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INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2015

A Global Stage

Primerus Helps Clients Thrive in a Global Marketplace

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Current Legal Topics:

Asia Pacific

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North America

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

Primerus will be featured on a global stage for the 2015 Primerus Global Conference October 1-4 in Amsterdam, Netherlands. The event will bring together clients and Primerus lawyers from around the world. With law firms in 46 countries, clients can rely on Primerus to help them find quality lawyers wherever they need.

Scan this with your smartphone to learn more about Primerus.

Primerus
The World's Finest Law Firms

Publisher & Editor in Chief: **John C. Buchanan**
Managing Editor: **Chad Sluss**

President's Podium

John C. Buchanan

A Global Stage

Greetings. At Primerus, nothing makes us happier than bringing together great clients and great lawyers. For more than 20 years, we have been doing this in countless ways, including hosting educational and social events for our members and clients to attend.

This fall, we're taking that to a new level with the 2015 Primerus Global Conference October 1-4 in Amsterdam, Netherlands. This is the first time Primerus is hosting the event outside of the United States. Also for the first time, clients are invited to attend the Global Conference, along with Primerus members.

On the opening day of the conference, we are hosting the Primerus Legal Risk Seminar for clients. It will feature excellent panel discussions about topics including: "A Global Comparative Approach to Litigation & Dispute Resolution," "Protecting Your Company from Cyber Risks and Potential Liabilities," "Intellectual Property – Protecting Your Assets in a Volatile Market" and "Protecting Your Company from Cross Border Pitfalls."

We hear from clients time and time again that they value the opportunities we provide to learn from educational presentations such as these, as well as to meet great lawyers from around the world. You will hear from some of them in this issue. Representatives from major international companies are interested in meeting more Primerus attorneys so they can retain them for matters across the globe.

We know that since the recession of 2008, clients are now calling the shots. They're demanding a lot more value for the money they spend on legal services. This doesn't scare Primerus law firms in the least – in fact, it's led to increased opportunities for our firms, who pride themselves on delivering the highest quality product and service for reasonable fees.

In this extremely competitive legal marketplace, we have found the stand-alone, unknown, small and mid-sized firms are missing out, as it's hard for the top national and international clients to identify the really good ones from the mediocre. That's where Primerus steps in and provides a highly valued matchmaker service to those premium clients on the one hand, and Primerus' outstanding "Six Pillar" law firms on the other.

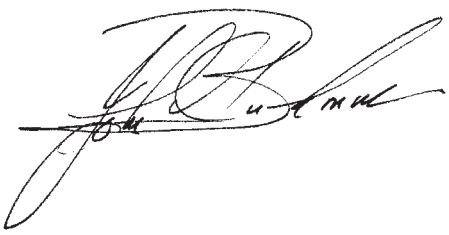
We're finding large international clients relying on our law firms for work they more than likely would have sent to the big pedigreed law firms in the past. They're sending that work to Primerus firms now, and in the process they're saving money, getting great results and developing trusted relationships with legal advisors.

I do not use the term "trusted relationships" lightly. We have found that clients of Primerus firms attend a Primerus event such as the Primerus Defense Institute Convocation, or the Primerus Business Law Institute North America Regional Symposium, or the Primerus Latin America & Caribbean Institute Seminar held in conjunction with the Association of Corporate Counsel Brazil Networking Group Legal Seminar, and they emerge with new friends as well as lawyers.

We hear from clients time and time again who tell us they value the opportunities we provide to learn from educational presentations, as well as to meet great lawyers from around the world.

This is happening at Primerus events around the world – in Brazil, Amsterdam, Singapore, Shanghai, New York, Chicago, Boston and many more cities. It's also happening on the phone and online through connections made with our society of 3,000 attorneys from 175 law firms. One client recently said the Primerus seal of approval is all she needs to see before knowing she can trust an attorney.

If you would like to learn more, please visit primerus.com or call us so we can connect you with an attorney you can trust, anywhere in the world.



Primerus Helps Clients Thrive in a Global Marketplace

When Colleen Taylor started 21 years ago as claims administrator in the legal department of Werner Ladder Company in Greenville, Pennsylvania, the company already had an established relationship with some Primerus firms in the United States.

Since then, Taylor's trust in Primerus firms has only grown. Now, as her company expands manufacturing and sales around the world, she anticipates needing more quality legal representation in other countries.

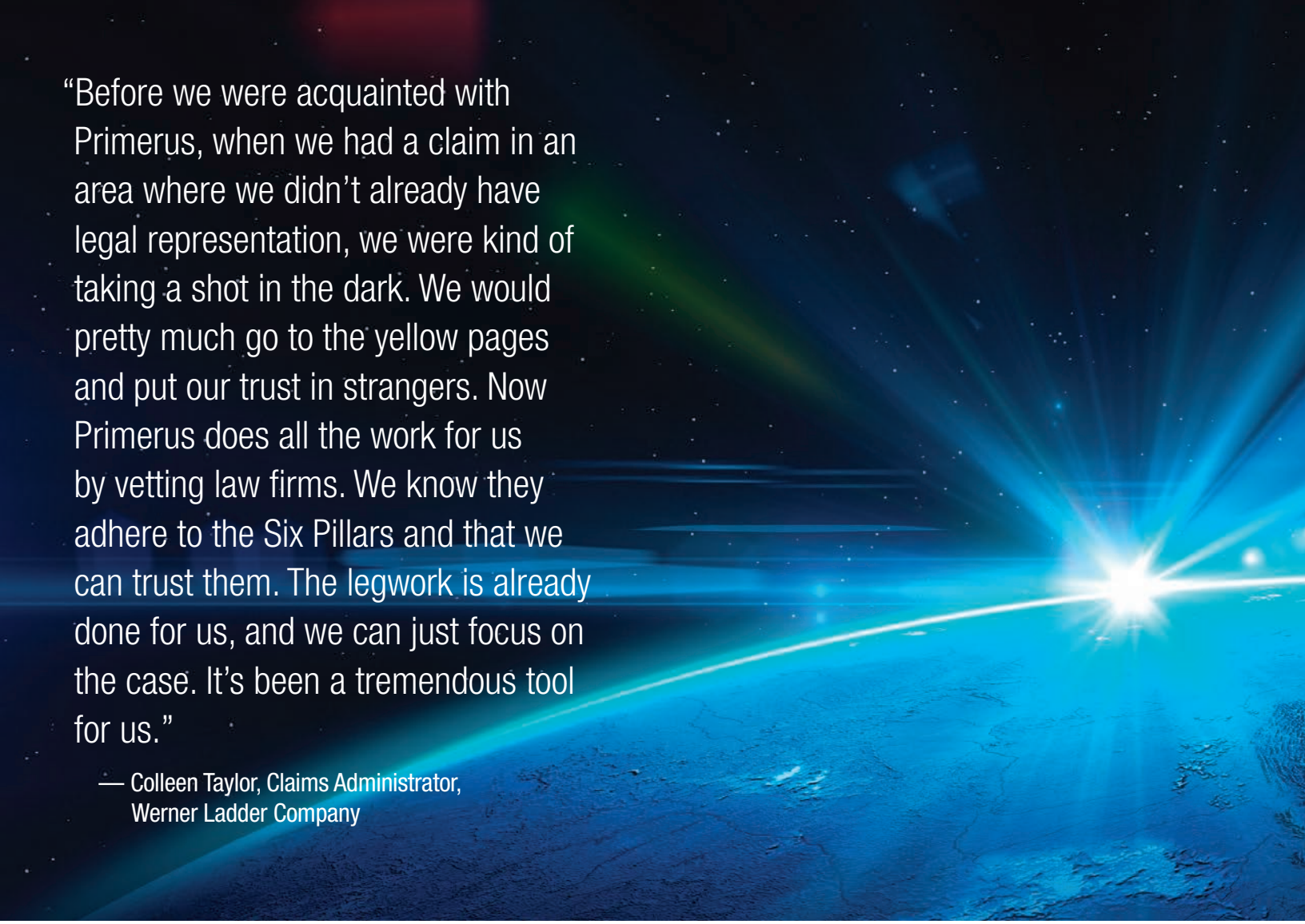
Taylor knows Primerus will help guide her way.

"Before we were acquainted with Primerus, when we had a claim in an area where we didn't already have legal representation, we were kind of taking a shot in the dark. We would pretty much go to the yellow pages and put our trust in strangers," Taylor said. "Now Primerus does all the work for us by vetting law firms. We know they adhere to the Six Pillars and that we can trust them. The legwork is already done for us, and we can just focus on the case. It's been a tremendous tool for us."

Taylor will be among the Primerus clients attending the 2015 Primerus Global Conference October 1-4 in Amsterdam, Netherlands. The event is historic for Primerus, as it marks the first time the society's premier annual event will be held outside of the United States. Also for the first time, clients such as Taylor are invited to attend the Global Conference, along with Primerus members. On October 1, Primerus will host a special client seminar called the "Primerus Legal Risk Management Seminar: A Comparative Analysis by World Region."

"We have worked with many Primerus firms, and we will continue to," Taylor said. "That's why I am so excited about attending the Global Conference in Amsterdam as our company expands globally. I am hoping to make new contacts, meet more nice people and make some more friends."

That's exactly the idea, according to Primerus President and Founder John C. Buchanan. "Our clients want to know they can find a good lawyer when they need one, where they need one. As more and more companies do business around the world, it's important for them to have connections with quality lawyers around the world," Buchanan said. "Primerus is the solution. We have attorneys in 45 countries around the world, and we provide wonderful opportunities such as the Global Conference, the Primerus



"Before we were acquainted with Primerus, when we had a claim in an area where we didn't already have legal representation, we were kind of taking a shot in the dark. We would pretty much go to the yellow pages and put our trust in strangers. Now Primerus does all the work for us by vetting law firms. We know they adhere to the Six Pillars and that we can trust them. The legwork is already done for us, and we can just focus on the case. It's been a tremendous tool for us."

— Colleen Taylor, Claims Administrator, Werner Ladder Company

Defense Institute Convocation and other events for clients to develop personal relationships with them."

Those personal relationships are what's key for Taylor. At one of her first Primerus events, she met Tamara Glaser of Primerus member firm Neil, Dymott, Frank, McFall & Trexler (San Diego, California). They soon discovered they were originally from small neighboring towns in western Pennsylvania. She also became fast friends with other Primerus attorneys including Marc Dedman of Spicer Rudstrom in Nashville, Tennessee – as well as his wife – and Duncan Manley of Christian & Small in Birmingham, Alabama.

"These are great, great people. I cannot say enough about how nice everyone is. They've become like family to me," Taylor said. "Primerus does exactly what Werner has prided itself on for years – they build friendships."

Taylor also said that to see a member like Manley be so dedicated to the Primerus society sends a message. "To see that his heart and soul is in this group means a lot to us. He is the one who introduced us to Primerus," she said.

Taylor appreciates that Primerus events start with strong continuing legal education presentations, but also leave room for social interaction. "They put on very good presentations, but then they spend the rest of the day building relationships with golf, fishing excursions and other outings. That is where you meet people and you just talk and really get to know them."

And that inevitably leads to trusted relationships with Primerus attorneys.

"If I could sum it up in one word, I would say they're trustworthy," Taylor said.

Taylor will be relying on that trustworthiness as her company seeks lawyers in various parts of the world in coming years. "To me, it's kind of like buying a used car. If you buy it from someone who says this was their Grandma's car and they know everything about it, you trust that. But if you buy it from a used car salesman who you don't know at all, you don't have that same level of comfort," Taylor said. "That's what Primerus brings to the table for us. They filter their members through a process so we know they're quality attorneys. We are trusting in the attorney, but we are trusting in Primerus primarily."

Client Events around the World

In addition to the Amsterdam event, earlier in 2015 Primerus hosted international client events in Singapore and Sao Paulo, Brazil.

The event in Sao Paulo, called the Primerus Latin America & Caribbean Institute Legal Seminar, was sponsored in cooperation with the Association of

Corporate Counsel Brazil Networking Group. According to Patricia Barcellos, chair of the Primerus Business Law Institute of Latin America & Caribbean and attorney at Primerus member firm Barcellos Tucunduva Advogados in Sao Paulo, Brazil, the event was highly successful in bringing clients and Primerus lawyers together.

"This event opened doors to many opportunities we hope to explore now," she said. "We have concrete leads to follow up on. That's the kind of thing I am looking for in Amsterdam [at the Global Conference]."

Barcellos noted that the quality and content of the educational program at the event was greatly appreciated by clients who attended. Artur Marinho, who has trained approximately 50,000 executives and entrepreneurs in over 300 companies, led an interactive program on human capital and legal management in mergers and acquisitions, focusing on the "day after" closing and the hurdles that end up at the in-house lawyer's desk and how outside counsel can help. This addressed a highly relevant matter for corporate clients in attendance, resulting in a lot of conversation and active participation.

Events such as these are also critical to showcase what Primerus firms can do for clients.

"In Primerus, we are smaller firms and because we are smaller, we have developed a set of skills sometimes I don't think we really know we have," Barcellos said. "We have learned to interact with a lot of people in order to deliver a task. If we don't have a specific expert on a matter in our own firm, we find it. Teamwork is something we are very skilled at, and our clients need that."

Barcellos said this event and other benefits of Primerus membership have been critical to the success of her firm, which recently celebrated its 60th anniversary.

"We were able to position ourselves in the global market," Barcellos said. Her firm has enjoyed referrals from other Primerus firms in South America, the United States and Europe.

"My hope is that we are able to see good opportunities and take advantage of them," she said. "Having Primerus with us increases our chances of success in the future."

She hopes the same for all Primerus firms. "My advice to other colleagues in Primerus is to always get involved," she said. "Invest some time because if you do, there will be a return. You have to make it another task to do in your day. If you don't do it that way then you're not likely to get the results you would like."

Members and Clients Getting Involved

Primerus is working to make it easier for new members to get involved and enjoy the benefits of membership with a new program called the Primerus Ambassadors. Under the leadership of an early Primerus member, Donald Winder of Winder & Counsel in Salt Lake City, Utah, about 50 Primerus members will serve as Ambassadors. They're charged with mentoring new Primerus members and encouraging greater participation from all members.

Their first step will be to host a First Time Attendee Breakfast at the Global Conference, where each Ambassador will be matched with a first time attendee based upon Institute membership and geographic proximity.

"To use [Primerus President and Founder] Jack Buchanan's language, we should put an arm around each new member and that's what we're going to do," Winder said.

Winder and other members know that the more you get involved, the more Primerus will work for you.

"I have been in Primerus for over 20 years, and it's easy to observe what happens if you become active. All kinds of good things happen," Winder said. "If you think all you have to do is send in an application form and good things will come your way, that's not realistic of our organization or any organization."

Having a society of highly active members is what benefits clients as well, according to Buchanan.

"Primerus is a great matchmaker of our members and clients around the world," Buchanan said. "We provide wonderful opportunities for them to meet and then the rest is up to them to engage and develop the relationships and trust needed for great legal partnerships." Those relationships give corporate clients leverage to compete in an increasingly competitive global business world, Buchanan said.

Bringing Members and Clients Together

Rodolfo Rivera, chair of the ACC Real Estate Committee and chief international counsel for Fidelity National Financial, Inc., will be among the clients attending the Global Conference in Amsterdam.

Rivera said his company has worked with six Primerus firms, and he values the benefits Primerus offers.

"Hiring a law firm to me is very precarious. It's hit or miss," Rivera said. "What I like about the Primerus model is that the firms are already vetted. There is a screening process, and if something goes wrong with a firm, I need to contact someone who can hold the firm accountable. That to me is the value."

When hiring a lawyer, Rivera looks for legal expertise, experience with foreign clients and the firm's ability to handle complex matters. Personal relationships are also important, and that's one reason why Rivera values events like the ACC Annual Meeting.

"Fidelity sold title policies throughout the world. The company never knows from which country the litigation will come, and I must act quickly to retain a law firm," Rivera said. "It is also human nature to do business with people you like and people you have a relationship with. We look at a case as a partnership. A lawyer has to tell me what he's doing and why he's doing it, and not just, 'I'm doing this.' It's like having a colleague or another partner working with them on the case. We treat litigation as a team effort."

Rivera also sees positive aspects of working with smaller firms like Primerus firms. "I find that most mid-sized firms are entrepreneurial. You're generally dealing with the person in charge and decisions can be made quickly."

Rivera looks forward to his trip to Amsterdam to meet more Primerus lawyers. "These travel trips are not just a way to vacation," he said. "It's just a really good opportunity for me to meet lawyers in Europe."

Buchanan said Primerus is excited to showcase itself as a truly international society in Amsterdam as well as at future client events around the world.

"Primerus adds tremendous value for clients and members alike in the international sphere," Buchanan said. "It is hard enough for clients to find good law firms in the U.S or their local country, but the difficulty is magnified when companies try to find quality law firms internationally."

That, Buchanan said, is why clients sometimes turn to the mega law firms with a well-known brand and higher fees, when they don't need to. He said it's also why the small and mid-sized international law firms, like Primerus firms, sometimes get passed over by these premium clients.

"That's where Primerus comes in and changes the whole equation," Buchanan said. "We give the small and medium-sized high quality law firms an entrée into the international legal marketplace for high quality business. And we take the hard work and worry off the shoulders of the premier business clients by helping them find excellent small or medium-sized law firms that provide outstanding legal service at a substantially lower cost. Clients tell us time and time again that this is a huge benefit for them."

2015 Primerus Global Conference

October 1-4, 2015 | Radisson Blu Hotel | Amsterdam, Netherlands

Primerus members and clients will gather in Amsterdam for this showcase event, featuring educational sessions and social events that will strengthen the society's global ties. For more information, contact Chad Sluss at csluss@primerus.com or 800.968.2211.

The NLRB's New Standard for Deferring to Arbitration Awards May Alter the Dynamics of Labor Arbitration in the U.S.

National Labor Relations Board ("NLRB" or the "Board") Chairman, William B. Gould IV, noted two decades ago that:

> [f]or…years, the Board and the courts have struggled with a problem endemic to American labor law…. the uneasy coexistence between public law under the … [National Labor Relations Act (the "Act")] and privately negotiated grievance-arbitration procedures involving the interpretation of collective bargaining agreements.[1]

This "uneasy coexistence" describes the pragmatic accommodation of the twin elements of American labor policy – enforcement of the Act on behalf of the public by the Board, and a national policy favoring arbitration to resolve private labor disputes.

The Board's December 2014 decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, 2014 NLRB LEXIS 964 (2014), which overturned its long established standard for deferring to arbitration awards, may well test – and ultimately diminish – the pillar of our national labor policy that favors arbitration.

The NLRB's Previous Standard for Deferral to Arbitration

For nearly 60 years, the Board stayed its hand as a matter of discretion, and, pursuant to a doctrine announced in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), deferred to arbitration awards involving the same underlying facts as the contemporaneous unfair labor practice claims.

The Board required only that the party seeking deferral show that (a) the arbitration proceedings appeared to have been fair and regular; (b) all parties agreed to be bound by the award; and that (c) the arbitrator's decision was not "clearly repugnant" to the purposes and policies of the Act. "Clearly repugnant," subsequent NLRB decisions explained, meant only that the arbitration award had to be "'palpably wrong," i.e., the decision was not susceptible to *any interpretation consistent with the Act*.

In *Olin Corp.*, 268 NLRB 573 (1984), the NLRB relaxed the requirement that the arbitrator had to have considered the unfair labor practice requirement, there announcing that it would be satisfied, and would defer if the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.

This standard assured deferral to the arbitration award in most cases in which it was sought.

In Announcing a New Deferral Standard, *Babcock* Overturns 60 Years of Precedent

In *Babcock*, the Board overturned its existing post-arbitral award deferral standard based on its belief, according to the NLRB's General Counsel (the "GC")[2] that the existing standard insufficiently balanced the protection of employee rights under the Act – the unfair labor practice issue – with the national policy of encouraging arbitration to resolve disputes

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over the interpretation and application of collective bargaining agreements.

