UNIT 6 Commercial Litigation

Quotation 1:

"A lawsuit is a machine which you go into as a pig and come out as a sausage."

—Ambrose Bierce

Quotation 2:

"A lean compromise is better than a fat lawsuit."

—George Herbert

Lead-in

Case Study

In law, frivolous lawsuits, due to their lack of legal merit, have little to no chance of being won. The party (or the party's legal counsel) has reason to know that the claim or defense is manifestly insufficient or futile. While colloquially, a person may term a lawsuit to be frivolous if he or she personally finds a claim to be absurd.

The following two cases are deemed frivolous lawsuits in one sense or another. Read these two cases and study whether the companies involved are guilty wrongdoers or innocent victims of frivolous lawsuits and what effective measures the companies involved could have taken to avoid these lawsuits.

Case 1

The Walmart case was filed in 2001 against the retailer by six female workers who alleged the women employed by the company face systemic sexism: They're paid less than men in comparable positions, receive fewer promotions and wait longer for promotions. They claimed that 65 percent of Walmart's hourly employees were women, while just 33 percent of the company's management team is female. If the court rules in favor of the women, it will most likely become the largest employment class-action suit in history, involving

millions of women and potentially billions of dollars.

Case 2

U.S.-based pet supply and animal accessory store PetSmart never expected dog poop to cost them millions of dollars. An outlet in Virginia is the target of a recent lawsuit from Robert Holloway, who happened to slip on uncleaned and unseen dog "waste" in the store's outdoor section. After slipping on the stray dog feces, Mr. Holloway fell and hurt his back, losing four false teeth and suffering a minor concussion. As a result of slipping on the stray poop, Mr. Holloway plans to sue the chain for one million dollars.

Text A

Reducing the Risk of Commercial Litigation in the United States

Notes:

1. practitioner: one who practices sth., especially an occupation, a profession or a technique
从业者，执业者

2. gadfly: a nuisance
讨厌鬼

3. Cassandra: daughter of Priam, the king of Troy, endowed with the gift of prophecy but fated by Apollo never to be believed; one that utters unheeded prophecies
卡珊德拉，希腊神话中的女预言家，能预卜吉凶却不被人相信。

4. course of action: a plan, a set of intended actions, through which one intends to achieve a goal
行动方针，行动计划

Litigation is like coming down with the common cold. There are things we can do to lower the risks: We can take vitamins, wash our hands and stay out of drafts, but we can't altogether eliminate the prospect of catching one anyway, although if this should happen, we hope that because of our actions, it will be less severe.

The mindset: limiting tangible risks

Managing litigation risks, like managing other kinds of risks, entails making a dispassionate assessment of reality. This may seem obvious, but, in practice, cajoling a client into facing the risks of a transaction can be the most formidable challenge to the practitioner[1]. Deals are achieved by accentuating the positive and de-emphasizing the negative. In the worst situation, a lawyer can be perceived of as a gadfly[2], a Cassandra[3] that can place a damper on the enthusiasm for a deal. This kind of relationship can be a source of substantial attorney-client tension. For the lawyer, therefore, evaluating the personality of the client is a significant first step toward evaluating tangible risks. A client who is likely to lie to counsel or conceal material information creates for itself the highest level of litigation risk. In the American system, which adorns the lawyer with the mantle of a gladiator, the attorney is under tremendous pressure to kowtow to the client, which often entails shying away from addressing the weaknesses of a course of action[4], especially where the outcome, at least in the short term, is expected to be very profitable. To limit litigation risk it is therefore critical for the client to perceive counsel as being not merely a tool to get things done, but as an objective and dispassionate advocate for reason and prudence. In sum, the more honest counsel can be with the client, the more likely it is that an effective strategy for limiting litigation risk can be devised. Such a plan necessarily will

entail balancing the prospect of short-term financial gains of a course of action against the risks of long-term litigation costs.

It is important that in making a risk assessment at the outset of a transaction, general counsel adopts the litigator's perspective, which assumes that at the beginning of any deal, litigation adversaries are almost always friends or friendly business associates who have the utmost confidence in one another's integrity. And yet how fragile these relationships are, regardless of their lengthy history and depth. Where important terms of a transaction are intentionally left ambiguous because it is believed that, in the end result, the parties will do the morally correct thing, this is the kind of transaction which presents significant litigation risk. The litigation perspective is necessarily more cynical than the corporate attorney's perspective which is defined by a much narrower time frame[5]. Corporate attorneys are often left to viewing a snapshot of the business relationship at a point in time; the litigator, on the other hand, is compelled to viewing the relationship as one would view a motion picture, with a beginning, where the parties have high expectations, a middle, where there are signs of disillusionment and an increasing sense of injustice, and an end, where personal and professional relationships are torn asunder by mistrust.

Accordingly, assessing litigation risk requires an appreciation of the changing currents of times and circumstances. Contracts, after all, are only balance sheets of risks, which are allocated in accordance with how the parties perceive them at the time that contract is entered into. To the extent that the counsel can prevail upon the client to take the long view of its business associations, there is a greater prospect that risks will be more easily identified and provided for. Counsel must always keep in mind that personalities in an organization can change, that personal relationships do not stay static and that whether a business relationship can survive often has less to do with personal loyalties than with bottom line profits. In the contemporary world in which we live, business is business.

The environmental risk of litigation

Assuming that there exists such a constructive relationship between

5. time frame: a period during which sth. takes place or is projected to occur
时间范围

6. statistical correlation: a statistical measurement of the relationship between two variables
统计相关性

7. contingency fee: a fee, as for an attorney's services, that is payable only in the event of a successful or satisfactory outcome
胜诉酬金，胜诉后付给律师的酬劳

8. frivolous litigation: the practice of starting or carrying on lawsuits that, due to their lack of legal merit, have little to no chance of being won
无聊诉讼

9. class action: a lawsuit brought by one or more plaintiffs on behalf of a large group of others who have a common interest
共同起诉，集体诉讼

client and counsel that there is a near perfect flow of material information between them, the next source of risk is the litigation environment in which the transaction is taking place.

