Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2012

Leading the Way

Navigating a New Legal World

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Asia Pacific • Latin America & Caribbean

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

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

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

About our cover

Today's legal market is a new world compared to five years ago, with increased competition and globalization. Primerus serves as a compass, helping law firms and attorneys navigate safe passage with high quality legal services at reasonable fees anywhere in the world.

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Primerus
The World's Finest Law Firms

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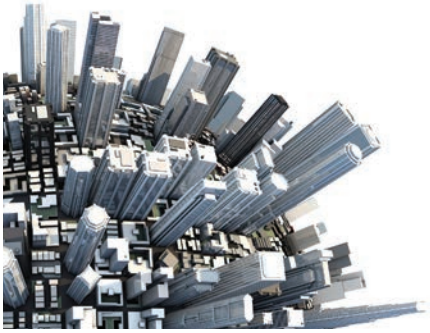

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President's Podium

John C. Buchanan

Leading the Way

In 2012, Primerus is celebrating its 20th anniversary. I am convinced now as much as ever that Primerus provides an invaluable service to the legal industry. We are leading the way into a new paradigm; we are at the cutting edge of a whole new concept in the delivery of high quality legal services at reasonable fees anywhere in the world.

Many of the challenges that emerged in the legal industry in 2008 when the economy suffered a historic downturn are still present today. During the time immediately following this, and continuing today, Primerus has experienced tremendous growth. Our brand of high quality legal services for reasonable fees was exactly what clients were looking for. And now, four years later, it turns out that it's still what they're looking for. I predict that's a trend that will never wane.

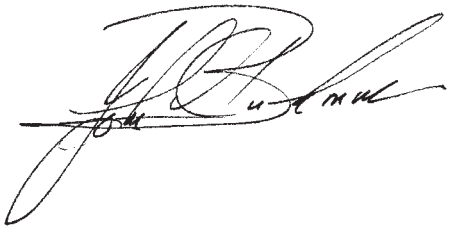
As a society of 200 law firms with nearly 3,000 attorneys in 37 countries and 130 cities around the world, we are truly global. With that kind of breadth comes tremendous resources in just about every practice area of the law you can imagine. If one of our member firms has a client needing the resources of another member firm, they simply pick up the phone and call. Because we have so stringently screened and monitored our member firms, they can have complete confidence in the quality of fellow member firms. They're all committed to the impeccable standards of the Six Pillars, which reflect the values clients look for in outside counsel – integrity, excellent work product, reasonable fees, continuing legal education, civility and community service.

If one of our member firms has a client needing the resources of another member firm, they simply pick up the phone and call. Because we have so stringently screened and monitored our member firms, they can have complete confidence in the quality of fellow member firms.

Because our member firms are boutique law firms that are small to medium-sized, clients get personalized, partner-level service at a much lower fee than they would pay equally experienced lawyers at a larger firm. And since each Primerus member firm operates independently, Primerus firms don't encounter the same conflicts of interest as at larger firms.

But Primerus' role in today's legal industry goes even a step further. Not only are we committed to finding the finest law firms for corporate clients anywhere in the world, we are also dedicated to helping them learn the latest legal developments of interest to them through sophisticated and enjoyable educational programs. For example, at the Primerus Defense Institute Convocation every year, about 50 insurance and corporate defense clients gather with about 75 Primerus defense counsel to learn together, all with the mission of helping clients reduce liability exposure and defense costs. And at the Primerus Business Law Institute Symposium held in Chicago each year, lawyers and clients gather to learn about the latest trends in the legal world affecting businesses in the United States and internationally. These are just a couple of examples of the many educational programs the Primerus Institutes provide to clients in specialty industries throughout the world.

As we enter the next 20 years, I have no doubt that Primerus will continue to be one of the most valuable resources available to high quality boutique law firms in finding excellent clients, and to clients looking for the "World's Finest Law Firms" providing high quality legal services at reasonable fees anywhere in the world.



Navigating a New Legal World

The legal industry went "over a cliff" with the economic downturn in 2008, to use the words of legal industry expert Jim Jones. Now, four years later, many of the trends that emerged in the aftermath continue to define the legal landscape, according to Jones, a senior fellow at the Center for the Study of the Legal Profession at Georgetown University.

"Today's legal market is a dramatically different place," Jones said, pointing to the shift from a seller's market to a buyer's market, increased competition, and globalization.

And according to Primerus President and Founder John C. Buchanan, Primerus is leading the way in this new legal world, offering law firms and clients an invaluable solution with the delivery of high quality legal services at reasonable fees anywhere in the world.

Falling Off the Cliff

For about a decade leading up to 2008, the legal industry had been experiencing an economic boom in which demand for legal services increased 4 to 6 percent every year, law firms raised rates 6 to 8 percent every year, and law firms' overall revenues jumped by double-digit rates every year, Jones said. All of that came to a screeching halt in 2008, when in about six months, demand dropped to negative 2 percent and law firm revenues and profits collapsed an average of 15 percent.

Suddenly, a seller's market had shifted to a buyer's market. For years, all of the important decisions about how a legal matter would be handled, from staffing and resources to the bottom line of cost, were dictated by the law firms. "That's no longer the case," Jones said. "Clients are now in control, and they like being in control. I don't think that's a trend that's going away anytime. The genie is out of the bottle and it cannot be put back in."

Clients are now insisting on two primary things in the delivery of legal services: efficiency and cost effectiveness, Jones said.

That's good news for small and medium-sized law firms, Jones said, who are realizing new opportunities in today's legal market. In the search for value, clients are more eager to "disaggregate" services, meaning that rather than sending all of their legal work to one firm, companies are now much more likely to match certain tasks with different law firms, creating in essence a virtual law team.

Jones said this started with clients hiring certain firms to handle specific areas of work, for instance one firm for securities work and another for labor and employment work. Then clients went a step further, choosing from a list of several firms in each of those practice areas depending on who can provide the best work with the most efficiency and cost effectiveness. And now clients are even spreading out the work on a single matter, hiring one firm as trial counsel, someone else for e-discovery or depositions. "This really breathes new life into the future of smaller firms," he said.

Growth for Primerus

Buchanan said that it's no coincidence that in 2009, the year immediately following the economic crisis, Primerus had one of its most successful years of growth ever. "The Primerus brand of high quality legal services for reasonable fees was and is just what clients are seeking – quality and value," he said.

"The mega and large firms are outdated, struggling and collapsing as evidenced by the recent implosion of the 1,400 attorney Dewey & LeBoeuf law firm in New York City. The unaffiliated small, independent law firms are also struggling to stay afloat because they too are out of date and inefficient, and some large corporate clients still don't trust the small unaffiliated firm," Buchanan said. "Primerus combines the best of both worlds. Primerus is made up of excellent small, independent boutique law firms that provide very high quality legal services at reasonable fees anywhere in the world. By joining together worldwide in a single organization such as Primerus, where global marketing, best practices and efficiency in shared buying power can substantially reduce overhead, the net result is higher quality legal service to the public at significantly less cost."

Buchanan said that Primerus has done the hard work of finding quality firms around the world so clients don't have to. He said to corporate counsel, "If you have legal needs anywhere in the world and need a quality law firm, call us. We don't charge you for it. We will help you find an excellent law firm," he said.

Global Reach

Another irreversible trend Jones sees altering today's legal landscape is globalization.

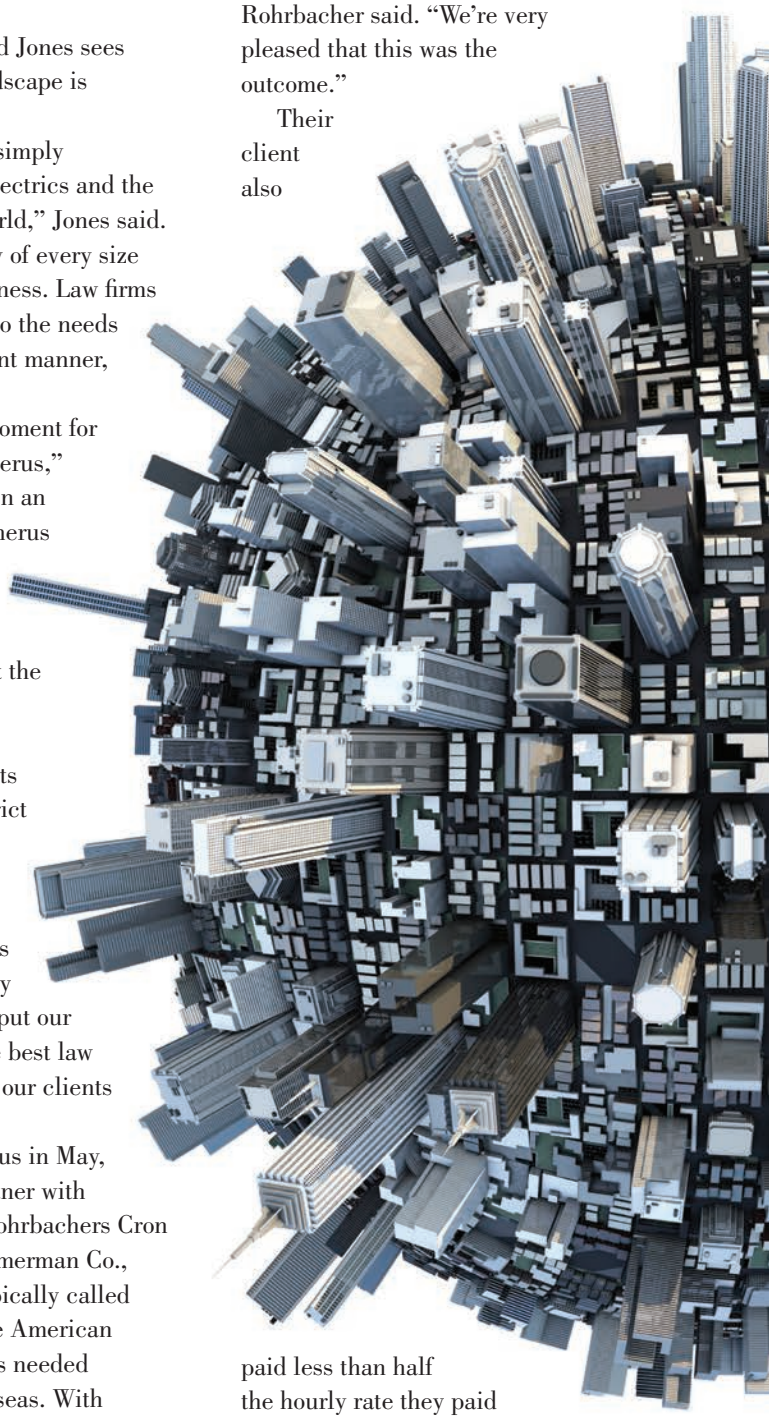
"Globalization is not simply impacting the General Electrics and the General Motors of the world," Jones said. "Virtually every company of every size is engaged in global business. Law firms must be able to respond to the needs of clients in a cost efficient manner, anywhere in the world.

"And this is a good moment for an organization like Primerus," he said. What is critical in an organization such as Primerus to truly help clients in a global economy is uniform standards and processes throughout the organization.

And according to Buchanan, Primerus meets that challenge with its strict admission recruitments and quality assurance programs. "We seek out, screen and audit our firms to make sure we have only the finest," he said. "We put our resources into finding the best law firms in the world so that our clients don't have to."

Before joining Primerus in May, David Rohrbacher, a partner with Primerus member firm Rohrbachers Cron Manahan Trimble & Zimmerman Co., LPA, in Toledo, Ohio, typically called upon local offices of large American law firms when his clients needed legal representation overseas. With those firms, he regularly encountered "stratospheric" rates which were multiplied by teams of lawyers working on a given case, he said.