In brief, *Babcock* now shifts to the party seeking deferral the burden not only of showing that the arbitration proceedings were "fair and regular" and that the parties agreed to be bound by the award, traditional *Spielberg* and *Olin* requirements not affected by *Babcock*; but also that:

(a) the arbitrator was explicitly authorized by the parties to decide the unfair labor practice issue;

(b) the arbitrator was presented with and considered the "statutory issue" (or was prevented from doing so by the party opposing deferral);[3] and that

(c) NLRB law "reasonably permits" the award.[4]

This new standard makes deferral by the Board much less certain, or even likely, going forward.

The Practical Implications of Babcock

A. Explicit Authorization

As a party seeking deferral must now show that the arbitrator was explicitly authorized to decide the unfair labor practice issue, parties may wish to consider the following steps to convince the Board to defer to arbitration awards under the *Babcock* standard: (a) incorporate the authority into a collective bargaining agreement (and parties with existing contracts might well consider renegotiating their contracts to give arbitrators the authority to determine the statutory issues); or (b) grant arbitrators case-by-case authorization to do so.

Granting blanket authority to the arbitrator poses certain risks. As arbitration awards are virtually never overturned on appeal, if a case raises a significant issue under the Act, a party might want that particular issue decided by the NLRB, whose decision is subject to judicial review, rather than by an arbitrator. On the other hand, a case-by-case authorization gives a union veto power in any particular case, and it is often the union that benefits by getting "two bites at the apple," and, at least in the Board proceeding – a free ride investigation and no-cost prosecution.

B. The Statutory Issue was Presented and Considered

As the NLRB no longer will "simply assume…merely from the fact that an arbitrator upheld a discharge under a 'just cause' analysis, that the arbitrator understood the statutory issue and had considered (but found unpersuasive) evidence tending to show unlawful motive" (GC Memo 4); a party seeking deferral must explicitly present the statutory issues, on the record, to the arbitrator. It could do so, for example, by: (a) articulating the statutory issue in the initial submission to arbitration; (b) reiterating the issue in opening and closing statements; and (c) addressing the issue, and summarizing the evidence submitted, in a post-hearing brief.

There are Potential Problems Ahead

In sum, as with any departure from decades of well-settled practice, the NLRB's new post-award deferral standard poses practical problems for the future, among them:

- It could encourage parties to circumvent their contractual grievance procedure entirely by filing unfair labor practice charges when they believe they can fare better before the NLRB;
- It doesn't diminish the incentive for a party that loses in arbitration to oppose post-award deferral and take a second "bite of the apple" at the Board;
- Arbitration proceedings will likely become more time consuming and expensive as parties, counsel and arbitrators spend time addressing underlying unfair labor practice issues in order to avoid duplicative litigation;
- There will be a steep learning curve while arbitrators figure out what is required of them in the way of finding and interpreting NLRB "law," and try to craft awards that comply with the NLRB's new standard. P

1 Gould IV, William B., The NLRB's Deferral to Arbitration Policy, 10 The Labor Lawyer 719 (1994).

2 See 2015 Memorandum to the NLRB's Regional Directors 1-2 (GC 15-02) (February 10, 2015), apps.nlrb.gov/link/document.aspx/09031d4581c0c5cf, ("GC Memo").

3 Although an arbitrator is not required to "engage in a detailed exegesis of Board law," to establish that he or she was "presented with and considered the statutory issue," the party urging deferral must show that the "arbitrator identified the issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice issue." (GC Memo 4)

4 This, the Babcock Board explained, requires that the award represent a "reasonable application of the statutory principles that would govern the Board's decision," meaning that the arbitrator need not rule exactly as the NLRB might have ruled; "[r]ather the award need only reach a result a 'decision maker reasonably applying the Act could reach." (GC Memo 7)

Employers Beware: New DOL Interpretation Threatens to Require FLSA Coverage for Traditional Independent Contractors

Much has been made of the United States Department of Labor's ("DOL") proposed rule, promulgated in response to President Barack Obama's March 2014 Executive Order, that increases the standard salary level required for the Executive, Administrative and Professional "EAP" or "white collar" exemption under the Fair Labor Standards Act ("FLSA") from $455 a week ($23,660 for a full-year worker), to $970 per week ($50,440 per year). After all, it is estimated that over five million, currently exempt, salaried employees will be entitled to overtime pay if the Rule becomes final. However, the DOL's recent position[1] regarding its interpretation of the FLSA's "Suffer or Permit" employment definition has the potential, if upheld, to include coverage for as many or more individuals, who may otherwise be deemed independent contractors.

As of 2005, there was an estimated 10.3 million independent contractors working in the U.S.[2] The DOL maintains that many employees are misclassified as independent contractors.[3] The DOL contends that certain employers may be intentionally misclassifying employees to cut costs associated with workplace protections such as minimum wage, overtime compensation, unemployment insurance and workers' compensation. In addition, misclassification results in lower tax revenues for the government and creates an uneven playing field for employers who properly classify their workers.

On July 15, 2015, DOL Administrator David Weil issued his Administrator's Interpretation No. 2015-1 ("Interpretation No. 2015-1"). The DOL related that it continues to receive numerous complaints from workers alleging misclassification and continues to bring successful enforcement actions against employers who misclassify. It has pursued a multi-pronged approach, entering into memoranda of understanding with many states and the Internal Revenue Service, in an effort to share information to combat misclassification. Interpretation No. 2015-1 was issued to provide "additional guidance" to the regulated community in classifying workers and to curtail misclassification.[4]

The FLSA requires covered employers to pay time and a half to employees who work over 40 hours in a given work week.[5] Under the FLSA, "employee" is defined, with certain exceptions, as "any individual employed by an employer."[6] "Employer," in turn, is defined as including "any person acting directly or indirectly in the interest of an employee in relation to an employee…."[7] Under the FLSA, "'employ' includes to suffer or permit to work."[8]

The U.S. Supreme Court has noted that the FLSA's "employ" definition is broad and is derived from child labor statutes.[9] In addition, the Court noted, "'This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.'"[10] As

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a result, the test applied to determine whether a worker is an employee or an independent contractor is the "economic realities test," rather than the common law "right of control"[11] standard.

The "economic realities test," also known as the *Silk*[12] test, considers the following factors: (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss; (3) the relative investment in the business; (4) the degree of skill and independent initiative required to perform the work; and (5) the permanence or duration of the working relationship.[13] No one factor is controlling nor is the list complete.[14] Several jurisdictions also include the extent to which the work is an integral part of the employer's business.[15]

Interpretation No. 2015-1 is not simply a regurgitation of existing law. It is clear that this 15-page document is an attempt to shape the analysis. First, it places high emphasis on whether the work performed is an integral part (e.g. painter working for painting company) of the employer's business. Concerning the opportunity for profit or loss factor, the DOL focuses less on whether the individual could be held to account for failing to perform and more on the individual's ability to use management skills to run and expand a business. In considering the relative investment factor, not only is the worker's investment important, but also the relative investment the worker has made compared to the hiring business. Worker investment in tools is downplayed. The DOL's focus on the fourth factor is not simply that the worker is skilled, but that they also display initiative similar to the management skills under the profit or loss factor. Concerning factor five, a permanent or indefinite relationship between worker and business suggests the worker is an employee. The "control" factor is downplayed. It must be more than theoretical; it must be actually exercised. Working from home or offsite, and employee control (flex schedules) over hours worked is not significant. The nature and degree of the alleged employer's control is key, rather than the employer's rationale. Finally, the DOL takes the position that the FLSA provides coverage where the worker is economically dependent, even if requisite control is not exercised.

If the DOL is successful in shaping the standards to be used in determining whether an individual is an employee or independent contractor, not only will there be greater exposure to businesses under the FLSA, but exposure will also be increased under the Family Medical Leave Act (FMLA), as the FMLA incorporates the FLSA's "employ" definition.[16]

The DOL's message is that businesses should review their relationships with those whom they contract. Red flags include situations in which individuals are employed in the same exact line the business is known for, those where the individual works solely for the one business and no other, those where the business exercises control (even quality control or following customer dictates), and those situations in which the individual has worked for the business on a permanent or indefinite basis.

1 U.S. Department of Labor and Wage Division, Administrator's Interpretation No. 2015-1, Administrator David Weil, July 15, 2015 ("Interpretation No. 2015-1").

2 See United States Government Accountability Office, Report to Ranking Minority Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate, Employment Arrangements, Improved Outreach Could Help Ensure Property Worker Classification, p. 11, Table 2 (GAO-06-656 (July 2006)).

3 See generally, Robert I. Gosseen and Morgan A. Godfrey, Employee Misclassification: The Employment Law Issue *du Jour*, Paradigm October 2010.

4 Interpretation No. 2015-1 at p. 1.

5 29 U.S.C. § 207(a)(1).

6 *Id.* at § 203(e)(1).

7 *Id.* at § 203(d).

8 *Id.* at § 203(g).

9 *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728, 67 S.Ct. 1473, 1476 (1947).

10 *Id.* 331 U.S. at 729, 67 S.Ct. at 1476 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150, 67 S.Ct. 640 (1947)).

11 The "right of control" test included such factors as: (1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge. See e.g. *Guhlke v. Roberts Truck Lines*, 281 Minn. 141, 143, 128 N.W.2d 324, 326 (1964). Of all factors, the right to control was considered the most significant. *Id.*

12 *United States v. Silk*, 331 U.S. 704 (1947).

13 Id. 331 U.S. at 716.

14 Id.

15 See e.g. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987). But see *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012) (applying an eight factor test, which is a hybrid between the right to control test and the economic realities test).

16 29 U.S.C. § 1802(5) ("The term 'employ' has the meaning given such term under [the FLSA, 29 U.S.C. 203(g)]." See Interpretation No. 2015-1 at p. 2, fn. 3.

Employees and Inventorship – Getting It Right

Inventorship in a patent application is a typically tertiary concern that receives little attention in the drafting process and can seem unimportant to the uninitiated. However, the consequences of making an error with regard to inventorship can be dire, resulting in the potential loss of significant revenue and control over who may or may not practice the invention. Thankfully, particularly for an employee inventor, there are many opportunities to avoid such unfortunate outcomes.

Inventors Rights

U.S. patent law states that each person who "contributes to the conception of the invention" is an inventor. Each inventor has an undivided equal partial interest in the entire patent. This means that each inventor has the legal right to make, use or sell the invention, and authorize others to do the same. Moreover, no inventor has any obligation to share in the proceeds of their individual monetization of the invention; each inventor may exploit the invention to their individual benefit. Accordingly, it is frequently in the best interest of all the inventors to transfer their interests in a patented invention in a single entity, who can then derive value from the patent by making and selling the invention embodied in it, licensing or various other methods. This is referred to as assignment, whereby an assignee gains the rights of the assigning inventors. The powers of the entity that the interest of the inventors is transferred to is a completely separate matter, and should be dealt with using corporate agreements, such as an operating agreement.

Employee Inventors

In the case of employee inventors, it behooves employers to require employees, as a condition of their employment, to assign their interests in any intellectual property that arises in the course of their employment. Such clauses are often included in employment agreements, employee handbooks, non-competition agreements, and the like. In such circumstances, an employee inventor is under a contractual obligation to assign their interest to their employer, presently and in the future.

Consequences of Errors in Inventorship

If there is an error in inventorship, a variety of outcomes are possible. When an inventor was omitted without deceptive intent, the inventor may be added by a routine procedure in the Patent Office. However, that inventor now has the same undivided interest in the patent that the other inventors who were previously named, leaving the newly-added inventor free to exploit the patent. This can present a problem when the patented invention is already in production, either by the inventors or by license to a third party. The newly added inventor may subvert these efforts by making their own use of the patent, releasing a competing product or entering into their own licensing agreements. Moreover, when a patent owner is seeking to enforce a patent in litigation against an alleged infringer,

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and the infringer learns of the newly-added inventor, the infringer may be able to obtain a license from the newly-added inventor, thus nullifying the claim of infringement.

It is precisely in this scenario that obligating employee inventors to assign their rights in intellectual property becomes invaluable. For example, if the inventor is no longer an employee, they may benefit little from assigning their interest in the patent. However, if they are obligated to do so, they may have a significant *disinterest* in doing anything other than assigning their interests, as required.

Bad as this scenario may seem, there may be worse. If, in the course of litigation involving a patent, it is discovered an inventor was omitted from a patent application, and there is evidence to suggest the inventor was *intentionally* omitted, it is possible the patent may be *invalidated*, thus dissolving a potentially valuable asset.

What to Do If You Discover an Error in Inventorship

Every effort must be taken to correct the inventorship of the invention. When the inventor appears willing to cooperate, both in terms of being added as an inventor and in assigning their interest, then adding them is relatively straightforward and painless. However, if the inventor is uncooperative in terms of adding themselves as an inventor, procedures exist within patent law for adding them despite their opposition.

Finally, as a measure of last resort, when the inventor appears likely to do harm to existing business interests that rely on the patent, certain elements of the patent may be eliminated so as to remove that person's contribution to the invention, thus removing them as an inventor. This is not always an option if their contribution cannot be readily excised, and certainly diminishes the value of the patent.

These entirely unnecessary risks can be avoided with careful review by the inventors, particularly with the assistance of a patent attorney, of who should be listed as an inventor, as well as ensuring employee inventors are under an obligation to assign their intellectual property rights as a condition of their employment. P

International Service of Process under the Hague Convention

Late on Friday afternoon, one of your oldest clients calls your office. Your client explains that his Dutch customer has refused to pay more than $1 million that it owes to your client for the manufacture and sale of certain solar panels that it purchased from your client.

You immediately ask yourself, "How do we sue someone in the Netherlands?" You know this will not be as simple as sending a process server to someone's place of business with a copy of the complaint. But it is not dramatically more difficult either.

The most relevant international agreement for service of process outside the United States is the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the "Hague Convention"). The Hague Convention is a multilateral treaty designed to simplify the methods for serving process internationally. Its aim is to ensure that defendants sued in foreign countries receive timely notice of suit. Many business clients and practitioners are unaware of the Convention's nuances, including the methods of service that the Hague Convention affords. Possible approaches to service under the Hague Convention are listed below. It is important to note, however, that the Hague Convention permits countries to opt out of one or more forms of service. You should consult the State Department's website to confirm that the subject jurisdiction has not opted out of the particular method of service that you are considering.

Service by Central Authority

Service of your summons is effected by foreign government officials, often the police. All courts in signatory countries regard this form of service as sufficient. Thus, any judgment your client might obtain is fully enforceable. Some countries permit only this type of service of foreign process. You must use proper forms, and all documents, including the summons and the complaint, must be translated into the local language.

To initiate service, obtain a Request for Service Abroad (form USM 94) from the U. S. Marshal's Service's website. You are permitted to complete the form as the requesting authority. The completed form, two copies of the papers for service, and translations of all papers are sent to the central authority for the country in question. Be cognizant of translation issues, as you might have to provide the documents in multiple languages. You should consult local counsel in your foreign jurisdiction for guidance. Primerus firms can work together in such cases. Be sure to visit the Primerus website to determine which Primerus firm is located in the jurisdiction where you need to effect service.

The Hague Convention provides for service of process in a manner typically used by the recipient country in domestic actions, which you can select with input from your foreign counsel. You can avoid collateral challenges by selecting a form of service that satisfies

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both the foreign and domestic courts.

The State Department advises that the Request for Service Abroad should prominently display its own authority, namely Rule 4(c) of the Federal Rules of Civil Procedure and, for state court actions, both Rule 4(c) and the local rule or statute. The U.S. Marshal's Service and the State Department can supply you with publications for further information.

International Registered or Certified Mail

Not all signatories to the Hague Convention permit service by mail within their territory. But the mail process is exceedingly simple. Some practitioners, however, have always been nervous about this procedure. If the defendant challenges service, you will be left only to argue that the signature on the green return slip belongs to the defendant or its representative. If the signature on the slip is later denied, any resulting judgment will be subject to attack. Attempting to sustain that judgment could turn out to be a far more expensive and time-consuming task than using another form of service at the outset would have been.

Letters Rogatory

This form of service involves a formal request by your local court addressed to a court in the foreign jurisdiction for issuance of process. Service of the foreign summons is then accomplished by foreign personnel. This procedure is sufficient regarding later enforcement of an American judgment because the summons is issued by the court in the foreign jurisdiction, which has personal jurisdiction over the defendant. It is, however, a complex and time-consuming process. The advantage of the letters rogatory procedure lies in the enforceability of the American judgment in the country where service of process was issued.

This procedure begins in your local court, where you petition for issuance of letters rogatory. Be sure to hire local counsel in the foreign jurisdiction, who can help ensure that your work is acceptable to the foreign court. All the material must be translated into the language of the destination court. You will incur considerable expense in obtaining good translations, working with foreign local counsel, and paying filing and service fees. Delays are common. This process should be used only when there is no other form of service permitted by the foreign jurisdiction.

Information on procedures involved with letters rogatory and with compliance with the Hague Convention generally is available from the Department of State. Procedures for contacting the attention of the foreign court also vary among countries. You should contact the nearest consulate or embassy of the destination country to learn local requirements.

Service in Person by Agent

Not all signatories permit service in person by an agent within their jurisdiction. With the cooperation of foreign counsel, service can be accomplished face to face, as in the United States. This procedure is a little more complex, however, in that you, working with your foreign counsel, must provide instructions in the foreign language. Paperwork too must be provided in the local language, unless the defendant voluntarily accepts service. The agent serving the process should provide you with a notarized affidavit confirming service.

Waiver of Service

One may simply ask the foreign defendant to waive formal service. This method is extremely efficient when the defendant cooperates. You can use a belt-and-suspenders approach by asking the defendant to execute the waiver in the presence of a United States consular official abroad.

Service by Publication

This is a procedure that involves mailing a notice to a last-known address, which is a step in the process open to factual dispute. All the usual concerns about publication apply, as do questions of proving that the use of such service was appropriate under the circumstances and done correctly.

After you explain all of the service options to your client and the costs and benefits of each, you jointly decide that while service by mail would be the least expensive, it is open to too many potential contingencies. While service by the central authority in the Netherlands will be more expensive, your client may avoid a challenge to the American judgment, especially because it involves meaningful sums of money and needs to be safeguarded against collateral attack. P

Can the King's Contractor Do No Wrong? An Introduction to Government Contractor Immunity under the Federal Tort Claims Act

Whether drafting a contract, drafting policies for your organization, or representing a client in a lawsuit, you would be wise to consider the implications of federal tort immunity.

Historically, citizens have not been able to sue their state. This historical principle is commonly known as sovereign immunity, sometimes expressed as "the king can do no wrong." In the United States, this is still true. In 1946, Congress enacted the Federal Tort Claims Act ("FTCA"), acting as a limited waiver of sovereign immunity. The FTCA allows private parties to bring lawsuits for state-law torts committed by persons who are acting on behalf of the United States, subject to the exceptions enumerated in 28 U.S.C. § 2680. *See also* 28 U.S.C. § 2674. Federal courts have jurisdiction over such claims, but apply the law of the state "where the act or omission occurred." 28 U.S.C. § 1346(b). To assert a claim under the FTCA, a plaintiff must exhaust the applicable administrative remedies prior to filing suit. *See* 28 U.S.C. § 2675(a).

If you believe you may have a tort claim against a federal agency, employee or government contractor, you must first determine whether your suit is permitted under the FTCA. Unless your claim is allowed by the FTCA, there is a good chance that it will be barred by sovereign immunity. Often, tort claims against federal agencies and employees are defended by an attorney from the U.S. Department of Justice. More complex is the situation where government functions are being handled by a private contractor.

If you are defending a suit in which your client is a government contractor, the FTCA is one of the first places you should look to prepare your defense. This defense preempts state law and immunizes government contractors from tort claims. The rationale for so-called federal government-contractor immunity is based upon two basic principles: (1) state tort law is preempted by federal common law in areas of unique federal interests, and (2) the procurement of equipment by the United States is such an area. *In re Katrina Canal Breaches Litig.*, 620 F.3d 455 (5th Cir. 2010). This is rooted in one of the exceptions found in the FTCA, the so-called "discretionary function" exception found at 28 U.S.C. § 2680 (a).

