Paradigm

WINTER 2011

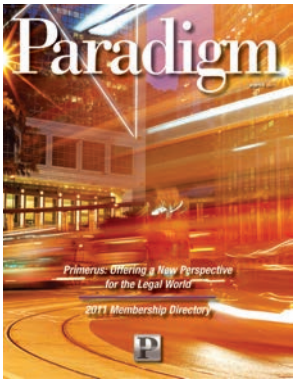
Primerus: Offering a New Perspective for the Legal World

2011 Membership Directory

Every lawyer in Primerus shares a commitment to a set of common values known as the Six Pillars:

Integrity
Excellent Work Product
Reasonable Fees
Continuing Legal Education
Civility
Community Service

For a full description of these values, please visit www.primerus.com.



About our cover

The effects of light and motion in this photo cause the viewer to consider a different perspective from the same scene photographed clearly in focus. In this issue of *Paradigm*, we examine the theme of perspective as it relates to the legal world – from attorneys who need a change of perspective in their practices, to the new perspective Primerus offers to the legal industry.

Primerus
Built on Integrity. Driven by Innovation.

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John C. Buchanan

Gaining a new perspective

Welcome to *The Primerus Paradigm*. We hope this will be a valuable resource for you to stay informed about legal issues and trends affecting companies today. In this issue, you will find articles written by a small sampling of our 2,500 member attorneys, who represent 170 law firms in 120 cities, 44 states and more than 20 countries. In these articles, they share their expertise in areas of the law including bankruptcy, intellectual property, labor and employment and professional liability. They also share some of the ways they are using the Primerus concept to offer the highest quality services to clients.

I formed Primerus in 1992 as an international society of top-rated, independent, boutique law firms. Since then, Primerus has experienced tremendous success as it has worked to restore honor and dignity to the legal profession and to help rebuild the public's trust in lawyers and the judicial system. Pursuing this goal was important then, and it's even more vital today. Given the economic changes of recent years, it has never been more important for companies around the world to develop trusted relationships with lawyers and law firms that offer high quality legal services at reasonable fees.

All of our member attorneys commit to following the Six Pillars: Integrity, Excellent Work Product, Reasonable Fees, Continuing Legal Education, Civility and Community Service. Through our commitment to these values, we have been able to attract and retain some of the world's best law firms. The screening process that each law firm applying for membership must pass is rigorous, thorough and completely objective.

Every once in a while, something or someone comes along that gives us a new perspective. It might be a friend or colleague whose views help us think about an issue in a new way. It might be an incident in our lives that shows us what's really important. Or it might be a client or a case that reminds us why we started practicing law, and why we love it. I think that Primerus offers the legal industry at large just the new perspective it needs.

Primerus, well on its way to becoming the largest and finest provider of legal services in the world through our high quality independent boutique law firms, represents a new way of doing things – your alternative to the world's mega-firms. In fact, Primerus is not a law firm at all, and that offers Primerus members and our clients several distinct advantages. Our members enjoy the freedoms of being independent firms, while also benefiting from the resources that come with being aligned with trusted law firms around the world. It's truly the best of both worlds, without the high overhead and numerous potential conflict of interest restrictions that most of the world's largest law firms face. We're able to grow, nearly without limit, while still keeping a grass roots management model and offering the finest legal services, without the sky-high fees.

Our members enjoy the freedoms of being independent firms, while also benefiting from the resources that come with being aligned with trusted law firms around the world.

Primerus stands apart from law firm networks and alliances. We're a society, a family, of the world's best law firms who are committed to clients above all. I call it "The Primerus 180." While many lawyers are focused on billable hours and income, our lawyers are headed 180 degrees in the other direction, focused on delivering outstanding services to their clients at reasonable rates.

In this issue of *Paradigm*, you can read more about this theme of perspective beginning on page 5. If you would like more information about Primerus, please visit www.primerus.com.

Primerus: Offering a New Perspective for the Legal World

In the *New York Times* best-selling book *The Noticer* by Andy Andrews, a character named Jones has a way of appearing in people's lives just when they need it the most, and giving them a simple gift – perspective.

In the first chapter, the only autobiographical part of the book, Jones appears to a young homeless man living under a pier in small coastal town in Alabama. In real life, that young man was Andrews, homeless after both his parents died when he was 19, his mother from cancer and his father in a car accident. Those circumstances, followed by a string of bad decisions, brought Andrews to the day he met Jones.

In that first meeting, Jones said to Andrews: "I am a noticer. It is my gift. While others may be able to sing or run fast, I notice things that other people overlook… I notice things about situations and people that produce perspective. That's what most folks lack – perspective – a broader view. So I give them that broader view, and it allows them to regroup, take a breath, and begin their lives again." (Page 6, *The Noticer*)

Andrews used that moment as a launching point for the rest of the book, which is fictional. Throughout, Jones passes on that gift of perspective to others, including a couple on the brink of divorce, the owner of a failing business, and young people who are unsure about the future.

Personal Perspective from Primerus

According to Primerus President and Founder John C. Buchanan, the book's theme relates on various levels to Primerus. First, what many attorneys today need is exactly what Jones gave to Andrews –perspective, and more specifically, a change of perspective.

"Many attorneys need to ask themselves, 'Why am I practicing law? Am I so focused on me that all I can think about is the billable hour rather than thinking about the client?'" Buchanan said. "If attorneys are committed to following the Six Pillars every day as Primerus attorneys are, their priorities are going to be in the right place. Their perspective of practicing law is going to be about the bigger picture and the things that really matter, like having integrity, doing work of the highest possible quality, charging reasonable fees, showing professionalism and giving back to the community."

Andrews, who frequently speaks at conferences and conventions for some of the world's largest corporations, said in a recent interview with Primerus that when someone wants to thrive in their business, they must increase their value. "You need to determine in your own life what it is about you that makes you valuable," he said. "Even as attorneys, it's not necessarily about the actual name on the line or the legal degree you have. The public sees one attorney as another. So who do they get when they need an attorney? They get the one they like. The person we are and how we present ourselves has an overwhelming effect on our productivity and profitability."

Buchanan agrees. He said that clients are drawn to attorneys who they view as strategic partners, trusted advisors and good friends. "Around the time Primerus was formed, the American Bar Association (ABA) performed research examining what it takes for a lawyer to be successful," Buchanan said. "The research found that what's important to clients is finding someone they can trust – someone with integrity who puts the best interest of clients first and foremost, and someone they like to be around."

Duncan Manley, one of the founding partners of Primerus member firm Christian & Small in Birmingham, Alabama, said he has been encouraging attorneys for decades to do exactly what Andrews refers to – by focusing on developing deep and personal client relationships. "Client relationships are personal relationships, and if they're not personal, then they're not going to be your clients for very long," Manley said. "I just like people. I like to talk and engage them and find out what they're all about. They know that I care about them and that our relationship is something more than business."

John O'Dorisio, Jr., managing and founding shareholder of Primerus member firm Robinson Waters & O'Dorisio in Denver, Colorado, said the legal world has seen a lot of changes in client

relationships in the 34 years since he joined the profession. "I have always taken the view that we are problem solvers and counselors as well as lawyers. You need a very strong relationship with clients in order to be an effective legal counselor. What we have seen because of advances in technology and the speed in which transactions are done is a loss of the kind of relationships we need to have with clients," he said. "Clients need to have a lawyer who understands their perspective and view of business and life. You're never able to be effective with a client unless you know them."

O'Dorisio said that since his firm joined Primerus two years ago, they have found that the common values among member firms, allows them to refer cases with confidence. "We have found that Primerus members take a much greater personal interest in the clients we refer. It's not the same at all as searching through Martindale-Hubbell," he said. "We have not had one bad experience. Every time, they have just gone the extra mile."

In fact, O'Dorisio's firm has in the last year referred several hundred thousands of dollars of work to fellow Primerus members. "We're so impressed with the quality of Primerus lawyers and that is absolutely critical," he said.

A New Perspective for the Legal World

In 2010, Primerus added the largest number of new firms ever – 49 – bringing the total number of member firms to 170. This surpassed the growth in 2009, which also broke existing records with 46 new firms joining. Much of the growth in 2010 has been outside of the United States. Currently, Primerus has law firms in countries including Canada, China, Cyprus, England, France, Germany, Greece, Hungary, India, Japan, Mexico, Puerto Rico, Romania, Russia, Switzerland, Taiwan, The Netherlands and 44 states in the United States.

Buchanan said growth like this shows that more and more law firms and clients embrace the new perspective Primerus offers to the legal world. "Primerus now has 2,500 member lawyers around the world, the size of many of the world's largest law firms," Buchanan said. "But Primerus represents a fundamentally different perspective than mega-firms, and clients are recognizing the advantages of that perspective."

Unlike large law firms with the same number of attorneys, Primerus member firms all operate independently and are small to medium-sized. That means clients who work with Primerus firms get all the things they like about smaller firms such as personalized partner level service, with all the benefits of global connections to thousands of other quality attorneys with expertise in various practice areas.

Following the economic downturn of the past few years, corporate clients are demanding more and more value – a

critical tenant of the Primerus model. "It has never been more important for clients to develop trusted relationships with law firms that offer significant value through high quality legal services at reasonable fees," he said. "The time of mega-firms business-as-usual sky high legal fees is long gone. Clients want a new way, and that's the perspective that Primerus has had ever since the beginning."

Primerus is much more like a family of lawyers bound together by their shared high principles and common values. Through its four institutes Primerus has created a framework for clients and member attorneys to join together for relationship-building and education, without high-pressure sales pitches.

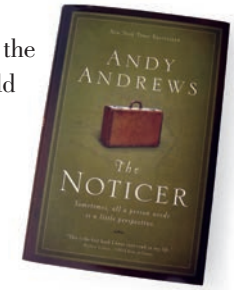
A New Perspective of Law Firm Networks

A third way Primerus represents a new perspective is in relation to law firm networks or alliances. Buchanan doesn't like to use either word to describe Primerus; he would rather call it a society of quality attorneys. Primerus, he said, is much more like a family of lawyers bound together by their shared high principles and common values. Through its four institutes – the Primerus Business Law Institute, the Primerus Consumer Law Institute, the Primerus Defense Institute and the Primerus International Business Law Institute – Primerus has created a framework for clients and member attorneys to join together for relationship-building and education, without high-pressure sales pitches.

According to Manley, who has been a member of Primerus since the original Primerus Defense Institute Convocation in 2005, he has always felt very comfortable inviting clients to Primerus events. "Primerus has a fresh perspective when compared with legal networking organizations. We are not an organization that is out networking to try to get business. We have something that is totally different to offer, and believe me, it resonates with clients," Manley said. "I don't consider us to be a networking organization. I consider us to be a legal family with a commitment to our clients." Manley remembers inviting a client to the first PDI Convocation. "Afterwards he said to me, 'Duncan, I almost declined your invitation because at most of these events I go to, it's a matter of lawyers who are all just interested in getting your business. I don't like that. It's offensive. Your lawyers have not done that at this meeting, and I hope I can come back to future events.'" Manley said. "To me, that's what it's all about."

Moving Forward

In *The Noticer*, Jones says to Andy: "So how does one become a person whom other people want to be around? Let me make a suggestion. Ask yourself this question every day: 'What is it about me that other people would change if they could?'" He adds later, "Look, son, I'm not saying that you should live your life according to the whims of others. I am simply pointing out that if you are to become a person of influence – if you want people to believe the things you believe or buy what you are selling – then others must at least be comfortable around you. A successful life has a great deal to do with perspective. And other people's perspective about you can sometimes be as important as your perspective is about yourself." (Page 15, *The Noticer*).



Buchanan encourages lawyers to ask themselves the same question: What would your clients change about you if they could? "The secret is 'the Primerus 180,'" Buchanan said. "Instead of focusing on you – your income, your status, your billable hours – do a 180 and think about how you can reach out and help clients with their challenges, how you can be your clients' trusted advisor, strategic partner and friend."

Andrews, Andy. *The Noticer*. Thomas Nelson, 2009.

Kevin M. Norchi
Ashley Budd

Kevin M. Norchi is managing partner and Ashley Budd is an attorney affiliated with Cleveland-based Norchi Forbes, LLC, which specializes in the defense of professional liability claims, including those against attorneys, medical providers and other professionals, in addition to the defense of employment and general liability matters. Norchi Forbes is a charter member of the International Society of Primerus Law Firms.

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Professional Liability Concerns for In-House Counsel: The Unauthorized Practice of Law

In-house counsel are often involved in strategic development, multi-jurisdiction transactions or litigation for their employer-client requiring the performance of legal services outside the jurisdiction in which they are licensed to practice law. The question is whether performing such services in jurisdictions in which they are not licensed to practice is the unauthorized practice of law.

Regardless of where the employer-corporation has its principle place of business, most states prohibit in-house counsel from providing legal advice, drafting legal documents or appearing in state courts if they are not admitted to practice law in that state. Many states, however, permit unadmitted in-house counsel to obtain certification or other authorization to practice law and represent their employer. It cannot be assumed that any in-house attorney is licensed to practice law in any particular jurisdiction without taking the necessary steps to confirm licensure. In the best of circumstances, this should be done in advance of the need as part of a disaster preparedness effort.

The practice of law is generally governed by regulations promulgated by the state's highest court. Only a person licensed as a lawyer in a jurisdiction, or otherwise allowed to practice by the state court through measures such as *pro hac vice* admission, is authorized to provide legal advice to a client in that jurisdiction. The unauthorized practice of law restrictions, which are designed to protect clients from non-lawyers, can also act as a barrier preventing in-house counsel from representing their clients in other jurisdictions.

Of course, attorneys may be authorized to provide legal services in other jurisdictions by means other than by passing the bar exam. In litigation, attorneys in good standing in another state are typically provided with *pro hac vice* admission on a particular case in a jurisdiction within a state in which they are not admitted to practice. Some states, however, are now taking steps that will restrict *pro hac vice* admission by such measures as raising application fees, monitoring the number of times a particular attorney seeks pro hac vice admission or limiting the number of *pro hac vice* admissions.

Other states, recognizing the need to lower the barrier for commerce among states that have active cross-border transactions, have undertaken efforts

to provide admission to attorneys in good standing.[1] A number of states have adopted a multi-jurisdictional practice regulation based on Model Rule 5.5, adopted in 2002 by the ABA house delegates, which states:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

There are currently 14 states, referred to as "host states," in which regulations have been adopted to allow lawyers licensed elsewhere in the United States to provide legal services as in-house counsel in the host state, consistent with Model Rule 5.5(d)(1), which states:

(d) A lawyer admitted in another United States jurisdiction, not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
  (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission.

Comment 16 to the rule indicates that it applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates (entities it controls, are controlled by or are under common control with the employer). It goes on to state, "This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. This paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer."

The rationale for this rule is that the in-house lawyer is serving the interests of its employer and does not create an unreasonable risk to that client and others because the employer is "well situated to assess the lawyer's qualifications and the quality of the lawyer's work."

The states that have adopted a rule identical to Model Rule 5.5(d)(1) include Alaska, Arkansas, Indiana, Illinois, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Oregon, Rhode Island, Utah, Vermont and Washington.[2]

Once permitted to provide legal services in the jurisdiction, newly accepted lawyers do not have to take the bar exam in the host state, but they do have to comply with the requirements the new jurisdiction may impose, such as mandatory CLE and annual registration fees. In-house lawyers are also often assumed to be subject to the disciplinary rules and regulations of the host state. In-house lawyers are restricted to providing legal services only to the employer and its affiliated entities, and not to executives, managers or any other constituents of the corporation. The language is specific in that legal advice can be provided only to or on behalf of the corporation.

States such as Arizona, Kentucky and Pennsylvania have similar language but add other requirements and include language to make clear that all out-of-state attorneys practicing in the jurisdiction are subject to attorney discipline in the host state as well as in their home jurisdiction.

Other states impose special registration protocols. Arizona, Connecticut, Delaware, Florida, Kentucky, Louisiana, Minnesota, Missouri, Ohio and Pennsylvania have adopted regulations requiring an in-house lawyer licensed in another jurisdiction to obtain the host state's limited license for out-of-state in-house counsel in order to be eligible to establish an office in the host state. This rule provides limited admission and seeks to address the needs of in-house counsel who want authorization to provide legal services in the host state on a continuous and systematic basis.

In Ohio out-of-state in-house counsel may register for corporate status as per Gov. Bar R. VI, Section 3, and Ohio Rule of Professional Conduct 5.5(d)(1). The registration process involves filing a Certificate of Registration and paying Ohio's registration fee (at this time $350). Attorneys registering for corporate status are required to provide a certificate of admission and good standing from their home jurisdiction. Corporate status allows an attorney who is licensed in another jurisdiction and who is employed full time by a nongovernmental Ohio employer to perform legal services for which *pro hac vice* is not required, but only for his employer. According to Gov. Bar R. VI, Section 3(C), an attorney who fails to register for corporate status "shall be precluded from applying for admission without examination." Limited licensure can be a valuable tool for in-house counsel, and failure to comply can result in a charge of unauthorized practice of law.

Professional liability concerns arising from the unauthorized practice of law for in-house counsel can be triggered when attorneys fail to consider the limit and extent of their own licensure. Consequences of violating unauthorized practice of law restrictions are disciplinary proceedings in the host state or the licensing state, which can include potential criminal prosecution, loss of fees, waiver of the attorney-client privilege, possible contempt of court and disqualification in representing a client.

If in-house counsel is providing legal advice to his client in a jurisdiction in which he or she is not licensed, an argument can be made that the attorney-client privilege does not protect that communication.[3] In *Gucci America, Inc. v. Guess?, Inc.*, an attorney held an active California license but then changed his license to inactive status during the 13 years he was working in-house. During litigation in which the in-house attorney was representing Gucci America, his lack of an active license came to light and he subsequently lost his job. As a result, the judge ruled that communication between the attorney and his purported client was not subject to the attorney-client privilege.[4] Therefore, it is important to maintain proper licensure as an in-house attorney, even in one's home jurisdiction.

Lawyers must examine each state's practice limitations by reviewing the actual law and then identifying the specific requirements that permit multi-jurisdictional practice. As early as possible, the in-house lawyer must register with the bar of jurisdictions where legal work is likely to occur. For example, if an in-house lawyer establishes an office or other presence in a host jurisdiction for the purpose of rendering legal services to the employer, that attorney must register promptly. In some states, such as Arizona, Iowa and Kansas, in-house lawyers must register within 90 days of beginning practice in that state. New Jersey and Wisconsin require attorneys to register within 60 days. In Ohio, the timeframe is even tighter - attorneys are required to register 60 days before starting work as an in-house lawyer. Of course, once admitted with a limited license, annual dues for law license renewals and registrations must be paid promptly.

In summary, professional liability concerns for in-house counsel are heightened when licensed attorneys are practicing and providing legal advice to their employer in other states. Whenever such a situation can be anticipated, lawyers should take the necessary steps to evaluate a state's laws and comply with the state's requirements and regulations. Once attorneys obtain permission to practice in another jurisdiction, they must be vigilant in complying with the ongoing licensure requirements of that jurisdiction.

The increasingly global nature of the practice of law highlights what may be considered an antiquated licensure structure of American attorneys. There are 53 States and U.S. territories, each with its own particular practice standards. A violation in any of the rules controlling licensure can result in the charge of unauthorized practice of law and a consequential attack on the attorney's ability to practice in his home state. P

1 *See, e.g.*, N.J.R. Ct. 127-2.

2 *See* www.abanet.org/cpr/mjp/quick-guide_5.5.pdf.

