'Connor's dissent simply cannot withstand scrutiny. Is she really suggesting the Supreme Court should superimpose its will to determine who among us is either too rich or too poor in a harmful way so that the condemnation and taking of our property may or may not serve a "public use?" Moreover, such on incomprehensible Supreme Court review is an affront to federalism and deference to the legislative branch. Cities across the nation have created new jobs and better neighborhoods through the use of eminent domain. Having one's property condemned is seldom a joyful event, even if it is done to build a badly needed freeway or school. Is it the really the role of the Supreme Court to decree that jobs and economic development for a "distressed municipality" such a New London is any less important?

THE CONDEMNED PROPERTY AT ISSUE IN THE KELO CASE WASN'T EVEN BLIGHTED

Of what significance is it that the condemned property in question wasn't even blighted? Although a Connecticut state agency did in fact declare the City of New London to be designated a "distressed municipality," it is fully recognized that the property condemned in the Kelo case was not blighted, and for that reason, the argument goes, the condemnation is especially objectionable. In other words, similar to the sentiment seemingly expressed in Justice O'Connor's dissent, it is permissible to condemn blighted neighborhoods, but not others. Or as the property owners before the Supreme Court in the Berman case put it: "To take for the purpose of ridding the area of slums is one thing; it is quite another, the argument goes, to take a man's property merely to develop a better balanced, more attractive community" (*Berman* at 31).

First of all, the Supreme Court has never held that property must be "blighted" to be condemned. Second, as some seem to suggest, why would it be acceptable to condemn blighted property for economic development, but not non-blighted property? After all, one person's blight may be another person's home. In fact, those displaced from blighted areas likely to have the fewest resources available to assist in relocation. The point is not that government should be prohibited from condemning blighted property for economic development, but rather that the status of the condemn property – blighted or not – should not be determinative of whether property is condemned for economic development. In other words, if it is acceptable to condemn blighted property for the public purpose of economic development, it should also be acceptable to condemn non-blighted property for the public purpose of economic development if that is the determination of the locally elected legislative body.

IS EVERY HOME IN PERIL?

What recourse, if any, is available to those offended by the decision? So now that Kelo is the law of the land, is Justice O'Connor's dire warning that "[a]ny property may now be taken for the benefit of another private party" cause for alarm? Of course, despite all the hysteria, the *Kelo* decision it truly of little consequence. Why? Well, it is simply of little consequence because the Supreme Court did not mandate or change anything. The majority merely restated what the law has been for over a century. Accordingly, the majority opinion – far from threatening – is merely old law, tried and true. As for those offended by the Court's decision, recourse is basic and quintessentially American – demand action from elected officials, attempt to make eminent domain a campaign issue (as many have already done), or otherwise seek to effect a change in the law. The Supreme Court did nothing more than restate that baseline for local officials seeking to invoke eminent domain condemnation proceedings – a baseline that has long been the law of the land, but one that local officials are free to make more stringent. Far from doing anything novel, it was in the property owners who sought to disregard precedent and assert "a new bright-line rule that economic development does not qualify as public use" (*Kelo* at 2665).

CONCLUSION

The Supreme Court made clear that their opinion in *Kelo* in no way precluded states from placing further restrictions on their exercise of the takings power. Many states already impose "public use" requirements that are stricter than the federal baseline. Justice O'Connor's dissent, and the surrounding hysteria by the media and the public, was entirely unfounded and unwarranted. The *Kelo* case was an unremarkable decision based on deference to precedent, to federalism, and to state legislatures. Nothing has changed – except, perhaps, a public that is now terribly misinformed about eminent domain and the state of the law surrounding it.

MANDATORY EMPLOYMENT ARBITRATION: A STACKED DECK?

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ABSTRACT

Mandatory employment arbitration is a means of resolving disputes between employer and employee. This type of arbitration refers to a pre-dispute binding agreement that requires a potential new hire to waive their rights to a trial by jury, agreeing instead to have any future case heard by an arbitrator. Employees have come to view this process as a binding agreement imposed by the stronger party (the company) on the weaker party (employee) in an economic relationship. The results of a survey of 204 college students indicated that only eight percent believed their claims in a dispute would be handled equally by either arbitration or by a judge and jury. Eighty-two percent believed that they were being forced to give up valuable legal rights in arbitration. Only 42 percent express the view that requiring employees to sign arbitration agreements, as a condition of employment was legal.

INTRODUCTION

Mandatory employment arbitration has become part of the business landscape for many US companies. Arbitration has been used as an alternative to litigation in open court since the United States Arbitration Act was passed in 1925. This legislation was intended to be employer friendly, making arbitration agreements binding and enforceable. The purpose of the legislation was to provide an efficient and cost-effective means of settling disputes between parties of reasonably equal stature. Arbitration was never intended to replace the right to a jury trial in which civil rights are involved (Engen, 1996).

The cost of arbitration may also be prohibitive to the employee and some employees may be discouraged from pursuing claims because of the financial impact. Even if the employee has access to all the facts and can financially afford to pursue arbitration, there is always the possibility of bias on the part of the arbitration service provider. The major providers of arbitration services are large and influential and some have invested financially in the very corporations that seek their services (Holding, 2001; LeRoy and Feuille, 2002).

Employment law accounts for approximately 25 percent of the entire federal docket and since the enactment of the Civil Rights Act of 1991, employees have won almost fifty percent of the federal employment discrimination cases tried in open court (Hafets and Boyd, 2003). Employment discrimination claims grew 2,200 percent between 1969 and 1994. It should also be noted that the typical employment dispute case has been estimated to cost at least $50,000 and require at a minimum two and one half years to complete, leaving employers with huge legal fees (Morris, 2000). Needless to say, the Civil Rights Act of 1991 has encouraged the utilization of arbitration, a lessening of Court loads and a reduction in the time for decisions.

BACKGROUND AND HISTORY

Congress enacted the United States Arbitration Act in 1925 and the Federal Arbitration Act (FAA) in 1947, with the hope of ending a tradition of judicial hostility toward arbitration. The Acts placed arbitration agreements on an equal footing with contracts (Fitz, 1999). In 1955, the Uniform Arbitration Act (UAA) introduced the framework for the states to adopt their own laws, and over time, arbitration has grown into a popular and robust dispute resolution mechanism.

In 1991, Interstate/Johnson Lane Corporation hired Roger Gilmer as a financial manager at the age of 56. He agreed to arbitrate any employment dispute. When he was terminated and replaced by a 28-year old employee, Gilmer filed an age discrimination charge with the EEOC (Lewis, 2003). The case made its way to the U. S. Supreme Court which held in *Gilmer v Interstate / Johnson Lane Corporation* that courts may compel arbitration on the basis of a signed pre-dispute agreement (Eastman and Rothenstein, 1995). This resulted in a tidal wave of litigation between employers and employees over the enforcement of pre-dispute clauses in employment contracts and handbooks. A survey of *Fortune* 1,000 companies in 1997 found that 87 percent of the companies utilized the even less formal mechanism at least once from 1994 – 1997 (Lewis, 2003).

The Civil Rights Act of 1991 expanded the potential remedies available to plaintiffs which included the right to a jury trial and compensatory and punitive damages(Reilly, 2002), however, it was recognized that arbitration agreements could be a means of resolving disputes “to the extent authorized by law” (Sevilla, 2005). In addition, in 1997, the EEOC issued enforcement guidelines regarding arbitration. The EEOC took the position that mandatory employment arbitration is contrary to the intent of civil rights law and that this position was supported by precedent and interpretation (EEOC, 1997).

In 2001, the Supreme Court ruled in favor of mandatory employment arbitration in *Circuit City Stores, Inc. v. Adams*. The case ultimately found its was to the United States Supreme Court which ruled that an exclusion of employment contracts provision in the agreement applied only to workers directly engaged in the interstate transportation of commerce, and thus that the employee, Adams, must submit to arbitration (Feingold, 2002).

MANDATORY EMPLOYMENT ARBITRATION LAW

The presumption in contract law is that contracts are between two willing parties who both benefit from the transaction. Both presumably have access to perfect information regarding the contract, can weigh the costs and benefits of the exchange, and have the freedom to sign, if they deem it in their best interest. In mandatory employment arbitration clauses, this is not the case. The employee is often not truly a willing participant, and is unable to make a meaningful judgment (pre-dispute) as to what is in their best interest.

EMPLOYEE PERCEPTIONS OF MANDATORY ARBITRATION

The purpose of this research is to investigate employees' level of understanding (or lack thereof) regarding mandatory arbitration agreements and the impact these have on employment. For purposes of this research, arbitration was defined as a process in which an employment dispute (i.e., sexual harassment/discrimination, termination, wrongful discharge, age/gender discrimination) is presented to a neutral third party (the arbitrator), for a final and binding decision. Neither a judge, nor a jury, nor the EEOC would be present.

Frequency distributions were obtained on the demographic data to ascertain the characteristics of the sample. Fifty-one percent (104) of the sample was male. Approximately 38% (77) had completed college and had some graduate work; 61% (123) were working on their first Bachelor’s degree. Approximately 65% (151) were employed either full time or part time, and 20%

(40) were unemployed. The age distribution was 60% (116) 25 and under; 29% (55) were 26 to 35 years old: and 11% (22) were 36 years old or over. The respondents are employed in varied fields which included 51% (97) as professional, 6% (12) as technical, 9% (17) as educational, and 32% (62) as clerical and retail. Sixty-four percent (131) planed to begin a job search with the next year.

Sample statements included, "Is it legal for a company to require employees to sign arbitration agreements;" "I was required to sign an arbitration agreement to get a job;" "By signing an arbitration agreement, I believe that I am giving up my right to sue for an employment dispute;" "If I am not satisfied with an arbitration ruling, I can use a court of law;" "Companies that require employees to agree to arbitration does so to promote its own interest without concern for the employee" and "I believe that arbitrators favor employers."

PERCEPTIONS OF MANDATORY EMPLOYMENT ARBITRATION

Forty-three percent believe they understand mandatory arbitration, and 46% believe they understand how it will affect them. Twenty-three percent of those surveyed state that they have signed arbitration agreements to get a job; however 11 percent don't know if they have. Eighty-one percent believe that companies should clearly indicate the mandatory arbitration requirement on employment applications. Only 13% of the sample indicated that their employers had informed them of this policy.

