

Legal Business Issues: The case of Tillie Throckmorton

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MG 503: The Legal and Ethical Environment of Business

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NOTE – This exam’s legal problems and issues were created specifically for me – other students received problems that were far less involved

SUMMARY OF ISSUES

Matilda "Tillie" Throckmorton is a friend of yours. She graduated from Fairfield University last year with a major in Art History and a minor in drinking and partying, skills which render her virtually unemployable. To help her get started on a career, her father, Osgood P. Throckmorton bought her a manufacturing business. She is now making fuel efficient cars which are called the WIDGET. Since Tillie has no background in business, she is seeking your advice concerning a variety of issues set forth below. She has heard that you were an outstanding student in Dr. McEvoy's THE LEGAL AND ETHICAL ENVIRONMENT OF BUSINESS.

Tillie has been bewildered by the variety of laws that affect her business. She wonders where the federal government gets the power to pass so many statutes that she now must follow. She asks you to explain to her the meaning of the "commerce clause" that she has heard so much about. Tillie also feels that she should engage in some activities to promote her business so she wants to do some advertising to encourage people to buy WIDGETS. She has heard of the concept of commercial speech but has no idea what it means. She asks you to prepare a memo on the subject that she can share it with her marketing department. Tillie is also concerned about the fact that a disgruntled customer has complained about her business dealings to the Federal Trade Commission. She is angry that the FTC believes that she has violated one of its rules. She asks you to fill her in on exactly what this body does. She wonders if she can call her Congressman, formerly her boyfriend, Willis G. Windbag to help her with her FTC problem. She heard Willis mention the "iron triangle" once when they were out on a date but she was too busy drinking vodka to pay attention to what he told her.

Compounding her woes is the fact that an OSHA inspector came to her Widget factory the other day and told her that she had some vats containing chemicals that were making her employees sick. Tillie told the inspector, Dan Diligent, that her workers should be lucky to have a job in a down economy and that some of them can barely speak English so they could not read the chemical labels anyway!

Tillie suspected that one of her employees, Betty Busybody called OSHA to squeal on her. In a confrontation on the factory floor, Tillie fired Betty, causing Betty to collapse into tearful sobbing. Betty recovered the next day and was found picketing the WIDGET plant, wearing a "F&!K Tillie" T-Shirt. Tillie was so mad that she ran over Betty with her WIDGET convertible. Betty jumped up and started beating Tillie with her picket sign. Reporters converged on the scene and Betty later appeared on a radio talk show telling the interviewer what a terrible boss Tillie was, that the workplace was unsafe and that Tillie hires illegal aliens, and that Tillie is the mother of an out of wedlock child with the married Congressman Windbag. The latter is not true.

Tillie wants to sue Betty for defamation of character and asks your opinion about whether or not she can win the case and what damages she might be awarded. Tillie admits that she did pose in SI's last swimsuit issue and that she later appeared on The View because she was voted "Swimsuit Model of the Year. Tillie has still more problems. While she ran into the ice cream shop to get a hot fudge sundae, her WIDGET convertible was stolen by the neighborhood hoodlum, Joe "Killer" Klopki. Joe drove Tillie's car to his favorite chop shop in Brooklyn and sold it piece by piece pocketing a tidy sum. Tillie asks you what action, if any, she can take against Joe Klopki.

Tillie was so upset by this chain of unfortunate events that she checked herself into a local hospital. While there she decided to have an unsightly wart removed from her big toe as part of her unending quest for bodily perfection. She asked Dr. Sam "Shakes" Smith to perform the surgery. Unfortunately, due to the fact that he has so many patients to take care of, instead of removing the wart, Dr. Smith replaced Tillie's left knee. When Tillie awoke from surgery she discovered what the doctor had done. Smith told her that she was going to need a knee replacement surgery eventually when she was 60, so she might as well have the surgery while she was still young enough to rehab quickly. Tillie's new boyfriend, Fred Phillips, was so incensed by what the doctor has done; he decided to go to his office to have a word with Dr. Smith. Smith had set up a shot gun trap in his office so when Fred walked in the door, he was immediately shot in the left leg. Now Fred needs a knee replacement.