The American market has a breadth and depth unique in the world. Political and economic stability prevail, creating predictability in economic relations that makes for a generally positive business climate. One important real or imagined source of unpredictability is the extent to which a business is vulnerable to litigation and therefore is exposed to an unanticipated level of litigation-related costs. While the American market has a worldwide reputation for imposing high levels of litigation costs on market participants, there has not been a decisive study showing conclusively that lawsuits are far more prevalent in the United States than elsewhere. One overly simplistic statistical correlation[6] equates the number of lawyers that are in active practice as a percentage of the entire population. In the United States, there are over 912,000 lawyers in a population of about 280 million, roughly three lawyers per thousand people. Our perceptions are based principally on anecdotal evidence, drawn from the popular literature which depicts the American people as a highly litigious group, facilitated in their thirst for easy money by attorneys working on contingency.

It has also been said that litigiousness in the U.S. may also reflect contemporary American culture, which has de-emphasized in commercial relationships moral concepts such as loyalty and honor. Consequently, litigation in the United States is less frequently about right or wrong, and more likely to be concerned about re-rationalizing the risks of business relationships that have proven to be unprofitable for one or both partners. Litigation in America, in short, has become merely another cost of doing business.

Of all the unique characteristics of American legal culture, litigation apparently driven by contingency fee[7] arrangements is particularly disturbing to foreign lawyers. Attorneys working with the expectation of obtaining an award of damages at the end of the day are frequently perceived of as being more likely to initiate frivolous litigation[8], increasing litigation risk. There is no question that in certain litigation areas, such as personal injury, products liability and class actions[9], contingency arrangements

drive the legal market. In commercial litigation, however, where contract damages are capped[10] and there is no component of pain and suffering, litigators are far more reluctant to work on contingency. It cannot be denied, however, that where the purpose of the litigation is to harass, and the quality of legal work is not a high priority, a party may be able to retain a young and eager lawyer on contingency. For the most part, however, I would say that most contingency-fee-based lawyers are more discriminating than is popularly believed and are more likely to take on a client only when the prospects of victory are significant. Time is, after all, money even to lawyers on contingency who must in each case weigh the prospects of a substantial recovery or settlement against the value of the time needed to achieve it.

On balance, therefore, it is unclear that contingency fee arrangements promote a greater percentage of truly frivolous litigation in the U.S. than elsewhere, although such arrangements may make it more likely that a party with a bona fide[11] cause of action[12] will resort to litigation. For counsel trying to assess the risks of attracting contingency-based litigation the rule of thumb[13] is that the risk of litigation is less where the dispute is complex factually and legally, and where damages are limited, and enhanced in disputes that are predominantly factual, where motion practice[14] and discovery[15] are likely to be minimal and where damages are not capped. In the latter category are disputes relating to most kinds of personal injury and work place discrimination.

What the corporate client often fails to appreciate is the lesson that just because a party may have a weak or non-existent case does not necessarily preclude it from commencing an action. The purpose of this kind of litigation is not necessarily to win on the merits but to create costs that will be so burdensome that a favorable settlement can be extracted. Again, the point is not whether a party is right or wrong but whether the economics of the dispute make it worth the fight.

The second lesson is that litigation is sometimes unavoidable and should therefore be considered a cost of doing business in the United States. Under this approach, the challenge to counsel is how to determine the relative costs and benefits of initiating, defending

10. cap: to set an upper limit on
给……定一个上限

11. bona fide: sincere; made or carried out in good faith
真诚的，做事有信誉的

12. cause of action: a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another part
原告的起诉缘由

13. rule of thumb: a useful principle having wide application but not intended to be strictly accurate or reliable in every situation
经验法则：一种可用于许多情况的有用的原则，但并非时时处处均可靠

14. motion practice:
动议程序

15. discovery: data or documents that a party to a legal action is compelled to disclose to another party either before or during a proceeding
透露：在诉讼前或诉讼过程中，当事人必须透露事实真相或有关文件的内容

16. benchmark: a standard by which sth. can be measured or judged
基准，规范

17. raise one's ugly head: If an unpleasant thing raises its ugly head, it becomes a problem that people have to deal with.
出现（不祥之物）

18. a priori: derived by logic, without observed facts
推理地, 演绎地

or settling litigation. There is no easy way of doing this since the kinds of disputes are potentially innumerable and the range of complexity impossible to gage. Nevertheless, there are some worthwhile approaches. For one thing, counsel can make a cost assessment based on experience with past litigation. For example, if a corporate client has been involved in trade secrets litigation, and is currently considering a transaction involving the licensing of a trade secret, the costs of the past litigation may provide a benchmark[16] for the costs of any similar future litigation.

Still another method of determining potential future costs is to outsource litigation services to local counsel under a fee arrangement that allows the client to budget for litigation costs on a long-term basis. The point of accepting litigation costs as an ordinary cost of doing business is to reduce uncertainty and at the same time retain a higher level of resources to respond to litigation initiated for the sole purpose of extracting favorable settlement terms. Although the client may in the short term possibly be paying local counsel for doing little work, over the long term, such fixed fee arrangements should result in lower and predictable costs when litigation does raise its ugly head[17].

Related to the strategy of allocating litigation costs is determining a priori[18] the circumstances under which the client is prepared to engage in a litigation for the purpose of discouraging other litigation. Indeed, the best way of lowering litigation risk is to be prepared to litigate to the full certain cases that could have substantial value of deterrence. For example, one way of discouraging leaks of confidential information is to sue aggressively individuals who have been found responsible for such leaks. Such litigation is often uneconomical, costing the litigant in absolute terms far more than what it could ever realistically expect to recover in compensatory damages, nevertheless, such actions have a deterrent value that more than makes up for their short-term costs. In the area of products liability, certain manufacturers have cleverly built reputations for litigation toughness that they believe have markedly discouraged litigation over the long run.