The classic example implicating government-contractor immunity arises when a defendant is producing a product or structure pursuant to a government contract and pursuant to plans/specifications provided by the government and is sued in tort. The seminal case on this issue is *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

In *Boyle*, a Marine Corps co-pilot was killed when his helicopter crashed

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during a training exercise. The co-pilot's father filed a diversity action in the United States District Court for the Eastern District of Virginia against the manufacturer, a government contractor that built the helicopter for the government. In his action, the plaintiff-father asserted state tort-law claims for the death of his son. Holding that the government contractor could assert an immunity defense under the FTCA, the United States Supreme Court formulated a three-part test to evaluate government contractor immunity from negligence claims by third parties. In that test, state law which imposes liability for design defects in military equipment is displaced when (a) the United States approved reasonably precise specifications; (b) the equipment conformed to those specifications; and (c) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States. Thus, in *Boyle*, the Supreme Court extended a sort-of derivative sovereign immunity once reserved to the government to private contractors because these contractors perform "discretionary functions" which are excepted from liability under the FTCA. 28 U.S.C. § 2860.

The *Boyle* test is not limited to tort claims resulting in personal injury. In the case *In re Katrina Canal Breaches Litig.*, 620 F.3d 455 (5th Cir. 2010), the plaintiffs brought class and individual tort actions against a government contractor that provided engineering, construction and management services to the United States Army Corps of Engineers in connection with work on and near flood protection systems that failed during Hurricane Katrina. The plaintiffs argued that the government contractor's negligent and improper actions in fulfilling the contract were a cause of flood damage resulting from Hurricane Katrina. The district court granted summary judgment for the government contractor based on government-contractor immunity.

Applying the *Boyle* analysis, the Fifth Circuit reversed summary judgment, finding that the specifications for the work at issue were not "reasonably precise" and thus the contractor was not entitled to government-contractor immunity. In its decision, the Fifth Circuit concluded that the government had provided only *general* instructions regarding work-method, which "ensured that [the government contractor] would have significant discretion over the method chosen. The exercise of that discretion by [the government contractor] is not protected by the [government contractor immunity] doctrine."

Government contracted service providers should take note as well, although it is typically more difficult to assert this defense. The issue of federal tort immunity often comes up in discrimination cases brought pursuant to 42 U.S.C. § 1983. As a preliminary matter, parties to such litigation should be aware that there is no respondeat superior for employers. For example, the Seventh Circuit Court of Appeals has held that a § 1983 claim will not support a claim based on a respondeat superior theory of liability. See e.g. *Iskander v. Village of Forest Park*, 690 F.2d 126 (7th Cir. 1982); but see *Shields v. Illinois Dept. of Corrections*, 746 F.3d 782 (7th Cir. 2014) (questioning the logic of *Iskander* but not overturning it).

Under federal law, for a private corporation to be held *directly liable* in a § 1983 case, a plaintiff must plead and prove that the defendant-employer had an "impermissible policy" or "'constitutionally forbidden' rule" that served as the "moving force" or proximately caused the alleged constitutional deprivation. See e.g. *Iskander v. Village of Forest Park*, 690 F.2d 126 (7th Cir. 1982). Thus, plaintiffs must often look to individual employees as the defendants in such claims.

Individual employees could attempt to assert qualified immunity from suit for constitutional violations as providers of services pursuant to contract with an agency of the federal government. This could be raised in a motion to dismiss, as an affirmative defense, or in a motion for summary judgment. However, this defense has some limitations.

The U.S. Supreme Court has found that the employees of a private, for-profit corporation (Corrections Corporation of America) that managed a state correctional center were not immune from suit in a §1983 case. *Richardson v. McKnight*, 521 U.S. 399 (1997). In reaching its conclusion, the Court noted that the denial of immunity was determined "narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Id*.

If there is a government connection to your suit, consider whether your facts support a government contractor defense. This will guide your discovery and help you determine the appropriate defendants. If you are negotiating a contract that includes plans and specifications or are developing policies in connection with the execution of a government contract, consider how these might impact an invocation of the government contractor defense, should litigation arise. P

Business Records in Court

The biggest lawsuits involve the biggest players – enormous corporations with scores of divisions and departments, tens of thousands of employees, and trillions of dollars in annual transactions.[1] When these giants battle in court, the same rules of evidence apply to their disputes as apply to a neighborhood grocery's bounced check case. One rule in particular – the business records rule – has taken center stage in some jurisdictions and is becoming a powerful weapon for the little guy defending against lawsuits brought by giant corporations, such as mortgage foreclosures.

The Business Records Rule

The "business records rule" is a rule of evidence. Most business records are considered hearsay in court. The business records rule is an exception to the hearsay rule. The rationale behind the business records exception is that businesses have incentives to keep accurate, reliable records.[2]

The rule specifies what kinds of business records qualify for admission in evidence. The records is admissible if it: (a) was made at or near the time of the transaction or event recorded in it; (b) is based on information reported by a person with first-hand knowledge of the transaction or event; (c) was made as a regular practice of the business; (d) was made and kept in the ordinary course of business.[3]

In addition to the four requirements of the business records exception, records stored electronically are also subject to evolving rules on electronically stored information (ESI). With all these requirements, it would seem that getting electronically stored business records admitted in court would be a tall order. But courts have tended to be lenient.

History of Leniency

Courts and trial lawyers usually expect business records to be admitted in court. Often lawyers agree to each other's business records being admitted. When admissibility is challenged, judicial standards vary, but more courts tend toward a lenient approach.

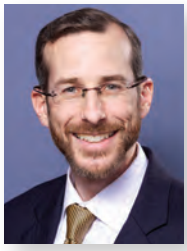
There is "a wide disparity between the most lenient positions [appeals] courts have taken in accepting electronic [business] records as authentic and the most demanding requirements that have been imposed… more courts have tended towards the lenient rather than the demanding approach."[4]

Tripping Over the Low Bar

Despite the typically low bar for admission of business records, homeowners in foreclosure have found an apparent Achilles' heel in the mortgage industry: their business records.

Several homeowners in Florida have recently won reversals of their mortgage foreclosures on appeal because the cases were based on business records that failed to satisfy the business records rule. Despite the bar being low, giant financial institutions have tripped over it and had their foreclosure judgments reversed and their cases thrown out of court.

In some cases, the records themselves were fine, but the lenders' witnesses could not testify to the four elements of the rule.[5]



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The more common problem has been that the foreclosing lender's case was based on the records of another business, whose record keeping practices were not known in detail by the lender's witness at trial.

Someone Else's Records

Businesses routinely rely on the records of other businesses in conducting their daily affairs. In the mortgage industry, loan servicing companies handle the payment processing, escrow accounting, and other loan management functions as contractors of the financial institutions that hold the notes and mortgages. It is common for a loan to be serviced by several companies during its lifetime. Each servicer may also engage multiple "sub-servicers" to handle highly specialized services, such as monitoring and paying county taxes when they fall delinquent.

When the mortgage becomes delinquent and the mortgage holder sues to foreclose, it has to rely on records created by these other businesses. Short of calling a witness from each business, authenticating their record keeping practices can be problematic.

An example is *Hunter v. Aurora Loan Services*[6], in which Aurora foreclosed its mortgage. Aurora had to prove that it held the mortgage note when it filed the case. It tried to do that through a business record of its prior servicer, Mortgage IT. However, its witness at trial was an employee of its new servicer, Rushmore Loan Management Service. The Rushmore employee testified based on Mortgage IT's records that Aurora held the note when the case was filed. However, the Rushmore employee was unable to testify to the record-keeping practices of Mortgage IT. Therefore, the appeals court reversed Aurora's foreclosure judgment.

Does this mean foreclosing lenders have to call witnesses from each prior servicer in every case? Do other businesses that rely on the records of other business have to call witnesses from those businesses to use their records in court?

Not in an Imperfect World

"In a perfect world, the foreclosure plaintiff would call an employee of the previous note owner [or servicer] to testify as to the documents. However, this is neither practical nor necessary in every situation…."[7], according to a Florida appeals court.

Courts across the country have been straining to lower the bar below the four elements of the business records exception so that these presumably reliable business records can be used in court by other companies without the cost and inconvenience of calling multiple witnesses at trial just to authenticate multiple businesses' record keeping practices.

In 2005, the Massachusetts Supreme Court ruled that the loan balance reported by the seller of a mortgage loan was an admissible business record when offered by the buyer of the loan because "it is normal business practice [in the financial industry] to maintain accurate business records regarding such loans and to provide them to those acquiring the loan."[8]

In 2010, the Hawaii Supreme Court announced its own lower standard: "when an entity incorporates records prepared by another entity into its own records, they are admissible as business records of the incorporating entity provided that it relies on the records, there are other indicia of reliability, and [the business records exception is] otherwise satisfied."

Loan investors and servicing companies welcome these judicial rulings, which make their cases easier to prove. Consumer advocates and other critics say the courts are putting pragmatism over important rules of reliable evidence. Billions of dollars hang in the balance.

Conclusion

Business records often determine the outcome of important courtroom battles. The standards for admissibility are developing and often make the difference between victory and defeat. P

1 Such mammoth litigation includes the multi-billion dollar case of *BlackRock Allocation Target Shares v. U.S. Bank N.A.*, U.S. District Court, Southern District of New York Case No. 1:14-cv-09401-KBF. That case was recently dismissed by the federal court, only to be re-filed in New York State court.

2 *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir.1995).

3 *Fed. R. Evid.* 803(6).

4 *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 558 (D. Md. 2007).

5 *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 781 (Fla. 4th DCA 2011) (summary judgment reversed based on deposition testimony of Bank's witness that he "did not know who, how, or when the data entries were made."

6 *Hunter v. Aurora Loan Services, LLC*, 137 So.3d 570 (Fla. 1st DCA 2014).

7 *Nationstar Mortgage, LLC v. Beredecia*, Case No. 5D14-569, 40 Fla. L. Weekly D1502a (Fla. June 26, 2015).

8 *Beal Bank, SSB v. Eurich*, 444 Mass. 813, 819, 831 N.E.2d 909, 914 (2005).

Seven Do's and Five Don'ts If You Are Sued

There is a knock at your front door. It's dinnertime, and you are not expecting any company.

"Are you John Smith?"

"Yes," you respond. The man at the door hands you a thick stack of papers he has been holding. You look at the documents. *Summons in a Civil Action*. Behind it: *COMPLAINT*. You begin to review the documents, and you finally realize what has occurred: Someone has sued both you and your company. What do you do now, and where do you even start?

It is important to know that the law does not give defendants much time to respond to a complaint. In Georgia state or superior court, the time to respond is 30 days. In federal court, the time is even shorter: 21 days. During this time, you have to: (1) find and meet with an attorney, (2) allow the attorney sufficient time to review all the relevant documents and learn your case, so he or she can (3) draft an answer and/or a motion to dismiss the complaint. And yet numerous clients and potential clients wait days or even weeks before calling an attorney after being sued.

That said, if you are sued, here are seven things to do, and five things not to do, to help put yourself in the best position possible to defend the lawsuit.

Do:

1. Read the complaint.

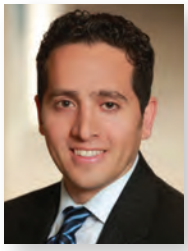
It is surprising how many clients and potential clients do not bother reading the entire complaint before trying to find and hire a lawyer. Perhaps you think it's the lawyer's job to read it and tell you what's in it. While that's true, reading the complaint yourself is important: a) so you can know what wrong things you are alleged to have done so you can begin preparing your defense, and b) so you can determine what type of attorney you think you need.

2. Get referrals for an attorney.

Tap into your professional and personal networks and ask them to refer you one or two names of attorneys in the practice area and geographic location you think you need. Chances are, even if they don't know someone, they know someone else who works with or knows an attorney. Friends, family members and contacts such as your accountant, your financial advisor, your friend who owns a business, or your doctor, can all be good referral sources. Once you get a few names, interview at least three attorneys before hiring one. This should be done preferably in person, but over the phone can suffice if distance or time prevent such a meeting. Speaking with at least three different attorneys will give you a good perspective of: a) cost, b) strengths and weaknesses of your case, and c) the attorney's style and personality. This should be done no more than a few days after you are served with the complaint.

3. Gather all relevant documents.

Before you contact or meet an attorney, you should gather all documents (e.g., emails, contracts, agreements, financial



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statements, etc.) that you think are relevant to the case and necessary for an attorney reviewing your case to see. For example, if your case involves an employment agreement, a good attorney will likely ask to review that agreement after speaking with you in order to properly assess your case.

4. Prepare a chronology of events and cast of characters.

This is an extraordinarily beneficial exercise for both you and your attorney. First, a chronology and cast of characters helps your attorney understand the sequence of relevant events, the relevant players, and the context of the allegations in the complaint. It is also your chance to explain your side of the story and significant details to your attorney. Second, it saves you money. By spending time (without your attorney) preparing a chronology, you don't have to pay your attorney to hear you tell bits and pieces of the story in order to get up to speed. Third, a chronology is a great tool to help you think seriously and carefully about the who, what, where, when, why, and how of your case, all of which helps prepare a proper defense.

5. Hire the right attorney for you.

You should choose an attorney that meets your cost needs while not compromising in representing your interests. Your attorney should also have a style you are comfortable with; some are very aggressive (some may say abrasive), while others are more deliberate or even-tempered. Regardless of style, your attorney must, however, be direct and up front with you about cost and likelihood of success. Any attorney who guarantees results or is not candid with you should be avoided. Your attorney also should promptly respond to your inquiries and keep you informed with updates in your case. Once you hire an attorney, try to meet in person at least once if you have not already done so.

6. Preserve documents.

Many companies have policies in place to discard old emails or documents after certain time periods (such as 30 days). Once you reasonably foresee your company may be involved in litigation, all such destruction policies must stop. In other words, you have a duty to preserve all potentially relevant documents and information. Important note: this duty to preserve documents can be triggered *before* a lawsuit is even filed if your company has reason to believe it may be sued, and the duty to preserve includes not just paper but all electronic documents and information as well.

7. Inform insurance carriers.

This may be both a requirement in your industry or under your policy. Insurance companies generally require claims to be reported very soon after an incident. In addition, it is possible your insurance policy (such as a directors and officers ["D&O"] or errors and omissions ["E&O"] policy) can provide coverage to help you offset the costs of litigation (including attorneys' fees and expenses) or a possible judgment. Check your policy and consult your attorney before contacting your carrier.

Don't:

1. Ignore or delay.

Closing your eyes, crossing your fingers and praying the lawsuit "goes away on its own" almost never works. If you fail to respond to the complaint, you will be in default and risk having a default judgment entered against you.

2. Destroy evidence.

We've all seen movies where the bad guys start shredding massive amounts of documents in windowless rooms just before they get caught. This is a terrible idea and also illegal. Destroying evidence (including deleting emails) can subject you and your company to costly sanctions including fines, striking certain defenses, and admission of allegations and facts favorable to the plaintiff and hurtful to your case.

3. Try to defend the lawsuit on your own.

First, while an individual is permitted to represent him or herself (i.e., *pro se*), in Georgia and in federal court, companies are required to have an attorney represent them in a lawsuit. Second, we've all heard the expression: "He who represents himself has a fool for a client." Your job is to run your company, increase profits and manage risk, not defend a lawsuit.

4. Call, email or communicate with the plaintiff before consulting an attorney.

You may think if you just call the plaintiff, you can reason with them and convince them to just drop the lawsuit. Or you may feel like lashing out. Either way, this is usually a bad idea. The plaintiff has already spent money on an attorney to review his/her case and draft a complaint, meaning they are likely prepared for some litigation. More importantly, everything you say, especially in an email, can be used against you in the lawsuit. For example, that angry email or your attempt to apologize can wind up later as an exhibit at trial.

5. Neglect your business.

Litigation can be a time-consuming, expensive cost of doing business, both economically and emotionally. It can be easy to let a lawsuit consume you professionally and personally. The best thing to do is to focus as much as possible on continuing to help your business grow and keeping up with your day-to-day duties. It is important to do your best to maintain your normal routine and keep your focus on your business, both for the health of your company and your relationships with your customers and employees.

Finally, a bonus don't is "Don't Panic." Yes, being sued is unpleasant. It may even be unfair, and hopefully you or your company are never in that position. The reality is, though, that lawsuits are a part of doing business, particularly as your company grows. Most of the time, though, it is not the end of the world or the end of your company. The key to navigating and surviving being sued is having the right, experienced attorney by your side. P

Just Work With Me: When Is It a Good Idea to Keep Working with a Defaulting Tenant?

How many times (even during a robust market) have landlords considered and perhaps acted on a tenant's request to grant them abatement, deferrals and other concessions in order to preserve the relationship, avoid vacancy, make their lender happy and keep the rent coming in? More often than you might imagine. Although there are clearly self-interests on both sides in the decision to allow the tenant to pay partial rent or defer overdue amounts under the lease, often landlords and tenants enter into such discussions with the best intentions for all involved. Yet, even the most benevolent agreements can lead to negative consequences down the road.

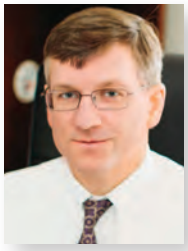
A landlord approached by a tenant with a request to vary from the terms of the lease agreement has a number of primary considerations to take into account before continuing this conversation:

1. How long has the tenant been in business at the premises?
2. What do the tenant's gross sales look like?
3. What plans does the tenant have for maintaining or increasing sales?
4. How valuable is the tenant's continued presence to the shopping center, indus-trial park or office building to the image or viability of the asset?
5. What are the current and long term plans for the property?
6. Is landlord considering refinancing its debt, any redevelopment or perhaps selling the project?
7. What is the effect of a forbearance or deferment on overall cash flow?
8. What is the status of the debt on the property?

Assuming that after putting all this together the landlord is comfortable moving forward with a discussion about the request for a change in the rent and other payment terms in the lease, the parties should try to come up with a framework for addressing the landlord's concerns and tenant's needs. But be careful!

Consider this example: A mid-sized shopping center anchor is four months behind in minimum rent and is slow paying. Taxes, Insurance & Common Area Maintenance (TICAM) explains that it is experiencing operational difficulties and reduced cash flow. The tenant has a plan that specifically addresses how it is going to address and solve these issues, but part of that involves an abatement or reduction in rent for a period of time, with an agreement to amortize the past due amounts in future rent payments. The landlord's cash flow at the center is strong and its lender is generally happy with the status of the loan and the asset.

However, the landlord has plans for refinancing the loan to allow for an expansion of the center in the next year, possibly requiring a relocation of



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the tenant. Landlord finds a short-term abatement and a year of reduced rent agreeable to allow the tenant to continue operating and producing cash flow for the center. The parties shake hands on the deal and the landlord gives the tenant free rent for four months and then begins accepting lower rent.

After a year, the tenant returns and tells the landlord that it still is having cash flow problems and simply cannot start paying full rent and an additional amortized payment to repay the reduced/unpaid amounts as well. In the meantime, landlord is halfway through negotiations to expand the center and finds that its lender is going to require that this tenant pay off all of the past due amounts immediately and start paying full rent or the loan will not be approved. The landlord demands the tenant honor its agreement. The tenant refuses and says its lawyer has advised that the landlord has "waived" the requirement of payment of the full contract rent and the payment of past due amounts. When the landlord reiterates its demand, the tenant responds that it has no other choice but to shut its doors in two months.

Could this situation have been prevented? Maybe and maybe not… The common law and/or statutes in most states provide that long term acceptance of a change of terms of a contract by a party can result in a legal waiver or estoppel preventing the party from enforcing the original terms of the lease. In extreme cases, this can also result in a permanent change to such terms for the remainder of the term. However, in many states, courts have upheld the right of commercial parties to enforce anti-waiver provisions that would preserve the original contract terms at the end of the abatement/reduced rent period. So, how could the landlord protect itself in the situation described above?