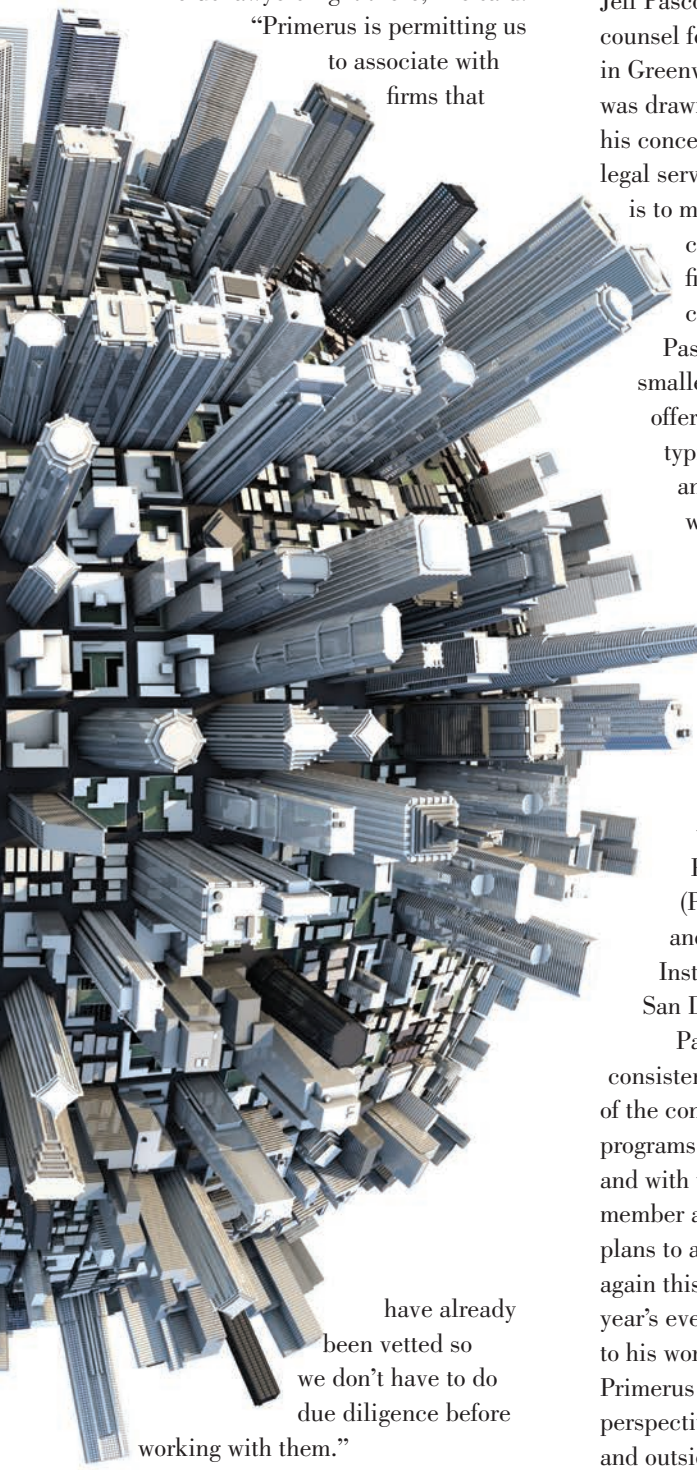
But when he recently needed counsel in Shanghai, China, to help a client purchase 53-foot shipping containers, he called upon Primerus member Dr. Edward Sun, managing partner of Hengtai Law Offices in Shanghai for help. "We had a contentious negotiation with the other side, and I don't think we would have been able to get through it without Dr. Sun's assistance," Rohrbacher said. "We're very pleased that this was the outcome."



Their client also paid less than half the hourly rate they paid the last time they hired counsel in China, he said. "And the quality of the work product was at least equal if not better," he added.

By joining Primerus, Rohrbacher's firm no longer had to shy away from

handling his clients' international needs. "What this has done for us is change our focus so when one of our clients is doing business overseas, we can look to see whether Primerus has counsel there. And typically, we find there are Primerus lawyers right there," he said. "Primerus is permitting us to associate with firms that have already been vetted so we don't have to do due diligence before working with them."



In the past, his firm has handled minimal international work, but that's quickly changing. He has needed law firms in China, Korea and Canada in the past month. "The world has shrunk," Rohrbacher said. "I think it's going to be a regular occurrence now."

Finding Value

Jeff Pascoe, vice president and general counsel for Gerber Childrenswear LLC in Greenville, South Carolina, said he was drawn to Primerus in part because of his concern with finding value in outside legal services. "One of my top priorities is to maximize the value of outside counsel. In that sense, Primerus firms are a good fit for my company and legal budget." Pascoe said he often finds that smaller to medium-sized firms offer the best value because they typically have lower overhead and often are located in markets where the rates are lower.

Pascoe, who is a board member of the South Carolina chapter of the Association of Corporate Counsel (ACC), learned about Primerus at the 2010 ACC Annual Meeting. Since then, he has attended two Primerus events – the 2011 Primerus Business Law Institute (PBLI) Symposium in Chicago and the 2012 Primerus Defense Institute (PDI) Convocation in San Diego.

Pascoe said he has been consistently impressed with the quality of the continuing legal education programs Primerus offers at these events, and with the expertise of the Primerus member attorneys who attend them. He plans to attend the PBLI Symposium again this year because he found last year's event to be so relevant and helpful to his work. He especially likes that Primerus educational programs offer perspective from both inside counsel and outside counsel. "They offer a common sense approach to things and they recognize that as clients we have to watch our budgets and are looking for good, real-world solutions to problems."

Buchanan said Primerus understands that clients now want to be much more involved so they can ensure matters are being handled efficiently and effectively. Primerus continues to put a great emphasis on bringing clients and lawyers together in meaningful ways by hosting events where clients can not only learn from legal experts and attorneys, but also develop lasting relationships based on trust.

What's Ahead

Jones predicts law firms will continue to face stressful times ahead, citing increased expenses and historically low realization or collections rates of an average of 84 percent. That means that for every dollar firms record at their standard billing rates, they collect on average only 84 cents, after reductions and negotiations take place. "With realization rates down, expenses up, productivity down and demand flat or slightly increased, you have a picture in which profitability is hard to manage," Jones said. "It's a very fragile time, and as you would suspect, some firms will emerge as winners and some as losers. The firms that are getting it right are pulling ahead."

Buchanan believes that in this increasingly competitive and challenging legal market, the need for a "third party" to benefit both lawyers and clients has never been stronger. "We offer a service to the legal industry that would otherwise be impossible without us," he said. "Not only do we help to provide a higher quality legal service to clients at a lower price, we also are working to uplift the profession by holding lawyers to the highest possible ethical standards and bringing lawyers and clients together in meaningful ways. Primerus is revolutionizing the legal profession of the 21st century by offering a whole new approach to the delivery of legal services."

Ruth E. Martin

Primerus and the Association of Corporate Counsel

Primerus greatly values its relationship with the Association of Corporate Counsel (ACC), the world's largest association of in-house corporate counsel with over 29,000 members in 75 countries. The relationship has blossomed over the years due in large part to Primerus' continued commitment to the organization and financial support of its Annual Meeting, the largest gathering of in-house counsel.

Primerus will be a sponsor, for the fourth year in a row, of the 2012 ACC Annual Meeting, to be held September 30 – October 3 in Orlando, Florida. As part of the evening festivities at the meeting, Primerus will host a cocktail reception on Tuesday, October 2, from 7 to 8:30 p.m., at the Mikado Steak House in the Orlando World Center Marriott.

Last year, three Primerus members were chosen as panelists for continuing legal education presentations at the ACC Annual Meeting. Brian Davidoff of Davidoff Gold LLP and Barry Kaltenbach of Kubasiak, Fylstra, Thorpe & Rotunno, P.C. participated in a presentation titled "Doing Business with Financially Troubled Companies." Brian Davidoff's article on page 9 is based on this presentation. In addition, Osayaba Giwa-Osagie of Giwa-Osagie & Company participated in a panel presentation titled "Doing Business in West Africa."

At the 2012 ACC Annual Meeting, Primerus member David Henry of Kohner, Mann & Kailas, S.C. has been chosen to participate in a presentation titled "Optimize Bond and Lien Processes and Case Management to Boost Company Revenue."

Primerus continues to show its support for the ACC by regularly contributing to the *ACC Docket*, the organization's magazine that is published 10 times per year and received by its entire membership. In addition to providing financial support in the form of regular advertising in the *ACC Docket*, Primerus and its members have contributed articles for the *Docket* and its *European Briefings*. An article co-authored by Primerus members Osayaba Giwa-Osagie and Nneka Ikwueze of Giwa-Osagie & Company titled "Overview of the Principles of Law Regarding the Establishment and Operation of a Business in Nigeria" appeared in the June issue of the *ACC Docket*. (This article was adapted from Giwa-Osagie's presentation at the 2011 ACC Annual Meeting.)

Due to the goodwill and trusted relationships that have developed over the years between Primerus and the ACC, the Primerus brand has become increasingly recognized by ACC members as the world's finest boutique law firms, committed to the things that are most important to them: high quality work product and legal representation, excellent "customer" service and reasonable rates. As a member of the ACC myself and Senior Vice President of Primerus' Corporate Client Division, I encourage anyone in need of a lawyer who is committed to excellence and reasonable legal fees to look to Primerus. The perfect Primerus lawyer can be found at www.primerus.com or by contacting Primerus' Corporate Client Division for assistance.

Ruth E. Martin, Esq., is General Counsel and Senior Vice President of Primerus' Corporate Client Division. She works to connect Primerus members with corporate clients around the world.

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Brian L. Davidoff

Doing Business with Financially Distressed Businesses

The Warning Signs

Too often when a company is facing financial distress, management adopts a "head in the sand" approach and cannot recognize the urgency of the problem or their responsibility in permitting it. While it is inevitable that situations will occur which are truly outside the control of management, in the vast majority of cases, management bears the responsibility for the financial condition of the business. Warning signs that the company's credit is becoming unstable include the following:

- A notification from the bank requiring that payments that otherwise have been going to the customer are required to be paid directly to the bank;
- A delay in timely payments;
- Reduced order levels;
- A search revealing the increase of collection lawsuits;
- A significant or sudden turnover of management staff.

Hiring a Consultant

When the customer who owes you money is in trouble, depending on the amount owed, it may be advisable to recommend the customer engage a good turnaround consultant. Too often the company management's reaction to the hiring of a consultant is that management knows the business best, and believes that someone else surely cannot direct the business at its most critical hour. While that may be true, almost invariably management does not have experience in how to deal with the issues surrounding financial distress. The turnaround consultant may not know the company, but what he/she brings to the table is an understanding of the issues that need to be addressed when a company is in financial distress. Certainly the consultant needs to learn the business, but understanding the mechanics of financial distress and how it affects the balance sheet of the company and its creditors, and more importantly how to address these effects, become pivotal. Another important contribution from a turnaround consultant is the credibility that a qualified individual can bring to the business's creditors, who may have lost confidence in the entrepreneur and/or his management team. The turnaround consultant may be able to get additional financing from the company's bank based in part on his/her credibility. Typically a bank will move a defaulted loan from the regular loan officer to a "special assets" officer. These bankers tend to be much more hard nosed than the entrepreneur may expect from the bank. The special assets bankers are however accustomed to working with turnaround consultants. Often the bank will welcome the engagement of a turnaround consultant, and indeed in some cases will recommend a turnaround consultant to the business owner. This is because the bank knows that the turnaround consultant will be truthful and accurate about current events in the business.

A turnaround consultant will also be valuable if the business ultimately has to file bankruptcy, since the experienced turnaround consultant will have expertise in the bankruptcy court process. He or

Brian L. Davidoff heads Davidoff Gold's bankruptcy practice. He has specialized in corporate reorganization, restructuring and bankruptcy law for more than 25 years. He also has a substantial practice advising companies on the various aspects of their growth, financing, contractual relationships and operations. In this capacity, he often acts as outside general counsel to his clients.

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she can help prepare the many necessary financial documents needed for and during a bankruptcy filing, allowing the owner to remain focused on business operations.

Directors and Officers Liability

The slide of a company from a solvent business to the "zone of insolvency" (described further below) has an important effect on the duties of the directors.

The duty of loyalty requires directors and officers to perform their duties in good faith and in a manner that they reasonably believe to be in the best interests of the company. The duty of loyalty generally mandates that the best interests of the corporation and its shareholders take precedence over any interests possessed by a director, officer or controlling shareholder and not shared by the stockholders generally. The duty of care requires directors and officers to act with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A director or officer who fails to exercise appropriate diligence may violate the duty of care, even if such officer or director did not realize any personal gain from the transaction at issue. However, directors (as well as officers) are generally protected by the "business judgment" rule from liability arising from negligent acts (as opposed to intentional or grossly negligent misconduct).

The "Zone of Insolvency"

Courts have not clearly defined when a company is in the "zone of insolvency." A company is insolvent when its liabilities exceed its assets. Most courts apparently presume a business is on the brink of insolvency if the questioned action by the directors would or reasonably could render the corporation insolvent in fact, or that there is the risk that creditors will not be paid.

Implications of the Duty to Creditors

Outside insolvency or the "zone of insolvency," directors and officers owe a fiduciary duty to shareholders. Directors of an insolvent corporation have a fiduciary duty to creditors. It is unclear whether the duty to creditors supplants the directors' duty to shareholders. The duty has been described as the duty as to protect the contractual and priority rights of creditors. If directors cause their business to incur debt they may be in breach of duties enforceable by creditors if, for example, the directors cause the business to incur unnecessary debt to or for the benefit of shareholders or otherwise divert assets from legitimate business uses.

When Bankruptcy Is the Only Option

If it is ultimately determined that bankruptcy is the only option, for most businesses there are typically two types of bankruptcy that are relevant: a Chapter 7 liquidation and a Chapter 11 reorganization. While Chapter 7 and 11 filings are normally voluntary (i.e. the company makes an affirmative decision to file), they may be involuntary and forced on a business which is delinquent in payment of its creditors.

A business should only consider a Chapter 7 liquidation if the business is going to cease to operate. The purpose of filing a Chapter 7 is to wind up a business and put the final liquidation of the assets in the hands of a trustee.

Unlike in a Chapter 7, in a Chapter 11 management of the business remains in place as a debtor in possession ("DIP"). No trustee is appointed unless the DIP has engaged in inappropriate conduct or other fraudulent acts, in which event a trustee might be appointed. A Chapter 11 is very flexible; it allows a company to either liquidate under the control of the DIP, sell the assets or reorganize. More often than not, management (often with professional assistance) is in a better position than a trustee to maximize the return on the asset liquidation.

The bankruptcy code has a priority scheme for the payout of creditors as follows: secured creditors, administrative creditors (which include the cost of the bankruptcy, wages, taxes, deposits on goods not delivered and certain other items), unsecured creditors and finally, equity holders.

In a Chapter 7 liquidation, a notice is sent to creditors by the bankruptcy court indicating both that the company has filed a Chapter 7 bankruptcy and whether or not assets are available for distribution. In the event that assets are available for distribution, creditors may file claims in the bankruptcy case and receive a pro rata distribution of the assets available. All of the assets of the company are delivered to a Chapter 7 trustee whose responsibility it is to conduct the liquidation and disposition of the assets.