Fifty-five percent of participants would prefer to work for a company that does not require arbitration and 28% would not seek a long-term employment relationship with a company requiring the contract. Forty-two percent believe companies that require such mandatory arbitration agreements should provide above average salaries as compensation.

Forty-three percent believe this practice is legal. Sixty-six percent believe that they give up their right to sue when they sign an arbitration agreement. However, 38% of the same sample believes that they still have recourse if they are not satisfied with the arbitration ruling, indicating a lack of understanding of arbitration agreements in general.

Seventy-three percent of those surveyed believe that companies require agreements to arbitrate because they have been sued in the past, while 53% feel companies use arbitration to promote their own interest without concern for the employee.

Forty-six percent believe that arbitration will result in a smaller amount of money recovered by the employee, and 74% believe they would have a better change to win a dispute against an employer if the claim was heard by a Judge and jury. Thirty-one percent believe that arbitrators are highly qualified, and 51% believe that arbitrators favor the employer over the employee.

DISCUSSION

The purpose of this research was to investigate perceptions and knowledge of mandatory employment arbitration. Our sample was informed in regards to arbitration. Based on the statistics reported above, over half of the participants appeared to understand the purpose of mandatory employment arbitration, but did not necessarily understand how it would impact them. Roughly the same percent believe that the company forces them to sign away their legal rights to sue and that the company may do this out of their own self interest. Most would prefer not to work for a company with this policy in place. They consistently perceived a company in a negative light when arbitration was used. For example, the sample viewed a company requiring arbitration to do so for its own good, to be interested in the bottom line and not in the employees, and to have an advantage over the employees in any dispute.

Our sample believed that they would not have a long relationship with a company requiring arbitration. In addition, they believed that such a company should pay a higher salary to attract applicants. A clear majority of the sample felt that their rights were not protected with arbitration. Interestingly, there was confusion about what rights they would retain under arbitration. Thirty-four percent believed that they could still sue the company and could still use their EEO rights after arbitration. Others believed that the arbitration was not final. Clearly, companies using arbitration need to educate their employees about the arbitration policy and process. Obviously, in doing so, some employees could become disenchanted with their jobs and seek positions elsewhere.

LIMITATIONS AND IMPLICATIONS

One limitation associated with this study suggests restraint when considering the findings and implications. We used a convenience sample composed of students at one state university. The results generated may not be reflective of the population as a whole. Future research would be of interest on full time employees' perception of mandatory employment arbitration and the company which requires that. Other issues to investigate are the conflict of mandatory arbitration and morale in the workplace.

CONCLUSIONS

If the adage that employees are a company's greatest asset rings true, then a company should aspire to have an employment relationship built on mutual trust and respect. A positive relationship must be established early on during the new hire phase. A comprehensive orientation containing a thorough explanation of all policies should be offered at that time. However, in today's litigious society, a company's greatest asset can also be their greatest potential liability. It is necessary for employers to be prudent and avail themselves of reasonable legal protection under the law.

The question of which brings the best resolution for an employer will always be connected to the culture ethics that a company chooses to follow. It is submitted, however, that either a full and meaningful disclosure of a pre-disputed arbitration agreement along with due regard for the employees rights or an open and voluntary post dispute alternative approach with due respect for the employees interest can fairly serve the interests of both the employee and the employer.

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FEDERAL CIVIL RIGHTS LEGISLATION AND STATE SOVEREIGN IMMUNITY

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ABSTRACT

State governments employ millions of people, and provide services to millions of Americans as well, some of which are of a governmental nature, but many of which are similar to those offered by the private sector. While the employment practices of most private employers are governed by a number of federal laws, state employers may not be required to conform to those regulations. Similarly, while the manner in which private employers provide services to the public are regulated by federal laws, state and local governmental service providers may be exempt from that regulatory scheme. Why? The Eleventh Amendment to the United States Constitution provides that, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." As a result, states may enjoy sovereign immunity, and may not be subject to the jurisdiction of federal courts in cases in which plaintiffs seek judicial relief under federal law. This paper will discuss the application of sovereign immunity with respect to federal civil rights legislation, and examine the most recent case to present this issue, which is pending before the Court this term.

THE NATIONAL LABOR RELATIONS ACT AND NON-UNION EMPLOYERS

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ABSTRACT

For most non-union employers, the National Labor Relations Act (NLRA) is probably not the federal statute that has drawn a great deal of attention in recent years. Given the steady decline in union membership, density, and the number of representation elections conducted over the last forty years, the lack of attention is understandable. Yet in spite of the steady decline in membership and organizing activity, the basic rights of workers to form and join unions guaranteed under the NLRA continue to be advanced by financially and politically powerful entities within the American economy. The purpose of this paper is to analyze recent US Court and NLRB decisions, examine recent union organizing initiatives, and to assess their impact on management policy and practice.

INTRODUCTION

Employers in the United States today have numerous federal and state laws and administrative agencies that impact their human resource management policies and practices. At the federal level Title VII of the 1964 Civil Rights Act as amended, enforced through the Equal Employment Opportunity Commission (EEOC), draws most of the attention of employers because of its prohibition of discrimination in virtually all human resource decision-making situations. Depending on the state where an employers' business is located, the presence of state law and state Fair Employment Practice Agencies (FEPA) can further complicate compliance with anti-discrimination regulations. Wage and Hour regulations under the Fair Labor Standards Act, also enforced through both state and federal departments of labor can also occupy a considerable amount of most employers' attention. For most non-union employers then, the National Labor Relations Act and the National Labor Relations Board (NLRB), are probably not the federal law and agency that draws a great deal of attention.

The NLRA applies to all "enterprises whose operations affect commerce" (NLRB, 1997). The NLRB's requirements for exercising its power or jurisdiction are called jurisdictional standards. The standards are based on the yearly amount of business done by the enterprise, or on the yearly amount of its sales or of its purchases. They are stated in terms of total dollar volume of business and are different for different kinds of enterprises. For example, a retail enterprise with at least $500,000 total annual volume of business would be covered by the Act. A non-retail business with direct sales of goods to consumers in other States, or indirect sales through others (called outflow), of at least $50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others (called inflow), of at least $50,000 a year would also be covered (NLRB, 1997).

The primary responsibility of the NLRB is the prevention and remedying of unfair labor practices under the National Labor Relations Act (NLRA) and the guaranteeing of the rights of employees to organize and bargain collectively with their employers. When you're a non-union employer without an open ongoing union organizing campaign underway, complacency with respect to the NLRA and the NLRB is understandable. Given the renewed interest and efforts on the part of organized labor to organize non-union employers and, NLRB and Federal Court decisions in the last decade, the mindset and perception as to the NLRA and the NLRB's impact on non-union employers should be changing. Organized labor has achieved some very large measures of success in organizing in recent years, and decisions by the NLRB, some already supported by court decisions, have impacted a number of issues important to all employers. The purpose of this paper is to examine recent US Court and NLRB decisions, recent union organizing initiatives, and to assess their impact on management policy and practice.

LEGAL BACKGROUND AND RECENT DECISIONS

Section 7 of the National Labor Relations Act (NLRA) provides employees with the right to form and join labor organizations and to engage in concerted activities for the purpose of collective bargaining (NLRB, 1997). To facilitate enforcement of employee Section 7 rights, Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right to self-organization. Included among the prohibitions in this regard, are prohibitions against employers threatening, interrogating, or conducting unlawful surveillance of employees in an effort to dissuade employees from unionization. It is important to note, that these prohibitions apply to both union and non-union employers and many employers in non-union organizations find out the hard way about the protections granted to their employees by the NLRA. It is not necessary that the employees be members of a labor union nor that a union organizing drive be underway for the employees' Section 7 rights to exists. Over time, employee rights to engage in concerted activity under the NLRA have been broadly construed by the courts (Suflas, 2005), and a wide variety of efforts of employees to join together for mutual aid or protection have qualified as protected concerted activity "even if those employees are not represented by or attempting to form a union" (Walsh, 2004, p. 363). Recent case examples include Superior Travel Service, Inc., Trompler, Inc. v. NLRB, Main Street Terrace Care Center, and Cintas Corporation.

In Superior Travel Service, the NLRB concluded that an employee who was fired after she prepared, circulated, signed, and presented to her employer a written petition complaining about certain employment policies contained in the employer's handbook, was engaged in concerted and protected activity and that her activity was the cause of her discharge. The employer alleged that the discharge was related to five performance concerns. The NLRB did not find any of Superior's arguments credible, partially because the employee was never written up or disciplined for the alleged shortcomings (Superior Travel Service, Inc., 2004). In Trompler Inc., the NLRB determined that six employees were unlawfully fired after they walked off their jobs in protest of supervisory failures to address sexual harassment, employee drug use, and employee training issues (Trompler, Inc. v. NLRB, 2003). In Main Street Terrace Care Center, the NLRB Administrative Law Judge (ALJ) found that Main Street had promulgated a rule prohibiting employees from discussing their wages. The ALJ then explained that "the mere existence of the rule inhibiting protected conduct, even if not enforced, constitutes an unlawful interference in violation of Section 8(a)(1) of the Act"(NLRB v. Main Street Terrace Care Center, 2000). The ALJ's decision was affirmed by the NLRB and its petition for enforcement was supported by the Sixth Circuit Court of Appeals (NLRB v. Main Street Terrace Care Center, 2000). In a 2005 decision involving Cintas Corporation the NRLB reaffirmed it's position in a case involving the firm's confidentiality rule which read in part "We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners (employees), new business efforts, customers, accounting and financial information" (Cintas Corporation, 2005). The ALJ ruled and the NLRB agreed that the "rule's unqualified prohibition of the release of any information regarding its partners could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees" (Cintas Corporation, 2005).

Numerous other non-union employer work rules have been challenged as violating the NLRA. In Guardsmark, LLC, the NLRB found that a work rule requiring employees to bring complaints about workplace issues directly to their supervisors violated the act. The rule stated in part, "while on duty you must follow the chain of command and report only to your immediate supervisor...Do not register complaints with any representative of the client" (Guardsmark, LLC, 2005). Thus, employees can not be prohibited from complaining about their terms and conditions of employment to the employers customers (Clark, 2005).