Solutions and Preventative Measures

Certainly there is no magic answer to address all of the problems that arose in this example, but here are a few thoughts on what the parties could have done:

1. The lease should contain a strong and specific anti-waiver provision, as well as robust remedies for tenant default;

2. The parties should document their discussions and final terms of agreement into a written lease amendment, including a clear recitation that the original contract terms will remain in full force and effect;

3. The amendment should include additional security for landlord to insure performance including one or more of the following: a) cross-corporate or personal guaranties; b) perfected security interest in favor of the landlord in tenant's trade fixtures, equipment, accounts etc; and c) letter of credit for the total amount of free and reduced rent plus any past due amounts as of the time of the agreement.

4. Don't fall asleep! Monitor the status and viability of the tenant's business during the abatement/reduced rent period. The first indication that the tenant is not back on track should not be an email from the tenant in response to a demand for proper performance. P

Cyber Liability Insurance: Is Your Company Covered?

In 2014, over 29,000 records were lost or stolen in the United States.[1] The average cost to cover the expenses related to a cyber breach was $5.85 million dollars.[2] Is your company prepared to handle a cyber attack? Most businesses have policies covering property damage, business interruption and professional liability. Cyber liability insurance should be added to this list.

What is cyber liability insurance?

Cyber liability insurance is designed to cover the costs associated with an electronic security breach. Whether the breach is due to a criminal attack, human error or a system glitch, cyber liability insurance protects the costs incurred when electronic data is compromised. Data includes personally identifiable information, such as an individual's name associated with their social security number, driver's license, credit card number or debit card number.

Typically, cyber liability policies provide first party and third party coverage. Coverage ranges from policies insuring business interruption from a network being shut down, costs related to cyber criminals who steal personal identification information that can be monetized, costs associated with restoring business assets stored electronically, costs of customer notification, costs of providing credit monitoring services to victims, and costs of lawsuits relating to the data breach.

Why does your company need cyber liability insurance?

The average total organizational cost of a data breach is $5.85 million.[3] A company that has a data breach faces the costs of detection of the breach (average cost $417,700); notification to victims of the breach (average cost $509,237); post-data breach costs such as legal expenditures, identity protection services, and regulatory interventions (average cost $1,599,996); and lost business costs, such as turnover of customers and damage to reputation (average cost $3,324,959).[4]

While companies may look to their general liability policy for coverage in the event of a cyber attack, this is probably a mistake, as explained below.

Will your commercial general liability policy cover a cyber attack?

Unfortunately, there is no definitive answer to this question. It depends. In light of the Insurance Services Office, Inc., change to its standard insurance forms, which excludes cyber breaches from its commercial general liability policy, it seems that a commercial general liability policy is insufficient to provide coverage for the costs involved in a cyber breach.[5]

The first issue to consider is the type of property covered by a commercial general liability policy. In claims alleging lost or damaged electronic data, software, computers or computer systems, the key issue will be whether the claim falls under the policy's definition of "property damage." Most commercial general liability policies only

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cover "tangible" property. If a court finds that software and data are covered under "tangible" property, a general liability policy may be sufficient. However, with the costs incurred by a cyber breach, that is not a risk worth taking.

AOL experienced first-hand the problems of having a policy that just covered "tangible" property. AOL's commercial general liability policy did not define "tangible." When AOL suffered a data breach, it sought coverage under its commercial general liability policy. The court held that the damage caused by the cyber breach was not covered under the term "tangible," and ruled in favor of the insurance carrier.[6] On the other hand, the Court of Appeals of Minnesota found that a commercial general liability policy was ambiguous as to whether "tangible" property included coverage for a computer tape containing data belonging to a third party, and the court ruled in favor of coverage.[7]

Whether a court will consider electronic data "tangible" property is just one of many issues that can arise when relying on a commercial general liability policy. Another issue to consider is a claim for defense and indemnification. In 2011, Sony Corp. of America and Sony Computer Entertainment America suffered a breach in which over 77 million user accounts were hacked, costing Sony around $2 billion.[8] The insurance company denied Sony's defense and indemnification claim, and the insurance company filed suit seeking a ruling that it did not have to defend Sony against any data breach claims. In 2014, the New York Supreme Court determined that the insurance company had no duty to defend. Specifically, the court found that the policy covered material published directly by Sony, and not the third party who stole the data.[9] The Sony case recently settled. One blogger calls the case a "Super Bowl ad for cyber liability insurance" and remarks that "Sony showed that companies cannot look to general liability policies to cover data breaches. They need to get cyber insurance."

How can you protect your company from the damages of a cyber attack?

There are many different cyber insurance policies available. When negotiating a cyber liability policy, analyzing your potential exposure is the first step. One way to analyze your exposure is to hire a forensic firm to perform a forensic analysis of your company's exposure to cyber risks. Once you receive the report, "Other key considerations include whether the company has overseas operations, whether the company has call centers, the extent of the company's internet operations and the company's reliance on cloud computing."[10] These factors will help determine the risk of your firm's data and help to provide the best coverage for your business.

Conclusion

After considering the risks involved in failing to procure coverage for a cyber breach, the advantages of purchasing cyber liability insurance are worth the cost. You would never leave the door to your business unlocked after closing time, why leave data exposed to cyber threats 24/7? According to ComputerWeekly.com, "Data breaches are now a fact of life together with taxes and death."[11] If your company is not prepared for a cyber attack, now is the time to do so. Conducting a forensic analysis of your company's exposure to cyber threats, addressing those security issues and procuring cyber liability insurance for coverage in the event of a cyber attack are crucial to protecting your company from the extensive costs of a breach. Relying on your commercial general liability policy is not enough. Procuring coverage through a cyber liability policy is the best decision to ensure coverage. P

1 Ponemon Institute, *2014 Cost of Data Breach Study: Global Analysis* at 1, PONEMON INSTITUTE LLC (May 2014), *available at* http://public.dhe.ibm.com/common/ssi/ecm/se/en/sel03027usen/SEL03027USEN.PDF (last visited February 23, 2015).

2 *Id.*

3 Ponemon Institute, *2014 Cost of Data Breach Study: Global Analysis*, PONEMON INSTITUTE LLC (May 2014), *available at http://public.dhe.ibm.com/common/ssi/ecm/se/en/sel03027usen/SEL03027USEN.PDF* (last visited February 23, 2015).

4 *Id.*

5 *ISO Comments on CGL Endorsements for Data Breach Liability Exclusions*, INSURANCE JOURNAL (July 18, 2014), *available at* http://www.insurancejournal.com/news/east/2014/07/18/332655.htm (last visited February 23, 2015).

6 *America Online, Inc. v. St. Paul Mercury Insurance Co.*, 207 F. Supp.2d 459, 462 (E. D. Va. 2002).

7 *Retail Systems, Inc. v. CNA Insurance Companies*, 469 N.W.2d 735, 737 (Minn. Ct. App. 1991).

8 Young Ha, *N.Y. Court: Zurich Not Obligated to Defend Sony Units in Data Breach Litigation*, INSURANCE JOURNAL (March 17, 2014) *available at* http://www.insurancejournal.com/news/east/2014/03/17/323551.htm (last visited February 23, 2015).

9 *Id.*

10 Latham & Watkins *Client Alert, Cyber Insurance: A Last Line of Defense When Technology Fails*, LATHAM & WATKINS INSURANCE COVERAGE LITIGATION PRACTICE (April 15, 2014), *available at* lw-cybersecurity-insurance-policy-coverage.pdf (last visited February 23, 2015).

11 Sarb Sembhi, *An introduction to cyber liability insurance cover*, ComputerWeekly (July 29, 2013), *available at* http://www.computerweekly.com/news/2240202703/An-introduction-to-cyber-liability-insurance-cover (last visited February 6, 2015).

Hirer Beware: Avoiding Common FCRA Pitfalls with Employee Background Checks

Employers using consumer reporting agencies to conduct background checks on applicants and employees have increasingly become targets of lawsuits alleging violations of the Federal Fair Credit Reporting Act (FCRA) and related state laws. These statutes – which impose highly specific disclosure, authorization and notice requirements when obtaining information from consumer reporting agencies – are technical minefields requiring aggressive compliance efforts and exhaustive attention to detail. Minor missteps bear low hanging fruit for plaintiffs' attorneys, and the recent prevalence of class action FCRA claims has proven costly for several major employers, including Publix ($6.8 million settlement), Home Depot ($1.8 million settlement) and K-Mart ($3 million settlement).

The following five points of advice, while not a comprehensive guide to compliance, can help avert common mistakes and offer a strong first line of defense against FCRA liability.

1. Include clear and conspicuous, standalone disclosure that a consumer report may be obtained

Under FCRA, "A person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless… a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes[.]" 15 U.S.C. § 1681b(b)(2)(A)(i) (emphasis added).

Because FCRA does not define "clear and conspicuous," employers and their attorneys are left looking to other statutes and case law to patch together factors that have resulted in findings of clarity and conspicuousness. While this standard can be subjective, elements that courts have considered (under the FCRA or in other contexts that require clear and conspicuous disclosures) include, in part:

- Whether the language was emphasized in some way (i.e., bold or capital letters);
- The size of the font;
- How many times the employee was made aware of the notice;
- Whether extraneous or distracting language is included; and
- Whether the language was poorly drafted, overly technical or otherwise incomprehensible.

See, e.g., Burghy v. Dayton Racquet Club, Inc., 695 F. Supp. 2d 689 (S.D. Ohio 2010).

Accordingly, the disclosure should be in an easily readable font (both font type and size), ideally with the "Disclosure" heading bolded, capitalized, underlined or otherwise emphasized. The disclosure should state in plain language, without extraneous technical or distracting information or legalese, that the

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employer may obtain consumer reports for employment purposes, and state what categories of information such reports may contain. The types of information included in the reports will vary by employer, as different employers request and obtain different information. For example, one employer might obtain criminal background and employment history, while another might obtain driving records and credit history. The disclosure should reflect the scope accordingly, and succinctly.[1]

Additionally, the disclosure must be included in a standalone document, consisting only of:

1. The disclosure itself; or
2. The disclosure, plus the authorization (to be signed by the applicant/employee) permitting the employer to obtain the consumer reports.

Under no circumstances can the document contain anything other than the disclosure and the authorization.

2. If obtaining an investigative consumer report, additional disclosure requirements apply

An investigative consumer report is a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics or mode of living is obtained through personal interviews with neighbors, friends or associates of the consumer about whom the report is made or with others with whom he is acquainted or who may have knowledge concerning any such items of information. 15 U.S.C. § 1681a(e).

When using a consumer reporting agency to obtain an investigative consumer report, the FCRA contains additional disclosure requirements beyond what is required when obtaining a non-investigative consumer report. Specifically, no later than three days after requesting an investigative consumer report, the employer must clearly and accurately disclose in writing (mailed or otherwise delivered to the applicant/employee) that:

- An investigative consumer report including information as to applicant/employee's character, general reputation, personal characteristics and mode of living, whichever are applicable, may be obtained; and
- The applicant/employee has the right to request in writing, within a reasonable time after receiving the instant disclosure, disclosure of the nature and scope of the investigation, and a written summary of rights under FCRA (discussed in Point 4, *infra*).[2] 15 U.S.C. § 1681d(a)(1).

Additionally, the employer must certify to the consumer reporting agency that it has made the above disclosures, and that the employer will comply with a statutory requirement that obliges the employer to provide a complete and accurate disclosure of the nature and scope of the investigation upon written request. *See* 15 U.S.C. § 1681d(b).

While employers commonly include the above investigative consumer report disclosures as part of the ordinary consumer report disclosure addressed in Point 1 above, there is some risk in doing so; extra information can quickly chip away at clarity and conspicuousness.

3. No signature, no consumer report

Written authorization from the applicant/employee is a requirement for obtaining a consumer report from a consumer reporting agency. As stated in 15 U.S.C. § 1681b(b)(2)(A)(ii), "a person may not procure a consumer report, or cause a consumer repot to be procured… [for employment purposes]… unless…. the consumer has authorized in writing (which authorization may be made on the [document containing the disclosure]) the procurement of the report by that person."

Accordingly, do not order a consumer report until the applicant/employee has provided written authorization. As mentioned, this authorization may be contained on the same document as the disclosure addressed in Point 1, but that document can otherwise contain no other information.

4. Provide pre-adverse action and adverse action notices

Before taking any adverse action based on the information contained in a consumer report, employers must provide a pre-adverse action notice to the applicant/employee, including:

- A copy of the consumer report; and
- A copy of "A Summary of Your Rights Under the Fair Credit Reporting Act."

15 U.S.C. § 1681b(b)(3)(A). While there is no specific requirement regarding the duration between a pre-adverse action notice and the moment adverse action is taken (i.e., when the employer rejects the applicant for employment), the Federal Trade Commission has opined that, while each case is fact-dependent, a period of five business days between the notice and the action may be reasonable. (See www.ftc.gov/policy/advisory-opinions/advisory-opinion-weisberg-06-27-97.)

When actually taking adverse action based on the information contained in a consumer report, employers must again notify the applicant/employee. The notice must include:

- The name, address and telephone number of the consumer reporting agency;
- A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

- Information regarding the individual's right to obtain a free copy of the consumer report from the consumer reporting agency, and to dispute the accuracy or completeness of the information with such consumer reporting agency.[3]

5. Be sure to include the most recent summary of rights under the FCRA document

As mentioned, a pre-adverse action notice must include the document entitled "A Summary of Your Rights Under the Fair Credit Reporting Act." Additionally, upon written request, an employer obtaining an investigative consumer report must also provide this summary of rights.

In 2012, the summary of rights document required under FCRA was revised, effective January 1, 2013. Confusion abounded, and lingers, regarding which summary of rights is the correct version to include with FCRA disclosures and notices, as the old and new versions remained in circulation. As of the writing of this article, the correct, revised version is available from the Consumer Financial Protection Bureau website. To comply with FCRA, it is imperative to use the correct summary of rights document.

Conclusion

The FCRA is a labyrinth of technicalities with compliance traps at every turn. Moreover, many states have enacted their own, more restrictive fair credit reporting statutes, imposing yet additional requirements on employers. The above guidance is not meant to, and does not, address all FCRA requirements and/or exceptions within the subjects addressed or throughout the statute, and does not address any state-specific requirements. Given the detailed legal requirements of these statutes, employers should contact labor and employment attorneys for compliance assistance. P

1 Note: State-specific laws may restrict the type of information an employer may obtain in a consumer report. For example, several states now have restrictions on the use of credit reports for employment purposes. Additionally, federal and state anti-discrimination and equal employment statutes create additional limitations on the use of background checks. These issues are outside the scope of this article.

2 If the applicant/employee submits such a request, the employer must make a complete and accurate disclosure of the nature and scope of the investigation, in writing mailed or delivered, no later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is later.

3 Additional requirements apply if the adverse action was based in whole or in part on the person's numerical credit score.

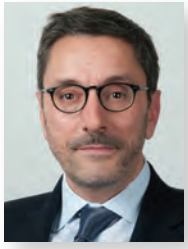
Precautionary Measures in Spain for Foreign Proceedings

Spanish law allows the request of precautionary measures in Spain, both for arbitral and judicial procedures that are being followed abroad, when they meet the established legal requirements.

The purpose of such measures is to ensure the effectiveness of the legal protection that may be granted in the judgment.

The precautionary measures that can be requested in Spain are the following:

1. The attachment of assets can be requested for the enforcement of judgments condemning to transfer money, rent and fungible cash, computable by applying certain prices. The attachment of assets can also be used to enforce other types of judgments, but only when such a measure is considered appropriate and non-replaceable with another one of equal or greater efficiency and less onerous for the defendant.
2. Intervention or judicial management of productive assets can be requested when a judgment involving an order to hand over such assets by way of ownership, tenancy or any other title that includes a legitimate interest in maintaining or improving productivity is intended. Likewise, this measure can be requested in case the guarantee of the productivity is of primary interest for the effectiveness of the legal protection that is sought.
3. The movable thing deposit can be requested when a judgment involving an order to hand over a movable thing, in possession of the defendant, is intended in the application.
4. The inventory of assets can be requested according to the conditions laid out by the court.
5. The precautionary registry entry of the claim can be requested with regard to goods or rights subject to registration in public registers.
6. Other registry entries can be requested in cases when registry publicity is useful for the success of the legal protection that is sought.
7. The interim court order to desist and refrain temporarily from an activity, performing a behavior, or temporary prohibition to interrupt or cease the implementation of a provision.
8. The intervention and deposit of revenues, generated by an illegal activity, can be requested if the legal action intends a prohibition or cessation of such an activity, as well as the appropriation or deposit of the amounts claimed as remuneration for the intellectual property rights.
9. Temporary deposit of copies of works or objects produced in violation of the rules on intellectual property, and the deposit of the material used for their production.



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10. The suspension of disputed resolutions, when the plaintiff or plaintiffs represent at least 1 or 5 percent of the share capital, upon which the defendant company's securities, issued or not, are admitted to trading on an official secondary market.

11. Other measures, whether expressly provided by law for the protection of certain rights, or considered necessary to ensure the effectiveness of the legal protection, if any, granted in the judgment.

For the adoption of the listed measures in Spain, in addition to the special requirement for the applicant to prove being a party of a foreign proceeding, which will be discussed below, the applicant must certify:

1. The existence of "fumus boni iuris," ("appearance of good law") which is a term used to indicate that there is

a possibility that the right claimed exists in practice. This requirement imposes an obligation on the applicant to file the lawsuit along with the materials that can prove *prima facie*, without prejudice of the merits of the case, that the claim is based on a "proper right of the claimant thereto."

2. The danger in delay (*periculum in mora*): The applicant must also prove that the delay in the proceedings will affect the effectiveness of the legal protection that can be granted once the proceedings are over, in a way that if the precautionary measures were not adopted, the judgment delivered in the case would not provide an effective protection to the rights of the claimant, due to, for example, the damage or loss of the goods that are the subject of the claim, or similar circumstances.

3. Provision of a guarantee bond: The claimant must also provide a guarantee deposit in order to cover any obligation of compensation of damages that can be caused to the defendant as a result of the adoption of the precautionary measures.

The documents supporting the previously mentioned application for precautionary measures based on a foreign proceeding, shall be duly translated and legalized, in accordance with the provisions of article 323 of the Act of Civil Procedure, in order to be recognized and, consequently, taken in consideration in the precautionary proceedings pursued in Spain.

Accreditation of the applicant's participation in a foreign proceeding

Finally, the claimant should prove his participation in a foreign proceeding against the individual subject to the precautionary measures (in accordance with the provisions of the article 724 of the Act of Civil Procedure).

The law does not establish in what way such participation should be proven, however in our opinion, both for the case of foreign arbitral proceedings, and for the case of court proceedings, the applicant must accredit his participation in the foreign proceeding with a judicial certificate of the country of origin, dully translated and legalized.

While the translation doesn't represent a major obstacle, the requirement of legalization is of vital importance. First, the claimant should consider if the country of origin is part of any treaty that exempts or establishes requirements for legalization of foreign public documents.

For example, in the case of the countries that are part of the Hague Convention No. XII of October 5, 1961, for a document to be publicly recognized in Spain, in addition to being translated, it must carry an "apostille."

Some countries, including Spain, have signed multilateral agreements in order to simplify the procedure of legalization of documents. Thus, according to these agreements, a direct presentation of a foreign document in Spain is enough for it to be publicly recognized, with no additional requirements regarding the "apostille" or other legalization procedure, this is the case of:

- Athens Convention No 17 of the International Commission on Civil Status (CIEC), of November 15, 1977.
- Vienna Convention No. 16 of the ICCS, 8 September 1976 (BOE 200 of 08/22/1983) on multilingual extracts of birth, marriage or death.
- London Convention No 63 of the Council of Europe, June 7, 1968, (BOE 206 of 08/28/1982) on exemption from legalization documents issued by diplomatic and consular agents.
- Exchange of Letters with the USSR on February 24, 1984, (BOE 93 of 04/18/1985,) on the abolition of legalization and issuing of Civil Registry.
- American Convention on Letters Rogatory of Panama, January 30, 1975 (BOE 195 of 08/15/1987). Legalize disclaims court documentation appended to the letters rogatory (Article VI).
- Convention between Spain and Italy regarding documentation exchange October 10, 1983, on Civil Registration and exemption from legalization of certain documents. Done in Madrid. (Entry into force on 1 August 1986. BOE. No. 124 of May 24, 1986).
- Exchange of Letters between the Kingdom of Spain and the Republic of Italy concerning the mutual recognition of diplomas of high school, colleges and universities, done at Rome on 14 July 1999. Entry into force on 14 July 1999. BOE. No. 277 of 18 November 2000. (Article 7, item four), does not require legalization or document translation.)