A Chapter 11 is a business reorganization. The purpose of a Chapter 11 is to allow a business which is financially distressed to get a breathing spell and an opportunity to modify its financial structure.

Upon the filing of a Chapter 11 bankruptcy, a separate estate, referred to as a bankruptcy estate, is created. At this point, the books and records of the business are started anew as of the date of the bankruptcy filing. Any assets created by sales occurring post petition become part of the bankruptcy estate.

In most Chapter 11 cases, a creditors' committee is appointed. The creditors' committee is usually between three and seven of the largest unsecured creditors of the company. The creditors' committee's role is to monitor the operations of the Chapter 11 company. The company's management will usually keep the committee closely involved in the decisions that company makes, and on occasion the company and the committee may disagree, in which event the disagreement is resolved by the court.

If the Chapter 11 company has a pre-existing secured loan, then bankruptcy law requires that the lender either consent to, or the court approve, the use of "cash collateral" during the course of the Chapter 11. "Cash collateral" is the proceeds generated from the security held by the lender. Receivables generated from inventory security held by a lender are "cash collateral." The company is not allowed to use the cash generated from

receivables if a lender has a security interest in the company's inventory and "accounts" (i.e., receivables).
In addition to the use of "cash collateral" in the preparation for a Chapter 11, typically the attorney and turnaround consultant will evaluate the need for and availability of Chapter 11 financing, called "DIP" or debtor in possession financing. Many businesses need additional financing to make it through the Chapter 11. This type of financing also requires court approval.

Although the filing of the bankruptcy creates an automatic stay precluding creditors from pursuing the company's assets, creditors are not stayed indefinitely. Typically, secured creditors can seek relief from stay by asking the courts to allow them "for cause" to pursue their pre-bankruptcy remedies. The court will evaluate whether cause exists on a case by case basis by balancing the needs of the company that has filed with the impact of the stay on the creditor.

A typical Chapter 11 filing for a middle market company takes about 12 to 15 months. This is the amount of time the court typically will give the business to start showing progress on the reorganization and turnaround. Even though a Chapter 11 can provide a "legal cocoon" around the business to allow the business time to reorganize, the fact is that the business must ultimately be viable.

Ultimately the objective of any Chapter 11 is to reorganize either through the filing of a Chapter 11 plan of reorganization or by selling the assets (dealt with below). If the reorganization is approved by the court, it is essentially a contract that is approved by the court which becomes binding on both the company in bankruptcy and all of its creditors. The plan of reorganization divides the creditors into various classes, which follow a certain order of priority. Secured creditors are first, priority creditors are

next, unsecured creditors then follow and finally equity is at the bottom. All creditors in the same class of creditors must be treated the same way:

- Generally, secured creditors are entitled to get paid in full (up to the value of their collateral) or to get their collateral back;
- Unsecured creditors often get partial payments, but they all have to be dealt with the same way. For example, if the plan calls for the unsecured creditors to get 50 cents on the dollar in monthly payments over a two-year period, they must all be given the same terms. The calculation of how much will be paid to unsecured creditors will often be the result of negotiation with the creditors' committee taking into account how much the company can reasonably be expected to set aside in the future to pay creditors after paying expenses for operations;
- Under the "absolute priority rule" unless the unsecured creditors are paid in full, the equity holders cannot participate and retain their ownership of the company. As a practical matter, the creditors of a smaller company are usually not interested in operating that company and if they stand any hope of seeing a recovery after the Chapter 11, it typically is because the current ownership continues ownership and operation of the company after bankruptcy. Creditors do, however, often use this "absolute priority rule" as leverage to make sure that the company pays them the most that can reasonably be expected as part of the reorganization plan that is negotiated by the parties and approved by the court.

Often it is evident that a company cannot survive the Chapter 11 process either because it cannot obtain financing or for other strategic reasons. The company's assets may however have value to a third-party buyer. Buyers are often very cautious about buying the assets of a troubled business because of the concern that the company's creditors could pursue the acquired business on various legal theories including "successor liability." The sale through a Chapter 11 bankruptcy offers the buyer a means to acquire the assets without concern that a creditor of the seller will pursue the buyer. It also offers the creditors of the seller a way to maximize the value of the assets by selling them to a buyer rather than simply liquidating the company. Such a sale is called a "section 363" sale, as the process takes place under section 363 of the Bankruptcy Code.

In a section 363 sale the assets which may be subject to bank and other judgment liens can be sold free and clear of liens so that the buyer receives the assets lien free. The cash proceeds paid by the buyer for the assets then attach to the liens in the same order and priority as the liens previously attached to the assets. This process allows the assets to be sold for the maximum price, leaving the disputing parties to litigate over the cash paid.

Recovery Rights in Bankruptcy

Preferences

A trustee in a Chapter 7 bankruptcy and the debtor in possession in a Chapter 11 bankruptcy have what are called "avoidance powers" to recover moneys paid out prior to the bankruptcy. One of the purposes of bankruptcy is to treat creditors of the same class equally. Sometimes when a business is in trouble and is about to file bankruptcy, it pays to creditors who scream the loudest, or those creditors whom the owner has personally guaranteed. These payments may be considered a "preference." While a preference is not illegal, the payment may be recoverable in the bankruptcy. Since the bankruptcy system is designed to treat creditors fairly and equally, if one creditor has been preferred, the funds may be recovered and divided among all like creditors.

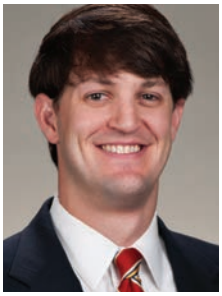
A payment is considered a preference if:

- There is a transfer by the company, whether voluntary such as a payment to a creditor, or involuntary such as a judgment obtained by a creditor;
- It is made within 90 days prior to the bankruptcy, or in the case of a payment to an insider (such as a relative or a director), it is paid within one year prior to the bankruptcy;
- It is paid on account of antecedent debt (i.e. a debt that is not current). So for example, payment of a current bill even if paid within 90 days is not a preference. The result may be different if the bill is past due;
- Paid while the company is insolvent (liabilities exceed the assets);
- As a result of the payment the recipient creditor receives more money than it would have as a result of a liquidation of the company in a Chapter 7.

There are several defenses to a preference, including that the payment was made in the ordinary course of business of the company, or that the payment is for a contemporaneous exchange for new value, for example a COD payment and delivery of goods.

Fraudulent Transfer

One of the other frequently used avoidance powers is a fraudulent transfer recovery. It sometimes occurs in the life of a business that is in financial distress that there are transactions by which the owner either intentionally caused the business to transfer assets in order to remove the assets from the grip of creditors (called an intentional fraudulent transfer), or where assets are transferred but without "reasonably equivalent" value (called a constructive fraudulent transfer). In both of these cases the trustee in bankruptcy or the creditors' committee can seek to recover such assets which are transferred within four years prior to the bankruptcy.



Charles Appleby

States Institute New Limits on Employers and Social Media – Will Your State Be Next?

Maryland is about to become the first state in the nation to ban employers from requesting access to the social media accounts of employees and job applicants. The new legislation was passed by the Maryland General Assembly on April 7 and only requires the governor's signature before becoming law. It prohibits employers in both the private and public sectors from requiring or seeking user names, passwords or any other means of accessing personal Internet sites such as Facebook as a condition of employment. See, S.B. 433 and H.B. 964.

The American Civil Liberties Union (ACLU) of Maryland was a big supporter of the legislation. Maryland ACLU legislative director Melissa Goemann stated the prohibition "is a really positive development because the technology for social media is expanding every year, and we think this sets a really good precedent for limiting how much your privacy can be exposed when you use these mediums." The Maryland Chamber of Commerce, on the other hand, opposed the prohibition because the bills did not acknowledge there could be legitimate issues for some employers to want to review applicants' or workers' social media messages.

While employers may not seek usernames and passwords from employees' personal Internet sites, the bills do allow employers to require employees to provide passwords and login information for non-personal accounts that are part of the employer's own systems, such as company e-mail accounts. In addition, the bills prohibit employees from downloading "unauthorized employer proprietary information or financial data" to personal accounts or to websites, and it allows employers to investigate these activities to ensure "compliance with applicable securities or financial law or regulatory requirements."

While Maryland is the first to pass this type of legislation, other states will surely follow. Michigan (H.B. 5523), Minnesota (H.F. 2963), Missouri (H.B. 2060), New York (S.B. 6938), South Carolina (H.B. 5105) and Washington (S.B. 6637) all have similar bills introduced. In addition, it is rumored lawmakers in Congress are working on legislation that would ban the practice nationally. United States Senators Richard Blumenthal, D-Conn., and Charles E. Schumer, D-N.Y., even called on the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice to launch a federal investigation into the emerging trend among employers. Schumer said in a statement, "Employers have no right to ask job applicants for their house keys or to read their diaries – why should they be able to ask them for their Facebook passwords and gain unwarranted access to a trove of private information about what we like, what messages we send to people, or who we are friends with?"

Will Congress ban the practice nationally or will your state enact its own legislation? Stay tuned.

Charles Appleby specializes in employment law, retail/hospitality/entertainment law and construction defect litigation. He regularly provides updates on social media policies, Americans with Disabilities Act regulations and other employment matters on South Carolina Employment Law Alerts.

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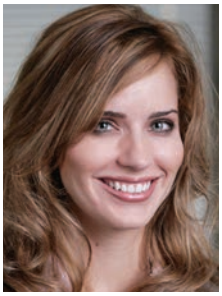

Amanda B. Mason

Immigration Enforcement and Compliance in the Workplace

Immigration enforcement remains inconsistent, seemingly changing year to year (or month to month). Most immigration trends are politically motivated. While aiming to expand opportunities for legalization of both family-based and employment-based immigrants, the Bush administration placed great emphasis upon worksite enforcement. The Obama administration has attempted no significant efforts at immigration reform, and deportation numbers are at an all-time high.

The prospect of employment lures people to the United States. If the government circumscribes the availability of jobs for illegal immigrants, then the incentive to come to the U.S. also declines. Accordingly, the government has deputized employers, requiring them to enforce the border in the office place and punishing those who fail to do so – sometimes even in criminal court.

Immigration requirements change often. Because the area is regulatory in nature, little notice is required to alter the requirements placed upon employers. For this reason, every business should be well acquainted with qualified immigration counsel. The attorney must be familiar with immigration law from a compliance/employment standpoint, and should have experience working with human resources professionals and company principals. He or she should also be practiced in federal criminal defense (or at least ensure the immigration attorney works with a good defense attorney), as the two areas of law often overlap.

No business is insulated from enforcement actions, and every employer must maintain an immigration policy. In addition to keeping immigration counsel at the ready, below are some of the major considerations for a business to formulate or refine its existing procedures.

Have the Basic Components of a Good I-9 Policy

The I-9 form is the document that an employer must complete for every new employee (NOT just foreign employees). It demonstrates an employer's commitment to immigration compliance, and if an investigation or raid ever occurs, the I-9 forms will become either the best friend or the worst enemy of the employer.

By completing the form properly, on time and uniformly, the business protects itself from a claim that it had "constructive knowledge" if an unauthorized employee turns out to be working. Most employers know that they cannot hire someone they already know to be unlawfully present in the U.S., but a willful policy of "looking the other way" can be just as dangerous. The goal of the I-9 is for a business to comply in good faith, regardless of whether an unauthorized individual slips through the cracks.

The form is deceptively simple. Making mistakes on the one-page document can lead to technical violations and/or fines, should the U.S. Department

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of Homeland Security conduct an audit. Remember – the employee must complete Section 1 on the first day he or she works for pay, not a day sooner. The employer must ensure that the information listed is clear and legible. The employee must then be given a list of documents he or she may present for verification of identity, authorization to work, or both. The employer must never ask for a specific document.

By day three, the employer (through a manager or human resources professional) must review the documents presented and complete Section 2. Afterwards, the I-9 is simply maintained on file with the employer. For a variety of reasons, businesses should keep the I-9s in a separate file or binder from the personnel file for the employee.

One great resource for I-9 procedures is the M-274, Handbook for Employers, available for download, along with the I-9 form, at www.uscis.gov.

Don't Forget About Proper Social Security No-Match Procedures

Because an employer must balance the duty to verify against the duty not to discriminate, companies should have written policies in the employee handbook to ensure uniform procedures. The policy should include a clearly outlined procedure in the event the employer receives notice from the Social Security Administration that the employee's name does not match his or her Social Security number. If an employer reacts too strongly, or in a non-uniform manner, the response could be deemed discriminatory.

States are increasingly involved in the immigration enforcement game. For instance, E-Verify is now mandatory in some states for certain employers. E-Verify is an Internet-based system that boasts "instant" ability to verify an employee's eligibility. In fact, the program merely checks the employee's name with agency records to determine if a match exists.

E-Verify is a good option for employers who wish to go the extra mile. The speed of verification is greatly increased; however, the results are subject to error. Consequently, employers who utilize the program must still maintain a written, uniform procedure for responding to non-confirmation results.

Audit, Audit, Audit: Better You Than Them

Each company should hire an external firm to conduct yearly audits of I-9 files, and respond quickly to any recommendations in the audit report. The government will consider these audits as evidence of the employer's "good faith" efforts at compliance. As such, managers should be regularly briefed by immigration counsel regarding local and federal changes to law and procedure.

