

## **BUL 6810**

### **Midterm Examination**

#### **INSTRUCTIONS**

The midterm examination consists of 4 essay questions; each question is worth 25 points. Each question and any subparts of the question must be answered. The midterm should be 6-8 pages, double spaced. The answer may exceed the page limitations. **This is not a group project.** Each student should work alone. **READ THE QUESTIONS CAREFULLY BEFORE ANSWERING.**

In order to do well on this test you **must** refer to materials in the chapters, including cases, and you may also refer to the handouts and in-class case studies and discussions. Make sure to use the legal and business terms that you have learned in the course and apply them to the facts of the questions. When you use a legal term, provide an explanation of its meaning and/or any legal test that explains how it is applied to any factual situation. If there is a case that supports your argument, make sure to explain the reasons.

**Deposit your exam into drop box on blackboard on the due date.**

1. Do the legal rules (i.e., fiduciary duties of care and loyalty, the business judgment rule, safe harbors, etc.) and the SEC self-regulatory oversight philosophy, both of which define corporate self-regulation in a free enterprise market economy, provide enough protection to stakeholders to prevent corporate misconduct? Should there be more regulation or less regulation of business? **EXPLAIN** your answer.
2. Beginning in 2006, Spike Clothing was besieged with a series of allegations that it was mistreating and underpaying workers at foreign facilities. Spike responded to these charges in numerous ways, such as by sending out press releases and writing letters to the editors of various newspapers around the country. In addition, in 2004, Spike commissioned a report by former Ambassador to the United Nations Andrew Young on the labor conditions at Spike production facilities. After visiting 12 factories, "Young issued a report that commented favorably on working conditions in the factories and found no evidence of widespread abuse or mistreatment of workers."

In 2008, Spike was sued by the Consumer Fraud Office of the State Attorney General for unfair and deceptive practices under the State's Unfair Competition Law and False Advertising Law. The Attorney General asserted that "in order to maintain and/or increase its sales," Spike made a number of "false statements and/or material omissions of fact" concerning the working conditions under which Spike products are manufactured.

Spike filed a motion to dismiss arguing that the Attorney General's suit was absolutely barred by the First Amendment prohibition against broad regulation of commercial

speech. Spike argued that its statements "form[ed] part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment."

The trial court denied Spike's motion and held that "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, . . . [the] messages are commercial speech." However, the court emphasized that the suit "is still at a preliminary stage, and that whether any false representations were made is a disputed issue that has yet to be resolved."

The case is now on appeal. The Appellate Court must decide whether a corporation participating in a public debate may "be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions.

This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance. On the one hand, if the allegations of the complaint are true, direct communications with customers and potential customers that were intended to generate sales--and possibly to maintain or enhance the market value of Spike's stock--contained significant factual misstatements. The regulatory interest in protecting market participants from being misled by such misstatements is of the highest order. "There is no constitutional value in false statements of fact." On the other hand, the communications were part of an ongoing discussion and debate about important public issues that was concerned not only with Spike's labor practices, but with similar practices used by other multinational corporations. Knowledgeable persons should be free to participate in such debate without fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance. Whether similar protection should extend to cover corporate misstatements made about the corporation itself, or whether we should presume that such a corporate speaker knows where the truth lies, are questions that may have to be decided in this litigation.

An editorial in the Washington Post stated: "The way to deal with corporate spin or even overt corporate lies is not to haul companies into court but to encourage aggressive scrutiny of corporate claims by journalists, public interest activists and other citizens. This is just what was happening in the Spike debate. It would be ironic if that debate produced a precedent under which future give-and-take over corporate conduct could no longer take place."

Part I: Applying the test in *Central Hudson*, how should the Appellate Court rule on the constitutionality of regulating Spike's commercial speech in this case? Explain your answer.

Part II: If Spike loses the case, would the resulting case precedent chill "future give-and-take over corporate conduct" as predicted by the Washington Post? Why or why not?

3. Read the attached Contract Analysis Exercise. You have been offered a job by the company. Answer all of the questions ##1-8. You must use full paragraphs and complete sentences in answering each question. Make sure to EXPLAIN your reasons as part of each answer. If you think that a provision of the contract is unfair or should be changed, you should add that to your answers. Be sure to answer each question!!!

Finally, would you sign the agreement as it is written? What issues would you raise during contract negotiations?

4. Plaintiffs, two minors, Patty Smith and Justin Blubber are consumers who have purchased and consumed the defendant Food Mills' breakfast products and, as a result, have become overweight and have developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and/or other detrimental and adverse health effects.

Congress provided that essentially all packaged foods sold at retail shall be appropriately labeled and their contents described. The Nutrition Labeling and Education Act of 1990, Pub. L. 101-535, 104 Stat. 2353 (Nov. 8, 1990) (the "NLEA"), 21 U.S.C. § 343(q).

Plaintiffs are suing Food Mills for negligence. Count 1 of the civil complaint alleges that Food Mills acted negligently in selling food products that are high in cholesterol, fat, salt and sugar when studies show that such foods cause obesity and detrimental health effects. Count 2 of the complaint alleges that Food Mills negligently failed to warn the consumers of Food Mills' products of the ingredients, quantity, qualities and levels of cholesterol, fat, salt and sugar content and other ingredients in those products, and that a diet high in fat, salt, sugar and cholesterol could lead to obesity and health problems.

Part I: Applying negligence legal principles (duty, breach, proximate cause and damages), how would you decide the case and why? EXPLAIN your answer.

Part II: Where should the line be drawn between an individual's own responsibility to take care of oneself, and society's responsibility to ensure that others shield a consumer? Explain.