RECENT UNION ORGANIZING INITIATIVES

A number of significant developments regarding union organizing in the United States in recent years have occurred. The most recent, involves the split in the American labor movement and the formation of the Change to Win Coalition. Another involves the increased use of "top-down organizing methods" like "corporate campaigns", the "card check" and "neutrality agreements" (Mix, 2005 and Babcock, 2005).

The Change to Win Coalition is an "umbrella organization" for a group of seven labor unions that split from the AFL-CIO in 2005. Member unions include the Teamsters, Service Employee International Union (SEIU), United Food and Commercial Workers, the Carpenters Union, Laborers' International Union of North America, UNITE Here, and the United Farm Workers. The formation of the new group was driven in large part by the group's dissatisfaction with AFL-CIO's efforts to organize new workers (Anderson, 2005).

This new coalition of financially strong members may present a powerful unified front in organized labor's efforts to stop the years of decline endured by the movement. The SEIU, described as one of the most vocal critics of AFL-CIO organizing efforts, has been one of the fastest growing unions in recent years, growing from 625,000 members in 1980 to more than 1.8 million members in 2005 (Schramm, 2005). In addition, members of the Change to Win Coalition filed almost half of all NLRB election petitions in 2004, winning nearly 60 percent of the elections they were involved in, with the SEIU earning a 75 percent win rate in elections it was involved in 2004 (Babcock, 2005).

POLICY AND PRACTICE ISSUES

The increasingly aggressive challenges to non-union employer work rules, the more frequent avoidance of NLRB election procedures and the use of top down organizing tactics coupled with the rise of the Change to 'Win Coalition should signal to employers that once again the death knoll of the American Labor Movement may be premature. Clifford H. Nelson, JR., a partner and head of the labor relations practice at Constangy, Brooks and Smith in Atlanta notes, "some employers have gotten complacent because they haven't felt exposed to this kind of threat in a long time" (Babcock, 2005). The member unions of the Change to Win Coalition will have an estimated $28 million in annual dues that it use to pay to the AFL-CIO to use in organizing campaigns (Marquez, 2005). These campaigns will be aggressive and employ pressure tactics that can come from both U.S. and international forces. The focus of these campaigns is largely aimed at industries and organizations that are among the fastest growing segments of the U.S. economy with labor components that are not easily off-shored or substituted with capital.

What can employers do in light of these changes to more effectively manager their human resources? Those employers that have become some what complacent with respect to the threat of union organizing must become more active in reviewing and auditing their human resource policies and practices. Work rules in particular must be reviewed to assess weather they do or do not violate the NLRA. It is clear, that rules prohibiting employees from complaining about their terms and conditions of employment to the employee's customers are in violation of the act. In addition, an overly broad work rule, even if the work rule is not enforced is a violation of the NLRA (Claremont Resort & Spa, 2005). Rules that deny an employer's off-duty employees entry to the employer's parking lots, gates, and other outside non-work areas will be found invalid (Walker, 2005). Human resource programs, policies, and procedures that are infrequently utilized, complaint procedures, especially open-door procedures and policies that require employees to first bring complaints to their immediate supervisors should be thoroughly reviewed. Pay secrecy policies, still popular in many organizations should be abandoned. No-solicitation policies, confidentiality, and plant access policies should also be examined in light of the NLRB's recent decisions.

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UNIFORM DEFINITION OF A CHILD BRING SIMPLIFICATION, UNEXPECTED RESULTS, AND UNANSWERED QUESTIONS

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ABSTRACT

The introduction of the uniform definition of a child as part of the Working Families Tax Relief Act of 2004 (WFTRA) helped to realize President Bush's overall goal of tax simplification by creating one definition for many of the child-based benefits including the dependency exemption, head-of-household filing status, the earned income tax credit, the child credit, and the child and dependent care tax credit. While the new rules, effective for tax years ending after December 31, 2004, do bring simplification, practitioners and taxpayers alike may be surprised to find that the provisions also bring unexpected results. In addition, despite the Tax Technical Corrections Bill of 2005 which makes conforming amendments clarifying when an individual qualifies as a dependent for health savings accounts (HSAs), the dependent care credit, and dependent care assistance programs (DCAPs), some questions remain.

This article will summarize the uniform definition of a child and explain its impact on the child-based benefits. Key provisions of each will be compared and planning tips introduced where appropriate. Possible pitfalls for unsuspecting taxpayers will be discussed followed by remaining questions surrounding the provisions. Finally, relevant proposals from the President's 2007 budget as well as recommendations from the National Taxpayer Advocate will be summarized.

ETHICS AND MUSIC: A COMPARISON OF STUDENTS AT PREDOMINANTLY WHITE AND BLACK COLLEGES, AND THEIR ATTITUDES TOWARD FILE SHARING

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ABSTRACT

The relationship between race and ethics has been explored in recent years, but to date only limited mixed empirical results have been recorded. Still, the notion of examining a race/ethics relationship has relevance because of the variance in culture by race.

In the last few years, the RIAA (Recording Industry Association of America) has launched thousands of lawsuits aimed at students in the university community. These lawsuits are aimed at people engaged in allegedly illegal music file sharing. While some progress has been made recently in assessing students' ethical beliefs about illegal music downloading, as well as differences based on student age, no information exists regarding racial and cultural differences in attitudes toward illegally downloading music.

This study examined student beliefs at two institutions, one a historically white university, the other a historically black university. The results showed that while there were some price sensitivity differences between blacks and whites regarding the prices of CDs and music downloads, there were no significant differences in their ethical views toward music downloading and file sharing. Both groups demonstrated generally equally favorable views toward illegal music downloading.

BUSINESS SKILLS EDUCATION AND TRAINING NEEDS FOR LAW FIRMS

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ABSTRACT

As in any other industry, law firms must have strong business skills to be successful. One critical problem law firms are facing today is the lack of business skills necessary to effectively run the firm. Attorneys need to have or acquire skills in accounting and finance, marketing, human resources, ethics, and other areas to effectively and efficiently operate the business side of their practice. Even if the firm chooses to outsource functions such as marketing, necessary skills are needed in order to hold the outsourced company accountable for performance. In this article, we examine the need for business skills among attorneys in private practice and in an empirical study demonstrate the breadth and depth of the need.

THE GEORGIA ECONOMIC LOSS RULE

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ABSTRACT

The Georgia Economic Loss Rule is a common law rule that inhibits claimants from seeking tort damages for losses in disputes about the functionality of products that are traditionally remedied in contract actions. The rule arises out of a desire by the courts to maintain separation between damages for breach of contract and the more expansive damages recoverable in tort. The rule provides that absent injury to person or property, other than to a malfunctioning product itself, where the loss is a pecuniary one like loss of the value or use of the product itself or the cost of repairing it, the claimant may not sue the provider for negligence. Application of the rule limits the claimant to remedies for breach of contract or warranty. The rationale is that where only the defective product is damaged due to an inherent defect an action for recompense seeks merely the benefit of the claimant's contractual bargain. Unfortunately, the application of this rule can produce harsh results when the claimant's breach of contract claims are time barred. Several exceptions to the rule have emerged that ameliorate its sometimes harsh effect. This paper will explore the rule, its rationale, and its limitations in Georgia.

INTRODUCTION

In the early 1970's, Mr. Nick Long purchased a new General Motors automobile from the Jim Letts Oldsmobile dealership in Georgia. The engine persistently ran hot and was even blowing out the liquid in the radiator. Neither the dealership nor General Motors were able to correct the problem. After 22 months and 27,000 miles, Long alleged that the engine was completely destroyed. Long sold the car for less than its book value and sued General Motors in tort for negligently manufacturing the car and Letts for negligently failing to repair it. Long did not sue the manufacturer or seller for breach of contract or warranty. Long alleged that his damages included expenses for repairs, time lost from work, loss of use of the car while being repaired, and diminution in the value of the car due to its propensity to overheat. The trial court granted summary judgment in favor of General Motors and Letts on all of Long's negligence claims. Long appealed. The appellate court affirmed and held that the breaches of duty to produce a car that would not overheat and the duty to fix a car that does were only breaches of contract duties and that Long's lawsuit for negligent tort could not stand. The court explained that the breach of duties alleged by Long arose solely from the automobile contract and therefore Long's claim amounted to a breach of contract and not a viable claim for negligence (Long v. Jim Letts Oldsmobile, Inc., 1975).

This case illustrates the application of the Economic Loss Rule in Georgia. The decision reinforced the dichotomy between that which is actionable in tort with its attendant damages and that which is actionable in contract with damages that are limited and not as expansive as tort damages. This paper will explore the Georgia Economic Loss Rule and its impact on the recovery of damages in products and services cases.

TORT AND CONTRACT

In Georgia "A tort is the unlawful violation of a private legal right other than a mere breach of contract, express or implied" (Ga. Code: Torts – General Provisions, 1933). On the other hand, in Georgia "A contract is an agreement between two or more parties for the doing or not doing of some specified thing" (Ga. Code: Contracts – General Provisions, 1933). An action in tort will not be permitted for a mere breach of contract, even if the breach was negligent or willful (A.L. Williams & Associates, Inc. v. Faircloth, 1989).

MEASURE OF DAMAGES DISTINGUISHED

Tort damages have been defined in Georgia as "a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another" (Hertz & Link, 2004). Tort damages are more far reaching than damages for breach of contract. In tort, the wrongdoer is liable for all consequences which naturally flow from his wrongful act, provided only that they be not too remote (Carr & Co. v. Southern Railway Co., 1913).

By contrast, Georgia damages for breach of contract are limited to those damages which arise either naturally according to the usual course of things from the breach or may reasonably have been in contemplation of both the parties at the time they entered into the contract (Stewart v. The Lanier House Company, 1885). In short, damages for breach of contract must be those that can be traced solely to the breach, must be capable of exact computation, must have arisen naturally and according to the usual course of things from such breach, and must be such as the parties contemplated as a probable result of the breach (Sanford-Brown Company v. Patent Scaffolding Company, Inc., 1945).

