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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 primerus.com.

About Our Cover

Primerus offers many opportunities for firms to make connections with members and clients around the world. In an increasingly global economy, these connections allow our firms to better serve clients as a preferable alternative to big law.

Scan this with your smartphone to learn more about Primerus.

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

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President's Podium

John C. Buchanan

Making Connections

Greetings. In this issue of *The Primerus Paradigm*, you will read about some of the many ways Primerus firms work together to better serve clients around the world. This illustrates the unique advantage of a global alliance of top quality small to medium-sized independent law firms working together as friends and partners.

More and more clients are recognizing these advantages and choosing Primerus law firms instead of the very large international law firms that have dominated the legal industry for the past 100 years. Their days of domination are numbered, due primarily to the explosive forces of globalization and technology sweeping the planet. These forces have leveled the playing field for the best small and medium-sized law firms that join together in a close alliance like Primerus.

In fact, now more than ever, Primerus represents the way of the future – what I like to call the international law firm of the 21st century. More and more companies around the world, and not just the largest companies, have cross-border needs, creating an overwhelming need to hire attorneys in other countries. Armed with the latest technology, including state-of-the-art video conferencing, as well as many opportunities for members and clients to interact in person at our global events, Primerus makes these cross-border transactions safe and easy.

It did not take a clairvoyant to see the decline of big law coming. A large law firm is still a single entity subject to very serious conflict of interest limitations that inherently limit its size. Since all legal work essentially involves multiple parties in adversarial or conflicting relationships, a single law firm, regardless of size, can essentially represent only one of them, and maybe none, due to a past relationship that would create a conflict of interest. This limitation does not affect an alliance like Primerus, as our firms remain independent entities and are not impacted by the conflicts of other members of the network.

We call upon our members to become active partners in our society – making connections that in the long run will benefit clients. A firm's ultimate success in Primerus boils down to making connections with other members.

The experts agree. According to a September 2017 article in *The Lawyer*, "Top 5 predictions for the future of law firm networks," the top global law firm mergers in the past year chose structures similar to those of independent networks like Primerus.

In that article, a panel of experts from some of the world's largest law firm networks reacts to the prediction that "all growing international firms will adopt the law firm network model (to some degree) to manage their global businesses from now on."

Carl Anduri, president of Lex Mundi, is quoted as saying: "All firms with a substantial clientele (not just growing international firms) will, to serve their clients, need to have broad international reach and will therefore become part of a network of independent firms or form their own network (more formal than a best friends arrangement) of firms with which they work."

For the best small to mid-sized firms around the world, I believe, the answer is Primerus. Primerus calls itself a society and not a network – which are often perceived as just referral organizations – because it brings so much more to relationships between lawyers and clients, as shown in the article on page 5. We call upon our members to become active partners in our society – making connections that in the long run will benefit clients. A firm's ultimate success in Primerus boils down to making connections with other members.

As one of our esteemed long-time members recently said, paraphrasing the late President John F. Kennedy, Primerus members should ask not what Primerus can do for them, but rather what they can do for Primerus. By asking that question, they are really asking, "What can we do for our clients?"

Primerus faces a future with tremendous potential. We invite you to join us on what will be an exciting journey of growth and making meaningful connections around the world.

Serving Clients Better by Working Together

An Inter-Firm Collaboration Illustrates the Best of Primerus

No other law firms in Nashville can say they have a Mexico desk.

But Primerus firm Spicer Rudstrom can.

For three months last year, the firm housed an attorney from fellow Primerus firm Cacheaux Cavazos & Newton (CCN) in Mexico, offering local Tennessee businesses face-to-face time with an attorney who could answer all their questions about doing business in Mexico.

This partnership is just one example of the countless ways Primerus firms collaborate to better serve clients with access to the highest quality legal counsel locally and around the world. As a result, more and more clients are taking notice and seeing Primerus firms as a viable – and preferable – alternative to big law.

Felipe Chapula, partner at CCN, points to one such client who contacted Spicer Rudstrom to set up a meeting when they learned about the Mexico attorney exchange program.

"This enables medium-sized firms such as CCN and Spicer Rudstrom to provide services to a client that normally would do business only with a 600-plus lawyer firm," Chapula said. "It shows how good law firms with good people and reasonable rates with this international footprint are of interest to larger clients that, even as we speak, tend to send their work to these huge law firms."

This year Primerus is offering more opportunities than ever for members and clients to connect around the world through webinars, as well as in-person events in cities including London, England; Sydney, Australia; Buenos Aires, Argentina; Paris, France; Miami, Florida; and several other cities throughout the United States.

In addition to the annual Primerus Defense Institute (PDI) Convocation, Primerus also will host the first Primerus International Convocation May 3-5 in Miami, Florida. Clients from around the world are invited to attend the event, where they'll attend legal education sessions and social outings, allowing them to get to

know Primerus attorneys in a no-pressure environment.

A Valuable Partnership

The idea for the CCN/Spicer Rudstrom partnership developed slowly over time. Marc Dedman, managing partner of Spicer Rudstrom, said it was his relationship with Chapula, formed through Primerus events over the years, that created the basis for the partnership. Add to that the unique business climate in Nashville – the second fastest growing city in the United States (behind only Austin, Texas) and a lack of established large, international law firms – and you have the perfect scenario for the exchange.

Dedman and Chapula first met at a Primerus event in Barcelona, Spain, in 2013, followed by several Primerus events since then.

"You get to know the people in Primerus firms, and you like them, respect them and feel comfortable with them," Dedman said.

In 2016, Dedman was in a meeting with an executive from a growing health care company, who talked about the challenges of finding legal counsel around the world – including sky-high costs.

"He was talking to me about the fees he was getting charged by law firms … numbers that are many multiples of what Primerus firm fees are," Dedman said.

After months of determining a potential business model which could address the points raised by the health care executive, he contacted Chapula in October 2016. After almost a year of planning details – involving everything from housing, insurance, IT, logistics, bar and ethical requirements, and immigration and visa regulations – on September 4, 2017, CCN Mexico City-based attorney Jose Ernesto Fuentes Vilalta began work in an office at Spicer Rudstrom's Nashville office.

The two firms identified potential companies that could benefit from their program and even developed a mission statement: "Take what seems scary and show that it is not; take what seems expensive and show that it can be affordable; and take what seems complicated and show that it can be straightforward."

Dedman wanted Tennessee businesses to see that they didn't have to go to bigger law firms with higher fees, but they could instead take advantage of Spicer Rudstrom's close international connections – and use that legal spend they would have had to instead grow their business.

As a result of a news article in a local business journal about the program, Dedman received about 25 unsolicited phone calls from companies who wanted a meeting with Fuentes. In addition, they held other meetings with companies Dedman's firm already knew. In total, Dedman said they met with about 60 companies they otherwise would not have met.

"The first meeting on the first day, we met with someone whose initial intent was to come in and talk about an opportunity he had to bring in people from Mexico on a temporary basis to work in Tennessee. During the conversation, a lightbulb went off for him, and he started talking about opening a business down there and how that could be accomplished," Dedman said. "He got this creative thought going, and I watched this happen again and again and again."

Chapula also came twice to Nashville from Mexico City during the 80-day period to meet with companies. One of his meetings was with a large client who would normally only do business with large international firms.

"Without this program, they would never have contacted my firm, and they never would have contacted Felipe's firm," Dedman said. "We had an outstanding lunch-and-learn with them, and it was beyond their expectations. They were asking very technical questions that Felipe knocked out of the park. He wowed them."

Both firms already count the program as a success, and now they wait to see what additional opportunities arise from it.

Helping Clients

The CCN/Spicer Rudstrom program is the perfect example of what Primerus helps firms do best: develop trusted relationships among members and then work together to benefit clients.

"Primerus is a family of lawyers and clients that actively work together to better serve the best interest of clients," said Primerus President and Founder John C. "Jack" Buchanan. "Reaching out, participating and helping each other is what Primerus is all about."

Roger Barton, managing partner of Primerus firm Barton LLP in New York City, did exactly that after his firm joined Primerus in 2016. He was impressed with the concept of a society of the highest quality small to mid-sized law firms in the world.

He was eager to use his Primerus affiliation as a tool to show in-house counsel that his firm – and his fellow Primerus firms – offered a value proposition that was a viable alternative to the big law firms they might traditionally work with.

"We're just one firm. It's hard to get recognized as an alternative to big law," Barton said.

But Barton thought if he could leverage the Primerus platform, and the connections the society provides nationally and internationally, that could change.

"I thought that's definitely a win," he said.

To make that happen, he immediately began attending Primerus events and getting to know his fellow members.

"It really is a society; there is a collegiality. There is a common purpose and goal," Barton said. "We do band

together to be better as a whole than we are separate."

Barton has worked with several fellow Primerus firms on matters. When a client of Brian Wagner from Primerus firm Mateer Harbert in Orlando, Florida, had a litigation matter in New York City, Wagner called Barton. When fellow New York City Primerus firm Ganfer & Shore needed another law firm to conduct an internal investigation for a client and issue a report, they called Barton. And when Primerus firm ONC Lawyers in Hong Kong needed an opinion written based on New York law, they called Barton.

Barton also has reached out to other firms when his firm's clients have needs. For instance, when they needed a yacht specialist in Poland, they contacted a Primerus firm. They also have collaborated with Broedermann Jahn in Hamburg, Germany, on a cross-border litigation case, and with Greenberg Glusker in Los Angeles, California, on a fraud case arising out of a $50 million private equity transaction.

In a recent meeting with a client – a private equity fund that manages $200 billion and conducts business internationally – Barton shared about Primerus and its benefits for the client.

"We have firms in all of these jurisdictions we can rely on," Barton said. "And we really know these firms. I could see they were very impressed by that."

'Sure Footing' with Clients

The same thing about Primerus also impressed Karen Austin, Vice President, Legal & Licensing, for Tractor Supply Company, a Fortune-500 company based in Brentwood, Tennessee.

Longtime friend Bob Zupkus, who is retired from Primerus firm Zupkus & Angell in Denver, Colorado, told her about Primerus and invited her to the 2015 PDI Convocation in Amelia Island, Florida. She's now a member of the Primerus Client Resource Institute and plans to attend the first Primerus International Conference in Miami this spring.

"I think there are a lot of advantages to an association like Primerus because the firms have been vetted," Austin said. "You can trust the law firm."

Austin often has legal needs that arise in small towns around the United States, and Primerus is a great tool for her when that happens.

"It's good to know I can pick a firm in Missouri or Nebraska and know they will be good," she said. "You don't want to just go to the biggest firm in the state and assume that's what you need. You may be getting a brand new associate."

Often, it's very important for the lawyer she hires to be connected and experienced within the specific jurisdiction.

"And the Primerus lawyers definitely meet that bill," she said.

Austin also loves Primerus's emphasis on building relationships.

"I have been at this a long time, and I really work based on relationships," she said. "At [an event like the PDI Convocation] you're talking with people, having drinks, riding bikes. You just get a feel for what they're about, and what they're about is different than what a bad lawyer is about."

At the Amelia Island convocation, she made contacts with many lawyers that gave her the confidence she needed not only to work with them herself, but also to refer them to other departments within Tractor Supply Company.

"I felt on very sure footing to hire any of the firms or to refer them out to our risk department or our real estate legal department," she said.

New Opportunities

According to Buchanan, 2018 offers more opportunities than ever before for members and clients to get to know one another around the world. Based on the success of the annual PDI Convocation, as mentioned earlier, Primerus will launch the first Primerus International Convocation May 3-5 in Miami, Florida.

Clients from around the world are invited to attend the event.

Other client opportunities include:

- The Primerus Client Resource Institute. Now with more than 50 members, the institute brings together in-house legal counsel, risk managers, claims managers and corporate executives responsible for legal affairs from around the world. There is no cost to join the institute, and clients who join are in no way obligated to hire Primerus lawyers.
- Webcasts offered in conjunction with the Association of Corporate Counsel International Legal Affairs Committee. Twice a month, Primerus attorneys from around the world share their expertise on legal matters affecting clients.
- Client events around the world, also in partnership with the Association of Corporate Counsel. Host cities in 2018 include London, England; Sydney, Australia; Buenos Aires, Argentina; Paris, France; Miami, Florida; and several more cities throughout the United States.

"Primerus events like this provide the highest caliber and highly relevant educational seminars and roundtable discussions," Primerus Senior Vice President of Services Chad Sluss said. "Clients also have the opportunity to meet each other and meet lawyers from all over the world in one location. They can share their legal issues and learn about potential solutions."

For a full list of events and webinars, visit primerus.com. P

Two Things to Remember When Representing Entities: Who the Client Is and Rule 1.13(f) Disclosures

As any in-house attorney knows, when representing an organization, the attorney's client is the organization itself. Except in limited instances subject to conflict rules, the organization's constituents, such as members, shareholders, officers, directors or trustees, are not clients. This tenet is based upon the American Bar Association (ABA) Model Rules of Professional Conduct (the "Rules"), Rule 1.13, Organization as Client, which provides in subsection (a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." However, notwithstanding this clear directive, attorneys still violate the rule.

John A. Snow

John A. Snow is a member of Prince, Yeates and Geldzahler, where his practice consists of general civil litigation.

Prince, Yeates & Geldzahler
15 West South Temple, Suite 1700
Salt Lake City, Utah 84101

801.524.1000 Phone

jsnow@princeyeates.com
princeyeates.com

To protect the client from having its attorney disqualified because of a conflict with the client's own constituents, as well as other potential ramifications, and to protect the individual constituent while working with the organization's attorney, Rules 1.13(f) requires: "In dealing with an organization's [constituents], a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

Although not based upon any data, it is reasonably safe to assume that attorneys who violate Rule 1.13(f) generally do so inadvertently. When an attorney works with an officer of a company for several years, the attorney may develop a loyalty to the officer and, at times, unconsciously conflate the interests of the organization and the officer. Another instance where the interest of the constituent and organization may be confused is when an attorney is engaged by a closely-held organization with a single shareholder or member who holds an overwhelming majority interest in the organization. Under those circumstances, it can be difficult to differentiate between the individual's interests and those of the organization. Another example of confusing the interests of the organization and constituent is when an attorney is representing an organization in litigation based upon an officer's conduct. The attorney can start to identify the officer as the client.

The repercussions of failing to maintain the distinction between the organization as the client, and the organization's individual constituents not as clients, can result in a conflict of interest for the attorney under Rule 1.7, Conflict of Interest: Current Clients. As an example, if the attorney and officer create an attorney-client relationship (even if informally) while the attorney is representing the organization on the same matter, and thereafter the officer and organization become adverse on that matter, the attorney will be conflicted.[1] A conflict can also develop under Rule 1.9, Duties to Former Clients. In this regard, if the attorney represented both the organization and an officer in the same litigation (which is permissible, subject to conflict rules),[2] and if one elects to pursue a claim against the other arising out of the same matter (such as a claim for subrogation or indemnification), the attorney would be conflicted.[3]

Before the obligation of disclosure under Rule 1.13(f) arises, the attorney must first "know or should know" that the interest of the organization and the constituent are "adverse." What is deemed to be "adverse" for purposes of Rule 1.13(f) is not entirely clear. Unlike Rule 1.7, the term "adverse" as used in Rule 1.13(f) is not modified by the term "directly" or any other limitation. Accordingly, the term "adverse" as used in Rule 1.13(f) can be broader than what is contemplated by Rule 1.7. The definition of "adverse" contained in Black's Law Dictionary (9th ed. 2009) is broad: "1. Against; opposed (to). 2. Having an opposing or contrary interest,

concern, or position. 3. Contrary (to) or in opposition (to). 4. Hostile." Accordingly, when considering the application of Rule 1.13(f) assume a broad definition of "adverse."

The phrase "know or should know," as used in Rule 1.13(f) is defined in Rule 1.0, Terminology. Subsection (j) of that Rule states: "'Reasonably should know' when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question." Of course, attorneys assume they will know when there is an issue because attorneys tend to believe they are reasonably prudent. However, except for the delusional, we all have at one time or another considered a proposed course of action to be based upon "reasonable prudence and competence," only to later – and perhaps too late – wonder whether the course of action was actually reasonable. The point here is that when considering whether there is adversity between the interests of the organization and constituent, err on the side of caution because these matters are reviewed retrospectively, which as a practical matter results in a higher standard in the application of Rule 1.13(f).

Additionally, consider the context of the attorney's interaction with the constituent. For example, when the attorney is engaged to investigate a criminal charge against the organization, there is a greater likelihood that the interest of the organization will be adverse to the constituents involved than when the attorney is dealing with a claim for breach of contract.

When dealing in areas of possible adversity, the safer practice is to inform the constituent that the attorney's client is the organization itself, not the constituent, and that the constituent has none of the customary protections and rights associated with an attorney-client relationship such as confidentiality or conflicts. It may even be appropriate to specifically inform the constituent that the information given to the attorney will be disclosed to others and could be used against the constituent.

Since the constituent is not a client, and they are unrepresented, the attorney should also keep in mind the prohibitions of Rule 4.3, Dealing With Unrepresented Person. This Rule states:

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
- When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

As a final note, in order to avoid the inadvertent creation of an attorney-client relationship with a constituent of an organization, the lawyer must know the principles of how the relationship is formed. Although state courts vary on the exact expression of the elements necessary to create the relationship, the attorney-client relationship is based upon contract and can be established by informal or implicit means when the client reasonably believes on an objective basis that she or he is dealing with the attorney in a professional capacity as her or his own attorney with a manifest intent to seek legal advice. See e.g. *Hillhouse v. Hawaii Behavioral Health, LLC*, 2014 WL 4093185, at *3 (D. Haw. 2014) (concerning the alleged creation of a professional relationship with a constituent of an organizational client). When dealing with constituents, consider the likelihood that they may believe the attorney is also their own. P

1 Rule 1.7: Conflict Of Interest: Current Clients

(a) [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

2 Rule 1.13(g). A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

3 Rule 1.9: Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client....

Using the UCC to Defend Claims Against Engineers

Use of Article 2 of the Uniform Commercial Code (UCC) to defend claims made against engineers who design and build custom items can raise some excellent defenses not available under breach of contract or general negligence law. Since UCC Article 2, governing the sales of goods, applies, it is important to understand what constitutes a "good" under the UCC. In addition, where the claim is based on a contract that includes both design and delivery of the product, understanding how courts interpret a mixed contract is equally important. Before examining the tests used to determine if the contract is for a good or a service, it is worth examining some of the benefits and risks of the UCC. Since professional liability attorneys use the UCC infrequently, a review of the applicable law is discussed below.

Brendan Richard

Brendan Richard is a trial attorney at Norchi Forbes LLC, where he defends architects, engineers, doctors and other professionals in negligence matters. He also represents businesses in catastrophic injury and property damage cases and in a wide variety of other areas.

Norchi Forbes LLC
Commerce Park IV
23240 Chagrin Boulevard, Suite 210
Cleveland, Ohio 44122

216.514.9500 Phone

brichard@norchilaw.com
norchilaw.com

UCC: Advantages for the Savvy and Pitfalls for the Unwary

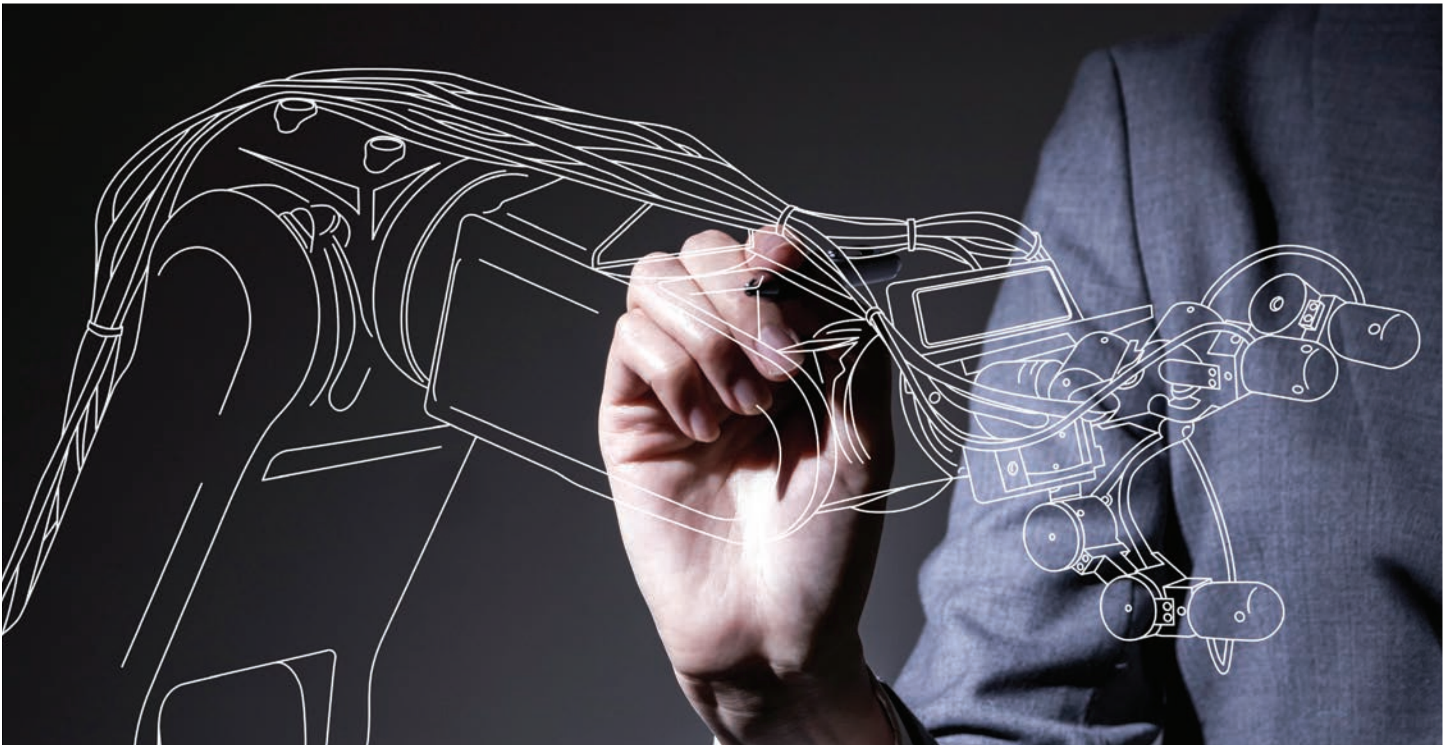
UCC claims, which can be pled in a number of ways including breach of warranty, failure to perform and failure of future performance, can trigger specific defenses not available under breach of contract or other causes of action. Plaintiffs may also attempt to avoid pleading the UCC at all and simply allege breach of contract. At that point, it will be up to the defense to identify UCC issues and respond accordingly.

For instance, where a company contracts with an engineer for a specific product, a lengthy statute of limitations (typically eight to 10 years) will apply to the written contract. However, where the contract is for a sale of goods, the UCC's shorter four-year statute of limitations will apply. The plaintiff in this scenario will argue that the UCC does not apply if the claims may be time-barred.

Damages and remedies are also impacted by the application of the UCC to sale of goods. The UCC's remedies are found in Article 2, Part 7. Depending on the specifics of delivery, acceptance and performance of the goods, among other factors, the UCC will affect damages. In many cases the damages for accepted goods will be the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. Consequential and incidental damages may also be recoverable. A thorough analysis of the possible outcomes should be considered before raising the UCC and attempting to take advantage of the available defenses. A defense may not be worth the impact on potential remedies. This is especially true where the relationship between the engineer and his or her client is governed by a contract that includes limitations on damages or remedies.

Is the Item a "Good"?

Before moving forward under the UCC, it is important to determine if the item is a good under the UCC and if the contract is one for sale of goods. Naturally, not all engineered items qualify as "goods" that are subject to the UCC. Several jurisdictions have determined that items are "goods" if, at the time of sale, the items are moveable.[1] However, things attached to realty are rarely "goods" under the UCC, even if the items were movable at the time of sale. For instance, windows installed in a home, tiles laid permanently on the floor, or insulation systems wrapped about a structure are not considered "goods."[2] All these items were moveable at the time of the sale but once incorporated into a real estate improvement under a construction contract, the items ceased to be UCC goods.[3] One Ohio court has articulated a simple rule for determining if the item is a good or a part of the realty: things attached to realty which are not capable of severance without causing material harm to that realty are not "goods" under the UCC. That court determined that



an in-ground swimming pool was not severable from the property because removing the pool would result in a large, deep, torn-up hole; a long, narrow torn-up hole where the plumbing was buried and a torn-up deck area.[4] A material harm indeed.

Is the Contract for Sale of Goods or for a Service?

Even after the presence of a "good" has been determined, the UCC analysis is far from complete. The UCC applies to sale of goods, not services. Typical engineering contracts are mixed goods and services contracts. For instance, where a company orders a custom engineered and manufactured item, is the contract simply for that item (a good) or for the services that go into engineering that item? Another example: an item that is purchased that has ongoing technical support of some kind. Is the purchaser buying the item or the support? The answer is probably a bit of both. Since the UCC is silent on how to treat the mixed contracts, many courts use the "predominant factor test."[5]

The typical predominant factor test for the inclusion in or the exclusion from sales provisions is whether the predominant factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved.[6] In one of the early cases examining mixed goods and services contracts, the plaintiff builder sued a subcontractor for breach of contract relating to a contract to design and provide steel for several structures. The dispute arose before construction. The court held that the contract was one for sale of goods, not services, despite the engineering that went into designing the building. Specifically, "the fact that a specially designed product to fulfill the needs of the project was required does not negate the characterization of the transaction as a sale of goods."[7]

This outcome can be compared to other cases where the predominant purpose was found to be a service. For instance, where parties entered into a contract to supply gravel to a road project, the hauling of gravel was found to be the predominant purpose, not the purchase of gravel.[8] Similarly, where a general contractor brought suit against a mason who supplied labor and bricks after the bricks began flaking, the contract was determined to be one for masonry services.[9] The court reached this conclusion despite the purchase of the bricks being included in the contract.