3 *See, e.g., Gucci America, Inc. v. Guess?, Inc.*, 2010 WL 1416896 (S.D.N.Y. 2010).

4 *See* www.nylj.com/nylawyer/adgifs/decisions/063010cott1.pdf.

Balz Hoesly

Dr. Balz Hoesly is a renowned practitioner in corporate governance and issues of strategic change. A member of several boards of directors, he has expert legal knowledge in corporate succession planning, e-commerce and interactive media. Through his former experience in politics, he is also engaged in public governance and business models for public-private partnerships.

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Zurich: A Destination International Companies Must Not Ignore

While the country of Switzerland may be small, it represents a highly significant market in Europe, as well as in the global economy. Zurich, the largest city in Switzerland, increasingly serves as a hub for internationally operating companies in Europe and routinely ranks as one of the most attractive places in the world to live and do business. These factors, and many others, combine to ensure that Zurich is a city that must not be ignored by international companies.

In the November 2008 study titled "Asian Headquarters in Europe: A Strategy for Switzerland" – a collaborative effort of McKinsey & Company, the Swiss-American Chamber of Commerce and the Swiss foreign trade organization OSEC – Switzerland is shown to be one of the most important economic centers in the world and a popular location for corporate regional headquarters.

According to the study, over the last decade, more than 180 international companies chose Switzerland as the site of headquarters or significant operations. These include IBM, General Motors, Kraft Foods, Phillip Morris, Procter & Gamble, DuPont, Nissan and Google. The study also states that more than 150 U.S. companies have a presence in Switzerland, with a primary concentration around Zurich and Geneva. Hewlett-Packard and Dow Chemical started the trend in the 1980s.

The study goes on to establish that the international expansion of Asian companies may represent the next wave in the trend of foreign companies setting up operations and regional headquarters in Switzerland.

The study points to several reasons for Switzerland's attractiveness, including its central location, stable political environment, competitive tax rate and system, liberal labor market, well-educated workforce, world-class academic institutions and high quality of life.

In fact, Switzerland ranked first in The Global Competitiveness Report for 2010-2011, released in September by the World Economic Forum. Following Switzerland

was Sweden in second place, Singapore in third and the United States in fourth. This ranking is based on the Global Competitiveness Index, developed for the World Economic Forum to include 12 pillars of competitiveness:

- Institutions
- Infrastructure
- Macroeconomic environment
- Health and primary education
- Higher education and training
- Goods market efficiency
- Labor market efficiency
- Financial market development
- Technological readiness
- Market size
- Business sophistication
- Innovation

In addition, Zurich ranked second globally (behind Vienna) in the 2010 Mercer Quality of Living Survey. Geneva followed in third place. To calculate its rankings, Mercer use detailed assessments and evaluations of 10 key categories:

- Political and social environment
- Medical and health considerations
- Public services and transport
- Consumer goods
- Economic environment
- Schools and education
- Recreation
- Housing
- Socio-cultural environment
- Natural environment

Factors such as these are exactly what makes Zurich attractive to corporate managers and their families as a place to live and work.

For a long time already, this global commercial environment in Switzerland dictates that business law firms in Zurich must be equipped to support international companies and help them to thrive. MME Partners embrace this challenge as a boutique law firm of some 20 attorneys focused on commercial and business law as well as on Swiss and international arbitration and litigation. The firm strives to remain highly partner-oriented, so that every client relationship is personally overseen by one of the partners.

All MME attorneys have international experience and international knowledge in their areas of expertise. Each attorney has one or two individually chosen core competencies, offering clients particular expertise in areas such as arbitration, compliance, corporate governance and e-commerce, IT law and more.

In addition, two partners of MME have extensive backgrounds in helping international firms locate in Switzerland. Dr. Luka Muller-Studer served as president of the Zug Chamber of Commerce for several years and currently provides assistance to companies in the technology and industrial sector as well as to industrial and family holdings. I formerly served as CEO of the OSEC, and have often worked in Public Private Partnerships with the Swiss federal administration and the administrations of the Canton and City of Zurich. P

Christian Seyfert

Dr. Christian Seyfert focuses his legal work on U.S., German and international intellectual property law and entertainment law. He has broad legal expertise in film, music, Internet and software law issues. Dr. Seyfert is also a specialist in competition law, enforcing his clients' privacy and publicity rights in and out of court, and representing German and international businesses concerning relevant competition law issues. He completed his legal education in both the U.S. and Germany.

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German Antitrust Actions Against EU Cartels

In the United States, private enforcement of antitrust laws against cartels has always played an important role in establishing a fair and prosperous marketplace. Europe, on the other hand, has relied primarily on the power of antitrust authorities, mainly the European Commission and national antitrust agencies, to do the same job.

The hesitation to commence private lawsuits for damages against cartels in European Union (EU) countries largely derives from the plaintiff's obligation to prove all facts – in particular, the cartel violations – beyond a reasonable doubt without obtaining the court's assistance. This contrasts with the situation in the United States.

Recent Changes

Current legal developments in the EU, particularly in Germany, have significantly changed this frustrating situation to the benefit of the infringed plaintiff:

- The plaintiff no longer needs to prove that a cartel violation was committed by the defendant if a final decision of the European Commission or a German antitrust agency says so. Such a decision is strictly binding on all follow-up damage proceedings before German antitrust courts. The only requirements left to prove are causation, intent or negligence on the side of the defendant and the amount of damages on the side of the plaintiff. The plaintiff may, of course, also use the findings of the European Commission and the German antitrust agencies to help establish these remaining requirements in court.
- In 2005, the German Antitrust Code explicitly excluded the passing-on defense, which was often used in the past. This defense consisted of the argument that the plaintiff allegedly had suffered no damage because the plaintiff had passed on the price overcharge of the price-fixing cartel to the purchaser by raising its own price. Since the reform, German antitrust courts have considered the price overcharge to be equal to the amount of damages incurred by the plaintiff.

Unclaimed Money

The European Commission currently estimates that cartels cause damages of between 25 billion and 69 billion euros every year in Europe. At the same time, the Commission estimates that the

compensation that victims of antitrust infringements are forgoing by non-claiming in the EU annually amounts to between 5.7 billion and 23.3 billion euros.

Example: German Cement Cartel

Recently, the German Antitrust Agency uncovered a hardcore cartel in the German cement sector. Numerous cement producers had divided the German cement market among themselves, fixed prices and made agreements with each other on sales quotas. The German Antitrust Agency therefore imposed a fine totaling 702 million euros on 12 German cement companies.

Because of recent German reforms concerning antitrust damages proceedings, a follow-up antitrust damages proceeding against the German cartel cement companies ensued before the antitrust court in Düsseldorf. The case is still unfolding, but the infringed companies in this proceeding have combined claims of 176 million (EUD).

German-Style Class Actions

Even though German civil proceedings do not allow for class actions as commonly practiced in the U.S., German law does allow damage claims to be bundled with one company that leads a particular lawsuit. Several German-style antitrust class actions have recently been started and successfully fought in court, some financed by U.S. law firms. The number of such antitrust lawsuits in Germany is increasing.

These suits are encouraged by the European Commission, which offers its assistance to plaintiffs in such cases. Considering the high quality of the specialized, internationally recognized German antitrust courts, follow-on actions for damages in Germany against EU cartels will continue to constitute a powerful tool for compensating cartel victims in the future and fostering fair and prosperous competition in Europe. P

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A Storm Is Brewing: China Now the Target of U.S. Trade Sanctions for Keeping Yuan Undervalued

China may soon be forced to pay the high price of its cheap currency. On Sept. 24, 2010, the Ways and Means Committee of the U.S. House of Representatives approved H.R. 2378, the Currency Reform for Fair Trade Act of 2010. This act amends Title VII of the Tariff Act of 1930 "to clarify that fundamental exchange-rate misalignment by any foreign nation is actionable under United States countervailing and antidumping duty laws." The bipartisan measure won easy passage when voted on by the entire House, receiving 80 percent of the House vote. Its prospect in the Senate, however, is less certain.

This bill reflects U.S. legislators' growing frustration with China's protectionist attitude towards its currency. American trade groups contend that the yuan is undervalued by as much as 40 percent against the U.S. dollar, increasing the relative cost of American exports in China and making the price of Chinese imports artificially low in the United States. Many see this disparity as a major component of the U.S.'s large trade deficit with China. Notably, Nobel laureate economist Paul Krugman estimates that China's currency policy reduces the U.S. gross domestic product by an annual rate of 1.4 percent. Conversely, other studies show that allowing the yuan to appreciate to its actual market value would not only enable U.S. manufacturers to be more competitive overseas, but would also create upwards of 500,000 manufacturing jobs in the United States.

Rancor over China's currency policies has been exacerbated in recent months by China's continuing failure to deliver on its recent promise to move to a more flexible exchange-rate system. Since making such a pledge in mid-July 2010 at the Group of 20 summit in Toronto, China has seen its yuan rise less than 2 percent against the U.S. dollar.

The most important aspect of the bill gives the Department of Commerce plenary power to impose trade sanctions on foreign governments that engage in manipulative currency practices. As a

general matter, under the existing U.S. countervailing duty law, remedial tariffs can be imposed on imports benefitting from foreign government subsidies for export, if it is shown that imports benefitting from such subsidies cause or threaten injury to a U.S. industry producing the same or similar products. To date, however, the Commerce Department has declined to investigate and classify foreign government currency practices as a convertible subsidy.

The bill reverses the Commerce Department's longstanding reluctance to find a foreign government culpable of imposing an "export subsidy" if the subsidy in question is not limited exclusively to the circumstances of export (i.e., non-exporters may benefit from a particular currency policy). The bill precludes the Department from imposing this bright-line rule, and instead requires it to consider all the facts in making its export contingency determination. In effect, the Commerce Department may no longer dismiss a claim based on the single fact that a subsidy is available in circumstances in addition to export.

Moreover, the bill provides important guidance to the Commerce Department in assessing whether a "benefit" exists in circumstances involving material currency undervaluation resulting from government intervention. Specifically, the Department is directed to assess "benefit" in terms of the additional currency the exporter receives as a result of the undervaluation, and to use widely accepted International Monetary Fund standards for determining the extent of undervaluation. In all cases, however, the bill, as amended, preserves the Commerce Department's authority – and responsibility – to consider each case on its facts and make a determination as to whether all the necessary legal elements of an export subsidy are fulfilled.

In sum, the Currency Reform for Fair Trade Act aims to make U.S. commercial law and trade policy more consistent with prevailing World Trade Organization (WTO) norms, which tend to be more protectionist and less tolerant of manipulative practices such as currency undervaluation. Consequently, under the act, countervailing duties may be imposed only when the Commerce Department finds, based on an assessment of all the facts, that the WTO criteria for an export subsidy have been satisfied – that is, only if:

- the foreign government's interventions in the currency markets result in a "financial contribution,"
- a "benefit" is thereby conferred, and
- the resulting subsidy is "contingent on export."

As a result of the bill's near-universal appeal to diverse constituencies, support has been strong across the political spectrum. Token opposition during the House hearings has come mainly from those who fear retaliatory sanctions by China on U.S. exports. If ultimately passed by the Senate and signed into law by President Obama, this legislation sends an important message to China that the U.S. will no longer tolerate manipulation of the yuan. However, the legislation would apply to only a relatively small share of the total trade between China and the United States. As mentioned, only products that are subject to countervailing duties will be penalized. Currently, fewer than 60 products from China are subject to anti-dumping or countervailing duties.

Finally, the act does not by itself impose duties in any particular instance, for it would merely authorize the Commerce Department to treat currency manipulation as an illegal export subsidy in countervailing duty investigations. Consequently, there is now growing support for even more aggressive action against Chinese currency manipulation, such as a flat 25 percent tariff across all Chinese imports.

A storm is brewing, and China must now seek shelter. P

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United Kingdom: The Equality Act 2010

Much of the Equality Act 2010 came into force across the United Kingdom on Oct. 1, 2010. This legislation will change, consolidate, innovate and extend the existing discrimination legislation and case law. The act was passed through Parliament in the final days of the outgoing Labour government so that its implementation is now the responsibility of the new coalition government. U.K. law on discrimination is a blend of European law and U.K. national law.

Groups currently protected – on grounds of age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage or civil partnership, pregnancy and maternity – will continue to be so, and sometimes with extended protection, but other groups will become protected for the first time.

This short article seeks to summarize the key changes brought about by this legislation, primarily from an employer point of view. Before we look at the extension of the ambit of the discrimination laws, let's review the alterations made to the protected characteristics.

Areas of no change:

- Age, noting especially that an employer default retirement age of 65 still applies
- Marriage and civil partnership
- Pregnancy and maternity
- Race and nationality
- Religion of belief
- Sexual orientation

Areas with changes:

- **Disability**. Case law had reduced what was perceived to be the scope of protection,[1] but this has been restored. The act now ensures that it protects problems connected to or arising from a disability and not just the disability per se. Therefore, an employee who makes spelling mistakes arising from dyslexia is restored to the scope of protection. Further, it is not now generally permissible to submit, say, health questionnaires to employee candidates prior to the making of a job offer unless, for instance, the object of the question is to make reasonable adjustment to the selection process, or to establish suitability for intrinsic or essential job functions.
- **Gender reassignment**. It is discrimination to treat transsexuals less favorably as a result of time off work when proposing, undertaking or having

undergone gender reassignment. Note that the protection is given to transsexuals and not to transgender people (such as cross-dressers). The requirement for the transsexual to be under medical supervision is removed.

Direct Discrimination

This occurs when one person is less favorably treated than another, directly because of his protected characteristic. There is very little change here. In passing, the reader might note that of all the protected characteristics, the only one in which direct discrimination *can* (not *will*) be justified is that of treatment by virtue of age. Justification requires the employer to show that there is proof of using a proportionate means to achieve a legitimate aim.

Indirect Discrimination

This was previously applied to all protected characteristics save disability and gender reassignment, but now it is extended to cover these two also.

Indirect discrimination continues to be the adoption of a condition, rule, policy or practice that applies to all in a group but that has the consequence of particularly disadvantaging a person who has a particular protected characteristic and of operating to that person's detriment.

It can be justified if it is a "proportionate means of achieving a legitimate aim." That remains unchanged.

Associative Discrimination

The coverage of this type of discrimination has been extended. It previously applied to race, religion, belief and sexual orientation. It is extended to cover age, disability, gender reassignment and sex.

An example is this[2]: June is looking forward to a promised promotion. She tells her boss that her mother has had a stroke. The boss withdraws the promotion because it is felt she will not be able to concentrate on her new job if she has to look after her mother. This is discrimination against June by virtue of association with her mother.

Perceptive Discrimination

The current and extended scope is the same as for associative discrimination. Take this problem: Jim is a 45-year-old lawyer. Many people assume he is in his mid-20s. He looks 25. He is not allowed to attend the Association of Corporate Counsel annual meeting because his crusty managing partner thinks he is too young. Jim has been discriminated against because of a perception of a protected characteristic: age.

Harassment

This is "unwarranted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual." The principle is well settled for sex cases but is now extended to all protected characteristics except civil partnership, marriage, pregnancy or maternity – although much adverse behavior so directed might well be caught under a different protected characteristic, such as sex or sexual orientation. Also, such adverse behaviors might now also be caught by the rules against associative or perceptive discrimination.

Take a disabled employee, Bob, who is constantly being humiliated by his boss over his disability. Bob shares an office with Jim. Jim is offended and humiliated by the boss's behavior. That will be harassment for Jim as well as Bob.

Third-Party Harassment

This principle concerns the behavior of the employer or fellow employees for whom the employer is liable. So far as liability for fellow employee behavior is concerned, the employer has a defense if it can show that it took all reasonable steps to prevent the behavior complained of (by way of effective policy, communication, training, discipline and so on).

In addition, the act extends the scope of employer liability to include the behavior of third parties, such as customers or clients who are not employees. This new extension now covers all protected characteristics save marriage, civil partnership, pregnancy and maternity.

To establish employer liability, it must be shown that:

- The harassment has occurred on at least two previous occasions
- The employer was aware, or made aware, of those occurrences
- The employer failed to take reasonable steps to prevent its recurrence

The defense is not the same as for the defense in respect of fellow employees.

Victimization

This occurs when employees are treated to their detriment because they have (or are suspected to have) made or supported a complaint or grievance within the scope of the act, in respect of any protected characteristic. This protection does not apply when employees have maliciously made or supported an untrue complaint.

General

The act permits positive action to be taken to reduce disproportionate representation of certain groups in the workforce.

Public body employers are given a specific duty to promote equality, but this provision is on hold. Unusually, this part of the act is out for consultation as to methods of implementation, despite the provision having been enacted.

There are plenty of other provisions in the act that were not implemented on Oct. 1, the date for which is still to be announced. These include:

- Dual discrimination
- Diversity reporting by political parties
- Positive action in recruitment and promotion
- Prohibition on age discrimination in services and public functions
- Family property
- Civil partnerships on religious premises
- Specialized issues in schools, taxi services and certain types of premises in Scotland. P

[1] *London Borough of Newham v. Malcolm* (2008) IRLR 700.

[2] We have taken our examples primarily from guidance published by ACAS (Advisory, Conciliation and Arbitration Service), a public body promoting good employment and labor relations, at www.acas.org.uk.

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Social Media and Employment Law: A New Set of Opportunities and Challenges for Employers

The explosion in the use of social media, both in and outside of the workplace, has created exciting new opportunities and dangerous challenges for employers. Many companies have embraced the use of social media such as Facebook, LinkedIn, Twitter and blogs to:

- Host company sites;
- Encourage employees to actively promote the company, enhance business relationships and foster the exchange of useful, non-confidential business information;
- Recruit, research and vet potential new hires; and
- Investigate and terminate employees or gain evidence to support a company's claims or defenses in trade secret and other employment-related matters.

Other companies view the ever-increasing use of social media as more of a liability than a business opportunity. For the past decade or so, employers have struggled to balance the benefits of employee e-mail usage, Internet browsing, instant messaging and texting with the costs of employee downtime and risks to the company. The exponential growth of new forms of social media is viewed by some as a distraction to employees, increasing legal and business risks to the company.

Legal and Business Dangers to Employers

Social media tools provide many ways to connect with friends and family, promote oneself personally and professionally, and to have fun. However, employee use of social media also creates new potential legal liabilities and serious business issues for employers. These include employees' defamation of co-workers or others; trade libel of employers or competitors; postings that embarrass or harm the employee, co-workers or employers; improper disclosure of trade secrets or confidential/proprietary business information; and harassing or discriminatory communications.

Furthermore, a Federal Trade Commission guideline effective December 2009 creates liability for companies whose employees, with or without the company's knowledge, publicly endorse or give testimonials about their employer's services/products on social media sites without disclosing that they work for the company they are "advertising." Employers may similarly be liable under the federal Lanham Act for employees' "false advertising" on such sites.

Employers can also face significant liabilities under state or federal employment law by improperly using information discovered on social media sites to terminate employees or decline to hire them. For example, if an employer learns through Facebook that an employee or applicant has a disability or other protected characteristic such as sexual orientation, pregnancy, or religious affiliation, the employer may face liability for discrimination if it fires or declines to hire the individual soon afterward. Employers may also face liability for taking adverse action against an employee, without a legitimate business reason, based on information about the employee's legal off-duty conduct made public through social media. An example of a state statute addressing this issue is California Labor Code Section 96(k), which bars employers from terminating or disciplining employees for lawful off-duty conduct.