Damages in tort can be higher than damages for breach of contract because of the very definite difference generally recognized by the courts between the two theories of action (Bennett v. Tucker & Pennington, 1924).

THE GEORGIA ECONOMIC LOSS RULE

The Georgia Economic Loss Rule is a judge-made rule, not a statute, which bars consumers of goods and services from asserting negligence on the part of the provider or manufacturer as a basis upon which to recover purely economic losses caused when the goods or services are defective and fail.

In Holloman v. D. R. Horton, Inc. (1999) the Georgia Court of Appeals stated the rule thusly: "The economic loss rule provides that absent personal injury or damage to property other than to the allegedly defective product itself an action in negligence does not lie and any such cause of action may be brought only as a contract warranty action. The rationale underlying this rule is that when a defective product has resulted in the loss of the value or use of the product itself, or the cost of repairing it, the plaintiff is merely suing for the benefit of his bargain." Therefore, the economic loss rule, when applicable, bars claims for damages for such items as repair or replacement and interruption of business (Alco Standard Corporation v. Westinghouse Electric Corporation, 1992).

In Bates & Associates, Inc. v. Romei (1993), a case involving services (defective shop drawings), the Georgia Court of Appeals discussed the rule in more detail and explained: "The Georgia 'economic loss rule' in essence prevents recovery in tort when a defective product has resulted in the loss of the value or use of the thing sold or the cost of repairing it. Under such circumstances, the duty breached is generally a contractual one and the plaintiff is merely suing for the benefit of his bargain. The rule does not prevent a tort action to recover for injury to persons or to property other than the product itself, because the duty breached in such situations generally arises independent of the contract."

The purpose for the economic loss rule, then, is to encourage buyers of goods and services to assure that they have adequate remedies under the contract with the seller or provider to compensate them in the event the goods or services are defective. If the buyer makes a bad bargain and has failed to provide for a contractual remedy in the event the goods or services prove defective then he must absorb the loss because an action for negligence will be barred by the economic loss rule.

THE UNITED STATES SUPREME COURT RATIONALE

In East River Steamship Corp v. Transamerica Delaval, Inc. (1986) the United States Supreme Court decided an admiralty case sounding in tort products liability. In that case, a shipbuilder entered into a contract with Delaval to design, manufacture and supervise the installation of turbines that would be the main propulsion units for four supertankers being constructed by the shipbuilder. When the ships were put into service the turbines on all four ships malfunctioned due to design and manufacturing defects. Each supertanker's defectively designed turbine components damaged only the turbine itself. The ship-owners sued Delaval in tort for products liability for more than $8 million in damages for the cost of repairing the ships and for income lost while the ships were out of service. The issue framed by the Court was "whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss?" A unanimous Court answered the issue "No". The Court reasoned that preserving a proper role for the law of contract precluded imposing tort liability where a defective product causes purely monetary harm.

EXCEPTIONS TO THE GEORGIA ECONOMIC LOSS RULE

Georgia courts and federal courts applying Georgia law have recognized four common law exceptions to the economic loss rule. The exceptions permit a tort action despite the underlying contractual nature of the cases. The exceptions are identified as (a) The accident exception; (b) The negligent construction exception; (c) The negligent misrepresentation exception; and (d) Asbestos-Hazardous Product exception. These exceptions to the economic loss rule and their rationale are discussed below.

The Accident Exception.

As stated above, the essence of the economic loss rule is that claims for damages resulting from a defective product or service where the injury is solely to the product or service itself are limited to contract warranty actions and consequent damages limitations. In short, when the economic loss rule applies, warranty is the appropriate cause of action. However, where the product or service fails in a sudden and calamitous event, and even though damages result only to the product or service itself, the economic loss rule will not bar a negligence action. The rationale for this exception is that the product or service, by failing in a calamitous way, posed an unreasonable risk of injury to persons or to other property which are events traditionally redressed in a tort action (Vulcan Materials Co., Inc. v. Driltech, Inc., 1983).

The negligent construction exception.

The Georgia courts have also decided that the economic loss rule will not bar an action sounding in tort for claims for negligent building construction despite the fact that the damage is only to the building itself (Fussell v. Carl E. Jones Development Company, Inc., 1993). The rationale for this exception is that building construction negligence is an independent and common law tort that exists separately from any contract between the builder and the property owner.

The negligent misrepresentation exception.

The Georgia courts have decided unequivocally that the economic loss rule will not bar a tort claim where there is fraud or passive concealment of a material fact even though a defect only caused damage to the product or service itself and no personal injury or other property damage resulted (Holloman v. D.R. Horton, Inc., 1999). The negligent misrepresentation exception is implicated when the seller of the product or service has failed to disclose a material fact or supplies false information about the product or service that has failed due to a defect even though there is no accident and no physical damage to other property or person (Smiley v. S & J Investments, Inc., 2003).

The Asbestos-Hazardous Product exception.

Mercer University brought a negligence property damage action against numerous defendants, including National Gypsum Company, in federal district court alleging that the defendant manufactured asbestos-containing products which were placed in Mercer's buildings and had to be removed because they posed a serious health hazard. Mercer demanded damages for the cost of removing the defendant's products from its buildings. The defendant argued that the negligence claim was barred by Georgia's economic loss rule. The district court held that the economic loss rule would not bar Mercer's negligence claim. The court decided that contract warranty law was not suited to correct problems of hazardous products that can cause personal injuries. The court observed that tort law imposes on manufacturers a duty to produce safe products. Therefore, the court decided that the rationale for the economic loss rule was absent from this claim and that the rule should not be applied to claims for damages associated with hazardous products. (Corporation of Mercer University v. National Gypsum Company, 1986).

SUMMARY AND IMPLICATIONS

The economic loss rule provides that absent personal injury or damage to property other than to the allegedly defective product itself an action in negligence will not lie and any such cause of action may be brought only as a breach of contract warranty action. The rationale underlying this rule is that when a defective product has resulted in the loss of the value or use of the product itself, or the cost of repairing it, the plaintiff is merely suing for the benefit of his bargain. The economic loss rule does not bar tort actions for damages for injuries to persons or other property that were caused by the defective product of service.

Parties acquiring products and contracting for services, then, must assure that adequate protections are in place in the contract for redressing damages arising out of the failure of the product or shortcomings in the rendering of the services. If the product proves to be defective and fails without causing injury to persons or other property then the purchaser will be limited to those damages contemplated by the parties at the inception of the contract. That is, damages for breach of contract. Buyers of products and clients for services understanding the remedy limitations imposed by the economic loss rule may be wise to hedge the risks for the potential costs of repair or replacement and for downtime and loss of use by acquiring insurance to compensate for such risks.

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AUTOSURFING……LEGITIMATE ADVERTISING OR MODERN DAY PONZI?

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ABSTRACT

Auto surfing is a new online advertising and business opportunity. Participants pay money to have their websites viewed by fellow members and in exchange, all parties receive a certain percentage of their individual payments as a commission.

The autosurf industry is highly controversial and frequently determined to be either illegal or unethical. This paper examines the pros and cons of autosuring and some related legal issues.

YOU BELONG TO ME: EMPLOYER ATTEMPTS TO KEEP EMPLOYEES FROM QUITING TO WORK FOR COMPETITORS VIA NON-COMPETE AGREEMENTS IN EMPLOYMENT CONTRACTS

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ABSTRACT

At one point in time, employees remained with one employer for most of their careers. Today, employees are more mobile and are likely to have several employers over the course of their careers. Because of this increased mobility, employers are concerned that former employees will use the knowledge and skills they learned while in the employer's service to compete with their former employer. Thus, employers are faced with the dilemma of how to protect themselves from the competition of former employees. In order to protect their interests, employers often include a covenant not to compete in their employment contracts. It is the authors' contention that non-compete agreements are anti-competitive and contrary to the free enterprise system. Because some state courts have also taken this position, some companies have sought more effective ways to collect for the expense of training an employee while permitting the employee to leave and immediately compete.

INTRODUCTION

Covenants not to compete in employment contracts allow employers to prevent or restrict employee competition when the employer/employee relationship is terminated. Employers in a wide variety of industries frequently use these non-compete agreements to prevent former employees from using the knowledge and skills obtained during their employment to compete with their former employer. Employers believe that the knowledge and skills they impart to employees belong to the employer's business and that consequently, they should be allowed to prevent employees from using that knowledge to compete with them (Stone, 2002).

Although many states recognize narrowly drawn covenants not to compete, some states refuse to recognize non-compete agreements that restrain employees from working for their former employer's competitors, unless such an agreement is necessary to protect the employer's trade secrets (*Muggill v. Reuben H. Donnelley Corp.*, 1965). These states strongly favor an employee's right to freely pursue a livelihood and have strong public policies against covenants that restrain that right (see, Cal. Bus. & Prof. Code 16600-602; *Swat 24 Shreveport Bossier, Inc. v. Bond*, 2001).

STATES LIKELY NOT TO ENFORCE

California courts have continuously held that § 16600 represents the strong public policy of California "to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice" (*Metro Traffic Control, Inc., v. Shadow Traffic Network*, 1994). "The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change" (*Diodes, Inc., v. Franzen*, 1968).

However, California courts have upheld narrower contractual restraints on a departing employee, such as those that prohibit a former employee from using confidential information taken from the former employer (*Kolani v. Gluska*, 1998, p. 260). In *Gordon v. Landau* (1958), the California Supreme Court held that if the restrictive covenant does not prevent the former employee from carrying on a business, but merely restricts his use of the employer's confidential lists to solicit customers for himself for a period of one year following termination of his employment, the agreement is valid and enforceable.

The Texas Supreme Court also has a trend of limiting the enforcement of covenants not to compete in employment contracts even though the legislature favors their enforcement (Foss, 2003). The applicable law is Tex. Bus. & Com.Code § 15.50(a), which states "a covenant not to compete is enforceable if it ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee" (Tex. Bus. & Com. Code Ann. § 15.50a). This Act does not require courts to consider either the interests of the employee or the general public and provides that sections 15.50 and 15.51 are "exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise" (Tex. Bus. & Com. Code Ann. § 15.52).