At the outset of any engineering professional liability case involving the sale of goods, it is important to consider the impact of the UCC Article 2 on the litigation. Begin by determining if the contract is one for the sale of goods and if the engineered item meets the UCC's definition of a "good." Then review the UCC's applicable sections on damages and remedies in order to understand the full impact of the UCC on the litigation's end game. Finally, review the contract in detail and determine what, if any, impact the contract has upon the UCC's defenses and damages. P

1 *Fugua Homes, Inc. v, Evanston Building and Loan Company*, 370 N.E.2d 780 (1977), *S. M Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc.*, 350 N.E.2d 321 (1976), *Lakeside Bridge & Steel Company v. Mountain State Construction Company*, 400 F. Supp. 273 (1975).

2 *Weiss v. MI Home Products, Inc.*, 677 N.E.2d 442 (2007), *Kennedy v. Vacation Internationale, Ltd.*, 841 F.Supp. 986, (D.HI.1994), *Keck v. Dryvit Systems, Inc.*, 830 So.2d 1, 8-9 (Ala. 2002), *Loyd v. Ewald*, 2nd Dist. Miami No. 87-CA-33, 1988 WL 37484, (1988).

3 *Id.*

4 *Loyd v. Ewald*, 2nd Dist. Miami No. 87-CA-33, 1988 WL 37484 (1988).

5 Brush, Jesse M., *"Mixed Contracts and the UCC: A Proposal for a Uniform Penalty Default to Protect Consumers"* (2007). Student Scholarship Papers. Paper 47.

6 *Allied Industrial Service Corporation v. Kasle Iron & Metals*, 62 Ohio App. 2d 144 (1977).

7 *Belmont Industries, Inc. v. Bechtel Corp.*, 425 F.Supp. 524, 528 (E.D.Pa.1976).

8 *Heuerman v. B & M Constr., Inc.*, 358 Ill. App. 3d 1157 (2005).

9 *Zielinski v. Chris W. Knapp & Son*, 277 Ill. App. 3d 735 (1995).

Preparing for a Federal Rules of Civil Procedure 30(b)(6) Deposition

Depositions of corporate representatives under Federal Rules of Civil Procedure (F.R.C.P.) 30(b)(6) are often the most critical event in corporate litigation. There are a myriad of procedural and substantive considerations that must be addressed prior to a F.R.C.P. 30(b)(6) deposition. This article will provide procedural and substantive considerations for outside counsel in preparing their corporate representative witnesses for a F.R.C.P. 30(b)(6) deposition.

Procedurally, there are limitations as to when the F.R.C.P. 30(b)(6) deposition may be taken, how the deposition must be noticed, what topics can be addressed, and the length of the deposition. In particular, leave of court is required to depose a corporate representative of a party or non-party when (1) the deponent is incarcerated, or (2) the parties have not stipulated to the deposition and (a) the topics to be covered would require more than 10 depositions, or (b) the deponent has already been deposed, or (c) the parties have not held the initial discovery conference required in Rule 26. Leave of court is not required to depose a corporate representative if the deponent is not incarcerated and will be available in the United States at or after the time scheduled for the deposition.[1]

The F.R.C.P. 30(b)(6) deposition notice must give reasonable written notice to every party; must state the deposition time, place and location; must state

Richard Maselli

Brenda Combs

Richard Maselli is a partner with Ogden & Sullivan, P.A., where he practices insurance defense as well as life, health and disability litigation. He is admitted to the Florida Bar, U.S. District Court, Southern, Middle and Northern Districts of Florida and the U.S. Circuit Court of Appeals for the Eleventh Circuit.

Brenda Combs is an attorney with Ogden & Sullivan, P.A., where she defends cases arising from trucking accidents. Before joining Ogden & Sullivan, she operated a solo practice focusing on securities litigation.

Ogden & Sullivan, P.A.
5422 Bay Center Drive, Suite 100
Tampa, Florida 33609

813.223.5111 Phone

rmaselli@ogdensullivan.com
bcombs@ogdensullivan.com
ogdensullivan.com

the deponent's name and address or "a general description sufficient to identify the person or the particular class/group to which the person belongs." The notice must state the method by which the deposition will be recorded – video, court reporter or otherwise. The designated corporate representative is not required to possess first-hand knowledge of the designated topics but can rely upon "a review of corporate records and inquiries within the corporation."[2] If the responding corporation does not designate a party with sufficient knowledge, the court can strip the responding corporation of its right to designate and compel a specific representative to appear.[3]

The notice may be accompanied by a Rule 34 request for production or inspection. The notice "must describe with reasonable particularity the matters for examination."[4] This requirement means more than broad topics. "[T]o allow the Rule to effectively function, the requesting party must take care to designate, *with painstaking specificity*, the particular subject areas that are intended to be questioned, and that are relevant to the issues in disputes."[5] [Italics in cited text.]

It may be necessary to object to or seek clarification regarding the areas of inquiry contained within the F.R.C.P. 30(b)(6) notice. A Motion for Protective Order may be required to limit and/or clarify the scope and nature of the areas of inquiry designated in the F.R.C.P. 30 (b)(6) notice. Pre-deposition discovery motions and communications should set clear boundaries regarding the areas of inquiry to prevent in-depth questioning in areas beyond the scope of the notice.[6]

A potential area of concern at the very start of a corporate witness deposition is inquiries into personal information, such as home address, social security number, salary or other sensitive personal information. Anticipate these types of questions and file and/or assert the proper objections. Prepare the corporate witness in advance and advise him or her exactly how you will address these types of questions.

Anticipating areas of disagreement with opposing counsel prior to the corporate representative deposition is key to a smooth deposition. Written objections and Motions for Protective Order often preempt opposing counsel's efforts to improperly exceed F.R.C.P. 26 discovery. If necessary, a F.R.C.P. 30(d)(3) Motion to Terminate the Deposition should be considered if opposing counsel continues with objectionable behavior, tactics or inquiries.

Most corporations have experienced "go to" corporate representative witnesses. Even experienced corporate representatives need to be comfortable and aware of their verbal and non-verbal communication. If you do not already, consider videotaping witnesses during their deposition preparation sessions. Showing a deponent how they are performing is often more effective than telling them about their testimony and non-verbal cues.

Regardless of whether your corporate representative witness is experienced or not, it is imperative that the witness understands their role as the "voice" of the company and the difference between being deposed individually as opposed to as a corporate representative.[7] This starts with deposition preparation well in advance of the deposition. Lack of adequate preparation in advance of the deposition can lead to the imposition of sanctions.[8]

While F.R.C.P. 30(b)(6) does not expressly or implicitly require a corporation or entity to produce the person "most knowledgeable" regarding designated areas of inquiry, a corporation is required to make a good faith effort to designate appropriate persons and prepare them to answer fully and non-evasively questions within the designated areas of inquiry.[9] A company who fails to produce knowledgeable corporate witnesses for a F.R.C.P. 30(b)(6) deposition may be required to designate supplemental witnesses.[10] However, the mere fact that a company witness is not able to answer all questions within designated areas of inquiry does not equate to a failure to comply with its F.R.C.P. 30(b)(6) obligation.[11]

As part of the 30(b)(6) deposition preparation process, the corporate witness will review documents. Unless the documents reviewed are attorney-client or otherwise privileged, it is likely the documents reviewed will be discoverable.[12] An exception may arise in voluminous document cases under the selection and compilation theory of the work-product doctrine. Under this theory, the legal skill and analysis provided by counsel in sorting and compiling documents for review by the 30(b)(6) witness may reflect the attorney's strategy and thought process and therefore be excluded from production.[13] Obviously, care should be taken regarding the documents shown to a 30(b)(6) witness during the deposition preparation process.

In conclusion, it is essential that a corporate deponent receive the preparation necessary to provide responsive and effective testimony in a F.R.C.P. 30(b)(6) deposition. P

1 Rule 30(a)(1), Fed. R. Civ. P.

2 McPherson v. Wells Fargo Bank, N.A., 292 F.R.D. 695, 698 (S.D. Fla. 2013).

3 Wachovia Securities, LLC v. NOLA, Inc., 248 F.R.D. 544, 550 (N.D. Ill. 2008).

4 Rule 30(b)(6), Fed. R. Civ. P.

5

Memory Integrity, LLC v. Intel Corp., 308 F.R.D. 656, 661 (D. Oregon 2015), citing, Sprint Communications Co., L.P. v. TheGlobe.com, Inc., 236 F.R.D. 524 at 528 (D. Kansas 2006).

6 There are two lines of cases regarding whether a party can inquire into areas outside the areas designated in the F.R.C.P. 30(b)(6) notice. Paparelli v. Prudential Ins. Co. of America, 108 F.R.D. 727 (D. Mass. 1985) reflects a narrow construction limiting inquiries to only those areas of requiring listed in the 30 (b)(6) notice. In contrast, other courts opine that the F.R.C.P. 30(b)(6) notice is limited in scope only by the general rules of Discovery in Rule 26. See, for example, King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla. 1995).

7 See, United States v. Taylor, 166 F.R.D. 356, 361 (M.D.N.C.), affirmed 166 F.R.D. 367 (M.D.N.C. 1996) for a concise definition of a F.R.C.P. 30(b)(6) witness.

8 Starlight International v. Herlihy, 186 F.R.D. 626, 639 (D.Kan. 1999) (inadequate preparation at a F.R.C.P. 30(b)(6) designee is sanctionable based on lack of good faith, prejudice to opposing side and disruption of proceedings).

9 QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 688 (S.D. Fla. 2012)

10 Alexander v. F.B.I., 186 F.R.D. 137, 142 (D.D.C. 1998).

11 Costa v. County of Burlington, 254 F.R.D. 187, 191 (D.N.J. 2008)

12 See, for example, Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc., 201 F.R.D. 33 (D. Mass. 2001).

13 See, for example, Schwarzkopf Technologies Corp. v. Ingersoll Cutting Tool Co., 142 F.R.D. 420, 422–23 (D. Del. 1992).

Warning to Creditors: The Clock Is Ticking

In a case of first impression, the North Carolina Court of Appeals recently held that a creditor's fraudulent conveyance claim was time-barred, even though the creditor did not know about the fraudulent nature of the transfer. The Court of Appeals elected to adopt the minority position held by other courts across the country, which have reviewed when the statute of limitations begins to run on a claim under the Uniform Voidable Transactions Act, formerly known as the Uniform Fraudulent Transfer Act (UFTA).

Byron Saintsing

Byron Saintsing has represented clients in the construction and equipment leasing industries for 30 years in matters including mechanics liens, bond claims, delay claims, warranty disputes and bankruptcy issues. He leads a practice group whose attorneys concentrate in matters of construction law, commercial and business litigation, representation of equipment lessors and commercial creditor bankruptcy.

Smith Debnam Narron Drake Saintsing & Myers, LLP
4601 Six Forks Road, Suite 400
Raleigh, North Carolina 27609

919.250.2000 Phone

bsaintsing@smithdebnamlaw.com
smithdebnamlaw.com

The case of *KB Aircraft Acquisition, LLC v. Jack M. Berry and 585 Goforth Road, LLC ("KB Aircraft")* (790 S.E. 2d 559 (2016)) involved a workout of a distressed aircraft loan. Mr. Berry, a guarantor of the loan, owned a vacation mountain home in North Carolina. The value of the house was substantial, and it was not encumbered by any debt. In 2008, the aircraft loan went into default. The creditor worked with the borrower from 2008 to 2010 to restructure the loan, modifying the loan on four separate occasions in an attempt to give the borrower breathing room to service the loan. Unbeknownst to the lender, Mr. Berry transferred his mountain house to a limited liability company, 585 Goforth Road, LLC, at the beginning of the workout negotiations. The LLC was owned by Mr. Berry and his wife. Mr. Berry would later testify that this mountain house was the sole remaining asset in his name and that he intentionally transferred the mountain house out of his name so that he would have no assets in his name. Each of the modification agreements provided, among other things, there had been no material change in the financial condition of the borrower or the guarantor, Mr. Berry.

The borrower ultimately defaulted after the fourth modification of the loan in 2010. The loan was sold to a new lender. The new lender conducted a title search after it acquired the loan and discovered the transfer. It immediately filed suit against the borrower and the guarantor in Florida on the underlying claims for default on the aircraft loan. Following three years of litigation, the new lender ultimately obtained a judgment in Florida against the borrower and Mr. Berry as the guarantor in excess of $10 million in 2013. The new lender immediately domesticated the Florida judgment in North Carolina and after that, filed a separate action under the UFTA to set aside the conveyance of the mountain house.

The trial court in North Carolina dismissed the case as not being brought in a timely fashion. On appeal, the North Carolina Court of Appeals upheld the dismissal. The Court of Appeals held that a literal reading of the UFTA dictated that the clock started running on the new lender's fraudulent conveyance claim at the time of the transfer of the property. It refused to adopt the reasoning of many other courts across the country, construing the very same statutory language, which ruled that the clock does not start running until the creditor knows about the fraudulent nature of the transfer.

Previously North Carolina's courts had held that the mere recording of a deed which served to transfer real estate was not sufficient to put a creditor on notice that the transfer was fraudulent. However, the Court of Appeals held that those cases were not applicable to the time limitations outlined in the UFTA.

The majority of courts reviewing this issue have ruled that the statute of limitations does not begin to run until the creditor is aware of the fraudulent nature of the transfer.[1] The states or courts adopting the majority rule include Illinois, Hawaii, Pennsylvania, Texas, Utah and the 3rd, 5th, 6th, 7th and 9th federal circuit Courts of Appeals. Several courts have adopted the minority position.[2] The states or court adopting the minority rule include Florida, Delaware and New Mexico. For

a recent comprehensive examination of this issue see Daniel Jouppi, Comment, *Saving No One: Unifying Approaches to the UVTA Savings Clause*, 52 Wake Forest L. Rev. 695 (2017).

After being unsuccessful before the North Carolina Court of Appeals, the new lender in *KB Aircraft* filed a petition for discretionary review with the North Carolina Supreme Court. The petition was allowed. The parties fully briefed the issues and the North Carolina Supreme Court held oral argument in the case. However, the North Carolina Supreme Court ultimately ruled that the petition for discretionary review was improvidently allowed. The result was that the North Carolina Supreme Court did not weigh in on the issue, which left the North Carolina Court of Appeals ruling as the final word.

So, what is the takeaway for creditors who litigate such claims in jurisdictions which have adopted the minority rule, or which have not ruled on the issue? Creditors cannot sit back and wait for their underlying claims to be fully adjudicated before investigating, and if warranted, taking action to set aside suspect conveyances. If they do, they run the risk of "winning the battle but losing the war" by being unable to have fraudulent conveyances of assets set aside in order to collect a judgment they obtain in the underlying action. P

1 *See Workforce Solutions v. Urban Servs. of Am.*, 977 N.E.2d 267, 2012 Ill. App. LEXIS 714 (2012); *Field v. Trust Estate of Kepoikai (In re Maui Indus. Loan & Fin. Co.)*, 454 B.R. 133, 2011 Bankr. LEXIS 1719 (D. Hawaii 2011); *State Farm Mut. Auto. Ins. Co. v. Cordua*, 834 F. Supp. 2d 301, 2011 U.S. Dist. LEXIS 138582 (E.D. Pa. 2011); *Schmidt v. HSC, Inc.*, 136 Haw. 158, 358 P.3d 727 (Hawaii 2015); *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 2013 U.S. App. LEXIS 5321 (5th Cir. 2013); and *William A. Graham Co. v. Haughey*, 646 F.3d 138, 2011 U.S. App. LEXIS 9906 (3rd Cir. 2011); *Duran v. Henderson*, 71 S.W.3d 833, 2002 Tex. App. LEXIS 1394, *rehearing overruled*, 2002 Tex. App. LEXIS 1968 (2002); *Freitag v. McGhie*, 133 Wn.2d 816, 947 P.2d 1186 (1997); *Rappleye v. Rappleye*, 2004 Ut. App. 290, 99 P.3d 348, *cert. denied*, 106 P.3d 743, 2004 Utah LEXIS 261 (2004); *Belfance v. Bushey (In re Bushey)*, 210 B.R. 95 (B.A.P. 6th Cir. 1997); *Fidelity Nat'l Title Ins. Co. v. Howard Savings Bank*, 436 F.3d 836, 839 (7th Cir. 2006); *Ezra v. Seror (In re Ezra)*, 537 B.R. 924 (B.A.P. 9th Cir. 2015).

2 *MTLC Inv., Ltd.*, 2004 U.S. Dist. LEXIS 31985 (MDFL 2004); *Fitness Quest Inc. v. Monti*, 2012 U.S. Dist. LEXIS 116867 (NDOH 2012); *Pereyron v. Leon Constantin Consulting, Inc.*, 2004 Del. Ch. LEXIS 46 (Del Ch. 2004); *Montoya v. Tobey (In re: Ewbank)* 359 B.R. 807 (Bankr. D. N.M. 2007); *Gulf Ins. Co. v. Clark* 20 P.3d 780 (Mont. 2001); *National Auto Serv. Ctrs., Inc. v. F/R 550, LLC*, 192 So.3d 498 (Fla. Dist. Ct. App. 2016).

Are Your Business Secrets Really a Secret?

Business owners need to be aware that employees may be transferring trade secrets completely by mistake simply by owning a smartphone. Storing confidential information and/or trade secrets on cloud storage services can pose serious risks to the protection of that information.

Typical sources of cloud computing include Google Drive, Apple's iCloud, Dropbox, Amazon Web Services and Google's Chromebook. Data in the cloud, for the most part, is stored in privately owned or third-party data centers that may be located anywhere in the world.

Lance Thompson

Lance Thompson is an associate attorney with Spicer Rudstrom PLLC. He serves as the firm's lead attorney for research and writing, including dispositive motions and pretrial motions with an emphasis on appellate briefs for all of the firm's attorneys. He works with domestic and international companies, providing them with in-depth analysis of often very complex issues arising under Tennessee law and surrounding jurisdictions.

Spicer Rudstrom PLLC
414 Union Street, Suite 1700
Nashville, Tennessee 37219

615.259.9080 Phone

lthompson@spicerfirm.com
spicerfirm.com

These services provide you with the ability to store your data on remote servers maintained by the service provider. This means that the data is not solely within your control, and that some unknown person could be looking at your data.

The threat of a cyber-attack is particularly concerning. Information thefts and security breaches to the cloud are becoming increasingly common. After information is uploaded to the cloud, it is a potential target for hackers and others with illicit motives. In the event of a cyber-attack, this could expose your company's most valued trade secrets.

In light of the potential exposure of confidential information being exposed in the cloud, a business should consider using cloud storage for non-confidential information, while storing all confidential information on locally controlled devices. Despite taking this precaution, an employee could still inadvertently violate a confidentiality agreement without knowing it. For example, it is common for employees to conduct business on their smartphones. An employee may respond to emails or text messages on their phone, and the content of those messages may contain confidential information such as trade secrets or customer lists. Once those messages are obtained on a cellular device, those messages are stored in the cloud by a third-party provider and the business no longer has control of the information. The transfer of this information generally occurs without the user even knowing it or taking into consideration what information is being sent to the cloud. For example, the cellular device will have an automatic backup without the user being notified that the transfer has occurred.

In the past, cloud storage could be turned off to avoid such a problem. However, the newest updates from cell phone hardware companies require the use of cloud storage. In addition, cell phone hardware companies also have a voluminous terms and agreement requirement for the use of the newest software, including the use of the cloud. The person accepting those terms agrees to them on a take-it-or-leave-it basis. Consequently, the user has no choice but to accept the terms of the agreement which may allow the transfer of trade secrets to the cloud.

This potential issue does not necessarily end with smartphones. Trade secrets may also be exposed to the cloud on a personal computer through the same process described above – automatic backup. For example, with the best of intentions, an employee can access highly confidential trade-secret information in the cloud from his/her home computer. Though the information is otherwise secure, once the employee accesses that information from his/her home computer, a copy of that file resides on the employee's computer and is no longer controlled by the company. This setup could even be known to the company. But once information is stored in the cloud, there is an increased risk of unauthorized access and use of that information to potential hackers. Of course, an employee also could obtain the information for dishonest purposes.

Whether a company took adequate measures to protect the information is generally the critical issue in trade secret litigation. If a court finds a failure to adopt reasonable measures to safeguard

confidentiality, the company may have little recourse.

Businesses should ensure reasonable security measures are used during all steps of the employment process, including with new, current and departing employees. A business should take precautions such as having employees sign non-disclosure agreements in the event that information has inadvertently been transferred. These obligations should extend beyond termination. A business should implement policies and train employees about the use or non-use of the cloud and, more generally, about the protection of confidential information. Employee handbooks, new employee orientations, posted company policies and annual employee training sessions all provide opportunities to address these issues.

An employer may also retain the right of the employer to review and/or wipe external devices upon departure. A company should also prohibit the sending of company email using personal accounts. A company should obtain consent to search personal devices of employment who use those devices for employment purposes. As an alternative to the above regarding personal devices, a company could provide the employee with a cellular device and/or home computer which may be monitored by an IT department and set up to prevent inadvertent cloud storage and the transfer of trade secrets. P

Make Merchants Love You – and Avoid Litigation

With more small businesses embracing digital commerce, old-fashioned customer service is still the glue that binds credit card processors to their merchant clients. Unlike large companies that hold agreements for credit card processing directly with the credit card companies, owners of restaurants, boutiques and professional services offices contract with third-party processors to accept card payments.

Change can be difficult for small business owners as they move from cash-only sales and see how cash flow delays from credit card payments affect their bottom line. One processor recently found his corporate bank accounts frozen by the local sheriff after a misinformed merchant accused the processor of stealing funds. This wasn't true. Ultimately, the sheriff returned the money and dropped the investigation, but only after the processor incurred substantial legal fees and sleepless nights. This could have been avoided had the processor better explained his contract terms from the outset.

Processors who rush through a contract closing, avoid phone calls or don't answer emails from a concerned merchant, shouldn't be surprised if their client starts crying "Thief!" when payments don't show up overnight. Many lawsuits could be avoided through clear and constant communication with merchants. Following are tips for creating successful, long-lasting processor/merchant relationships.

- **Be available** – Business relationships don't exist in a vacuum. Answer merchants' emails. Take their phone calls. Support them and work through problems that arise. Check in regularly with merchants even if you don't have a specific reason to call. Make them feel appreciated.
- **Anticipate needs** – Sit with your clients to explain the contract. Let them know the procedures and timing involved before their payments arrive. Reassure them about hold-back periods and how they are handled. Look for ways to help them.
- **Be transparent** – Help merchants understand your system. Remove the mystery of the myriad rates and fees. Explain why they exist and dispel myths about padding prices. Carefully explain costs and how to read a statement. Give more than is expected. Show merchants the flow of their funds, including date and amount of future disbursements.
- **Communicate** – Decode processing industry jargon and abbreviations. Provide a "dictionary" of terms to help merchants unravel the contract and statements, and to make it easier for them to convey their concerns. Listen attentively. Be sincere. Acknowledge their worries. Encourage feedback. Follow through with what you say you will do. Build trust.

Customer service is hard work, yet at the end of the day, a healthy business relationship is necessary to maintain clients and increase your bottom line.

Processors Take all the Risks

The fact that processors take all the risks should cement your resolve to interact with your merchants about the terms and conditions of your agreement. To limit risk, a processor must have a clear contract with the merchant. Therefore, it's recommended that merchant agreements include the following:

1. Sufficient holdback period
2. Transaction, refund and chargeback fees
3. Access to the merchant's bank account
4. Extended holdback period following termination of merchant agreement
5. Termination fee

When negotiating the holdback period, keep in mind that if it's too long, the merchant will not have sufficient cash flow to maintain a business. Therefore, consider negotiating lower transaction fees in exchange for a longer holdback

Jake Greenberg

Jake Greenberg is an attorney with Agentis PLLC in the firm's commercial and business litigation practice. He represents businesses, startups and individuals in a variety of complex commercial disputes. His clients include private equity lenders, toxicology laboratories, e-commerce merchants, credit card processors, wholesale importers and electronic medical record software companies.

Agentis PLLC
501 Brickell Key Drive
Suite 300
Miami, Florida 33131

305.722.2002 Phone

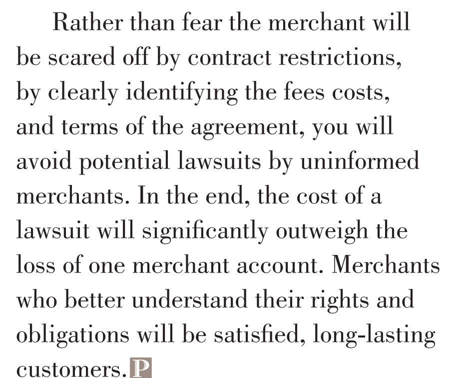
jmg@agentislaw.com
agentislaw.com

period. Conversely, larger transaction fees can protect a processor with a shorter holdback period.