Know What to Do if an Investigator Visits Your Office

An employer could get a visit from an investigating official from the U.S. Department of Labor or from the U.S. Department of Homeland Security (DHS) sub-agencies. These visits can occur without prior warning. Sometimes the official is investigating possible fraud in employment-based immigration applications, such as an H-1B visa for foreign skilled workers. Other times, DHS may be interested in conducting an audit of the company's I-9 forms.

A manager should always politely request to view the agent's identification and obtain a business card. The company may request an attorney's presence.

Know What to Do if Your Workplace Is Raided

A raid is different from an investigation. An immigration raid indicates that the United States government has targeted an employer for criminal activity, and likely believes that the business has employed a large number of undocumented immigrants. A fraudulent document scheme may have taken place on-site, and the company management may have been completely unaware of it. By the time a raid occurs, the company has been under investigation for a protracted period of time.

Anyone within a company, especially anyone involved with hiring, can be implicated criminally for immigration violations. A lower level manager may be targeted by federal agents hoping to gain information against higher level managers and owners.

In the event of a raid, the employer should obtain the search warrant and fax or email it to counsel. At the outset, any illegal employees likely will abscond. The employer should never assist them in any way, but allow law enforcement to handle such issues.

At that time, the agents will also attempt to interview individuals. No one is obligated to engage in such an interview, and any discussions with agents should wait until an attorney can be present. The risk of not having counsel present is the inadvertent disclosure of incriminating information. These unprotected statements and the information derived from them may be used to bolster the prosecution's case.

Audits and raids are not entirely preventable, but vigilance minimizes business owner/manager culpability for any issues that may arise. Take time to revisit your company's immigration compliance. Carefully crafted policies and procedures bring peace of mind and enable employers to worry about the most important things – the business of The Business.P

Stephen L. Smith

IRA Investment in Real Estate

I became interested in the subject of IRA investment in real estate some years ago when an investment opportunity came up in the Phoenix area and I did not want to use all of the funds I had available in my bank account. I therefore turned to my IRA and made the investment, partnering with my IRA so that I provided some of the funds needed for the investment and my IRA provided a smaller portion of the funds. That investment has since been sold at a significant profit and the proceeds reinvested. As a result, my IRA now owns a percentage interest in a limited liability company which owns a small shopping center in Goose Creek, South Carolina.

As it has become obvious in the last few years that we cannot depend on Social Security and investments in the stock market for our retirement, I have become more and more interested in the notion of IRA investment in real estate. Even if investment in real estate is not totally the answer for you, then investment in real estate at least provides some diversification from investments in the stock market. The same general concepts also apply to 401(k) plan account investments in real estate but with some additional complications and opportunities that are more particularly described in my book.

Allowable Investments in Your IRA

The way the rules are laid out, the real question is what can I not invest in rather than what can I invest in, because the answer is your IRA can invest in anything with three specific exceptions. You will not find any specific rule in the Internal Revenue Code as to what an IRA can invest in. Rather you will only see rules specifying the limited things IRAs cannot invest in.

What Can I *Not* Invest In

There are three specific items in which you cannot or should not invest your IRA as follows:

1. A life insurance policy on the life of the IRA owner.
2. Collectibles, with certain exceptions.
3. Subchapter S corporation stock.

Two of these three items are discussed more specifically below.

What Are Collectibles and What Are the Consequences of Investing in Them?

The following are collectibles: works of art, rugs, antiques, metals (except as provided below with respect to certain coins), gems, stamps, alcoholic beverages (e.g., vintage wines), musical instruments, historical objects (such as documents or clothes), most coins (see below) and other items of tangible personal property that the IRS determines are collectibles. There is an exception allowing investments in one, one-half, one-quarter or one-tenth ounce U.S. gold coins or one-ounce silver coins minted by the Treasury Department as well as certain platinum coins and certain gold, silver, palladium and platinum bullion.

The impact of investing in a collectible is that the investment is regarded as being distributed to the IRA owner at its fair market value in the year of the investment and as if

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the distribution was made in the year of purchase. This can mean ordinary income arises in an amount equal to the fair market value. In addition, if the IRA owner is under age 59½, the "deemed distribution" may be subject to a 10 percent additional tax based on the value of the collectibles.

What Is the Issue on Investment in Subchapter S Corporation Stock?

There is not actually a prohibition against your IRA investing in the stock of a Subchapter S corporation, but if you do invest the IRA in a Subchapter S corporation, the corporation will be disqualified under Subchapter S and will become a taxable corporation under Subchapter C. This is because only certain types of trusts can qualify to own Subchapter S corporation stock without terminating the Subchapter S election. An IRA does not qualify as an allowable trust. While this may not impact you, particularly if the only stock in the corporation you hold is through your IRA which is generally exempt from income tax (with the exception of unrelated business taxable income as discussed in my book), the other stockholders will likely be very unhappy if your IRA's investment terminates the qualification for Subchapter S status for all of them.

Can I Invest in Real Estate?

Real estate is not on the list of the three things you cannot or should not invest in, so absolutely you can invest in real estate. You can not only invest directly in various types of real estate, but also in debt obligations secured by real estate or in entities (such as a limited liability company) investing in real estate. The only caution here is that you need to be aware of the prohibited transaction rules, the taxability of unrelated debt financed income and the Plan Asset Rules which are discussed in separate chapters of my book.

Why Have I Not Heard About This?

The simple answer is that most of the traditional trustees and custodians of IRAs are banks, brokerage firms and similar institutions which do not traditionally focus on real estate investments. It has always been easier for them to recommend stock, bond and mutual fund investments rather than dealing with real estate investments. We also understand from several of the companies that do provide services as custodians allowing your IRA to invest in real estate, that having to handle the necessary paperwork to allow for real estate investments is simply less profitable for the custodians and trustees. Therefore, many traditional custodians and trustees tend to stay away from informing you about those possible investments.

Other Issues

As noted, this article is very brief and cannot begin to touch on the other subjects such as prohibited transactions and disqualified persons, unrelated business taxable income and the Plan Asset Rules with which you should be familiar before you have your IRA invest in real estate. I refer you to my book for a full discussion of these issues. P

Gerardo M. "Gerry" Balboni

Rule 506 After the JOBS Act

President Obama signed the Jumpstart Our Business Startups Act (the "JOBS Act") on April 5, 2012, making significant changes to Rule 506 of Regulation D and changing the trajectory of the law of private offerings.

Regulatory Background

Section 5 of the Securities Act of 1933 (the "Securities Act") prohibits the use of the U.S. mail or other means of interstate commerce to effect the offer or sale of any security ***unless*** a registration statement is in effect or an exemption is available. Public and private issuers frequently rely on two "private offering" exemptions, Section 4(a)(2) of the Securities Act[1] and Rule 506 of Regulation D.

Private Offerings – Pre JOBS Act

Section 4(a)(2) of the Securities Act provides an exemption for "Transactions by an issuer not involving any public offering." The term "public offering" is not defined in the Securities Act, so issuers have relied on guidelines synthesized from various Securities and Exchange Commission ("SEC" or "Commission") releases and rules, no action letters, and court cases. These guidelines have focused on the number of offerees, the relationship of the offerees to the issuer or someone acting on its behalf, the relationship of the offerees to each other, the manner of communication of information regarding the offering and the sophistication of the offerees.

Uncertainty regarding availability of then Section 4(2) of the Securities Act increased when the Supreme Court rejected the SEC's use of a specified number of offerees or purchasers by holding that a public offering occurs whenever purchasers "need the protection of the Securities Act," ostensibly because they are not able "to fend for themselves."[2] The Court noted that a person can "fend for himself" if the person is sophisticated in financial and business matters and has access to the type of information disclosed in a registration statement. The underlying concepts of sophistication are knowing what to ask for and having the bargaining power to obtain it.

General solicitation and advertising are not permitted in a private offering. The SEC has stated that "negotiations or conversations with, or general solicitation of, an unrestricted and unrelated group of prospective purchasers for the purpose of ascertaining who would be willing to accept an offer of securities is inconsistent with a claim that the transaction does not involve a public offering even though ultimately there may only be a few knowledgeable purchasers.[3]

Rule 146 was promulgated in 1976. Rule 146 limited offerees to 35, prohibited general solicitation and general advertising, and required issuers to prescreen offerees to evaluate their financial means and sophistication.

Regulation D[4], promulgated in 1982, superseded Rule 146. Rule 506 of Regulation D[5] is the safe harbor for the 4(a)(2) exemption and permits an issuer to raise an unlimited number of dollars from an unlimited number of accredited investors and up to 35 non-accredited investors, subject to certain conditions.[6] One condition of Rule 506 is the prohibition of general solicitation or advertising.

Rule 501(a)[7] of Regulation D defines "accredited investor," a class of investors that are presumed to be sophisticated and able to fend for themselves. Accredited investors include certain financial institutions, pension plans, trusts, corporations and other entities with total assets in excess of $5 million, individuals with a net worth of more than $1 million or net income of more than $200,000 or joint income with that person's spouse of more than $300,000, and any entity owned exclusively by accredited investors.[8] The definition also provides that the issuer must have only a "reasonable belief" that a purchaser is an accredited investor.

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Under current practice, an issuer's "reasonable belief" is based upon representations made in a purchase agreement or an investor questionnaire, generally without further inquiry by the issuer.

Changes Made by the JOBS Act

Title II of the JOBS Act changes the landscape for private offerings. Section 201 of the JOBS Act:

- Requires the SEC to promulgate regulations by July 5, 2012, that:
  - eliminate the prohibition of public solicitation in Rule 506 offerings, provided that the issuer takes reasonable steps to verify that all purchasers are accredited investors;
  - specify the methods an issuer must use to "verify" that a purchaser is an accredited investor;
  - eliminate the prohibition of public solicitation in Rule 144A transactions to permit public solicitation, if all purchasers are reasonably believed to be Qualified Institutional Buyers.
- Amends Section 4(2) of the Securities Act, to provide that offers and sales of securities under Rule 506 shall not be deemed public offerings as a result of general advertising or general solicitation.
- Amends Section 15(a)(1) of the Securities and Exchange Act of 1934, to exclude from broker dealer registration a person that maintains a platform or mechanism for Rule 506 offerings that permits the offer, sale, purchase or negotiation of, or with respect to, securities, or permits general solicitations or general advertisements by issuers of securities whether in person, or online, or by any other means.

What Should I Do Now?

The relaxation of the prohibition of general solicitation in Rule 506 offerings will not be effective until the Commission adopts new regulations.

Things to Think About Now

If a general solicitation is made in a Rule 506 offering, the issuer is required to limit the purchasers of the securities in that Rule 506 offering to accredited investors. A few things to consider before undertaking a Rule 506 offering with general solicitation:

- What is the effect on the offering if securities are issued to a person that is not an accredited investor? Would the entire exemption be blown? If the sale to the non-accredited investor is rescinded, would the exemption then exist for the accredited investors?
- Is it possible to have concurrent offerings – one for accredited investors with public solicitation and another for non-accredited investors without public solicitation?
- How long would an issuer have to wait before it can issue securities to an investor that is not an accredited investor?
- Does a Rule 506 offering with general solicitation limit an issuer's ability to issue stock and options to its employees?
- What will the verification requirements require from an issuer?

Rule 502(a)[9] suggests that a six-month period would have to elapse between the completion of a Rule 506 offering with general solicitation and the start of another Regulation D offering without general solicitation to unaccredited investors, if during such six-month period, there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, except for offers or sales of securities under an employee benefit plan.[10]

Rule 502(a) suggests that concurrent offerings under Regulation D are unlikely, however, a concurrent offering under Regulation D with public solicitation and Regulation S[11] (e.g. outside the United States) may be possible under current law.[12] Regulation S prohibits "directed selling efforts."[13] Clarification by the SEC that general solicitation in a Rule 506 offering is not directed selling efforts in a Regulation S offering would be useful for issuers contemplating concurrent offerings under Regulation D with public solicitation and Regulation S.

Rule 502(a) expressly permits the issuance of securities to employees during, or after, an offering under Regulation D.

The SEC will develop regulations that address verification standards. Commentators[14] have urged the SEC to adopt rules that reflect current custom and practice and honor the purpose of the JOBS Act to encourage and support capital formation and to recognize the legitimate privacy concerns of purchasers.[15]

1 Section 4(2) of the Securities Act of 1933 prior to amendment by the Jumpstart Our Business Startups Act, H.R. 3606.

2 SEC v. Ralston Purina, 246 U.S. 119, 124-25 (1953).

3 Securities Act Release No. 33-4552 (Nov. 6, 1962)

4 17 C.F.R. 230.500 et. seq.

5 17 C.F.R. 230.506.

6 See Rule 502 (17 C.F.R. 230.502) for the general conditions applicable to a Regulation D Offering and Rule 506 (17 C.F.R. 230.506) for the conditions specific to a Rule 506 offering.

7 17 C.F.R. 230.501(a).

8 See Rule 501(a) (17 C.F.R. 230.501(a))for the complete definition of accredited investor.

9 17 C.F.R. 230.502(a).

10 As defined in Rule 405 (17 C.F.R. 230.405), the term employee benefit plan means any written purchase, savings, option, bonus, appreciation, profit sharing, thrift, incentive, pension or similar plan or written compensation contract solely for employees, directors, general partners, trustees (where the registrant is a business trust), officers, or consultants or advisors. However, consultants or advisors may participate in an employee benefit plan only if: (1) They are natural persons; (2) They provide bona fide services to the registrant; and (3) The services are not in connection with the offer or sale of securities in a capital-raising transaction, and do not directly or indirectly promote or maintain a market for the registrant's securities.