An unfair labor practice charge filed by the National Labor Relations Board this fall in Connecticut calls into question whether employers, including those in non-unionized workplaces, may be held liable for taking adverse action against employees for engaging in protected concerted activity through use of social media. The NRLB complaint, which is set for hearing in late January 2011, alleges that an ambulance service employee was unlawfully discharged under Section 7 of the National Labor Relations Act for her Facebook postings that were highly critical of her supervisor, based on the company's Blogging and Internet Posting Policy that the NLRB contends was overbroad in prohibiting disparaging comments about the company or its supervisors. *In Re American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576. Future developments in this and other cases will help define the line between an employer's protection of its legitimate business interests and employees' Section 7 and other rights.

The challenges for employers and employees presented by social media use are compounded by the blurring of the line between business and personal communications. Employees may unintentionally or carelessly publicize information that should have been saved for a smaller audience. Social network postings can create a permanent record that may haunt individuals in job searches for years to come or cause business or legal problems for themselves or their employers. Even when certain privacy settings are used, there remains some risk of the information becoming public.

Recommended Actions for Employers

With the increasing pervasiveness of social media, we recommend that companies consider carefully the business, legal and human resources issues raised and take steps to maximize business opportunities while minimizing risks.

As an important first step, employers should develop a social media policy, coordinating it with any existing policies on e-mail, Internet and electronic media usage, and codes of business conduct. The policies should include language reserving the company's right to monitor employee use while at work or using company electronic devices *and* while off-duty using the employee's personal electronic devices in a way that affects the employer's business interests.

Publishing employer policies that minimize any employee rights of privacy is important given privacy interests that may be created in electronic communications under common law rights of privacy and federal laws such as the Stored Communications Act, Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act. Having explicit policies covering social media use by employees is particularly important in states that have special privacy laws such as California, where employees have a right of privacy under the California Constitution. Two federal court decisions out of the Ninth Circuit and the district court in New Jersey indicate that employers need to be careful about using underhanded means or their persuasive power as employers to gain access to otherwise "private" social media communications by disgruntled employees.

The focus of an employer's social media policy will vary according to the company's business needs and culture. Issues to consider include the following:

- Requiring disclosure/approval of company-related content under certain circumstances.
- The appropriateness of "friending" of bosses, managers, subordinates and clients, whether of the same sex or opposite sex.
- Determining how much personal use of social media during work time, if any, is acceptable.
- Specifying uses of social media that violate company policy because they may create business problems or legal liability for the company.
- Emphasizing the use of common sense and good judgment as to what employees post or write when using social media, given that seemingly personal postings can have serious business implications.

Last summer, the United States Supreme Court declined to answer the question of whether a government employee had a reasonable expectation of privacy in personal text messages he sent on a work-issued devise because "[a] broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted." (*City of Ontario v. Quon*, 130 S.Ct. 2619, 2630.) Employers are in largely uncharted waters in addressing the challenging issues raised by employees' active use of social media. As the laws and norms in this area evolve in the coming years, employers will need to update and revise their policies and the ways that they strike a balance that works for their particular company's business and legal interests.

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Preemption Creates Conflict between State and Federal Courts in Pennsylvania

In 1893, Congress enacted the first Safety Appliances Act (SAA), and in 1911 it followed with the Boiler Inspection Act (BIA), now known as the Locomotive Inspection Act. These two statutes were enacted with the same congressional purposes and are primarily concerned with protecting railroad "employees and others by requiring the use of safe equipment."[1] The BIA and SAA are part of a broad federal regulatory scheme governing interstate transportation and are now codified in Title 49 of the United States Code.[2]

Nearly a century ago, the United States Supreme Court first established the field preemptive effect of the SAA, stating that "Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject."[3] Likewise, the Supreme Court established field preemption under the BIA in 1926 by unanimously holding that it was intended to occupy the field of "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances."[4]

As the Ninth Circuit Court of Appeals explained, "[t]his broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."[5]

Over the years, the field preemptive scope of the BIA and SAA and, thus, the national uniformity of federal regulation over the railroad industry have been upheld by an "avalanche" of authority from around the country.[6]

In fact, only one state – Pennsylvania – has affirmatively rejected the field preemption argument. The Pennsylvania Supreme Court's decision in *Norfolk & Western Ry. Co. v. Penn. Public Utility Comm'n*[7] abandoned BIA preemption, relying mainly on Congress's enactment of the Federal Railroad Safety Act of 1970 (FRSA). The *Norfolk & Western* court reasoned that, because the FRSA contained an express preemption provision, field preemption under the BIA was essentially abrogated.[8] Although this argument has been rejected several times

throughout the country,[9] Pennsylvania state courts still hold fast to *Norfolk & Western* as controlling precedent on this issue of federal law. Even more interesting, however, is the fact that federal courts within Pennsylvania have expressly rejected the reasoning and rule of *Norfolk and Western*.[10]

Two recent cases, *Atwell v. John Crane, Inc.*[11] and *Harris v. A.W. Chesterton, Inc.*,[12] illustrate the unwillingness of Pennsylvania state courts to acknowledge BIA and SAA field preemption. These cases involve asbestos claims against manufacturers of locomotive and railcar parts. The field preemption defense was raised by way of summary judgment motions, which were denied based on the holding of *Norfolk & Western*. *Atwell* and *Harris* were tried together, with each resulting in a jury verdict in favor of the plaintiffs. The Pennsylvania Superior Court affirmed both judgments, and the Supreme Court denied review. Petitions for writs of certiorari are currently pending in the United States Supreme Court, which recently invited the solicitor general to file a brief in Atwell expressing the view of the United States on the issue.

At the same time that *Atwell* and *Harris* were being tried and appealed in state court, a Pennsylvania federal court granted summary judgment in favor of two defendants on BIA field preemption grounds in *Kurns v. A.W. Chesterton*.[13] The *Kurns* decision was appealed to the United States Court of Appeals for the Third Circuit, which affirmed the trial court's grant of summary judgment and subsequently denied en banc rehearing. The plaintiff in *Kurns* has yet to petition for a writ of certiorari in the Supreme Court. The deadline to do so is Jan. 5, 2011.

BIA and SAA field preemption is a matter of national importance that affects the entire railroad industry. For example, dispositive motions raising the preemption defense are pending in tens of thousands of cases in the asbestos multidistrict litigation[14] (which is, ironically, situated in the Eastern District of Pennsylvania). It is clear from the decisions in *Atwell*, *Harris* and *Kurns* that a direct conflict exists between state and federal courts in Pennsylvania on the issue.

In the coming months, the Supreme Court will have the opportunity to settle this conflict. If certiorari is granted in one or all of the above cases, the result will either uphold the national uniformity of federal regulation that currently exists or open the door to countless (and confusing) possibilities for state-by-state regulation. P

[1] *Urie v. Thompson*, 337 U.S. 163, 182, at n. 20, 190 (1949).
[2] 49 U.S.C. §§ 20301-20306 (1994) (SAA); and 49 U.S.C. §§ 20701-20903 (1994) (BIA).
[3] *Southern Ry. Co. v. R.R. Comm., Indiana*, 236 U.S. 439, 446-47 (1915).
[4] *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926).
[5] *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir.1997) (internal quotes omitted).
[6] *See, Frastaci v. Vapor Corp.*, 158 Cal. App. 4th 1389, 1403 (2007) (stating that its finding of preemption was "consistent with an avalanche of state and federal court decisions"); *see also, In re: West Virginia Asbestos Litigation*, 592 S.E.2d 818, 822 (W.Va. 2003) (holding that "an overwhelming body of case law" weighed in favor of preemption and that any other result was "blocked by an avalanche of adverse authority"), *cert. denied sub nom., Abbott v. A-Best Products Co.*, 549 U.S. 823 (2006).
[7] 413 A.2d 1037 (Pa. 1980).
[8] 413 A.2d at 1043.
[9] *See, e.g., Scheiding v. General Motors Corp.*, 993 P.2d 996 (Cal. 2000), *cert. denied* 531 U.S. 958 (2000); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 655-657 (E.D. Pa. 1982), *aff'd sum.*, 696 F.2d 981 (3d Cir. 1982), *aff'd sum.*, 461 U.S. 912 (1983); *Law v. General Motors Corp.*, 114 F.3d 908, 913 n.4 (9th Cir. 1997); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Forrester v. Am. Dieselelectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 2001).
[10] *Consolidated Rail Corp., supra.*; and *Kurns v. A.W. Chesterton Inc.*, __F.3d__, 2010 WL 3504312 (3d Cir., Sept. 9, 2010).
[11] 986 A.2d 888 (Pa. Super. 2009); *John Crane Inc. v. Atwell*, U.S. Sup. Ct. Case No. 10-272.
[12] No. 3505 EDA 2008 (Pa. Super., March 5, 2010); *Griffin Wheel Company v. Harris*, U.S. Sup. Ct. Case No. 10-520.
[13] __F.3d__, 2010 WL 3504312 (3d Cir., Sept. 9, 2010). In re: Asbestos Products Liability, 2:01-md-0875-ER (E.D. Pa.).
[14] *In re: Asbestos Products Liability*, 2:01-md-0875-ER (E.D. Pa.).

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Five Quick Tips About Preference Lawsuits That In-House Counsel Should Know

Let's say your company has been served with a preference lawsuit or has received a letter from counsel demanding the return of alleged preferential transfers. There are numerous applicable defenses that could greatly lessen, if not eliminate, liability. However, in addition to the standard defenses a company should consider, there are other factors and strategies that could greatly assist you in settling or resolving a preference lawsuit.

1. What is it?

Generally, a preference lawsuit is an attempt to recover payments made by a debtor to a creditor within the 90-day period prior to the debtor's bankruptcy filing (the "preference period"). Specifically, the debtor may recover an interest of the debtor that was transferred to, or for the benefit of, a creditor during the preference period while the debtor was insolvent – particularly if the amount transferred is more than such creditor would receive if the case were under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 547).

2. How do I respond to a demand letter?

Your company may receive a demand letter prior to the filing of suit. A demand letter typically includes a general introduction to the applicable bankruptcy case and itemized amounts that the debtor contends were received by your company during the preference period. The debtor will probably offer to settle for 80 to 90 percent of the alleged amount. While a demand letter or lawsuit should never be ignored, be mindful that it is possible that the debtor may send demand letters to see what kind of settlements can be garnered quickly and easily. This may be true even if the debtor does not intend to file complaints.

This is especially true in smaller cases. The debtor may have a cutoff of $10,000 or some other determined amount, below which they will not file suit. However, they may send a demand letter to see whether a settlement can be secured. Note that 28 U.S.C. §1409(b) requires that an action to recover preferences in an amount less than $11,725 be brought in the defendant's district. It is unlikely that the debtor or trustee will opt to incur the expense of hiring counsel in the foreign jurisdiction for such small

amounts, but they may send a demand letter. Keep this in mind when determining your response.

3. Who are you dealing with?

It may be worthwhile to review the docket of the underlying bankruptcy case to see who is pursuing the preference actions and how they have dealt with preference actions previously in this case. Professionals will most likely need to have court approval for their retention. It may be useful to see how they are being compensated for their work on the preference lawsuits, whether hourly or on a contingency-fee basis. This information may help you determine your litigation strategy, and when and if to make settlement offers.

Further, in many bankruptcy cases, the settlement of preferences requires court approval. Such motions are filed pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and are commonly referred to as "9019 motions." Pull a couple of 9019 motions from the bankruptcy docket and you might be surprised at their content. The motion may show how and for what amounts the debtor is settling other cases based on certain defenses or other circumstances. This information could be useful in determining your settlement strategy.

4. What if I can't pay the demand?

Claiming that you can't pay is called "pleading poverty," and it is a common plea by preference defendants. In making this claim, your company is essentially saying that regardless of the merits of the preference lawsuit, it cannot pay a judgment, even if the debtor is successful.

Be prepared for a request for balance sheets, operating reports, tax returns and other documentation to support a claim that you cannot pay the demanded settlement amount or that any judgment taken would be uncollectible. Be sure to reach some sort of confidentiality understanding with opposing counsel prior to providing the documents. Also, upon resolution of the case, ask that the documents be returned and/or destroyed.

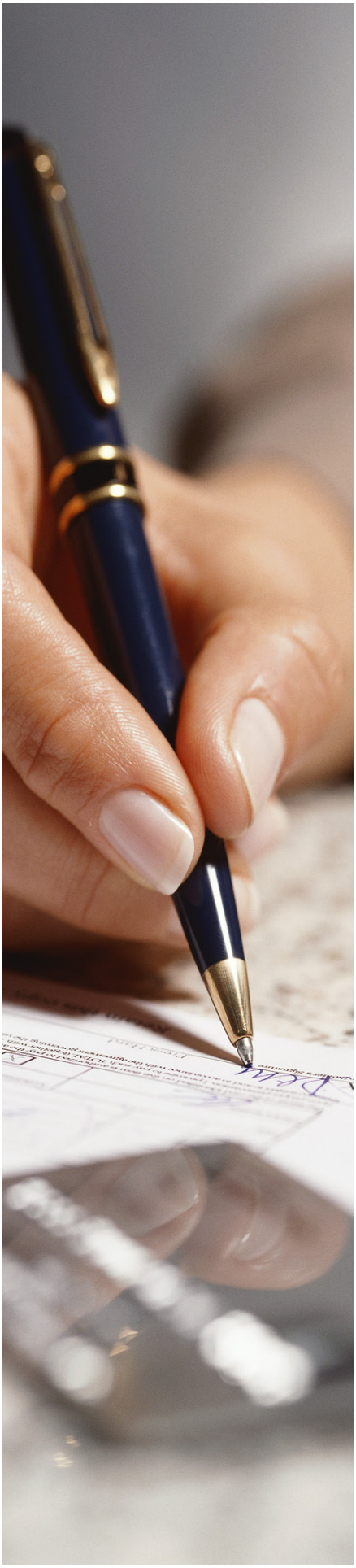
Finally, it is better to plead poverty and couple your plea with a nominal offer than to say you have no money at all. Of course, if the latter is true, your company may be nearing its own bankruptcy proceeding, which may lead to another round of preference lawsuits.

5. What about an "informal exchange" of information?

This can be a useful way to resolve a preference lawsuit quickly, before incurring substantial litigation expense. Even before a suit is filed in response to a demand letter, you may be asked to provide information and documentation on your alleged defenses. Be sure to review your information carefully before you provide it to the plaintiff's counsel. Your goal is to persuade plaintiff's counsel as to the merits of your defenses in order to achieve a lower settlement or dismissal.

What you don't want to do is provide information that could increase your company's liability. For example, sometimes a preference lawsuit fails to include all payments that could have been recovered; your provision of information should strictly correspond to the payments itemized in the complaint or demand letter. You do not want to provide information unnecessarily that may lead the plaintiff to amend its complaint or increase its demand. Yes, this information is discoverable and may need to be disclosed eventually, but initially, your informal exchange of information should respond strictly to the payments made at issue by the plaintiff.

These tips are set forth as general suggestions that may assist you in resolving a preference lawsuit or relevant demand. In addition, there are numerous defenses that may apply to your preference case. Many of these cases are fact specific and will need analysis on a case-by-case basis. The attorneys at Ferry, Joseph & Pearce, P.A. are experienced at both prosecuting preference lawsuits and representing preference defendants in the United States Bankruptcy Court. P



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U.S.-Style Judicial Review for France?

Will France have a U.S.-style Supreme Court?

The *question prioritaire de constitutionnalité* (QPC) refers to a major reform of French constitutional law that significantly broadens the right to contest the constitutionality of a law.

The reform passed in the summer of 2008 and took effect March 1, 2010. As a result, the argument that a law is unconstitutional may now be raised in the course of litigation and the legislation set aside by the French judge.

Until this reform, it was impossible under the French Constitution (that of the Fifth Republic, adopted in 1958) to contest within the French court system the constitutionality of a law, once promulgated.

Constitutionality can now be decided by the Constitutional Council (*Conseil Constitutionnel*), a body organized under the current 1958 French Constitution and initially meant to act as an advisory body to the executive branch. Over time, the Constitutional Council's role has evolved into a more active judicial one.

A bit of background: Constitutional law in France, as in many European countries, does not apply the same theory of checks and balances as does United States law. Although there are the three separate branches of government – executive, judicial and legislative – the balance is not the same. The French system, not unlike the U.K. system, has until now been based on the theory of legislative supremacy (i.e., the law cannot be set aside by the judiciary, the Parliament being an elected body with greater legitimacy than the non-elected judiciary). Thus in France, judicial review of constitutionality has been severely limited and, until this recent reform, was restricted principally to the judicial review of administrative acts: application of the rules of separation of authority of the branches of government, individual decisions of a public body, secondary legislation, etc.

Under the rules applicable prior to the July 2008 constitutional reform, the constitutionality of a law could be contested only in the period between its vote by Parliament and its promulgation – and only if a certain number of members of Parliament (60), the president, prime minister or president of either house of Parliament petitioned the Constitutional Council.

As a result, provided there was sufficient consensus amongst the legislative and executive branches, an unconstitutional law could be passed and no recourse was available within the French judicial system. The only recourse available was before the European Court

of Justice for violation of European law (which to a certain extent provides similar guarantees), and this was available only if judicial recourse in France was first exhausted. In short, it was, where possible, costly and time consuming to challenge a law for violation of basic rights guaranteed by the French Constitution.

In what has been characterized as a "jurisdictional big bang" by law professor Dominique Rousseau, a constitutional challenge may now (since March 1, 2010) be brought directly before the Constitutional Council by any citizen. The former head of the Paris Bar, Yves Repiquet, has termed this a "revolution" and a major step forward for democracy.

In the first landmark ruling of the French Constitutional Council, the new criminal law procedure for temporary pretrial detainment (garde à vue) was declared unconstitutional, requiring a new set of rules to be adopted. There are many more cases (25 at the time of writing) to come.

The Constitutional Council was originally meant to be an advisory body. As stated on the Constitutional Council's website (www.conseil-constitutionnel.fr), "The Constitutional Council is not situated at the summit of a hierarchy of judicial or administrative courts. In that sense it is not a Supreme Court." It is interesting to read the Council's own definition of its role on its website – the English version of which has not been updated as a result of this reform – as restricted to electoral disputes; apportionment of powers between the legislative and regulatory authorities; and review (prior to promulgation, ratification or approval) of law, treaties or international agreements and rules of procedure of Parliament.

This role has now changed significantly to include review of any law, even ones that have been in effect for years. The right is open to all parties to a lawsuit, at any time in the proceeding, provided only that the petition be made in writing (even before jurisdictions where proceedings are oral) and separate from pleadings as to jurisdiction or merits.

The petition (called a *question prioritaire de constitutionnalité*, or QPC) is heard as a matter of priority before dealing with other arguments in the case. If the judge feels that the QPC meets the relevant criteria, the QPC is sent for review to the relevant supreme court (*Cour de Cassation* in civil and criminal matters, Conseil d'Etat in administrative and public law matters), which again reviews before submitting the question to the Constitutional Council.

An organic law, 2009-1523 of Dec. 10, 2009, and implementing decrees dated Feb. 10, 2010, n° 2010-148 and n° 2010-149, provide details of how this new right of review is implemented.

Criteria for the QPC are cumulative and are as follows:

1. The contested provision of law must:
   - Be relevant to the case or be the basis for the claim.
   - Not have been already reviewed by the Constitutional Council (unless there has been a change in circumstances or law).
2. The QPC must not be frivolous.

Once the QPC has been submitted to the relevant supreme court, the lower court suspends the case, except where personal liberty is at stake or in the case of criminal investigations by a juge d'instruction.