Second, require the merchant to maintain an account with the processor with a minimum threshold balance. The amount should be sufficient to reimburse the processor for any potential disputed transactions. Most credit card companies allow their consumers to dispute transactions for up to six months, sometimes longer. Therefore, the processor might want to unilaterally increase the minimum threshold balance as he or she deems necessary.

Third, the agreement should allow the processor to "set off" any disputed transaction from future transactions. For example, the processor should be entitled to retain $100 from one of the merchant's future transactions if a consumer purchase services for $100 and disputes the transaction after the processor has released the $100 to the merchant. Likewise, the processor should have the ability to debit the disputed amount from the merchant's bank account.

Should the agreement be terminated, the processor remains liable for disputed transactions for at least six months. Therefore, at a minimum, the processor should be entitled to retain all transacted funds until six months after the last transaction. The final layer of security is a termination fee that will provide the processor funds in the event of a shortfall for disputed transactions.



Rather than fear the merchant will be scared off by contract restrictions, by clearly identifying the fees costs, and terms of the agreement, you will avoid potential lawsuits by uninformed merchants. In the end, the cost of a lawsuit will significantly outweigh the loss of one merchant account. Merchants who better understand their rights and obligations will be satisfied, long-lasting customers. P

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Today's Use of Social Media Blurs Lines with Non-Solicitation Covenants

Social media has become an integral part of business interactions. Job postings, industry news and personal career changes are commonly shared through LinkedIn and other social media sites. However, social media activity often blurs the lines of certain obligations contained in non-solicitation covenants between employers and their former employees. For example, may a former employee post news about starting a new job if the former employee is "linked" with clients and customers of the employer? Can a former employee connect with clients, customers and employees of a former employer? Or must an employee delete any social media connections with an employer's customers or clients upon termination? Generally, an employer's non-solicitation covenant is silent on such questions. The resulting void has required the courts to decide how social media activity should be considered in the context of non-solicitation covenants.

Daniel B. Fitzgerald

Daniel B. Fitzgerald is an associate at the law firm of Brody Wilkinson PC. He practices in the areas of employment law, business law and litigation. He frequently represents employers in connection with employment matters, including the drafting and enforcement of non-competition and non-solicitation covenants.

Brody Wilkinson PC
2507 Post Road
Southport, Connecticut 06890

203.319.7100 Phone

dfitzgerald@brodywilk.com
brodywilk.com

The Increasing Popularity of Non-Solicitation Covenants

Amid concerns regarding adverse economic consequences and basic fairness, non-competition covenants in the employment context are becoming increasingly disfavored across the country, both by courts and state legislatures seeking to statutorily limit the use of such covenants. A less restrictive and often more enforceable alternative is a non-solicitation covenant. A non-solicitation covenant between an employer and employee typically protects the employer's clients, customers, vendors and/or employees from being poached by a former employee for a specified period of time.

Do General LinkedIn Posts and Updates Constitute Solicitations?

"[T]he use of social media, whether it be Facebook, LinkedIn, Twitter, or some other forum, has become embedded in our social fabric." The Connecticut Superior Court so observed in the case of *BTS, USA, Inc. v. Executive Perspectives*, 2014 Conn. Super. LEXIS 2644 (Super. Oct. 16, 2014) (aff'd, 166 Conn. App. 474 (2016)). In *BTS, USA, Inc.*, the court, among other things, was presented with the issue of whether defendant, Marshall Bergmann, breached a non-solicitation covenant with his former employer, plaintiff, *BTS, USA, Inc.* The non-solicitation covenant at issue, which was contained in Bergmann's employment agreement, stated in relevant part, that:

> "[e]mployee shall not for a period of two (2) years immediately following the end of Employee's active duties with employer, either directly or indirectly… [c]all on, solicit or take away or attempt to call on, solicit or take away or communicate in any manner whatsoever, with any of the clients of Employer; [or] [c]all on, solicit, or take away, or attempt to call on, solicit, or take away or communicate in any manner whatsoever, with any of the clients of Employer on behalf of any business which directly competes with employer."

After approximately five years of employment with BTS, Bergmann accepted a position with Executive Perspectives, LLC, a direct competitor of BTS. Thereafter, Bergmann took to LinkedIn. Bergmann first posted about his new job on LinkedIn and subsequently invited his connections to "check out" his new employer's website which he had reworked. Notably, clients and contacts that Bergmann developed during his employment at BTS were part of his LinkedIn network. He did not "unlink" these individuals upon his departure from BTS nor was he requested to do so. Bergmann also counted current BTS employees in his network.

BTS alleged that Bergmann's LinkedIn activity constituted a breach

of his non-solicitation covenant with the company. The court, however, was unpersuaded. Bergmann's posts did not constitute a solicitation or breach of his employment agreement, the court held. Significantly, the court noted that his announcement of his new employment was "a common occurrence on LinkedIn" and although he invited his network to visit Executive Perspectives's website, "[t]here was no evidence as to the extent to which any BTS clients or customers received the posts." Moreover, the court noted that "[a]bsent an explicit provision in an employment contract which governs, restricts or addresses an ex-employee's use of such media, the court would be hard-pressed to read the types of restrictions urged here, under the circumstances, into the agreement."

Other jurisdictions have treated social media activity similarly to the court in *BTS, USA, Inc.*, drawing a bright line between direct solicitation and passive activity, such as general posts and updates. For example, a Massachusetts court found that becoming "friends" with former clients on Facebook, absent other evidence of solicitation, did not constitute solicitation. *Invidia, LLC v. Difonzo*, 30 Mass. L. Rep. 390 (2012). In *Pre-Paid Legal Services v. Cahill*, 924 F. Sup.2d 1281 (E.D. Okla. 2013), Facebook posts of a former employee touting his new employer's product did not violate an agreement to not recruit employees from his former employer. However, a Minnesota court granted a preliminary injunction ordering a former employee to remove LinkedIn posts touting the products of her new employer for the duration of her non-solicitation covenant. *Mobile Mini, Inc. v. Vevea*, 2017 U.S. Dist. LEXIS 116235, at *1 (D. Minn. July 25, 2017). Most recently, the Illinois Appellate Court held that a former employee's request to connect on LinkedIn with three former employees was not violation of a covenant not to recruit employees. *Bankers Life & Cas. Co. v. Am. Senior Benefits LLC*, 83 N.E.3d 1085 (Ill. App. 2017).

Lessons for Employers

This area of employment continues to develop and will likely change as social media evolves. The overriding lesson that can be derived from these decisions is that courts have drawn a distinction between passive or generic activity on social media, such as general posts and updates, and direct solicitations that would breach a non-solicitation covenant whether conveyed over email, telephone or in-person. General posts, status updates and linking with others, even clients, customers or employees of a former employer, may be acceptable so long as activity is not accompanied by a direct solicitation. Further, absent an agreement to do so, a former employee is not required to remove clients, customers or former co-workers from online networks for fear of violating a non-solicitation covenant.

If an employer wishes to govern the social media activity of its former employees, the employer should include specific language to that effect in a non-solicitation covenant. (For example, by including a definition of "solicitation" that includes communication on social media). However, an employer must avoid including overly restrictive terms which may render the covenant unenforceable. In addition, an employer should discuss social media activity with departing employees and consider providing a notice to the departing employee, reminding the employee of his or her continuing obligations to the employer.

Conclusion

It appears that employers have been slow to contemplate the pervasive nature of social media as it pertains to non-solicitation covenants. Nevertheless, employers must address the use of social media in its non-solicitation covenants if employers expect to enforce such provisions through litigation. To this end, the courts, despite the inherently fact-specific nature of such claims, have provided employers with useful guidance to modernize employee non-solicitation covenants. P

Arbitration Agreements in the Employment Context

It's rare when one of the most well-known coffee companies in the world gets into a trademark battle. But that is what happened last year when Starbucks, Inc., released a unicorn-themed Frappuccino® drink in an attempt to capitalize on the "unicorn craze." As with most things Starbucks does, the drink received wide publicity. The public's reaction to the drink was mixed – some were enthused by the drink's bright colors and fanciful flavoring; while others, including some famous actresses and artists, expressed their "complete disgust" with the drink.

One small café in New York was particularly distraught about Starbucks' new offering. The End, which is owned by the Montauk Juice Company, sells healthy organic drinks and juices at its store in Brooklyn. The End had recently created a drink called the Unicorn Latte® which featured a mix of colorful "superfood" ingredients, such as cold-pressed ginger, lemon juice, dates, cashews, maca root, blue-green algae and vanilla bean. The End's product also featured no cow's milk, so the use of the term "latte" appeared to be a spoof of an actual latte.

The End's Unicorn Latte received increasing publicity for its unique colors and health benefits, being featured in various local and national news outlets, including *The New York Times*. After initial fanfare in late 2016 and early 2017, The End's owners decided to register the mark "UNICORN LATTE" with the U.S. Patent and Trademark Office (Serial No. 87308906).

A few months later, Starbucks released its unicorn-themed drink. This limited Frappuccino release had a distinct blue and pink color scheme with a sparkle top, similar to the Unicorn Latte. However, the Unicorn Frappuccino was cream-based and contained mango syrup, sugar and classic syrup. The drink was then topped with whipped cream and "dusted" with a blue and pink unicorn dust. A side-by-side comparison shows some of the similarities:

The End's Unicorn Latte® Starbucks' Unicorn Frappuccino®

On April 24, 2017, with their recently registered mark in hand, The End issued a cease and desist letter to Starbucks for its allegedly infringing use of the term "unicorn" to describe its Frappuccino drink. Although the products were different, the complaint alleged that "the size of and scope of Starbucks' product launch was designed so that the Unicorn Frappuccino would eclipse the Unicorn Latte in the market, thereby harming plaintiffs and confusing their customers." The complaint also noted that customers started to ask The End to create Unicorn Frappuccinos for them, while online publications and customers furthered ongoing confusion by referring to Starbucks' product as a Unicorn Latte.

Starbucks failed to comply with the cease and desist letter. So, The End filed a lawsuit in the U.S. District Court for the Eastern District of New York on May 3, 2017.[1] The End's theories of liability were broad and well-crafted. The complaint sought relief not only for trademark infringement, dilution and false designation of origin under the Lanham Act, but also brought claims of unfair business practices, as well as common law trademark and state law claims. The End cited to its registered mark, and also to Starbucks' failure to mitigate the confusion through its marketing.

Michael Hewitt

Anna Nagornaia

Michael Hewitt and **Anna Nagornaia** are both associates at Dillingham & Murphy, LLP.

Michael's general practice focuses on branding, employment and business litigation. He also advises clients on how to build and maintain their valuable intellectual property portfolios and assists with enforcing his clients' rights when necessary.

Anna's practice involves general litigation defense in various industries, including healthcare and professional sports. Anna provides legal counseling in matters concerning employment law and securities litigation. Anna also counsels start-ups and small businesses, helping them to formulate specific legal plans for their transactional needs.

Dillingham & Murphy, LLP
601 Montgomery Street, Suite 1900
San Francisco, California 94111

415.397.2700 Phone

an@dillinghammurphy.com
mhh@dillinghammurphy.com
dillinghammurphy.com

It claimed that by creating and marketing such a similar product, Starbucks ought to be "held accountable for infringing, diluting and otherwise diminishing" The End's intellectual property.

The End sought a permanent injunction against Starbucks' use of the "UNICORN LATTE" or "UNICORN FRAPPUCCINO" mark, as well as damages in the form of Starbucks' profits from the drink and any losses that The End incurred. Some sources claim the demand totaled $10 million.[2]

In September 2017, before the litigation was resolved, the parties settled for an undisclosed sum. Even though the court documents do not specify the amount, the record shows that each party will pay their own costs and also noted prejudice against Starbucks.[3]

Although we will likely never know the actual cost of Starbucks' alleged infringement, the lawsuit highlights how well-maintained intellectual property and a skillfully drafted complaint can lead to quick and successful litigation, even against one of the largest brands in the world. If The End had not registered its mark with the Patent and Trademark Office, it would have diminished its ability to bring suit for nationwide damages since it had only one location in New York. In addition, the registration put Starbucks on constructive notice that its product would potentially infringe on The End's mark. But the registration wasn't the only component that led to The End's ultimate success.

The complaint's inclusion of state law and common law claims also forced Starbucks to defend its general business tactics in failing to take steps to clarify that its product was distinct from The End's latte. The unfair business practices claims and common law claims would have likely prevented Starbucks from arguing that it had no control over its customers' use (or misuse) of the Unicorn Latte mark to refer to its Frappuccino once the product was released.

However, it also should be noted that Starbucks might have identified the Unicorn Latte mark in advance, but determined that the risk of infringement was not likely or that the money it would make off of the product was worth the risk.

This Unicorn Latte example also serves as a reminder to protect any new brands at an early stage – even small ones. The small brand owner should collect evidence of confusion and call upon an attorney early to draft a comprehensive complaint under common law, state law and federal law. Doing so can prevent large brands from co-opting unique intellectual property, especially during a fast-moving social trend, such as the unicorn movement, making this prudent protection process potentially worth its weight in gold. P

1 Complaint, Montauk Juice Factory Inc., The End Brooklyn v. Starbucks Corporation d/b/a Starbucks Coffee Company, WL 1747128 (E.D.N.Y. 2017). (No. 1:17-cv-02678).

2 Corinne Ramey, Starbucks and Brooklyn Cafe Settle Unicorn-Drink Lawsuit, Fox Business (Sept. 5, 2017), foxbusiness.com/features/2017/09/05/starbucks-and-brooklyn-cafe-settle-unicorn-drink-lawsuit.html; Dave Simpson, Starbucks, NY Cafe Settle 'Unicorn Frappuccino' TM Row, Law360 (Sept. 5, 2017, 10:04 PM), https://www.law360.com/articles/960858/starbucks-ny-cafe-settle-unicorn-frappuccino-tm-row.

3 Stipulation of Voluntary Dismissal with Prejudice Pursuant to F.R.C.P. 41(a)(1)(A)(ii), Montauk Juice Factory Inc., The End Brooklyn v. Starbucks Corporation d/b/a Starbucks Coffee Company, No. 1:17-cv-02678 (E.D.N.Y. Sept. 5, 2017).

Stateside Discovery Assistance for Overseas Litigators

It is a rare instance in today's litigation environment when discovery is confined to tracking down evidence located in the forum jurisdiction. Commercial disputes, product liability cases, and even everyday defamation or business interference matters, often involve discovery requests that cross state lines and even international borders. As much of the world's economic activity flows through the United States, such efforts are often directed at U.S.-based witnesses and records from disputes in overseas venues. It is thus more important than ever for foreign and American counsel to be familiar with the federal court mechanism that will allow them to assist our foreign counterparts in obtaining discovery for use in proceedings in other jurisdictions.

John R. Brydon

James V. Weixel

John R. Brydon, a premier trial attorney in toxic tort and insurance bad faith and casualty defense, is the managing partner of the San Francisco office of Demler, Armstrong & Rowland, LLP.

James V. Weixel, also with Demler's San Francisco office, has participated in a wide array of trial and appellate litigation for corporate, public entity and individual clients in California and Ohio since 1990.

Demler, Armstrong & Rowland, LLP
575 Market Street, Suite 2080
San Francisco, California 94105

415.949.1900 Phone

bry@darlaw.com
jvw@darlaw.com
darlaw.com

Section 1782 of Title 28 of the U.S. Code, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," allows an interested party in a foreign proceeding to apply to a federal court for a subpoena for information or the testimony of witnesses located in that court's district.[1] The goal of Section 1782 is to provide assistance to participants in international litigation while encouraging foreign countries to provide similar assistance to American courts.[2]

The scope of Section 1782 is very broad. A local witness can be compelled to testify and produce documents "upon the application of any interested person" involved in the foreign proceeding.[3] Section 1782 applies not only to civil proceedings, but to criminal and administrative proceedings as well.[4] In fact, the statute does not require that the foreign proceedings be pending or even imminent. Rather, all that is necessary is that a "dispositive ruling" by a foreign adjudicative body is "within reasonable contemplation."[5]

The usual mechanism for seeking discovery under Section 1782 is an ex parte application.[6] The application is typically reviewed and ruled upon by a magistrate judge. If the court grants the application, the applicant's counsel can then issue a subpoena for the taking of testimony, the production of documents and other evidence, or both.

The district court will consider whether the person from whom the discovery is sought is in fact a participant in the foreign proceeding; the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or tribunal to U.S. judicial assistance; whether the request attempts to circumvent foreign or domestic discovery restrictions or other policies; and whether the request is "unduly intrusive or burdensome."[7] Despite this set of standards, however, the party seeking discovery generally does not need to establish that the information sought would in fact be discoverable under the governing foreign law or American practice.[8]

In practice, this is not a difficult set of standards to meet. However, as Section 1782 does expressly provide for the protection of privileged information,[9] most district judges will expect counsel, in the application, to inform the court of any restrictions on discovery, privacy regulations, or other protections that would operate as "privileges" in the foreign jurisdiction. The target of the subpoena, as well as the interested parties in the foreign litigation, may contest the subpoena itself.[10] Therefore, laying out the foreign law in the application will not only help assure the court that the discovery method comports with typical federal discovery practices and safeguards the litigants' rights in the foreign proceedings, but it can also reduce the chances of a challenge by the target or the subject of the subpoena.

Preparing such an application will require the applicant's counsel to educate himself or herself about discovery principles in the foreign country. This can sometimes be difficult, but can best be accomplished by consulting with counsel in the foreign jurisdiction. For instance,

in one matter in which one of the authors was involved, the parties had to advise the district court on the restrictions that French discovery practice rules and European Community privacy directives placed on the compulsory disclosure of personal information, before the court would permit a subpoena to be issued for electronic communications and other information pertaining to one of the parties.[11] In another such case, the author was required to consult with an Irish barrister and give a primer to the court about family law proceedings in Ireland and the background of the proceedings pending there – a task requiring somewhat delicate handling, as Irish family court matters are afforded almost complete confidentiality and are not readily accessible like those in American courts.[12] It is essential, therefore, that U.S.-based counsel be capable of learning and summarizing foreign principles for the court in an understandable manner.

Of course, obstacles sometimes arise. Numerous district courts have restricted discovery or even denied it altogether, reasoning that the foreign courts are the better arbiters of discovery practice or that the foreign protections should prevail.[13] Again, U.S.-based counsel requesting discovery under Section 1782 must be prepared to explain principles of the foreign jurisdiction's evidentiary law and procedure, in addition to showing that the requested discovery would not offend traditional notions of American discovery practice.

Section 1782 gives American attorneys the ability to act as a tremendous resource for counsel from other jurisdictions in obtaining evidence for use in foreign proceedings. That power, however, comes with the responsibility to become well informed on the procedures and protections given to evidentiary matters in foreign jurisdictions. Fortunately, Section 1782 is a relatively simple tool to use, and can provide many favorable opportunities for American counsel to foster professional relationships by assisting their colleagues in other jurisdictions. P

1 28 U.S.C. § 1782(a).

2 *Schmitz v. Bernstein Liebhard & Lifshitz*, LLP, 376 F.3d 79, 84 (2d Cir. 2004); see also *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).

3 § 1782(a).

4 *Id.*

5 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258-259 (2004).

6 See generally *In re Letters Rogatory from Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976).

7 *Intel*, 542 U.S. at 264-265.

8 *Id.* at 247, 261-63.

9 § 1782(a) (providing that discovery may not be compelled "in violation of any legally applicable privilege").

10 *Id.*

11 *London v. Does 1-4*, 279 Fed. Appx. 513 (N.D.Cal. 2008) (affirming denial of motion to quash subpoena to unmask identities of several anonymous members of Internet discussion groups).

12 *In re Roebers*, No. C12-80145 MISC RS (LB) (N.D. Cal., July 11, 2012).

13 *See, e.g., In re Microsoft Corp.*, 428 F.Supp.2d 188, 194 (S.D.N.Y. 2006) (district courts should be more reluctant to permit intrusive discovery under §1782 where the parties should follow the foreign court's discovery procedures instead); Intel, 542 U.S. at 261, citing *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 6 (1st Cir. 1992) ("Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited to their concepts of litigation"); *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (3d Cir. 1995) (courts must consider whether "a foreign tribunal would reject evidence obtained with the aid of section 1782").

Identity Theft: Genetic Privacy

Genetic privacy and security is a very real issue today, especially with the advent of new technology and companies like AncestryDNA and 23andMe. While these companies advertise themselves as a fun way to learn about your family history or to learn more about your health, the voluntary (and potential involuntary) distribution of this information can affect the privacy of not only the individual, but of the individual's close family members and future generations. Genetic information, if misused, can potentially be stored and utilized without consent by law enforcement; by employers with the potential to discriminate against employees or potential employees; by private corporations to develop or advertise products; or even worse, by private individuals with bad intent who seek to "surreptitiously" obtain personal information for the purpose of discovering sensitive or embarrassing personal information about others.[1]

The National Institute of Health's National Human Genome Research Institute has long recognized the importance of genetic privacy where genetic information is being used for research, clinical or other purposes.[2] Traditionally, genetic information collected for research purposes has been stored anonymously to protect privacy. However, genetic information by definition is unique to each individual, which makes it challenging to truly anonymize.[3] Through the advent of new technology, even genetic information stored in databases for research and clinical purposes, without personal information like names or other obvious identifiers, are subject to risk.

In 2013, a researcher affiliated with the Massachusetts Institute of Technology was able to identify five individuals from a DNA database using only their DNA information, age and the states that they lived in – *in a matter of hours*.[4] Not only was the researcher able to track down the individuals, he was also able to find the individuals' close relatives.[5] Even more astounding, in 2008, a research study was proposed by geneticist, David W. Craig, whereby DNA would be collected from discarded needles of intravenous drug users to establish a database to look for viruses or DNA information and to determine a particular individual's DNA from the database of genes. The result was shocking – Dr. Craig was able to develop a method to identify an individual even if that person's DNA was only 0.1 percent present. Moreover, DNA is not the only type of genetic material from which individuals can be identified. It was discovered at Mount Sinai School of Medicine that RNA data could not only be used to identify individuals, but could also be used to develop a "profile" of an individual, including age, weight and certain medical conditions, such as diabetes or viral infections like HPV or HIV.[6]

Discussed further below are just some of the ways that new genetic privacy concerns are being raised.

Genetic Information and the 4th Amendment

Government collection of genetic information is subject to the 4th Amendment protection against unreasonable search and seizure. The federal government's collection of genetic information expanded rapidly more than a decade ago. In 2000, Congress passed the DNA Analysis Backlog Elimination Act of 2000, which required certain felons – primarily violent felons who were convicted of murder, voluntary manslaughter or sexual abuse – to provide DNA samples for inclusion in a national database.[7] The database is used for law enforcement identification purposes; in judicial proceedings if otherwise admissible; for criminal-defense purposes; and for a population-statistic database for identification research, or for quality-control purposes, if personally-identifiable information is removed.

Just four years later, Congress passed the Justice For All Act, which expanded the class of felons to all felons of federal crimes.[8] This expansion has been upheld by federal appellate courts.[9] While this may be

Vani Verkhovsky

Jason Newman

Vani Verkhovsky is a civil defense attorney. Her practice focuses on insurance defense, intellectual property and commercial litigation.

Jason Newman concentrates his practice in the areas of civil defense, intellectual property and environmental law. He is a registered patent attorney with experience in patent, trademark and copyright litigation.

Cardelli Lanfear P.C.
322 West Lincoln
Royal Oak, Michigan 48067

248.544.1100 Phone

vverkhovsky@cardellilaw.com
jnewman@cardellilaw.com
cardellilaw.com

a reasonable invasion of privacy directed toward a relatively small group of the population, the limits of the 4th Amendment relative to genetic information are yet to be specifically defined by the judiciary.

Genetic Discrimination

Discoveries in genetics will likely advance to a point where every individual's genome will reveal vulnerability to some health problem. Obviously, some vulnerabilities will be more serious than others. Needless to say, the advancements in the use of that information, both beneficial and exploitive, will keep pace with the science of genetics itself.

The current legal protections against genetic discrimination are fairly narrow. On the federal level, there is the Genetic Information Nondisclosure Act (GINA), 42 USC Section 2000ff-1. However, that statute only prohibits discrimination in the context of employment and health insurance. There are notable exceptions to both categories. In the context of employment, GINA does not apply to employers with less than 15 employees or the U.S. military. In the context of health insurance, it does not apply to individuals who receive health care through the Veterans Administration or the Indian Health Service.

Some states offer broader legal protections against genetic discrimination. For example, California protects genetic information from discrimination in housing accommodations, as well as employment (Cal Gov Code Section 12920).

Thus, there remain many areas where genetic discrimination is largely unchecked. One of the most notable areas is life insurance. In the event of an untimely death, life insurance is used not only to help a dependent cover everyday living expenses or cover outstanding debts, but also to pay for funeral and burial costs that can easily run into the tens of thousands. There are currently no legal safeguards to ensure individuals are not discriminated against based on their genetic information regarding this common place benefit.