However, for the countries that do not form part of any of the two groups, all of the documents, whether judicial or not, must be legalized by the following procedure:

1. Reviewed and stamped by the Ministry of Foreign Affairs of the State of origin.
2. Sealed by the Spanish diplomatic or consular representation of that State.
3. Checked and sealed, once in Spain, by the Ministry of Foreign Affairs and Cooperation (MAEC-Legalization Section) which certifies the seal of the diplomatic representative abroad. P

New Privacy Rules for European Union Will Apply to Companies Worldwide

A new regulation will apply to all European Union (EU) citizens and therefore to all companies in and outside the EU that process data of citizens of the EU, e.g. data related to the offering and selling of goods or services. In order to protect the privacy of EU citizens, the European Parliament adopted a General Data Protection Regulation on March 12, 2014, which is likely to become effective in 2017. This regulation will change the current privacy law and will have direct effect in the whole EU. As there will be severe fines for (repeated) breaches of the new regulation, it is very important that businesses take timely measures to comply with it. It is expected that the new European regulation will also have implications for privacy rules in, for instance, the United States, as many American businesses are active on the European market.

So what are the most important provisions of this regulation? The EU citizens will get new rights, for example the right to information and the right to be forgotten. On the other hand, companies which are working with personal data have to deal with new obligations, for instance: appointing a data protection officer, assessing the processing of data in their company and providing information to those concerned.

Fines

One important aspect of this regulation will be the introduction of new penalties including extremely severe sanctions for (repeated) breaches of privacy of EU citizens. At the moment, e.g. the Dutch Data Protection Agency (College bescherming persoonsgegevens) can impose a maximum fine of EUR 4,500. However, the new fines could be up to maximum of EUR 100,000,000 or 5 percent of the global annual turnover of a company, depending on which amount is higher. Fines are imposed for the following violations, for instance:

- Processing of personal data without consent or legal basis.
- Processing of personal data with regard to:
  - Racial or ethnic origin
  - Political opinions
  - Religious or philosophical beliefs
  - Trade union membership
  - Genetic information
  - Health
  - Sex life
  - Criminal convictions and related security measures
- Not taking appropriate technical and organizational measures to prevent data leaks, unauthorized access to and elimination of data.
- Not reporting data leaks in time, for instance, loss of a USB device or website hacking.

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- Non-performance of data protection impact assessment upon processing data that involve special privacy risks, for instance regarding health.

Data Protection Officer

According to the regulation, the following businesses and organizations must appoint a data protection officer:

- Businesses with more than 250 employees
- Companies processing data of more than 5,000 persons within a period of 12 months
- Government authorities/public bodies

The data protection officer – also referred to as privacy officer – is an independent person who monitors the general quality of the data protection policy of an organization. The data protection officer will control whether the processing of data in a company is in accordance with the Data Protection Act. If the data protection officer detects irregularities, he must report them to the person in charge or to the company he was appointed by. In addition, the data protection officer is allowed to make recommendations. However, these recommendations have an advisory function only. Ultimately, it's up to the person in charge whether to follow the advice of the data protection officer or not. Appointing a data protection officer might imply that the national data protection agency will act reluctantly if the data protection officer performs his duties properly.

Data Leak Notification Requirement

A new data leak notification requirement will be introduced. This means that if a company has been affected by a data leak, it has to report it within 24 hours to the relevant authorities. There is a notification requirement in the event of a breach of an organizational security measures for data. Examples are: theft of password or client data, hacking or loss of data, for instance, if an employee has lost a USB device.

A data leak must be reported by the person in charge of data processing in a company, for instance the data protection officer. If a breach could lead to the risk of negative consequences for the protection of data, the responsible person needs to notify the relevant authorities and also all persons who are concerned in this matter.

A breach of data processing needs to be reported by the person in charge within 24 hours after noticing. If a breach of the data processing isn't reported within 24 hours, a specific explanation must be provided. An organization that doesn't report a violation completely or in a timely manner will risk incurring a severe fine. The amount of the fine will be determined based on the facts, as, for instance, prior breaches, the scope of the breach and whether it's a question of intent of gross negligence.

Right to be Forgotten

Pursuant to the new regulation, the consumer has the right that companies and institutions delete the data and that further spread of the data will not occur if:

- It is no longer required to store the processed personal data for the purpose they used to be collected or processed for;
- The person in question withdraws his/her consent, and/or when the period allowed for data storage has passed;
- The person in question lodges a complaint against the processing of personal data;
- The company or institution does not comply with the other provisions of the regulation.

The regulation requires not only to delete the data in question but also to prevent further spread of the data. Therefore, a company is obliged to inform third parties who process data provided by the company of the person in question's request to delete any link or copy of the personal data. It is wise to create a protocol for handling requests about information, modification or deletion of personal data according to the new regulation.

Conclusion

In view of the fact that the fines businesses can incur are a lot higher than before, it is really important that companies throughout the world are fully aware of the rights and obligations of EU citizens that arise out of the new regulation. It must be taken into account that as this new regulation will protect the data of all EU citizens, it will apply to all companies worldwide that process data of EU citizens. This may be the case, for example, when your company has a webshop that offers goods or services. P

Competition Inquiry into the E-commerce Sector – What Does the Future Hold for Online Sales Restrictions?

The legal framework on vertical restrictions and e-commerce could see a significant change in Europe after the European Union (EU) Commission's plan to fully embrace the "digital revolution" and open up digital opportunities for its citizens and businesses.

On May 6, 2015, the EU Commission announced a Digital Single Market strategy for Europe. The aim of this strategy is to create in the near future a "connected digital single market," which in the words of Mr. Jean-Claude Junker (President of the EU Commission), could "generate up to EUR 250 billion of additional growth in Europe in the course of the mandate of the next Commission."[1]

According to even more optimistic figures released by the Commission, a fully functional Digital Single Market "could contribute EUR 415 billion per year to the European economy and create hundreds of thousands of new jobs."[2]

The Commission intends to achieve its ambitious goals (rather optimistically) by the end of 2016, through a set of targeted actions aimed at tearing down (public and private) online barriers and "regulatory walls" that currently hinder a "seamless" access and exercise of online activities by consumers across the 28 national markets of the EU.

The overall strategy is built on three pillars and 16 key actions. The first pillar focuses on granting a better access for consumers and businesses to digital goods and services across Europe.

Within the first pillar, as a complementary action of the Digital Single Market strategy, the Commission also launched an Antitrust Competition Inquiry into the e-commerce sector, with a particular focus on "potential barriers erected by companies to cross-border online trade in goods and services where e-commerce is most widespread," such as "electronics, clothing and shoes, as well as digital content."[3]

According to the Commission's May 6 decision, despite an upward trend, cross-border e-commerce remains rather limited in the EU. In 2014 only 15 percent of the EU population shopped online from a trader of goods or a provider of services based in another EU member state. This is not only because of language barriers, consumer preferences and differences in legal frameworks between member states, but also due to contractual restrictions which may be "deliberately" created by players in the e-commerce sector.

The purpose of the e-commerce inquiry is to gain more market knowledge in order to better understand the nature, prevalence and effects of the (private) barriers and identify competition concerns, to then be assessed in the light of EU antitrust rules.

In the course of the inquiry, the Commission may request the companies and the subjects concerned, to supply the information necessary for giving effect to Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), and carry out any inspections necessary for that purpose. In particular, the Commission may request these entities – including service providers, suppliers and distributors of

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goods, online market places and price comparison websites[4] – to communicate all agreements, decisions and concerned practices and to supply information, documents or statements.

Indeed, starting in June 2015, the Commission has sent out rather data intensive questionnaires to a wide range of stakeholders across the EU, planning to publish a preliminary report in mid-2016. Then, following a public consultation on the preliminary report, the Commission expects to publish the final report in the first quarter of 2017.

If, after analyzing the results, the Commission should identify specific competition concerns, it could open case investigations to ensure compliance with EU rules on restrictive business practices and abuse of dominant market positions.

Only the outcome of this inquiry will reveal its real impact on the existing legal framework of internet sales in the EU. However, companies and businesses involved in this inquiry should definitely expect some changes in the regulation of commercial practices resulting in barriers to cross-border online sales and should be ready to revise their present agreements.

In particular, the following online sales restrictions will be, most probably, under the attentive scrutiny of this investigation:

(i) territorial restrictions imposed by manufacturers/suppliers throughout the distribution chain with the aim of limiting the geographical scope of online sales. The Commission is firmly determined to tackle and stop "unjustified geo-blocking" (i.e. practices used by online sellers for commercial reasons and often resulting from specific contractual provisions, when consumers are either denied access to a website based on their IP address/location/ credit-card details or re-routed to a local store with different prices);

(ii) restrictions to online sales obtained through contractual clauses limiting the use of third party platforms, especially in exclusive and/or selective distribution agreements (i.e. "platform bans").

In particular, online platform bans will certainly be in the near future a hot topic, as competition concerns could arise in connection with contractual clauses imposing restrictions on distributors in the use of third party platforms. These are restrictions that are very common in selective distribution systems and that, at present – but probably not for much longer – are allowed under § 54 of the Commission's Guidelines (Vertical Block Exemption Regulation "VBER" No. 330/2010).

In fact, this provision appears at odds with some recent court decisions in the cosmetics (Pierre Fabre case: ECJ Judgement of October 13, 2011) and sports and leisure equipment sectors (Adidas case: German Federal Cartel Office proceedings closed in June 2014), where the European Court of Justice and the German Antitrust Authority have ruled that online (general) bans require "objective reasons," and that "the aim to maintain a luxurious brand image is not a legitimate aim for restricting competition through a de facto ban of internet sales."

Based on these antitrust precedents and also on the possible results of the Commission's inquiry, the VBER and relevant guidelines (despite having been updated only five years ago) will probably be subject to further revision.

In the light of this trend, companies operating in the e-commerce sector will certainly need to check up soon on their existing distribution agreements and seek specialized legal guidance for revising or setting up the same. P

1 Extract from the Political Agenda for the next European Commission – *A new Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change* (15 July 2014).

2 European Commission - Press release (*A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen* – 6 May 2015).

3 European Commission - Press release (*Commission launches e-commerce sector inquiry* – 6 May 2015).

4 European Commission Decision of May 6 2015, initiating an inquiry into the e-commerce sector pursuant to Article 17 of Council Regulation (EC) No. 1/2003.

Privilege and Expert Discovery in Bankruptcy Adversary Proceedings

The practices of counsel specializing in financial reorganization overlap with issues that must be resolved in federal bankruptcy court on a regular basis. Whether it's a client in financial difficulty or pursuing the collection of assets or debts owed, insolvency issues play a prominent role for federal practitioners with commercial and general litigation practices. This becomes even more pertinent when considering the recent historic fiscal crisis in places such as Detroit, Michigan; Stockton, California and Puerto Rico.

What is surprising to many is how similar the litigation of adversary proceedings in bankruptcy can be to federal practice. Below I provide a general summary of how mechanisms available under Federal Rule of Civil Procedure 26(a)(2) and (b)(3)(4)(5) in regards to Privilege and Expert Discovery come in handy in bankruptcy litigation.

Rule 26 Discovery Available in Adversary Proceedings

An adversary proceeding in bankruptcy court is a lawsuit filed within a bankruptcy case.[1] While it remains a part of the bankruptcy case, it has its own separate case number, and may involve a different attorney than the one handling the bankruptcy itself. Any party can file an adversary proceeding in a bankruptcy – the trustee, a creditor or the debtor. The purpose of an adversary proceeding is to obtain some form of relief that requires a judge's attention and cannot be accomplished through a court motion. Adversary proceedings are resolved by the presiding bankruptcy judge, and juries are not selected, only bench trials are held, when necessary.

An adversary proceeding starts when the plaintiff files a complaint with the bankruptcy court. The complaint lists the facts that pertain to the lawsuit and asks the court to enter a judgment based on the facts and the law. When the plaintiff files, the court will issue a summons, which the plaintiff must serve upon the defendant, along with a copy of the complaint. Once the defendant receives the complaint, he or she generally has 30 days to respond, depending on the local rules of the bankruptcy court. To respond, the defendant must file an answer, which responds to the allegations in the complaint. If the defendant does not file an answer on or before the deadline, the court will enter a default, and the plaintiff can obtain a default judgment. The most common types of adversary proceedings are fraudulent transfers, preferential transfers, lien stripping, a proceeding to obtain an injunction or other equitable relief and objections to discharge.[2]

Disputes between or among parties arise often in adversary proceedings, and vary from simple, relatively straightforward matters to those involving complex, protracted litigation. The nature of a proceeding and the degree of its complexity cannot always be determined simply. Occasionally,

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adversary proceedings may be required. Further, these types of disputes may often exist simultaneously in a single bankruptcy case or, if not simultaneous, may occur one after the other without much time in between. These realities of bankruptcy practice necessitate cooperation of counsel, realistic discovery requests and earnest attempts to compromise. Notwithstanding these unique aspects of bankruptcy litigation, Bankruptcy Rules 7026 through 7037 make Civil Rule 26 applicable in adversary proceedings.

Expert Witness Discovery

Rule 26(a) (2) requires a party to disclose the identity of any witness who will provide expert testimony. Absent a stipulation or court order to the contrary, these disclosures must occur 90 days before trial. Parties to adversary proceedings should consider whether to adjust the default disclosure schedule – and obtain a stipulation or order from the court, accordingly. Another feature of the rule is that it distinguishes between witnesses who must provide a full expert report and witnesses for whom a party must merely disclose the subject matter of the testimony and a summary of the facts and opinions that will be the subject of the testimony. The rule provides that a full report is required only from witnesses retained specifically to provide expert testimony, or witnesses who are employed by the party and whose duties as an employee regularly involve giving expert testimony. Expert testimony from other witnesses is subject only to the abbreviated disclosures required by this rule.

Federal Rule of Civil Procedure 26(b) (4) governs the disclosure of, and discovery related to, expert witness testimony in adversary proceedings. This rule sets forth certain rules and procedures regarding discovery related to expert witness testimony. First, the rule provides that a party may depose any person identified as testifying expert – and if the witness is required to supply a report, the deposition must occur only after that report is issued. Second, the rule protects against disclosure of (1) drafts of any expert report and (2) most communications between a party's attorney and any witness required to provide a report.

Asserting and Protecting the Privilege in Response to Discovery Requests

Federal Rule of Civil Procedure 26(b) (3) protects documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent). Federal Rules of Civil Procedure 26(b) (5) requires the submission of a privilege log where a person served with a document request or subpoena objects to the production of requested documents on the ground of privilege. However, a document-by-document privilege log is not always necessary when a party has, in good faith, asserted other non-privilege objections to the discoverability of a whole range of materials. Rule 26(b) (5) does not expressly state a deadline for submitting the privilege log. A party asserting a privilege or attorney work product must describe in detail the documents or information sought to be protected and provide precise reasons for the objection to discovery.

Conclusion

Federal Rule of Civil Procedure 26(a) (2) and 26(b)(3)(4)(5) play a role in adversary proceedings in regards to Privilege and Expert Discovery. As such, litigators must take this into consideration when they step into the bankruptcy forum. P

1 See generally Rule 7001 of the Federal Rules of Bankruptcy Procedure.

2 See generally Rule 7001(4) of the Federal Rules of Bankruptcy Procedure.

The New Colombian Corporate Governance Code and Its Applicability in Family Companies

The new Colombian Code of best practices, known as Country Code (NCC), was published by the Financial Superintendence of Colombia (FSC) through its 2014 External Circular 028 as an effort to update the previous Country Code, issued in 2007. The NCC is an answer to the 2008 global financial crisis.

By issuing the new FSC, the Colombian government is likely seeking to achieve two objectives: (i) update its internal provisions considering the best practices accepted by entities such as the Organisation for Economic Co-operation and Development (OECD) and the Development Bank of Latin America (CAF) that already consider the new business tendencies[1]; and (ii) fulfill the suggestions and demands of the former, considering that Colombia is in the process of becoming a permanent member.

The new NCC provisions address issues in five corporate governance areas:

a. Shareholder Rights and Equal Treatment

b. General Shareholders' Assembly

c. Board of Directors

d. Control Architecture

e. Financial and Non-Financial Transparency and Information

In these areas, there are 33 specific measures related to crucial corporate issues and 148 recommendations that aim to facilitate and ease the understanding, analysis, implementation and adoption of the measures by Colombian corporations.

Regarding the application of the NCC's provisions, they are built over the principle of Comply or Explain; although initially it is addressed to all Colombian "Security Issuers" regulated, supervised and controlled by the FSC, regardless of their size and level of capitalization. Considering the legal nature and autonomy of the issuers, they are free to decide whether or not to apply it, depending of their needs, and the schedule in which to do so.

In order to trace the effectiveness of the included provisions and recommendations, once a year the securities issuers must fill out and submit to the FSC the form named "Report on the Implementation of Best Corporate Practices." The main objective of this report is to "describe, in general, their corporate governance practices and their adoption of the Country Code recommendations so that shareholders, investors, and the market at large may evaluate them."[2] The idea is to explain the reasons why they did or did not adopt the NCC's recommendations.

a. Shareholder Rights and Equal Treatment

This area focuses on the following measures: (i) The acknowledging of the shareholders' rights, giving them equal treatment, real participation and vote in

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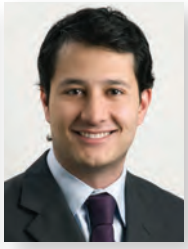

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the General Assembly; (ii) Preventing minority dilutions; (iii) Sharing information and maintaining fluent and permanent communications with the stockholders; (iv) Benefits participation and control related parties transactions; and, (v) Setting different mechanisms of conflict resolutions such as direct agreements, amiable composition, settlement or arbitration.

b. General Shareholders Assembly

This area focuses on the faculties of the General Shareholders Meeting (GSM) to dictate its own rules and to establish a procedure to perform and summon the meetings. The main and relevant recommendations are: (i) Functions, regulation and competence of the GSM; (ii) Term, media to convey, contents of the GSM call and agenda; (iii) GSM rights of information; (iv) Norms on shareholders representation and attendance to the GSM of persons different than the shareholders.

c. Board of Directors

This area of the NCC is integrated by 12 measures; some of the most important are: (i) Functions and regulation of the Board of Directors (BoD), prohibiting delegation of some of them as legal representatives of the company, such as corporate governance policy, internal control systems, financial and investment guidelines and its approval depending on the amount and characteristics of the transactions, among others; (ii) Size; (iii) Appointment of its members (executive, independent and proprietary members); (iv) Organization (president, secretary, risk, internal audit, nomination and corporate governance committees); (v) Operation (number of meetings per year, internal and external evaluation, peer evaluation, etc.); (vi) Duties (diligence, loyalty, non-competition, secrecy, non-use of corporate assets, etc.) and rights (information, experts assistance, induction and permanent training) of the members; (vii) Conflicts of interest and related party transactions; (viii) Compensation policy; and (ix) Real separation between the BoD of the corporation and its president and his team.

d. Control Architecture

This area contains just four measures and is mostly applicable to Security Issuers, focusing the recommendations in: (i) Environment of control; (ii) Risk management; (iii) Internal control systems; (iv) Compliance, information and communication, and (v) Monitoring of the control architecture through the appointment of the internal and statutory auditor in an independent manner. The implementation of some of these measures allows all the company staff, the BoD and senior managers, to have a consolidated and safety structure, simplifying the control and integration of the subsidiaries and branches located offshore.

e. Financial and Non-Financial Transparency and Information

The measures included in this chapter can be considered development of the principle of transparency essential for Security Issuers; its application bolsters and strengthens the existing bonds between the company and their shareholders by the disclosure of crucial financial and non-financial information. The aforementioned measures are: (i) Information disclosure policy; (ii) Financial statements; (iii) Information to the markets; and, (iv) Annual corporate governance report.