The supreme court may refer the matter to the Constitutional Council or reject the QPC if it considers the criteria to be unmet. In at least one instance already (an April 16, 2010, ruling involving an illegal immigrant arrested in Belgium by the French police), the *Cour de Cassation* has referred the matter to the European Court rather than to the Constitutional Council.

If the QPC is not sent to the Constitutional Council by the *Cour de Cassation* or the *Conseil d'Etat*, then the lower court is required to apply the contested rule, unless it is argued that the legislation is contrary to a treaty, a matter generally within the purview of the lower court. However, if the argument is that the French law is contrary to European law, the matter may be submitted to the European Court for interpretation of the European law.

The Constitutional Council is required to rule on the QPC within three months and takes the position that constitutionality includes review of the contested provision of law for conformity with:

- The Declaration of Rights of Man and Citizens of 1789
- The Preamble to the 1946 Constitution
- Fundamental rights recognized by the laws of the French Republic, such as liberty of association or liberty to teach
- The 2004 Environmental Charter

The potential for conflict of jurisdiction and between rulings of the Constitutional Council and the European Court is a matter of concern and at this early stage in the application of this constitutional reform has caused much speculation among professionals. The April 16 ruling of the *Cour de Cassation* is indicative of this tension. In its May 12, 2010, ruling on regulation of gambling, the Constitutional Council indicated that its role is limited to review of constitutionality (in the broad sense indicated above) and excludes review for conformity with international and European treaties.

In a commentary published in *Le Monde* on Aug. 1, 2010, Cécile Prieur stated that the Constitutional Council has been "transformed into a Supreme Court."

The legal community will watch with great interest the implementation of this new rule by the traditional "supreme courts" in their dealings with the Constitutional Council (as they filter petitions made by the lower courts and refer them, or not, to the Constitutional Council), as well as the reaction of the executive and legislative branches of government – who retain the right to request the Constitutional Council to review a law prior to promulgation, thus severely restricting the risk that it will later be ruled unconstitutional.

It is notable that the same 2008 constitutional reform also opened up legislative initiative, until now concentrated in the hands of the executive, providing broader powers to the legislative branch, the effects of which are only gradually becoming apparent.

This 2008 constitutional reform, voted by the presidential majority and a single Socialist vote, may well in time become the main legacy of the Sarkozy administration. P

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Labor Law in the Netherlands: Ready for a Challenge?

When starting a business, hiring employees or conducting business in the Netherlands, foreign entrepreneurs should not underestimate the Dutch labor law obstacles they may encounter. Employees are highly protected in the Netherlands, which makes hiring and firing a challenge. Yet, this challenge can be overcome by knowing the rules.

International Market

The Netherlands is known as the gateway to Europe. The harbor of Rotterdam is one of the world's largest harbors, while Schiphol Airport is among the five largest airports in Europe. A founding member of the European Union, the Netherlands is a trading nation, and Dutch multinationals are important players in the European and international market.

While Dutch companies are important in the international market, the Dutch market itself is also international. In the Dutch stock market, Dutch companies represent a value of 290 billion euros. American companies are the second-largest investors, with 32 billion euros.

The biggest American investor in the Netherlands is the asset management corporation Capital Research and Management, with at least 6.3 billion shares in Dutch companies. Other American top-10 investors in Dutch companies are BlackRock (3.1 billion), Fidelity Fund (2.7 billion) and AllianceBernstein Corporation (2.6 billion).

Legal Advantages

Dutch tax law can create pleasant conditions for foreign companies, making it relatively cost-efficient to locate their holdings in the Netherlands. Apart from its favorable central location in Europe, being part of the European Union also creates a stable legal climate. European directives govern the national laws of the member states to improve uniformity in the common market. This also applies to Dutch labor law, which is highly regulated.

This article provides succinct advice on how to overcome the main challenges of Dutch labor law.

1. Applicable law

Dutch labor law is mandatory with regard to employees who perform their duties in the Netherlands. This means, for example, that an American company that solely employs American nationals but is located in the Netherlands must obey the rules of Dutch labor law. Moreover, the Dutch court is often the competent court in labor law cases.

2. Protective legislation

There are many legal provisions that protect the interests of the employee. These include provisions regarding holidays, minimum wages, working hours and employment of disabled employees. As a consequence,

employers are not entirely free in concluding employment agreements.

3. Definite or indefinite employment agreement

An employment agreement can be entered into for a definite period (fixed term) or for indefinite duration. If no fixed term is agreed upon, the agreement is considered to be for an indefinite period. In addition, there are two situations in which the employment agreement for a definite period of time is legally regarded as an agreement for an indefinite period. This is the case if:

- more than three consecutive employment agreements for a definite period of time are concluded, with no intervals of more than three months between them; *or*
- two or more consecutive employment agreements are concluded that together exceed a period of 36 months, the intervals taken into account.

4. Preventive dismissal assessment

One of the most striking features of Dutch labor law is the preventive dismissal assessment. In short, this means that the termination of an employment agreement by the employer can be effected only after preventive assessment of the reason of dismissal. This assessment is generally made by the public employment service or the court. The Dutch system significantly differs from many other legal systems, such as the American one, where the at-will employment doctrine applies.

5. Termination of the employment agreement

There are several ways to end an employment agreement, depending on the term of the agreement:

- ***Fixed term***. The employment agreement for a fixed term or a fixed project ends on the final date specified in the employment agreement or upon completion of the project. Termination upon notice before the end of the definite period is not possible, unless the parties have agreed otherwise.
- ***Indefinite period***. There are various ways to terminate an employment agreement for an indefinite period:

  – *Termination upon notice.* Both the employer and the employee can terminate the employment agreement by giving notice, taking into account a notice period. The employer needs a permit from the public employment service for this, which will be granted only if the employer has a valid reason.

  – *Termination for urgent cause.* The employment agreement can be terminated with immediate effect by both parties due to an urgent cause, such as theft, fraud or crimes involving a breach of trust. No permit is required, but a termination for urgent cause can be effected only if strict criteria are met.

  – *Termination by court decision.* The employment agreement can also be dissolved by the district court. The employer or employee can request the court to terminate the employment agreement for serious cause. This can consist of an urgent cause that has not been previously invoked or a change in circumstances. In the latter case, the court often awards the employee compensation, which is to be paid by the employer.

  – *Termination by mutual consent.* The last option for terminating an employment agreement is by mutual consent, preferably in writing. Usually the employee only agrees to the termination in exchange for a severance payment.

6. Collective dismissal

Here special rules apply, based on the European directive on collective dismissals. Any employer intending to terminate the employment agreement of at least 20 employees within a period of three months is required to give written notification to the public employment service. The notification must contain the reasons for the intended collective dismissal and the number of employees to be dismissed, subdivided according to function, age and sex. Trade unions and works council (see no. 8) must be consulted regarding the necessity and extent of the collective dismissal.

7. Illness

If an employee becomes unfit to work due to illness, the employer is obliged to continue to pay 70 percent of the salary for a maximum period of two years. Both the employer and employee must do everything in their power to ensure that the employee can resume work.

8. Transfer of business

In the Netherlands, employees are protected if the company they work for is transferred. This legislation is based on the European transfer of undertakings directive. In a transfer, the employees and their employment agreements move to the new company.

9. Employee participation

Employees have a legal right to participate in company affairs in the Netherlands. Employee participation is the process whereby employees or their representatives can influence the decision-making process of the company they work for. There are two types of employee participation: direct and indirect. Direct participation takes place within the company; indirect participation takes place through a trade union:

- ***Trade unions***. These usually represent employees of several companies within a specific branch of industry. An important tool for trade unions is the conclusion of collective agreements. Many aspects of the employment, such as wages, working hours, overtime, holidays, pension schemes and rules on health and safety, are governed by a collective agreement.
- ***Works councils***. Direct participation is often realized through works councils. Entrepreneurs who have 50 or more employees are obliged to establish a council. Works councils can be powerful. According to the law, they have the right to render advice, the right of approval and the right to information, consultation and initiative. It is important for employers to maintain a good relationship with their works councils, since they have the power to influence important company decisions. They even have the power to stop or reverse decisions of the company with respect to mergers or selling the company.

Successful Solutions

Dutch employee protection is far-reaching and can impose severe restrictions on employers. However, the Netherlands is an appealing place to conduct business, particularly with a qualified lawyer steering you through the rules and regulations of Dutch labor law. P

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The Role of Biofuels in the Energy Sector

Biofuels can be broadly defined as solid, liquid or gas fuels consisting of or derived from biomass, or biological raw materials. In a 2003 European Union biofuels directive, biofuels are categorized as liquid or gaseous fuels for transport, produced from biomass. Biofuels are considered a means of reducing greenhouse gas emissions and increasing energy security by providing an alternative to fossil fuels.

Use and Production of Biofuels

Biofuels are used globally, and the biofuel industry is expanding in Europe, Asia and the Americas. The most common use for biofuels is automotive transport. Biofuel can be produced from any carbon source that can be replenished rapidly; many different plants and plant-derived materials are used for biofuel manufacture.

The European Union (EU) continues its reign as the world's largest biodiesel producer, but nearly two-thirds of the region's installed production capacity is currently idle. According to the European Biodiesel Board, the EU produced approximately 9 million metric tons of biodiesel in 2009, while installed capacity measured nearly 22 million tons. Even with this high ratio of unutilized capacity, the EU produced about 65 percent of the world's biodiesel last year.

Overall, the EU produced 16.6 percent more biodiesel in 2009 than 2008, although not all areas of the region contributed to this increase. While Austria, Belgium, Finland, Italy, the Netherlands, Poland and Spain increased production in 2009, production in Germany, Greece and the United Kingdom decreased. Currently, the top three biodiesel producing nations in Europe are Germany, France and Spain.

Demand for biodiesel is largely driven by its suitability as a substitute for fossil fuels. The biofuel industry is still in its formative stages, but global interest is increasing rapidly. Biofuel is considered an important component of the global strategy to increase energy security by providing an alternative to fossil fuels. It is also believed that the efficient production and use of biofuels as substitutes for fossil fuels may reduce greenhouse gas emissions. In addition, the growing use of biofuels carries positive geo-political ramifications, including a reduction in dependency on countries with oil reserves and the introduction of new countries as energy producers.

According to a Reuters report, ExxonMobil has opened a greenhouse facility

to grow and test algae, the next step in its nascent biofuels program. Researchers from ExxonMobil and its partner, Synthetic Genomics Inc. (SGI), will use the facility to test whether large-scale quantities of affordable fuel can be produced from algae. Exxon in 2009 said it would invest $600 million in the program if research milestones are met, $300 million of which will be allocated to SGI. Exxon's biofuel investment represents a tiny portion of the oil company's spending, which is set at $32 billion for 2010.

Political bodies are beginning to note the advantages of biofuel and are moving to incentivize the industry's development. Japan and Brazil have embarked on a joint effort to increase Brazilian ethanol and biodiesel production for the Japanese market. The United States, Canada, India and Thailand all have programs to replace a portion of their gasoline consumption with biofuels, and other countries are considering such initiatives. Several governments are exploring ways to accelerate the development of biofuels with various development schemes, including favorable tax treatments.

Legal Background in the EU

In recognition of biofuels' importance in the energy sector, the EU passed the aforementioned biofuels directive (Directive 2003/30/EC). This Directive sets forth that the European Council in June 2001 agreed on a European Community (EC) strategy for sustainable development consisting of measures that include the development of biofuels.

The directive called for an intermediate target of 2 percent by Dec. 31, 2005, and a target of 5.75 percent by Dec. 31, 2010. The percentages, calculated on the basis of energy content of the fuel, apply to petrol and diesel fuel for transport purposes placed on the markets of member states. Member states are encouraged to take on national "indicative targets" in conformity with the overall target.

According to a Renewable Energy Road Map published in 2007 by the Commission to the Council and the European Parliament (titled "Renewable Energies in the 21st Century: Building a More Sustainable Future"), biofuels are the only available large-scale substitute for petrol and diesel in transport. This document states that the indicative targets set by member states for 2005 were less ambitious, equating to an EU share of 1.4 percent. The share achieved was even lower, at 1 percent.

In addition to cost factors, there are three main reasons for the slow progress:

- Appropriate support systems were not in place in most member states.
- Fuel suppliers have been reluctant to use bioethanol (which accounted for only 20 percent of total biofuel consumption) because they already have an excess of petrol, and the blending of bioethanol with petrol makes this worse.
- The EU regulatory framework for biofuels is underdeveloped, particularly in relation to the need for member states to translate their objectives into action.

The Road Map also states that the minimum target for biofuels for 2020

should – on the basis of conservative assumptions related to the availability of sustainably produced feedstocks, car engine and biofuel production technologies - be fixed at 10 percent of overall consumption of petrol and diesel in transport.

Directive 2009/30/EC of the European Parliament and of the Council, dated April 23, 2009 (which amends Directive 98/70/EC and Council Directive 1999/32/EC and repeals Directive 93/12/EEC) provides incentives to encourage increased production of biofuels worldwide.

Where biofuels are made from raw materials produced within the EC, they should also comply with EC environmental requirements for agriculture, including requirements for the protection of the quality of groundwater and surface water, and with social requirements.

Directive 2009/28/EC of the European Parliament and of the Council, dated April 23, 2009, lays down that "the European Council of March 2007 reaffirmed the Community's commitment to the Community-wide development of energy from renewable sources beyond 2010. It endorsed a mandatory target of a 20% share of energy from renewable sources in overall Community energy consumption by 2020 and a mandatory 10% minimum target to be achieved by all Member States for the share of biofuels in transport petrol and diesel consumption by 2020, to be introduced in a cost-effective way."

Legislation in Hungary

Hungary is also moving into biofuel research and development. Today in Hungary, drivers can refuel with bioethanol (E85) at more than 10 petrol stations. Furthermore, a Fagen/ICM corn ethanol plant is under construction. And Budapest-based Pannonia Ethanol, a company developed by Ethanol Europe, has contracted with a U.S. team to build an American-style corn ethanol plant along the Danube River about 50 miles from Budapest at Dunaföldvár. The plant, with a capacity of 50 million gallons per year, is being built adjacent to a Cargill grain handling facility and is expected to be completed in mid-2012.

In accordance with EC law, Hungarian Government Resolution No. 2233/2004 (IX.22) sets the reference value for the EC targets at 0.4-0.6 percent, calculated on the basis of energy content, of all petrol and diesel for transport purposes placed on the market by Dec. 31, 2005. The target of 2 percent is to be met by Dec. 31, 2010.

In harmony with the EU biofuels directive, Hungarian Government Decree No. 138/2009 (VI.30) contains relevant definitions and regulations. Additional regulations, such as a decree by the Ministry of Agriculture and Rural Development, concern the volume of production of biomass.

Benefits and Limitations

In our opinion, biofuels can provide many environmental benefits, including reduced greenhouse gas emissions, reduced fossil fuel use, increased national energy security, increased rural development and a sustainable fuel supply for the future.

However, biofuels have limitations. The feedstocks for biofuel production must be replaced rapidly, and biofuel production processes must be designed and implemented so as to supply the maximum amount of fuel at the lowest cost, while providing maximum environmental benefits. Broadly speaking, first-generation biofuel production processes cannot supply us with more than a few percent of our energy requirements sustainably.

Due to rising demand for biofuels, farmers worldwide have an increased economic incentive to grow crops for biofuel production instead of food production. Without political intervention, this could lead to reduced food production, increased food prices and inflation. The impact would be greatest on poorer countries or countries that rely on imported food for their subsistence.

All of these factors should be considered when future programs, initiatives and legislation are adopted. We must support sustainable development and protect future generations not only from an environmental perspective, but also from cultural, political and industrial standpoints.

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Inequitable Conduct in Patent Cases

The habit of charging inequitable conduct in almost every major patent case has been characterized by the Court of Appeals for the Federal Circuit as an "absolute plague." It has become standard practice for a patent infringement suit to proceed as follows. The patent owner files a complaint for infringement of the patent and the defendant, in nearly every case, files an answer that he does not infringe the patent, the patent is invalid under one or more provisions of the Patent Act, and the patent is unenforceable due to inequitable conduct during prosecution of the patent. A finding of inequitable conduct results in a powerful remedy – the patent is rendered unenforceable. More often, however, the charge of inequitable conduct is alleged to increase the cost of litigation for the patentee. Part of the reason this occurs is because the Federal Circuit's jurisprudence on inequitable conduct is confusing at best. Recently the court has been taking cases to clarify inequitable conduct and one underlying finding, breach of the duty of disclosure.

Duty of Disclosure

37 C.F.R. § 1.56 requires that a patent applicant fulfill a duty of candor and operate in good faith when dealing with the United States Patent and Trademark Office (PTO). This includes the duty to disclose information that is material to the patentability of any claim in a pending patent application. In general, the applicant must submit to the PTO any prior art, e.g., previous patents and publications, that may affect whether the invention claimed in his patent application is patentable. The duty also includes disclosing information of prior public use or sale of the invention that may constitute a bar to patentability.

The duty of disclosure extends not only to the inventor, but to his patent attorney and "every other person who is substantively involved in the preparation or prosecution of the application" or is associated with someone else that has the duty to disclose. While this seems to be a wide range of people subject to the duty, the Federal Circuit has held that the duty applies only to individuals and not to corporations.

One recent decision held that a person is substantively involved in a patent application if his "involvement relates to the content of the application or decisions related thereto, and that the involvement is not wholly administrative or secretarial in

nature." In that particular case, the court held that the founder and president of a closely held corporation, although not involved in invention nor in the preparation or prosecution of the patent application, nonetheless owed the duty of disclosure because he was involved in "all aspects" of the company, including the company's intellectual property.

Rule 56 does not specify the penalty for failing to comply with the duty of disclosure. Breach of this duty may result in a finding of inequitable conduct. If inequitable conduct is proven, the courts have instituted a penalty that renders the patent unenforceable. In fact, not only is that patent unenforceable, but any patent related to that patent is also held unenforceable. Thus, the penalty for failing to comply with the requirements of Rule 56 can be quite severe.

Inequitable Conduct

How does one prove that inequitable conduct has occurred during prosecution of a patent? Inequitable conduct has two elements. First, an individual associated with prosecution of the application must have made a misrepresentation, failed to disclose material information, or submitted false information to the PTO. Second, that the misrepresentation or failure was done with a specific intent to deceive the PTO. And, given that an issued patent is presumed valid, these elements must both be proven by clear and convincing evidence.