(Adapted from oppapers.com)

Exercises

I. Reading Comprehension

1. Multiple Choice: Choose the best answer to each question based on the information you get from the text.

1) What are the similarities between litigation and coming down with the common cold?

A Both of them cause severe damage to those involved.

B Neither of them can be eliminated despite good efforts.

C Both of them are infectious and have a widespread effect.

D Precautionary measures can be taken against both of them.

2) What is a source of substantial attorney-client tension?

A Clients are well ready to face the risks of a transaction.

B Attorneys who often warn of the risks are perceived of as a nuisance.

C Clients want to achieve deals although they know there are some potential risks.

D Attorneys tend to accentuate the positive and de-emphasize the negative in a deal.

3) What kind of transaction presents significant litigation risks?

A Transactions that involve business rivals competing for the same market segment.

B Transactions with important terms left ambiguous due to negligence of both parties.

C Transactions that involve parties with utmost confidence in one another's integrity, thus not making their contract airtight.

D Transactions undertaken between friendly business associates having long and deep friendly relationship.

4) What should a counsel keep in mind when the clients are making a transaction?

A To maximize bottom-line profits at whatever price.

B To develop stable, last-lasting personal relationships.

C To achieve personal loyalties for business associations.

D To maintain a business relationship based on the corporate interests.

5) Which of the following is NOT the reason for America to be regarded as a highly litigious society?

A In America, there are roughly three lawyers per thousand people.

B American corporate culture promotes integrity and righteousness.

C Americans interpret the litigation as the risks of business relationships.

D The popular literature depicts the American people as a highly litigious mercenary group.

6) What is the lesson the corporate client often fails to appreciate?

A What is most important for the client is to defeat the adversary in the litigation.

B What really matters is whether it is economically worthwhile to commence the legal action.

C A favorable settlement is more likely to be achieved between adversaries who abhor conflicts.

D A party should be discouraged from initiating litigation unless it has sufficient evidentiary support.

7) Which of the following statements is NOT true about the methods of determining future litigation costs?

A Referring to the past litigation as the benchmark for future litigation costs.

B Making a cost assessment of future litigation costs based on prior experience.

C Allowing local counsel to take charge of litigation services under a fee arrangement.

D Outsourcing litigation services to local counsel who budgets for litigation costs on a long-term basis.

8) What is the best way of lowering litigation risk?

A To sue aggressively for deterring other litigation.

B To take on a long view of business relationships.

C To achieve a settlement between litigation adversaries.

D To reduce litigation costs by recovering compensatory damages.

2. Essay Questions

1) What are the main suggestions on how to reduce the risks of litigation and the costs of litigation in commercial community?
2) What are the differences in perspective between the litigator and corporate attorney?
3) What role does contingency fee play in the litigation and frivolous litigation?
4) What are worthwhile approaches to determine potential future costs of litigation?

II. Word Derivation

Complete the following sentences with the words given in the brackets. Change the form when necessary.

1. It is shown in a latest report that the United States is falling behind because of a _____ legal and regulatory environment. (burden)
2. We're in such a _____ environment now that people are more afraid of doing the wrong thing or appearing to do the wrong thing. (litigation)
3. Frustrated with unending peace talks and _____ with the recent military uprising, many people in the country are looking for a new path to statehood. (illusion)
4. The ad of four-wheeled vehicle gives viewers a feeling of _____ that no matter

what happens weatherwise, no matter how much it snows or how bad the mudslides are, you can go out in your four-wheel drive. (vulnerable)

5. In such an environment of uncertainty, any policy that emerges is unlikely to be based on a _____ analysis. (passion)
6. Culture was not an _____ to human existence, but almost its deepest meaning. (adorn)
7. The government is criticized to underscore the perils posed by its manipulation of legislative policymaking, and its _____ of deliberation. (emphasize)
8. Disappointingly, the consultancy merely leads the company management to _____ of the market trends. (ambiguous)
9. His works—far from opaque but also far from _____—demand audience involvement to decipher their meanings. (simple)
10. People are helpless to resolve the complex issues that escalate to war, incapable of processing the _____ of war, and bewildered by the magnitude of suffering that war produces. (rational)

III. Paraphrasing

1. Rewriting: Rewrite the underlined part of each sentence in your own words.

1) To limit litigation risk it is therefore critical for the client to perceive counsel as being not merely a tool to get things done, but as an objective and dispassionate advocate for reason and prudence.

To limit litigation risk it is therefore critical for the client to perceive counsel as being not merely a tool to get things done, but as _____

_____.

2) To the extent that the counsel can prevail upon the client to take the long view of its business associations, there is a greater prospect that risks will be more easily identified and provided for.

To the extent that _____

to take the long view of its business associations, there is a greater prospect that

_____.

3) For the most part, however, I would say that most contingency-fee-based lawyers are more discriminating than is popularly believed and are more likely to take on a client only when the prospects of victory are significant.

For the most part, however, I would say that most contingency-fee-based lawyers are

_____

_____.

4) What the corporate client often fails to appreciate is the lesson that just because a party may have a weak or non-existent case does not necessarily preclude it from commencing

an action.

What the corporate client often fails to appreciate is the lesson that _____

_____.

5) The purpose of this kind of litigation is not necessarily to win on the merits but to create costs that will be so burdensome that a favorable settlement can be extracted.

The purpose of this kind of litigation _____

_____.

2. Sentence Transformation: Complete the following sentences based on the structures given.

1) For the lawyer, therefore, evaluating the personality of the client is a significant first step toward evaluating tangible risks.

The lawyer, therefore, _____

_____.

2) Assuming that there exists such a constructive relationship between client and counsel that there is a near perfect flow of material information between them, the next source of risk is the litigation environment in which the transaction is taking place.

Assuming the existence of a near perfect flow of material information between client and counsel _____,

the next source of risk is the litigation environment in which the transaction is taking place.

3) One important real or imagined source of unpredictability is the extent to which a business is vulnerable to litigation and therefore is exposed to an unanticipated level of litigation-related costs.