11 17 C.F.R. 230.901 et. seq.

12 See 17 C.F.R. 230.500 and SEC Release No. 33-6863 (April 24, 1990).

13 Rule 902(c) (17 C.F.R. 230.902(c)) defines directed selling efforts as "any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S (Rule 901 through Rule 905, and Preliminary Notes). Such activity includes placing an advertisement in a publication 'with a general circulation in the United States" that refers to the offering of securities being made in reliance upon this Regulation S.' The definition also describes a publication "with a general circulation in the United States," and specifies disclosures that are not directed selling efforts.

14 See comments posted at http://www.sec.gov/comments/jobs-title-ii/jobs-title-ii.shtml.

15 See comment letter of Jeffrey W. Rubin, Chair, Federal Regulation of Securities Committee, Business Law Section, American Bar Association, New York, New York dated April 30, 2012, p. 4.

Robert I. Gosseen

Romance at Work: The Aftermath of a Failed Relationship

When a supervisor pursues romance on the job and his or her subordinate (more often than not) terminates the relationship, regardless of how consensual it might have been, the supervisor's post-breakup conduct toward the subordinate, if obnoxious, harassing, petty or retaliatory, often leads to liability under Title VII of the Civil Rights Act of 1964.[1] The federal Equal Employment Opportunity Commission ("EEOC") and the courts have declared that sexual harassment violates Title VII.[2] The EEOC's Guidelines define two kinds of sexual harassment: "quid pro quo," in which "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual," and "hostile environment," in which unwelcome sexual conduct "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile or offensive working environment."[3]

Yet, despite decades of litigation, there still is no "bright line" test for determining whether the supervisor's conduct is merely spiteful or violates Title VII.

In one case, involving co-workers rather than a supervisor,[4] described by the judge as a "classic setting of a love affair gone awry," a married teacher broke off his relationship with a co-worker, who then made verbal threats, left notes on his car and embarrassed him in front of his students and other teachers. He filed a written complaint and the principal verbally reprimanded both teachers, instructing them to keep their personal problems out of the workplace.

When the jilted teacher continued to harass him, the plaintiff sued under Title VII, alleging a sexually hostile work environment. Dismissing the case, the court found that the former lover's harassment, which "was motivated not by [plaintiff's] . . . male gender, but rather by [the jilted lover's] . . . contempt for [him] arises not out of the fact that plaintiff is male, but rather, out of [her] . . . contempt for [plaintiff] . . . following their failed relationship; [and that plaintiff's] . . . gender was merely coincidental."[5] *Succar* thus appeared to grant a "free pass" from Title VII liability for their post-breakup behavior where there had once been a consensual sexual relationship.

Subsequent decisions, however, have cast doubts on *Succar's* correctness, and today, most courts consider it "flawed,"[6] and flatly refuse to follow its reasoning,[7] In *Perks v. Town of Huntington*, for example, the court found a Title VII violation based on evidence of unwelcome sexual conduct and harassment by a supervisor following the cessation of a sexual relationship. The trial judge stated that "to interpret such behavior not as gender discrimination, but rather as discrimination 'on the basis of the failed interpersonal relationship' is … [a] flawed . . . proposition under Title VII…".

In another decision rejecting *Succar*, the Fifth Circuit affirmed a subordinate's post-breakup Title VII hostile work

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environment and retaliation claims where "it was only after the relationship ended that Richardson began to harass [the plaintiff],"[8] concluding that "[t]his fact alone supports a jury's inference that he harassed her because she refused to continue to have a casual sexual relationship with him. As such… there was sufficient evidence to support the jury's finding of sexual harassment."

In still another case,[10] the court observed that after the breakup of their affair, "[i]f Bacon's harassment of [the plaintiff]… was motivated by her refusal to have a sexual relationship with him, as Plaintiff asserts, he does not get a "free pass" for such conduct simply because he once had a romantic relationship with her."[11]

We can learn from these cases that despite the absence of a "bright line" test in these failed romance cases, "there is a point where inappropriate behavior crosses the line into Title VII harassment[12] — and most courts leave that determination to the jury.

As the court stated in *Oakstone v. Postmaster*,[13] "[t]here is sufficient evidence to generate a factual issue, requiring jury resolution, as to whether Ms. Philbrook's retribution crossed the line into Title VII harassment. Ms. Philbrook chose to use as her weapon a false allegation of male on female physical abuse and there is sufficient evidence… from which a jury could conclude that her choice of weapon was an act of gender-based harassment."[14]

Bad post-breakup behavior in the workplace carries a heavy price, and it would be better for the disappointed supervisor simply to say goodbye, let it go and maintain a professional relationship. P

1 42 U.S.C.A. §2000e, *et seq.*

2 *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986); *EEOC Guidelines on Discrimination Because of Sex*, 29 C.F.R. §1604.11(a).

3 29 C.F.R. §§1604.11(a)(2) and (3).

4 *Succar v. Dade County Sch. Bd.*, 229 F.3d 1343 (S.D. Fla. 1999); *see also, McCollum v. Bolger*, 794 F.2d 602, 610 (11th Cir. 1986) ("[p]ersonal animosity is not the equivalent of sex discrimination and is not proscribed by Title VII").

5 *Id.* at 1345. The circuit court affirmed. *Succar v. Dade County Sch. Bd.*, 229 F.3d 1343 (11th Cir. 2000) (*per curiam*).

6 251 F.2d 1143, 1157 (S.D.N.Y. 2003), *quoting with approval Babcock v. Frank*, 729 F.Supp. 279, 288 (S.D.N.Y. 1990).

7 In *Perez v. MCI World Com Communications*, 154 F.Supp.2d 932, 940 (N.D.Tex. 2001), for example, the court characterized *Succar* as a "renegade" opinion; *Forrest v. Brinker Inter-national Payroll Company, LP*, 511 F.3d 225 (1st Cir. 2007) (the court explicitly expressed its doubts as to the correctness of *Succar*).

8 *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642, 657 (5th Cir. 2002); see also Shrader v. E.G. & G. Inc., 953 F.Supp. 1160.1167 (D.Colo. 1997).

9 *Id.* at 657; *see also Chamblee v. Harris & Harris, Inc.*, 154 F.Supp.2d 670, 672-74 (S.D.N.Y. 2001) ((permitting an employee who had a previous sexual relationship with her supervisor to proceed to trial on her hostile work environment claim based on the supervisor's behavior toward her after she refused to continue the relationship).

10 *Baker v. International Longshoremen's Association, Local 1423*, (Slip Copy), 2009 WL 368650 (S.D.Ga. 2009).

11 *Id.*

12 *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1188 (11th Cir. 2001). Where the conduct does not constitute harassment by virtue of a hostile work environment or quid pro quo harassment, a number of courts do not find post-breakup discrimination or poor behavior illegal. *See, e.g., Mauro v. Orville*, 259 A.D.2d 89, 697 N.Y.S.2d 704, 707 (3d Dept. 1999) ("Although surely antithetical to good business practices, discrimination against an employee on the basis of a failed voluntary sexual relationship does not of itself constitute discrimination because of sex) (internal citations omitted); *Zutrau v. ICE Systems, Inc.*, 33 Misc.2d 1215(A), 941 N.Y.S.2d 542 (Table), 2011 WL 5137152 (N.Y. Sup.) (Sup.Ct. Suffolk Co. 2011) (court summarily dismissed claim for sex discrimination under New York's Human Rights Law where the plaintiff did not allege that a continued sexual relationship was a condition of continued employment, or that she refused to submit to her boss's requests for sexual favors or sexual demands; she asserted that she was discharged because she terminated the affair and rebuffed the boss's attempts to rekindle the relationship).

13 332 F.Supp.2d 261 (D.Maine 2004).

14 *Id.* at 271.

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Who Owns It? Copyright Ownership for the Collaborative Age

"Collaborate or die!" While a touch over the top, this familiar and often used Millennial-generation refrain is becoming a reality for industries that rely on creativity and innovation. Creators, innovators and "makers" (hereafter, innovators) are realizing that isolation can equal death – that intricate projects require the expertise and participation of widely varying talents. It is not uncommon for complex engineering or product development teams to include designers, marketers, business professionals, accountants, engineers, programmers, artists and other "big thinker types" to bring a concept to fruition or market. During the initial stages of any project, the participants are typically on the same page and smitten with the common goal of bringing a novel concept to life. Over time, relationships and organizations change; sometimes they sour and lawyers are called in to clean up the toxic stew. If issues pertaining to ownership of a project, including individual contributions made to the project, are not addressed up front, the parties will likely end up in some rather sticky and complex situations. *Collaborate or die* should therefore really be read as "collaborate and you may die" if the upfront good feelings are not matched with proper planning for the ownership and control of the project or creation.

As the innovator, it is critical to ask yourself "Who is working with me to bring my concept to life?" Unfortunately, the tendency of many innovators or project sponsors is to believe, "If I pay for it, I own it." While this may be a logical assumption, it is not always a correct conclusion. With an understanding of the role and scope of involvement that is to be made by such third parties, you can effectively avoid the pitfalls that lurk.

An Example

Let's suppose you have an idea for creating a novel piece of construction machinery and you ask your lawyer for assistance. During product development, you realize that the services of a third-party software developer are required in order to engineer the computer code for the machinery. Your lawyer advises you that you will want to own all rights to the copyright in that software code. If you do not, there is a risk that the third-party developer will retain ownership of the underlying copyright in and to the developed software. If the developer retains such control, he or she could, in the future, require that you pay a licensing fee or royalties in order to continue to use the software code; or he or she could turn around and sell that code to a competitor. It is in your best interest, when possible, to own all intellectual property associated with the machine being developed. The best time to negotiate for these rights is up front when everyone is in the haze of collaborative bliss.

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Is an Independent Contractor Involved?

In many cases, when an independent contractor is hired to complete a work, that contractor may automatically retain ownership therein and to the copyright in the work. Take the example above. Although you hired a third-party software developer specifically to create software for your machinery, you may not be the legal owner of that software absent a specific agreement to that effect. When determining whether a contributing party is an independent contractor, the following factors, although not dispositive of the issue, are important considerations:

- Extent of control;
- Type of occupation;
- Whether skill is required;
- Payment method;
- Length of time employed;
- Whether the work is part of the regular business of the employed; and/or
- Who supplies the instrumentalities, tools and place of work?

The answer is usually clear as mud. True to most issues involving copyright law, courts are not consistent in their application of the factors, though the inconsistencies provide endless fodder for law review articles. Consequently, any application of these factors to a particular set of facts is problematic and unpredictable. Much of this uncertainty can be avoided by addressing the ownership of the copyright on the front end of a development project. Implementation of a simple and straightforward agreement (or the addition of well-planned copyright clauses in the underlying contract) can avoid such eventual headaches, heartaches and litigation expenses required to determine copyright ownership in the courts.

As a precautionary measure, you should always execute a written and signed work-for-hire agreement with all third-party contributors. Such an agreement generally states that all copyrights in and to the commissioned work, and prepared on your behalf, will be exclusively owned by you. As a "catch-all" approach, it is also a good idea to include an overarching copyright assignment clause in the agreement itself rather than relying on the creator executing an assignment after the project is completed. If the relationship between you and the creator of the work you commissioned is such that it does not meet the requirements for a work-for-hire relationship, such a copyright assignment will transfer title to you up front and, most importantly, without additional payment or negotiations.

Does Someone Else Own Rights in a Preexisting Work?

In the software programming world, code is often a "derivative work" that is based upon one or more preexisting works. Derivative works are extremely common in these industries and the existence of preexisting works should always be considered when you hire a software developer to create computer or software programming. For example, because the rights in and to a derivative work extend only to the "new material" created and not to the preexisting work, the scope of the copyright in the derivative work may be limited. Additionally, the rights to the preexisting work are retained by the original author thereby potentially subjecting you to liability for using or misappropriating the preexisting works. This alleged exploitation of the derivative work may, therefore, subject you to liability for copyright infringement, an award of monetary damages, and the prohibition of future use.

What Other Deals are Involved? Has Anyone Offered to Publish the Work?

If you are a creative type (such as an artist, writer or musician) it is critical that you truly understand the nature of the "deal." Entire industries are devoted to the purchase of copyright interests in and to literary and musical works in exchange for marketing and "deal shopping." These "publishers" (i.e., promoters) kick back a portion of any deal they procure to the artist, writer or musician in the form of royalties. While promoter-based deals are good for some creative types, particularly those who are not interested in "the business of it all," they may not be a good fit for everyone. It is important for you to be counseled and advised of the limitations of your remaining rights and the possibility of never receiving a royalty payment even if the promoter inks a deal.

A great and shining example of an artist who maintained control of the copyright in and to her work is J.K. Rowling, author of the acclaimed *Harry Potter* series. A little known fact is that you cannot find *Harry Potter* on iTunes for download. You must go to an e-commerce site set up by Rowling herself (http://www.pottermore.com/), one in which she retains a large proportion of the purchase price, in order to download and listen to audio versions of her books. While an author may want to enter into a deal with a promoter for the written book, the copyright in and to the audible version or the movie rights may be retained by the author. These examples are just a taste of the many ways in which a copyright can be divided and subdivided for licensing or marketing purposes. This is a strategy brilliantly used by Rowling which has allowed her to maintain for herself many of the rights and opportunities routinely given away by authors.