Commercial Use

Although it may seem innocuous to send out your DNA to sites like Ancestry.com and 23andMe, a closer look at the terms and conditions for companies like these may make you think twice. One potentially frightening reality – the terms and conditions when sending out your DNA are often broad, with testing companies claiming ownership of your DNA sample and the analytical information they obtain from it, or in the alternative, claiming full rights to transfer, process, analyze or communicate your genetic information to others for research and/or product development.[10] In 2012, 23andMe did just that when it announced that it had procured a patent (with exclusionary rights) for "Polymorphisms Associated With Parkinson's Disease" stemming from the data it had aggregated from its customers.[11]

Surreptitious Use of Personal Information

With the development of faster and more inexpensive ways to analyze DNA, more concerns are raised about what is known as "abandoned DNA" (like the DNA on the tissue you throw away after you blow your nose).[12] A former romantic partner with a grudge or a "frenemy" interested in causing mischief could potentially collect your abandoned DNA and have it analyzed for sensitive personal information, including embarrassing health information or to reveal paternity. Not likely to happen, you say? Well, this was the case for one multi-millionaire Hollywood producer, Steve Bing, whose DNA was obtained from dental floss stolen from his trash and used to prove paternity by a former lover.[13]

Final Thoughts

Much of the focus of future privacy concerns is directed to computers, or other electronic devices, and the data they store as a consequence of human interaction. However, as set forth in this article, innovation in the extraction, analysis and storage of specific genetic information may be even more consequential. Complete privacy of genetic information may have been left behind in the 20th century. P

1 Privacy in Genomics, National Human Genome Research Institute, genome.gov/27561246/privacy-in-genomics/

2 Privacy in Genomics, National Human Genome Research Institute, genome.gov/27561246/privacy-in-genomics/

3 Privacy in Genomics, National Human Genome Research Institute, genome.gov/27561246/privacy-in-genomics/

4 Poking Holes in Genetic Privacy, by Gina Kolata, nytimes.com/2013/06/18/science/poking-holes-in-the-privacy-of-dna.html (article dated June 16, 2013); see also Identifying Personal Genomes by Surname Inference, by Yaniv Erlich et al., http://science.sciencemag.org/content/339/6117/321 (article dated January 18, 2013)

5 Poking Holes in Genetic Privacy, by Gina Kolata, nytimes.com/2013/06/18/science/poking-holes-in-the-privacy-of-dna.html (article dated June 16, 2013).

6 Poking Holes in Genetic Privacy by Gina Kolata, nytimes.com/2013/06/18/science/poking-holes-in-the-privacy-of-dna.html (article dated June 16, 2013).

7 *Banks v. United States*, 490 F3d 1178 (10th Cir. 2007).

8 *Id.*

9 *Id.*

10 What DNA Testing Companies' Terrifying Privacy Policies Actually Mean, by Kristen V. Brown, what-dna-testing-companies-terrifying-privacy-policies-1819158337

11 Genetic Endowments… by Patricia J. Williams, madlawprofessor.wordpress.com/2012/12/17/genetic-endowments/

12 Your DNA In Your Garbage: Up For Grabs, by Kevin Hartnett, bostonglobe.com/ideas/2013/05/11/the-dna-your-garbage-for-grabs/sU12MtVLkoypL1qu2iF6IL/story.html

13 Steve Bing Sues MGM Mogul, ABC News, abcnews.go.com/Entertainment/story?id=101219&page=1

Paper and Pen No Longer Required: Electronic Wills and Recent Legislative Activity

"Because they didn't have any paper or pencil, [the testator's brother] suggested that the will be written on his Samsung Galaxy tablet," wrote an Ohio Probate Court Judge to describe the scene in which a man who lay in the hospital dictated his testamentary wishes to his brother, who then wrote them on the tablet with a stylus.[1] That same stylus was then used by the testator and his witnesses to electronically sign their names at the end of the will on the tablet. Ironically, this electronic will was printed on paper before its admission to probate in 2013 under the harmless error doctrine.

Across the globe in recent years, various messages created in electronic formats have been admitted to probate despite their non-traditional nature, including an unsent text message found on a decedent's iPhone who committed suicide.[2] This is especially true in dispensing power jurisdictions, like Australia, that have moved beyond centuries-old will execution formalities in favor of simpler tests, such as whether the decedent intended or adopted the communication as his or her last will.

Presently, the widely adopted Uniform Electronic Transactions Act provides that electronic records and signatures shall be given the same legally binding effect as paper records and manually signed signatures, with one significant exception – the creation and execution of wills.

In the United States, a quiet revolution is underway in state legislatures to modernize the law of wills to make room for electronically created and stored wills and other estate planning documents. Financially motivated entrepreneurs and owners of technology and software companies, such as Willing (owned by Bequest,

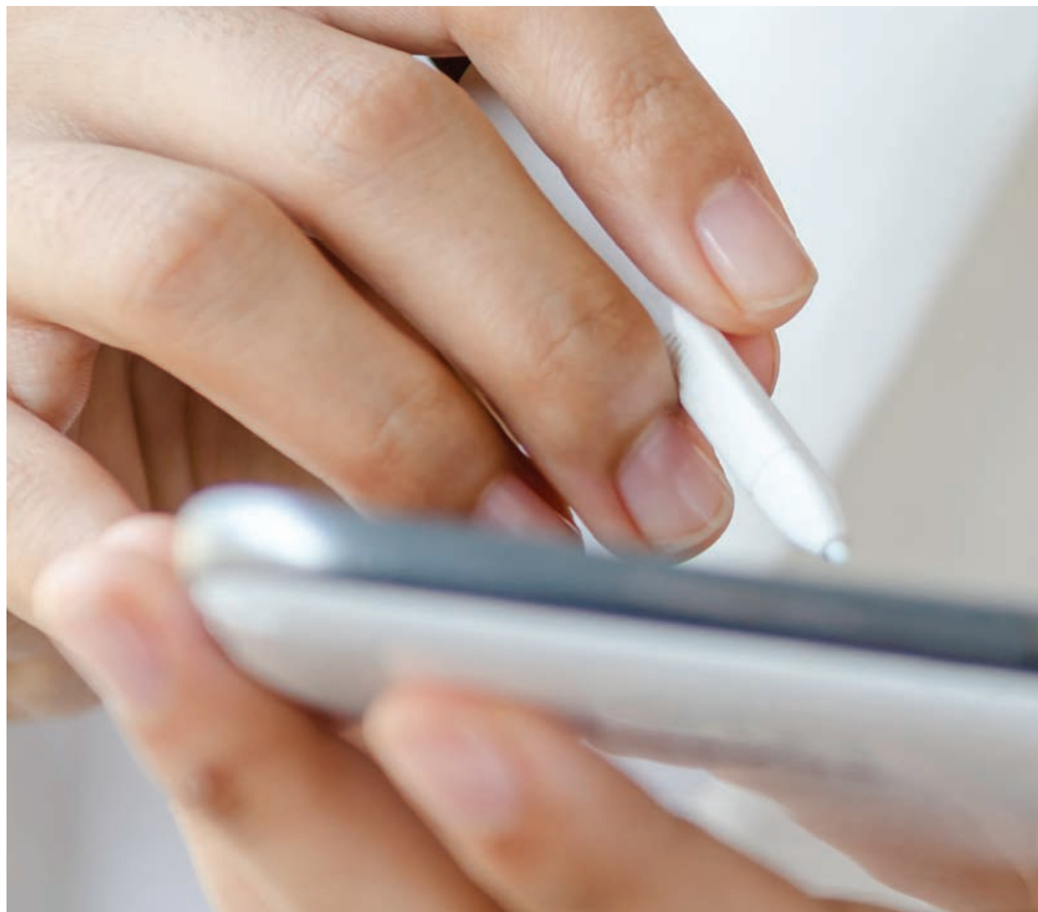
Kyle B. Gee

Kyle B. Gee is a partner at Schneider Smeltz Spieth Bell LLP, where he concentrates in the core areas of estate planning and wealth transfer, administration of trusts and estates, fiduciary representation and dispute resolution, charitable planning, business succession, family foundations and taxation.

Schneider Smeltz Spieth Bell LLP
1375 East 9th Street, Suite 900
Cleveland, Ohio 44114

216.696.4200 Phone

kgee@sssb-law.com
sssb-law.com



Inc.) and LegalZoom, with their lobbying teams, are behind the current push to permit citizens to create and store estate planning documents entirely online without the need for physical interaction with any other person during the creation or execution phases.

In 2017, these companies quickly introduced electronic will legislation in at least seven states. Legislatures in New Hampshire, Arizona, Virginia, Indiana and Washington, D.C. did not pass the bills last year. Florida's bill did pass but was ultimately vetoed by its governor. Nevada's comprehensive legislation became law on July 1, 2017, and its controversial provisions reach beyond Nevada's borders.[3] Among the concerns by estate planners around the country is that people who have no nexus at all with Nevada can now create a will entirely online before remote witnesses and notaries, and such electronic wills are deemed to have been executed in Nevada and can be probated there.

Given the speed at which electronic will legislation was introduced in various U.S. states by technology companies and the initial lack of collaboration with state bar associations, the Uniform Law Commission has responded by forming an electronic wills committee. This committee bypassed its research phase and immediately held its first drafting meeting in October 2017 and will meet again in March 2018.

The committee is tasked with drafting a model law addressing the formation, validity and recognition of electronic wills and is considering expansion of its charge to include electronic powers of attorney for health care and finance.[4]

The United Kingdom's Law Commission is also currently undertaking a significant project to modernize its law of wills, citing "the emergence of and increasing reliance upon digital technology" as one reason.[5]

Given our widespread reliance on electronic signatures in the global marketplace, the growing acceptance of the harmless error doctrine, the rapid invention and adoption of new technologies, the recent introduction of remote notarization in certain jurisdictions, and the influential lobbying efforts of technology companies, we can expect to see more legislative activity to modernize laws governing the creation, execution and storage of wills, trusts, powers of attorney and other estate planning documents. P

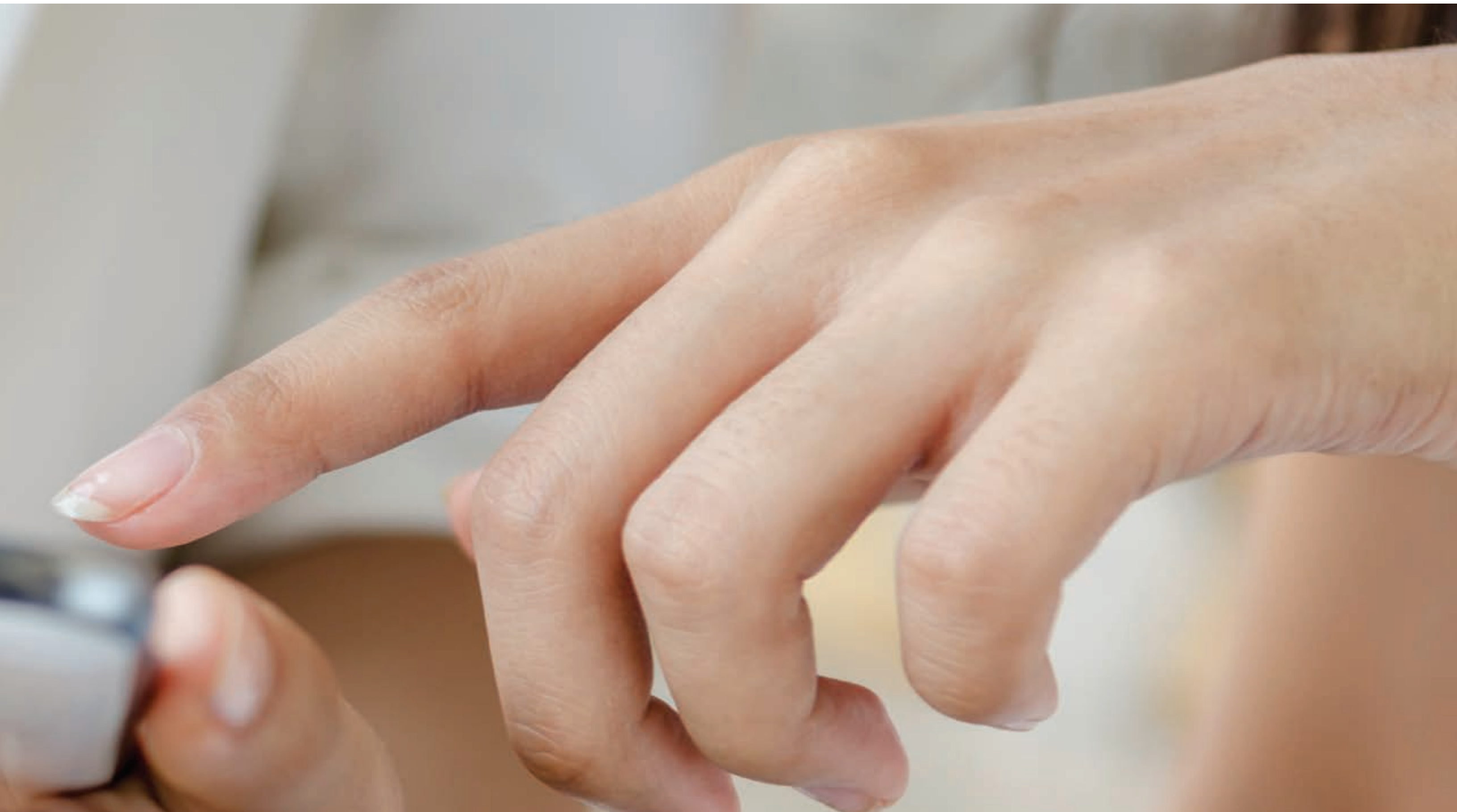
1 *In re Estate of Javier Castro*, 2013-ES-00140 (Ct. Com. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013).

2 *Re Nichol; Nichol v Nichol & Anor* [2017] QSC 220 (Sup. Ct. of Queensland, Oct. 9, 2017).

3 S. and Assemb. 413, 79th Sess. (Nev. 2017).

4 THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, uniformlaws.org/Committee.aspx?title=Electronic%20 Wills (last visited January 12, 2018).

5 THE LAW COMMISSION, lawcom.gov.uk/project/wills/ (last visited January 12, 2018).



Italian Web Tax

The Italian web tax is a tax levied on Italian and foreign entities providing "digital activities," i.e. digital platforms, digital applications, databases, virtual warehouses, digital services, as well as other activities which will be determined in the coming months through the issues of an Italian Decree.

The rule was approved with the Italian Finance Bill for 2018, with discussions dating back to 2013, when an effort to introduce the tax was eventually rejected.

The rule has been the subject of several amendments, and there may be more to come.

The Italian web tax will go into effect starting January 1, 2019. The time before then could allow, from one perspective, improvements and specifications, or from another perspective, possible amendments to conform with a European web tax which is under consideration by France, Germany, Spain and Italy.

The tax is levied only on business-to-business (BtoB) transactions concerning services (mainly data analytics, cloud computing and web advertising), while e-commerce transactions will be exempted. The tax will be applicable only if the number of transactions exceeds 3,000 per year.

The tax will be levied through a withholding tax of three percent. The withholding tax will be applied to Italian customers so that, for example, if the cost for the service is 100Euro, the Italian customer will pay 3Euro to the Italian Tax Agency and 97Euro to the service provider.

The tax is not applicable to (i) BtoB services rendered to entrepreneurs under flat-tax regimes, to (ii) BtoB services rendered by providers whose yearly number of transactions does not exceed 3,000 and to (iii) business-to-consumer services and all e-commerce transactions (i.e. digital transactions concerning goods).

Large online retailers Amazon, Apple and Google recently have agreed to pay to Italian tax authorities – through ad hoc agreements – respectively 100MEuro, 318MEuro and 306MEuro.

The reason for the tax assessment from Italian authorities was that these large, multinational companies would have, in the past, carried out commercial activity in Italy without declaring a permanent establishment.

Considering such big amounts, it seems that the Italian web tax could appear like a "gnat" to the giants of the web. By contrast, it could result in being, once again, an additional burdensome tax for Italian companies.

Only time will tell, however, whether and how these laudable Italian plans will actually be put into practice and what the outcome will be.

Maria Adele De Luca

Francesco Luigi De Luca

Maria Adele De Luca has been a partner at FDL Studio legale e tributario since 2013. Her main areas of practice are mergers and acquisitions, corporate law, retail law and general commercial law matters. She represents and advises Italian, as well as international corporations, in Italian and cross-border transactions.

Francesco Luigi De Luca is of counsel at FDL Studio legale e tributario. He is in charge of tax matters, with a particular focus on tax litigation and tax assessment.

FDL Studio legale e tributario
Piazza Borromeo, 12
Milano, Italy 20123

+39 02 7214921 Phone

m.deluca@fdl-lex.it
f.deluca@studiotributariodlp.it
fdl-lex.it

Working in Germany: The Seven Most Important Issues

In Germany, the legal relations between employees and employers are extensively regulated. In most cases, individual contractual agreements cannot deviate from legal safeguards at the expense of the individual employee. In addition, numerous collective or company-based agreements determine the working conditions of the employees of various industries.

Apart from European law, the rulings of German courts are of particular relevance to the German labor law. Outstanding specialists are needed to find their way through the jungle of regulations. Companies and investors from abroad are hence confronted with particular difficulties when assessing the risks of investing in Germany. This article is intended to help readers understand the basics of the seven most important issues of German labor law.

Benjamin Pfaffenberger

Benjamin Pfaffenberger is an associate at WINHELLER Attorneys at Law & Tax Advisors. He specializes in German employment law. His main practice areas include advising on collective labor law issues, especially concerning co-determination matters related to German industrial constitution law. He also focuses on employee data protection and litigation.

WINHELLER Attorneys at Law & Tax Advisors
Tower 185
Friedrich-Ebert-Anlage 35-37
Frankfurt am Main, Germany D-60327

+49 69 76 75 77 80 Phone

info@winheller.com
winheller.com

1. Minimum Wage

Employees and employers can freely agree on the amounts of salaries in employment contracts. However, a statutory minimum wage amounting to EUR 8.84 (gross amount) per hour has been applicable throughout Germany since January 1, 2017. This minimum wage can in no case be undercut and will have to be paid by the employer in any event.

Additionally, many collective agreements provide for minimum pay rates that are applicable to certain industries or regions within Germany and will have to be paid by any company that is a party to such a collective agreement. Some collective agreements are generally binding and have to be observed even if the parties to the employment contract are not covered by the collective agreement (e.g., in the construction industry, the hotel and restaurant industry and facility cleaning).

2. Working Hours and Overtime

In Germany, the statutory maximum working time is 48 hours on average per six-day week. The maximum permissible working time per day is 10 hours. The period between the end of one and the beginning of the next working day must not be less than 11 hours. After no more than 13 consecutive working days without a day off, the employee must be granted at least one day off.

Employees may work overtime up to the statutory maximum working time of 48 hours per week, but must get overtime pay or time off in lieu in such cases. The details are very often specified in collective agreements or individual agreements between the employee and the employer. The salary of personnel working in executive positions usually includes overtime work, which is permissible within certain limits.

3. Foreign Assignments and Postings

German employees may work at their employers' other European Union (EU) branches for a limited period of time without fear of disadvantages in terms of tax or social insurance law. Conversely, employees from other EU countries may also be temporarily posted to Germany without losing the protection of the social security system of their home country.

Posting employees from Germany to countries outside the EU and from countries outside the EU (e.g., the U.S. or Canada) to Germany, however, involves greater effort. Usually, an employee temporarily posted to Germany will have to apply for a residence and work permit. Depending on the length of the posting, the employee may be subject to German taxes and compulsory social insurance. In any event, employees posted to Germany are subject to the minimum working and occupational safety conditions set out by mandatory law. Whether or not the employment contract is governed by German law is irrelevant in this context.

4. Employee Leasing

For companies in Germany, employee leasing is comparatively important. Many companies meet their staffing needs, partly or even chiefly, by leasing workers (so-called temporary workers) from temporary employment agencies against payment of a fee. Due to an amendment of law, which has been in force since January 1, 2018, the rules applying to the commercial supply of temporary workers have become

stricter. Under the amended legislation, the supply of temporary workers in Germany is permissible only if the company, which supplies temporary workers against payment of a fee, has an official permission from the competent authority. The aim of this new legislation is to protect the working conditions encountered by temporary workers. Since January 1, 2018, companies leasing temporary workers have to ensure that, as of the first day of service, the temporary workers benefit from the same working conditions and pay as the employers' permanent staff. In addition, no temporary worker may be leased for a period exceeding 18 months. Due to the new provisions, leasing workers has become less attractive in Germany, which is the reason why some companies have already started seeking alternative solutions.

5. Dismissal and Protection Against Dismissal

Under the German Protection Against Unfair Dismissal Act *(Kündigungsschutzgesetz)*, the reasons for employers in Germany to give notice of dismissal are restricted. This Act is applicable in enterprises having more than 10 employees, who have been employed with the employer for no less than a six-month period.

Under the German Protection Against Unfair Dismissal Act, any dismissal by an employer must be justified by a good reason. These include reasons relating to:

- changes in business (e.g., redundancies);
- the employee's conduct (e.g., misconduct);
- the employee's person (e.g., permanent disability due to a long-term illness of an employee).

There are no restrictions on dismissals for important reasons, so-called extraordinary dismissals. An extraordinary dismissal is possible whenever there is a reason that makes it unacceptable for the employer to continue the employee's employment until expiry of the notice period for termination.

Except in case of an extraordinary dismissal, any dismissal by an employer is subject to the statutory or contractually agreed notice periods. The statutory notice periods vary from four weeks to seven months depending on how long the employee was employed with a company. During the notice period, the employee stays on the payroll and must be employed, unless he or she is placed on leave.

Prior to giving notice of dismissal, the works council (see item six) must be heard. However, the works council cannot prevent a dismissal. Any notice of dismissal must be sent to the employee in written form and must be signed by a person authorized to represent the company.

In Germany, employees can go to court requesting that the dismissal be declared invalid. In order to do so, the employee must bring an action in the competent labor court on grounds of unfair dismissal within three weeks after receipt of the notice of dismissal. In many cases, it will be difficult for the employer to provide a reason able to satisfy the labor court that the dismissal was valid. Therefore, although there is no statutory entitlement to receive severance pay, the employer and the employee often agree to terminate the employment by mutual consent with severance pay going to the employee. For calculating severance pay, the following formula is usually used:

Gross monthly salary × years of service × factor = severance pay

The "factor" depends on the negotiating skills of the parties to the employment contract and the risks involved in a legal action and usually is between 0.5 and 1.5.

6. Corporate Co-Determination

In Germany, companies that have five or more employees can elect a works council to represent the employees' interests in dealings with the employer. However, there is no legal obligation to do so. As a consequence, there are numerous companies in Germany that have no works council.

An employer must involve the works council in a variety of decisions, e.g., when the employer intends to terminate an employment relationship (see item five). There are also matters where the employer must inform or involve the works council. Regulating operating procedures in matters that are of particular relevance to the employees requires a real consent of the works council. In such cases, the employer cannot act without the consent of the works council, so-called co-determination. The following are examples of matters that are subject to co-determination of the works council:

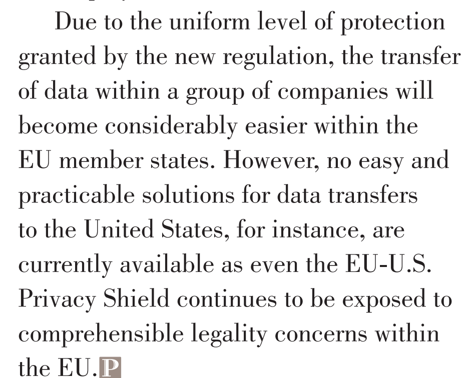
- internal order and conduct of the employees at work (e.g., smoking ban, dress code);
- distribution of the weekly and daily working time (e.g., duty rosters);
- temporary reductions or extensions of working time (e.g., overtime or short-time work orders);
- leave policies (vacation schedules);
- introduction and use of technical equipment (includes virtually all IT-systems); and
- issues relating to wage structuring (structuring of a profit-related bonus scheme).

Furthermore, the employer must involve the works council in various other matters, like relocating or recruiting employees or changing the operational organization if a change can entail disadvantages for employees, e.g., in case of closing or merging businesses or parts of businesses.

7. Data Protection

The EU-wide new data protection provisions of the General Data Protection Regulation will introduce some changes to employee data protection in Germany as of May 25, 2018.

Although the implementation of an employment relationship will continue to justify the collection and processing of the employee's personal data, changes will probably occur with respect to the (secret) monitoring of employees, who are suspected of having committed a criminal offense or severe breach of duty against the employer.



Due to the uniform level of protection granted by the new regulation, the transfer of data within a group of companies will become considerably easier within the EU member states. However, no easy and practicable solutions for data transfers to the United States, for instance, are currently available as even the EU-U.S. Privacy Shield continues to be exposed to comprehensible legality concerns within the EU.

Living and Working in Europe

Once established in the European Union (EU) as a foreign entrepreneur, does the EU single market, with its free movement of labor, work for you, too? Of course, EU citizens are free to live and work in any EU Member State. However, non-EU citizens often require a residence and work permit to be allowed to work in the EU legally. Most residence permits are valid in one EU Member State only. In this article, I will discuss the permits required by entrepreneurs and their employees to stay and work in the EU.

Please keep in mind that as a Dutch lawyer, I can only advise on European and Dutch migration law and on entry of foreign nationals to the Netherlands. The same goes for migration lawyers in other EU Member States. Thus, members of the International Society of Primerus Law Firms are ideally suited to advise non-European companies that intend to expand across the continent.

EU/European Economic Area (EEA) and Swiss Nationals

Nationals of EU/EEA Member States and Switzerland, as well as their family members (regardless of their nationality), in principle, only need a valid passport to enter and reside in any other Member State, provided that they do not constitute a danger to public order, public security or public health, and are able to support themselves. If they do so, they are free to work in the Netherlands. They have lawful residence on the basis of the treaties concerned. Those who want to stay for more than three months must register their domicile with the municipal personal records database. After five years of continuous stay in another Member State, EU/EEA/Swiss nationals can apply for a document certifying “permanent residence as an EU/EEA/Swiss national.”