Although the purpose of the act is to make covenants not to compete enforceable when they meet certain criteria and to provide a means to enforce those covenants (*Cardinal Health Staffing Network v. Bowen*, 2003), the Supreme Court of Texas in *Light v. Centel Cellular Co. of Texas* (1994, p. 644), nevertheless struck down a covenant not to compete that appeared to meet the required criteria. In the *Light* case, the court found that the covenant not to compete was not ancillary to an otherwise enforceable agreement because the covenant was not designed to enforce the employee's consideration or return promise. The covenant was not designed to enforce the at-will employee's promise to give fourteen days' notice and provide an inventory upon termination. The court held that if the employee had promised, which she had not, not to disclose confidential proprietary information upon termination, the covenant would have been ancillary to the otherwise enforceable agreement (*Light v. Centel Cellular Co. of Texas*, pp. 647-648).

Louisiana also has "a strong public policy disfavoring noncompetition agreements between employers and employees" (*Swat 24 Shreveport Bossier, Inc., v. Bond*, 2001). The reasoning behind this restriction is that Louisiana has a "desire to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden" (*Swat 24*, 2001). Thus, noncompetition agreements are "strictly construed against the party seeking their enforcement (*Swat 24*). One exception provided for in the statute states that an employer and an employee may agree to restrict the employee "from carrying on or engaging in a business similar to that of the employer . . . within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment" (Louisiana Revised Statutes 23: 921 [C]).

In *Swat 24*, the Louisiana Supreme Court interpreted "carry on or engaging in a business similar to that of the employee" to mean that a former employee could be restrained only from opening his own competing business and from soliciting customers of the employer for his own competing business or the competing business of another. Thus, the Supreme Court nullified covenants not compete that restricted an individual from securing employment with a competitor of his former employer.

The Louisiana legislature responded to this portion of the *Swat 24* decision by enacting an amendment to the statute. The amendment states that "a person who becomes employed by a competing business, regardless of whether or not that person is an owner or equity interest holder of that competing business, may be deemed to be carrying on or engaging in a business similar to that of the party having a contractual right to prevent that person from competing" (2003 La. Acts No. 428 § 1, 2003).

STATES MORE LIKELY TO ENFORCE

Kansas courts have repeatedly recognized that covenants not to compete are valid if ancillary to any lawful contract, reasonable, and not adverse to the public welfare. Freedom of contract is the driving force behind finding such covenants enforceable (*Weber v. Tillman*, 1996). In *Weber*, the court set forth four factors to be considered in determining whether a covenant not to compete is reasonable: "(1) Does the covenant protect a legitimate business interest of the employer? (2) Does the covenant create an undue burden on the employee? (3) Is the covenant injurious to the public welfare? (4) Are the time and territorial limitations contained in the covenant reasonable?" (*Weber*, p. 90).

In New York, an employer is able to restrict more post-employment activities of a former employee than in many other states. New York courts will enforce a covenant not to compete if it is reasonably limited in scope and duration, and necessary to prevent not only an employee's disclosure of trade secrets or an employee's release of confidential information regarding the employer's customers, but also "in those cases where the employee's services to the employer are deemed special or unique" (*Ticor Title Ins. Co. v. Cohen*, 1999).

Florida is also a state which recognizes employers' right to protect their legitimate business interests. Although a covenant not to compete will only be enforced if it is supported by a legitimate business interest (*Passalacqua v. Naviant, Inc*., 2003), a Florida statute contains an expansive list of types of information which could constitute a "legitimate business interest" (Fla. Stat. § 542.335), such as, trade secrets, valuable confidential business or professional information, substantial relationships with specific prospective or existing customers, patients, or clients, customer, patient, or client goodwill associated with an ongoing business or professional practice, a specific geographic location or a specific marketing or trade area, and extraordinary or specialized training (Fla. Stat. § 542.335[1][b]).

PROPOSAL

Since some courts are refusing to enforce noncompetition agreements which prevent an employee from earning a living, employers are trying a different approach at recovering the cost of their investment in training employees. The term is called "cost sharing." It is still a restrictive covenant in the employment agreement, but it does not prevent the former employee from competing with the former employer immediately after termination. Instead, in return for receiving training or investment from the employer, the employee agrees to work for a specified length of time. If the employee leaves before that period is completed, the employee must reimburse the former employer for its cost of training (Rives, 2005). This type of restrictive covenant was upheld by the North Carolina Supreme Court in the case of *Eastern Carolina Internal Medicine v. Faidas* (572 S.E.2d 780 [NC 2002]). Eastern Carolina had sued Faidas claiming breach of its employment contract with her and sought liquidated damages. Faidas claimed the liquidated damages provision was actually a covenant not to compete, which in North Carolina was against public policy (Eastern Carolina, p. 54). The employment contract had a cost-sharing clause that specified:

> *In the event Employee, within one year [of] termination shall . . . practice medicine in [counties of Jones, Pamlico, or Craven, North Carolina, or become employed with any practicing physician or group practice in those three counties or become employed by any hospital, clinic or other health care provider in those three counties, Employee shall pay to Employer an amount equal to the Cost Share . . . which shall be computed as follows: Total Operating Expense of Employer for the fiscal year immediately preceding the date of termination . . . as [shown] in fiscal year-end financial statements . . . shall be divided by the number of full-time physician employees of Employer during such fiscal year, and the quotient shall be multiplied by twenty-five percent with the product being the Cost Share amount* (Eastern Carolina, p. 54).

The court found this provision was not a non-compete clause because Dr. Faidas could practice medicine immediately after termination with her former employer. Further, the court held that the liquidated damage amount was not punitive because it was based on a specific mathematical formula and the amount demanded ($109,029.04) was only 3 percent of the $3.5 million produced by Dr. Faidas in a year (Eastern Carolina, pp. 56-57).

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ETHICS OF COMPUTER USE: A SURVEY OF STUDENT ATTITUDES

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ABSTRACT

An important issue for many years has been the potential for misuse of computer systems and resources. Rapid growth in use of the Internet and distributed systems for financial and other sensitive purposes causes ethical issues surrounding misuse of computer resources to become increasingly serious problem.

This paper surveys ethical attitudes of undergraduate business majors. The survey presented scenarios. Students were asked to indicate whether scenario actions were ethical or unethical using a seven level Likert scale. Base scenarios were designed to present ethical issues relating to unauthorized access to computer resources. Other base scenarios focus on using computers to illegally copy products. For each base scenario, sub-scenarios were presented where the motives of the individual vary between intellectual curiosity, securing resources for personal use, profit, and malice. These scenarios provided an evaluation of how the level of malicious intent affects students' perception of the degree ethical breach.

Results suggest that the intent of the individual engaging in unauthorized access or illegal copying does substantially affect student perceptions of the degree to which the behavior is a violation of ethics. In general, actions undertaken for profit or malicious intent were judged to be less ethical than the same actions undertaken for intellectual curiosity or to secure resources for personal use.

INTRODUCTION

Research in information systems security and control, has reported large losses attributable to unethical activities (Straub, 1986). Pearson et al. define three factors which require further study of ethical behavior of IS professionals. These include a greater reliance on IT systems across the business enterprise, increasing use of system generated information for decision making, and the lack of single unified code of ethics for all IT personnel (Pearson, et. al., 1996).

Professional organizations like ACM and SAGE (http://www.sage.org) have implemented an ethical code of conduct. In addition, organizations are increasingly establishing codes of ethics for internal use with about 93% of U.S. firms having such codes in place in 1992 (Berenbeim, 1992). Unfortunately, many of these codes are either very general statements which are difficult for workers to translate into individual situations or, in some cases the ethical statements are viewed by workers with a certain denial of responsibility (Harrington, 1996). As a result, gaining understanding of ethical issues is best accomplished through the use of scenarios. These scenarios must be specific and engage the participant.

APPROACH

This study examined differences in perceived motivation and how these differences in motivation affected student ethical evaluations. Student perceptions of unethical behavior were examined using a number of scenarios. The scenarios described unauthorized access to computer systems, or use of computers in the illegal copying or distribution of copyrighted materials. While a number of studies have looked at similar issues, few have rigorously examined how the motivation for the unauthorized access or illegal copying affects our ethical assessment of this behavior.

Alternative scenarios created the focus on intent. In the alternative scenarios, the type of access or copying were identical, but the motivation of the individual involved and the use made of the unauthorized access or illegal copies was varied. The varied motivations included intellectual curiosity, malicious use of resources, obtaining resources for personal use, illegal coping to support non-profit activities, or obtaining resources for profit. We hypothesized that acts motivated by profit or malice would be viewed as more severe breaches of ethics than the same acts performed to satisfy intellectual curiosity or to obtain resources not used for profit.

The question set used was adapted from one developed by Paradice (1990). Paradice defined three motivations for his question set, consisting of obligation, opportunity, and intent. Since the purpose of the study was to identify levels of perceived intent, Paradice's questions on obligation were deleted. Questions about opportunity were used essentially unchanged and questions about intent were extended to provide better clarification of actor intent and supplemented with additional questions relating to software piracy.

A follow-on study applying a rigorous factor analysis to Paradice's question set isolated three specific factors (Whitman, et. al., 1999). These ethical factors were defined as software license infringement, illicit use (writing and disseminating viruses or causing a system crash), and misuse of corporate resources. To ensure comprehensive coverage of these factors affecting ethical decision making, this question set was mapped to these factors replacing the original motivations defined by Paradice (1990). Questions 1 and 2 map to misuse of corporate resources, 3 and 4 map to illicit use, and 5, 6 and 7 map to license infringement.

The nature of the software referred to in each question (Word processing vs. Web Bots) was also changed to reflect the timeframe of this study, since the original work was created nearly 15 years ago. In addition, we have systematically increased the number of alternative scenarios in which the type of unauthorized access or license infringement was the same but the motive and type of use differed.

This survey was administered to students in a junior level management information systems (MIS) course at an AACSB accredited school of business which includes an outside ethics course in addition to ethics content included throughout the business core courses. The survey was administered across multiple sections serving different populations. One section, with 30 respondents, was an on-line section whose students were predominantly participants in a web-based undergraduate degree program for students with community college degrees relating to information technology. The remaining sections, with 37 respondents, were open to all business majors and were taught in face-to-face mode with supplemental materials, including the survey, provided on-line.