Conclusion — Think Before You Leap

Early in the relationship and before "the deal is done," it is critical to ask yourself, "With whom am I working?" In law, just as in medicine, the same principle applies – "prevention is the best medicine" and, with collaborative endeavors as with medicine, the precautions you take at the outset may make all the difference in the outcome or recuperation (legal battle) that ensues. P

Ashley Belleau

Practical Tips to Manage the Efficient and Cost-Effective Arbitration

Today, corporate clients are searching for quicker and more economical and effective alternatives to traditional court litigation to resolve disputes. This article will offer some practical tips for one such alternative — arbitration.

1. Drafting the Arbitration Clause

The arbitration process begins when the arbitration clause is written in the contract. The drafter should consider the type of matter and the business industry when drafting the clause and determine the "best" venue and forum (American Arbitration Association, JAMS, private or local arbitration group) for the arbitration to take place.

The parties' contract to arbitration is generally embodied in an arbitration clause in a more comprehensive contract. The arbitration clause should include the basis for, scope and procedure of arbitration. Also, costs should be considered when drafting the arbitration clause. For example, it is important to identify the number of arbitrators. Three arbitrators will increase the cost and complexity of the arbitration, but offers the opportunity to have panelists with different areas of expertise. However, a small claim may not merit the cost of three arbitrators. The arbitration clause could include a term that if a claim is less than $250,000, there will only be one arbitrator.

Limiting discovery can control costs. The limitation of discovery term may include:

- Precluding or limiting the number and hours of depositions
- Limiting the interrogatories and requests for production of documents
- Setting a time frame for completion of discovery
- Limiting number of experts

Further, the arbitration clause should include the type of arbitration award to be rendered; written reasons or decision only. Awards that contain written reasons may encourage one party to challenge the award on the basis the panel failed to follow the law. Decision-only awards are less likely to be challenged.

2. Selecting the "Right" Arbitrator for the Matter

It is imperative to conduct due diligence on potential arbitrators to determine their background, experience, reputation, knowledge, effectiveness and tendencies in handling arbitrations. The first place to start is to conduct Internet/social media investigation via LinkedIn, Google, Avvo and other types of websites. Depending on the forum, publically rendered awards may be accessible. A review of such awards can provide insight on the arbitrator's experience and tendencies toward the claimant or respondent in a particular type of dispute.

Such investigation should include contacting counsel who has had arbitrations with the proposed arbitrator. Such contact can illuminate whether the potential arbitrator has knowledge about the law, insight into the rules of the forum, and whether the arbitrator allows attorneys to present the case without

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providing too much "rope" to have full blown discovery. Does the potential arbitrator have the ability to control the tempo of the arbitration?

3. Immediately Investigate the Facts of the Matter

Immediately investigate the facts of the arbitration upon notice of the dispute. By doing so, it can be determined what claims or potential defenses should be asserted and the necessary discovery within the confines of the controlling arbitration clause and/or the forum rules. Gather the supporting documents early to avoid documentation being lost. By taking these immediate steps, the theme can be developed with the case early and potential witnesses identified. Statements, if necessary, can be obtained in the event a witness is moving or will otherwise not be available in the future.

4. Discovery

Early on, it should be determined what evidence will be needed to prove or to refute the claims. Do not merely ask for "everything" in the discovery phase because it is not cost-effective and can cause delay. Counsel must determine what is necessary to prove or refute the claims. Further, the client and counsel should work together to tailor the necessary discovery requests and maintain a cost-effective discovery process.

5. Preparing for the Arbitration

Be flexible, think "outside the box" and leverage technology. Consider video conferencing witnesses as an alternative to live testimony. At the outset of the claim, the client should define what the objective is – to posture the case for early settlement or to obtain an award after hearing. Oftentimes the client wants to posture the case for early settlement due to the amount of the alleged damages involved.

Once the ultimate objective is set, then counsel can evaluate how best to streamline the process without losing the benefits of the preparation period. The parties can agree to limit discovery and depositions, and to the exchange of all documents, electronically stored and tangible, necessary to support the claims or defenses in the matter. This duty to disclose is similar to Rule 26 of the Federal Rules of Civil Procedure.

In preparing for the arbitration the theme established early in the process must be the focal point. The theme should be simple and easily understood; every part of the claim or defense should circle back to that theme. The witnesses and the documentary evidence that are chosen should support the theme.

Finally, it is important to reaffirm the ultimate objective: whether to win or to put the case in a posture for settlement.

6. The Arbitration Hearing

During the arbitration avoid unnecessary repetition in order to keep the process streamlined. Stick to the theme and make common sense arguments! Avoid the courtroom formalities. The beauty of arbitration is that one doesn't have to be "Perry Mason" to be effective. Stay focused on the ultimate objective at the hearing.

7. Miscellaneous Techniques

The need for an expert should be ascertained. If so, potential experts should be vetted to determine whom to hire. Also, it is important to determine the best scheduling of the hearing for the client and the expert.

8. Other Cost Considerations

Other cost considerations include the retention agreement of outside counsel. Fee arrangements can include a flat fee with milestone for exceptional results; an hourly fee; or a blended rate with a bonus if the defined objective is achieved. Using a flat fee arrangement allows a client to know the costs up-front, whereas an hourly fee allows a client to pay for the services as they are rendered. A blended rate with a bonus allows a client to pay less than the hourly rate and to spread the payments over time as services are rendered and gives counsel the added incentive to achieve the defined objective so he can earn the bonus.

Another cost consideration is to mediate the dispute to achieve an early resolution, which reduces the costs. Mediation allows the client to attempt to resolve the dispute on its terms, before binding arbitration determines that one side wins and one side loses. If a mutually agreeable resolution can be reached, then the settlement is binding once an agreement is signed.

By maximizing its built-in benefits, arbitration can be an easier, faster and less expensive alternative to court litigation. Following the aforementioned tips and techniques will increase the efficiency, minimize expense and ensure a quick resolution at each step of the arbitration proceeding. P

Rick D. Norris

Becoming a Master of the Obvious: Understanding the Defense of Open and Obvious Conditions

It seems that we all love stuff. While not a frequent shopper, I have recently noticed what seems to be a greater effort on the part of retail stores to get more merchandise in front of the potential buyer. This observation is supported in an April 7, 2011, *New York Times* article: "Stuff Piled in the Aisle? It's There to Get You to Spend More," which details our love for stuff. The article indicates that after years of shedding inventory, retailers have shifted directions and are redesigning their stores to add more inventory. The article cites major retailers' efforts to raise shelf height, turn empty walls into additional areas for merchandise storage, add lanes and bring in bigger items – tactics calculated to increase the number of items for sale. Marketing research supports the theory "the messier the store, the better deal it projects to the customer." Retail marketing consultants say research indicates that "messiness, or pallets in the middle of an aisle, are also a cue for value." Organization and simplification alter the shopper's perception of the best environment and opportunity to snag a bargain. In essence, the greater the mess, the bigger the bargain.

For the Premises Liability defense practitioner, messiness and clutter create particular problems with increased risk of danger created by falling merchandise, as well as trip, slip and fall hazards. When defending any type of Premises action, particularly cases involving store clutter, the defense of open and obvious condition should always be considered as a potential bar or limitation on the claimant's recovery. The open and obvious doctrine holds that a premises owner is not required to protect an invitee from open and obvious dangers. Common open and obvious hazards include holes, boxes and spilled liquids.

Several years ago I had the privilege of representing a major retailer in a case where a woman claimed injury due to the messy condition of the store where she fell. In this case, the claimant attempted to push her shopping cart down an aisle filled with boxes of holiday decorations eventually falling over two cases of merchandise. Plaintiff testified that she did not see the cases even though by her own testimony they were at least knee high. She argued that the focus of her attention was merchandise on the shelf, not boxes in the aisle of the floor. Suit was filed alleging that the store failed to maintain its premises in a safe condition. We argued that the boxes were an open and obvious condition and that as such, the store had no duty to eliminate the condition or warn of its presence. Although the jury returned a verdict in the plaintiff's favor, the Alabama Supreme Court reversed and rendered a judgment in favor of the retailer. The Court followed precedent establishing that an objective standard is used to assess whether a hazard is open and obvious – the question being whether the danger should have been observed, not whether it was consciously appreciated.

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A Brief History of Time: The Jurisdictional Analysis

The availability and effect of the open and obvious defense varies by jurisdiction. As the last holdout of contributory negligence, the open and obvious defense has easier application in Alabama than other jurisdictions. In comparative negligence jurisdictions, the application of the defense varies from state to state. Some states continue to use the defense as a complete bar to a plaintiff's recovery: e.g., Massachusetts, Nevada and Ohio. Other states have held that the defense is not a complete bar to recovery because the obvious nature of the hazard may not always defeat a landowner's duty: e.g., Illinois, Kentucky, Michigan, Missouri, New Mexico, Utah and Tennessee. Still other states have abolished the defense and consider the known quality of a danger solely as a component of comparative fault: e.g., Idaho, Mississippi, Oregon, Texas, Hawaii and Wyoming.

It is important to remember that a landowner may be liable for an unreasonably dangerous condition, even if it is open and obvious, but not if a reasonable person would avert harm. That is the rule of the Restatement (Second) of Torts §343A(1) (1965), which states:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Thus, regardless of the negligence scheme in your state, the open and obvious nature of the hazard can play an important role in your case even if it does not serve as a complete bar to recovery.

Posturing Your Case for Success

In order to posture your case for success, it is important to establish plaintiff's awareness of the store's condition during discovery of the case. During deposition, attempt to elicit information regarding the following:

1. **Establish Plaintiff's Familiarity With the Premises** – Whether the plaintiff frequents the store on a weekly to monthly basis.
2. **Explore Plaintiff's Awareness of the Condition of the Store** – Whether the plaintiff noticed merchandise in the aisle. Whether the plaintiff was aware of the store's general condition, e.g., store frequently had boxes of merchandise in the aisle, generally cluttered or messy, etc.
3. **Examine Plaintiff's Personal Knowledge of the Hazard** – Whether the plaintiff attempted to maneuver around the alleged hazard; step over a spill; inquire or make comments to store employees regarding the store condition.
4. **Evaluate Using an Objective Standard** – Should the danger have been observed by the plaintiff? Not whether it was consciously appreciated, but whether the plaintiff should have seen the hazard given its size, location or other characteristics.

By obtaining this information as early as possible, you will be able to determine the availability and potential impact of the open and obvious defense on your case.

Conclusion

While certainly defense practitioners should continue to encourage our clients to vigilantly maintain safe premises, the open and obvious doctrine serves to provide protection in an age of growing retail clutter. Although the open and obvious defense may not always lead to a certain victory, the benefits that it can provide show that it should always be an important consideration in defending any premises claim.

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Avoiding the Pitfalls of Doing Business with Tribal Governments and Entities

Against the historical backdrop of treaties dating back to the U.S. Constitution, the federal government has contracted with and passed laws affecting the "self-determination" of indigenous peoples, involving both government services and private enterprise. State governments have likewise entered into inter-governmental agreements or "compacts" with tribes, including regulation of Indian gaming. Opportunities for private entities to do business with Indian nations and on reservation lands has spawned economic development in many areas, including real estate, finance, natural resources, retail and commercial operations, as well as tourism and entertainment. This article is intended to help companies and individual entrepreneurs understand the risks and corresponding benefits of contracting with tribal governments and doing business with tribal entities.

With Whom Are You Doing Business?

In one form or another, you are dealing with the tribe itself, which is a sovereign nation, meaning that it has sovereign immunity. The tribe's absolute immunity from suit, in government operations as well as commercial transactions, applies even to contracts and business activities off the reservation. This can be intimidating for individuals or companies seeking a business relationship with a tribe; however, those who take the time to understand the law and plan for the pitfalls, may reap many lucrative economic opportunities.

Apart from some traditional government operations, some of which may fall under the aegis of federal law, Indian tribes often conduct business through separate entities, such as tribal corporations and business "enterprises." Tribal corporations can be established under federal law, but more commonly are created under that tribe's own laws, which will be controlling for most business transactions and disputes.

Federal law vests tribal governments with the power to engage in business transactions and to create business corporations under Section 16 of the Indian Reorganization Act (IRA) for government operations, such as housing authorities, and under Section 17 for other commercial activities. The key issue is that most Section 17 corporate charters include a "sue and be sued" clause, which has been interpreted as being a limited waiver of sovereign immunity, at least regarding those assets specifically pledged or assigned in the transaction. Keep in mind that there are some contracts, including certain leases and professional services agreements, which must comply

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with requirements set forth by the Bureau of Indian Affairs ("BIA") and are subject to BIA review and approval.

A tribal government may also transact business through a tribal corporation or a business "enterprise" established under tribal law. These entities may also perform traditional governmental functions, such as providing housing, health care and governmental services, or they can be purely economic or business entities created, for example, to operate a resort or casino. Generally, the rights and liabilities will usually be dictated exclusively by the operation of tribal law, including the tribe's Constitution or Charter, and any tribal law or business ordinances for the creation of such entities.

The key question is whether there has been a waiver of sovereign immunity in either the creation of the business entity or in the transaction or contract at issue. Some tribal codes, charters and articles of incorporation waive the immunity of those corporations on a limited basis, or authorize the corporation to do so, sometimes without approval by the tribal government. Otherwise, there must be an explicit and unequivocal waiver by the tribe in order to enforce the contract. Remember, if the tribal corporation or business entity functions as an "arm" of the tribe and for the benefit of the tribe, it likely will have the same attributes of the tribe, including sovereign immunity, again unless the immunity has been expressly waived.