Non-EU/EEA/Swiss Nationals

Non-EU/EEA/Swiss nationals (in the following referred to as “foreigners”) who wish to stay in the Netherlands for more than three months need a Dutch residence

Ynze Kliphuis

Ynze Kliphuis is a senior lawyer at Russell Advocaten B.V. He is an experienced lawyer who serves as outside corporate counsel to foreign and domestic businesses, as well as embassies and consulates. He deals with all aspects of international business immigration, real estate and rent.

Russell Advocaten B.V.
Reimersbeek 2
Amsterdam, Netherlands 1082 AG

+31 20 301 55 55 Phone

ynze.kliphuis@russell.nl
russell.nl

permit. In principle, they will also have to obtain a Provisional Residence Permit (*MVV; Machtiging Voorlopig Verblijf*) in their country of origin before they are allowed to enter the Netherlands. The MVV must be utilized within six months after the date of issue. Nationals of Australia, Canada, Japan, Monaco, New Zealand, South Korea, the United States or the Vatican do not need an MVV, but only a residence permit.

The Dutch Migration Authority (IND) will assess the application for the requested specific purpose of stay and verify the documents. If the application is rejected, the foreigner can lodge an objection in writing, appeal to the District Court and further appeal to the Administrative Law Division of the Council of State.

Purposes of Residence

A residence permit is related to a certain purpose of stay. There are different requirements for each purpose. If foreigners wish to reside in the Netherlands for work, they must produce an employment contract. If they wish to live with their family, birth and/or marriage certificates are required. These documents usually need to be authenticated or legalized. The means of legalization and acceptance of legalized documents varies from country to country.

Work-Related Purposes of Stay

The Netherlands has several work-related purposes of stay, for example, as:

- employees,
- highly skilled migrants or EU blue card holders,
- intra-corporate transferees, or
- self-employed persons.

Employees

Employers need a work permit to employ non-EU/EEA/Swiss nationals. A work permit will only be issued if no job applicants from within the EU/EEA/Switzerland (that do not require a work permit either) are available to fill the position within a reasonable period of time. The Netherlands Employee Insurance Agency advises the IND whether the work permit should be granted. Employers who employ migrants without a work permit risk a fine of EUR 24,000 for every migrant for each violation.

Highly Skilled Migrants and EU Blue Card

There are special streamlined procedures for obtaining a permit for highly skilled migrants and for an EU blue card. Whether or not such residence permits will be granted depends on income levels and agreements between the IND and the employers. These employers assume responsibility that their foreign workers meet the applicable specific requirements. Employers do not require a work permit for highly skilled migrants or EU blue card holders.

To qualify for this permit, a highly skilled migrant should earn a minimum gross monthly income of EUR 4,404 (or EUR 3,229 if they are under 30 years old). Migrants qualify for an EU blue card if they earn at least EUR 5,160 per month, regardless of age, and they have completed a higher education program of at least three years. The employer, in turn, must prove that he will be able to pay the wage.

Strangely, a Dutch EU blue card is not valid as a residence or work permit in other EU Member States. The only advantage is that an EU blue card obtained in one Member State may simplify the procedures in another EU Member State should the holder of the EU blue card move. In that case, an MVV is not required for the second application.

Intra-Corporate Transferee

The only true European residence permit is the residence permit for intra-corporate transferees. Foreign managers and key personnel at a higher professional level who have an employment contract with an undertaking established outside the EU and who will temporarily be transferred to one or more branches of this undertaking within one or more Member States in the EU, can obtain a residence permit for intra-corporate transferees. The application is to be submitted in the Member State where the transferee will work and stay most of the time, but it will entitle him to work for branches in other Member States and stay there as well. The main drawback is that this permit expires after a maximum of three years and cannot be extended.

Self-Employed Persons

Self-employed foreigners in the Netherlands do not need a work permit (it is only required for the persons or companies that hire them), but they must meet strict requirements, for example:

- The self-employed foreigner's business must serve an essential Dutch (economic) interest by being innovative for the Netherlands.
- The foreigner should have the qualifications and licenses that are required for his or her profession in the Netherlands.

The foreigners must prove by means of a business plan and financial data that their business will provide them with sufficient means of support.

Thanks to bilateral treaties, it is a lot easier for American and Japanese citizens to obtain a residence permit on a self-employed basis in the Netherlands, provided that they do business between their country of origin and the Netherlands or develop and lead the general business of an American or Japanese company in the Netherlands. The business of these American and Japanese nationals is not required to serve an essential Dutch (economic) interest.

Conclusion

Apart from the permit for intra-corporate transferees, Dutch residence permits are only valid as a residence permit in the Netherlands. Even migrants in possession of a Dutch EU Blue Card that want to live and work in other EU countries are obliged to apply for a residence permit (and sometimes a work permit) if they move to these countries. Non-European companies that want to expand their business across Europe and bring their own personnel can contact any Primerus lawyer to obtain access to a complete network of European (migration) lawyers covering every EU Member State. Together, Primerus lawyers can advise the entrepreneur on the specific requirements for obtaining a work or residence permit in any EU Member State. P

Peru: A Destination for Foreign Investment

Peru has the fastest growing economy in Latin America. Its unique and wide diversity, with a variety of micro-climates and magnificent natural resources, sets Peru apart. It has developed a solid economic and industrial background.

Thus, as of today, Peru is considered one of the world's leading emerging markets. Sixteen years of uninterrupted annual growth and well-defined legal framework defines the country as a surprising and excellent destination for investors, offering a great variety of investment possibilities.

Juan Prado Bustamante

Juan Prado Bustamante is a partner at Llona & Bustamante Abogados, where his practice focuses on corporate and financial law, along with insurance and financial services. He has participated in various privatizations and public offerings of state owned enterprises.

Llona & Bustamante Abogados
Francisco Masias 370 piso 7
San Isidro, Lima 27 Peru

+511 418 4860 Phone

jprado@ellb.com.pe
ellb.com.pe

The main factors creating new and better business opportunities for this emerging Andean country are:

- mining industry,
- infrastructure project developments,
- gastronomy, agribusiness and cultural tourism,
- middle class growth,
- solid macroeconomic fundamentals, and
- strong legal framework encouraging private investment.

Over the years, Peru has turned into one of the most attractive destinations for investment in mining. It has the winning combination that all successful investors look for worldwide based on its large deposits of mineral resources, while a very small percentage of the country's territory is being explored. Peru ranks among the worldwide top producers of copper, silver, gold, zinc, tin and lead.

Likewise, the lack of modern infrastructure facilities in the territory offers important opportunities for the development and modernization of highways, railway, port and airport infrastructure, among others. In addition, Peru is a country with high availability of hydric resources, natural gas and renewable energy, as well as hydrocarbon resources, with great investment opportunities.

Peru's southern hemisphere location has resulted in an important growth for its agribusiness industry. Its wide biodiversity and climate conditions allow the supply of off-season products to the world market. Our country is a significant worldwide player for asparagus, coffee, cacao, bananas, grapes, quinoa, mangoes, citrus, avocados and blueberries.

Finally, as it is well known, Peru is the Land of the Inkas, with amazing archaeological monuments, biodiversity, cultures and gastronomy, offering its tourists a wide spectrum of experiences and adventures, becoming a world-class destination attracting investors.

But none of these investment opportunities will work without the appropriate framework. Peruvian constitutional and legal framework opens our economy to private investment, which is exercised in the context of a social market economy, governed by the law of supply and demand. This means that, in general terms, prices for goods and services are fixed by market, repressing any conduct that restricts it.

Peru has established several principles to entice foreign investment and provide stability and continuance to all investors. The most significant measures are:

- acknowledgment of a non-discriminatory treatment compared to national investors,
- freedom of trade and industry,
- property rights guarantees,
- free possession of local/foreign currencies,
- use of the most favorable currency exchange rate,
- freedom to re-export any capital investment and remittance of profits after taxes,
- unlimited access to domestic credit,
- freedom to hire technology and remittance of royalties, and

- entering into legal stability agreements with the government guaranteeing legal and tax stability, including companies receiving their investments.

Another example of Peru's commitment to boost foreign investment is the existence of the Peruvian Private Investment Promotion Agency, ProInversion, the agency responsible for promoting and facilitating private investment. This agency assists investors in the prospection and establishment stages of their projects. ProInversion also implements processes to promote investment in infrastructure and public utilities projects, through public-private partnerships, identified by national or regional governments, or as a response to proposals made by investors.

ProInversion's portfolio contains projects that contribute to improving the connectivity and competitiveness of Peru and, at the same time, addresses the requirements for social infrastructure. All of these measures are aimed at maintaining a favorable investment environment, which is the key growth driver of Peru.

On the international arena, Peru has worked to secure the most amicable environment, by prioritizing the development of an ideal infrastructure to increase competitiveness and to create a geographic space that can be integrated to the world. The latest is the Free Trade Agreement that has consolidated Peru's opening and economic integration toward the Asia-Pacific markets, in addition to various Bilateral Investment Agreements, Free Trade Agreements and agreements preventing double taxation.

In an effort to strengthen and consolidate Peru's image as an attractive destination for investments, it has deliberately put in place a well-defined framework giving sufficient comfort and equal treatment to investors, regardless of nationality, guaranteeing them the free possession of different currencies and the freedom to remit abroad their investments and gains without governmental approvals. P

The Current Regulation of Cryptocurrencies in Brazil and What to Expect for the Future

Cryptocurrencies have been gathering a lot of attention lately, mainly due to the explosive growth in the value of bitcoins and the fact that Chicago Board Options Exchange and Chicago Mercantile Exchange are starting to negotiate these assets in regulated environments – but most of all, because of their various uses.

This kind of scenario is possible due to blockchain, the technology that grants every member of the structure access to a secure database containing all the transactions carried out within the system. This allows members to check the path traveled by each unit generated by the system since its inception and insert new transactions, which are divulged to everyone else.

Otavio Augusto de Lara Borsato

Luiz Gustavo Doles Silva

Otavio Augusto de Lara Borsato is a partner at Barcellos Tucunduva Advogados, where he practices in the areas of banking, finance, capital markets law and investment funds.

Luiz Gustavo Doles Silva is an associate at Barcellos Tucunduva Advogados, where he practices in the areas of banking, finance, capital markets law and investment funds.

Barcellos Tucunduva Advogados
Av. Presidente Juscelino Kubitschek,
1726 – 4º andar
Sao Paulo, 04543-000 Brazil

+55 11 3069 9080 Phone

oborsato@btlaw.com.br
ldoles@btlaw.com.br
btlaw.com.br

Many systems have offered some of these features and had some of these characteristics, but the cryptocurrencies and their respective blockchain have incorporated them all in the same package. They were the first systems to achieve great popularity in this field.

Cryptocurrencies allow each person to act as the custodian, the payment agent and the clearinghouse of their transactions and currency. This changes the logic behind the current financial structure, as the user becomes responsible for the security of his or her money.

Such an innovation is possible given that blockchain changed the logic behind information and transaction verification.

Previously, some companies and the state were the only entities that held a very special asset: market and consumer confidence; hence, only they could act as intermediaries in financial transactions and verification of information.

Blockchain allowed anyone to play this role, as the portion of information necessary to perform these checks is public, and the system encourages its users to perform these activities by supplying them with cryptocurrencies.

Upon analyzing the legal impact of this situation, a well-known lesson is reinforced: the law has great difficulty in keeping up with technological innovation. This fact stems from the very nature of the legislative process and the formation of precedents, which take years to complete, while technology advances and reinvents itself with great agility.

Current Regulations in Brazil

There are only a few effective rules regarding the legal treatment of cryptocurrencies in Brazil, and some regulatory efforts: Draft Bill 2303 of 2015, Notices 25,306/2013 and 31,379/2017 issued by the Brazilian Central Bank (BACEN); the Brazilian Securities Exchange Commission Market Statement published on November 16, 2017; and the positioning of the Brazilian Internal Revenue Service.

Draft Bill 2303/2015 is the main regulatory effort regarding cryptocurrencies in Brazil. It seeks to include "virtual currencies" (another nomenclature to cryptocurrencies) and air mileage programs in the definition of "payment arrangements" under the supervision of BACEN.[1]

For several reasons, this bill is receiving harsh criticism given that cryptocurrencies can be used as a payment arrangement, but, due to the possibilities provided by their blockchains, they have many other completely different uses (digital identity, logistics, etc.). If this bill makes the start-ups that act in this segment comply with the rules that regulate payment arrangements, they will leave Brazil. There is no central authority issuing cryptocurrencies, so there is no way to apply the controls applied to payment arrangements to exchanges and other companies.

BACEN itself has declared that it is against the current wording of the Draft Bill 2303/2015, and several public hearings on the subject have been held. On December 12, 2017, the congress commission responsible for the Draft Bill issued a

report stating that they are against the mining and circulation of cryptocurrencies in Brazil, whereas this is not the final position of the regulatory entities.

We will have to wait for the final result of the procedure in order to verify how the local authorities will deal with this subject.

The Brazilian Central Bank issued Notice 25,036 in 2013 in which it indicated that virtual currencies (cryptocurrencies) are not to be confused with electronic currencies (used in payment arrangements). Until now, the entity saw no reason to intervene in the market, given that it is too small to pose any threat to the Brazilian economy as a whole.

BACEN also expressed its views on the subject in Notice 31,379 issued on November 16, 2017,[2] in which it made clear that cryptocurrencies cannot be used as a means of international transfers. Exchange regulations and the elaboration of Financial Operations Registry, essential in the performance of foreign exchange operations, still have to be observed in order to make foreign exchange transactions, regardless of the instrument being used by the involved parties.

In addition, the Brazilian Securities and Exchange Commission (CVM) also expressed its views on the use of cryptocurrencies in its market note on Initial Coin Offerings (ICOs), indicating that, depending on their content, the ICOs must be approved by the agency.[3]

CVM will adopt criteria similar to those applied by the Securities Exchange Commission in order to identify which ICOs must be presented. This criteria, known as the Howey test, seeks to verify if the analyzed asset can be considered as a security using three questions:

1. Is it an instrument for the investment of resources?
2. Is it a collective investment?
3. Is there any expectation of profit arising from the efforts of third parties, and not from the investor?

If all questions are answered with a yes, the negotiated token shall be considered as a security, and consequently CVM procedures must be observed.

The Brazilian Internal Revenue Service has also positioned itself on the taxation of cryptocurrencies in a very clear way: the purchase and mining must be included in the Annual Income Tax Declaration and the income tax over the capital gain generated by the sale of cryptocurrencies must be collected.[4] There are exemption limits (gains of up to R $35,000 in the year), and the applicable rates depend on the earnings generated during the year.

The Future of Regulation

By observing how each regulator has dealt with this technology to date, one can verify that the regulation of the use of cryptocurrencies in Brazil is a work in progress, including the use of blockchain, which is also taking its first steps.

What can be expected regarding the regulation of this technology in the future?

Taking into account the main concerns of public entities, the following things come to mind:

1. effective definition of the legal nature of cryptocurrencies, and how this instrument must be treated in each situation;
2. specific regulation regarding money laundering prevention and know-your-customer policies for cryptocurrency exchanges;
3. regulation of the use of cryptocurrencies in general trade and their role in the national financial system;
4. specific legislation regarding the reporting of information by individuals and legal entities that deal with cryptocurrencies, in particular exchange companies; and
5. official guidelines regarding minimum security parameters for users of cryptocurrencies.

This list certainly does not exhaust the situations that can be regulated, but each of these points is sure to require a lot of discussion in the future.

The only certainty we have at the moment is the fact that the market is moving forward, and regulation is always running behind. We can only follow the development of this subject and take the necessary precautions so that the future regulation of this technology is useful for everyone involved. P

1 camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=1555470
2 bcb.gov.br/pre/normativos/busca/normativo.asp? Number = 31379 & type = Notice & data = 16/11/2017
3 cvm.gov.br/noticias/arquivos/2017/20171116-1.html
4 Question 447 -
5 idg.receita.fazenda.gov.br/interface/cidadao/irpf/2017/perguntao/pir-pf-2017-questions-and-resposals-version-1-1-03032017.pdf

Management Power of Employers in the Dominican Republic

In the Dominican Republic, an employment contract may be modified as a consequence of the provisions in the Labor Code and subsequent labor laws, collective bargaining agreements or mutual consent.

Also, the employer is allowed to enforce necessary changes to the employment agreement, as long as they do not imply an unreasonable exercise of this power, alter the essential conditions of the contract, or cause material or moral damage to the employee. That means that the change cannot negatively affect the employee by decreasing or eliminating any rights or benefits.

Angelina Salegna Bacó

Angelina Salegna Bacó is a partner at Sánchez y Salegna, where she specializes in labor and employment law. She is a frequent speaker at seminars and conferences, where her topics include helping employers find solutions for common labor problems, training management in handling a variety of workplace situations, and union issues.

Sánchez y Salegna
Lope de Vega No.29, Novocentro Tower, Suite 605
Ensanche Naco
Santo Domingo, Dominican Republic 10119

809.542.2424 Phone

asalegna@sys.do
sys.do

Such a change would be considered an abusive exercise of the management power (in our country, we use the Latin phrase *"ius variandi"*), which is the employer's right to change the working conditions unilaterally, even against the will of the employee, by a justified need. The abusive modification of the employment contract could lead to a breach thereof, with full employer liability. The abusive use of the management power can be just cause for the resignation of the employee.

In the Dominican Republic, this is one of the most significant labor-related topics: the management power of employers and the limits established for such power by our legislation. In general terms, this power may be defined as the possibility for employers to regulate on a discretionary basis the manner in which employment relationships should develop.

This aspect is regulated under articles 40 and 41 of the Dominican Labor Code. Article 40 of the Labor Code states that employers' management powers should be exercised on a functional basis. Moreover, it establishes that the management power should serve the company's interests and the production needs, to the extent that the conservation and improvement of employees personal and economic rights are not negatively affected by this power.

Article 41 of the Labor Code declares that employers are entitled to put in place any necessary changes for the purposes of adequate provision of services. But such changes should not entail an unreasonable exercise of such management powers, nor imply a disruption to the essential conditions of the employment contract or cause material or moral damages to employees.

Based on this, it is clear that the Dominican law provides for the existence of management powers in favor of employers. Such powers materialize in the employers' right to determine the manner in which their companies should be organized, as well as in the operational, technical and disciplinary guidelines on which companies' operations should rely.

Thus, any changes to the conditions of the labor agreement issued by employers with basis on their management powers must ensure the moral, physical and economic integrity of employees. This means that such changes should not be issued in violation of any employee rights established under labor laws, let alone impair employees' dignity and privacy.

So, any changes to employment contracts to be conducted by employers in the execution of their management power should not result from arbitrary or retaliatory decisions. But, they should derive from actual and functional interests of the company. They should be based on objectively valid reasons. Also, these changes should not affect the essential conditions of the employment contract (time, place and specific way services should be provided) as initially agreed upon by the parties. Finally, management powers should not affect moral, material or economic interests of employees.

The Supreme Court of Justice of the Dominican Republic has provided several examples in connection with situations that have infringed on the *ius variandi* principle. Such infringement may occur when:

a) the employer unilaterally decides to change the conditions of the employment contract, thereby causing economic, material or moral damages;

b) the tasks specific to the job position are modified to the employee's detriment;

c) the employee's safety is at risk; or

d) the salary earned by the employee is cut in whole or in part.

The Supreme Court of Justice of the Dominican Republic has also stated that the unilateral modification of employees' work schedules is considered a practice against the *ius variandi* because this aspect constitutes an essential condition of the employment contract.

In another decision, the Supreme Court of Justice of the Dominican Republic considered that changing the calculation method of employees' salaries to move from a fixed and variable wage system to exclusively variable salaries constitutes a violation of the management power.

In conclusion, labor regulations currently in force in the Dominican Republic, especially article 41 of the Labor Code, prevent employers from unilaterally changing employment contracts to the detriment of employees. A unilateral amendment of the employment contract that causes economic disadvantage to the specific employee will be null and void.

Then, when there is a risk that the change to working conditions of the employee could be considered illegal, it is necessary first to get the employee's consent. Otherwise, the employee could file a lawsuit called *"dimisión"* or dismissal at court. This is a termination of the labor agreement by the employee due to employer's violations of its obligations. If the court rules on the employee's behalf, then the company will be ordered to pay severance, including pre-noticed, unemployment, acquired rights and six months of salary as compensation.

Taking this into consideration, we suggest that when a company informs employees of the changes they would like to make, they explain clearly that the changes won't affect the essential conditions of the labor agreement and that these changes are not discriminatory for any person. P

Ciudad Lagos de Torca: An Example of Coordination for City Development

One of the main challenges developing countries must face is obtaining the necessary resources to create infrastructure that provides decent living conditions for its citizens. The systems generated to meet this goal without affecting fiscal sustainability include, among others, public-private partnerships.

Colombia, as expected, has not been a stranger to this phenomenon. The political constitution of 1991 provided a legal framework that allows the public and private sectors to align their interests. Such partnerships facilitate, on the one hand, compliance with the purposes of the state, and on the other, the recognition of benefits for private parties derived from the assumption of burdens that would otherwise be assumed by the state. An example of these schemes can be found in law 388/1995 and law 1508/2012.

Previously, the country had not implemented non-traditional financing schemes for projects other than for road construction, governed by law 1508. Now the country has left behind this historic lag to allow for one of the most ambitious projects ever seen in the country – known as "Ciudad Lagos de Torca."

Lagos de Torca came to life on March 3, 2017, pursuant to the issuance of Decree 088 by Enrique Peñalosa, mayor of Bogotá D.C. The decree's main purposes are: (i) regulate the urban planning and environmental conditions where its area of influence will be developed, 1,800 hectares north of the city; and (ii) establish a trust mechanism that allows the confluence of interests of the public and private sector, to develop the required infrastructure for the use of this portion of the city. In fact, according to the financial analyses performed by the district administration, more than 4 trillion pesos are necessary for the construction of roads, main utilities networks, parks and recovery of environmental lands and to ensure

Julián Felipe Rojas Rodríguez

Julián Felipe Rojas Rodríguez is manager of the department of corporate law for Pinilla, Gonzalez & Prieto Abogados. His main area of practice is related to civil and commercial law.

Pinilla, Gonzalez & Prieto Abogados
Av. Calle 72 No. 6-30 pisos 9 y 14
Bogota, Colombia

+57 1 210 10 00 Phone

jrojas@pgplegal.com
pgplegal.com

decent living conditions for those who are part of the project.

In addition to the special regulations for urban planning and environmental law, Lagos de Torca is a pioneer in introducing a contractual scheme as a mechanism to ensure compliance with the objectives mentioned above. Some of the most important elements of the trust agreement mentioned in Decree 088 are:

- for its incorporation, the trust agreement must be signed by the owners of the land located within the scope of application of Lagos de Torca, representing percent of the total area thereof, meaning 450 hectares;
- although it is true that the purpose of the agreement is to create roads, main utility networks and environmental elements, the funds managed by the trust are 100 percent private;
- regarding the management of the agreement – which will bring together more than 100 owners – it includes rules related to: (i) election of the trust board; (ii) participation in the owners assembly; and (iii) rules to avoid modification of the rights provided in favor of each;
- notwithstanding the private nature of the funds that make part of the trust, the District will comprise part of the trust board to monitor compliance with work schedules, ensuring compliance with the purposes of the scheme; and
- the agreement text includes provisions related to the assignment of rights of those bound by it, in any case producing mechanisms that allow keeping transparency and traceability of the goods contributed to the same.

In consideration of the contribution made by the private sector, which will allow the construction of more than 42 kilometers of main roads, a 72-hectare metropolitan park and a hospital, the District will offer building rights that may be applied within the 1,800 hectares comprising Ciudad Lagos de Torca. Consequently, it will be possible to develop a project of more than 132,000 housing units, representing sales for over 10 trillion pesos.

Considering the characteristics of the project, the private sector worked hand-in-hand with the district entities in the construction of the trust agreement that governs it. This agreement was signed on January 25, 2018, by land owners of approximately 530 hectares and with initial contributions amounting to 10 billion pesos. According to the timetable of the project, the District expects the trust to consolidate the resources required for the first operation no later than the second semester of 2018. Design will start in the first quarter of 2019.

Companies Act 2016: A New Dawn for Business in Malaysia

Winding up is a process of closing a company, where its assets are collected and realized. In Malaysia, we have two modes of winding up:

- voluntary winding up; and
- compulsory winding up.

Voluntary Winding Up

The first type of winding up is known as a voluntary winding up for a solvent company. The process is initiated by the company itself, through its directors and shareholders. This process does not involve the court at all. The directors and shareholders may decide that they wish to wind up the company, sell all of the assets and distribute the proceeds back to the shareholders.

A second form of voluntary winding up is where the company is insolvent. This is a situation where the company is unable to pay off all of its debts. However, this type of process can still be initiated by its directors and shareholders. A creditor who is owed money by a company cannot object to a company deciding to wind itself up or the company deciding to close down its business.

Compulsory Winding Up

In the Malaysian context, it is very common for the winding up of a company to be done through the court process. This is known as a compulsory winding up. It is because the company is unable to pay its debts.