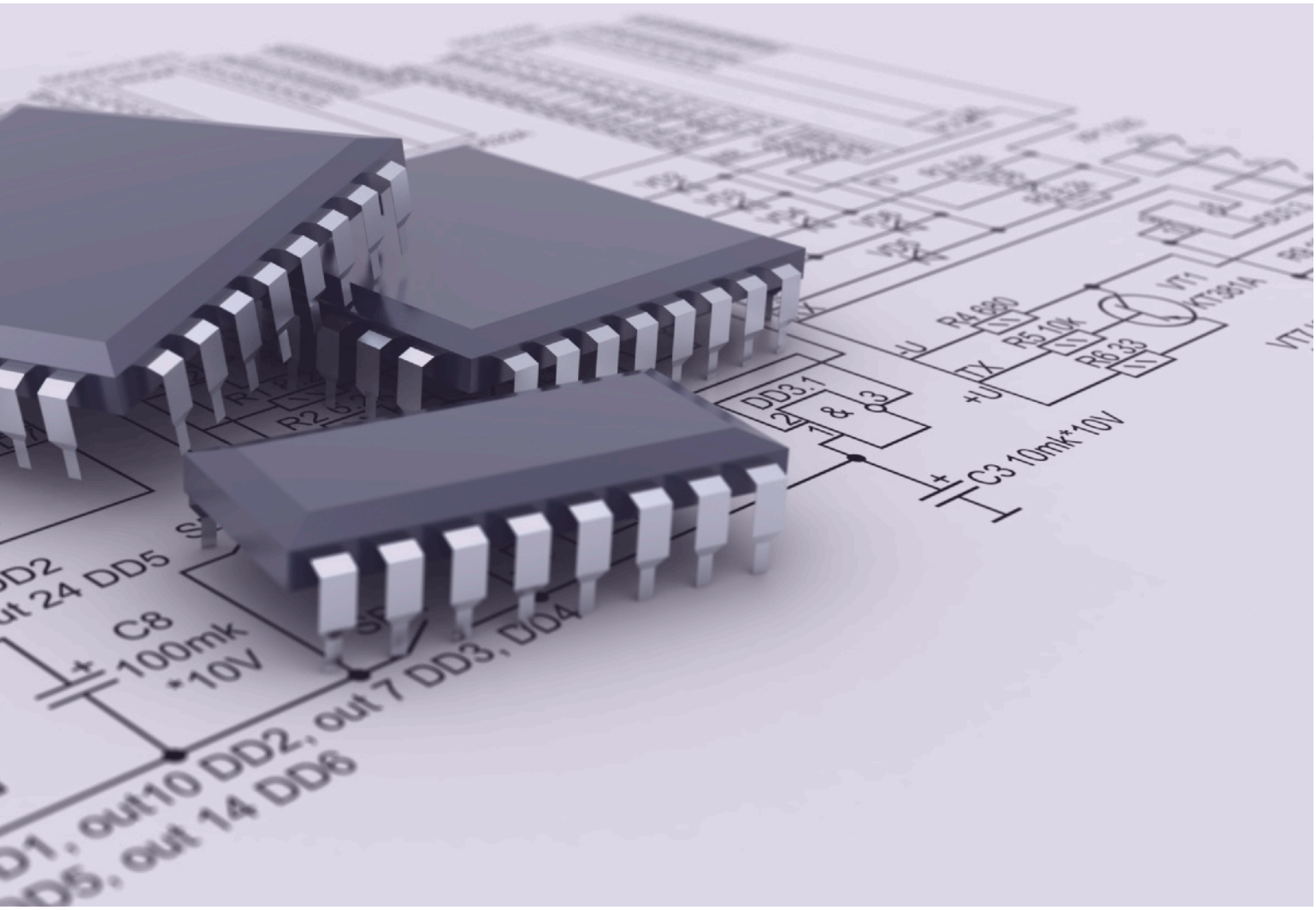
Rule 56 does provide some guidance as to the first element of the defense, the materiality element. The rule states that information is material to patentability if (1) by itself or combined with other information it establishes a prima facie case of unpatentability of any claim; or (2) it refutes or is inconsistent with an argument taken by the applicant regarding patentability of the claim. This is a fairly heavy burden, but not unduly so. Applicants generally err on the side of disclosing too much to the PTO rather than too little. While a patent owner can be accused of having "buried" a particularly material piece of information in a stack of less useful or non-material information, this is a more difficult case to make than that the patent owner withheld some information that was arguably material.

The real meat of the argument over inequitable conduct occurs on the second element of the claim: the intent element. It seems pretty straight forward; did the applicant intend to mislead the patent examiner into granting a patent that he would not otherwise have been entitled to if the examiner had had all of the material information available to the applicant? Either he did or he didn't, right? That's not how the Federal Circuit views it.

Instead, the Federal Circuit has developed a sliding scale test that blends the two elements of inequitable conduct. The more material a piece of information is, the less intent to deceive is required Conversely, the more the evidence shows that the patent owner intended to deceive the PTO, the less material the evidence need to be to prove inequitable conduct.

In fact, the "intent" element has been reduced to something less than gross negligence. The Federal Circuit has indicated that intent can be inferred when (1) highly material information is withheld, (2) the patent applicant knew of the information and knew or should have known of its materiality, and (3) has not provided a credible explanation for its withholding. Thus, intent to deceive the PTO now sounds more akin to a negligence standard of proof that the patent applicant "should have known" that the information was material to the patentability of the claims.

There is a chance, however, that the Federal Circuit's jurisprudence on inequitable conduct will be clarified soon in an en banc opinion. On November 9, 2010, the Federal Circuit heard oral argument in TheraSense v. Becton-Dickinson,



where they will hopefully clarify the law of inequitable conduct.

TheraSense v. Becton-Dickinson

The plaintiffs have not had much luck in the case of TheraSense v. Becton-Dickinson. They sued the defendants for infringement of a number of patents. The district court and the jury found the patents to be invalid for anticipation, obviousness, and violating the written description requirements. The court also held that U.S. Patent No. 5,820,551 was unenforceable due to inequitable conduct based on failure to disclose statements made to the European Patent Office in a revocation proceeding for a European patent. The court held that these statements were directly contradictory to statements made to the PTO in prosecution of the '551 patent. A Federal Circuit panel affirmed.

Judge Linn issued a lengthy dissent where he argued that the district court erred in its factual determinations in this case. The plaintiffs had an adequate explanation for how the statements were not contradictory and why they were not disclosed to the PTO. He also stated that he would find there was no intent to deceive on the part of the plaintiffs because they did not recognize that the statements were material. The trial court simply disagreed with the plaintiffs' interpretation and explanation of the facts.

According to Judge Linn, the Federal Circuit already has five different standards for materiality. And here, the majority seemed to want to add yet another standard that heightens the disclosure requirement for close cases.

For the en banc case, the full Federal Circuit is reviewing a number of questions regarding the inequitable conduct defense: (1) Should the materiality-intent balancing framework be modified or replaced? (2) Should it be tied more directly to fraud or unclean hands? (3) What is the proper standard for materiality? Should it be that a patent would not have issued if the material was not withheld? (4) Should intent ever be properly inferred from the circumstances? (5) Should the balancing inquiry be abandoned? (6) Should the court look to materiality and intent in the context of other agencies or at common law?

Hopefully the resulting opinion from this case will clarify the Federal Circuit's jurisprudence on inequitable conduct and alleviate the "plague" that is the allegation of inequitable conduct in every major patent case. P

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Workin' for the Company: Only the Beautiful Need Apply

Despite the protections of Title VII[1] and the Americans with Disabilities Act (ADA),[2] looks-based discrimination – favoring attractive and image-enhancing employees[4] and shunning the unattractive – remains alive in the workplace and largely beyond the reach of antidiscrimination legislation.[4]

The Overweight and Obese Are Not Wanted

Morbid obesity that is the product of a physiological disorder is a protected impairment under the ADA,[5] but "physical characteristics such as… weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder" are not.[6] Thus, employers uniformly refuse to hire overweight applicants[7] or to promote[8] or even retain overweight employees when they exceed weight guidelines.[9]

That obesity severely diminishes employment opportunities "[i]n a society that all too often confuses 'slim' with 'beautiful' or 'good,"[10] is well-illustrated by *Goodman v. L.A. Weight Loss Centers, Inc.*,[11] in which a company marketing weight reduction plans successfully refused to hire a 350-pound individual as a sales counselor on the ground that it viewed his physical appearance as being "manifestly inconsistent with the product it was trying to sell."[12]

Tattoos and Body Piercings Are Taboo

Employers as a rule disapprove of tattoos and body piercings,[13] and employees have with little success challenged their employers on religious,[14] disparate treatment[15] and First Amendment grounds.[16]

Prohibiting Males from Wearing Earrings and Studs

As antidiscrimination laws are "not meant to prohibit employers from instituting personal grooming codes which have a *de minimis* effect on employment,"[17] employers commonly prohibit males from wearing earrings or ear studs because they project an unprofessional image, while permitting females to do so.[18]

Deformities and Disfigurement

In EEOC v. Extra Space Management, Inc.,[19] an employer that terminated an employee because he was visibly disfigured as a result of sustaining severe burns[20] – although physically capable of performing his job duties – settled the EEOC's ADA suit for $95,000.[21] In general, however, unless a deformity or dis-

figurement is an impairment that limits, or is perceived as limiting, an employee in a major life activity, it is not protected by the ADA.[22]

Charting a Prudent Course

The economic meltdown of the past few years has, to a degree, shifted corporate focus from hiring to preserving market share and adjusting staffing to reflect concerns about profit margins and costs, reducing concern with "beauty" in the workplace. As the economy improves, bringing with it increased hiring, the issues we have reviewed here are certain to resurface.

What, then, can we expect in the immediate future? There is little probability of new legislation – on any level – that will infringe on employers' right to hire or retain individuals whom they deem attractive and to shun the unattractive. On the other hand, expanding concepts of protected disabilities, particularly obesity and disfigurement, which inform hiring decisions, are likely to spark EEOC and state human rights agencies' enforcement efforts.

It is likely, too, that disparate treatment, customer preference and gender bias challenges to hiring decisions and grooming rules will accelerate. This will require the prudent corporation to review its hiring standards, weight guidelines and appearance/grooming policies and to sharpen its hiring and supervisory employees' awareness of the impact of looks-based discrimination under existing laws.

1 42 U.S.C. § 2000e et seq. (2000).

2 42 U.S.C. § 12101 et seq. (2000).

3 See, e.g., *Yanowitz v. L'Oreal USA Inc.*, 36 Cal. 4th 1028 (Cal 2005) (general manager of perfume company, who preferred "fair-skinned blondes," instructed regional manager to fire dark-skinned sales associate; on return visit, finding that associate hadn't been fired, pointed to "young, attractive blonde girl, very sexy" and told manager, "Damn it, get me one that looks like that"); Id. at 1038. Cf. *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, No. 03-2817 SI (N.D.Cal. 2004) (class action settled for $50 million; plaintiffs alleged that A&F's "Look Policy," the company's conception of "natural, classic American style," epitomized by "good-looking" sales force, unlawfully excluded African-Americans and Hispanics from selling jobs).

4 Washington, D.C. [D.C. Code Ann. § 2-140.11 (2001)], and Santa Cruz, California [Santa Cruz Municipal Code 9.83], prohibit discrimination on the basis of physical appearance, as does the City of Madison, Wisconsin, but Madison exempts employer requirements uniformly applied "in a business establishment for a reasonable business purpose." Madison Genl. Ordinance § 39.03(2)(bb). The State of Michigan prohibits discrimination on the basis of height and weight only. Mich. Comp. Laws § 37.2202(1)(a).

5 See, e.g., *Cook v. State of Rhode Island, Dept. of Mental Health, Retardation, and Hospitals*, 10 F.3d 17 (1st Cir. 1993).

6 29 C.F.R. §1 630.2(h) (Appendix) (2000).

7 New York's definition of "disability" is broader than the ADA's. Thus, a rejected applicant's "gross obesity," if the result of a medical condition, is protected under New York's human rights law, though it is not an ADA impairment. *State Division of Human Rights v. Xerox Corp.* 65 N.Y.2d 213 (N.Y. 1985); see also *Hazeldine v. Beverage Media, Ltd.*, 954 F. Supp. 697 (S.D.N.Y. 1997) (obese employee fired; ADA claim dismissed; "obesity" not an ADA disability; summary judgment denied on state and city human rights law claims). In the recent case of Spiegel v. Schulman, 2006 WL 3483922 (E.D.N.Y. 2006), *aff'd in part and vacated and remanded in part*, 604 F. 3d 72 (2d Cir. 2010), the trial court summarily dismissed the claims of a karate instructor terminated because of his weight. The Second Circuit, affirming that obesity itself is not protected under the ADA or New York's human rights law, remanded the case to the district court to determine whether obesity alone may constitute a disability under New York City's recently broadened human rights law, as no New York appellate court had yet decided that question.

8 See *Marks v. National Communications Assoc. Inc.*, 72 F. Supp. 2d 322 (S.D.N.Y. 1999) (270-pound female telemarketer repeatedly turned down for promotion; when she learned that "thin and cute" woman had been promoted, her performance declined and she was terminated; claimed that employer unlawfully applied more stringent weight and attractiveness standards to women than men, but failed to adduce evidence to support her claim).

9 See, e.g., *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997).

10 *Cook*, 10 F.3d at 28.

11 2005 WL 241180 (E.D.Pa. 2005).

12 *Id.* at *3.

13 See, e.g., *Sam's Club Inc. v. Madison Equal Opportunities Comm'n*, 266 Wis.2d 1060, 2003 WL 21707207, at *1, 15 (Wis.Ct.App. 2003) (court reversed local commission's ruling that termination of employee for wearing eyebrow ring violated ordinance prohibiting discrimination on the basis of personal appearance, stating, "Sam's Club attempts to project … a conservative, no frills, no flash image for its business; it does so because … [it] wants to convey to customers that they are getting the best value for their money."

14 See *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (court ruled against Church of Body Modification member who refused employer's proposed accommodation that she cover eyebrow piercing at work); see also *Swartzentruber v. Gunite Corp.*, 99 F.Supp.2d 976 (N.D.Ind. 2000) (Church of the American Knights of the Ku Klux Klan member terminated for refusing to cover wrist-to-elbow Klan tattoo that offended his African-American co-workers unsuccessfully sued for religious discrimination; court held that employer had offered reasonable accommodation by permitting employee to work if he covered tattoo).

15 But see *Hub Folding Box Company, Inc. v. Massachusetts Commission Against Discrimination*, 2001 WL 789248 (Mass.App.Ct. 2001) (female terminated for refusing to cover heart-shaped tattoo on forearm; male not required to cover Navy tattoo). The employer claimed it was concerned that customers would react negatively because tattoos on a woman "symbolized that she was either a prostitute, on drugs, or from a broken home" (Id. at *1). That justification, based on outdated gender stereotypes, was an unlawful predicate for disparately treating women, the court held.

16 "The tattoo is nothing more than 'self-expression,' unlike other forms of expression or conduct which receive first amendment protection." *Stephenson v. Davenport Comm. Sch. Dist.*, 110 F.3d 1303, 1307 n. 4 (8th Cir. 1997); see *Baldetta v. Harborview Medical Center*, 116 F.3d 482 (9th Cir, 1997) (discharge of hospital employee who refused to cover "HIV-Positive" tattoo upheld; displaying tattoo could stress patients, outweighing employee's interest in speaking out on matter of public concern).

17 *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 804 (Sup. Ct. Iowa. 2003).

18 See *Kleinsorge v. Eyeland Corp.*, 2000 WL 124559 (E.D.Pa. 2000) (employer's application of differing grooming codes for males and females did not violate Title VII).

19 No. 8:08-cv-02498-PJM (D.Md.2009).

20 When the district manager saw the employee, the manager exclaimed that the employee "was handicapped, deformed or something and it's clear he can't get the job done." (Complaint, ¶10, found at Docket #1).

21 EEOC Press Release, "Extra Space Management to Pay $95,000 for Disability Bias Against Employee with Cosmetic Disfigurement" (May 28, 2009), http://www.eeoc.gov/eeoc/newsroom/release/archive/5-28-09.html.

22 See *Talanda v. KFC National Management Co.*, 140 F.3d 1090 (7th Cir. 1998) (store manager terminated for hiring person missing several front teeth for counter job and then refusing order to move employee out of the view of customers; retaliation claim dismissed; missing teeth, per se, not ADA-protected impairment).

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Alternatives to the Billable Hour in Business Litigation

For the last half century or so, billing by the hour has been the norm for most law firms engaged in business litigation. This billing method, however, has been subject to increased criticism in recent years. In particular, clients have complained that hourly billing leads to costs that are too high for the value received and too unpredictable. They also complain that hourly billing places a law firm's interest in maximizing fees in conflict with the client's interest in early resolution of disputes. These complaints have led many clients to search for alternative fee arrangements.

Our firm in Indianapolis has been routinely using alternative fee arrangements in the litigation of business cases since the 1980s. As a firm that does predominantly complex plaintiffs' cases and that is accustomed to taking risks, we have found that alternative fee arrangements work well in many kinds of business litigation. It takes more work on the front end in case evaluation and in developing an appropriate fee agreement with the client, but the additional effort can yield significant benefits for both the client and the law firm. In some circumstances, small companies or individuals would not be able to pursue their business claim without an alternative fee arrangement.

There are many varieties of alternative fee arrangement that can work in business cases. Most such arrangements involve a fixed fee, a contingency fee, or some hybrid of the two. The arrangement that we have most frequently used in business cases involves a **Fixed or Capped Fee with a Contingency Bonus**. In this arrangement, the client makes an initial payment or payments up to an agreed limit and additional fees are paid only if the case is successful. We believe it is important that a business client have some "skin in the game" and that we not undertake all of the risk ourselves.

The percentage of the "bonus" paid to the firm will vary depending on the amount of the fixed or capped fee and the amount of risk that the firm has assumed. When a fee is capped at a relatively small amount compared to the investment likely to be required in the case, e.g., $10,000 where a lodestar (i.e., hours times hourly rate) of $300,000 or more is likely, the contingency "bonus" percentage may look very much like the typical contingency fee in a personal injury case, e.g., 33 1/3 percent if settled before trial. As the amount of the fixed or capped fee paid by the client goes up, the percentage of the contingency bonus may go down, e.g.,

if fees are capped at $250,000, the agreed contingency bonus might be 15 percent.

Contingency bonuses are used most often in plaintiff cases but they can also apply in defending. This will typically require the defending firm to agree to a fee that is initially capped, fixed or discounted with the opportunity for a success bonus if a good result is achieved (e.g., win a motion to dismiss or settle below a specified amount). Another way in which this can be structured is for the client to hold back a portion of the hourly fees, for example 20 percent, to be paid with a multiplier (e.g., two times the holdback) if a good result is achieved and if not, the holdback would be permanently withheld.

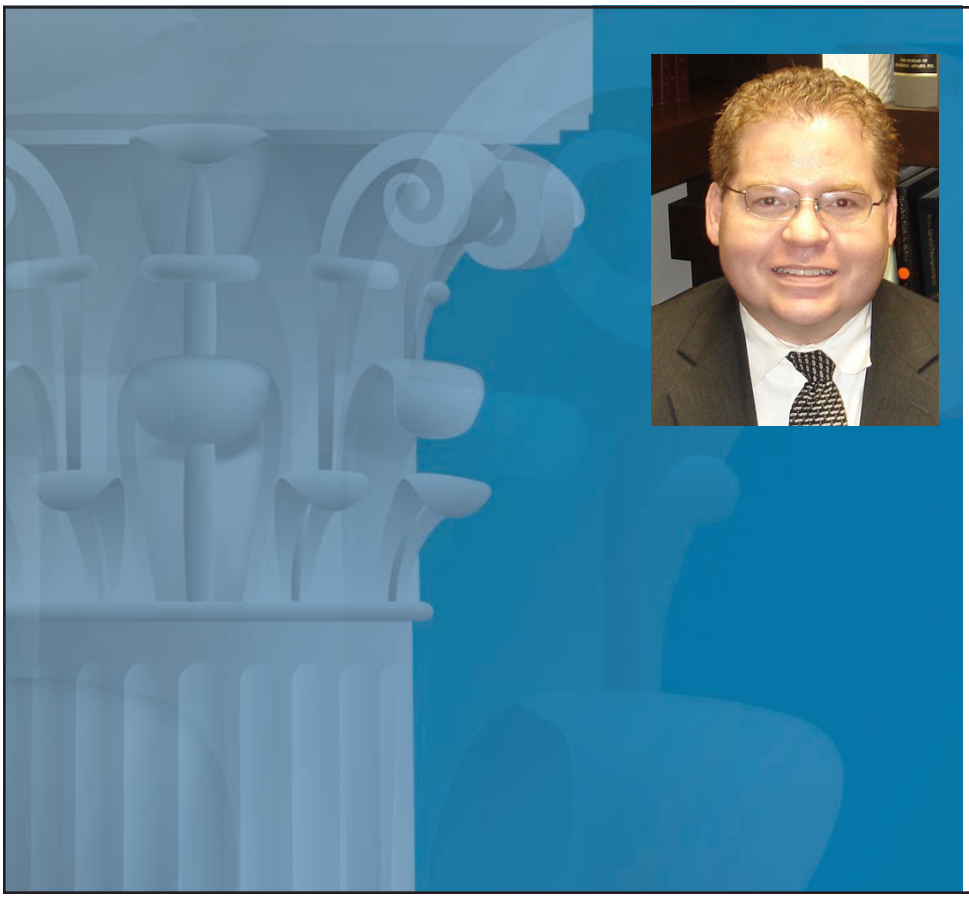
A pure **fixed fee** will provide a viable option only when costs are reasonably predictable. In our experience with business cases, this is most often possible when the fixed fee is associated with discrete phases of the case. Recently, we agreed to appear in a case that was already in litigation and to represent the client through a scheduled mediation for a fixed fee. We could reasonably estimate the work required for this discrete phase. Whenever there are repetitive cases that require similar amounts of work or at least, similar amounts of work during discrete phases, then fixed fees for each phase or for the case as a whole should be considered.

