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At the center of § 402A of the Restatement (Second) of Torts, the fountainhead of modern products liability law, lies a curious puzzle. Comment j to § 402A contains one sentence which says that a product bearing a warning is not defective. Some courts have read this sentence literally to mean that a manufacturer has no duty to design away product hazards - no matter how great, and no matter how simple to do so - if the manufacturer provides a warning of danger. In subordinating the duty of safe design to the duty to warn, this interpretation of comment j undermines modern products liability doctrine by eviscerating its core responsibility: the duty of safe design. But this interpretation is wrong. Comment j in fact applies only to the narrow class of inherently dangerous products - notably, food, alcoholic beverages, tobacco, and pharmaceutical drugs - whose hazards are unavoidable and, hence, cannot be designed away. Comment j simply does not address other, "normal" types of products whose manufacturers thus must take all reasonable steps to design away substantial hazards, an obligation largely independent of the duty to warn.

REHABILITATE THE AGE DISCRIMINATION IN EMPLOYMENT ACT:
RESUCITATE THE "REASONABLE FACTORS OTHER THAN AGE"
DEFENSE AND THE DISPARATE IMPACT THEORY

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Contrary to earlier interpretations of the Age Discrimination in Employment Act, courts are currently allowing an employer to use age-correlated factors, such as seniority and high salary, to make unfavorable employment decisions. Most courts now hold that age-correlated factors are no longer probative at all of dispa-
rate treatment and that the disparate impact theory does not apply to the ADEA. Courts are thus allowing employers to use age-correlated factors to cut older workers from the workforce with impunity.

This article proposes a solution containing two components that, working together, could help deter the unjustified use of age-correlated factors that exclude older workers from the workforce. These components are (1) application of the disparate impact theory to the ADEA and (2) proper interpretation and application of the ADEA’s “reasonable factors other than age” [RFOA] defense. The first component requires courts to apply the disparate impact theory to the ADEA, and thereby force the employer to justify the use of an age-correlated factor that would have a disparate impact on older workers. The employer’s justification would implicate the second component of the solution, the ADEA’s RFOA defense. Whether the case is based on disparate impact or disparate treatment, the employer should be required to bear the burden of persuasion that the use of an age-correlated factor that selects out older workers, such as high salary, is justified as a “reasonable factor other than age.” The Supreme Court has recently granted certiorari to decide whether the disparate impact theory applies to the ADEA; consequently, whether the ADEA can be resurrected as a viable vehicle for protecting older workers will soon be authoritatively determined. These legal issues, at bottom, ask whether we want a society in which older workers are disposable or, rather, valued.

**Facilitating Auditing’s New Early Warning System:**
**Control Disclosure, Auditor Liability, and Safe Harbors**

*Lawrence A. Cunningham*.......................... 1449

This Article considers the interplay between new auditing standards governing audits of internal control over financial reporting and pre-existing legal standards governing auditor liability for audit failure. The interplay produces skewed liability incentives that, if unadjusted, threaten to impair the objective of this new control-audit regime. The regime’s objective is, in part, to provide an early warning to financial statement users when current financial statements are reliable but control weaknesses indicate material risk of a company’s future inability to produce reliable financial statements. To be meaningful, auditor disclosure of material weaknesses in control and their potential effects on financial statements is necessary.

While liability rules under Section 11 of the Securities Act of 1933 will reinforce auditor incentives to provide this disclosure, liability rules under Section 10(b) of the Securities Exchange Act of 1934 will discourage auditors from providing disclosure because doing so likely makes them primary actors subject to liabil-
ity rather than secondary actors not subject to liability. To address this skewed interplay between new auditing standards and pre-existing legal liability rules, this Article suggests developing a safe harbor system to protect from Section 10(b) liability auditor disclosure of forward-looking information necessary to make the early warning system meaningful.

This Article gives a comprehensive account of new auditing standards, noting interpretive questions and showing a system entirely dependent on extensive auditor disclosure. It then explains how the new system expressly nullifies existing case law under Section 11 by substantially expanding required auditor disclosure of internal control conclusions and how it probably nullifies existing case law under Section 10(b), including the Supreme Court’s landmark 1994 case, Central Bank of Denver v. First Interstate Bank of Denver, that generally insulated auditors from Section 10(b) liability. These effects pose limits on the early warning system’s promise and this Article suggests using safe harbors to overcome them. This Article also offers some criticism of the current preoccupation with control effectiveness as the key to reliable financial reporting evident in auditing’s otherwise appealing new early warning system.