Previously, in Companies Act 1965, a creditor who is owed more than RM500 could send out a demand letter to the company to pay within 21 days pursuant to section 218 of the Companies Act. Now, Companies Act 2016 brings a major change. If a company is indebted in a sum of more than RM10,000, the creditor can issue a letter of demand under section 466 of the Companies Act 2016.

If the company fails to pay the amount demanded in this letter, there is a statutory presumption that the company is now insolvent. The creditor can now file the court paper, known as a winding up petition, to seek a court order to wind up the company. The court process for the winding up petition will require mandatory advertisement and insertion of a notice in the Government Gazette. If the company disputes or objects to the sum demanded, it is important for a company to take steps to prevent the filing of a winding up petition.

Companies Act 2016 Section 467 states that the commencement of the winding up shall be at the date of the winding up order. The previous Companies Act 1965 stated it should start when the petition is presented at the court.

New Insolvency Mechanism

Besides that, the Companies Act 2016 also makes some significant changes to Malaysia's corporate insolvency regime and introduces two types of Corporate Rescue Mechanism.

1. Judicial management under Part III Division 8 of Companies Act 2016 which consists of section 403 – section 430.
2. Corporate voluntary agreement under Part III Division 8 of Companies Act 2016 which consists of section 395 – section 402.

Judicial Management

Judicial management allows a company, its directors or a creditor, to apply to the court to place the management of a company in the hands of a qualified insolvency practitioner known as a "judicial manager." But, this application is not applicable to a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by Central Bank of Malaysia and a company which is subjected to Capital Markets and Services Act 2007 *(section 403)*.

A judicial management order directs that the affairs, business and property of the company shall be managed by the judicial manager for the period in which the order is in force, which is six months with the possibility of a further

Nur Achinta Ezyana Sufian   Vanessa Anak Jawa

Nur Achinta Ezyana Sufian is an Advocate & Solicitor of the High Court of Malaya. She is also a member of the Malaysian Bar.

Vanessa Anak Jawa is an Advocate & Solicitor of the High Court of Malaya. She is also a member of the Malaysian Bar.

J. Lee & Associates
A-16-13, Tower A
No.5 Jalan Bangsar Utama 1
Kuala Lumpur, Malaysia 59000

+60 3 2288 1699 Phone

jlee-kl@jlee-associates.com
jlee-associates.com

six-month extension. From the time the application is made and for the duration of any judicial management order, a moratorium will be in force to prevent any winding up order or any other legal proceedings against the company without leave of court, including enforcement proceedings by secured creditors. (A moratorium is a period in which no legal proceedings can be taken against the company.)

The application for a judicial management order will be allowed if the company is or will be unable to pay its debts and if there is a reasonable probability of rehabilitating the company.

Secured creditors have the power to apply for a judicial management order and seek to proceed with the appointment of a receiver or receiver and manager, subject to the following:

- the overriding discretion of the court to make a judicial management order if public interest requires and, if appropriate, to appoint an interim judicial manager, and
- the moratorium that would be in place from the time an application is made for a judicial management order until the grant or dismissal of the order.

Corporate Voluntary Arrangement

A company may put up a proposal to its unsecured creditors for a voluntary arrangement, and the implementation of the debt restructuring proposal will be supervised by an insolvency practitioner with minimal court supervision.

The proposal for a corporate voluntary arrangement has to be accompanied by a statement of a nominee indicating whether or not, in his or her opinion, the debt restructuring proposal has a reasonable prospect of being approved and implemented; whether the company is likely to have sufficient funds available for the company during the proposed moratorium to enable the company to carry on its business; and whether a meeting of the company and its creditors should be held to consider the proposal.

The process of the Corporate Voluntary Agreement commences once the applicant has filed the proposal and all the documents (as provided in Section 398 of Companies Act 2016) at the court, whereupon a moratorium on actions by creditors commences automatically.

Within 28 days of the commencement, a meeting will be held among the company's shareholders and creditors to vote on the proposal. Approval of a simple majority of the shareholders and 75 percent of the total value of the creditors must be obtained.

Once approved, the proposal becomes binding on all creditors and members, and the nominee or another insolvency practitioner functions as the supervisor of the voluntary arrangement to see to its implementation.

However, by virtue of section 395 of Companies Act 2016, this mechanism does not apply to several types of companies such as:

(a) a public company;

(b) a company which is a licensed institution or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia;

(c) a company subject to the Capital Markets and Services Act 2007; and

(d) a company which creates a charge over its property.

The introduction of the Judicial Management and Corporate Voluntary Arrangement mechanisms are new moves towards bringing Malaysia's insolvency laws up to the same international standards as many other countries in the region. Both of the mechanisms are likely to come into effect in 2018. P

Changes to the Fair Work Act

Following a spate of investigations by Australia's peak industrial law watchdog, the Fair Work Ombudsman (FWO), in which 7-Eleven, Caltex, Dominos, Pizza Hut and a number of other well-known, multi-national companies, were found to have been underpaying their Australian-based workers, the Commonwealth Parliament has rolled out a number of amendments to the Fair Work Act 2009 (FWA). Having come into effect on September 15, 2017, these amendments are unique in that, for the first time, head franchisors, even those that are not located within Australia, can now be held strictly liable for underpayments (as well as other breaches of Australian industrial law) made by local, Australian-based franchisees. While the amendments are, on one level, a reaction to the seeming epidemic of underpayment of workers by such companies, it can also be seen as part of the current government's broader push to hold overseas companies more accountable for their Australian-based operations.[1]

This article will look at some of the key features of these amendments and offer some practical risk mitigation strategies for overseas-based companies who have established, or are looking to establish, franchises in Australia.

Gregory Rogers

Gregory Rogers is a dispute resolution lawyer at HHG Legal Group. He advises and represents a broad spectrum of clients in both complex and simple commercial litigation matters including shareholder and partnership disputes, consumer and competition legislation matters, insolvency and related matters, as well as employment law matters.

HHG Legal Group
Level 1
16 Parliament Place
West Perth, Western Australia 6005

+61 8 9322 1966 Phone

greg.rogers@hhg.com.au
hhg.com.au

Key Features

As mentioned above, the key feature of the amendments is that the law now targets franchisors that turn a blind eye to the breaches of their franchisees, with franchisors now strictly liable for their franchisees' actions when exercising a "significant degree of control" over them. The Parliament has deliberately left the definition of "significant degree of control" relatively open. The deliberate vagueness in the definition is not unique to these amendments and is a common feature throughout the FWA. The apparent policy rationale for this approach is to encourage employers (and now franchisors) to "over comply" with their obligations to best protect themselves from breaches of the FWA. Sophisticated employers often used skilled employment and industrial lawyers to balance their legal obligations under the FWA with the commercial reality of that employer's business. With these changes, franchisors, especially those with headquarters outside Australia, are now encouraged to engage such specialists as part of their retinue of Australian-based service providers.

Another key feature of the amendments is that franchisors (as well as franchisees) are now exposed to significantly higher penalties for contravening payment-related workplace laws, with fines increasing ten-fold. In addition, employers are now prohibited from asking their employees for "cash-back" – an amendment spurred by findings that young workers were led to ATMs by employers and forced to return some of their wage.

The Practical Reality

A franchisor has yet to be charged under these new laws, despite the FWO charging ten companies under the FWA since the amendments went into effect. In the recent decision of *Fair Work Ombudsman v NSH North Pty Ltd t/as New Shanghai Charlestown* [2017] FCA 1301, Justice Bromwich endorsed the policy rationale and objective of the amendment. He called Parliament's efforts to increase penalties for such cases as "entirely warranted." With multi-national bodies such as 7-Eleven charged with paying employees as little as $5 an hour, the necessity of such stringent laws becomes apparent.

However, not everyone is satisfied. The scope of the new laws has been criticized, particularly when considering the breadth of the definition of the "franchisor," the type of control required by the franchisors, and the level of knowledge they must have in terms of wrongdoing by franchisees. As more cases come before the court, the parameters of liability for franchisors under the amendments are very likely

to become more clearly defined through judicial consideration. Nevertheless, and for the reasons discussed above, the amendments (as well as the FWA overall) are designed to retain some degree of vagueness in their terms and operation.

Advice for Investors and Business Owners

To minimize the risk of violating the FWA, franchisors should assist their franchisees in understanding and complying with their legal responsibilities; record-keeping and pay slip obligations are of particular importance now. Not only can franchisors be liable when they have actual knowledge of their franchisees' wrongdoing – if the court is of the view that they could reasonably have known that their franchisee has breached workplace laws, they can be equally liable.

Be prepared to have to disprove allegations relating to wage claims in court. The onus of proof has been reversed for employers who do not meet their record-keeping or pay slip obligations without a reasonable excuse.

For international investors in Australia-based franchisors, the biggest challenge will lay in ensuring that franchisees are following the law, notwithstanding the fact that the parent franchisor may be many thousands of miles away. One way to minimize risk of franchisees breaching the law and, in doing so, exposing the parent franchisor to liability, is to have strict protocols and systems in place by which regular compliance audits are conducted. It is also recommended that individual staff members should be held accountable for ensuring compliance with all laws. This can be achieved by having carefully drafted contracts of employment. Working closely with an industrial and employment law specialist to assist with the development of these systems or protocols will be invaluable in minimizing this risk. P

1 Another example of the current government's push to hold overseas-based companies liable is in respect of tax avoidance, with increased penalties for the same currently set to be forwarded to the Commonwealth Parliament for consideration.

Primerus Attorney Uses Love of Music and the Law to Write Acclaimed Opera

When Derrick Wang was a first-year law student taking Constitutional Law and reading a thick textbook of Supreme Court cases, there were three "magic" words that always caught his attention: "Scalia, J., dissenting."

"Every time I saw those three words, everything that came after was astounding," said Wang, an attorney at Primerus firm Thomas & Libowitz, P.A. in Baltimore, Maryland. "It leapt off the page. You could say it was operatic."

Then came the counterpoint to opinions from Justice Antonin Scalia – those of Justice Ruth Bader Ginsburg.

"There was this great synergy that happened. The idea occurred to me that this would be so interesting on stage," Wang said. "Then I learned the two of them in real life are very good friends and bonded over a love for opera. So I decided: clearly, there's an opera here."

So Wang wrote a comic opera called *Scalia/Ginsburg*, inspired by the opinions of the U.S. Supreme Court justices.

In June 2013, the two justices invited Wang and opera singers from the Peabody Institute of Johns Hopkins University to perform sections of *Scalia/Ginsburg* for them in the East Conference Room at the Supreme Court of the United States. Nina Totenberg from NPR (National Public Radio) was also there to report about the event for "All Things Considered." The opera then had its world premiere at the Castleton Festival in Virginia in July 2015, followed by a sold-out second production in 2017 at The Glimmerglass Festival in Cooperstown, New York.

The critically-acclaimed opera brought world-wide publicity and dramatically changed life for Wang, who joined Thomas & Libowitz in November 2016.

"It was very heartening to know that people were interested in the idea of this opera," Wang said. "The funny thing is that the NPR story, including interviews with the justices, came out about three weeks before the bar exam. The resulting attention was very flattering, but I didn't have all the time in the world to respond right away."

A Maryland native, Wang's interest in music came before his interest in the law. He graduated from a private preparatory high school in Baltimore while studying piano at the Peabody Institute. He went on to earn his bachelor's degree in music from Harvard University and his master's degree in music composition from the Yale School of Music.

It was his interest in intellectual property – based on his experience as a musician – that drew him to attend law school at the University of Maryland Carey School of Law, where he was inspired to write the opera.

"All the words the singers are singing to each other are rooted in something they [the justices] said," Wang said. "The music harks back to landmark moments in operatic history in the same way the lyrics hark back to constitutional law."

Wang finds the friendship between the justices – one a liberal and one a conservative – inspiring. (Justice Scalia died in February 2016.)

"It is an example to us all of bringing people together over political divides," Wang said. "We are different, and we are one."

After graduating from law school in 2013, Wang took time to pursue publicizing the opera. He also spent time in Silicon Valley at a startup accelerator called Y Combinator, where he shadowed a group of over 100 startups while researching the creativity of tech entrepreneurship. Now, at Thomas & Libowitz, he focuses on intellectual property and business law, advising creative clients in all industries as they launch new businesses. "As a composer of a high-profile interdisciplinary musical work, Derrick Wang possesses a unique understanding of the relationship between proprietary intellectual property and the law, and this insight is of tremendous value to growing companies," said Steven Thomas, co-founder and CEO of Thomas & Libowitz.

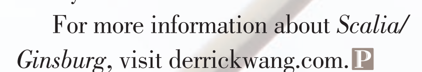
Wang also designs and teaches interdisciplinary courses on law and music at the Peabody Conservatory.

Wang looks for every opportunity to break down barriers and bring people together through law and music – whether by writing an opera based on the law, helping lawyers appreciate opera and helping opera fans appreciate the law, or making the law accessible to the public by showing how it intersects with other fields.

Wang is writing other musical and operatic works as well. Meanwhile, you'll find him practicing law in the offices of Thomas & Libowitz every day.

He urges others to also embrace their creativity and never let anyone put them in a box saying "this is who you are and this is what you do."

For more information about *Scalia/Ginsburg*, visit derrickwang.com.



Derrick Wang, writer of *Scalia/Ginsburg*

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Primerus Law Firm Directory – North America

Alphabetical by State/Country

Alabama — PBLI / PDI

Ball, Ball, Matthews & Novak, P.A.

107 Saint Francis Street, Suite 3340
Mobile, Alabama (AL) 36602

Contact: Ham Wilson
Phone: 251.338.2721
Email: hwilson@ball-ball.com
Website: ball-ball.com

Alabama — PBLI / PDI

Ball, Ball, Matthews & Novak, P.A.

445 Dexter Avenue, Suite 9045
Montgomery, Alabama (AL) 36104

Contact: Ham Wilson
Phone: 334.387.7680
Email: hwilson@ball-ball.com
Website: ball-ball.com

Alabama — PBLI / PDI

Christian & Small LLP

Suite 1800, Financial Center
505 North 20th Street
Birmingham, Alabama (AL) 35203

Contact: Duncan Y. Manley
Phone: 205.795.6588
Email: dymanley@csattorneys.com
Website: csattorneys.com

Alaska — PBLI / PDI

Matthews & Zahare, P.C.

911 West 8th Avenue, Suite 400
Anchorage, Alaska (AK) 99501

Contact: Thomas A. Matthews
Phone: 888.796.2925
Email: tom.matthews@matthewszahare.com
Website: mzlawoffice.com

Arizona — PBLI / PDI

Burch & Cracchiolo, P.A.

702 East Osborn, Suite 200
Phoenix, Arizona (AZ) 85014

Contact: David M. Villadolid
Phone: 602.274.7611
Email: dvilladolid@bcattorneys.com
Website: bcattorneys.com

California — PPII

Brayton Purcell LLP

222 Rush Landing Road
Novato, California (CA) 94945

Contact: James P. Nevin, Jr.
Phone: 415.898.1555
Email: jnevin@braytonlaw.com
Website: braytonlaw.com

California — PBLI

Buchman Provine Brothers Smith LLP

2033 North Main Street, Suite 720
Walnut Creek, California (CA) 94596

Contact: Roger J. Brothers
Phone: 925.944.9700
Email: rbrothers@bpbsllp.com
Website: bpbsllp.com

California — PBLI / PDI

Coleman & Horowitt, LLP

499 West Shaw Avenue, Suite 116
Fresno, California (CA) 93704

Contact: Darryl J. Horowitt
Phone: 559.248.4820
Email: dhorowitt@ch-law.com
Website: ch-law.com

California — PDI

Demler, Armstrong & Rowland, LLP

575 Market Street, Suite 2080
San Francisco, California (CA) 94105

Contact: John R. Brydon
Phone: 415.949.1900
Email: bry@darlaw.com
Website: darlaw.com

California — PDI

Dillingham & Murphy, LLP

601 Montgomery Street, Suite 1900
San Francisco, California (CA) 94111

Contact: Patrick J. Hagan
Phone: 415.277.2716
Email: pjh@dillinghammurphy.com
Website: dillinghammurphy.com

California — PDI

Farmer Smith & Lane, LLP

3620 American River Drive, Suite 218
Sacramento, California (CA) 95864

Contact: Blane A. Smith
Phone: 916.679.6565
Email: bsmith@farmersmithlaw.com
Website: farmersmithlaw.com

California — PBLI

Ferris & Britton, A Professional Corporation

501 West Broadway, Suite 1450
San Diego, California (CA) 92101

Contact: Michael R. Weinstein
Phone: 619.233.3131
Email: mweinstein@ferrisbritton.com
Website: ferrisbritton.com

California — PBLI

Greenberg Glusker

1900 Avenue of the Stars, 21st Floor
Los Angeles, California (CA) 90067

Contact: Brian L. Davidoff
Phone: 310.553.3610
Email: bdavidoff@greenbergglusker.com
Website: greenbergglusker.com

California — PDI

Hennelly & Grossfeld LLP

4640 Admiralty Way, Suite 850
Marina del Rey, California (CA) 90292

Contact: Michael G. King
Phone: 310.305.2100
Email: mking@hgla.com
Website: hennellygrossfeld.com

California — PDI

Neil, Dymott, Frank, McFall, McCabe & Hudson APLC

110 West A Street, Suite 1200
San Diego, California (CA) 92101

Contact: Hugh A. McCabe
Phone: 619.238.1712
Email: hmccabe@neildymott.com
Website: neildymott.com

Primerus Business Law Institute (PBLI) · Primerus Defense Institute (PDI) · Primerus Personal Injury Institute (PPII)

California — PBLI

Wilke, Fleury, Hoffelt, Gould & Birney, LLP

400 Capitol Mall
Twenty-Second Floor
Sacramento, California (CA) 95814

Contact: David A. Frenznick
Phone: 916.441.2430
Email: dfrenznick@wilkefleury.com
Website: wilkefleury.com

Colorado — PPII

Ogborn Mihm LLP

1700 Broadway, Suite 1900
Denver, Colorado (CO) 80290

Contact: Michael T. Mihm
Phone: 303.592.5900
Email: michael.mihm@omtrial.com
Website: omtrial.com

Colorado — PBLI

Timmins LLC

450 East 17th Avenue, Suite 210
Denver, Colorado (CO) 80203

Contact: Edward P. Timmins
Phone: 303.592.4500
Email: et@timminslaw.com
Website: timminslaw.com

Colorado — PDI

Zupkus & Angell, P.C.

789 Sherman Street, Suite 500
Denver, Colorado (CO) 80203

Contacts: Muliha Khan/Kristi Lush
Phone: 303.894.8948
Email: mkhan@zalaw.com
Website: zalaw.com

Connecticut — PBLI

Brody Wilkinson PC

2507 Post Road
Southport, Connecticut (CT) 06890

Contact: Thomas J. Walsh, Jr.
Phone: 203.319.7100
Email: twalsh@brodywilk.com
Website: brodywilk.com

Connecticut — PDI

Szilagyi & Daly

118 Oak Street
Hartford, Connecticut (CT) 06106

Contact: Frank J. Szilagyi
Phone: 860.541.5502
Email: fszilagyi@sdctlawfirm.com
Website: sdctlawfirm.com

Delaware — PBLI

Rosenthal, Monhait & Goddess, P.A.

919 North Market Street, Suite 1401
Wilmington, Delaware (DE) 19801

Contact: Norman Monhait
Phone: 302.656.4433
Email: nmonhait@rmgglaw.com
Website: rmgglaw.com

District of Columbia — PPII

Price Benowitz LLP

409 7th Street NW, Suite 200
Washington, District of Columbia (DC) 20004

Contact: Seth Price
Phone: 202.600.9400
Email: seth@pricebenowitz.com
Website: pricebenowitz.com

District of Columbia — PBLI

Stewart and Stewart

2100 M Street NW, Suite 200
Washington, District of Columbia (DC) 20037

Contact: Terence P. Stewart
Phone: 202.785.4185
Email: tstewart@stewartlaw.com
Website: stewartlaw.com

Florida — PBLI

Agentis Legal Advocates & Advisors

501 Brickell Key Drive, Suite 300
Miami, Florida (FL) 33131

Contact: Robert P. Charbonneau
Phone: 305.722.2002
Email: rpc@agentislaw.com
Website: agentislaw.com

Florida — PBLI

Bivins & Hemenway, P.A.

1060 Bloomingdale Avenue
Valrico, Florida (FL) 33596

Contact: Robert W. Bivins
Phone: 813.643.4900
Email: bbivins@bhpalaw.com
Website: bhpalaw.com

Florida — PBLI

Hodkin Stage Ward, PLLC

54 SW Boca Raton Boulevard
Boca Raton, Florida (FL) 33432

Contact: Adam Hodkin
Phone: 561.810.1600
Email: ahodkin@hswlawgroup.com
Website: hswlawgroup.com

Florida — PBLI / PPII

Mateer Harbert, P.A.

Two Landmark Center, Suite 600
225 East Robinson Street
Orlando, Florida (FL) 32801

Contacts: Kurt Thalwitzer/Brian Wagner
Phone: 407.425.9044
Email: kthalwitzer@mateerharbert.com
Website: mateerharbert.com

Florida — PDI

Nicklaus & Associates, P.A.

4651 Ponce de Leon Boulevard, Suite 200
Coral Gables, Florida (FL) 33146

Contact: Edward R. Nicklaus
Phone: 305.460.9888
Email: edwardn@nicklauslaw.com
Website: nicklauslaw.com

Florida — PDI

Ogden & Sullivan, P.A.

5422 Bay Center Drive, Suite 100
Tampa, Florida (FL) 33609

Contact: Timon V. Sullivan
Phone: 813.223.5111
Email: tsullivan@ogdensullivan.com
Website: ogdensullivan.com

Primerus Business Law Institute (PBLI) Primerus Defense Institute (PDI) Primerus Personal Injury Institute (PPII)

Florida — PDI

Saalfield Shad, P.A.

245 Riverside Avenue, Suite 400
Jacksonville, Florida (FL) 32202

Contacts: Clemente Inclan/Richard Stoudemire
Phone: 904.355.4401
Email: clemente.inclan@saalfieldlaw.com
Website: saalfieldlaw.com

Florida — PBLI / PDI

Widerman Malek, P.L.

1990 West New Haven Avenue, Suite 201
Melbourne, Florida (FL) 32904

Contact: Mark F. Warzecha
Phone: 321.255.2332
Email: mfw@uslegalteam.com
Website: uslegalteam.com

Georgia — PDI

Fain, Major & Brennan, P.C.

100 Glenridge Point Parkway NE, Suite 500
Atlanta, Georgia (GA) 30342

Contact: Thomas E. Brennan
Phone: 404.833.2540
Email: tbrennan@fainmajor.com
Website: fainmajor.com

Georgia — PBLI

Krevolin & Horst, LLC

1201 West Peachtree Street NW
One Atlantic Center, Suite 3250
Atlanta, Georgia (GA) 30309

Contact: Douglas P. Krevolin
Phone: 404.888.9700
Email: krevolin@khlawfirm.com
Website: khlawfirm.com

Georgia — PPII

Tate Law Group, LLC

2 East Bryan Street, Suite 600
Savannah, Georgia (GA) 31401

Contact: Mark A. Tate
Phone: 912.234.3030
Email: marktate@tatelawgroup.com
Website: tatelawgroup.com

Hawaii — PDI

Roeca Luria Shin LLP

900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii (HI) 96813

Contact: Arthur F. Roeca
Phone: 808.538.7500
Email: aroeca@rlhlaw.com
Website: rlhlaw.com

Idaho — PBLI / PDI

Elam & Burke

251 East Front Street, Suite 300
Boise, Idaho (ID) 83702

Contact: James A. Ford
Phone: 208.343.5454
Email: jaf@elamburke.com
Website: elamburke.com

Illinois — PBLI

Kozacky Weitzel McGrath, P.C.

55 West Monroe Street, Suite 2400
Chicago, Illinois (IL) 60603

Contact: Jerome R. Weitzel
Phone: 312.696.0900
Email: jweitzel@kwmlawyers.com
Website: kwmlawyers.com

Illinois — PPII

Lane & Lane, LLC

230 West Monroe Street, Suite 1900
Chicago, Illinois (IL) 60606

Contact: Stephen I. Lane
Phone: 312.332.1400
Email: stevelane@lane-lane.com
Website: lane-lane.com

Illinois — PDI

Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.