One important real or imagined source of unpredictability is the degree of a business's

_____

_____.

4) Time is, after all, money even to lawyers on contingency who must in each case weigh the prospects of a substantial recovery or settlement against the value of the time needed to achieve it.

Time is, after all, money even to lawyers on contingency because they must weigh whether _____

_____.

5) Such litigation is often uneconomical, costing the litigant in absolute terms far more than what it could ever realistically expect to recover in compensatory damages, nevertheless, such actions have a deterrent value that more than makes up for their short-term costs.

The reason why such litigation is often uneconomical is that _____

_____,

nevertheless, as a deterrent _____

_____.

IV. Translation

1. Sentence Translation

1) In the worst situation, a lawyer can be perceived of as a gadfly, a Cassandra that can place a damper on the enthusiasm for a deal.
2) In the American system, which adorns the lawyer with the mantle of a gladiator, the attorney is under tremendous pressure to kowtow to the client, which often entails shying away from addressing the weaknesses of a course of action, especially where the outcome, at least in the short term, is expected to be very profitable.
3) Our perceptions are based principally on anecdotal evidence, drawn from the popular literature which depicts the American people as a highly litigious group, facilitated in their thirst for easy money by attorneys working on contingency.
4) For counsel trying to assess the risks of attracting contingency-based litigation the rule of thumb is that the risk of litigation is less where the dispute is complex factually and legally, and where damages are limited, and enhanced in disputes that are predominantly factual, where motion practice and discovery are likely to be minimal and where damages are not capped.
5) Indeed, the best way of lowering litigation risk is to be prepared to litigate to the full certain cases that could have substantial value of deterrence.

2. Passage Translation

无聊诉讼正让我们的社会面临破产。陪审团不断提高诉讼协议中的惩罚性损害赔偿的上限。每一个令人震惊的几十亿美元的赔偿协议都为下一次大的诉讼确立了新的标准，这一切都由美国民众买单。健康保险的费用似乎从来不低，但是诉讼已经提高了健康保险的价格，使其超出了许多人的支付能力。全国各地的雇主们也感到捉襟见肘。我们可以把我们在医药方面所承受的涨价归咎于医疗领域的无端诉讼。医生们不愿涉足高风险的专业，许多本来想进入医疗领域工作的人已经重新考虑并改变了他们的人生目标。一个聪明人能够胜任任何工作，何必非得从事一个经常遭受会使你破产的无聊诉讼的威胁的职业呢？过去我们曾经为美国人支付高昂的处方药费而愤愤不平，直到我们知道了其原因所在——那是因为美国人起诉制药公司，而这种诉讼的费用必须有人买单，那就让爱好诉讼的美国社会来买单。制药企业很快就意识到，只出售以前研发并经过试验的药品对他们更加有利，因为诉讼风险消除了发明新药的动机。如此一来，好的一面是药品的价格将会更加便宜；不好的一面则是我们将只能使用现有的药物。

V. Cloze

All too often, terminated employees retaliate against their former 1) e_____ by bringing frivolous discrimination lawsuits. These lawsuits are judicial blackmail. The risk of a large damage award, the high cost of a defense, and embarrassing publicity surrounding a court 2) t_____ are all incentives for a company to 3) s_____ a frivolous employment discrimination 4) s_____ out of court. This is true even if it knows it has done nothing wrong. Those who file frivolous cases 5) c_____ on the willingness of a company to make a payment to avoid the nuisance of a defense. While it is impossible to entirely 6) s_____ a company from the risk of a frivolous lawsuit, there are strategies a company can use to 7) m_____ the number of frivolous discrimination lawsuits. At a minimum, the company should:

- Have a 8) d_____ employment contract.
- Document termination decisions.
- Treat employees with 9) d_____ upon termination.
- Require a waiver as a 10) c_____ of severance pay.
- Never pay discrimination blackmail.
- Petition to recover legal fees.

VI. Listening

1. Blank-filling: Listen to Part One and complete the following passage with the information you get.

The 1) _____of frivolous lawsuits comes up on the news and even in ordinary conversation. One must understand what it actually means in the context of a lawsuit. A correct understanding of this term leads to a good understanding about what the participants are 2) _____ and complaining about. A frivolous lawsuit lacks both legal and 3) _____ support. It may present arguments lacking both legal support and logical or 4) _____ support. Rather than have just weak evidence, it's a claim that lacks any evidence. Even weak evidence may sound 5) _____ to others. Frivolous lawsuits are rather rare because such claims will usually be quickly 6) _____ of by the court. Several 7) _____ are available to the court and to parties to ensure that a frivolous lawsuit does not go very far. First, attorneys are concerned about their 8) _____. Second, with many lawsuits brought on a 9) _____ fee basis, attorneys are discouraged by frivolous lawsuits which have little chance of success. The attorney's own 10) _____ reduces the number of frivolous lawsuits.

2. Multiple Choice: Listen to Part Two and choose the best answer to each question.

1) Some people use the term "frivolous lawsuit" to refer to a successful lawsuit on a law which they disagree with or do not like. Why is this incorrect?

A Because all persons should enforce laws they like or agree with.

B Because the attorney's perception plays a role in the equal law enforcement.

C Because all persons should enforce laws even if they don't like or agree with them.

D Because a democratic system depends on that all persons challenge the existing laws.

2) What does any other system than democracy result in?

A The downfall of legal system.

B The absence of law enforcers.

C The disagreement over existing laws.

D The absence of law and the willful enforcement of the law.

3) Some people use the term "frivolous lawsuit" to refer to lawsuits which were successful, but they disagree with the outcome. Which of the following sentences is NOT a statement of the reason why this definition is incorrect?

A People lack a good knowledge of the facts.

B Frivolous lawsuits can hardly be successful.

C People are too biased with the outcome of lawsuit.

D People disagree with the law rather than the outcome.

4) What is the last incorrect definition of "frivolous lawsuit"?

A Any suit that leads up to a settlement.