The term "**flat fee**" is sometimes used when a fixed fee is established for a series of cases. If a client has numerous cases of a particular kind, a law firm might agree to represent the client in all such cases for a specific amount per case, or if the number of cases is predictable, for a specific amount to provide representation in all such cases.

Flat fees and fixed fees can be combined with a **collar arrangement** to mitigate unfairness when the unpredictable happens. For example, a flat fee or fixed fee with a 10 percent collar could allow the law firm to be paid 50 percent of its normal hourly rate for additional hours worked when the 10 percent collar is exceeded (i.e., when the lodestar exceeds the fixed fee by 10 percent) and allow the client to reduce its fee proportionately when the lodestar falls short of the fixed amount by more than 10 percent. In this way, the firm and the client can reduce their respective risks.

Which alternative fee arrangement will work best in a particular case depends on a variety of factors including: how much money the client has available to pursue the case, whether the law firm has sufficient experience and information to reliably evaluate the risks in the case, and the amount of risk the client and the law firm are respectively prepared to undertake.

Big firms sometimes talk the talk of alternative fees but don't walk the walk. Like most Primerus firms, our firm is smaller and more agile with lower overhead than the big firms. As a result, we have more flexibility to truly partner with our clients by sharing the risks and ensuring that our interests are aligned through alternative fee arrangements. That doesn't mean the billable hour is dead. But it does mean for many business cases, there are other options that better meet the interests of the client and the law firm. P



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Doing Business in Puerto Rico

Organization of a Business

Investors have a variety of options for optimizing liability shield and tax treatment characteristics in Puerto Rico. Partnerships do not necessarily receive pass-through tax treatment, and not all corporations face double taxation. Instead, partnerships and corporations face taxation both at the partnership/corporate and partner/shareholder levels as the default rule, but both have the option of electing pass-through tax treatment if they meet certain criteria.

In Puerto Rico, partnerships may be organized under the civil code, the commercial code or the Limited Liability Partnership Act. The civil code treats a partnership as a juridical entity separate from the partners. Except for partners in limited liability partnerships and limited partners of limited partnerships and special partnerships, the liability of the individual partners is unlimited and joint with respect to losses, damages, disbursements and obligations.

Puerto Rico's General Corporations Law is based on Delaware's. Corporations must maintain a designated principal office and agent in Puerto Rico for service of process. Nonresidents of Puerto Rico and non-U.S. citizens may own stock and serve as directors and officers of a Puerto Rico corporation. Where permitted by the law of a foreign corporation's state of incorporation, Puerto Rico law allows for merger with a non-Puerto Rico corporation.

All corporations not organized under Puerto Rico laws are considered foreign corporations. Prior to conducting business in Puerto Rico, foreign corporations must register with the Puerto Rico Department of State. Legal process against a foreign corporation may be served on its authorized resident agent, who must be either a natural or a judicial person residing in Puerto Rico, but cannot be a stockholder, officer or director of the corporation.

Limited Liability Companies (LLCs) may engage in any lawful activity but must maintain a registered office and resident agent for service of process in Puerto Rico. The management of an LLC is typically governed by an LLC agreement. LLCs are generally taxed at both the business entity and member levels, but can file for pass-through tax treatment.

Starting a Business

Entities engaged in business in Puerto Rico must fulfill the following require-

ments or registrations before starting operations:

- Obtain a federal Employer Identification Number from the U.S. Internal Revenue Service.
- Register with the Registry of Businesses at the Puerto Rico Treasury Department.
- Register with the Compulsory Business Registry.
- Provide written notice to each municipality in which it will operate and request a provisional license for the quarter in which it commences operations.
- Register with the Bidders Registry if pursuing business with any government agency.
- Secure a license from the Puerto Rico Treasury Department if necessary (required in certain cases).
- Secure a construction permit from the Regulations and Permits Administration (ARPE) if seeking to build a new structure or modify an existing one.
- Secure a use permit from ARPE when the construction is completed. This may require a sanitary license from the Department of Health and a fire department inspection. Additional permits are required in specific circumstances.
- Pay construction taxes to the municipality. The construction tax rate is generally 4 or 5 percent of the cost of the project. Exemptions may apply to nonprofit organizations and others.

Other reporting requirements and taxes may apply after commencement of operations.

Business Incentives

To foster investment in key sectors, Puerto Rico provides attractive tax and other incentives to "eligible businesses." These include businesses established to:

- Manufacture products
- Render services for foreign markets or for other eligible businesses in Puerto Rico
- Engage in activities such as scientific research and development, generation of renewable power, recycling, hydroponics, software development and manufacture of renewable energy equipment

Approved eligible businesses qualify for the following benefits, among others: reduced income tax rates, real and personal property tax exemptions, tax credits, reduced tax rate on royalties or license fees, exemption from municipal license tax and exemption from excise tax and sales and use tax.

Other special incentives have been created to encourage the establishment and retention of local and foreign investment. Examples include financing for certain science and technology projects and workforce training incentives.

Labor and Employment Law

Both federal and local labor and employment laws apply in Puerto Rico.

Unless otherwise agreed, there is a presumption that employer-employee relationships are for an indefinite period, but employers are permitted to hire employees for specific time periods or based on other defined conditions. Such contracts should be in writing.

Payroll taxes, including applicable income, Social Security, local and federal unemployment, and disability taxes are subject to withholding. In addition, all employers must obtain workers' compensation insurance from the State Insurance Fund. If the employer hires non-executive employees who are required or permitted to operate motor vehicles, chauffeur's insurance must be paid instead of the Puerto Rico Disability Benefits Tax.

The federal minimum wage applies to businesses that have annual gross sales of at least $500,000. The Puerto Rico minimum wage applies to businesses excluded from the federal minimum wage; this is the equivalent of 70 percent of the prevailing federal minimum wage.

Employees not covered by the Fair Labor Standards Act are covered by Puerto Rico's wage-and-hour laws and are entitled to double pay for work in excess of regular time. Special rules apply to employees working on Sundays and

certain holidays. Under Puerto Rico law, the word "employee" does not include executives, administrators, professionals or labor union officials or organizers acting as such.

Hourly employees are entitled to paid vacation and sick leave, generally of 1.25 days and 1 day per month, respectively. The employee must work at least 115 hours a month to receive such benefits.

Employers are required to pay an annual bonus during the period of Dec. 1-Dec. 15 to each employee who works at least 700 hours during the 12-month period commencing Oct. 1 of each calendar year. Certain exemptions may be available.

Female employees are generally entitled to an eight-week maternity leave with full pay (including for adoption when the adopted child is 5 years or younger). The employer is required by law to reserve the position. Upon return to work, time is allotted during each full-time workday for breastfeeding.

An employee hired for an indefinite term who is discharged without just cause is entitled to severance pay. Employees hired for a probationary period are not covered, provided their contract is in writing and the probationary period does not exceed three months.

Real Estate

The Puerto Rico Registry of Property is an archive that contains all recorded documents pertaining to the ownership and other rights over real property. Anyone interested in purchasing a property should first obtain a title study stating the status of the property's recordation in the registry. This will include information about any liens or encumbrances the property may have. Except in exceptional cases, anyone who purchases a property pursuant to the registry will be protected from third parties alleging rights encumbering the property.

The sale of real property must be evidenced by a public deed executed before a notary public and recorded in the property registry.

Any person or entity can lease real estate in Puerto Rico via a private contract. The civil code states that any lease agreement may be terminated if the title holder sells the leased property, unless the parties have executed a long-term lease via a public deed or the parties have mutually agreed, pursuant to a public deed, that the lease may be recorded in the property registry.

Zoning

Anyone seeking to develop a real estate project should request a site consultation from the Puerto Rico Planning Board (PRPB). The PRPB uses zoning to determine how and where specific social and economic activities are permitted. Zoning maps show the various zoning districts around the island. The PRPB is authorized to consider changes to the zoning of any given sector or piece of land to accommodate new uses.

Autonomous municipalities have and manage their own land use plan. In these municipalities, zoning changes must be run through the municipal government pursuant to its own rules and procedures.

Permits

Permits are required to construct buildings and establish businesses. These permits can be obtained from the ARPE. Autonomous municipalities are authorized to handle permitting for projects within their territory. They issue the same permits as ARPE but have their own forms and procedures. Some of the most common permits are for environmental assessment, building use, installation of signs or advertisements and demolition.

Foreign Trade Zones

Puerto Rico has the largest noncontiguous Foreign Trade Zone (FTZ) system in the United States. The system offers companies significant financial savings, since raw material, components and packaging can be transported tax-free throughout these zones and items shipped abroad after processing are exempt from U.S. taxes. Puerto Rico offers importers the option of operating under FTZ procedures within all of its municipalities.

The benefits of operating within a FTZ include:

- Paying duties either at the rate applicable to the foreign material in its condition as admitted into a zone or at the emerging product rate
- Deferment of the corresponding duty while in the zone
- Tax advantages for FTZ operators

Environmental Laws

As a territory of the United States, Puerto Rico is subject to both federal and local environmental laws and regulations. The Environmental Protection Agency (EPA) has delegated certain responsibilities to the Puerto Rico Environmental Quality Board (EQB). In many cases EPA and EQB have agreements to coordinate the enforcement and implementation of their regulations. EQB has regulations to minimize environmental harm and to control activities that cause pollution, which it enforces with fines and by suspending, amending or revoking permits or other authorizations.

The Puerto Rico Department of Natural and Environmental Resources creates programs for the use and conservation of the natural resources based on the standards established by the EQB. Other agencies are charged with regulating specific environmental issues, such as hazardous materials transport, land use planning and construction.

Puerto Rico's Environmental Public Policy Act typically requires an endorsement letter from a "lead governmental agency" to the EQB. This is a required precondition for obtaining other permits. P

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Manufacturing in Mexico: A Practical Overview

Why Mexico Now?

Together with the U.S. and Canada, Mexico is part of the North American Free Trade Agreement, or NAFTA, the largest free trade zone in the world. During recent years, Mexico has become America's second- or third-largest trading partner. The U.S. is the largest foreign direct investor in Mexico, with investments valued at approximately $90 billion.

In spite of the security issues facing Mexico as a result of the Mexican government's strategy to confront drug traffickers and organized crime – and the resulting increase in violence along certain sections of the U.S.-Mexico border – employment in Mexican manufacturing has recovered after the global economic crisis. In some regions of Mexico, manufacturing employment has returned to levels last seen in 2006. The Mexican Social Security Institute, or IMSS, recently reported that payrolls are now above 2008 levels.

A report by Texas-based Trinity Real Estate Finance, Inc. notes the following:

> "While the press has focused on the negative news coming out of Mexico, market dynamics have quietly changed the game in Mexico's favor. Shipping and transportation costs are rising. China is re-valuing its currency, and labor unrest in Mainland China is forcing up wages. The companies that went to China for cheap labor ten years ago are moving back to North America, and Mexico is the winner. No other country offers manufacturers the proximity, ease of travel, infrastructure, and low-cost labor that Mexico does. Again and again we see manufacturers choosing to access the border region and Mexico's labor market because of this irreplaceable combination of advantages. Despite its troubles, Mexico functions extremely well as the workbench for manufacturing companies seeking to access the North American market, and the U.S. Border Region is thriving because of it."

As a result, Mexico is emerging as one of the most attractive places to invest in new or expanded manufacturing operations. A February 2010 study by Alix-Partners found that "Mexico continues to lead as the number one low-cost country (LCC) for outsourcing from the U.S., while China, improving considerably over last year's study, still came in 6th." Mexico jumped ahead of both China and India to claim the top spot for sourcing manufactured goods to the U.S. market.

Benefits of Manufacturing in Mexico

A member of the Organization for Economic Cooperation and Development, Mexico has for many years followed sound economic policies and maintained healthy public finances, providing comfort to foreign investment. Many companies turn to Mexico for its privileged geography, skilled and productive labor force, competitive exchange rate, modern infrastructure and extensive network of free trade agreements.

Mexico has signed free trade agreements with the U.S. and Canada (NAFTA), Colombia and Venezuela (G-3), Costa Rica, Bolivia, Nicaragua, Chile, the European Union, El Salvador, Guatemala, Honduras, Iceland, Norway, Lichtenstein and Switzerland, Uruguay, Israel and, most recently, Japan.

Mexico has also signed international treaties for the promotion and mutual protection of investments with most of its major trading partners, including France, Italy, Portugal, the United Kingdom, Germany, Spain, Switzerland, Finland, Portugal, Sweden, Argentina, Panama, Uruguay, South Korea, Australia, India and China. Special provisions regarding protection of investment with Canada and the U.S. are contained in Chapter 11 of NAFTA.

This combination of free trade agreements allows, for example, companies from Europe or Asia to establish a presence in Mexico and export, free of tariffs, goods to the U.S. and Canadian markets.

Mexico's many competitive advantages include low risk country levels, investment grade economy, low inflation rates, healthy public finances and high levels of international reserves.

Numerous benefits are derived from establishing a manufacturing operation in Mexico, including the ability to:

- Better compete in world markets by combining advanced U.S. technology with qualified and cost-competitive Mexican technical staff and labor force
- Continue to employ U.S. personnel in U.S. facilities in administration, warehousing, product finishing, etc.
- Fully own and efficiently control and administer a Mexican entity and its operations
- Use U.S. technical and administrative personnel in Mexico operations (up to 10 percent may be non-Mexican and may obtain the required working visas)
- Acquire, through a Mexican entity, fee-simple ownership of land and buildings for industrial operations in Mexico's border zone
- Import NAFTA origin raw materials, components, machinery and equipment on a duty-free or NAFTA duty-rate basis
- Defer duties on imported raw materials until after the exportation of finished or semi-finished products, and the ability to take advantage of preferential duty rates under applicable Mexican Sectorial Programs
- Avoid non-tariff barriers
- Take advantage of preferential U.S. Customs and Border Protection programs, which allow U.S. companies to import finished products and semi-finished products duty free or based on the value added in Mexico
- Use state-of-the-art infrastructure for efficient cross-border transfer of goods and simplified U.S. and Mexican customs clearance procedures
- Easily access U.S., Mexican and Latin American markets

The IMMEX Decree

The Decree for the Promotion of the Manufacturing, Maquiladora and Export Services Industries (IMMEX Decree) contributes to the competitiveness of Mexican manufacturing and export operations in many ways:

- Creating new business structures and opportunities
- Establishing a better business environment with respect to export regulation and compliance obligations

- Offering a uniform tax treatment while also establishing tighter control and verification procedures for the benefit of foreign trade and federal tax agencies

The IMMEX Decree exempts exporting companies from payment of value-added tax when temporarily importing raw materials, goods and equipment into Mexico. The IMMEX Decree provides that companies may file for one program authorization (an "IMMEX Program") to carry out export-related operations under one or various IMMEX Program legal mechanisms.

There are five types of IMMEX Programs: Holding (*Controladora de empresas*), Industrial, Services, Shelter and Third-party company (*Terciarización*). These options are intended to allow Mexican companies greater flexibility to innovate and compete in a global economy.

Under the holding option, manufacturing activities of controlled subsidiaries may be integrated with those of the holding entity, while individual programs granted to the controlled companies will be automatically cancelled. The industrial option applies to processes for the production and transformation of goods that were typically carried out by *maquila* entities.

The services option now includes not only services provided in relation to the production of export goods, but also activities which themselves are export services, such as design development, reengineering, information technology-related services, software development, administration, accounting, subcontracting, call centers and data processing services.

Finally, the shelter and third-party company options allow third parties to carry out production activities. The aim is to allow medium-sized Mexican companies to enter the global market by entering into agreements with companies that own technologies but do not intend to perform production activities in Mexico themselves.

In addition to the IMMEX Program, Mexico's Sectorial Programs, or Prosecs, were established to favor manufacturers that supply both the internal and external markets and to reduce the impact of NAFTA limitations on the duty deferral programs. Mexico felt compelled to provide substantial relief to maquiladoras and other companies in Mexico that must import non-NAFTA origin raw materials, components, machinery or equipment from countries with which Mexico does not have international trade treaties.

Sectorial Programs are used to obtain a reduction in import duties related to:

- Industrial equipment, regardless of its origin
- Raw materials, parts and components of *non-NAFTA* origin that are used for the production of products exported to the U.S. or Canada
- Importation of raw materials, parts and components not originating in a NAFTA member country that are exported to non-NAFTA countries
- Any type of permanent importations by manufacturing and production companies

Structuring a Mexico Manufacturing Operation

Planning an appropriate corporate structure in Mexico generally involves the same factors one would consider in forming a company in the U.S. – primarily, limitation of liability and tax considerations. However, the international character of such operations requires the consideration of a broader base of applicable U.S. and international laws, and certain special factors, including customs and tax matters. Other issues include permanent establishment issues, transfer pricing, special taxes, mandatory employee profit-sharing and issues related to the financing and capitalization of the entity.

Standard investment vehicles for direct foreign investment in Mexico are the Sociedad Anónima de Capital Variable (S.A. de C.V.), which is similar to the standard business corporation in the U.S., and the Sociedad de Responsabilidad Limitada de Capital Variable (S. de R.L. de C.V.), which is somewhat similar to a U.S. limited liability company.

The traditional structure for a maquiladora company is a simple structure whereby the U.S. parent company forms an S.A. de C.V. or an S. de R.L. de C.V. and acquires all of the stock/membership interest (together with a second shareholder/member, as required by Mexican law, who acquires a nominal interest).

The parent company furnishes the machinery, equipment, raw materials, components and supplies on consignment, pursuant to the terms of a free bailment contract, for assembly or manufacture by the maquiladora. The parent company retains the title to all said materials, supplies and equipment, as well as the semi-finished or finished products. The maquiladora charges the parent company and invoices the parent company periodically a service fee for these assembly or manufacturing services based on costs plus a markup on an "arm's-length" basis, in compliance with Mexican transfer pricing rules.