As Tillie recovers from surgery, a Hollywood agent spoke with her about appearing in movies. He had landed Tillie a five year oral contract to appear in three films produced by Landmark Pictures. The President of Landmark was impressed by the intellectual qualities Tillie displayed in posing for the SI layout that he thinks she could be a star. Landmark's president, Shifty Lazar, wants Tillie to start work immediately but she is still recovering from the operation. She wonders if she can delegate her duty to perform in the film to her sister, Tania, who some believe is even prettier than Tillie and more talented. She majored in Communications while at Fairfield. Shifty is demanding that Tillie fly to Hollywood immediately to perform in the movie, "Sex Kittens" and threatens to sue her for specific performance if she declines.

One day after Tillie returned to her office at the WIDGET factory after a grueling session of physical therapy, she was served with a summons notifying that she and WIDGET were being sued by a purchaser of a WIDGET who had gotten into an accident. The complaint claims that the WIDGET was defective because a key part had been left off the car when it was made at the factory. The lawsuit claims not only breach of warranty but negligence and strict liability. Tillie has never heard of the law of products liability before and asks you to explain the key concepts to her. She also asks you to explain what defenses might be available to combat the case and if they are unsuccessful what damages the injured purchaser, Hugo Burton, might be able to recover. She also asks you what steps she might take in the future to minimize her risk of being sued. **DISCUSS ALL THE ISSUES PRESENTED BY TILLIE.**

MEMO

To: Tillie Throckmorton

From: Annie McCarthy

Date: 7/30/2010

Subject: Response to your note about your recent troubles

As you mentioned in your note to me, I understand you have a lot going on in your life and have been faced with some challenges with the WIDGET factory, problems with employees, problems with your doctor, your past boyfriend the Congressman, OSHA, Joe Clocked and Shifty Lazar. I learned a great deal from my professor, Dr. Sharlene McEvoy, in her Legal and Ethical Environment of Business class in June. Listed below I outline background and laws regarding some of the agencies you have encountered and what I learned in class to help you with your problems.

It's great to hear that you were able to start a manufacturing business with the help of your father, to create the fuel-efficient WIDGET car. I'd love to test drive one, or get a friendly discount! With any new business there is bound to be some bumps in the road. The federal government has a lot of power over what you can do to market your product and how you treat your employees, so you need to be prepared for any negative outcomes.

As I've learned in class and through some research, The Commerce Clause refers to Article 1, Section 8, and Clause 3 of the United States Constitution, which gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." "Commerce" is not defined in the Constitution. It can be widely interpreted. It

refers to trade or exchanges, while some argue that the founders of the Constitution intended a broader definition of both commercial and social relationships between citizens of different states. The interpretation of “commerce” affects the appropriate dividing line between federal and state power.

In reference to your question about commercial speech, it is speech done on behalf of a company or individual for the intent of making a profit. It usually has the intent of convincing the audience to partake in a particular action, often purchasing a specific product, in this case, the WIDGET. Generally, the Supreme Court defines commercial speech as speech that "proposes a commercial transaction." While commercial speech is entitled to First Amendment protection, the Supreme Court has remarked on the common sense differences between speech that does no more than propose a commercial transaction. The Supreme Court has developed a four-pronged test to measure the validity of restraints upon commercial expression. Under the first prong of the test as originally formulated, certain commercial speech is not entitled to protection; the informational function of advertising is the First Amendment concern and if it does not accurately inform the public about lawful activity, it can be suppressed. Secondly, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. Third, the restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose. Finally, fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive. The Supreme Court requires there is a “reasonable fit” between the means and ends, with the means “narrowly tailored to achieve the desired objective.”