B Any suit in which the plaintiff is successful.

C Any suit in which the defendant is successful.

D Any suit in which the defendant is found guilty.

5) What is the principal purpose of the civil justice system?

A To allow deserving parties to win.

B To help a plaintiff prevail in the court trial.

C To persuade jury by presenting sufficient evidence.

D To allow a neutral forum for parties to resolve a dispute.

VII. Writing

Much is made of the fact that Americans are litigious, or even overlitigious. Write a composition of approximately 300 words on the title "Why Are Americans So Litigious?" to explain the reasons for this.

Text B

The McDonald's Coffee Lawsuit and Now, the Rest of the Story…

Notes:

1. poster child: sb. or sth. that represents a particular quality, idea, etc., often used humorously
模范人物，典型代表（常为幽默用法）

2. take a crack at: to try to do sth.
尝试做某事

3. punch line: the last few words of a joke or humorous story that make it funny or surprising
（笑话或故事中最后几句点题或抛出笑料的）妙语，画龙点睛的结束语

4. Cosmo Kramer: a fictional character on the American television sitcom *Seinfeld*
卡拉马，美国情景喜剧《宋飞正传》中的一个角色

Somehow, somewhere along the way, the McDonald's coffee lawsuit became the poster child[1] for frivolous lawsuits. Who hasn't taken a crack at[2] this lawsuit for the sake of furthering their own cause? Numerous comedians have exploited this case as the punch line[3] to countless jokes.

One of my favorite episodes involves Cosmo Kramer[4] suing Java World after Kramer spills a cup of café latte himself while trying to get a seat at a movie theater. Kramer suffers from minor burns that are easily remedied after a single application of a balm. Kramer asks his favorite attorney, Jackie Chiles, if the fact that he tried to sneak the coffee into the theater is going to be a problem in their lawsuit. Jackie responds, "Yeah, that's going to be a problem. It's gonna be a problem for them. This is a clear violation of your rights as a consumer. It's an infringement on your constitutional rights. It's outrageous, egregious[5] and preposterous[6]." When Kramer asks if this lawsuit has a chance, Jackie responds, "Do we have a chance? You get me one coffee drinker on that jury, you gonna walk outta there a rich man."

It seems that nearly everyone has an opinion about frivolous lawsuits. I recently removed a box containing class handouts sitting on the floor in the middle of an entryway into a classroom and asked the person who put the box there if he minded my moving the box because someone could accidentally get hurt. The person responded by simply snorting as he walked away, "I think everyone who files a frivolous lawsuit should be shot." "Objection, non-responsive[7]," I thought, but you get the point. All too often there does not appear to be much we can do to change people's opinions on this subject. Or is there?

Unfortunately, people often refuse to let the facts alter their points of view. "I have my opinion, and I won't let truth, reality or the facts get in the way." However, if people really knew the true facts about the McDonald's lawsuit, few would have the same opinion (or misconception) that they carry around today. Let's be honest. Most people, attorneys included, know little to nothing about the infamous McDonald's lawsuit other than the last joke they heard about it. A woman spilled some McDonald's coffee on herself, got burned and got millions of dollars. That is about all most of us know about this woman and her legendary lawsuit. And yet many uninformed people have very strong opinions on this case. And now, the rest of the story?

Liebeck v. McDonald's Restaurants

Stella Liebeck, 79 years old, was sitting in the passenger seat when her grandson drove his car through a McDonald's drive-thru window in February 1992. Liebeck ordered coffee that was served in a McDonald's Styrofoam cup. After receiving the order, the grandson pulled his car forward and stopped for his grandmother to add sugar and cream to her coffee. We have probably all heard someone say, "Watch out! That coffee is hot. You could have a lawsuit on your hands."

The rumors of Liebeck spilling her coffee while driving were inaccurate. The car was not moving, and she was not driving. While parked, Liebeck placed the cup between her knees and attempted to remove the plastic lid from the cup. As she attempted to remove the lid, the contents of the cup spilled onto her lap. The coffee was estimated to be somewhere between 180 to 190 degrees. Liebeck was wearing sweatpants that day, which absorbed the scorching coffee, holding it next to her skin. A vascular[8] surgeon diagnosed her as having suffered full thickness burns[9] over her inner thighs, perineum, buttocks, and genital and groin areas. These third degree burns extended through to her subcutaneous[10] fat, muscle or bone. While she was hospitalized for eight days, Liebeck underwent skin grafting, and later debridement[11] treatments. Liebeck was permanently disfigured and disabled for two years as a result of this incident.

5. egregious: conspicuously bad and noticeable
极其严重的

6. preposterous: completely unreasonable or silly
荒唐的，荒谬绝伦的

7. objection, non-responsive:
（法庭术语）反对，与本案无关

8. vascular: relating to the tubes through which liquids flow in the bodies of animals or in plants
（动物）脉管的，（植物）维管的

9. full thickness burn:
全层皮肤烫伤

10. subcutaneous: located, found or placed just beneath the skin
皮下的

11. debridement: the medical removal of a patient's dead, damaged or infected tissue to improve the healing potential of the remaining healthy tissue
（医学）清创术

12. mediator: a person or organization that tries to end a quarrel between disputants
调停者，解决纷争的人或机构

13. punitive damage:
（法律）惩罚性赔偿

Ms. Liebeck, a retired department store clerk, informed McDonald's of her accident and requested the company to pay for her medical expenses totaling approximately $11,000. McDonald's refused. With no other recourse in sight, Ms. Liebeck retained a Houston attorney named Reed Morgan who had filed a similar hot-coffee lawsuit against McDonald's.