Survey Questions asked respondents to rate the behavior described in each scenario on a 7 point, centered, Likert scale. Seven fundamental ethical scenarios were presented. However, variations with modification in the motivation for the action described were presented for most of the scenarios leading to a total of 19 questions. Two of the base scenarios and 4 total questions dealt with instances of misuse of corporate computer resources, Two base scenarios and 5 questions dealt with instances of illicit use of (unauthorized access to) computer resources. Finally, three base scenarios and 10 questions dealt with aspects of illegal copying and/or distribution of copyrighted software or digitized music. An example of the full scenario wording with sub-scenarios and response choices is presented in Table 1.

Table 1

A student suspected and found a loophole in the university computer's security system that allowed him to access other students' records. He told the system administrator about the loophole, but continued to access others' records until the problem was corrected 2 weeks later.

A. The student's action in searching for the loophole was

B. The student's action in continuing to access others' records for 2 weeks was

C. The system administrator's failure to correct the problem sooner was

1) very ethical	2) ethical	3) somewhat ethical	4) questionable
5) somewhat unethical	6) unethical	7) very unethical	

SURVEY RESULTS

The results of the survey are summarized in Table 2. This table presents the results in highly summarized form. Complete results are available from the authors upon request. Table 2 shows the median ranking for each activity and also the score for the test for differences between the different activities for each scenario.

The single sample Wilcoxin signed-ranks test for differences in paired responses was used to assess differences in response across scenarios posing the same action but with variations in the motivation for the action. Given coding of the data, a positive value for the signed rank statistic S means that respondents believed the first item in the pair to be less ethical than the second. Thus, for instance, the substantial negative value for the S statistic in the comparison of Question 1A with Question 1B in Table 2 indicates that respondents believe that the student's actions in finding the security loophole represented less of an ethical breach than the student's actions in using the loophole to access other students' records. Statistically significant values are underlined.

The median rank for all activities is in the range of somewhat unethical to very unethical. The results show that the intent of an individual engaging in the activity does alter the students' perception of the level of ethical behavior. Personal use of software, or downloads was judged more as being just somewhat unethical as was hacking into a computer system for reasons of intellectual curiosity. Malicious activity in scenarios 1, 2, 3 and 4, however, was judged primarily in the unethical to very unethical range. Accessing other peoples records, changing code for personal gain, and causing reduced response time on company PCs was judged to be in the unethical to very unethical range. However, causing reduced response time for a company that was believed to exploit its workers and was unfriendly to the environment was viewed no more negatively than the same activity performed without malicious intent. In scenarios 5, 6, and 7, sharing illegal copies with others was seen as less ethical than just personal use of such copies, and profiting from the illegal reproduction of music CDs was overwhelmingly judged to be very unethical (over 80 percent found this to be very unethical).

Very little difference was observed between the IS and general business groups of students in our survey, and detailed results of comparisons of those two groups are not presented here. It appeared the IS students were a little less tolerant of modest breaches of ethics, but no significant differences between the two groups were found for any of the actions motivated by profit or malice.

Table 2
Summary Results

Scenario	M	B	C	D
1. LOOPHOLE IN COMPUTER SYSTEM				
A. Student searches for loophole	su	-351	-16	
B. Student accesses other student's records	vu		571	
C. System Administrator fails to correct problem on a timely basis	su			
2. COMPANY MANGER USING A COMPETITORS SIMILAR SERVICES				
A. Tries to break security system to cause competitors system to crash	vu	428		
B. Used access to identify customers for sales prospects	u			
3. PROGRAMMER AT BANK MAKES CHANGE IN CODE TO ELIMINATE A FEE				
Code is changed back to original as soon as the balance is updated	u			
4. POPULATION OF "BOTS" ON COMPUTERS USING THE INTERNET				
A. Causes a website of a company with questionable labor and environmental practices to be unavailable for a few hours.	u	-24	-214	
B. Causes infected PCs in companies to calculate Pi to 8 billion decimals when those PCs have idle resources	u		-247	
C. Causes degraded service of an online site for hours, and demands a ransom to remove the "bots"	vu			
5. STUDENT'S USE OF SOFTWARE FOR EDUCATIONAL USE ONLY				
A. Uses the software as a volunteer for charitable organizations	su	-2	-290	
B. Uses the software for correspondence and job search activities	su		-305	
C. Uses the software for a for-profit business services company she started	u			
6. DOWNLOAD OF A MUSIC CD BY A FAMOUS ARTIST ON A MAJOR RECORD LABEL				
A. Uses the music on personal PC and MP3 player	su	-300	-367	-580
B. Sends copies of music to 3 friends	u		-85	-315
C. Makes copies of music available to anyone accessing his website	u			-253
D. Makes copies on CDs and sells them	vu			
7. PURCHASE OF CD SOLD BY A LOCAL BAND				
A. Makes copies on CD to give to friends	su	-180	-733	
B. Sends copies on CD to anyone requesting the CD on her website	u		-564	
C. Makes copies on CD and sells them	vu			

Column M - Median response (Very Ethical, Ethical, Somewhat Ethical, Questionable, Somewhat Unethical, Unethical, Very Unethical

Columns B, C, D – Wilcoxin signed-rank value for differences in paired responses. Example: 1A (minus value) is much less of an ethical breach compared to 1B. 1A and 1C are about the same. 1B (plus value) is much more of an ethical breach as compared to 1C.

CONCLUSIONS

This paper presents the results of a survey of ethical attitudes among undergraduate business majors and IS majors. Students evaluated various scenarios related to the use of computer systems by individuals. Students found the actions in virtually all of the scenarios to be at least somewhat unethical. In general, motivations of profit or malice made a given action seem significantly more unethical in the minds of the students.

Further research should be performed using other populations of students, industry users, and non industry home users to see if there are differences in attitudes among different types of users.

Also, future research should examine the effects of ethics curriculum and the use of codes of ethics by conductive comparative studies of students before and after exposure to ethics instruction.

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TIME TO REFORM SOCIAL SECURITY: AN EMPICIAL LOOK

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ABSTRACT

Looking at the various plans to reform the current US Social Security system, this study discovered that there are a myriad of views as to what needs to be address to fix the program. There are many researchers who simply criticize the ideas of others pointing out the shortcomings of these plans without putting forward any ideas of their own. Those wishing to research the subject easily become lost in a conundrum of politics, economics, and opinion. Truly this is an instance in which "the more you learn, the more you realize you still do not know". In all of this research, we did not come across a reform idea that we felt was unique and innovative yet feasible, diverse in its options, and financially grounded. Most of all, this study did not find an idea that we thought had the potential to please the majority of people, young and old, wealthy and impoverished. To this end the study decided to place itself in others' shoes, and attempted to come up with a plan that would satisfy all needs no matter where we stood. A reform concept was created that feel is unique. Parts of it are borrowed from other ideas but as a whole it has no equivalent. This study does not presume to believe that this reform concept is complete or faultless in any way. The study does however believe that it can help to generate new ideas on the subject and potentially be the basis for a much more thorough analysis and proposal.

That being said this paper will start out with a brief history of social security in the U.S., followed by a description of the solvency problems it currently faces, an analysis of several of the current reform proposals, followed by the author's proposal. The object of this paper is to present the basic concepts of social security and other related programs and determine what these programs are supposed to accomplish, how to best achieve those goals, and how to measure the success of the social security system. In the process it will be shown how various reform ideas plan to help the social security system to meet its goals and where these reforms fail to address certain goals. Finally this paper will look at the reform concept the author envisions and determine if it might be better able to help the system than some of the other ideas.

OUTSOURCING IN THE ACCOUNTING PROFESSION: TAX PREPARATION AND ADEQUACY OF DISCLOSURE?

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ABSTRACT

The outsourcing of American manufacturing is well documented. Many industries, e.g. textiles, have been lost to low-wage countries. Outsourcing is a complex issue and many factors contribute to the decision to close a plant and relocate to another country. Factors include cost considerations such as cheap labor and capital, availability of a labor pool, and trade agreements such as NAFTA.

In addition to outsourcing of manufacturing, professional services are now beginning to be outsourced. The accounting profession is not exempt. Tax preparation services are now being outsourced, primarily to India. Other professions are experiencing outsourcing as well.

In response to the outsourcing of tax preparation services by CPA firms in the United States, the American Institute of Certified Public Accountants has been active in providing guidance to the profession regarding disclosure to clients when a CPA uses a third-party service provider. A question arises-- does the disclosure really communicate to the taxpayer that the taxpayer's confidential information may be sent to a third-party service provider in a foreign country?

The purposes of this presentation are to review the concept of outsourcing tax preparation services by CPAs, to present the disclosure recommendations of the AICPA, and to present the results of a preliminary survey regarding taxpayer perceptions of those disclosure recommendations. Finally, identifying other professional accounting services that may be outsourced and the potential impact outsourcing may have on accounting education will be explored.

AN EMPIRICAL STUDY OF THE ETHICS OF TAX EVASION

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ABSTRACT

This paper examines the issue of the ethics of tax evasion. It begins with a review of the literature and proceeds to discuss the three main views on the issue that have emerged over the last 500 years. The paper then reports on the results of a survey taken of German business students.

FACULTY ETHICS FROM THE PERSPECTIVE OF COLLEGE OF BUSINESS ADMINISTRATORS

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ABSTRACT

Recent corporate scandals have led to calls for improved instruction in ethics in colleges of business. The leading accrediting body for business programs, the Association to Advance Collegiate Schools of Business (AACSB) has also recently increased its standards concerning ethics in business curricula. Furthermore, the ethics of professors themselves have come under increasing scrutiny. Deans are key contributors to and enforcers of college policies, and their expectations help influence ethics within a college of business. However, there is a dearth of ethical analysis of faculty behavior as viewed by college of business deans and administrators. A questionnaire of American and Canadian college of business deans and administrators was conducted to provide insight into the implications and frequency of particular faculty behavior.