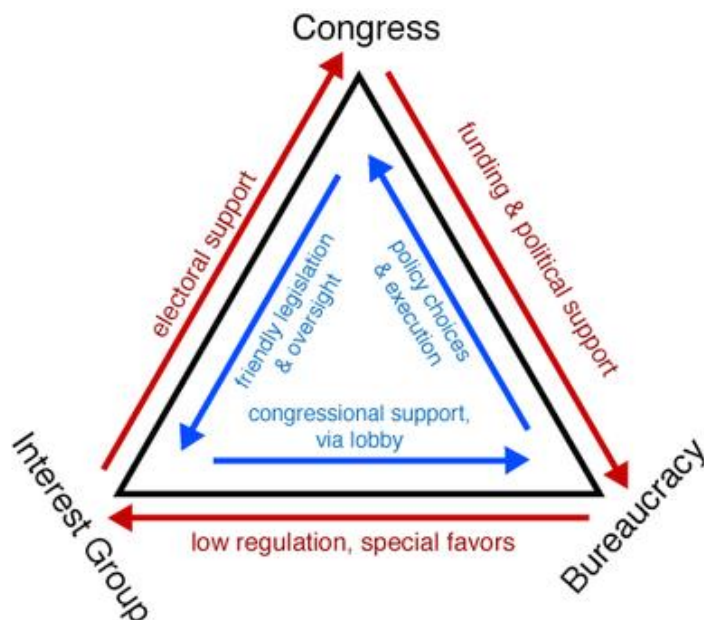
I’m glad you had fun out drinking vodka with your ex-boyfriend, Congressman Willis G. Windbag. I remember our fun vodka drinking college days at Fairfield University!

Unfortunately, in reference to help with the complaint from a customer, I'm not sure if he will be of much help with the Federal Trade Commission (FTC). The FTC is an independent agency of the United States government. It was established in 1914 by the Federal Trade Commission Act. Its principal mission is the promotion of "consumer protection" and the elimination and prevention of what regulators perceive to be harmfully "anti-competitive" business practices, such as monopolies. Consumer protection laws exist to ensure fair competition and the free flow of truthful information in the marketplace. Your customers are entitled to buy a safe product. The consumer protection laws are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and may provide additional protection for the weak and those unable to take care of themselves.

If there was any breach of warranty you and your company could be sued. There is extra liability if the seller (you) at the time of the contract had reason to know additional loss would result by failure to meet the buyer's requirements. Defenses to a claim for breach of warranty include the buyer has to show that the breach of warranty was the proximate cause of loss, give notice to the manufacturer that there was a breach of warranty, and contributory negligence is not a defense. Consequential damages can include the loss of profits from re-sale of goods, the loss of operating profits, and damage of goodwill, basically a public relations nightmare! Additionally, if there is an automotive recall or defect you are required to notify past purchasers and required to have the problems corrected, otherwise you may be sued.

The "iron triangle" Willis Windbag mentioned is made up of three sub-governments: Congress, bureaucrats and interest groups. Members of agencies and members of Congress need to maintain good relations with each other. Bureaucrats can do favors for members of Congress. Within the federal government the three sides often consist of various congressional committees,

which are responsible for funding government programs and operations and then providing oversight of them, the federal agencies, which are often independent agencies, which are responsible for the regulation of those affected industries, and finally, the industries themselves, as well as their trade associations and lobbying groups which benefit, or seek benefit, from these operations and programs. If you're thinking it sounds corrupt and confusing, it can be. Here's a chart to better help you understand the iron triangle.



You mentioned some problems with an employee, Betty Busybody, who you publicly fired because you think she called OSHA about chemicals making employees sick. As background, the Occupational Safety and Health Administration (OSHA) is an agency of the U.S. Department of Labor. It was created by Congress of the United States under the Occupational Safety and Health Act signed by President Richard M. Nixon, on December 29, 1970. Its mission is to prevent work-related injuries, illnesses, and occupational fatality by

issuing and enforcing standards for workplace safety and health. You must cooperate with Dan Diligent, the OSHA Inspector, or your company will be fined.