Mr. Morgan's prior case against McDonald's involved a Houston woman who suffered third degree burns from McDonald's coffee. In that case, Mr. Morgan deposed Christopher Appleton, a McDonald's quality assurance manager, who testified that he was aware of this risk but had no plans to turn down the heat. McDonald's settled that case for $27,500. Before filing suit, Liebeck requested that McDonald's pay $90,000 for her medical expenses and pain and suffering. McDonald's countered with a generous offer of $800. Ms. Liebeck had never filed a lawsuit before in her life, and she said she never would have filed this lawsuit if McDonald's hadn't dismissed her request for compensation for pain and medical bills with an offer of $800. Ms. Liebeck brought suit against McDonald's alleging that the coffee she purchased was defective because of its excessive heat and inadequate warnings. Punitive damages[13] were also sought based on the allegation that McDonald's acted with conscious indifference for the safety of its customers. As the trial date neared, Liebeck's attorney offered to settle the case on her behalf for $300,000 and reportedly would have settled for half that amount. A mediator[12] recommended a $225,000 settlement on the eve of trial, but McDonald's again refused any attempt to settle.

Evidence at trial was simply damning. It was learned that McDonald's was aware of more than 700 claims brought against it due to people being burned by its coffee. Some of these claims involved third degree burns that were substantially similar to the burns suffered by Liebeck. Moreover, McDonald's had previously spent over $500,000 in settling these prior coffee-burn claims. In spite of the knowledge of these claims and this inherent danger with its coffee, McDonald's refused to change its corporate policy and serve its coffee at a safer temperature. McDonald's own quality assurance manager testified that McDonald's enforced a

policy requirement that all coffee be served at 185 degrees, give or take five degrees. He also admitted that its coffee was not "fit for consumption" because it would cause scalding injuries to the mouth and throat if drunk by the consumer.

Although coffee at various temperatures has the capacity to inflict burns, the problem with McDonald's coffee is the fast rate at which it could cause such serious burns. McDonald's own expert testified that coffee served above 130 degrees could produce third degree burns; therefore, McDonald's argued, it did not matter whether its coffee was served at 180 to 190 degrees. However, this argument has some serious flaws that the plaintiff exploited.

Charles Baxter, Liebeck's expert in thermodynamics[14] as applied to skin burns, testified that liquids can cause full thickness burns to skin in two to three seconds at 190 degrees, in 12 to 15 seconds at 180 degrees, and in 20 seconds at 160 degrees. Obviously, if Liebeck's coffee had been served just a little less scalding, vital seconds could have been added to her response time to allow her to get out of her grandson's car and disrobe to prevent more serious burns from occurring. Unfortunately, she had only about two or three seconds before third degree burns set in, and the instantaneous damage was already done. Plaintiff's warnings expert, Lila Laux, testified that while people know that coffee is hot, they do not know how severe these burns can be and how quickly the burns can set in. An obvious question needs to be asked at this point.

Why did McDonald's make their coffee so hot? If this danger of scalding customers was known and could be easily remedied, then why not simply reduce the temperature of its coffee? That question was answered at trial. McDonald's requires that its coffee be prepared at scalding temperatures, based on the recommendations of coffee consultants and industry groups claiming that hot temperatures are necessary to fully extract the full coffee flavor during the brewing process. McDonald's operations and training manual state that its coffee must be brewed at 195 to 205 degrees and held at 180 to 190 degrees for optimal taste. Keep in mind that water boils at 212 degrees Fahrenheit. Hence, the reason for preparing the coffee at near-boiling temperatures was to optimize

14. thermodynamics: the science that deals with the relationship between heat and other forms of energy
热力学

15. the implied warranty of merchantability: an implied warranty on a product for sale that essentially guarantees through implication that a product will reasonably conform to a buyer's standards and that the product is suitable for sale
商品性能保证

16. the implied warranty of fitness for a particular purpose: It is implied that a buyer relies upon the seller to select the goods to fit a specific request.
商品适销性保证

the taste. Besides, one billion annual McDonald's coffee drinkers cannot all be wrong, can they?

McDonald's knew that its coffee was being served at extremely hot temperatures, but market research suggested that McDonald's customers wanted hot coffee, they wanted it steamy hot, and they expected to get it that way.

McDonald's continued to demonstrate this same corporate indifference. McDonald's human factors engineer, Dr. P. Robert Knaff, testified that the number of hot coffee burns that occur was statistically insignificant when compared to the billion cups of coffee McDonald's sells annually.

At trial, McDonald's argued that Liebeck contributed to her own injuries by placing the coffee cup between her legs and by not removing her clothing promptly after the spill. McDonald's further alleged that the severe nature of the burns suffered by Liebeck was worse than usual because of her older skin making her more vulnerable to more serious injuries. A McDonald's executive testified that McDonald's had chosen not to warn its customers of the possible severe burns its coffee could cause because there are more serious dangers in restaurants.

The jury deliberated after hearing seven days of evidence, testimony and arguments of counsel, finding that McDonald's was liable on the claims of product defect, breach of the implied warranty of merchantability[15], and breach of the implied warranty of fitness for a particular purpose[16]. The jury further determined that Ms. Liebeck's injuries merited an award of $200,000 compensatory damages. However, because the jury found that Ms. Liebeck was 20 percent at fault, that award was reduced proportionately to $160,000. Finally, the jury awarded Ms. Liebeck $2.7 million in punitive damages based on evidence the jury heard that McDonald's daily coffee revenues amounted to approximately $1.34 million.

These exemplary damages represented about two days worth of McDonald's coffee revenues. However, a fact that rarely ever makes headlines (in this case, or in any allegedly fraudulent lawsuit) is that the punitive damages were reduced by the trial

court to $480,000 (three times the compensatory damages) for a total award of $640,000. Judge Robert H. Scott, who presided over this trial, stated in regard to the reduced punitive damages award, "I think that there was evidence and argument about the defendant knowledge that the coffee could cause serious, third degree, full tissue burns. The defendant McDonald's knew that the coffee, at the time it was served, was too hot for human consumption."

With knowing the risk of harm, the evidence and testimony would indicate that McDonald's consciously made no serious effort to warn its consumers by placing just a simple, adequate warning on the lid of the cup in which the coffee was served. This is all evidence of culpable corporate mental state and I conclude that the award of punitive damages is and was appropriate to punish and deter the defendant for their wanton conduct and to send a clear message to this defendant that corrective measures are appropriate. Judge Scott ordered the parties to engage in a post-verdict settlement conference which resulted in a settlement of the case for an undisclosed amount (less than $600,000) which remains confidential.