INTRODUCTION

Ethics is the inquiry into the nature and grounds of morality, which includes moral judgments, standards and rules of conduct (Taylor, 1975,1). There have been many studies on the unethical behavior of academics. The books *Saints and scamps: Ethics in academia* (Cahn,1986) and *ProfScam: Professors and the demise of higher education* (Sykes, 1988) both outline the profile of the unethical academic. According to Sykes, many professors have "abandoned their teaching responsibilities and their students. To the average undergraduate, the professoriate is unapproachable, uncommunicative and unavailable" (1988, 5). Cahn (1986) is more specific by providing a brief sketch of the shirking professor. This professor regularly cancels classes, arrives late, is unprepared, avoids giving exams, leaves mail unopened and never attends faculty meetings.

Given the conspicuous breaches of trust identified in the practices of business executives in organizations such as Qwest Communications International Inc., HealthSouth, Enron, WorldCom, Oracle, Sunbeam, General Electric, Royal Ahold NV, Comroad, Global Crossing, Parmalat, and Arthur Anderson it is essential that business schools complete a self evaluation of the practices within their organizations. It is not enough to teach ethical practices; students expect professors to be ethical. In two recent studies of undergraduate students, Kuther (2003) found that students expect professors to be highly competent and current in the classroom and to keep their personal and professional lives separate. According to Cahn (1986), it is the extraordinary degree of faculty autonomy that leads academics into an ethical thicket. If academics are going to advocate the adoption of strong ethical principles and ethical self evaluation by faculty, academics and administrators must engage in dialogue to define behaviors that are and are not acceptable.

This paper differs from previous research by surveying deans of colleges of business rather than faculty of a specific discipline. The opinions of deans are important given their administrative roles in initiating policies, overseeing accreditation of their schools by the Association to Advance

Collegiate Schools of Business (AACSB), dealing with the consequences of unethical behavior and interacting with students, faculty and external stakeholders.

This paper examines the ethical implications ascribed to particular behaviors and the frequency of occurrence of such behaviors as viewed by administrators within colleges of business in the United States and Canada. The research was conducted through a self-administered questionnaire mailed to business school deans. The findings of this research are of particular relevance to management educators because of the impact faculty behavior can have on students, the administrative perception of ethical behavior, and the concern that codes of ethics may be adopted but not adequately implemented.

METHOD

This study was an exploratory examination of the ethical issues surrounding faculty behavior in teaching, research, and relationships deemed by deans to (a) have the strongest ethical implications, and (b) occur most frequently. Questionnaires were sent to deans of American university business schools with membership in the AACSB (659 universities), and 54 deans of Canadian universities with business schools (some, but not all, AACSB members). AACSB members include all universities engaged in the AACSB accreditation process, all accredited universities and some universities not involved in accreditation or accredited but interested in the services offered through the AACSB.

A series of faculty behaviors were presented. Respondents were asked to rate these behaviors according to ethical implications on the following three-point scale: (1) “Not an ethical problem,” (2) “Maybe an ethical problem,” or (3) “Definitely an ethical problem.” Respondents were then asked how frequently they believed the specific behaviors occurred on a five-point scale: (1) “Almost never,” (2) “Seldom,” (3) “Occasionally,” (4) “Frequently,” (5) “Almost all the time.” There were 32 behaviors dealing with three foci: teaching, research and professional activities, and relationships.

RESULTS

The survey had a 30% response rate. In the area of research and professional activities, the five behaviors determined to be of the highest ethical implication were these: falsify data in research projects; plagiarize significant blocks of text; abuse organizational resources for personal consulting; referee papers unfairly or with bias; and, receive joint authorship of a paper without making a material contribution. In the area of relationships the five behaviors with the highest ethical implication were the following: violate the confidentiality of research subjects/organizations; violate the confidentiality of students’ personal information; accept money from students; treat students or colleagues differently on the basis of sexual orientation; and develop consensual intimate relationships with undergraduate students.

Overall, the five behaviors that had the highest means on a 3-point scale across all three foci were these: falsify data in research projects (2.99); plagiarize significant blocks of text (2.99); violate the confidentiality of research subjects/organizations (2.93); violate the confidentiality of students’ personal information (2.90); and, accept money from students (2.88). These behaviors also exhibited the greatest respondent consensus, with standard deviations ranging from 0.073 to 0.326. Many of the behaviors with the lowest means related to teaching conduct. The five behaviors that had the lowest means across all three foci were using only subjectively graded assignments for an entire course grade; returning papers with a grade but no specific feedback; using poor research methodology/lack attention to detail; recycling exams that have been previously released to students; and creating a negative classroom environment.

In teaching, the three behaviors that are deemed to happen most frequently are returning papers with a grade but no specific feedback, failing to keep scheduled office hours/appointments, and using only subjectively graded assignments for an entire course grade. In research and professional activities the behaviors which seem to occur most frequently are selling complementary textbooks for cash, using poor research methodology/lack attention to detail, and allowing consulting activities to lead to a neglect of teaching. In the category of relationships, the behaviors believed to happen most frequently are gossiping about colleagues/administrators to achieve political ends or participate in departmental feuding, openly discussing with colleagues the poor performance of a particular student, and abusing the time of graduate students.

In an effort to identify behaviors which are perceived by administrators to be high in both implication and frequency the means on both measures were ranked overall and within each of the three categories of behaviors. Two behaviors ranking high in both dimensions: violating the confidentiality of students' personal information and treating students or colleagues differently on the basis of sexual orientation.

In identifying administrator's perceptions of faculty behaviors the presence of a code of ethics was considered. Of the universities with codes of ethics, perceived familiarity and effectiveness were measured. Faculty familiarity with a code of ethics had a mean 2.92 on a five-point scale, and effectiveness of the code of ethics a mean of 3.01.

One way ANOVA analysis was used to examine the differences in the mean evaluation of the perceived ethical implications and behavioral frequency of respondents from universities with codes of ethics versus those without. Of the 32 behaviors postulated, 16 revealed a statistically significant difference between the perception of ethical implication by administrators from universities with codes of ethics and those without. In all but two of the 16 behaviors, the administrators from universities with codes of ethics rated the ethical implications of behaviors higher (of greater ethical implication) than those respondents from universities without codes of ethics. The first exception was violating the confidentiality of student's personal information, and the second exception was receiving joint authorship of a paper without making a material contribution.

DISCUSSION

The behaviors of highest concern relate to research, followed by relationships, then teaching. Plagiarism, data falsification, violations of confidentiality, accepting money from students, abusing organizational resources, treating others differently on the basis of sexual orientation, refereeing with bias, and intimate relationships with students were the behaviors considered to be definite ethical problems. These findings disagree with those of Krugman and Ferrell (1981), who found that issues of an overt nature are judged to be more unethical than those of a covert nature. Falsifying data, abusing organizational resources for personal consulting and not policing or enforcing academic integrity standards can all be covert actions.

Our initial expectations of an inverse relationship between importance and frequency were generally supported, but there were a few factors found to be both frequent and important. When the behaviors that ranked highest in frequency in the three categories are compared with ethical implications, four behaviors stand out. These are failure to enforce academic integrity, abuse of resources, violating student confidentiality, and treating students and colleagues differently on account of sexual orientation.

The results indicate that the presence of a code of ethics in a college of business is helpful in creating greater awareness of the implications of behaviors but does not appear to impact frequency of such behaviors. This suggests that understanding what is and is not ethically acceptable does not necessarily alter the way academics act. This finding agrees with Trevino (1986) who pointed out the relationship between moral judgment and moral action is not yet clearly defined. It also raises the question about enforcement. According to Ferrell and Skinner (1988, 107), the "existence and enforcement of codes of ethics are associated with higher levels of ethical behavior." Business colleges may be good at writing policies or codes of ethics but not dedicated to ensuring their application. More emphasis on the importance of altering, not just identifying, unethical behavior may be required. Universities may also need to protect whistle blowers as a means of changing behaviors.

CONCLUSION

This study identifies specific behaviors that colleges of business may want to study more closely. Of particular interest would be those ranked high based on means of ethical implication and/or frequency. The presence of a code of ethics has a positive influence on raising perceptions of the ethical implication of behavior, however once a college of business has a code of ethics, it needs to concentrate on monitoring and enforcement. One way to encourage the design of an effective code of ethics and improve enforcement is to institute benchmarking. Benchmarking must be based on standards set in academia and outside the industry. Colleges of business need to track the prevalence of particular behaviors and how these behaviors are viewed and responded to by all participants. Such benchmarking would provide information on frequency of activities at an institutional level, information on enforcement and create greater awareness of the application of a code of ethics.

It is essential that academia is proactive in the area of ethical standards if developing ethical leaders is a priority. If business colleges are found to be reactive rather than proactive in embracing standards, their credibility could be seriously undermined as could the effectiveness of delivering quality education. Even if a minority of university business programs are found to be lax in their application of ethical standards, they could tarnish the reputation of programs in general. Additionally, accreditation bodies that expect attention to ethics in curricula but do not extend such expectations to faculty are unlikely to be taken seriously on this issue. In order to maintain the practical component of a college of business it is in the interest of business program administrators to establish strong ethical standards, enforce the standards and differentiate their programs based on these standards.

LIMITATIONS

The conclusions are based on the responding administrators' estimation of events as opposed to a direct measure of actual activities. The respondents were commenting on the activities of others, not themselves. Or they may have answered based on anecdotal discussions with peers rather than first hand knowledge. A second limitation is that the behaviors proposed did not provide context. This could have resulted in some respondents viewing a behavior differently than others due to interpretation.

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RFID AND CONSUMER PRIVACY

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ABSTRACT

"Caveat Emptor," or "Let the Buyer Beware," has long been a legal adage warning consumers of the ramifications of purchasing defective products. Until the advent of product liability laws, the consumer suffered without legal recourse when injured by dangerous products. Now, this adage can be used to warn consumers of another potential danger associated with the purchase of goods, the loss of their privacy.

The utilization of Radio Frequency Identification ("RFID") technology in the marketplace has intensified the debate and concern over consumer privacy. The ability to collect and use data through the use of RFID to market to and monitor consumers raises new questions about the consumer's ability to know about, correct and to restrict the collection and use of his or her personal data. Currently no federal or state legislation addresses the consumer privacy issue in regard to RFID. Will existing tort privacy law be able to address the privacy issues raised by the collection, use and dissemination of consumer information? This paper considers the nature of the RFID privacy debate and reviews tort privacy law in light of its potential application to consumer suits involving privacy the collection and use of personal data.