The parent company funds the maquiladora operations by advancing funds for capital and operating expenses to the maquiladora as needed, in addition to paying the service fees from time to time. An intercompany payable in favor of the parent company usually accumulates; however, this may need to be capitalized from time to time to avoid a potential phantom Mexican income tax on inflationary gains.

Final Considerations

Mexico's legal system is a rich, complex fabric of European, Latin American and North American ideas that have resulted in a unique system and culture, which can be complicated to understand and navigate. From a legal perspective, doing business in Mexico does pose considerable challenges to the foreign investor, given the country's highly regulated sectors such as labor, energy and tax, to name a few. P

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Hedge Funds and Investment Advisers to Face New Regulation

The fact that some hedge fund managers could manage billions of dollars for numerous clients without being subject to U.S. Securities & Exchange Commission ("SEC") registration has given industry observers heartburn for many years. Although the Investment Advisers Act of 1940 (the "Advisers Act") requires most investment advisers to register, hedge fund managers historically had been able to rely upon a statutory exemption available to advisers with less than 15 clients. Over the years various bills have been proposed in an attempt to remedy this perceived loophole, but they all floundered in Congress until the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Financial Reform Act") and the associated sweeping overhaul of financial regulation.

On July 21, 2010, President Obama signed into law the Private Fund Investment Advisers Registration Act of 2010 (the "Act") as part of the Financial Reform Act, which eliminated the so-called "Private Adviser" exemption under the Advisers Act. Under that exemption, investment advisers were not required to register if they did not hold themselves out to the public as investment advisers and had fewer than 15 investment advisory clients during the preceding 12 months. This exemption was significant for advisers to private funds (e.g., hedge funds) because each fund managed by an adviser (rather than the underlying investors in the fund) was counted as a client for purposes of the 14-client limit. The exemption allowed advisers to manage up to 14 funds with hundreds of investors without regard to the amount of assets under management. In fact, some advisers who relied on the "Private Adviser" exemption from registration were hedge fund industry titans who managed multi-billion dollar funds.

Although the "Private Adviser" exemption is no longer available, the Act created various other new exemptions from registration. One such new exemption provides that investment advisers who exclusively manage private funds and have less than $150 million in total assets under management may avoid registration with the SEC. Another new exemption provides that investment advisers who exclusively manage "venture capital funds" are not required to register. Congress gave the SEC 12 months to define what constitutes a "venture capital fund."

The Act also provides an exemption from registration for non-U.S. investment advisers and keeps the exemption that has always been available for investment advisers who are registered as commodity trading advisors with the Commodity Futures Trading Commission.

While not technically an exemption from registration, the Act also creates a new class of "mid-sized" investment advisers (i.e., advisers managing assets between $25 and $100 million), who will no longer be required to register with the SEC as long as they are required to register with and be subject to examinations by state regulators. Advisers in states that would not require the adviser to register are required to register with the SEC if they manage assets in excess of $30 million. Finally, an adviser who would be required to register with more than 15 states would be permitted to forgo registration with any single state or group of states and register with the SEC instead.

It remains to be seen whether cash-strapped states, whose regulatory resources are already strained, will be able to effectively regulate all of the additional investment advisers that now fall within their jurisdiction. State regulatory authorities are currently reviewing how to best regulate the investment advisers that now fall within their jurisdiction. Accordingly, investment advisers required to be registered at the state level should anticipate that the states will implement regulatory changes in the near term. Advisers who are now required to register with the SEC and states will have until July 21, 2011 to do so.

In addition to all of the changes to the registration requirements for investment advisers, the Act also provides that all investment advisers, whether registered or not, are now required to keep records and provide to the SEC any information that the SEC determines to be "necessary or appropriate in the public interest or for the protection of investors." Advisers likely will be required to provide information regarding assets under management, types of assets held, leverage practices, trading practices and valuation policies. The SEC may use this information to help it focus its resources on the areas of the industry that present the greatest risks to the financial system and to investors.

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For more than 25 years, LaBella Alvis has been successfully litigating cases in State and Federal courts. She has been recognized by Best Lawyers in America for personal injury litigation, named as one of Top 25 Women Lawyers in Alabama in 2008 by Alabama Super Lawyers and a "Litigation Star" by Benchmark Litigation.

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The Evolution of an Idea: The Vision of a Firm

Christian & Small's managing partner, Deborah Alley Smith, spent much of 2010 guiding the firm through a strategic visioning process. Efforts began with an internal audit asking attorneys, "What kind of firm are we? What do we want to be in five years?" A strong sentiment emerged from this internal audit. The people at Christian & Small enjoy the collegial relationship between attorneys and staff. It was very important that as the firm explored its future, this mutual respect and feeling not be lost.

Armed with thoughts, opinions and comments from all attorneys, a Strategic Planning Team was selected, which together with a professional moderator, participated in an all-day vision planning session. Core values and goals were set and a vision for 2015 was articulated, as follows.

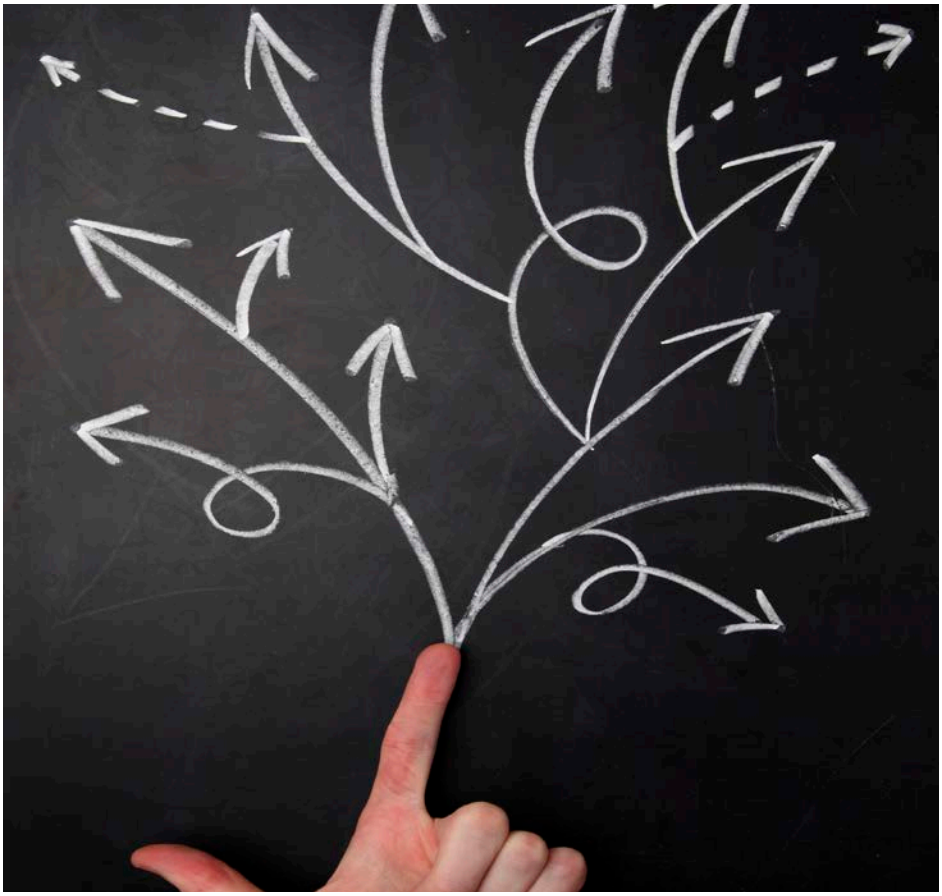
- Completely delighted clients
- Reward and recognition for actions by everyone in the firm who support the vision
- Create awareness of the firm's areas of expertise
- Purchase and employ cutting edge technology
- Planned strategic hiring of attorneys
- Improved communication: intra-firm and with clients
- Fair profitability

Our 2015 vision is descriptive of our mission:

Christian & Small is committed to being a dedicated, diverse and supportive team of legal professionals partnering with our clients to render superior service and exceptional value in the areas of litigation, business and tax.

Determining the vision of the firm is one challenge; implementation is another. The firm began by conducting an in-depth survey of clients to learn what is important to them and to measure the responsiveness of our attorneys and staff.

With the firm core values and goals identified, and armed with insight from key clients, six bold steps were established by the Strategic Planning Team and a nine-month timeline for completion was communicated. Every member of the firm was encouraged to participate on at least one of the bold step committees: Brand the Firm, Understand Current Profitability, Evaluate Current



Technology, Identify Emerging Growth Areas in the Legal Profession, Improve & Sustain Internal Communication, Improve & Sustain Client Communication.

The greatest leap of faith came with the choice of a creative branding team. The Brand the Firm team recognized that the legal industry has changed and law firms must change also. With this in mind, firm leaders deliberately chose a company with no law firm experience, but with plenty of savvy business-to-business experience to assist us. This company was key in capturing the culture of Christian & Small and in articulating our vision in a simple and easy to understand tagline:

Nonstop Advocates
For our clients.
For our community.
For each other.

For our clients – Our primary goal is to keep our clients moving forward in business. They need our advice and action to get past challenges. We strive to get our clients beyond those challenges as efficiently and effectively as possible so they can keep moving forward. We are conducting ongoing client satisfaction surveys to assess how we are doing.

For our community – We support our community through giving our time and resources. The firm seriously reviewed numerous service opportunities, and after many deliberate hours, chose Teach for America as the primary firm charity. Teach for America is in its first year in Alabama. Christian & Small is partnering with the Sumter County, Alabama, school system and specifically, with five of its teachers to promote better education in a county lacking needed resources to support its school system.

This holiday season, instead of the typical holiday gift, the firm invited clients to participate in an online holiday giving campaign to benefit one of three nonprofit organizations: Teach for America, Make-A-Wish, or Feeding America. Clients visited the designated www.nonstopadvocates.com website and selected one of the three designated charities. The firm made a donation to that charity in honor of the client. At the end of holiday season, the impact made was remarkable: 53 students reached through Teach for America, two families of four sent to Disney World through Make-A-Wish, and 17,500 meals provided through Feeding America.

For each other – We want our firm to be a place where lawyers and staff may build a successful career by providing a menu of interesting opportunities, and a clear path for growth and mutual support. A two-year core competency program for associates was developed and the firm has taken steps to encourage more personal contact between attorneys and clients. Senior attorneys are increasing their roles in mentoring young attorneys and involving them in client visits.

In October, Christian & Small sent five attorneys to the Primerus Annual Conference in California. Two of these attorneys are young associates who have taken leadership positions with the Primerus Young Lawyers Section. Joining seasoned attorneys with young associates provides benefits to all: young attorneys see first hand how to build and nurture relationships; more seasoned attorneys are given insight into the next generation of firm attorneys and ultimately, the next generation of firm leaders. It demonstrates to other young attorneys and law students that Christian & Small values and develops young talent.

The firm is updating its website and print material. In an effort to provide greater efficiency, firm materials are being created in PDF form that can be loaded on a flash drive, sent electronically or downloaded from the internet – making delivery of information faster and paperless.

By taking the bold steps of soliciting input from attorneys, staff and key clients, and hiring a creative team that specializes in branding, Christian & Small achieved its goal of creating an exciting new vision, look and message while maintaining and cultivating the core values of trust, mutual respect and collegial environment. As we look forward, the firm continues to monitor, refine and update our annual goals and to ensure that our decisions continue to reflect the 2015 vision and that we continue to be **Nonstop Advocates.** P

Jennifer M. Frankola

Jennifer Frankola is an associate in the litigation department at Lewis Johs Avallone and Aviles, LLP, a New York firm. Jennifer and managing partner, Eileen Libutti, started the special education practice group in the spring of 2010. They specialize in special education law, representing children with disabilities and their families throughout the administrative hearing process and related proceedings.

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Embracing New Legal Trends: Taking Risks, Diversifying Skills, Increasing Rewards

When written in Chinese, the word "crisis" is composed of two characters; one represents danger, and the other represents opportunity.

— John F. Kennedy

In a time of economic recession and tightening purse strings, many law firms turned to hiring freezes, salary splintering and department cuts – a typical knee jerk and cost effective strategic reaction during a financial crisis. Let's be honest. It's scary. When you are in the midst of any sort of crisis, it is often difficult to see the forest from the trees. It's only natural to cling to familiar practices and what is believed to be the most stable. Taking a risk to try out something new is not even a thought.

But like any cycle, valleys turn to peaks over time. Law firms with a long-term, visionary approach, more often than not, embrace these dangerous down times as opportunity. They take risks and make investments to diversify their skills in order to meet the needs of the times. It's risky business, but an overall smart choice.

I joined Lewis Johs Avallone Aviles, LLP, a full service law firm in New York in the spring of 2010 as a newly admitted attorney. Like many new law graduates, I too was impacted by the economic downturn and was looking for a job. Prior to joining Lewis Johs, I studied and worked within a very specialized area as a full time law clerk and a former special education teacher. As I submitted my resume and perused the various legal departments on the firm's website, I thought to myself, "Why would this well established defense firm want to take a risk on a newly minted civil rights oriented attorney like me?" I had no training in civil defense work. They did not have a special education department. I had worked with children and parents at administrative impartial hearings and federal appeals. They did not have a family law division. I truly believed my resume would be tossed to the bottom of the pile.

A few weeks later, much to my surprise, I got a phone call from one of the head partners, Fred Johs, asking to set up an interview. A week later, I met with many other partners including Eileen Libutti. Knowing special education law was an unfamiliar area to the firm, it was important for me to describe the procedural and substantive legal significance

of its existence as a civil rights practice. But more importantly, I wanted to impart on the partners how helping families opens the door to developing very close and intimate relationships with them as your clients – something I know Lewis Johs values. In other words, forming a new practice to serve a new kind of clientele allows the firm to cross-market its other services. For example, I assist the Smith family in obtaining educational and therapeutic services for their learning disabled child during the school year. A year later, the Smiths call Lewis Johs to draft their special needs trust or close on their new home or help with a new business venture. It's a matter of taking a risk to embrace an opportunity and watching the entire practice overlap and expand.

Special education law is a new trend in the legal field. It is ever growing and ever evolving. There are not many firms that practice in this area, but the need is ever present. Children are born each day with different developmental and learning disabilities. In fact, it is becoming a national epidemic. Most families in need come to us during their times of crisis. These children and their families are protected under the federal laws and deserve quality representation at their due process hearings. Our special education practice group assists parents whose children are entitled to services under Section 504 of the American with Disabilities Act and the Individuals with Disabilities Education Act (IDEA). We counsel our clients through the initial evaluation stages and the education system, mediation with their school districts, and, if necessary, due process proceedings and federal appeals in order to secure effective interventions and therapies for their children to make meaningful progress in school and in life.

Lewis Johs understands the need for effective advocacy for parents and children. They believe a sound and dignified education allows children opportunities to reach their potentials and become productive and creative members of our world. Needless to say, this practice is an investment on many levels. By embracing this new area of law, the firm diversifies its already well established practice by taking care of families in various legal aspects.

Since its inception in June 2010, Eileen and I have assisted well over 30 families – and the list continues to grow. It has become clear that our clients appreciate our individual approach and firm commitment to the welfare of their children. Because of this, they feel more than comfortable allowing us to handle their other legal matters. Not only has this practice proven to be rewarding on many levels, it has allowed the firm to expand its other practices. In essence, the return on investment is not only well worth the risk, it is also personally and professionally rewarding. P

Kinanis LLC

Kinanis LLC, a law and consulting firm, is a multi-disciplinary practice comprising four divisions: Corporate, Accounting, Litigation and Property. The Cyprus firm serves corporate and private clients in the local and international business environment.

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Doing Business Through a Cyprus Company

The new tax regime in Cyprus has created a unique and attractive environment for holding, financing and trading companies. This tax regime has created numerous advantages, making Cyprus a prime location in the field of international tax planning.

Cyprus, being a full member of the European Union since 2004, is regarded as a jurisdiction with stability and respectability which makes it the most advantageous vehicle for international tax planning and use. With careful tax planning, Cyprus provides a tax efficient way to direct investments to Europe and Asia by taking advantage of its wide network of double tax treaties and its beneficial tax system.

Taxation Advantages

A tax-resident Cyprus company is taxed as follows:

- **Ten percent taxation for tax-resident companies.** Resident companies pay the lowest taxation rates in Europe (10 percent) on their net profits. However, the effective tax rate can be even lower due to the favorable tax treatment of some types of income.
- **Zero percent tax on dividends received.** Dividends received by a Cyprus company, on certain conditions, are free of tax, making Cyprus the most competitive jurisdiction for holding companies.
- **Zero percent withholding tax on dividend payments.** Dividends payable by a Cyprus resident company to its foreign shareholders (whether a company or individual) are not subject to withholding tax in Cyprus.
- **Zero percent withholding taxes on interest and royalties.** There are no withholding taxes on interest payments to non-residents or on royalties arising from sources outside Cyprus. Royalties arising from the use of an asset in Cyprus are subject to a 10 percent withholding tax.
- **No capital gains tax.** Companies trading in shares and other securities as identified in the law may be formed with zero percent taxation on profits from trading of such titles. No capital gains tax is payable on the sale or transfer of shares. No capital gains tax is paid on the transfer of immovable property owned by a Cyprus company abroad (outside Cyprus) given that this is not part of the company's trading activities.
- **Zero percent taxation on profits from foreign establishment.** A resident company is not taxed on profits received from its overseas establishment, under certain conditions.

- **No estate duty on the inheritance of shares.** In the event of death of a shareholder, no estate duty is payable in Cyprus.
- **Tax losses.** Tax allowable losses can be carried forward and set off against future profits indefinitely. There is no time limit.
- **Zero percent taxation for non-tax resident companies.** Non-tax resident companies may be established with zero percent taxation in all respects, provided their management and control is exercised outside of Cyprus. Companies seeking respectable jurisdictions with the European Union (EU) "stamp" can use such a structure on their tax planning. However, a non-tax resident company cannot enjoy the benefits of the Double Tax Treaties that Cyprus has signed with third country, or the benefits of the various EU directives.
- **Unilateral tax credit relief.** Unilateral tax credits are granted on any tax paid abroad to any foreign country, regardless of whether Cyprus has a double taxation treaty with that county. In such cases, the income is taxed only once. In rare situations the tax authorities have the power to refuse the grant of such credit if the evidence presented are not clear in proving the payment of such taxes abroad.
- **Double tax treaties/international tax planning.** Cyprus has signed double taxation treaties with several countries to avoid the double taxation of income earned in any of the contracting states. These countries include Austria, Belarus, Belgium, Bulgaria, Canada, China, Czech Republic, Denmark, Egypt, France, Germany, Greece, Hungary, India, Ireland, Italy, Kuwait, Lebanon, Malta, Mauritius, Moldova, Norway, Poland, Qatar, Romania, Russia, San Marino, Seychelles, Singapore, Slovakia, South Africa, Syria, Sweden, Thailand, United Kingdom, United States, USSR*, Yugoslavia**.

* Armenia, Kyrgyzstan, Tadzhikistan and Ukraine apply the USSR – Cyprus double tax treaty.
** Montenegro , Serbia and Slovenia apply the Yugoslavia – Cyprus double tax treaty.

Other Advantages

1. Reorganization of companies

The new tax legislation provides extensive, flexible reorganization rules. It implements the European Commission (EC) Merger Directive in a liberal manner, making the Cyprus reorganization rules far more flexible than the EC directive. According to Cyprus law:

- Reorganizations apply not only to companies, but also to any body of people.
- Reorganizations can be made not only between Cypriot and EU entities, but also with entities from non-member states.
- Any profits or gains made by reason of reorganization, the transfer of property or the transfer of shares in exchange for shares in another company are exempt from income tax.