Where Are You Doing Business?

Most tribal governments impose business license requirements as a pre-condition of doing business on tribal lands. This requirement is not usually a difficult or expensive process, but you should research it and be aware of the process and the time involved to complete it well in advance of finalizing the agreement. Businesses which fail to obtain the required tribal licenses risk losing their ability to enforce any obligation arising out of on-reservation business activity. Federal law also requires a business to obtain an Indian traders' license, which is issued by the BIA. Any non-Indian party seeking to do business on a tribal reservation should, therefore, review and understand the licensing requirements for doing so as set forth in both tribal and federal law.

What Taxes Will You Need to Pay?

Tribal governments may impose certain taxes on anyone doing business on tribal lands. Whether a state may tax a business transaction on an Indian reservation is more complicated. Tribal governments and members are typically exempt from state taxes, but if the transaction at issue does not involve trade under the Indian Traders statute and involves a non-Indian, courts generally apply a balancing test. Unfortunately, this balancing test is imprecise and can leave non-Indian business in the difficult position of being obligated to pay tribal, state and federal taxes. Under some circumstances, however, this risk can be minimized by structuring the transaction as a management or service agreement in which the tribal government is deemed to be the project owner or operator and the non-Indian business is retained to provide limited management services.

What Happens If You Have a Dispute?

Ideally, commercial transactions and contracts should be structured to minimize disputes and to otherwise delineate the methods by which the parties can enforce their rights and remedies. Contracting with tribal governments and enterprises, however, presents unique issues, from the provisions regarding sovereign immunity to jurisdiction and choice of law questions. Fundamentally, all federally recognized Indian tribes are sovereign nations who are immune from suit unless there is a clear and unequivocal waiver by the tribe or an act of Congress. Indian tribes, and in most cases their wholly-owned tribal entities, cannot be sued in any state or federal court, even for business transactions that occur outside the reservation boundaries, without an express waiver by the tribe. Thus, immunity, jurisdiction and choice of law issues must be agreed upon in advance of any business transaction with the tribe or any tribal entity.

It bears noting that a waiver of sovereign immunity does not necessarily mean that a tribe is subjecting itself to jurisdiction in federal or state courts, nor to arbitration, at least without a specific agreement and choice of law provision. More often than not, the tribal courts have exclusive jurisdiction over disputes with a tribe, or tribal court remedies must first be exhausted before seeking other redress. Most tribes have their own substantive laws and rules of procedure, and will also follow "traditional law" and the customs of the tribe.

Having successfully negotiated the sovereign immunity and jurisdictional hurdles, the next thing to consider would be choice of law, and in particular any applicable rules of tribal law or procedure, such as Notice of Claim provisions and the statute of limitations for claims against the tribe and its members. Naturally, you will want to engage an attorney who is not only admitted to practice in the tribal court, but also understands tribal law, procedure and custom as well as how disputes are resolved in tribal court, including the length of time it may take and the applicable rules of appellate procedure. P

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Tackling Internal Fraud: Weeding Out the Enemy Within

Advancements in technology have made fraudulent schemes easier to perpetrate, and have allowed criminal activity to expand in both quantity and nature. Today, corporate fraud is limited only by the creativity of the perpetrator. The most obvious effect of internal fraud is damage to a company's financial bottom line. Another significant impact is that the company's reputation takes a nosedive, the practical implications of which are extremely destructive.

This article spells out the steps that in-house counsel can undertake in handling a case of internal fraud – from initial detection and internal investigation, to criminal and civil prosecution, through implementation of better controls and remedial safeguards.

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Initial Detection

There are a number of ways in which internal fraud may be detected – for example, by monitoring high risk jobs, receiving tips or complaints from someone, or conducting reviews and internal audits. Regardless of how fraudulent activities are detected, it is important that the confidentiality of those reporting suspected fraud is protected. Employees who make whistleblowing reports regarding suspected fraud should be protected from victimization, harassment, discrimination and threats of disciplinary action. In this regard, companies can establish their own whistleblower policies and procedures.

All allegations of fraud should be recorded. This need not be a costly or unnecessarily complicated procedure. Depending on the size of the company and the type of fraud, this might entail a simple spreadsheet, a reporting database or a full blown case management system.

Internal Investigation

In-house counsel should make sure that appropriate persons are assigned to investigate an allegation of fraud. Investigators must be objective and not have an interest in the outcome of

the matter. The team investigating the situation should be carefully selected and may include a senior auditor of the company, someone from corporate security, in-house counsel and other trusted individuals.

Whenever a serious allegation of wrongdoing is made, the investigation team should quickly move to secure evidence with all investigative steps documented. They should gather documents and evidence, and interview employees and outside vendors, if necessary. The investigators must pursue all leads to determine the extent of the wrongdoing. It is important that the investigative team maintain an open mind and not let preconceived notions of what the facts might be dictate the conclusions reached. Additionally, all investigative material, including opinions and conclusions prepared by the team, must be labeled as confidential and separate files should be maintained to segregate the confidential material.

Suspected Employee's Interview

Confrontation of the suspected employee needs to be carefully planned, witnessed and documented and should occur at the end of the investigation when all other available facts are gathered. The fact of the matter is that, before it gets to the confrontation point, the in-house counsel needs to have hard evidence.

At the interview, the employee's response or "story," including any admissions or concessions, must be documented. This may involve asking the employee to sign a written statement with the account provided. Depending on how the situation develops, this evidence can prove invaluable in later civil or criminal proceedings. In-house counsel should also watch for applicable privacy laws to ensure the company does not run afoul of them.

Action Post Investigative Findings

Once the investigation is complete, and if the investigative team has reached the conclusion that fraud has been committed, action must be taken. Before communicating the decision to the employee, make sure that an employment lawyer reviews the basis for it. The decision and the basis for it should also be communicated to company officers, the board, the audit committee and any key supervisors.

Until now, things should have been handled with great confidentiality. But news of the employee discipline or termination cannot be contained and the company is wise to consider the nature of any response to questions that arise. At this point, the company must decide how to handle the public relations aspect of the situation, at least internally. A consistent message must be formulated and used by management.

Remedies

The company can start civil proceedings to claim damages if, following an investigation, it is clear that the company is the victim of fraud and the persons responsible for the fraud have been identified. At the core of most internal fraud cases are claims for fraud, conversion and breach of fiduciary duty. Obviously, the company will also be expected to vigorously pursue the recovery of stolen property or location of other assets. In appropriate circumstances, it can be necessary to obtain provisional remedies such as orders of attachment or accelerated motions for other preliminary injunctive relief. This will allow assets to be frozen and important evidence to be preserved. It goes without saying that in-house counsel should consider all options and do everything within its power to recover stolen property or right other wrongs.

Conclusion

Much can be learned from managing an internal fraud investigation, no matter how painful such an experience might be. Also, lessons learned can substantially improve the operations of a business. For example, establishing a formal code of ethics is considered a hallmark of a well managed company. Such a code should include examples of business ethics dilemmas, ethical tests used by staff to facilitate decision-making, and best practices. A working and effective compliance program is also critical. Adopting systems for routine auditing, establishing mechanisms for reporting suspicious information, and creating a top-down atmosphere of strict ethical behavior so it becomes part of the company's core culture are all at the heart of a good compliance program. By implementing appropriate controls and preventive measures, companies can make dramatic progress to weed out the enemy within. P

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Contractual Indemnification and Contractual Terms in Design-Build Construction Contracts

Design-Build (D-B) has become a popular delivery system in the construction industry. D-B concentrates both design and construction responsibility in the same firm or team, providing the owner or developer with "one neck to grab" for any issues that may arise. It gives the design-builder total control over the execution of the project. Hopefully, both parties benefit from reduced conflicts and expedited construction, translating into lower costs and greater profits.

Design-builders are usually general contractors who enter into subcontracts or joint ventures with design firms to undertake a construction project. Some D-B projects are led by design firms that subcontract with general contractors, but most of the time it works the other way, with the general contractor leading the team.

In contractor-led D-B projects, the design-builder may pass the design work on to a subcontractor or joint venture partner. But even if the design-builder is not itself providing design services, as between the owner and the design-builder, the latter will still be responsible for the design and any design errors.

A general contractor will ordinarily carry general liability (GL) insurance to protect itself from potential liability for personal injury or property damage. Contractors usually require their subcontractors to show evidence of their own GL insurance and to name the contractor as an additional insured on the subcontractor's GL policy. However, both the contractor's and the subcontractor's GL insurance most likely exclude professional services.

Protection Options

The contractor has several options to protect itself against the risk of liability for design errors. It can add a professional liability (PL) endorsement to its GL policy; it can purchase a separate PL policy; or it can require the designer to provide insurance for the benefit of both parties. When relying on a designer's PL insurance, however, the contractor must take care, as additional insureds are normally not recognized in PL policies.

In a typical belt-and-suspenders approach, the subcontract or joint venture agreement will include a clause that states, regardless of insurance, the design firm shall indemnify and defend the contractor against any loss, liability or expense arising out of the designer's work.

Thus, the contractor may perceive that it has three-way protection: its own insurance, the designer's PL insurance and contractual indemnification. Problems can arise, however, if the PL insurance and the contractual indemnity are not coordinated. The designer could find itself assuming uninsurable risks, and the contractor may end up having to rely on its own PL insurance, if any.

Issues

Professional liability insurance covers deviations from the "standard of care," i.e., the failure to render services with the degree of care ordinarily observed by other competent designers who render similar services as those provided by the designer in question for similar projects in similar geographic areas. PL insurance does not insure contractually undertaken obligations that go beyond the standard of care. Guarantying a defect-free design, warranting fitness for a specific purpose, guarantying that the project will achieve a specific outcome (such as a minimum LEED point level), or agreeing to indemnify and defend another party all may go beyond the

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standard of care and would therefore be uninsurable under a PL policy.

Further, a small to medium-size design firm may carry only minimal PL coverage limits, and those limits may have to cover more than one simultaneous claim. Moreover, the designer's defense costs will ordinarily be charged against the limits. So a design partner or subcontractor may not have much insurance for the contractor to rely on. Contractor's coverage, by contrast, is usually written for relatively higher limits, which may be available for more than one simultaneous claim, and defense costs typically are not charged against the limit.

Solutions

One partial solution for the design-builder would be to engage D-B subcontractors to execute particular components of the project and require the subcontractors to do their own design work (or hire their own sub-designers). Although this does not overcome the problem of insurance coverage for duties that go beyond the standard of care, it does insert an additional layer of protection for the D-B contractor.

A more reliable, but complex, solution would be to limit the scope of the duty owed to the owner in the first place and to express that duty in terms of the standard of care in the owner contract. One could literally transcribe the standard of care definition into the contract, for example:

> "Contractor's [or subcontractor's] design services shall be rendered by or under the supervision of licensed professional architects or engineers and shall conform to the degree of care ordinarily observed by other competent architects and engineers who render similar services as those to be provided under this contract for similar projects in similar geographic areas."

D-B contracts should avoid words and phrases like "best," "superior," "perfect," "guaranteed," "suitable for the intended purpose" or anything suggesting that the design outcome must exceed the standard of care. PL insurance generally will not cover design services which allegedly fail to meet an abnormal standard, even if contractually required.

Similarly, when negotiating contracts, general contractors should try to match the scope of the indemnity clause in the owner contract to the contractual indemnity coverage the contractor has in its own insurance policy and that which the contractor requires from its subcontractors. The same advice would apply as between a subcontractor and a next tier design sub-subcontractor.

For example, if a general contractor's own contractor's policy provides contractual indemnity coverage only to the extent that the general contractor is at fault (the "limited form"), or if the general contractor requires no more than the limited form from its subs, then that general contractor should make sure the owner contract does not impose a broader indemnity obligation than the general contractor's insurance will cover. If this is not possible, then the general contractor should be sure to require parallel indemnification from subcontractors or purchase broader contractual liability coverage for itself, or both. The "intermediate form" contractual liability coverage would protect a general contractor from contractual liability for bodily injury or property damage for which it and another party are jointly liable, and the "broad form" would protect it so long as the indemnitee (usually the owner) is not solely negligent. Broad form contractual indemnification coverage is rare, however, in PL policies.

Conclusion

Design-builders who engage subcontractors or joint venture partners to provide the "design" half of a D-B project do not thereby escape the risk of design liability to the owner or third parties who may suffer injuries or losses because of a design error. Design-builders have multiple ways to protect themselves from such risks, but the different avenues of protection have to be coordinated, or their benefits may be lost. P

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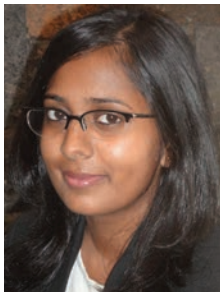

Poonam Geemul

Mauritius as a Platform for Investment in Africa

The African business mood has been gaining momentum, with leaders taking major measures to enhance their economies and foster political stability. Africa, being a land of untapped mineral resources, has attracted investors to its growing markets, including the telecommunications sector. In addition, Mauritius is increasingly being hailed as a jurisdiction of choice for doing business and facilitating investment. This has been highlighted by its top African ranking by the World Bank in its 2011 "Ease of Doing Business" Report and in the Mo Ibrahim Index of Corporate Governance. Such indices acknowledge that the logistical, corporate governance and legal setup of Mauritius provides incentives which are fundamental to instilling unparalled confidence in business transactions in Africa. Such positioning has been fundamental in establishing the Mauritian jurisdiction as an emerging port for investors to effect investment on the African continent.