Applicability of the NCC in Family Companies

Regardless the scope of the NCC already explained, a question arises regarding its application to family owned companies. According to recent studies[3], some of the risks that these companies face to succeed in a globalized world are: (i) Lack of clear financial information; (ii) Lack of clear direction – interests of the founder above the company's interests; (iii) Lack of clear succession rules; (iv) Lack of professional direction; (v) Excessive dependence on the founder figure.

In trying to overcome these risks, the application of NCC's provisions and recommendations is vital. Considering not only that it is built over the best practices accepted by some of the more important multilateral entities, but also that they considered both current business tendencies and the mistakes committed by large companies during the 2008 financial crisis, it represents an important tool that allows family owned companies to change or adapt, if necessary, their internal structures. Additionally, implementation of some of the recommendations already explained are essential to build not only stronger companies, but also a stronger economic system, especially for developing economies like Colombia.

Change, of course, is not easy. It requires commitment and deep analysis of each of the measures and recommendations analyzed. The goals of the administration will be achieved only if the correct measures are implemented and the schedule to do it is carefully applied according to each company's needs. P

1 Mostly of these new changes are based in the "*Guidelines for a Latin American Code of Corporate Governance*" published by the Development Bank of Latin America (CAF).

2 External Circular 028. September 30th, 2014.

3 http://www.cnnexpansion.com/emprendedores/2013/09/12/8-errores-de-las-empresas-familiares

New Important Contracts Regulation in Argentina

Current Civil and Commercial Codes

Argentina´s legal system is based in the continental or civil law system, such as in continental Europe. That is to say that a considerable number of our regulations are included in codes. For instance, most of the civil regulations could be found in the National Civil Code, the commercial issues under the National Commercial Code, and so on.

The actual Civil Code was written by Dalmacio Velez Sarsfield in 1869 and went into effect in January 1871. Basically, this Civil Code gathers most of the continental law, Napoleon Code and the principles of the Roman law. The approval of the Civil Code was of utmost importance in Argentina, since it permitted unity of criterion and allowed the inhabitants of this country to foresee how a judge would construe a case. This Civil Code had several amendments, but the most important was the one of 1968, under law 17,711, which modified approximately 5 percent of the Civil Code.

The Commercial Code was written by Eduardo Acevedo and Dalmacio Velez Sarsfield in 1858. Originally enacted to govern only the Buenos Aires State, it was then accepted by the rest of the country in 1862. Likewise, in 1889 Congress approved other regulations (such as bankruptcy law, customs issues, guarantees, etc.) to be included in the Commercial Code and in 1890 the final Code was approved. In addition, the Commercial Code had also been amended several times.

These two codes have been very important in Argentina since they rule most of private law in Argentina. This is about to change and become history.

New Civil and Commercial Code

On October 1, 2014, the Congress of the Republic of Argentina enacted law 26,994 which unified the civil and commercial codes into one code (the "New Code"). The New Code will be in full force and effect starting August 1, 2015.

It is worth pointing out that the New Code amended a considerable number of civil and commercial provisions in effect as of today, modifying the structure of private law (civil and commercial) in the Republic of Argentina.

We will introduce certain topics and modifications regarding contracts that we consider important. Please note that this is only a preliminary introduction.

1. Commercial Contracts

The New Code not only modified contracts regulations included in the civil and commercial codes, but also legislated about certain commercial activities that existed in the Republic of Argentina but were not previously included in any code.

The advantage of having these commercial activities or relationships under a certain legal framework is it permits parties to draft better contracts, and allows judges to construe the cases not only based on what the parties have

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written in a contract, but also on the legal framework enacted by the New Code.

For instance, the New Code includes legislation on certain commercial relationships that were previously ruled in separate laws or only accepted by customary or judicial precedents, such as, supply contracts, leasing contracts, banking contracts, factoring contracts, agent contracts, concession contracts, franchising contracts, arbitration contracts, trust contracts and consumer protection framework.

2. Interpretation

The New Code states certain provisions that indicate how a contract should be construed. These provisions are not only a suggestion, but mandatory ruling. The principal rule in order to construe a contract would be "the common intention of the parties" and "good faith." Section 961 of the New Code states that the parties commit to comply with the contract not only to what it is expressly stated, but also to all consequences that could be considered and compounded, by a reasonable and careful party.

3. Contracts and Foreign Currency

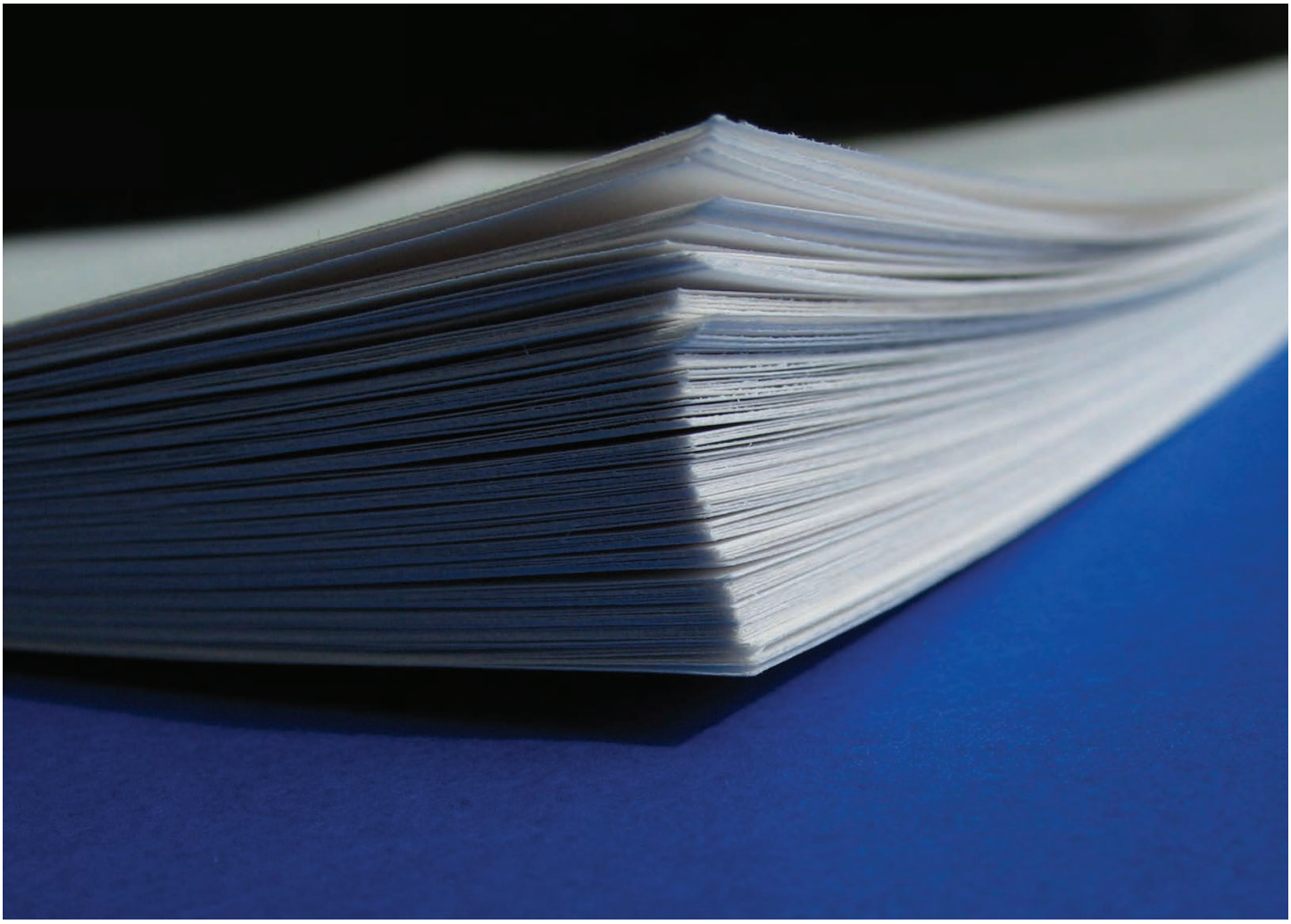
From 1991 until August 2015, obligations to pay money subject to Argentine law could be stated in local or foreign currency. If a party undertook the obligation to repay a loan in USD (United States Dollars) such party could and should cancel its obligation paying USD. The New Code amended certain provisions that stated the manner a party could repay a loan payable in foreign currency in Argentina. Basically, the New Code states that if a party undertakes the obligation to pay in foreign currency, such obligation shall be considered as an obligation to deliver goods. That is to say, according to the New Code, the debtor could cancel its obligation paying in Argentine pesos at the official exchange rate, but it is important to note that this provision may be modified by the parties' agreement.

So, in order to protect the interest of the parties, contracts signed after August 1, 2015, with foreign currency obligations shall be drafted taking into account different situations (e.g. if the contract is local or international, if the parties are locals or foreigners, if the object of the contract has any relation to markets using foreign currency, etc).

Conclusion

There are many other provisions of the New Code that should be considered at the time of doing business in the Republic of Argentina. The entire legal sector in Argentina is studying and analyzing the New Code, since it actually represents a new regulation on most of private relations.

This is just a brief overview of the New Code; much more remains to be said and studied. P



Anti-Corruption Compliance in Mexico: Heightened Awareness and Enforcement

Anti-corruption laws significantly impact operations of international companies doing business in Mexico. All such companies should be aware of important U.S. and Mexican anti-corruption laws that imply increased business costs. The stepped-up enforcement of the U.S. Foreign Corrupt Practices Act (FCPA) over the last several years as well as anti-corruption reform in Mexico means that companies doing business in Mexico must create and maintain improved compliance structures. This article reviews key elements of the FCPA and the new anti-corruption reform in Mexico, and discusses general considerations for compliance programs for international companies that have a presence in Mexico.

FCPA

The FCPA (15 U.S.C. §§ 78dd-1, et seq.) is the most important United States anti-corruption law[1], and contains both anti-bribery and accounting provisions. The anti-bribery provisions prohibit U.S. persons and businesses from paying money or anything of value to foreign governmental officials and public figures in order to obtain or retain business. The accounting provisions require detailed accounting of overseas payments and certain accounting controls. The U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share enforcement responsibility of the FCPA.

Parent-subsidiary liability is an issue for Mexican operations that are owned by U.S. companies. Successor liability may be implicated when companies merge with or acquire another company. Therefore, liability for anti-bribery violations is not limited to the actions of a company's existing employees, but is also applied to pre-existing relationships with business partners, distributors, customers and potential merger partners.

Potential consequences for violations of the FCPA include hefty fines to companies, as well as fines, criminal charges, and even jail terms imposed on responsible individuals, which could include a company's officers, directors, stockholders or agents. In addition, the DOJ and SEC have civil enforcement authority and may pursue civil actions under relevant anti-bribery provisions.

For operations in Mexico, common compliance risks include the following:

- Selling to or contracting with government/state owned entities;
- Obtaining concessions, authorizations, licenses, permits or approvals (building permits, occupancy permits, land use rights);
- Common use of "*gestores*" (third-party consultants);
- Dealing with environmental, labor or safety inspection authorities;
- Requests for donations by municipal authorities; and,
- Entertainment and business hospitality.

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Mexico's Anti-Corruption Reform

On May 27, 2015, Mexican President Enrique Pena Nieto, signed into law constitutional changes establishing a new National Anti-Corruption System (*el Sistema Nacional Anticorrupción*) that aim to greatly strengthen existing anti-corruption legislation in Mexico.[2] The reform amended several sections of the Mexican Constitution, and the passage of the amendments required approval from both houses of Congress and the approval of more than half of Mexico's state legislatures (17, since Mexico has 31 states and a Federal District). The purpose of the reform is to coordinate the actions and policies of federal, state and municipal governments in the prevention, detection and sanctioning of corrupt acts. Congress now has one year to pass a number of related laws in order to complete the reform's implementation.

The reform does the following:

- Establishes a special anti-corruption prosecutor with power to investigate and sanction corrupt officials across the three levels of government (municipal, state and federal);
- Extends the time limit for imposing administrative sanctions from three to seven years after crimes have been committed;
- Creates a central anti-corruption body responsible for coordinating various government institutions in an effort to apply checks and balances, giving more power and independence to investigative bodies;
- Provides that audits of government spending occur more frequently and in real time. The Federal Audit Office (ASF) will have greater powers to trace the use of public money;
- Requires public officials to disclose their assets and any conflicts of interest;
- Contains whistleblower provisions; and
- Expands penalties to individuals and private companies that engage in acts of corruption and adds suspension of activities and dissolution to existing penalties.

Although opponents question Mexico's ability to implement and enforce the anti-corruption program, proponents see it as a strong basis for combatting corruption of public officials in Mexico. Regardless, the new anti-corruption program inevitably increases compliance concerns for international companies with operations in Mexico, and it comes at a time when the fairness and oversight of public spending will face one of its biggest tests. With the opening of the country's energy sector to foreign investment, the signing of billions of dollars of contracts with international companies is expected. For those investing in this environment, the new rules could mean less risk, but increased compliance obligations.

General Considerations for Compliance in Mexico

The following are common compliance measures for multinational companies with operations in Mexico: (i) leadership and compliance programs and policies; (ii) risk assessment, due diligence and monitoring; and (iii) training and communication.

(i) A company's organizational structure should establish a high-level central figure responsible for monitoring compliance and providing leadership. The organizational structure should also include a compliance department and chief compliance office for overseeing and coordinating compliance policies, as well an individual in each department who is responsible for oversight. Second, robust compliance programs and policies within the company help detect and prevent noncompliance. At a minimum, a compliance program should comply with Mexican and U.S. anti-corruption laws and include a company code of ethics signed by all employees.

(ii) Risk assessment should be performed periodically on employees as well as a company's third party network, including a review of its business partners, third parties, distributors, suppliers and potential merger partners. Due diligence is particularly important in relation to making decisions and entering into contracts with customers, suppliers and other third parties. For this, a structured program requiring due diligence is essential.

(iii) Every company employee should receive training on the FCPA and Mexico's anti-corruption laws. While the best training is in-country, conducted face-to-face, online compliance courses are also commonly available. In addition to FCPA training, signing codes of ethics ensures that employees are aware of the rules.

Companies doing business in Mexico inevitably face corruption and bribery concerns and need to be aware of U.S. FCPA and Mexican anti-corruption laws. In addition to knowing what their divisions, employees, subsidiaries and third party agents are doing in Mexico, it is imperative that international companies enact and maintain robust corporate compliance programs in order to ensure compliance with both countries' anti-corruption laws. P

1 U.S. laws related to anti-corruption include, without limitation, the Travel Act (1952), Sarbanes-Oxley Act (Additional 2002), anti-money laundering laws including the Bank Secrecy Act (1970) and the USA Patriot Act (2001), Dodd-Frank Wall Street Reform and Consumer Protection Act, mail and wire fraud laws, and U.S. tax laws.

2 The existing Federal Law Against Corruption in Public Procurement went into effect in 2012. Additional anti-corruption laws in Mexico include Mexico´s Federal Criminal Code, Federal Law on the Prevention and Identification of Transactions with Funds from Illegal Sources (anti-money laundering law), Federal Law on Protection of Personal Data Held by Private Parties, and Federal Law on Economic Competition, among others.

Economic Impact of the Transatlantic Trade and Investment Partnership on the United States, European Union and Turkey

From past to present, international trade and investments have continued growing rapidly and connecting the countries globally. Many bilateral treaties and/or conventions have been signed by many countries to boost trade and investment. Those international treaties, at the same time, provided for sustainable economic development in the commercial and investment areas by removing the trade and investment barriers among such countries.

Getting Beyond the Borders

Needless to say, since the beginning of the 1900s, the leading parties in setting the rules of international commerce and investment have been the United States of America (US) and the European Union (EU). In 2010 the EU issued a press release called Trade, Growth and World Affairs[1] indicating the EU's trade strategy, which can be briefly summarized as developing the economy by maintaining a sustainable development with high level job opportunities and a steady policy in economy. Similarly, the US's strategic plan for 2013-2017 also contemplated fast growth in the economy with the expansion of market access for American goods and services and signing bilateral, regional and multilateral trade and investment agreements[2].

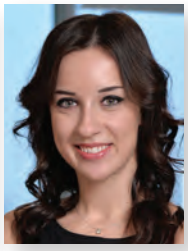
The US and the EU are the world's largest economic blocs and obviously they are each other's main trading partners. This partnership has ultimately led to entering into treaty to strengthen trade on both sides of the Atlantic, namely Transatlantic Trade and Investment Partnership (TTIP), which currently is under negotiation.

TTIP's aim is to create a free trade zone between the territories of the EU and the US under "beyond-the border" trading concept, with special focus on "regulatory issues and non-tariff trade barriers" between the US and EU countries. The contents of TTIP involve terms on the trade of goods and services between US and EU countries, transatlantic job opportunities and transatlantic innovation economy[3] with the aim of improving the treaty and parties' economies accordingly.

Current Status of TTIP

On January 7, 2015, the EU Commission presented the negotiated texts[4] to the public. According to the EU Commission's news, the treaty has 24 chapters with three substantial sections, which are: (i) market access, (ii) regulatory cooperations and (iii) rules. Factsheets on trade in goods and customs duties, on services, on regulatory coherence, on food safety and animal and plant health, on sustainable development, on customs and trade facilitation etc. have recently been published by the EU Commission. On February 4, 2015, the eighth round for presentation and chief negotiators briefing was held in Brussels[5]. The discussions with the European Parliament, the EU Member States and the stakeholders had started and will continue.