230 West Monroe Street, Suite 2260
Chicago, Illinois (IL) 60606

Contacts: Raymond Lyons, Jr./Bradley C. Nahrstadt
Phone: 312.448.6230
Email: rl@lipelyons.com
Website: lipelyons.com

Illinois — PDI

Roberts Perryman

6608 West Main Street, Suite 1
Belleville, Illinois (IL) 62223

Contact: Ted L. Perryman
Phone: 314.421.1850
Email: tperryman@robertsperryman.com
Website: robertsperryman.com

Indiana — PBLI / PDI

Jones Obenchain, LLP

202 South Michigan Street, Suite 600
South Bend, Indiana (IN) 46634

Contact: Jacqueline Sells Homann
Phone: 574.233.1194
Email: jsh@jonesobenchain.com
Website: jonesobenchain.com

Indiana — PDI

Whitten Law Office

6801 Gray Road, Suite H
Indianapolis, Indiana (IN) 46237

Contact: Christopher R. Whitten
Phone: 317.362.0225
Email: cwhitten@indycounsel.com
Website: indycounsel.com

Kentucky — PBLI

Eddins Domine Law Group, PLLC

3950 Westport Road
Louisville, Kentucky (KY) 40207

Contact: H. Kevin Eddins
Phone: 502.893.2350
Email: keddins@louisvillelawyers.com
Website: louisvillelawyers.com

Kentucky — PBLI / PDI

Fowler Bell PLLC

300 West Vine Street, Suite 600
Lexington, Kentucky (KY) 40507

Contact: John E. Hinkel, Jr.
Phone: 859.554.2877
Email: jhinkel@fowlerlaw.com
Website: fowlerlaw.com

Primerus Business Law Institute (PBLI) | Primerus Defense Institute (PDI) | Primerus Personal Injury Institute (PPII)

Kentucky — PDI

Thompson Miller & Simpson PLC

734 West Main Street, Suite 400
Louisville, Kentucky (KY) 40202

Contact: W. Kennedy Simpson
Phone: 502.585.9900
Email: ksimpson@tmslawplc.com
Website: tmslawplc.com

Louisiana — PDI

Degan, Blanchard & Nash, PLC

5555 Hilton Avenue, Suite 620
Baton Rouge, Louisiana (LA) 70808

Contact: Sidney W. Degan, III
Phone: 225.610.1110
Email: sdegan@degan.com
Website: degan.com

Louisiana — PDI

Degan, Blanchard & Nash, PLC

Texaco Center, Suite 2600
400 Poydras Street
New Orleans, Louisiana (LA) 70130

Contact: Sidney W. Degan, III
Phone: 504.529.3333
Email: sdegan@degan.com
Website: degan.com

Louisiana — PBLI

Gordon Arata Montgomery Barnett

301 Main Street, Suite 1170
Baton Rouge, Louisiana (LA) 70801

Contact: John Y. Pearce
Phone: 225.329.2800
Email: jpearce@gamb.law
Website: gamb.law

Louisiana — PBLI

Gordon Arata Montgomery Barnett

201 St. Charles Avenue
40th Floor
New Orleans, Louisiana (LA) 70170

Contact: John Y. Pearce
Phone: 504.582.1111
Email: jpearce@gamb.law
Website: gamb.law

Louisiana — PPII

Herman Herman & Katz, LLC

820 O'Keefe Avenue
New Orleans, Louisiana (LA) 70113

Contact: Brian D. Katz
Phone: 504.581.4892
Email: bkatz@hhklawfirm.com
Website: hhklawfirm.com

Maine — PBLI / PDI

The Bennett Law Firm, P.A.

121 Middle Street, Suite 300
Portland, Maine (ME) 04101

Contact: Peter Bennett
Phone: 207.773.4775
Email: pbennett@thebennettlawfirm.com
Website: thebennettlawfirm.com

Maryland — PPII

Dugan, Babij, Tolley & Kohler, LLC

1966 Greenspring Drive, Suite 500
Timonium, Maryland (MD) 21093

Contact: Henry E. Dugan, Jr.
Phone: 410.308.1600
Email: hdugan@medicalneg.com
Website: medicalneg.com

Maryland — PBLI

Thomas & Libowitz, P.A.

100 Light Street, Suite 1100
Baltimore, Maryland (MD) 21202

Contact: Steven A. Thomas
Phone: 410.752.2468
Email: sthomas@tandllaw.com
Website: tandllaw.com

Massachusetts — PDI

Hermes, Netburn, O'Connor & Spearing, P.C.

265 Franklin Street, Seventh Floor
Boston, Massachusetts (MA) 02110

Contact: Holly Polglase
Phone: 617.728.0050
Email: hpolglase@hermesnetburn.com
Website: hermesnetburn.com

Massachusetts — PBLI

Rudolph Friedmann LLP

92 State Street
Boston, Massachusetts (MA) 02109

Contact: James L. Rudolph
Phone: 617.723.7700
Email: jrudolph@rflawyers.com
Website: rflawyers.com

Michigan — PDI

Bos & Glazier, PLC

990 Monroe Avenue NW
Grand Rapids, Michigan (MI) 49503

Contact: Carole D. Bos
Phone: 616.458.6814
Email: cbos@bosglazier.com
Website: bosglazier.com

Michigan — PPII

Buchanan & Buchanan, P.L.C.

171 Monroe Avenue NW, Suite 750
Grand Rapids, Michigan (MI) 49503

Contact: Robert J. Buchanan
Phone: 616.458.2464
Email: rjb@buchananfirm.com
Website: buchananfirm.com

Michigan — PDI

Cardelli Lanfear Law

322 West Lincoln Avenue
Royal Oak, Michigan (MI) 48067

Contact: Thomas G. Cardelli
Phone: 248.544.1100
Email: tcardelli@cardellilaw.com
Website: cardellilaw.com

Michigan — PBLI

Demorest Law Firm, PLLC

322 West Lincoln Avenue, Suite 300
Royal Oak, Michigan (MI) 48067

Contact: Melissa Demorest LeDuc
Phone: 248.723.5500
Email: melissa@demolaw.com
Website: demolaw.com

Primerus Business Law Institute (PBLI) · Primerus Defense Institute (PDI) · Primerus Personal Injury Institute (PPII)

Michigan — PPII

McKeen & Associates, P.C.

645 Griswold Street, Suite 4200
Detroit, Michigan (MI) 48226

Contact: Brian J. McKeen
Phone: 313.447.0634
Email: bjmckeen@mckeenassociates.com
Website: mckeenassociates.com

Michigan — PBLI

Silver & Van Essen, PC

300 Ottawa Avenue NW, Suite 620
Grand Rapids, Michigan (MI) 49503

Contact: Lee T. Silver
Phone: 616.988.5600
Email: ltsilver@silvervanessen.com
Website: silvervanessesn.com

Minnesota — PDI

O'Meara, Leer, Wagner & Kohl, P.A.

7401 Metro Boulevard, Suite 600
Minneapolis, Minnesota (MN) 55439

Contact: Dale O. Thornsjo
Phone: 952.831.6544
Email: dothornsjo@olwklaw.com
Website: olwklaw.com

Minnesota — PDI

Oppegard Law Firm

2901 South Frontage Road
Moorhead, Minnesota (MN) 56560

Contact: Paul R. Oppegard
Phone: 218.233.8105
Email: poppegard@owqlaw.com
Website: owqlaw.com

Mississippi — PDI / PBLI

Dukes, Dukes, Keating & Faneca, P.A.

2909 13th Street, Sixth Floor
Gulfport, Mississippi (MS) 39501

Contacts: Walter W. Dukes/Haley Necaise Broom
Phone: 228.868.1111
Email: walter@ddkf.com
Website: ddkf.com

Mississippi — PDI / PBLI

Dukes, Dukes, Keating & Faneca, P.A.

100 Dudley W. Conner Street
Hattiesburg, Mississippi (MS) 39401

Contacts: Walter W. Dukes/Haley Necaise Broom
Phone: 601.583.0999
Email: walter@ddkf.com
Website: ddkf.com

Missouri — PDI

Foland, Wickens, Roper, Hofer & Crawford, P.C.

1200 Main Street, Suite 2200
Kansas City, Missouri (MO) 64105

Contact: Scott D. Hofer
Phone: 816.472.7474
Email: shofer@fwpclaw.com
Website: fwpclaw.com

Missouri — PBLI

Martin Leigh PC

1044 Main Street, Suite 900
Kansas City, Missouri (MO) 64105

Contact: Thomas J. Fritzlen, Jr.
Phone: 816.221.1430
Email: tjf@martinleigh.com
Website: martinleigh.com

Missouri — PDI

Roberts Perryman

1354 East Kingsley, Suite B
Springfield, Missouri (MO) 65804

Contact: Ted L. Perryman
Phone: 417.771.3121
Email: tperryman@robertsperryman.com
Website: robertsperryman.com

Missouri — PDI

Roberts Perryman

1034 South Brentwood, Suite 2100
St. Louis, Missouri (MO) 63117

Contact: Ted L. Perryman
Phone: 314.421.1850
Email: tperryman@robertsperryman.com
Website: robertsperryman.com

Missouri — PBLI

Rosenblum Goldenhersh

7733 Forsyth Boulevard, Fourth Floor
St. Louis, Missouri (MO) 63105

Contact: Carl C. Lang
Phone: 314.726.6868
Email: clang@rgsz.com
Website: rosenblumgoldenhersh.com

Montana — PBLI / PPII

Datsopoulos, MacDonald & Lind, P.C.

Central Square Building
201 West Main Street, Suite 201
Missoula, Montana (MT) 59802

Contact: William K. VanCanagan
Phone: 406.728.0810
Email: bvancanagan@dmllaw.com
Website: dmllaw.com

Nevada — PDI

Atkin Winner & Sherrod

1117 South Rancho Drive
Las Vegas, Nevada (NV) 89102

Contact: Thomas E. Winner
Phone: 702.243.7000
Email: twinner@awslawyers.com
Website: awslawyers.com

Nevada — PDI

Laxalt & Nomura, LTD

9790 Gateway Drive, Suite 200
Reno, Nevada (NV) 89521

Contact: Daniel T. Hayward
Phone: 775.322.1170
Email: dhayward@laxalt-nomura.com
Website: laxalt-nomura.com

Nevada — PDI

Stephenson & Dickinson Law Office

2820 West Charleston Boulevard, Suite 19
Las Vegas, Nevada (NV) 89102

Contacts: Bruce Dickinson/Marsha Stephenson
Phone: 702.474.7229
Email: bdickinson@sdlawoffice.net
Website: stephensonanddickinson.com

Primerus Business Law Institute (PBLI) | Primerus Defense Institute (PDI) | Primerus Personal Injury Institute (PPII)

New Jersey | PBLI

Earp Cohn P.C.

20 Brace Road, 4th Floor
Cherry Hill, New Jersey (NJ) 08034

Contact: Richard B. Cohn
Phone: 856.354.7700
Email: rbcohn@earpcohn.com
Website: earpcohn.com

New Jersey | PPII

Lesnevich, Marzano-Lesnevich, Trigg, O'Cathain & O'Cathain, LLC

21 Main Street, Court Plaza South
West Wing, Suite 250
Hackensack, New Jersey (NJ) 07601

Contact: Walter A. Lesnevich
Phone: 201.488.1161
Email: wal@lmllawyers.com
Website: lmllawyers.com

New Jersey | PBLI

Mandelbaum Salsburg P.C.

3 Becker Farm Road, Suite 105
Roseland, New Jersey (NJ) 07068

Contact: Robin F. Lewis
Phone: 973.736.4600
Email: rlewis@lawfirm.ms
Website: lawfirm.ms

New Jersey | PDI

Thomas Paschos & Associates, P.C.

30 North Haddon Avenue, Suite 200
Haddonfield, New Jersey (NJ) 08033

Contact: Thomas Paschos
Phone: 856.354.1900
Email: tpaschos@paschoslaw.com
Website: paschoslaw.com

New Mexico | PBLI | PDI

Hinkle Shanor LLP

7601 Jefferson NE, Suite 180
Albuquerque, New Mexico (NM) 87109

Contact: Mary Moran Behm
Phone: 505.858.8320
Email: mbehm@hinklelawfirm.com
Website: hinklelawfirm.com

New Mexico | PBLI | PDI

Hinkle Shanor LLP

400 Pennsylvania, Suite 640
Roswell, New Mexico (NM) 88201

Contact: Richard Olson
Phone: 575.622.6510
Email: rolson@hinklelawfirm.com
Website: hinklelawfirm.com

New Mexico | PBLI | PDI

Hinkle Shanor LLP

218 Montezuma Avenue
Santa Fe, New Mexico (NM) 87501

Contact: Jaclyn M. McLean
Phone: 505.982.4554
Email: jmclean@hinklelawfirm.com
Website: hinklelawfirm.com

New York | PBLI

Barton LLP

Graybar Building, 18th Floor
420 Lexington Avenue
New York, New York (NY) 10170

Contact: Roger E. Barton
Phone: 212.687.6262
Email: rbarton@bartonesq.com
Website: bartonesq.com

New York | PBLI | PPII | PDI

Coughlin & Gerhart, LLP

99 Corporate Drive
Binghamton, New York (NY) 13904

Contact: James P. O'Brien
Phone: 607.821.2202
Email: jobrien@cglawoffices.com
Website: cglawoffices.com

New York | PBLI

Ganfer & Shore, LLP

360 Lexington Avenue, 14th Floor
New York, New York (NY) 10017

Contact: Mark A. Berman
Phone: 212.922.9250
Email: mberman@ganfershore.com
Website: ganfershore.com

New York | PDI

Lewis Johs Avallone Aviles, LLP

One CA Plaza, Suite 225
Islandia, New York (NY) 11749

Contact: Robert J. Avallone
Phone: 631.755.0101
Email: rjavallone@lewisjohs.com
Website: lewisjohs.com

New York | PDI

Lewis Johs Avallone Aviles, LLP

61 Broadway, Suite 2000
New York, New York (NY) 10006

Contact: Robert J. Avallone
Phone: 212.233.7195
Email: rjavallone@lewisjohs.com
Website: lewisjohs.com

New York | PBLI | PDI

Nolan & Heller, LLP

39 North Pearl Street, 3rd Floor
Albany, New York (NY) 12207

Contact: Justin Heller
Phone: 518.449.3300
Email: jheller@nolanandheller.com
Website: nolanandheller.com

New York | PBLI | PDI

Trevett Cristo P.C.

2 State Street, Suite 1000
Rochester, New York (NY) 14614

Contact: Louis B. Cristo
Phone: 585.454.2181
Email: lcristo@trevettcristo.com
Website: trevettcristo.com

North Carolina | PPII

Charles G. Monnett III & Associates

6842 Morrison Boulevard, Suite 100
Charlotte, North Carolina (NC) 28211

Contact: Charles G. Monnett, III
Phone: 704.376.1911
Email: cmonnett@carolinalaw.com
Website: carolinalaw.com

Primerus Business Law Institute (PBLI) | Primerus Defense Institute (PDI) | Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

North Carolina — PBLI

Horack, Talley, Pharr & Lowndes, P.A.

2600 One Wells Fargo Center
301 South College Street
Charlotte, North Carolina (NC) 28202

Contact: Clayton S. Curry, Jr.
Phone: 704.377 2500
Email: scurry@horacktalley.com
Website: horacktalley.com

North Carolina — PBLI

Smith Debnam Narron Drake Saintsing & Myers, LLP

4601 Six Forks Road, Suite 400
Raleigh, North Carolina (NC) 27609

Contact: Byron L. Saintsing
Phone: 919.250.2000
Email: bsaintsing@smithdebnamlaw.com
Website: smithdebnamlaw.com

North Dakota — PDI

Oppegard Law Firm

2309 Rose Creek Boulevard South
Fargo, North Dakota (ND) 58104

Contact: Paul R. Oppegard
Phone: 218.233.8105
Email: poppegard@owqlaw.com
Website: owqlaw.com

Ohio — PPII

Mellino Law Firm, LLC

19704 Center Ridge Road
Rocky River, Ohio (OH) 44116

Contact: Christopher M. Mellino
Phone: 440.333.3800
Email: listserv@mellinolaw.com
Website: christophermellino.com

Ohio — PDI

Norchi Forbes, LLC

Commerce Park IV
23240 Chagrin Boulevard, Suite 210
Cleveland, Ohio (OH) 44122

Contact: Kevin M. Norchi
Phone: 216.514.9500
Email: kmn@norchilaw.com
Website: norchilaw.com

Ohio — PBLI

Schneider Smeltz Spieth Bell LLP

1375 East 9th Street, Suite 900
Cleveland, Ohio (OH) 44114

Contact: James D. Vail
Phone: 216.696.4200
Email: jvail@sssb-law.com
Website: sssb-law.com

Oklahoma — PBLI

Dunlap Codding

609 West Sheridan Avenue
Oklahoma City, Oklahoma (OK) 73102

Contact: Douglas J. Sorocco
Phone: 405.607.8600
Email: dsorocco@dunlapcodding.com
Website: dunlapcodding.com

Oklahoma — PBLI / PPII

Fogg Law Firm

421 South Rock Island
El Reno, Oklahoma (OK) 73036

Contact: Richard M. Fogg
Phone: 405.262.3502
Email: richard@fogglawfirm.com
Website: fogglawfirm.com

Oklahoma — PPII

The Handley Law Center

111 South Rock Island Avenue
El Reno, Oklahoma (OK) 73036

Contact: Fletcher D. Handley, Jr.
Phone: 405.295.1924
Email: fdh@handleylaw.com
Website: handleylaw.com

Oklahoma — PBLI

James, Potts & Wulfers, Inc.

2600 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma (OK) 74103

Contact: David W. Wulfers
Phone: 918.584.0881
Email: dwulf@jpwlaw.com
Website: jpwlaw.com

Oklahoma — PDI

Smiling, Smiling & Burgess

Bradford Place, Suite 300
9175 South Yale Avenue
Tulsa, Oklahoma (OK) 74137

Contact: A. Mark Smiling
Phone: 918.477.7500
Email: msmiling@smilinglaw.com
Website: smilinglaw.com

Oregon — PDI

Brisbee & Stockton LLC

139 NE Lincoln Street
Hillsboro, Oregon (OR) 97124

Contact: Drake A. Hood
Phone: 503.648.6677
Email: dah@brisbeeandstockton.com
Website: brisbeeandstockton.com

Oregon — PBLI

Haglund Kelley, LLP

200 SW Market Street, Suite 1777
Portland, Oregon (OR) 97201

Contact: Michael E. Haglund
Phone: 503.225.0777
Email: mhaglund@hk-law.com
Website: hk-law.com

Pennsylvania — PBLI / PPII

Earp Cohn P.C.

123 South Broad Street, Suite 1030
Philadelphia, Pennsylvania (PA) 19109

Contact: Richard B. Cohn
Phone: 215.963.9520
Email: rbcohn@earpcohn.com
Website: earpcohn.com

Pennsylvania — PBLI

Rothman Gordon

Third Floor, Grant Building
310 Grant Street
Pittsburgh, Pennsylvania (PA) 15219

Contact: William E. Lestitian
Phone: 412.338.1116
Email: welestitian@rothmangordon.com
Website: rothmangordon.com

Primerus Business Law Institute (PBLI) — Primerus Defense Institute (PDI) — Primerus Personal Injury Institute (PPII)

Pennsylvania — PDI

Summers, McDonnell, Hudock, Guthrie & Rauch, P. C.

945 East Park Drive
Suite 201
Harrisburg, Pennsylvania (PA) 17111

Contact: Kevin Rauch
Phone: 717.901.5916
Email: krauch@summersmcdonnell.com
Website: summersmcdonnell.com

Pennsylvania — PDI

Summers, McDonnell, Hudock, Guthrie & Rauch, P. C.

Gulf Tower, Suite 2400
707 Grant Street
Pittsburgh, Pennsylvania (PA) 15219

Contact: Stephen J. Summers
Phone: 412.261.3232
Email: ssummers@summersmcdonnell.com
Website: summersmcdonnell.com

Pennsylvania — PDI

Law Offices of Thomas J. Wagner, LLC

8 Penn Center, 6th Floor
1628 John F. Kennedy Boulevard
Philadelphia, Pennsylvania (PA) 19103

Contact: Thomas J. Wagner
Phone: 215.790.0761
Email: tjwagner@wagnerlaw.net
Website: wagnerlaw.net

Rhode Island — PBLI, PDI

McKenney, Quigley & Clarkin, LLP

72 Pine Street, 4th Floor
Providence, Rhode Island (RI) 02903

Contact: Peter Clarkin
Phone: 401.490.2650
Email: pclarkin@mqc-law.com
Website: mqc-law.com

South Carolina — PDI

Collins & Lacy, P.C.

1330 Lady Street, Sixth Floor
Columbia, South Carolina (SC) 29201

Contacts: Joel Collins, Jr./Christian Stegmaier
Phone: 803.256.2660
Email: jcollins@collinsandlacy.com
Website: collinsandlacy.com

South Carolina — PBLI, PDI

Roe Cassidy Coates & Price, P.A.

1052 North Church Street
Greenville, South Carolina (SC) 29601

Contacts: William A. Coates/Carroll “Pete” Roe, Jr.
Phone: 864.349.2601
Email: wac@roecassidy.com
Website: roecassidy.com

South Carolina — PBLI, PPII, PDI

Rosen Hagood

151 Meeting Street, Suite 400
Charleston, South Carolina (SC) 29401

Contacts: Alice F. Paylor/Richard S. Rosen
Phone: 843.577.6726
Email: apaylor@rrhlawfirm.com
Website: rrhlawfirm.com

Tennessee — PPII

Kinnard, Clayton & Beveridge

127 Woodmont Boulevard
Nashville, Tennessee (TN) 37205

Contact: Randall Kinnard
Phone: 615.933.2893
Email: rkinnard@kcbattys.com
Website: kinnardclaytonandbeveridge.com

Tennessee — PBLI, PDI

Spicer Rudstrom PLLC

537 Market Street, Suite 203
Chattanooga, Tennessee (TN) 37402

Contact: Robert J. Uhorchuk
Phone: 423.756.0262
Email: info@spicerfirm.com
Website: spicerfirm.com

Tennessee — PDI

Spicer Rudstrom PLLC

119 South Main, Suite 700
Memphis, Tennessee (TN) 38103

Contact: S. Newton Anderson
Phone: 901.523.1333
Email: info@spicerfirm.com
Website: spicerfirm.com

Tennessee — PBLI, PDI

Spicer Rudstrom PLLC

414 Union Street, Suite 1700
Nashville, Tennessee (TN) 37219

Contact: Marc O. Dedman
Phone: 615.259.9080
Email: info@spicerfirm.com
Website: spicerfirm.com

Texas — PDI

Donato, Minx, Brown & Pool, P.C.

3200 Southwest Freeway, Suite 2300
Houston, Texas (TX) 77027

Contact: Aaron M. Pool
Phone: 713.877.1112
Email: apool@donatominxbrown.com
Website: donatominxbrown.com

Texas — PDI

Downs ♦ Stanford, P.C.

2001 Bryan Street, Suite 4000
Dallas, Texas (TX) 75201

Contact: Jay R. Downs
Phone: 214.748.7900
Email: jdowns@downsstanford.com
Website: downsstanford.com

Texas — PBLI

Moses, Palmer & Howell, L.L.P.

309 West 7th Street, Suite 815
Fort Worth, Texas (TX) 76102

Contact: David A. Palmer
Phone: 817.255.9100
Email: dpalmer@mph-law.com
Website: mph-law.com

Texas — PBLI

O’Donnell, Ferebee & Frazer, P.C.

Two Hughes Landing
1790 Hughes Landing Boulevard, Suite 550
The Woodlands, Texas (TX) 77380

Contact: Jason L. Frazer
Phone: 281.875.8200
Email: jfrazer@ofmflaw.com
Website: ofmflaw.com

Primerus Business Law Institute (PBLI) | Primerus Defense Institute (PDI) | Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

Texas — PBLI / PPII

Shaw Cowart LLP

1609 Shoal Creek Boulevard, Suite 100
Austin, Texas (TX) 78701

Contact: Ethan L. Shaw
Phone: 512.499.8900
Email: elshaw@shawcowart.com
Website: shawcowart.com

Texas — PDI

Thornton, Biechlin, Reynolds & Guerra, L.C.

418 East Dove Avenue
McAllen, Texas (TX) 78504

Contact: Tim K. Singley
Phone: 956.630.3080
Email: tsingley@thorntonfirm.com
Website: thorntonfirm.com

Texas — PDI

Thornton, Biechlin, Reynolds & Guerra, L.C.

100 NE Loop 410, Suite 500
San Antonio, Texas (TX) 78216

Contact: Richard J. Reynolds, III
Phone: 210.342.5555
Email: rreynolds@thorntonfirm.com
Website: thorntonfirm.com

Utah — PPII / PDI

Magleby Cataxinos & Greenwood

170 South Main Street, Suite 1100
Salt Lake City, Utah (UT) 84101

Contact: Donald J. Winder
Phone: 801.359.9000
Email: winder@mcgiplaw.com
Website: mcgiplaw.com

Utah — PBLI

Prince Yeates

15 West South Temple, Suite 1700
Salt Lake City, Utah (UT) 84101

Contact: Thomas R. Barton
Phone: 801.524.1000
Email: tbarton@princeyeates.com
Website: princeyeates.com

Vermont — PBLI / PDI

McNeil Leddy & Sheahan, P.C.

271 South Union Street
Burlington, Vermont (VT) 05401

Contacts: William F. Ellis/Michael J. Leddy
Phone: 802.863.4531
Email: wellis@mcneilvt.com
Website: mcneilvt.com

Virginia — PBLI / PDI

Goodman Allen Donnelly

4501 Highwoods Parkway, Suite 210
Glen Allen, Virginia (VA) 23060

Contact: G. Wythe Michael, Jr.
Phone: 804.346.0600
Email: wmichael@goodmanallen.com
Website: goodmanallen.com

Virginia — PBLI / PDI

Wharton Aldhizer & Weaver, PLC

100 South Mason Street
Harrisonburg, Virginia (VA) 22801

Contacts: Thomas E. Ullrich/Jeffrey R. Adams
Phone: 540.434.0316
Email: tullrich@wawlaw.com
Website: wawlaw.com

Washington — PBLI

Beresford Booth PLLC

145 3rd Avenue South
Edmonds, Washington (WA) 98020

Contact: David C. Tingstad
Phone: 425.776.4100
Email: davidt@beresfordlaw.com
Website: beresfordlaw.com

Washington — PDI

Johnson Graffe Keay Moniz & Wick, LLP

925 Fourth Avenue, Suite 2300
Seattle, Washington (WA) 98104

Contact: John C. Graffe, Jr.
Phone: 206.223.4770
Email: johng@jgkmw.com
Website: jgkmw.com

Washington — PDI

Johnson Graffe Keay Moniz & Wick, LLP

2115 North 30th Street, Suite 101
Tacoma, Washington (WA) 98403

Contact: Christopher W. Keay
Phone: 253.572.5323
Email: ckeay@jgkmw.com
Website: jgkmw.com

Washington — PPII

Menzer Law Firm, PLLC

705 2nd Avenue, #800
Seattle, Washington (WA) 98104

Contact: Matthew N. Menzer
Phone: 206.903.1818
Email: mnm@menzerlawfirm.com
Website: menzerlawfirm.com

West Virginia — PPII

The Masters Law Firm, L.C.