NOTES

CONSTRAINING MODERN MERCENARISM

James R. Coleman

Mercenarism’s metamorphosis during the final decades of the twentieth century from the profession of soldiers of fortune into the work of publicly traded private military assistance corporations has enabled modern mercenaries to evade a burgeoning international legal movement toward their eradication. Despite persistent efforts to recognize private military corporations as mercenary companies, the evolution of legal definitions of mercenarism has failed to keep pace with the strong international consensus against mercenaries, thereby causing the letter of international law to diverge from its spirit. Hiding mercenarism behind a corporate veil flouts the spirit of international law and serves to eviscerate the accountability of governments for the actions of the corporate mercenaries they hire. Changing the traditional definition of mercenarism from an actor-oriented conception to one focused on prohibited activities would establish consistency between the letter and spirit of international law and provide for governmental accountability. From a theoretical perspective, modern mercenarism can be understood as one as-
pect of a larger philosophical problem posed by the common intuition that a powerful state is free to disregard international law to whatever extent it can. There are, however, philosophical grounds for recognizing an obligation to obey international law, which is binding on all states even in the absence of enforceable sanctions. Ideally, the definition of mercenarism should be amended to bring the letter of international law in line with its spirit; but, even without such a change, the dictates of the spirit of international law should nevertheless be recognized as binding.

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The Supreme Court recently returned to the Framers’ intent behind the Confrontation Clause and overruled precedent which allowed a court to admit hearsay against a criminal defendant upon a finding that the hearsay was particularly reliable. Now, a court may admit testimonial hearsay against a criminal defendant only if the defendant has an opportunity to cross-examine the declarant. This Note examines how this decision may affect expert witness testimony offered by the prosecution in a criminal trial.

Under the Federal Rules of Evidence, expert witnesses may rely on—and disclose to a jury—inadmissible hearsay that forms the basis of their opinions. Such hearsay, though, must be a type of information reasonably relied upon by similar experts in the field, which leads some courts to consider it particularly trustworthy. This Note highlights that because “particularly trustworthy” is no longer sufficient to satisfy the Confrontation Clause, a risk exists that an expert’s testimony will violate a criminal defendant’s constitutional rights if the expert essentially repeats testimonial hearsay to the jury while adding little of his own expertise or analysis.
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What Lawyers Need To Know
About Real Estate Appraisal Reports
Robert F. Reilly
Any time valuation is an issue in important real estate matters such as taxation, condemnation, estate planning, and commercial litigation, an appraisal report is required. These reports consist of many parts and usually contain a great deal of data and computations. However, they are essentially opinions that can be disputed and challenged. Real estate attorneys must be familiar with the contents of, and methodologies used in, these reports. An illustrative appraisal report table of contents and a table of typical city, neighborhood, and location data are included.

Negotiating Takeover And
Self-Help Rights In Shopping Center
Construction Projects (With Form)
Jacob W. Reby and Marisa L. Byram
Shopping center developers often go bankrupt before completing the project. Anchor and other tenants are usually the biggest casualties in such project failures. By ably predicting and handling the many difficulties that may arise in takeovers, the anchor retailer can prevent disaster in a pre-opening developer default. The authors supply a sample three-party insolvent project takeover agreement and sample takeover language for a site development agreement.

Minimizing Lawyer Liability In Large
Firm Real Estate Practice (With Forms)
Robert A. Creamer
Large firm real estate practice, which often involves representation of developers and the creation of investment vehicles, including limited partnerships, is fraught with lawyer liability risks. Those risks, although varied, tend to fall into a few recognizable categories. As an adjunct to the discussion of these risk categories, the author supplies a sample "I'm not your lawyer" letter and sample scope of representation language.

Dealing With Real Estate Sales
Contracts For Multiple Properties
(With Forms And Checklist)
Earl L. Segal and Michael A. Segal
Using a single contract for a multiple-property, portfolio sale requires drafting, keen analytical skill, and an ability to anticipate problems before they happen. This is especially so if the properties are in different jurisdictions. The authors include sample provisions on purchase price allocation, allocation of fees and expenses, and inability to close on all properties.

The forms and Practice Checklists in each issue of The Practical Real Estate Lawyer are available on 3.5-inch floppy disks. For more information or to order, call 1-800-CLE-NEWS.
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