Serap Zuvin



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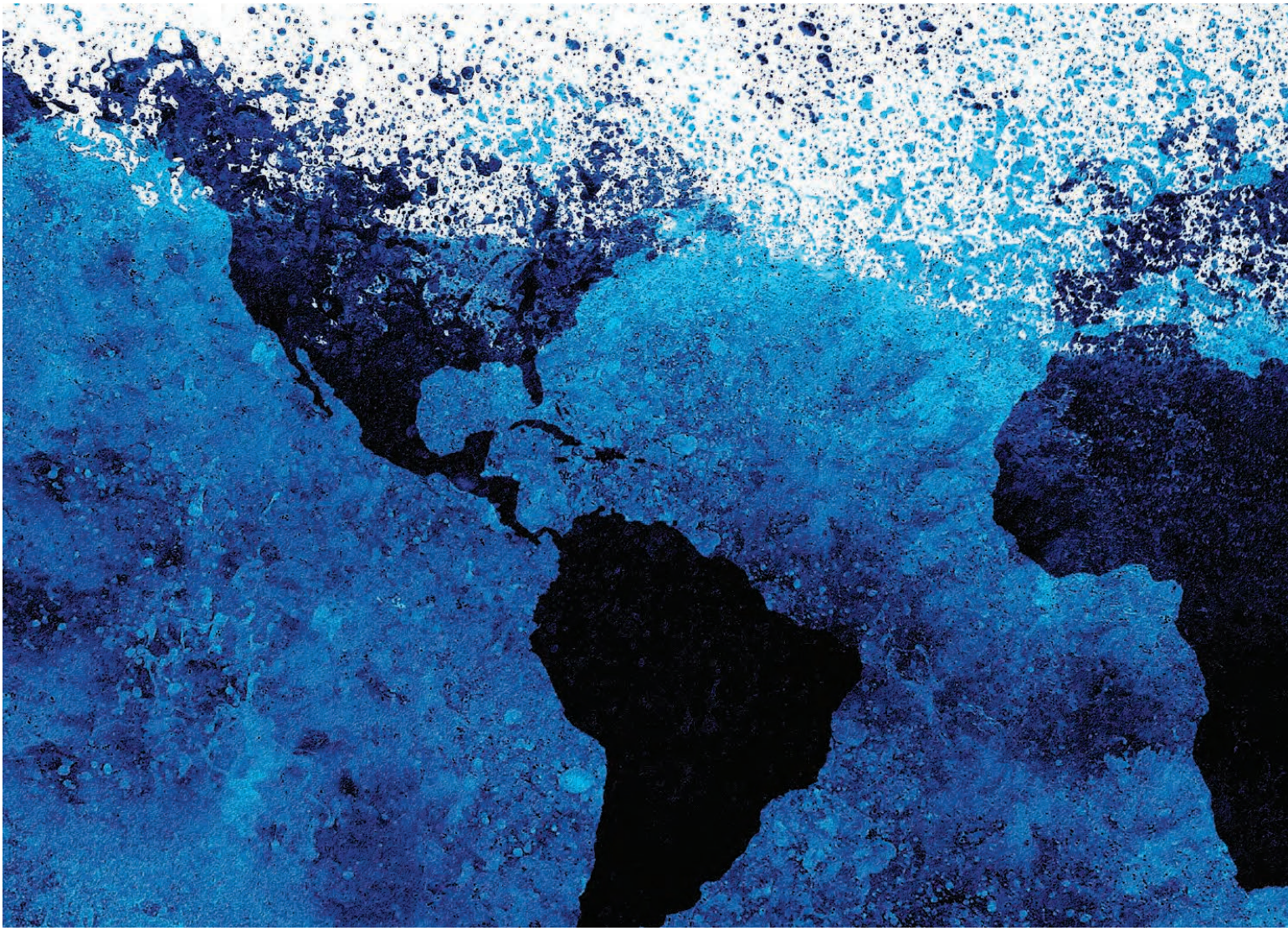


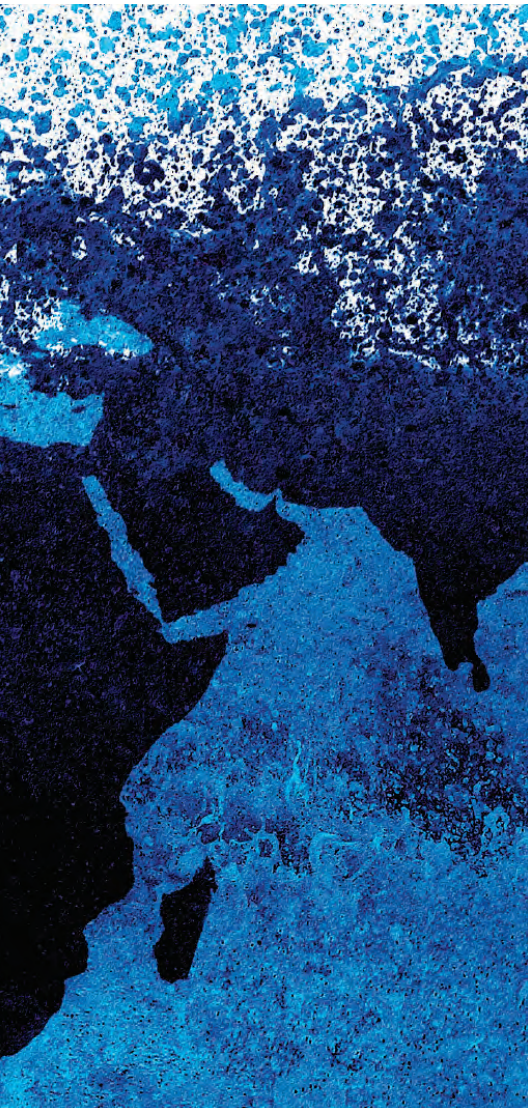
Potential Practical Problems

While the supporters of TTIP allege that TTIP will provide multilateral economic growth and such growth will lead to sustainable development in almost all areas of trade, the opponents of TTIP claim the other way around. According to the allegations of the opponents, in the event TTIP comes into effect, local competent authorities will have a weaker position in terms of regulating the internal market and determining trading rules and procedures. The opponents in the EU claim that such practical problems will arise given the fact that the US and EU have different standards and perspectives on protection of the consumers, environment and public society. It is further emphasized that signing TTIP will intervene with the decision-making power of the local competent authorities on various aspects because the new standards of TTIP will become a benchmark not just for the international trade relationship between the US and the EU, but for any potential treaties and arrangements which may be established by them with other third parties.

The main issue under discussion is the potential risk of putting the corporate interests of countries before the states' and citizens' own interests. For example, hygiene and safety standards in the food and agriculture sectors or data protection standards are quite different in the US and EU, and thus it is difficult to harmonize the two. It is alleged that recognition of mutual standards on protection levels by TTIP especially in the areas of environment, health, private data protection and consumer/worker rights will not be beneficiary due to the conflicting standards between the EU and the US.

Still There is a Common Ground

Despite all of the differences, the US and EU may still have a common goal to attain. Needless to say, the trade load has shifted to the East and China by having lower standards and cheaper labor force as compared to the US and the EU. This area has become a leading party in a very short time, especially in the commerce of locally produced industrial products. So, with the desire of promoting sustainable growth in their economies by removing the trade and



investment barriers, the EU and US came together at the negotiation table. Ultimately, it is an undeniable fact that the US and the EU still have the world's biggest integrated economic relationship. Since total US investment in the EU is three times higher than in all of Asia and EU investment in the US is around eight times the amount of EU investment in India and China together, EU and US investments are the leaders of the transatlantic relationship, contributing to economic growth and jobs on both sides of the Atlantic[6]. The transatlantic commercial relationship also forms the shape of the global economy as a whole. Either the EU or the US is the largest trade and investment partner for almost all other countries in the global economy, the EU and the US economies account together for about half the entire world GDP and for nearly a third of world trade flows.

How About the Other Countries?

While the EU and US will enjoy the benefits of TTIP, other countries trying to export goods and services to the US and/or the EU will suffer from the formalities of expatiation and they will need to expend more efforts. These concerns have mutually been addressed by most of the countries not covered by TTIP, especially the developing ones. In any case, potential resolutions for such concerns have been discussed in the negotiation phase by both parties at the briefings of TTIP.

How is TTIP Expected to Affect Turkey?

Since the geopolitical position of Turkey is very crucial for global commerce, both the US and the EU have smooth and effective trade relations with Turkey. Turkey has already signed a Customs Union Agreement[7] with the EU on December 31, 1995; however, with TTIP, Turkey will be in a disadvantageous position while trading with the EU or the US. The goods imported from the US and the EU will pass through the customs of Turkey without any customs tariff; however, Turkey will suffer from the tariffs. This will lead to an unfair competition for Turkey against the EU and the US. Although having signed a customs union agreement with the EU, TTIP would effectively block Turkish exports to enjoy the tax advantages in the EU, unless Turkey's being a party to the free trade rules are negotiated with the EU and/or the US.

Taking these concerns into account, the Turkish government announced the possibility of freezing the customs union agreement with the EU in the event that Turkey does not become a party to TTIP. The government foresees that being left out of TTIP would create a $3 billion loss to Turkey per year[8]. For this very reason, Turkey asked the EU to add an article into the TTIP for the automatic inclusion of countries with whom the EU already has a Customs Union arrangement.

A Significant Improvement for Turkey to be Involved in TTIP

There has been an important step taken recently on the betterment of Turkey's status and position at the Customs Union, which is between Turkey and the EU and TTIP. Nihat Zeybekci, the minister of economy of Turkey, and Cecilia Malmström, the European Commissioner for Trade, came together in Brussels on May 12, 2015, and signed a memorandum of understanding (MoU) to amend the Customs Union Agreement to conform with TTIP. The MoU covers certain significant titles such as i) agriculture, services and public procurement, ii) Turkey's taken a part in the position of decision making process, iii) decrease of quota in land transportation, etc. Nevertheless, the most critical section of the MoU is the part about Turkey's being included in the TTIP. As the EU is one of the two parties of the TTIP, EU's support to Turkey for being a part of TTIP is very crucial. The MoU will take effect on January 1, 2016, and until such date and then, Turkey has been promised by EU to be informed of every step and progress of the negotiations between the US and EU about TTIP.

Still, there should be concrete steps taken by Turkey to enact necessary economic reforms. After satisfying all the required standards in the domestic market, production and legislation, debates over the involvement of Turkey in the TTIP can take place at a realistic level. P

1 europa.eu/rapid/press-release_MEMO-10-555_en.htm
2 ustr.gov/sites/default/files/USTR%20FY%202013%20-%20FY%202017%20Strategic%20Plan%20final.pdf
3 transatlantic.sais-jhu.edu/publications/books/TA2014/TA2014_Vol_1.pdf
4 trade.ec.europa.eu/doclib/press/index.cfm?id=1230
5 trade.ec.europa.eu/doclib/events/index.cfm?id=1239
6 ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/
7 www.avrupa.info.tr/fileadmin/Content/Downloads/PDF/Custom_Union_des_ENG.pdf
8 www.hurriyetdailynews.com/eu-backs-us-position-on-turkeys-inclusion-to-ttip.aspx?PageID=238&NID=74185&NewsCatID=429

Shareholder Activism: Beware the Barbarians

Shareholders in South Africa of listed companies have, until recently, adopted a passive approach to managing their companies. However, recent events involving attempts to have boards reconstituted and opposition to the approval of director's remuneration raises the prospect that more and more South African companies will soon be facing a brand of shareholder activism more akin to that practiced in the United States and United Kingdom financial markets.

Unlike the media appointed individual "shareholder activists" in South Africa, shareholder activists in the United States and United Kingdom are fund managers and wealthy individuals, holding significant stakes in companies, who may be seeking to influence the way in which those companies are run.

As *Time* magazine points out, these fund manager and wealthy individual activists are by and large the re-branded corporate raiders of the 1980s. What motivates a shareholder activist today are the same issues which motivated the corporate raiders of the 1980s; namely underperforming boards, idle assets sitting on balance sheets and/or the accumulation of non-core assets that are perceived to be worth more if sold off than retained. What has changed is that shareholder activists no longer seek out the weak and vulnerable, but are targeting some of the best performing companies.

The re-birth of the shareholder activist has been prompted by the events that followed the 2007-2008 global financial crisis, which has caused many companies, like Apple, to batten down the hatches and has resulted in them accumulating enormous cash reserves. *Moody's* reports that United States firms were sitting on US$1.6 trillion of cash at the end of 2013. To provide some perspective, that is 10 times more cash than the South African government's entire expenditure budget for 2014-2015. In addition, pre-2008 double digit growth in earnings has given way to low growth expectations. While shareholders were largely passive during the high growth/high return period leading up to the global financial crisis, shareholder intervention in the running of companies is now more widespread. According to FactSet Research Systems, in the last five years activists have initiated campaigns at over 20 percent of the industrial companies in the S&P 500.

As a result, shareholder activism has increased significantly in the United States and other parts of the world, with a view to unlocking trapped wealth or forcing boards to adopt the strategies of the shareholder activist. Typically the actions of these new shareholder activists consist of seeking board appointments, proxy wars, threats of litigation or proposing resolutions to declare dividends or sell assets. The success rate of these activists is somewhat mixed.

In South Africa, many companies on the JSE are in the same position as those in the United States. Recently Grant Thornton reported that South African companies were sitting on "excessive" cash piles. Yet South Africa

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has not, to date, seen much in the way of the United States style of shareholder activism. Part of the reason for this is perhaps the incestuous nature of South African investor community. Many of the fund managers, whose counterparts in the United States are at the forefront of shareholder activism, are cowed into silence by the fact that much of the money they manage comes from other shareholders of companies that may well be ripe for a dose of shareholder activism.

Inevitably, the question arises as to whether the actions of a shareholder activist are good for the long term sustainability of a company or merely achieve short term profits for themselves. Faced with an activist shareholder, the first reaction of many boards is to resist and to paint the activist goals as being bad for the company. However, as pointed out in a recent article in the *Harvard Business Review*, often the emergence of a shareholder activist in the ranks of a company's shareholder base can serve as a wake-up call for a hitherto complacent board. The demands of shareholder activists can usefully point directors to areas of a company's finances or operations that need attention or which may unlock value. Apple announced plans to return US$100 million to its shareholders by 2015, more than double originally planned. In addition, Apple recently announced it was using some of its cash reserves to acquire Dr Dre's Beats Electronics for US$3 billion, most of it in cash, the single biggest acquisition by Apple in its 38-year history.

Given the downturn in the South African economy, South African companies can no longer operate under the illusion that shareholder activism will be limited to justifying their executive's remuneration at the next AGM. Faced with diminishing returns, fund managers will be examining companies more closely and calling for them to unlock value, either through changes in strategy, demand for board seats, sales of non-core assets and/or returns of unused cash sitting on balance sheets.

In order for companies to insulate themselves from the attentions of shareholder activists, boards of these companies should ensure they have a coherent strategy, that short term goals are achieved and that the board itself is unified and not easily divided and conquered. Companies should also have on hand a range of advisors, fully briefed, to ensure that responses to the attentions of a shareholder activist are swift and coherent.

What to Include in a Shareholders' Agreement

Purchasing shares in private or proprietary limited companies in Australia continues to be an attractive option for many international investors. But what happens when the shareholders, international or domestic, in any given private company enter into a dispute? One of the most expeditious and cost effect methods of resolving shareholder disputes is having a shareholders' agreement in place. This article highlights some of the key clauses to include in any shareholders' agreement and emphasizes the benefit of having a shareholders' agreement in place before acquiring or expanding your or your client's shareholding in an Australian company.

A standard company constitution will not always protect shareholders in the event of a dispute between members. This is where a shareholders' agreement, regulating the rights and obligations of shareholders, can help avoid the uncertainty of costly court litigation. While it is not compulsory under the Corporations Act, the primary piece of legislation regulating companies in Australia, a considered and properly formulated shareholders' agreement is highly recommended for all companies.

So, what should you include in a shareholders' agreement?

Every shareholders' agreement should be individually tailored because every company is different. The specific provisions of each shareholder agreement should take into account the number of shareholders, the objectives of the shareholders, the funding arrangements, and the nature of the business or industry in which the company operates. However, there are also some basic clauses that every shareholder agreement should have.

1. Alternative Dispute Resolution

As a pre-requisite to any court proceedings, it is recommended for all parties to try resolve their disputes through an alternative dispute resolution (ADR) process stipulated in the shareholders' agreement. These processes generally take less time and cost less money than proceedings in a court. ADR may include mediation, arbitration or conciliation. It should be noted that a provision in a shareholders' agreement to resolve disputes through an ADR process will not preclude a court from hearing the dispute at a later date. A well drafted ADR clause will be effective in making litigation an absolute last resort.

2. Deadlock Provisions

Deadlock provisions deal with circumstances where shareholders cannot agree on the management of the company. The shareholders' agreement should set out a procedure to resolve a deadlock if one arises. There are a number of procedures that can be used to resolve deadlocks, including:

- Shotgun clause – enables a shareholder to serve notice on another shareholder requiring the

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receiving shareholder to buy his/her shares at a nominated price. If the receiving shareholder chooses not to buy those shares, he/she must sell his/her shares to the initiating party at the same nominated price.

- Chairman clause – enables one of the shareholders to become the chairman in the event of a deadlock and have the casting vote on the dispute.
- Liquidation clause – if the deadlock continues for a set period of time, all the company's assets will be sold and the company will be divided up voluntarily. The shareholders equally share in the expenses of liquidating the business. This solution is generally a last resort when there is no alternative other than to liquidate.

3. Pre-Emptive Rights

Pre-emptive rights impose certain restrictions on the transfer of shares. Pre-emptive rights may include:

- Right of first refusal – provides existing shareholders the first opportunity to purchase the shares from another shareholder of the same company before the shares can be offered to parties outside the company.
- Right to refuse transfer – the board will have the discretion to refuse to register a transfer of shares to prevent unwanted parties from joining the company.
- Board consent to transfer – a shareholder wishing to transfer his/her shares will have to obtain the consent of the board to transfer shares or transfer shares to certain parties.

4. Mandatory Sale Events

The shareholders' agreement should specify certain fundamental changes in circumstance which will trigger a mandatory sale of that member's shares. Examples of such events include:

- A shareholder's death
- A shareholder's insolvency/ bankruptcy
- Certain fundamental breaches of shareholders' agreement
- Temporary or permanent disability
- Cessation of employment
- Loss of professional certification (where this is required because the company trades, for example, as a doctor's surgery or a law practice).

5. Share Valuation Methods

The shareholders' agreement must stipulate a method for determining the value of shares in relation to pre-emptive rights and mandatory sale events. Typical share valuation methods include:

- Fixed price – price agreed by the shareholders.
- Assets based – the value of the net assets divided by the current number of shares.
- Expert valuation – usually, valuation by an accountant.
- Board valuation – those directors who are not directly involved in the transaction value the shares.

As discussed above, every company is unique. Similarly, every dispute that arises between the shareholders of a given company will be unique. Despite the difficulty in predicting the range and nature of disputes that may arise, prudent investors should always insist on a shareholders' agreement with at least the clauses identified in this article. The initial expense incurred in preparing a well drafted shareholders' agreement will pale in comparison to the cost of any dispute.

Recovering Bribes and Other Misused Funds

The Australian press has recently been reporting a new case in which executives of a company are alleged to have misused the funds of their corporate employer. The allegations include:

1. Very large increases in payments made to a company part owned by one of the executives, with a three-year contract granted to that company;
2. Large increases in payments to the former employer of the CEO;
3. Corporate assets being redirected to the executives, their spouses and others; and
4. Similar allegations against a second CEO.

If the allegations are true, then that points to either a lack of appropriate corporate governance controls, or a failure in the implementation of controls.

Carroll & O'Dea has recently acted in a number of matters in which an organization sought recovery from an executive, member of staff and suppliers, for bribery, misappropriation of funds, and in connection with holding an interest in a supplier.

Lack of Controls

While it is trite to say that prevention (through appropriate governance controls) is better than attempting to recover misused funds after the fact, bribery and misuse of funds poses special problems for recovery.

While the employer claims to have uncovered the alleged frauds in the case that is being publicized now, some perpetrators will avoid having anything in writing that can point back to what they have done – the key incriminating part of the transaction is frequently cash in "brown paper bags." This creates not only difficulties proving the misconduct, but also difficulties in identifying that it has happened at all. In the case of bribery, a later audit might identify that pricing is above market, but that will not get the employer to proof of bribery, because the excessive price could equally be explained as a poorly negotiated deal.

Where the perpetrators have avoided anything incriminating being in writing, the victim may never be able to discover the fraud without a confession by one of the parties. Even though the victim may be able to get preliminary discovery (although even that has its challenges in bribery cases), there may not be any documents to discover. Even if there are documents to discover, it is no small stretch to suspect that the sort of person who takes, or pays, bribes, might not be inclined to comply with discovery obligations.

Even if the fraud is discovered, a senior executive who is careful with their spending is less likely to be motivated to commit frauds, so it may well turn out that the fraudster has spent all of their money and has no assets to satisfy a judgment. In those cases, the best avenues for recovery may be against

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others who are involved, to some degree, in the fraud.

The Nature of These Actions

A common lawyer who is looking for recovery for these sorts of claims may be tempted to go straight for equitable causes of action, since the breach of fiduciary duties and associated actions are the ones where misappropriation may have been dealt with in law school. However, the equitable actions are not the only place to look, or even necessarily the best. These underlying facts may also give rise to claims for conspiracy, deceit, or (in Australia) misleading conduct.

The alternative claims may be more straight-forward to pursue. They may also be preferable for procedural reasons, such as if the rules of court allow you to get default judgments for damages claims, but not for other types of relief. In that case, if other relief is pleaded, the defendant may be able to simply ignore the claim without putting on a defense, and effectively put the victim to the expense of proving it.

The equitable claims are likely to be of assistance only where equitable remedies specific to the equitable claims are needed, for example if the plaintiff seeks to be able to trace proceeds of the fraud, or where the equitable remedy provides for a higher recoverable amount than a damages remedy.

Bribery – A Higher Duty to Disclose

A claim for bribery can be brought against both the payer of the bribe, and the payee of the bribe. While there is some lack of clarity in the cases, it seems that bribery is in the nature of its own tort claim at common law.

A little known aspect of bribery claims is the burden imposed on a person who provides a benefit to the agent of another. The law defines a bribe as a payment of a secret commission whereby the person making the payment:

1. Makes it to the agent of the other person with whom he is dealing;
2. Knows that the person is acting as the agent of the other; and
3. Fails to disclose to the other person that he has made that payment to the person whom he knows to be the other person's agent.

That is, the payer has a positive duty to disclose the payment to the principal. It is not enough for the payer to say that they thought the principal was aware of the payment (or other benefit).