INTRODUCTION

"Caveat Emptor," or "Let the Buyer Beware," has long been a legal adage warning consumers of the ramifications of purchasing defective products. Until the advent of product liability laws, the consumer suffered without legal recourse when injured by dangerous products. Now, this adage can be used to warn consumers of another potential danger associated with the purchase of goods, the loss of their privacy.

Radio Frequency Identification ("RFID") is the powerful new tracking technology has intensified the debate regarding consumer privacy. With RFID anything can be tracked, from consumer goods to currency to people. Such a powerful tracking device creates the potential for abuse and that should be a serious concern to consumers. While the privacy debate is not a new one, the fear of the continued loss of privacy reaches new levels with RFID because the tags do not require line of sight to be read and, moreover, data collected and stored in databases with each reading can be combined to identify the who, what and where of consumer purchasing. This form of data collection and data mining create a reality where consumer purchases can be linked to consumer information, creating the commercial availability of personal and private information.

RFID AND THE PRIVACY DEBATE

Many in business and industry believe that the privacy concerns regarding the use of RFID are exaggerated. These advocates of RFID argue that consumers are already tracked and that tracking allows merchants to better respond to customers. Moreover, they argue that RFID is still a relatively new and expensive technology that has yet to proven in the marketplace (Brito, 2004). For these commercial applications, RFID proponents argue that consumers will be delighted by the reduced costs they experience as a result of the utilization of RFID. Inventory and tracking control will now be so easily and tightly monitored that there will be cost savings. Every item can be identified and located eliminating unexplained inventory loss and waste (Electronic Privacy

Information Center (EPIC) Privacy Page). Furthermore, proponents argue that the technology is far too expensive for extensive use and, therefore, privacy concerns are overblown (Brito, 2004).

On the other hand, opponents argue that the commercial applications for RFID represent another step in the consumer's loss of privacy in that RFID can be, and will be, utilized for purposes other than just tracking inventory. The privacy clearinghouse has published a "RFID Position Statement of Consumer Privacy and Civil Liberties Organizations' detailing the privacy concerns associated with the use of RFID. The position statement reads "…RFID has the potential to jeopardize consumer privacy, reduce or eliminate purchasing anonymity, and threaten civil liberties" (RFID Position Statement of Consumer Privacy and Civil Liberties Organizations). The position statement envisions the possibility that every physical object will have its unique identifier which can be linked to an owner. Moreover, the position of these organizations is that consumers have the right not to be tracked by purchases in the store or out. While the organizations signing on to this statement do acknowledge legitimate uses for RFID, they propose a moratorium on the use of the tags until there is an assessment made as to its implications for consumer privacy (Id).

FEDERAL RESPONSE TO CONSUMER PRIVACY

But is self regulation a solution to the privacy concerns? Is there a need for specific legislation aimed at controlling the collection and use of consumer information by the use of RFID? Does exiting law provide any protection for consumers?

Many turn to the US Constitution for answers regarding individual privacy rights. The 4th amendment to the Constitution provides that citizens are to be "Free of unreasonable intrusion of government into personal papers…" The 4th amendment is designed to limit government's interference into the personal affairs of citizens by requiring probable cause. However, this amendment is not applicable to non-governmental interference, not from the interference of a private nature, such as an intrusion by a commercial establishment into a consumer's privacy.

However, the federal government has dealt with the issue of consumer privacy in various areas. Several statutes put limits on the disclosure of consumer information and require the self-policing of certain industries. Some of these federal statutes include the Cable Communications Policy Act, the Video Privacy Protection Act, the Telephone Consumer Protection Act and the Health Information Protection and Portability Act. These statutes often put the onus on the consumers to take an active role in monitoring personal data collected for errors, such as those that may occur on a credit report, and to actively pursue the correction of such errors. Most of these federal statutes also prohibit the disclosure of personal data without the consumers' prior written consent. No federal law specifically addresses such technology and privacy issues as those posed through the use of RFID.

STATES RESPONSE TO CONSUMER PRIVACY

California and other state legislatures have attempted to address the consumer privacy issue and bills have been introduced in various state legislatures although, to date, no state has enacted legislation protecting the collection of consumer information by use of RFID. Legislators in Missouri, South Dakota, Rhode Island, New Mexico, Virginia, Tennessee, Massachusetts and New Hampshire have also introduced legislation to address consumer privacy and the use of RFID. The bills are similar in approach in that they attempt to resolve the issue of protecting individual consumer privacy. Some legislative suggestions include: detailed labeling on products with RFID devices, the destruction of the devices upon purchase, written consent from an individual before data is collected or shared, prohibitions against using the technology to track individuals, and criminalizing the unauthorized access to information contained within a RFID device (EPCglobal Inc.,guidelines on EPC for consumer products).

Without legislation to guide the courts regarding the protecting of privacy in the marketplace, existing laws must be viewed in a new light to determine how successfully these laws could be utilized to allow consumers to bring litigation regarding the collection and use of private information by use of RFID.

INVASION OF PRIVACY TORTS

Civil law has long recognized the right to privacy in light of privacy invasions by non-governmental, private persons or businesses. The privacy torts have been part of the legal system for over a hundred years and allow individuals to bring civil actions against others for the harmful misuse of private information. The four torts usually categorized under the umbrella "Invasion of Privacy" are: intrusion upon seclusion, commercial appropriation, publicity given to private life and false light in the public eye. Each of these torts has specific definitions and requirements that must be met for the litigant to successful pursue her or his case. The questions of determining unreasonableness, private affairs or offensiveness as maybe required for a tort is determined on a case by case basis. The seeming vagueness of this law is intentional in that these elements of any must be viewed and molded to a variety of behaviors.

Intrusion upon seclusion is defined as "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for the invasion of his privacy, if the intrusion would be highly offensive to a reasonable person" (Restatement of Law § 652B).

Another privacy tort, appropriation of name or likeness, also called commercial appropriation, is defined as "One who appropriate to his own use and benefit the name or likeness of another of another is subject to liability to the other for the invasion of his privacy" (Restatement of Law § 652C). This tort requires the use of a person's likeness or name without his or her consent and for a commercial benefit.

To prevail in an action based on this tort, the use of name or likeness must be to benefit from the value of the person's name or likeness. If there is no "unique quality or value" to the person's name or likeness, there is no violation of this tort (Allison v. Vintage Sports Plaques (1998)).

The tort of publicity given to private life involves "One who gives publicity to a mater concerning the private life of another is subject to liability to the other for the invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public" (Restatement of Law § 652D).

Last, but not least, is the tort of "False Light." Publicity placing a person in false light is defined as "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for the invasion of his privacy , if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed" (Restament of Law § 652E).

To prevail with this tort, the plaintiff must prove that the information made public is materially false (Veilleux v. National Broadcasting Company (2000)). Oklahoma law requires that the plaintiff establish that "as a reasonable man, would be justified in the eyes of the community as feeling seriously offended and aggrieved by the publicity" (Hussain v. Palmer Communications Incorporated (2003)). Moreover, the defendant in such an action must "have had a high degree of awareness of probable falsity or in fact entertained serious doubts as to the truth of the publication" (Id.) The injury suffered by the plaintiff in a suit for false light must be of a mental and emotional nature (Howard v. Antilla (2002)).

APPLICATION OF TORT LAW TO RFID AND CONSUMER PRIVACY

Lawsuits based on the privacy torts, as with all torts, place the burden on the plaintiff to identify the privacy breach that has taken place, the manner in which the breach took place and the person who acted to disclose or wrongfully use that information. Moreover, for the privacy torts to apply, the invasion must be highly offensive; in some cases the invasion of privacy must include a high degree of shame, embarrassment, humiliation and mental distress. As it stands now, these torts might well be the only basis of litigation when privacy issues come to the forefront based on the use of RFID. However, there is no precedent in these common law torts addressing a consumer arguing against a business for the invasion of privacy as it relates to collected consumer and personal information or the use of the information. To complicate the matter even more, each state would have different outcomes for those actions because that state may not recognize some of the privacy torts or the elements of the tort may be defined differently in each state.

How then would a consumer fare in such an action against a business for the use and dissemination of RFID collected data? The first obstacle would be one of knowledge. The use of RFID could be so subtle that the consumer may not know or have access to the information that has been collected about her or him. With the potential for extensive databases linking information in various ways and on various systems, it might be impossible for a consumer to be able to identify collected information in all systems. Moreover, how does the consumer successfully argue that the use of that information constitutes an invasion of privacy tort if their name and likeness have no likeness and value? Without establishing that, the tort of appropriation would not be an option. For the torts of false light and publicity of private facts, would the disclosure of consumer information between merchants rise to the level of “public disclosure?” Could businesses argue that sharing information does not violate tort law since the businesses have a “natural and proper interest” in the information shared? With intrusion upon seclusion, could a business argue that since a consumer entered a store or business willingly there is no expectation of privacy? Will consumers be embarrassed, humiliated and shamed should some personal information be disclosed?

CONCLUSION

Invasion of privacy tort law varies from state to state and there is no federal tort law providing national consistency. The individual’s ability to sue for the collection and misuse of personal information by a business would vary in each state creating a patchwork of results. Furthermore, the remedies available, such monetary awards would be different from state to state and may be insufficient to deter use or misuse of collected information.

Clearly, the privacy torts were not developed and have not been applied with new technologies in mind. While court’s can interpret and construe the torts based on the factual events of each case, precedent does not exist for consumer actions based on use and dissemination of consumer data collected by businesses. Nor do these torts address the fundamental issue of the collection of personal information. Current law is not sufficient to clearly define the privacy rights of a consumer as to the collection, use and disclosure of data nor does it provide appropriate legal remedies for the misuse of that information. Law and technology have not been able to keep pace. Ultimately, there must be national legislation that can create consistent nationwide standards for the collection and use of information acquired through the application of RFID and the remedies available for the violations of those standards. Until that time, let the buyer beware.

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