I'm not sure that the court will rule in your favor if you sue Betty Busybody for defamation of character, but you can try. In many cases like yours that we discussed in class, the plaintiff has been awarded damages. There are several things you can do to help your case, besides getting a good lawyer to argue you suffered extreme emotional disturbance when you ran her over with your WIDGET convertible. The good news is Betty probably will not sue you for wrongful termination if she was an at-will employee you had the right to fire her. However, if she was a union employee she will more likely win reinstatement and/or damages. If Betty can prove she was discriminated against because of sex, religion, color or national origin under EEOC guidelines she may also win damages. Juries often sympathize with workers, so you will have an uphill battle in your case.

Was Joe "Killer" Klopkid caught and arrested for stealing your WIDGET convertible? You can try to sue him but you need to go through your insurance company. I hope your car insurance is current. If you have car insurance with comprehensive coverage on it you will want to contact your insurer and let them know that your vehicle has been stolen. You will need to provide them with a case number as provided by the police. If you have replacement car rental coverage, your insurance will cover the cost of a rental car for a period of time so that you can continue to meet your regular obligations, while waiting to find out if your car has been recovered. You may or may not have a waiting period before you are eligible for this coverage, depending on your insurer. Be sure to ask your insurer about what to expect.

I am sorry to hear about your wart and your subsequent botched surgery on your knee by Dr. Sam “Shakes” Smith! I recall a case study we discussed in class with a similar situation. You can sue the doctor and collect from his medical malpractice insurance. What happened to you is commonly known as "wrong-site surgery." This is surgery performed on the wrong side, wrong body part, wrong location, or wrong patient. It can also be the wrong surgical procedure. While considered rare, wrong-site surgery has continued to increase annually since the 1990's. I recently learned it has been estimated that there are 5-10 cases of wrong-site surgery per day in the United States! There are several reasons why wrong-site surgery can occur. Some causes include miscommunication between the surgical team, inadequate pre-operational preparations, and time pressure. You could even try to have Dr. Smith arrested and charged with battery since its medical battery, it is offensive touching to your body.

It is exciting to hear about your upcoming movie roles. Be careful with any contracts you sign, it sounds like Shifty Lazar is trying to take advantage of you! See if you can request a medical leave of absence until you heal.

In reference to your problems with the customer, Hugo Burton, who claims the WIDGET is defective; please see my above comments about breach of warranty and keep in mind that breach of warranty has to be proved by the buyer. Negligence and strict liability are serious claims. The law of products liability is complex. Product liability is the area of law in which manufacturers, distributors, suppliers, retailers, and others who make products available to the public are held responsible for the injuries those products cause. There are three major types of product liability claims, manufacturing defects, design defects, and a failure to warn (also known as marketing defects). A seller's warranty, whether express or implied extends to any natural person who is in the household of the buyer. In class I learned there are five elements need to be

established for a claim to collect damages: existence of a contract, goods did not conform to warranty, defect caused by injury, amount of damages was suffered, and establish facts needed to overcome defenses. There are three classifications of warranties: express, implied warranty or merchantability, and implied warranty or fitness for a particular purpose.

Rather than focus on the behavior of the manufacturer (as in negligence), strict liability claims focus on the product itself. Under strict liability, the manufacturer is liable if the product is defective, even if the manufacturer was not negligent in making that product defective. The difficulty with negligence is that it still requires the plaintiff to prove that the defendant's conduct fell below the relevant standard of care. However, if an entire industry tacitly settles on a somewhat careless standard of conduct, then the plaintiff may not be able to recover even though he or she is severely injured, because although the defendant's conduct *caused* his or her injuries, such conduct was not negligent in the legal sense. As a practical matter, with the increasing complexity of products, injuries, and medical care (which made many formerly fatal injuries survivable), it is quite a difficult and expensive task to find and retain good expert witnesses who can establish the standard of care, breach, and causation. In the future to minimize risk your company needs to use high quality manufacturing, give instruction and warning labels, warn about the important of maintenance of the vehicle, and keep up to date records of design, quality control, manufacturing and sales.

Tillie, I hope my advice will be helpful with your current problems. We have to get together soon for a nice vodka tonic! Please tell Dr. McEvoy that my advice to you was helpful so I can get an A in the class! ☺