In addition, in a bribery claim against the payer of a bribe, it does not matter whether:

1. The payer of the bribe acted with a corrupt motive;
2. The agent's mind was actually affected by the bribe;
3. The payer knew or suspected that the agent would conceal the payment from the principal;
4. The bribe was given specifically in connection with a particular contract.

Once a bribe is paid there is an irrefutable presumption that the principal's loss is at least the amount of the bribe. The principal only needs to prove loss if they seek to recover more than the amount of the bribe.

If the only remedy required is damages, the bribery claim will often be the most efficient to run, where it applies, given the simplicity of the elements of the claim, its strict imposition of duties on the participants, and the lack of any need to prove damages.

Other Senior Employees – Failure to Report

In some cases there may be another senior employee who has failed to report, or has even assisted in covering up, bribery or misuse of funds by another, even though they were not themself receiving bribes or misdirected funds.

For some senior employees, there is an implied obligation in the contract of employment, to report misconduct of both more junior and more senior employees, especially if that misconduct amounts to misappropriation of company property. If the employee is sufficiently senior to attract this obligation, then it applies even if, by reporting that misconduct, the employee also reveals their own misconduct.

An employee who fails to report that misconduct may be liable for damages for breach of contract, for amounts the employer would have saved if the conduct had been reported.

Conclusion

Detecting and proving bribery and misappropriation of an organization's property is very difficult, so it is always best to have in place procedures designed to prevent it in advance.

Where an employee has taken bribes, or misappropriated an organization's property, there are several causes of action to consider, rather than just fiduciary duty claims, and in the case of bribery, the specific action for damages bribery may be the most effective remedy. P

Is Google Subject to the Hong Kong Court's Defamation Jurisdiction?

In *Dr. Yeung Sau Shing Albert v. Google Inc.* [2014] 5 HKC 375, the Court of First Instance found that there is a good arguable case that Google is a publisher of defamatory material by generating defamatory search suggestions through its search engine to its users and that the Hong Kong courts have jurisdiction over it.

When the Entertainment Tycoon and the Internet Giant Clash in Court

In *Dr. Yeung Sau Shing Albert v. Google Inc.* [2014] 5 HKC 375, the Plaintiff (Yeung), a Hong Kong businessman most famous for his success in the entertainment industry, discovered that typing his Chinese and English names in the search box of the Defendant (Google)'s search engine automatically generated below the search box a list of search suggestions that associated Yeung with criminal activities and triad groups (the "Autocomplete" function). Further, on hitting the search button with his Chinese and English names in the search box, a list of related search results of a similar nature was displayed at the bottom of the page (the "Related Search" function). His solicitors wrote to Google and its legal representatives to demand removal of the defamatory words that the two functions generated. As Google failed to comply with his request, he initiated legal proceedings against Google in Hong Kong.

In order for Yeung to commence proceedings in Hong Kong against the U.S.-based defendant, he was required to show, among other things, that he had a good arguable case against Google that (1) there was publication of defamatory words by Google to a third party reader; and (2) Google can be regarded as a publisher of the defamatory words being predictions or suggestions derived from the completely automated search process.

How Google Lost the Battle (*For Now*)

1. Are the search suggestions publication?

In defamation cases, material is considered "published" when and where it is comprehended by the reader. Since Yeung's IT staff and his solicitors were able to download and print out copies of the Autocomplete and Related Search results from the Google website, the court accepted that there may have been publication by Google to third party readers in Hong Kong. Although the people that downloaded and printed the material were connected to Yeung, the court found it to be irrelevant and that they could still be considered as third party readers. Overall, the court was satisfied that there was arguably publication of the defamatory material by Google in Hong Kong, which gave rise to its jurisdiction over the matter.

Ludwig Ng

Ludwig Ng is a senior partner at ONC Lawyers, where his major area of practice is insolvency and corporate restructuring. Under his leadership, the firm has a thriving practice advising and representing insolvency practitioners in Hong Kong and overseas in all aspects of their practice, particularly on investigation of corporate fraud, assets tracing and recovery, actions against former company officers, cross-border insolvency and corporate restructuring.

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2. Is Google a publisher?

Google argued that it was not a publisher because no human input was required in generating the Autocomplete and Related Search suggestions. It argued that it had no control over the automatically generated results as the results that display is based heavily on the popularity of the search queries among all Google users. It therefore followed that Google only acted as a passive medium. However, the court rejected this argument and applied the "strict publication rule," meaning whoever takes part in making the defamatory statement known to others is liable unless the publisher (Google) can put forward a legitimate defense.

Google's defense was that it was a subordinate publisher (like a library or a newsstand) who did not know and would not reasonably have known in the circumstances that the publication contained defamatory content. It sounded like a strong argument because, considering the high volume of information Google deals with daily, it could not possibly have known all contents in the publication. However, the argument fell through after Google was notified by Yeung, through the letters his solicitors had written to itself and its solicitors, of the existence of the defamatory search suggestions. Since Google is capable of censoring its material, and since it chose not to take action within a reasonable time after being notified of the existence of such search suggestions, it could be argued that Google should be treated as a main publisher (instead of a subordinate publisher). As such, it is arguable that Google's defense will not be accepted by the court.

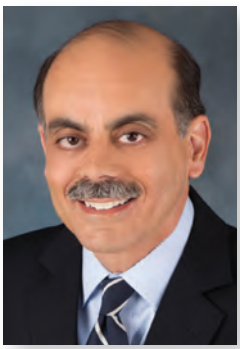
The court also found a good arguable case that Google intends to be a publisher of the defamatory words. Based upon how the search engine works, it is arguable that Google intends to publish anything its automated system produces. As the Autocomplete and Related Search suggestions are results of multiple factors set by Google through the algorithms it designed, revised and improved, the system functions the way Google intends it to and may not be argued that it merely conveyed information neutrally or acted as a passive facilitator.

The Court's Decision

Considering all circumstances of the case, the court found that Yeung has a good arguable case against Google that (1) Google was a publisher; and (2) there was publication by virtue of the search engine's Autocomplete and Related Search functions. Combined with the large scale of defamatory publication from the search suggestions and the likely substantial damage to Yeung's reputation due to such publication, the court confirmed that Yeung should be allowed to continue the proceedings against Google in the Hong Kong court. It should be noted that the court's decision here is only a preliminary one on jurisdiction (not a substantive finding that Google was liable for defamation) and Google has already filed an appeal against the decision. The judge recognized the complexity and novelty of the issues and granted leave to Google to appeal the decision. Further elaboration of the law must await the ruling of the Court of Appeal and the eventual trial of the action.

Primerus Firm Wins Major Victory in Antitrust Case in United States Supreme Court

Kohner, Mann and Kailas, S.C. (KMK), a Primerus member firm in Milwaukee, Wisconsin, won a major victory this April in the United States Supreme Court in an antitrust case that could return hundreds of millions of dollars to the Wisconsin economy.



Robert Gegios
Kohner, Mann and Kailas, S.C.

According to Robert Gegios, chair of the firm's litigation department, the opinion addresses litigation begun in 2006 on behalf of Wisconsin industrial and commercial users of natural gas, claiming alleged price-fixing. The Wisconsin cases were consolidated in federal court in Nevada with others from around the country, but in all of the consolidated cases, the plaintiffs contend that retail prices for natural gas more than doubled in the early 2000s as the result of collusion by large natural gas company defendants and other conspirators, which also brought about the California energy crisis. The Wisconsin cases seek damages for the higher prices Wisconsin businesses paid for natural gas from 2000 to 2002.

The defendants sought to dismiss the suits, arguing that the Wisconsin plaintiffs' state law claims would interfere with the authority of the Federal Energy Regulatory Commission, which oversees interstate wholesale natural gas markets. That federal authority, the defendants argued, preempts the state antitrust laws on which these cases are based.

The Ninth Circuit Court of Appeals sided with KMK's clients, and the Supreme Court affirmed with a 7-2 decision written by Justice Stephen Breyer. The decision upheld the authority of states to act and ordered the litigation to proceed.

Now, KMK is working to determine whether these cases will be class actions and preparing to proceed to trial.

> "We don't need more substantial resources in terms of manpower to litigate and try these major cases," Gegios said. "Sometimes you just have to fight. You have to be dedicated to your client's cause, persistent, and understand what's important and what's not."

The Wisconsin plaintiffs include manufacturing companies Briggs & Stratton Corp., Merrick's, Inc., and ATI Ladish, LLC; Carthage College; cheese producer Sargento Foods; paper producer NewPage Wisconsin System Inc.; and catalog printing company Arandell Corporation.

Primerus President and Founder John C. Buchanan noted that this case highlights the capabilities of Primerus firms.

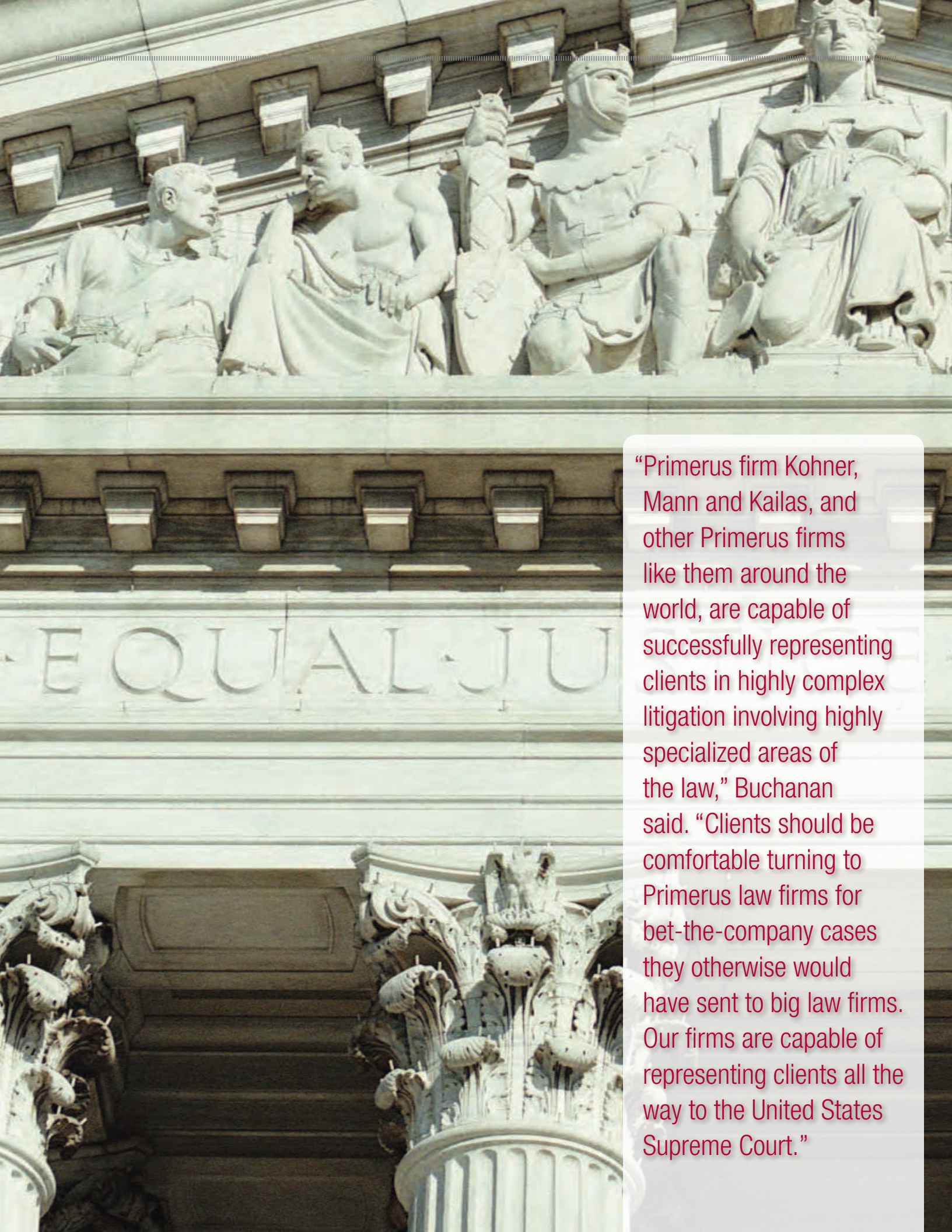
"Primerus firm Kohner, Mann and Kailas, and other Primerus firms like them around the world, are capable of successfully representing clients in highly complex litigation involving highly specialized areas of the law," Buchanan said. "Clients should be comfortable turning to Primerus law firms for bet-the-company cases they otherwise would have sent to big law firms. Our firms are capable of representing clients all the way to the United States Supreme Court."

Gegios, who was just recognized as a Lawyer of the Year by The Best Lawyers in America©, said this is not the first time his 25-person firm has successfully handled cases against very large companies. They have a long track record of beating huge companies represented by large firms in big-stakes litigation.

For example, KMK won a federal court jury trial brought by Super Group Packaging and Distribution – a start-up Wisconsin company that sold woven, non-paper bags – against Smurfit-Stone Container Corp., which was at the time the largest manufacturer of paper bags in the world.

Super Group turned to Gegios' firm because they knew they needed someone who specialized in complex business litigation in order to contend with this much larger company. They eventually won a multi-million dollar verdict, one of the largest in a business case in Wisconsin in recent years.

"We don't need more substantial resources in terms of manpower to litigate and try these major cases," Gegios said. "Sometimes you just have to fight. You have to be dedicated to your client's cause, persistent, and understand what's important and what's not."



"Primerus firm Kohner, Mann and Kailas, and other Primerus firms like them around the world, are capable of successfully representing clients in highly complex litigation involving highly specialized areas of the law," Buchanan said. "Clients should be comfortable turning to Primerus law firms for bet-the-company cases they otherwise would have sent to big law firms. Our firms are capable of representing clients all the way to the United States Supreme Court."

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New Hampshire
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Downs.Stanford, P.C.	Dallas, Texas	Jay R. Downs	214.572.2254
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O'Donnell, Ferebee & Frazer, P.C.	Houston, Texas	Jason L. Frazer	281.617.1170
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Beresford Booth PLLC	Edmonds, Washington	David Tingstad	425.939.2838
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Gary L. Shockey, PC	Jackson, Wyoming	Gary Shockey	307.733.5974

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Alice Paylor Gives Back by Mentoring Young Women Attorneys

Alice Paylor, a shareholder with Primerus member firm Rosen Hagood in Charleston, South Carolina, remembers meeting at a restaurant with all of Charleston's women attorneys in 1977 when she graduated from the University of South Carolina School of Law. There were only eight of them.

Now, she is dedicated to mentoring young women attorneys starting out in the legal profession. Though the numbers have changed, with many more female attorneys now, the issues they face have not.

"Nothing is new. If they're going through it, then I probably went through it 25 years ago," she said. "I think the practice of law is a great career and profession, and I want women to come in and have as good a time as I have had doing that."

For her efforts mentoring women, as well as many other civic and professional contributions, Paylor recently received the Platinum Compleat Lawyer Award from her alma mater, the University of South Carolina School of Law.

The award is given annually by the law school's Alumni Council to alumni who have demonstrated the highest level of professional competence, ethics and integrity throughout their professional career.

The selection committee included the Chief Justice of the South Carolina Supreme Court, the Chief Judge of the South Carolina Court of Appeals, the President of the South Carolina Bar, the Co-Chair of the Law School Alumni Council, and the Dean of the Law School.

"Alice is very deserving of the Compleat Lawyer Award," said Richard Rosen, managing shareholder at Rosen Hagood. "The firm is very proud of her and pleased that she is being recognized for her civic and professional accomplishments."

Paylor focuses her law practice in the areas of complex business and commercial litigation, employment litigation, and school and education law. She joined Rosen Hagood in 1982.

Alice Paylor, Rosen Hagood

Paylor has a long history of service within the South Carolina Bar and other legal organizations, serving as President of the Bar in 2013-2014. She was the fourth woman to ever hold that post.

Paylor has also served on the Bar's Board of Governors since 2005, including in the positions of secretary and treasurer. In the past she has served on the Conventions Committee and Judicial Qualifications Committee, as the secretary and treasurer of the Young Lawyers Division, and as a member and chair of the House of Delegates.

In 2014, Paylor was appointed to the American Bar Association's Commission on Women in the Profession and was elected to the Executive Council of the National Conference of Bar Presidents.

Within Primerus, Paylor has been responsible for organizing women's cocktail receptions at the Primerus Defense Institute Convocation. About 20 young women Paylor has mentored

Primerus is creating a new Women's Lawyer Section (WLS) to provide women attorneys with a network devoted to promoting the interests of women within Primerus.

Please join the new group Thursday, October 1, at the Primerus Global Conference in Amsterdam, Netherlands, for the section's first luncheon. The event will be at 11:30 a.m. at Restaurant De Palmboom in the Radisson Blu hotel. All women attorney attendees are invited to attend the a la carte luncheon.

The goals of the section include: facilitating and offering increased networking opportunities among the women attorneys of Primerus; providing an avenue for the exchange of ideas and issues pertaining primarily to women attorneys; and providing opportunities for personal and professional development of WLS members as future leaders of Primerus. For more information please contact Katie Bundyra at kbundyra@primerus.com.

wrote letters in support of her winning this award.

She hosts events at her house regularly for women in various stages of their legal careers, creating a safe and encouraging place to talk.

"I tell the young women there that I was one of the most shy people you could ever meet," Paylor said. "If you had told me 40 years ago that I would be giving speeches in front of hundreds of people, I would have said I would never be able to do that."

She said it's all about being self-confident and competent at what you do.

"I tell women, 'You can do it. Don't ever say you can't do anything. You might not get to do it, but you can do it,'" Paylor said.

Paylor loves to tell the story of one young woman she mentored. When they met, the mentee had a contract lawyer job she hated and she lacked self-confidence. Paylor noticed in her resume that she had a strong background in public health.

"I asked her, 'Why aren't you using that,' and she said that she would love to," Paylor said.

Paylor worked with her and then sent her resume to a woman she knew who was in charge of the South Carolina Department of Health and Environmental Control, who thought she was perfect for the department.

"If you met her today, she is not the same person," Paylor said. "It all worked out, and I see her and she's just as happy as she can be. Nothing can be more rewarding than that."

She credits her parents with instilling her with a community service mindset.

"They brought me up to respect all people and to treat everyone with dignity, no matter who they were and what their circumstances were," she said. "And they gave me a lot, including my education. I realize I have had many opportunities that most people don't have, so it's always been my philosophy to take advantage of every opportunity. Many opportunities are to give back. I feel that that's a very important part of being a lawyer." P

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2015 and 2016 Calendar of Events

September 30-October 4, 2015 – Primerus Global Conference
Amsterdam, Netherlands

October 1, 2015 – Primerus Legal Risk Seminar
Amsterdam, Netherlands

October 18-21, 2015 – Association of Corporate Counsel Annual Meeting
Boston, Massachusetts – *Primerus will be a corporate sponsor.*

November 5-6, 2015 – National Association of Women Lawyers General Counsel Institute Seminar
New York, New York – *Primerus will participate.*

January 15, 2016 – Primerus Western Regional Meeting
Seattle, Washington

February 24-27, 2016 – Primerus Personal Injury Institute Winter Conference
Boca Raton, Florida

March 3-4, 2016 – Primerus Defense Institute Transportation Seminar
Las Vegas, Nevada

April 14-17, 2016 – Primerus Defense Institute Convocation
Napa, California

May 22-24, 2016 – Association of Corporate Counsel Europe Annual Meeting
Rome, Italy – *Primerus may be a corporate sponsor.*

October 13-16, 2016 – Primerus Global Conference
Washington, District of Columbia

October 16-19, 2016 – Association of Corporate Counsel Annual Meeting
San Francisco, California – *Primerus will be a corporate sponsor.*

Scan this with your smartphone to learn more about Primerus.

There are other events for 2015-16 still being planned which do not appear on this list. For updates please visit the Primerus events calendar at www.primerus.com/events.

For additional information, please contact Chad Sluss, Senior Vice President of Services, at 800.968.2211 or csluss@primerus.com.

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