McDonald's has taken some remedial measures in the aftermath of the Liebeck lawsuit. Many McDonald's drive-thrus now have a sign warning, "coffee, tea and hot chocolate are VERY HOT!" Also, the lids of McDonald's hot beverage cups are now embossed with the words "HOT! HOT! HOT!" It is debatable whether the coffee at McDonald's is served any cooler than the coffee that injured Ms. Liebeck. Some sources indicate that McDonald's current policy is to serve coffee between 175 and 195 degrees Fahrenheit. The industry standard still calls for near boiling temperatures for the best tasting coffee. It appears that the current reaction to coffee lawsuits is to do a better job of warning, but maintain the temperature for better tasting java[17].

What can be learned from this case? First, the McDonald's coffee case is not a frivolous lawsuit, as many people believe. In fact, Ms. Liebeck had a very strong case against a very unsympathetic corporate defendant. An argument can obviously be made that the punitive damages should not have been decreased, especially in light of the purpose of punitive damages. A judgment of $480,000

17. java: (informal) coffee
（非正式）咖啡

certainly would not be the same deterrent as $2.7 million.

Second, our profession can and must do our part to help change the public perception of our legal system. Far too many have the misconception that if any insignificant, trivial misfortune happens to someone, the affected person can manipulate the legal system until he or she finally strikes gold. That simply is not the case. Our legal system has numerous checks and balances and control measures in place that deter and penalize frivolous lawsuits and curb excessive jury verdicts. Our legal system works, and those who degrade and twist our profession by spreading half-truths and distorting reality, sadly align themselves with those who have exploited the ignorance induced fear of others throughout history. It is truly amazing how the truth can change perspectives.

But what if they won't listen to me? Just like Moses at the burning bush[18], we may need a little extra ammunition for the mission ahead. Well, here it is. The next time someone is indulging in the latest pastime of "lawyer-bashing[19]", challenge that person by saying, "I bet you probably think that the McDonald's coffee lawsuit was a frivolous lawsuit, don't you?" After they accept the challenge to your seemingly indefensible position, you can then begin to (politely) dismantle their perception of the poster child, cornerstone and personification of frivolous lawsuits by informing them of the rest of the story behind Liebeck v. McDonald's Restaurants.

By educating people, one on one, about the facts in Liebeck v. McDonald's Restaurants, it is possible to begin dismantling the public's perception of frivolous lawsuits and change the misconceptions about our profession and our legal system.

(Adapted from wordpress.com)

18. Moses at the burning bush: In the Book of Exodus, the burning bush is a miracle performed by God on Mount Horeb to inform Moses of his divine calling.
摩西站在燃烧的灌木前（《圣经》故事）

19. bash: to criticize sb. or sth. very strongly
严厉批评，猛烈抨击

Exercises

I. Speaking

1. Role-play

Situation

At the trial court, the plaintiff's attorney and the defendant's attorney are questioning Christopher Appleton, the quality assurance manager of McDonald's and Chris Tiano, grandson of Stella Liebeck.

Task

The following sample is a written transcript of the plaintiff's attorney questioning the quality assurance manager, whose testimony illustrates McDonald's culpability. Refer to the sample and role play the conversation at the court trial.

Attorney: *So... when somebody buys a cup of coffee and it's sold to them at McDonald's and they go to sit down and drink it in less than five minutes, it's not fit for consumption to drink, if consumption means to drink?*
Manager: *It's perfectly fit to open the top and add cream and sugar and really dilute the product as far as temperature goes and it probably would be very fit for consumption.*
Attorney: *If you don't mind getting burned, it's fit for consumption. My question is, is it fit to be drunk, actually fluid going down your esophagus?*
Manager: *I think I already answered that.*
Attorney: *And the answer is no, it's not, isn't it?*
Manager: *Yes, we answered that.*

Role Cards

Student A: the plaintiff's attorney

1) You question Chris Tiano about how the accident took place.
2) You continue to question Christopher Appleton about the prior cases of coffee burn, illustrating McDonald's callousness and indifference to customer safety.

Student B: Christopher Appleton

1) You respond to the plaintiff's attorney about prior cases of coffee burn and the settlement of these cases.
2) You respond to the defendant's attorney about the reasons why McDonald's coffee is prepared at scalding temperatures.

Student C: the defendant's attorney

1) You question Chris Tiano about what he was doing when the accident took place.
2) You question Christopher Appleton about the reasons why McDonald's coffee is prepared at scalding temperatures.

Student D: Chris Tiano

1) You respond to the plaintiff's attorney about how the accident took place.
2) You respond to the defendant's attorney about what you were doing when the accident took place.

2. Debate

Theory

Constructing the Affirmative Case

- **Determining the Issues**

  Remembering that the issue is the basic element in the support of the proposition, speakers should make their first task to discover what the issues are. To do this, they use the method known as the application of a questionnaire analysis. Since certain issues must be established for any proposition, the questions which suggest these issues are stock, or standard, questions of analysis.

- **Analyzing Policy Propositions Through Stock Issues**

  Typically, five stock issues are used in the analysis of the policy proposition. The first issue aims to analyze the problem and the other four analyze the proposed solution.

  The five stock issues are:

  1) Is there a need for a change from the status quo?
     A. Does a significant problem exist sufficient to warrant a change?
     B. Does the affirmative proposal offer a solution to the problem presented?
  2) Does the affirmative proposal offer a solution to the problem presented?
  3) Is the proposal practical and workable?
  4) Is the proposal the best available solution to the problem?
  5) What are the implications of adopting the proposal?
     A. Does the proposal itself have inherent faults which would create greater problems (disadvantages) than the proposal seeks to alleviate?
     B. Does the proposal have any benefits (advantages)?