181 Summers Street
Charleston, West Virginia (WV) 25301

Contact: Marvin W. Masters
Phone: 800.342.3106
Email: mwm@themasterslawfirm.com
Website: themasterslawfirm.com

Wisconsin — PBLI

Kohner, Mann & Kailas, S.C.

Washington Building, Barnabas Business Center
4650 North Port Washington Road
Milwaukee, Wisconsin (WI) 53212

Contact: Steve Kailas
Phone: 414.962.5110
Email: skailas@kmksc.com
Website: kmksc.com

Wyoming — PPII

Gary L. Shockey, PC

P.O. Box 10773
Jackson, Wyoming (WY) 83002

Contact: Gary L. Shockey
Phone: 307.733.5974
Email: gary@garyshockeylaw.com
Website: garyshockeylaw.com

Primerus Business Law Institute (PBLI) | Primerus Defense Institute (PDI) | Primerus Personal Injury Institute (PPII)

Primerus Law Firm Directory – North America

Alphabetical by State/Country

Colored Houses, Iglesia de San Roque Market – Guanajuato, Mexico

British Columbia, Canada PBLI

Koffman Kalef LLP

19th Floor, 885 West Georgia Street
Vancouver, British Columbia, Canada V6C 3H4

Contact: Jim M.J. Alam
Phone: 604.891.3688
Email: jja@kkbl.com
Website: kkbl.com

Manitoba, Canada PBLI

Pullan Kammerloch Frohlinger Lawyers

300 - 240 Kennedy Street
Winnipeg, Manitoba, Canada R3C 1T1

Contact: Thomas G. Frohlinger
Phone: 204.956.0490
Email: tfrohlinger@pkflawyers.com
Website: pkflawyers.com

Quebec, Canada PBLI

Greenspoon Bellemare

Scotia Tower, 1002 Sherbrooke Street West
Suite 1900
Montreal, Quebec, Canada H3A 3L6

Contact: Howard Greenspoon
Phone: 514.499.9400
Email: hgreenspoon@gplegal.com
Website: gblegal.ca

Ontario, Canada PBLI

Houser Henry & Syron LLP

145 King Street West, Suite 2701
Toronto, Ontario, Canada M5H 1J8

Contact: Michael R. Henry
Phone: 416.362.3411
Email: mhenry@houserhenry.com
Website: houserhenry.com

Mexico PBLI

Cacheaux Cavazos & Newton

Avenida Tecamachalco No. 14-502
Colonia Lomas de Chapultepec
Mexico City, Mexico C.P. 11010

Contact: Felipe Chapula
Phone: +52 55 5093 9700
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Ignacio Herrera y Cairo 2835 Piso 3
Fracc. Terranova
Guadalajara, Jalisco, Mexico C.P. 44689

Contact: Edmundo Elias-Fernandez
Phone: +52 33 2003 0737
Email: eelias@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Edificio Centura, Blvd. Agua Caliente
No. 10611-1001
Tijuana, Baja California, Mexico C.P. 22420

Contact: Javier Zapata
Phone: +52 664 634 7790
Email: jzapata@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Boulevard Tomas Fernandez No. 7930
Edificio A, Suite 20
Ciudad Juarez, Chihuahua, Mexico C.P. 32460

Contact: Felipe Chapula
Phone: +52 656 648 7127
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Edificio VAO 2 David Alfaro Siqueiros No. 104
Int. 1505 Colonia Valle Oriente
San Pedro Garza Garcia, N.L., Mexico C.P. 66269

Contact: Jorge Ojeda
Phone: +52 81 8363 9099
Email: jojeda@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Boulevard Centro Sur No 98 oficina 101
Colonia Colinas del Cimatario
Queretaro, Queretaro C.P. 76090

Contact: Felipe Chapula
Phone: +52 442 262 0316
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Boulevard Los Leones, Suite 318
Colonia Los Leones
Reynosa, Tamaulipas, Mexico C.P. 88690

Contact: Felipe Chapula
Phone: +52 899 923 9940
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Honduras No. 144 Altos
Colonia Modelo
Matamoros, Tamaulipas, Mexico C.P. 87360

Contact: Felipe Chapula
Phone: +52 868 816 5818
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Puerto Rico PBLI

Estrella, LLC

150 Tetuan Street
San Juan, Puerto Rico 00901

Contact: Alberto G. Estrella
Phone: 787.977.5050
Email: agestrella@estrellallc.com
Website: estrellallc.com

Primerus Business Law Institute (PBLI)

Primerus Law Firm Directory – Europe, Middle East & Africa

Alphabetical by Country

Austria PBLI

Lansky, Ganzger + partner

Biberstrasse 5
Vienna, Austria 1010

Contact: Ronald Frankl
Phone: +43 1 533 33 30 0
Email: frankl@lansky.at
Website: lansky.at

Belgium PBLI

ORYS Advocaten

Wolvengracht 38 bus 2
Brussels, Belgium 1000

Contact: Koen De Puydt
Phone: +32 2 410 10 66
Email: koen.depuydt@orys.be
Website: orys.be

Croatia PBLI

Vukmir & Associates

Gramaca 2L
Zagreb, Croatia 10000

Contact: Tomislav Pedišic
Phone: +385 1376 0511
Email: tomislav.pedisic@vukmir.net
Website: vukmir.net

Denmark PBLI

Koenig & Partners Law Firm

Amaliegade 22
Copenhagen, Denmark 1256

Contact: Niels Thestrup
Phone: +45 3370 2000
Email: nt@danlaw.dk
Website: danlaw.dk

France PBLI

Vatier

41 avenue de Friedland
Paris, France 75008

Contacts: Pascal Le Dai/Amelie Vatier
Phone: +33 1 53 43 15 55
Email: p.ledai@vatier.com
Website: vatier.com

Germany PBLI

Broedermann Jahn

ABC-Straße 15
Hamburg, Germany 20354

Contact: Prof. Dr. Eckart Broedermann
Phone: +49 40 37 09 05 0
Email: eckart.broedermann@german-law.com
Website: german-law.com

Germany PBLI

WINHELLER Attorneys at Law & Tax Advisors

Tower 185
Friedrich-Ebert-Anlage 35-37
Frankfurt am Main, Germany D-60327

Contact: Stefan Winheller
Phone: +49 69 76 75 77 80
Email: primerus@winheller.com
Website: winheller.com

Hungary PBLI

Fusthy & Manyai Law Office

Lajos u. 74-76
Budapest, Hungary H-1036

Contact: Dr. Zsolt Fusthy
Phone: +36 1 454 1766
Email: zfusthy@fusthylawoffice.hu
Website: fusthylawoffice.hu

Italy PBLI

FDL Studio legale e tributario

Piazza Borromeo, 12
Milan, Italy 20123

Contact: Giuseppe Cattani
Phone: +39 02 72 14 921
Email: g.cattani@fdl-lex.it
Website: fdl-lex.it

Kenya PBLI

Njoroge Regeru & Company

Arbor House, Arboretum Drive
P.O. Box 46971
Nairobi, Kenya 00100 GPO

Contact: Njoroge Regeru
Phone: +254 20 3586592
Email: njoroge@njorogeregeru.com
Website: njorogeregeru.com

Netherlands PBLI

Russell Advocaten B.V.

Reimersbeek 2
Amsterdam, Netherlands 1082 AG

Contact: Reinier W.L. Russell
Phone: +31 20 301 55 55
Email: reinier.russell@russell.nl
Website: russell.nl

Nigeria PBLI

Giwa-Osagie & Company

4, Lalupon Close, Off Keffi Street S.W. Ikoyi
P.O. Box 51057, Ikoyi
Lagos, Nigeria

Contact: Osayaba Giwa-Osagie
Phone: +234 1 2707433
Email: giwa-osagie@giwa-osagie.com
Website: giwa-osagie.com

Spain PBLI

1961 Abogados y Economistas

Mestre Nicolau 19, 2ª planta
Barcelona, Spain 08021

Contact: Carlos Jiménez
Phone: +34 933 663 990
Email: cjb@1961bcn.com
Website: 1961bcn.com

Spain PBLI

Dr. Fruhbeck Abogados S.L.P.

Marqués del Riscal, 11, 5°
Madrid, Spain 28010

Contact: Dr. Guillermo Frühbeck Olmedo
Phone: +34 91 700 43 50
Email: madrid@fruhbeck.com
Website: fruhbeck.com

Sweden PBLI

Vangard Law

Svartmangatan 16
2nd Floor
Stockholm, Sweden 111 29

Contact: Mats E. Jonsson
Phone: +46 73 383 9620
Email: mats.jonsson@vangardlaw.se
Website: vangardlaw.se

Primerus Business Law Institute (PBLI)

Switzerland **PBLI**

Suter Howald Rechtsanwälte

Stampfenbachstrasse 52
Postfach
Zürich CH-8021 Switzerland

Contact: Urs Suter
Phone: +41 44 630 48 11
Email: mail@suterhowald.ch
Website: suterhowald.ch

Turkey **PBLI**

Yamaner & Yamaner Law Office

Cumhuriyet Street, Gezi Apt. No:9 Floor:5
Istanbul, Turkey 34437

Contact: Cihan Yamaner
Phone: +90 212 238 1065
Email: cihanyamaner@yamaner.av.tr
Website: yamaner.av.tr

United Kingdom **PBLI**

Marriott Harrison LLP

11 Staple Inn
London, United Kingdom WC1V 7QH

Contact: Jonathan Pearce
Phone: +44 20 7209 2000
Email: jonathan.pearce@marriottharrison.co.uk
Website: marriottharrison.co.uk

Stockholm, Sweden

Argentina PBLI

Badeni, Cantilo, Laplacette & Carricart

Reconquista 609, 8° piso
Buenos Aires, Argentina C1003ABM

Contact: Mariano E. Carricart
Phone: +54 011 4515 4800
Email: m.carricart@bclc.com.ar
Website: bclc.com.ar

Belize PBLI

Quijano & Associates

56 Daly Street
Belize City, Belize

Contact: Julio A. Quijano Berbey
Phone: +501 223 0486
Email: belize@quijano.com
Website: quijano.com

Brazil PBLI

Barcellos Tucunduva Advogados

Av. Presidente Juscelino Kubitschek,
1726 - 4º andar
São Paulo/SP, Brazil
04543-000

Contact: José Luis Leite Doles
Phone: +55 11 3069 9080
Email: jdoles@btlaw.com.br
Website: btlaw.com.br

British Virgin Islands PBLI

Quijano & Associates

Mandar House, Third Floor
Suite 301
Road Town, Tortola, British Virgin Islands

Contact: Julio A. Quijano Berbey
Phone: +1 284 494 3638
Email: quijano@quijano.com
Website: quijano.com

Cayman Islands PBLI

Diamond Law Attorneys

Suite 200, 2nd Floor, Sussex House
128 Elgin Avenue
Box 2887
George Town, Grand Cayman KY1-1112
Cayman Islands

Contact: Stuart N. Diamond
Phone: +1 345 326 4293
Email: stuart@diamondlaw.ky
Website: diamondlaw.ky

Chile PBLI

Garcia Magliona y Cia. Abogados

La Bolsa 81, 6th Floor
Santiago, Chile

Contact: Claudio Magliona
Phone: +56 2 2377 9449
Email: cmagliona@garciamagliona.cl
Website: garciamagliona.cl

Colombia PBLI

Pinilla González & Prieto Abogados

Av Calle 72 No. 6-30 pisos 9 y 14
Bogota, Colombia

Contact: Felipe Pinilla
Phone: +57 1 210 1000
Email: fpinilla@pgplegal.com
Website: pgplegal.com

Costa Rica PBLI

Guardia Montes & Asociados

Ofiplaza del este, edificio C, 2nd floor
P.O. 7-3410-1000
San Jose, Costa Rica

Contact: Luis A. Montes
Phone: +506 2280 1718
Email: lmontes@guardiamontes.com
Website: guardiamontes.com

Cuba PBLI

Dr. Frühbeck Abogados S.L.P.

5ta. Ave No.4002 esq. 40. Playa Miramar
Havana, Cuba

Contacts: Maria Elena Pubillones Marin/
Dr. Guillermo Fruhbeck Olmedo
Phone: +537 204 5126
Email: habana@fruhbeck.com
Website: fruhbeck.com

Dominican Republic PBLI

Sánchez y Salegna

Lope de Vega No. 29
Novocentro Tower, Suite 605
Ensanche Naco
Santo Domingo, Dominican Republic 10119

Contact: Amado Sánchez
Phone: +1 809 542 2424
Email: asanchez@sys.do
Website: sys.do

Honduras PBLI

Ulloa & Asociados

Edif. Centro Morazan, Torre 1
#1217/18 Boulevard Morazan, frente al Centro
Comercial El Dorado
Tegucigalpa, Honduras

Contact: Marielena Ulloa
Phone: +504 2221 3422
Email: marielena.ulloa@ulloayasociados.com
Website: ulloayasociados.com

Honduras PBLI

Ulloa & Asociados

21 Avenida N.O., 21 y 22 calle
PH A Colonia El Pedregal
San Pedro Sula, Cortes
Honduras 21104

Contact: Marielena Ulloa
Phone: +504 2516 1133
Email: marielena.ulloa@ulloayasociados.com
Website: ulloayasociados.com

Mexico PBLI

Cacheaux Cavazos & Newton

Avenida Tecamachalco No. 14-502
Colonia Lomas de Chapultepec
Mexico City, Mexico C.P. 11010

Contact: Felipe Chapula
Phone: +52 55 5093 9700
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Ignacio Herrera y Cairo 2835 Piso 3
Fracc. Terranova
Guadalajara, Jalisco, Mexico C.P. 44689

Contact: Edmundo Elias-Fernandez
Phone: +52 33 2003 0737
Email: eelias@ccn-law.com.mx
Website: ccn-law.com

Mexico PBLI

Cacheaux Cavazos & Newton

Edificio Centura, Blvd. Agua Caliente
No. 10611-1001
Tijuana, Baja California, Mexico C.P. 22420

Contact: Javier Zapata
Phone: +52 664 634 7790
Email: jzapata@ccn-law.com.mx
Website: ccn-law.com

Primerus Business Law Institute (PBLI)

Mexico **PBLI**

Cacheaux Cavazos & Newton

Boulevard Tomas Fernandez No. 7930
Edificio A, Suite 20
Ciudad Juarez, Chihuahua, Mexico C.P. 32460

Contact: Felipe Chapula
Phone: +52 656 648 7127
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Mexico **PBLI**

Cacheaux Cavazos & Newton

Edificio VAO 2 David Alfaro Siqueiros No. 104
Int. 1505 Colonia Valle Oriente
San Pedro Garza Garcia, N.L., Mexico C.P. 66269

Contact: Jorge Ojeda
Phone: +52 81 8363 9099
Email: jojeda@ccn-law.com.mx
Website: ccn-law.com

Mexico **PBLI**

Cacheaux Cavazos & Newton

Boulevard Centro Sur No 98 oficina 101
Colonia Colinas del Cimatario
Queretaro, Queretaro C.P. 76090

Contact: Felipe Chapula
Phone: +52 442 262 0316
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Mexico **PBLI**

Cacheaux Cavazos & Newton

Boulevard Los Leones, Suite 318
Colonia Los Leones
Reynosa, Tamaulipas, Mexico C.P. 88690

Contact: Felipe Chapula
Phone: +52 899 923 9940
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Mexico **PBLI**

Cacheaux Cavazos & Newton

Honduras No. 144 Altos
Colonia Modelo
Matamoros, Tamaulipas, Mexico C.P. 87360

Contact: Felipe Chapula
Phone: +52 868 816 5818
Email: fchapula@ccn-law.com.mx
Website: ccn-law.com

Nicaragua **PBLI**

Bendaña & Bendaña

Pricesmart 1c norte, 20m oeste
Av Genizaro
Bolonia, Managua, Nicaragua 12066

Contacts: María José Jirón Bendaña
Phone: +505 2266 8728
Email: mjose@bendana.com
Website: bendana.com

Panama **PBLI**

Quijano & Associates

Salduba Building, 3rd Floor
East 53rd Street, Urbanización Marbella
Panama City, Panama

Contact: Julio A. Quijano Berbey
Phone: +507 269 2641
Email: quijano@quijano.com
Website: quijano.com

Peru **PBLI**

Llona & Bustamante Abogados

Francisco Masías 370 piso 7
San Isidro, Lima, Peru 27

Contact: Juan Prado Bustamante
Phone: +511 418 4860
Email: jprado@ellb.com.pe
Website: ellb.com.pe

Puerto Rico **PBLI**

Estrella, LLC

150 Tetuan Street
San Juan, Puerto Rico 00901

Contact: Alberto G. Estrella
Phone: 787.977.5050
Email: agestrella@estrellallc.com
Website: estrellallc.com

Ometepe Island, Nicaragua

Primerus Law Firm Directory – Asia Pacific

Alphabetical by Country

Australia PBLI

Carroll & O'Dea Lawyers

Level 18, St James Centre
111 Elizabeth Street
Sydney, New South Wales, Australia 2000

Contact: Selwyn Black
Phone: +61 2 9291 7100
Email: sblack@codea.com.au
Website: codea.com.au

China PBLI

Hengtai Law Offices

Cloud Nine Plaza, Suites 1103-1105
1118 West YanAn Road
Shanghai, China 200052

Contact: Edward Sun
Phone: +86 21 6226 2625
Email: edward.sun@hengtai-law.com
Website: hengtai-law.com

Singapore PBLI

HJM Asia Law & Co LLC

49, Kim Yam Road
Singapore, Singapore 239353

Contact: Caroline Berube
Phone: +65 6755 9019
Email: cberube@hjmasialaw.com
Website: hjmasialaw.com

Australia PBLI

HHG Legal Group

Level 1
16 Parliament Place
West Perth, Western Australia, Australia 6005

Contact: Simon E. Creek
Phone: +61 8 9322 1966
Email: simon.creek@hhg.com.au
Website: hhg.com.au

Hong Kong PBLI

ONC Lawyers

19th Floor, Three Exchange Square
8 Connaught Place, Central
Hong Kong

Contact: Ludwig Ng
Phone: +852 2810 1212
Email: ludwig.ng@onc.hk
Website: onc.hk

Taiwan PBLI

Formosan Brothers

8F, No. 376 Section 4, Jen-Ai Road
Taipei, Taiwan, R.O.C. 10693

Contact: Li-Pu Lee
Phone: +886 2 2705 8086
Email: lipolee@mail.fblaw.com.tw
Website: fblaw.com.tw

China PBLI

HJM Asia Law & Co LLC

B-1002, R&F Full Square Plaza No. 16,
Ma Chang Road
ZhuJiang New City Tianhe District
Guangzhou, Guangdong, China 510623

Contact: Caroline Berube
Phone: +8620 8121 6605
Email: cberube@hjmasialaw.com
Website: hjmasialaw.com

Malaysia PBLI

J. Lee & Associates

A-16-13, Tower A
No.5 Jalan Bangsar Utama 1
Kuala Lumpur, Malaysia 59000

Contact: Johan Lee
Phone: +60 3 2288 1699
Email: jlee@jlee-associates.com
Website: jlee-associates.com

Taipei, Taiwan

Primerus Business Law Institute (PBLI)

Primerus Fights Hunger at Home and Around the World

In 2016, 815 million people, or 11 percent of the world's population, were hungry – up 38 million from the previous year. This marked the first increase in global hunger after more than a decade of decline.

That year, when a small group of Primerus attorneys was seeking a cause for Primerus members around the world to embrace, they found those United Nations statistics too startling to ignore. So the *Primerus Fights Hunger* effort was born. Launched at the Primerus Global Conference in October 2017, the effort continues throughout 2018.

It's an issue Terence Stewart, managing partner of Primerus member firm Stewart and Stewart in Washington, D.C. has cared about for a long time, including writing papers exploring the global food crisis. His law firm works in international trade and trade regulation, so they're no strangers to tackling global issues.

"When you see the kinds of reports that are coming out of the United Nations, that 20 million people are starving to death in 2017, the only reason that can happen is if there's a failure of the body politic to respond and open their hearts to people in need," Stewart said. "This is a matter of life and death for hundreds of thousands upon millions of people. How could that not be important to law firms who are interested in the rule of law and decent livelihood for all?"

Stewart, joined by a working group of other Primerus members, set out to organize an effort that would allow Primerus firms to exemplify one of the Six Pillars – community service – by combating hunger locally and globally. The group also included Robin Lewis of Mandelbaum Salsburg in Roseland, New Jersey; John Pearce of Gordon Arata Montgomery Barnett in New Orleans, Louisiana; Tim Sullivan of Ogden & Sullivan in Tampa, Florida; and John Hemenway of Bivins & Hemenway in Tampa, Florida.

The effort, called *Primerus Fights Hunger*, invites Primerus firms to get involved in their own cities, and globally:

- Locally, firms may collect food and canned goods to be donated to a food bank of their choice.
- Globally, firms may make a contribution to the United Nations World Food Programme for the cost of at least one billable hour. The World Food Programme delivers food and assistance to hungry people around the world.

Primerus then asks that firms report their participation to Chris Dawe, Primerus Vice President of Services and Associate General Counsel.

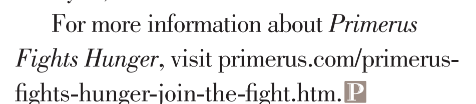
Stewart's firm already took action, with firm employees contributing around $6,000 to the World Food Programme, as well as organizing a food drive for the Capital Area Food Bank last year. Other Primerus firms have done the same, including:

- Barton LLP donated to City Harvest.
- Coleman & Horowitt donated to Fresno Community Food Bank.
- Degan, Blanchard & Nash donated to Second Harvest Food Bank in New Orleans, Louisiana, and Greater Baton Rouge Food Bank.
- Demler, Armstrong & Rowland donated to the San Francisco Food Bank.
- Earp Cohn donated to the Food Bank of South Jersey.
- Ogden & Sullivan donated to Metropolitan Ministries in Tampa, Florida.
- Rosen Hagood donated to Lowcountry Food Bank in Charleston, South Carolina.
- Rothman Gordon donated to the Greater Pittsburgh Community Food Bank.
- Spicer Rudstrom donated to Second Harvest Food Bank in Nashville, Tennessee; Chattanooga Area Food Bank; and Mid-South Food Bank in Memphis.

Stewart said there's still time to participate throughout 2018, whether in their own city or through the United Nations.

"You deal with it at a local level because that's where you live, and if you can, you try to deal with it on a global level since there are a lot of people less fortunate than you," Stewart said.

For more information about *Primerus Fights Hunger*, visit primerus.com/primerus-fights-hunger-join-the-fight.htm.



2018 Calendar of Events

Scan to learn more about Primerus.

January 19, 2018
Primerus Western U.S. Regional Meeting
Las Vegas, Nevada

January 24-25, 2018
Primerus Europe, Middle East & Africa/Association of Corporate Counsel Europe Seminar
London, England

January 26, 2018
Primerus Southeast/South Central U.S. Regional Meeting
Atlanta, Georgia

February 2, 2018
Primerus Client Resource Institute Legal Seminar
Nashville, Tennessee

February 21-24, 2018
Primerus Plaintiff Personal Injury Institute Winter Conference
Sedona, Arizona

February 22-23, 2018
Primerus Defense Institute Transportation Seminar
Las Vegas, Nevada

March 5-6, 2018
Primerus Asia Pacific Legal Seminar
Sydney, Australia

March 7-9, 2018
Primerus Young Lawyers Section Conference
Charleston, South Carolina

March 21-22, 2018
Primerus Latin America & Caribbean Legal Seminar
Buenos Aires, Argentina

April 26-29, 2018
Primerus Defense Institute Convocation
Scottsdale, Arizona

May 3-5, 2018
Primerus International Convocation
Miami, Florida

May 20-22, 2018
Association of Corporate Counsel Europe Annual Meeting
Paris, France
Primerus will be a corporate sponsor/exhibitor.

June 14, 2018
Primerus Midwest Regional Meeting
Chicago, Illinois

June 28, 2018
Primerus Northeast Regional Meeting
Philadelphia, Pennsylvania

October 17-21, 2018
Primerus Global Conference
Boston, Massachusetts

October 21-24, 2018
Association of Corporate Counsel Annual Meeting
Austin, Texas
Primerus will be a corporate sponsor and exhibitor.

November 8-9, 2018
Primerus Defense Institute Insurance Coverage and Bad Faith Seminar
Chicago, Illinois

There are other events for 2018 still being planned which do not appear on this list. For updates please visit the Primerus events calendar at 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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171 Monroe Avenue NW, Suite 750
Grand Rapids, Michigan 49503

Toll-free Phone: 800.968.2211
Fax: 616.458.7099
primerus.com