Reorganizations include mergers, demergers, transfer of assets and exchanges of shares between Cyprus resident companies and/or nonresident companies.

2. Group relief

Group relief (setting off the loss of one company with the profit of another) is allowed, provided both companies of the group are tax resident in Cyprus. (This requirement may be in conflict with EU law, according to the decision of the European Court of Justice [ECJ] in the case of Marks & Spencer PLC v. the U.K. Inspector of Taxes, which makes group relief within member states possible. According to this judgment, foreign subsidiaries may transfer losses back to their parent company if the losses cannot be used for tax purposes in the country where they were made.)

Two companies are deemed to be members of a group if:

- one company is the 75 percent subsidiary of the other, or
- both are 75 percent subsidiaries of a third company.

For the holding company, a 75 percent subsidiary is a company in which it holds either directly or indirectly at least 75 percent of its voting shares and that is beneficially entitled directly or indirectly to at least 75 percent of the income and 75 percent of the assets in case of winding up. Group relief is available only when both companies have belonged to the same group for the whole financial year. Losses incurred in one year can be set off only against profits of the same year.

A partnership transferring business into a company can carry forward tax losses into the company for future utilization

3. CFC legislation

Cyprus does not have Controlled Foreign Company (CFC) legislation. In effect, no income is imputed to a Cyprus parent even if the income arises in a tax haven country or in respect of passive activities. A recent decision of the ECJ (Cadbury Schweppes v. the U.K. Commissioner of Income Tax) re-confirmed the tax competition within member states and in effect established that CFC rules cannot be enforced once the subsidiary registered in a member state is engaged in genuine economic activities.

4. Thin capitalization rules

Cyprus tax legislation does not contain thin capitalization provisions; there are no provisions requiring companies to maintain a particular debt-to-equity ratio. In this respect, a Cyprus holding company may be capitalized with loans without risk that interest paid at arm's length to the parent company being considered in effect as dividends.

5. Re-domiciliation

Cyprus has recently enacted a new law allowing re-domiciliation of foreign companies in Cyprus and allowing Cyprus companies to be re-domiciled abroad. This gives foreign holding companies tremendous flexibility to move their holding companies in Cyprus without disturbing their overall structure.

6. Listing in stock exchanges

The Cyprus holding company can be listed in the Cyprus Stock Exchange or in any other reputable international stock exchange. Its corporate structure, which is based on English company law, makes it a suitable vehicle for such listing, if the following requirements are met:

- Transform into public company.
- Engage an adviser/broker to prepare admission document and complete the listing process.
- Proceed with the listing of the shares. With Cyprus being a member of the EU, the use of a Cyprus holding company as a vehicle for listing adds credibility and opens up the various incentives and common platforms provided by European legislation.

7. Value added tax (VAT)

Holding activities fall outside the scope of the VAT in Cyprus; a Cyprus holding company exclusively engaged in holding activities is neither entitled nor obliged to register for VAT purposes. Trading companies engaged in general trading may be registered with the VAT authority in Cyprus and apply the relevant VAT rules, which are mandatory in cases of trading within the EU.

8. Trusts

Cyprus International Trusts (CIT) may be established to hold the shares or to be used as a vehicle for a tax structure; international trusts are not taxed on their profits.

9. Liquidation

If a Cyprus holding company is liquidated and distributes its assets to its shareholders, the distribution is done without taxation on shareholders who are nonresidents of Cyprus.

The Future

The new tax legislation of Cyprus has introduced numerous advantages, giving Cyprus a prime position in the global trading world. In effect, the new law ensures companies:

- the ability to receive dividends at a low or zero withholding tax rate.
- non-taxation of dividends received subject to some conditions.
- non-taxation of profits from the sale of shares.
- tax-free distribution of dividends to nonresident shareholders.
- flexible reorganization rules.

These and the other advantages discussed above make the Cyprus company a key player in the world regime of holding companies – and a valuable international investment vehicle for investments within and outside of the EU.

The tax reforms are designed to balance the future competitiveness of Cyprus as an international business center with its commitments to the EU pending its accession. We do not predict drastic changes to the current environment – only positive changes, step by step.

The Cyprus company has the lowest taxation rates in Europe and at the same time has acquired the European stamp of respectability. In effect, it is the gate to Europe and Asia for the international investor.

Disclaimer: This article is a general guide and is for information purposes only. It is not a substitution for professional advice.

Primerus Institutes and Practice Groups

Winter 2011

The International Society of Primerus Law Firms contains four main institutes, allowing clients and attorneys to gather for educational and social events including conferences, webinars and conference calls.

The Primerus Business Law Institute (PBLI) brings together top-quality law firms to meet the challenges businesses face in a global economy. With a wide variety of legal expertise in locations around the world, the PBLI offers the same resources as large law firms, along with the value businesses today demand.

The Primerus Consumer Law Institute (PCLI) is a group of plaintiff and consumer law firms dedicated to sharing ideas with one another in a non-competitive environment – all with the goal of better meeting the needs of clients.

The Primerus Defense Institute (PDI) includes more than 800 of the world's finest independent defense attorneys with expertise in nearly every aspect of corporate defense litigation. Formed for the purpose of lowering business litigation costs and reducing clients' exposure to liability, the PDI is a valuable resource for corporations seeking outside counsel around the world.

The Primerus International Business Law Institute (PIBLI) includes Primerus member firms from countries including Australia, Austria, Canada, China, Cyprus, England, France, Germany, Greece, Hungary, India, Ireland, Japan, Mexico, Poland, Puerto Rico, Romania, Russia, Spain, Switzerland, Taiwan and The Netherlands. If you're seeking an attorney outside the United States, the PIBLI has the sophisticated, trusted legal advisors you need to thrive in a global economy.

Within these institutes, Primerus member firms provide partner level service at reasonable fees through 19 practice groups:

- Bankruptcy
- Commercial Law
- Energy and Environmental Law
- Family and Matrimonial Law
- Insurance Coverage and Bad Faith
- Intellectual Property
- International Dispute Resolution
- International Operational Services
- International Transactional Services
- Labor and Employment
- Liquidation of Commercial Debt
- Product Liability
- Professional Liability
- Real Estate
- Retail, Hospitality, Entertainment Liability
- Securities
- Transportation
- Workers' Compensation
- Young Lawyers Section

For more information about how a lawyer with expertise in one of these areas can help you, visit www.primerus.com or contact Primerus at 800.968.2211.

Member Spotlight

Marc Dedman is an attorney at the Nashville office of Primerus member firm Spicer Rudstrom, PLLC. Dedman specializes in business and commercial litigation, employment practices litigation, insurance coverage litigation, pharmacy malpractice and professional liability. He lives with his wife, Janna, and children, Emma, 16, and Robert, 13, in Nashville.

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When Marc Dedman was in his early 30s, the extent of his daily exercise was walking up the courthouse steps. Now, at age 52, Dedman is a dedicated runner who has finished eight marathons and countless other competitive races.

He credits the sport with improving his health, helping him manage the stressful job of a litigator, growing closer to his family and making many friends of all ages and backgrounds.

In the spring of 2001, Dedman decided it was time to follow through on his long-time dream of running the New York City Marathon. He started training, 35 pounds overweight and barely able to run one mile. Unfortunately, just days before the World Trade Center terrorist attacks of September 11, 2001, he was diagnosed with a stress fracture and doctor's orders sidelined him. The events in the city only reinforced his determination to run in 2002.

And he did, finishing his first marathon in 4:30:31 – a time and a memory he will never forget. He went on to compete in seven more marathons – two Twin Cities Marathons, one Country Music Marathon, one Marine Corps Marathon and three Boston Marathons.

"It is a fantastic feeling to finish a race and there's someone 20 years your junior that you're kicking past," he said. "There aren't many sports that people my age are able to participate with, and compete against others who may be decades younger."

As his training and competitive running continued, he not only lost weight and got healthier, but he also got faster, progressing from running 13-minute miles to winning numerous awards, and even money prizes, in various races. His family got interested, too. "My children were so excited," he said. "I would come home, and they would say, 'Daddy, how far did you run today?' I was feeding off their excitement."

His hobby of running also has impacted his career. In addition to helping him manage stress, he has met clients and a number of people he has retained as experts in lawsuits. He has also used running to evaluate his cases. "I will go out on a 15- or 20-mile run with a group of five or six people, and I will present the facts that are going to come out in a trial or mediation. I use them as a mock jury. They find it interesting and I get a benefit out of it. And the clients benefit because I don't bill them for it," he said.

He has also met fellow Primerus members and clients who share his interest when looking for running partners at Primerus conferences. "Through running, I have met several Primerus attorneys I now call friends."

While he has positive memories of all of his marathons, one stands out in particular – the 2010 Marine Corps Marathon last October. In the spring, he learned that the 4-year-old daughter of one of his running partners was diagnosed with leukemia. He and his wife, Janna, organized a group eventually totaling over 30 runners who signed up for the marathon and vowed to run it for the girl, Isabel.

"One of the 30 was my 16-year-old daughter, Emma, who babysits for Isabel. My wife also signed up," he said. "We each carried a pearl in honor of Isabel."

"We grew closer as a family by participating in this event. It was a truly special time in my life and one I will always remember."

The group presented Isabel with a beautiful pearl necklace. "If she wants to, she can wear it when she gets married," Dedman said. "She will know that there were many runners in marathons all across the East Coast running for her. We may not have changed the world by doing what we did, but, maybe, Isabel will change the world."P

Primerus 2010 Community Service Award Winner and Finalists

Bivins & Hemenway
Cavett & Fulton
Collins & Lacy

Whether they're volunteering for a back-to-school backpack drive, donating their services as general counsel of The Greater Brandon Community Foundation, or volunteering in local schools, the attorneys and staff at Bivins & Hemenway, P.A., find no shortage of ways to help their community.

Thanks to these community service efforts and more, the Valrico/Tampa, Florida-based firm won the 2010 Primerus Community Service Award, as announced at the Primerus Annual Conference in October. Every year, Primerus names two finalists in addition to the winner. This year's finalists are Collins & Lacy, P.C., in Columbia, South Carolina, and Cavett & Fulton, P.C., in Tucson, Arizona.

Photo above: Seated from left to right, managing partner Robert W. Bivins and partner John M. Hemenway. Standing from left to right, Lynn Langowski, certified land closer; Eric A. Cruz, attorney; Kelly D. Haywood, attorney; Sonja C. Simmons, staff; and Leah S. Herczeg, staff.

Bivins & Hemenway

A small firm of four attorneys and three full-time staff members, Bivins & Hemenway focuses much of its community service efforts on promoting youth and education. In 2009 and 2010, the firm organized, raised money, and volunteered time for backpack drives sponsored by two organizations – the Tampa Metropolitan Area YMCA and the Emergency Care Help Organization. More than 1,000 children, including foster and migrant children, were served each year by the two drives combined.

Firm members also volunteer in several area schools through Parent Teacher Associations, a Recognition Committee (which distributes more than 1,500 award certificates for student achievement each year), Cub Scout programs, Kiwanis-sponsored programs, and the Head Start program at one local elementary school, which primarily serves children of migrant workers. The firm helped raise funds to provide each child with a book and an educational toy – and Lynn Langowski, the firm's residential closing specialist, acted as "Santa's Helper" during the Christmas event at the school.

"We have always stressed to our lawyers and professional staff the value of giving back to our local community," said Robert W. Bivins, the firm's managing partner. "That often involves more than just writing a check. The commitment often means rolling up your sleeves and leaving your comfort zone to help your neighbors in these challenging times. If we don't personally step up to help our neighbors in our own community, how can we expect anyone else to do so?"

The firm's work also extends to leadership in community non-profit organizations. The firm's partners serve as general counsel on a pro bono basis

to The Greater Brandon Community Foundation, Inc., a charitable foundation dedicated to acting as a leader, catalyst and resource for philanthropy in the eastern Hillsborough County area. Members of the firm are currently assisting the Foundation with structuring its planned giving program.

The law firm's managing partner also served as Chairman of the Advisory Board of the Campo Family YMCA in Valrico, Florida, last year and has begun his term as the Chairman of the Campo Family YMCA Annual Giving Campaign – a role that will make him responsible for raising nearly $200,000 for 2011. The money will be used to provide services and outreach to low income families, foster families and migrant families.

Donating to the local legal aid organization is also important to the firm. Each of its attorneys contributes financially and/or provides at least 40 hours a year in pro bono legal services to the community. In the last year, the firm estimates it has donated more than 400 hours in pro bono services.

"Our firm has a reputation for contributing the three 'T's to the Brandon community: time, talent and treasure," said partner John M. Hemenway. "I believe that the goodwill this reputation has fostered has significantly contributed to our business success. Although no one at the firm undertakes community service for personal recognition, we were nevertheless very honored to receive what is Primerus' most prestigious annual award."

Bivins & Hemenway also was nominated for Small Business of the Year by the Greater Brandon Chamber of Commerce for the third year in a row.

As the winner of the 2010 Primerus Community Service Award, Bivins & Hemenway wins a full-page ad which Primerus will place in their state bar journal. The firm will proudly display the Community Service Bowl in its lobby during the coming year and then will receive a plaque to display permanently.

Cavett & Fulton

Cavett & Fulton, a law firm of two attorneys defending physicians, dentists, nurses, therapists and others in the medical and mental health fields when sued in court or investigated by federal or state agencies, believes they can have just as much positive impact on the community outside of the courtroom as they can inside it.

"In the cases we handle in our law firm, we see, first hand, how individuals in our community are impacted by a lack of services and/or a lack of access to services, especially health care services," the firm wrote in their application. "The cases are often heart-breaking. The work we do in the courtroom, while worthwhile, is not enough. Our justice system does not solve all problems and we believe we can effectuate positive change by being active participants in Tucson's volunteer community at the grass roots level."

The firm does that in many ways: performing free and discounted services to those in need of counsel with no or limited ability to pay, raising money for activities ranging from the Susan G. Komen Race For The Cure to The Muscular Dystrophy Association, serving on boards including the St. Joseph's Hospital Foundation and the Southern Arizona Task Force against Domestic Violence, and teaching reading to underprivileged children through Lawyers for Literacy.

Collins & Lacy

For the second year in a row, Collins & Lacy was named a finalist for its community service efforts. This year, in addition to its traditional volunteer efforts within South Carolina, the firm cast its efforts around the country and world.

In January 2010, firm members responded to the Haitian earthquake by collecting funds within the firm to send to victims. Through the membership of the firm's founding partner, Joel Collins, in the American Board of Trial Advocates (ABOTA), the firm elected to partner with ABOTA in by sending the funds to ABOTA, which matched the first $25,000 of donations made by ABOTA members.

In May 2010, Collins & Lacy acted locally in response to the Gulf Coast Oil Spill by initiating the first city-wide campaign in Columbia, South Carolina, to collect hair to help the oil spill clean-up efforts. Hair salons, pet groomers and even an assisted living facility donated more than 50 bags of hair and nylon to the "Hair-to-Spare" campaign. Collins & Lacy then packaged and shipped the supplies to the environmental group Matter of Trust, which was assisting local municipalities and harbor towns.

The list of the community service efforts of Collins & Lacy, and all three of the firms, is extensive. Please join us in congratulating these firms for exemplifying the Community Service pillar to all Primerus members. P

2011 Member Listing – International Society of Primerus Law Firms

- Primerus Business Law Institute
- Primerus Consumer Law Institute
- Primerus Defense Institute
- Primerus International Business Law Institute

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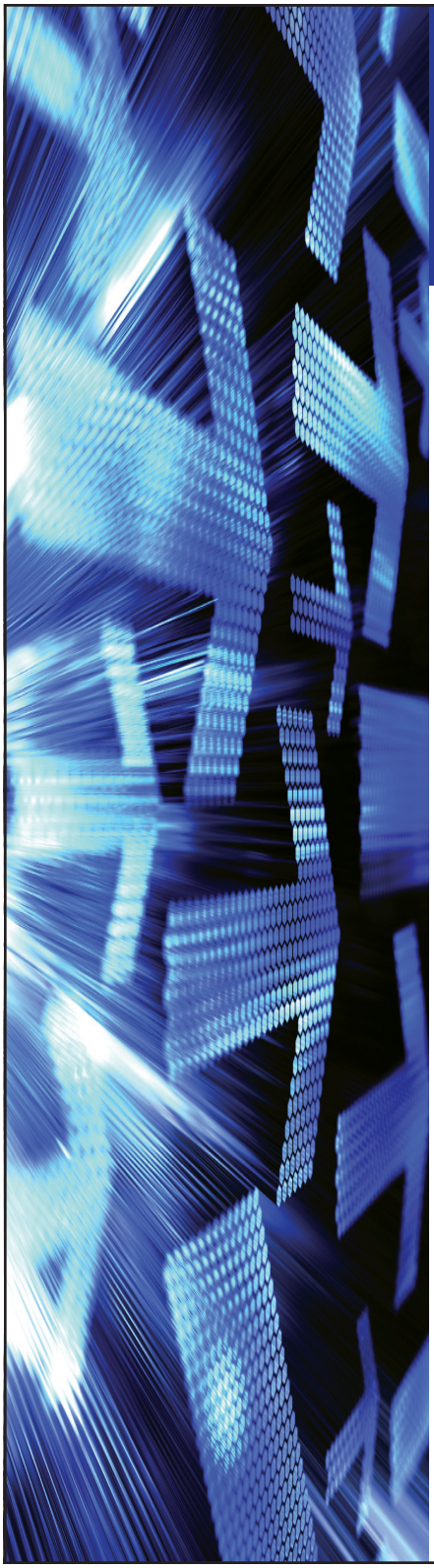

Calendar of Events

2011

January 11-14, 2011 – Alliance of Merger & Acquisition Advisors Winter Conference
New Orleans, Louisiana
Primerus was a sponsor at this event.

February 10-11, 2011 – Primerus Defense Institute Transportation Seminar
Gaylord Texan Resort, Dallas, Texas

March 2-6, 2011 – Primerus Consumer Law Institute Winter Conference
Herradura, Costa Rica

April 7-10, 2011 – Primerus Defense Institute Convocation
Ritz Carlton Hotel, Naples, Florida

May 10-12, 2011 – Third Global M&A Symposium
London, England
Primerus and the Alliance of Merger & Acquisition Advisors (AM&AA) are co-hosting this event.

May 13, 2011 – Primerus International Business Law Institute Practice Group Kick-Off Meeting
London, England

May 15-17, 2011 – Truckload Carriers Association Safety & Security Meeting
Nashville, Tennessee
Primerus will be a sponsor at this event.

May 22-25, 2011 – International Council of Shopping Centers Recon Academy
Las Vegas, Nevada
Primerus will be a sponsor at this event.

June 22-24, 2011 – Primerus Business Law Institute Symposium
Chicago, Illinois

July 9-13, 2011 – American Association of Justice Annual Convention
New York, New York
Primerus will be a sponsor at this event.

October 20-23, 2011 – Primerus Annual Conference
Charleston, South Carolina

October 23-26, 2011 – Association of Corporate Counsel Annual Meeting
Denver, Colorado
Primerus will be a sponsor at this event.

October 30 – November 4, 2011 – International Bar Association Annual Conference
Dubai
Primerus will be a sponsor at this event.

November 2-4, 2011 – Professional Liability Underwriting Society Annual International Conference
San Diego, California
Primerus will be a sponsor at this event.

For additional information, please contact Chad Sluss, Primerus Director of Services, at 800.968.2211 or csluss@primerus.com.

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