- **Explaining the Need, or Problem, Issue**
  1) Do sufficient and compelling problems exist to warrant a change from the status quo?
  2) Why does the problem exist? Does it come from inherent flaws in the status quo?

Applied to a specific proposition, the result of the suggested analysis may appear as follows:

Resolved: That the federal government should adopt a new program for the development of the nation's highways.

1. The present system of state and federal highway development is inadequate, for:
   1) United States highways are substandard for present needs. (Relevant evidence here will include a description of the problems, expert opinion and authoritative documentation.)
   2) Expansion under the present system is not adequate for future needs, for:
      A. Public needs
      B. Private needs
      C. Defense needs
   3) While the need for adequate highways is apparent, the need for the federal government to develop an adequate highway program is the essence of the question under consideration. A main contention of the affirmative is that the present problems can be traced to a lack of federal development or, in short, to problems inherent within the status quo. Those problems are:
      A. Interstate rivalry
      B. Unequal distribution of wealth among the states
      C. Much state road building is planned to satisfy short range political objectives, rather than to carry out long range interstate needs.
2. The present system…

- **Explaining the Issues Relevant to the Solution**

Does the affirmative proposal offer a solution to the problem? The debate speaker must determine to what extent the solution ought to be enlarged and developed in order to form a clear plan of action. Essentially, the importance of the plan depends upon the nature of the problem.

Is the proposal practical and workable? This element of the affirmative case, generally called the workability issue, often becomes the key issue in the debate. The first responsibility of the advocate of change is to offer a solution that is practical. It applies to normal human experience. A proposal may satisfy all the other issues, yet be justifiably rejected on the basis of impracticality.

Is the proposal the best available solution to the problem? While this question usually does not emerge as a key issue in a debate, it is nevertheless vital in the process of analysis upon which the construction of the case depends. It bears directly on two aspects of the debate: the plan of the affirmative and the possible use of a counter plan by the negative.

Within the terms of the proposition, the affirmative faces the problem of tempering the desirability of its plan with practicality and workability. The best plan may not be the one that seems to offer the most advantages, but the one which best balances the advantages and disadvantages.

This question suggests a second matter of concern: There may be a solution to the affirmative need issue that is outside the terms of the proposition for debate. If this is so, the negative may offer the solution as a counter proposal. While the practice of offering counter proposals is somewhat unusual, it is nevertheless a part of debate and ought to be anticipated and prepared for by the affirmative speakers.

What are the implications of adopting the proposal? This question also bears directly on two aspects of the affirmative proposal: the possible disadvantages and the alleged advantages.

Disadvantages: The affirmative must anticipate negative arguments on disadvantages and be prepared that the disadvantages will not occur or balanced by the advantages to be gained.

Advantages: Persuasive appeal is given to enumeration of benefits that actually emerge as concrete results of solving the problems. Furthermore, other benefits may emerge that are not directly related to the need issue. Added benefits constitute a kind of need in and of themselves. A special case may even be constructed out of compelling benefits, called the comparative advantage approach. In this case, the affirmative does not focus on needs or problems at all but simply on a new plan and the compelling advantages which they allege it will result in. In the comparative advantage approach, the benefits must still be sufficient and compelling to warrant a change in the present system.

Practice

Divide the whole class into several teams to debate on the topics given. Each team consists of four students, two of whom act as the affirmative side and the others as the negative side. Then choose one or two teams to demonstrate in front of their classmates.

◆ Value-oriented Proposition

McDonald's coffee case is a frivolous lawsuit.

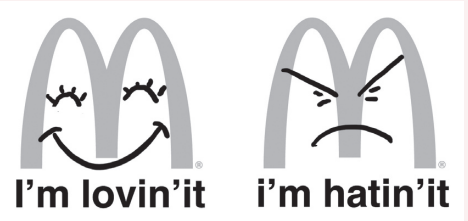
◆ Policy Proposition

Foreign fast-food business should be banned in China.

II. Writing

Read the following news. Write a news commentary in which you should compare the lawsuit over McDonald's Happy Meal toys with the McDonald's coffee lawsuit and state your opinions about whether the lawsuit over McDonald's Happy Meal toys is another example of wasteful frivolous lawsuit.

The Lawsuit over McDonald's Happy Meal Toys



The Washington advocacy group warned McDonald's in June 2010 that it would sue if the company did not stop providing toys with children's meals that have high amounts of sugar, calories, fat and salt. The suit, filed in San Francisco Superior Court, seeks class-action status.

"McDonald's offerings consist mostly of fatty meat, fatty cheese, French fries, white flour and sugar—a narrow combination of foods that promotes weight gain, obesity, diabetes and heart disease—and may lead to a lifetime of poor diets," Michael Jacobson, the group's executive director, said in a news release. The lead plaintiff in the suit—Monica Parham, a mother of two from Sacramento—said the company uses toys as bait to induce her kids to clamor to go to McDonald's.

McDonald's spokeswoman Bridget Coffing said Happy Meals offer quality foods in smaller portions that are appropriate for children. As the debate over Happy Meals and childhood obesity has raged in recent months, McDonald's has consistently pointed out that parents can choose apple slices instead of French fries for their children, and order milk instead of soda. "We are proud of our Happy Meals and intend to vigorously defend our brand, our reputation and our food," said Coffing. "We are confident that parents understand and appreciate that Happy Meals are a fun treat, with quality, right-sized food choices for their children that can fit into a balanced diet."

Topic-related vocabulary

1.	patent infringement	专利侵权
2.	patent troll	专利投机人
3.	verdict	陪审团的裁决
4.	indict	起诉
5.	appeal	上诉
6.	injunction	禁令
7.	testimony	证词
8.	waiver	弃权，弃权证书
9.	acquittal	宣告无罪
10.	parole	假释，有条件释放
11.	jurisdiction	司法权，裁判权
12.	prima facie	初步的，表面的，未经调查的
13.	enforceable	可强制执行的
14.	promulgate	颁布（法律）
15.	covenant	契约，盟约