For centuries, Africa and Mauritius have enjoyed close rapport, founded on cultural heritage and ancestry. Throughout the years, the relations have developed into mutual collaboration in trade and investment. Those relationships have now translated into solid diplomatic ties, coupled with the necessity for the African parties to be more economically supportive of each other in the face of European and Chinese giants. The need to create more favorable trading terms among themselves has led to the addition of Mauritius to a number of regional initiatives, namely the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), the Africa Growth and Opportunity Act (AGOA), the African-Pacific-Caribbean (ACP) and the Indian Rim Countries (RIM). These memberships bring benefits including duty free access, no custom duties and privileged market access. It should, however, be noted that despite such regional endeavors, investments in Mauritius are regulated by the Investment Promotion Act 2000, which is compliant with the World Trade Organization's agreement on Trade Related Investment Measures (TRIM).

On a more contractual basis, the need to foster investment has led to the signature of no less than 13 Double Taxation Avoidance Agreements with African counterparts, with three more pending ratification. There are also a number of Investment Promotion and Protection Agreements which are in place between Mauritius and other countries of the continent under the aegis of the Board of Investment. Most notably, such bilateral agreements have been reached with South Africa, Botswana, Ghana and Zimbabwe.

By way of a backdrop to African investment by a Mauritian entity, a company which holds a Category 1 Global Business License delivered by the Financial Services Commission, the Mauritian financial regulator may apply for a tax residence certificate to be treated as a Mauritian resident for all tax intents. By virtue of the application of respective Double Taxation Avoidance Agreements, such an entity would benefit from non-double taxation through tax credits of 80 percent, such that the Special Purpose Vehicle would rarely be amenable to tax in the jurisdiction. In the event that any

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tax is imposed, this would involve a maximum threshold of 3 percent, since the corporation tax in Mauritius is currently 15 percent. Moreover, the absence of any tax on capital gains, repatriation of profits, capital and dividend makes the Mauritian jurisdiction an ideal platform to provide a regional headquarter, through which to conduct all investment decisions on the continent.

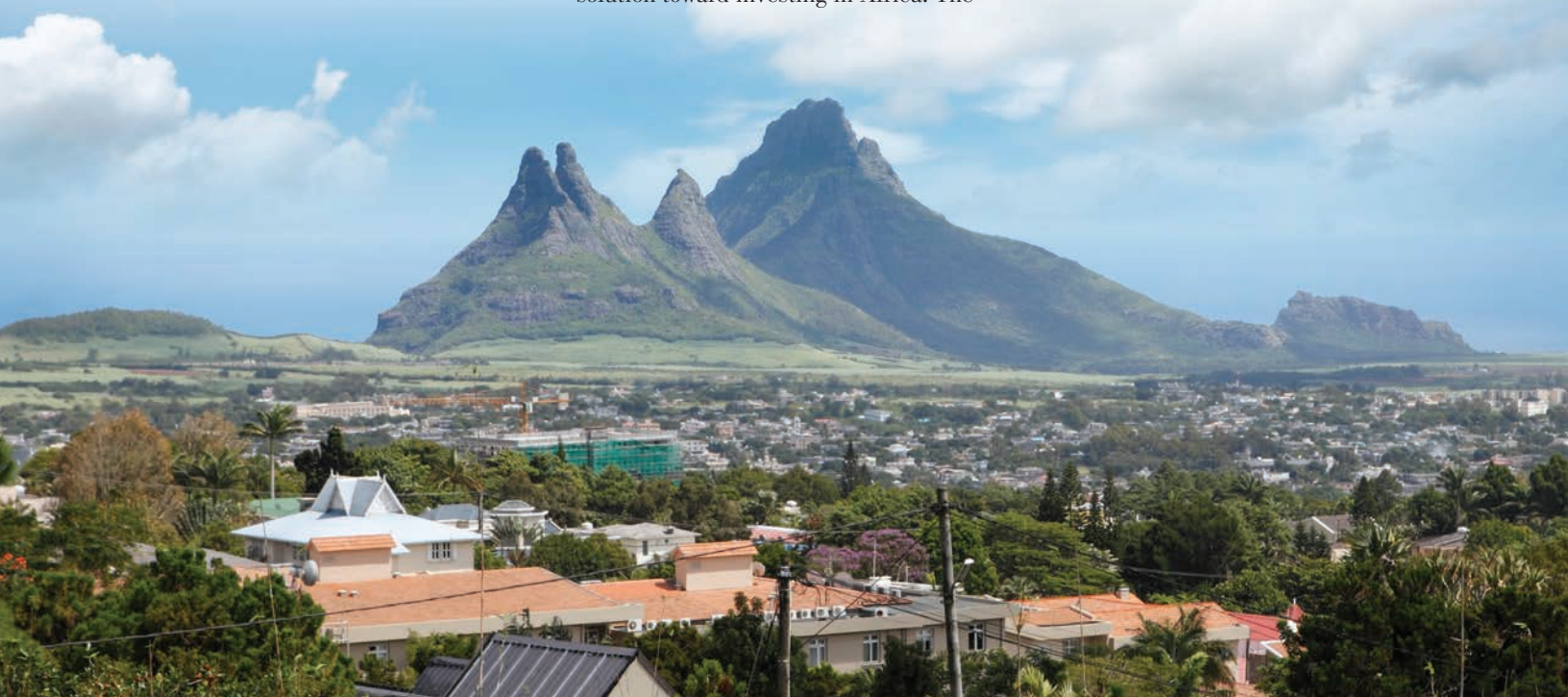
The jurisdiction is rendered more economically attractive through the absence of foreign exchange controls and because foreign investors may own 100 percent of shares of their businesses. The panoply of investment vehicles which may be availed by the investor also matches sophisticated jurisdictions. Besides a number of corporate vehicles such as companies, trusts and limited partnerships are available to encourage private equities, collective investment schemes, holding companies and headquartering initiatives and general commercial undertakings to benefit from the advantages of their investments. Routing investments through Mauritius may also serve a treasury function, whereby the shares of the entity in Mauritius are pledged, so as to provide finance to the African entities.

In spite of the numerous tax advantages that it offers, Mauritius should not be viewed as a tax haven. Instead, it would be more appropriately classified as a low tax jurisdiction. Indeed, the investment route necessitates the demonstration of substance on the island. The requirement to have local directors, to be able to benefit from the sacrosanct tax residence certificate, as well as the necessity to hold meetings from the offices of the company, are a few examples of how the Financial Services Act ensures that the advantages which are guaranteed by the double taxation treaties are not abused. Moreover, there is now the possibility for offshore businesses to conduct business on the island itself, whereby those transactions will then be amenable to the standard corporation tax rate. Such initiatives have dissociated Mauritius from the negativity which flows from being branded a tax haven, and has instead posited the country on the white list of the Organization for Economic Cooperation and Development (OECD).

The legal system of Mauritius must not be underestimated, since the hybrid system of common law and codified law enables counsel to understand the backdrop to cross-border transactions. All transactions are also subject to significant rules to combat anti-money laundering and terrorism financing. The recognition of foreign judgments by the Mauritian courts and being the first country in the Southern African region to enact the International Arbitration Act 2008, based on the UNCITRAL, further makes Mauritius a jurisdiction of choice.

From a logistical perspective, Mauritius is ready to provide a working solution toward investing in Africa. The availability of regular flights from Mauritius to the continent has been a key factor in establishing the headquarters of a company on the island. The possibility to reach the offices through relatively short haul flights, as opposed to travelling to European destinations and further, is a fundamental criterion. Furthermore, the presence of multinational banks, which provide reliable service on the island, is also a key reason why investment is routed from and/or effected in Mauritius. Furthermore, there is a highly educated workforce, with most people being bilingual and sometimes even multilingual, fluent in English, French and other languages like Hindi. This indubitably opens the door for reluctant Anglophone and Francophone countries.

Mauritius is undeniably a dot in the Indian Ocean and has not been bestowed with substantial natural resources. Nonetheless, the country seems poised to create a niche for itself in the regional financial arena. With a history charged with innovation, adaptability and flexibility, Mauritius today prides itself in being a sound, safe and welcoming investment center. The African continent, which has yet to take full advantage of its countless resources, represents the future where investments are concerned. The island unquestionably posits itself as the missing link which can help African countries reach their full potential.P



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The "Permanent Establishment" Trend According to the Italian Tax Agency

The current economic crisis notwithstanding, Italy is the eighth largest economy in the world and the fourth largest European economy.

The Italian economy is, and has always been, characterized by a large number of small and medium industries focused on the export of niche market and luxury products. At the same time, Italy has a smaller number of global multinational corporations than other economies of comparable size. Lastly, Italian locations are known worldwide for their touristic appeal.

Due to these characteristics, the Italian market has attracted a wide range of international corporations, which have tended – due to high Italian taxation rates – to set up local structures with the aim of minimizing the tax burden.

Italian tax authorities, however, are showing firm and increasing opposition to this trend by utilizing a wide range of legal "tools," among which is the concept of permanent establishment (PE), which is increasingly utilized because of the resulting advantages for government coffers.

Permanent establishment is a concept created in 1963 by the OECD (Organization for Economic Cooperation and Development), and thereafter included in most international income tax treaties. Since 2004, the permanent establishment concept has also been included in the Italian Income Tax Law.

Very briefly, a permanent establishment is a "fixed place of business" in State A which may generate turnover for a corporation resident of State B. In other words, the turnover generated by (i) sales activity carried out partly or wholly in Italy on (ii) a non-occasional basis and (iii) with the use of personnel, assets or not-independent entities there, is subject to income and VAT taxation in Italy, even if the corporation is tax resident abroad.

Recently, the field of application of the PE concept has been somewhat broadened by Italian tax authorities as well as by Italian tax courts. For example, a foreign corporation may be considered to have a PE in Italy:

- Even if there is already an Italian subsidiary of the group active in Italy;
- Even if only a preliminary stage of the commercial activities (such as the mere agreement on quantity discount, while the purchase order was filled abroad) is carried out in Italy;
- Even if the activity is carried out by an agent who is formally independent, but economically dependent on the foreign corporation.

The PE may be "overt" (i.e. the foreign corporation does duly comply with its tax obligations in the other country) or "hidden."

In the latter case, no income tax statement or financial statements have been filed in Italy, thus allowing Italian tax authorities to assess the taxable income on the basis of mere presumptions. Presumptions whose (mis)application often yield an amount of taxes, as well as proportional administrative fines, that are often higher than usual. The large amounts of assessed taxes may also lead to the indictment of the legal representatives of the corporation.

Should the existence of a hidden PE be discovered, the tax authorities can demand payment of all relevant income taxes due (an average of 31.4% in 2011), VAT (21%), interest and administrative

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penalties (not less than 120% of the tax assessed). Further penalties may be imposed in the case of avoidance of withholding tax duties (regarding, for instance, the payment of wages).

This nightmarish scenario is made even worse by the fact that Italian tax authorities are entitled to assess taxable income on a presumptive basis, without taking into consideration the financial statements of the enterprise (should such statements ever have been drafted). Therefore, even actual costs related to commercial activity in Italy may not be considered to be deductible for the purposes of assessing the taxable income of the PE.

Moreover, should any tax crime be ascertained, Italian tax authorities may extend the assessment back 11 previous tax years. The length of this timespan may not only result in the multiplication of the amounts due, but at the same time significantly hamper the possibilities of the foreign corporation (and of its advisors) to gather all documentation and/or information necessary for the purpose of an appeal to the tax authorities and/or for eventual litigation.

From the point of view of criminal law, should Italian authorities discover a hidden PE, the risks for a criminal procedure, in parallel with the tax procedure, are very high.

In fact, tax evasion in connection with a hidden PE may lead either to an indictment for the crime of "income tax statement omission" (and those found guilty may face one to three years of detention) or for fraudulent income tax statements (punishable by prison sentences ranging from 18 months to six years in length). While Italian public prosecutors and courts move between these two possibilities, it is certain that the assessment of a hidden permanent establishment has extremely relevant consequences from a criminal point of view.

The risks concern not only the Italian subjects involved (i.e. the legal representatives of the Italian subsidiary), but also the foreign corporation's legal representatives, who would be indicted for the omitted/fraudulent income tax statement of the PE. In a worst case scenario, individuals involved could even be charged with conspiracy.

Moreover, should the existence of a tax crime be found, there is the possibility for the Public Prosecutor's office, during even the preliminary phases of investigations, to seize an amount of money or other economic values (i.e. the stakes owned by the foreign subject in the Italian corporation) equivalent to the income taxes allegedly due, in view of a possible confiscation in the event of a guilty outcome at the criminal trial.

In the end, the assessment of a hidden PE can easily lead not only to indictments for the legal representatives, but also to considerable economic damages for the corporation itself.

The consequences of a hidden permanent establishment in Italy may thus not only lead to truly negative economic impacts on the foreign corporation, but also create a major threat for the continuity of its activities on the Italian market.

It is therefore highly advisable that foreign corporations request that their tax advisors carefully evaluate the characteristics of their Italian activities (as well as those of any local structures), with the aim of verifying whether such activities might be deemed to be permanent establishments.

Should the outcome of such verification be positive, it is highly advisable to evaluate whether to operate as an overt permanent establishment, paying higher taxes but avoiding any further drastic fiscal and criminal sanctions. Should the outcome be negative, on the other hand, it would in any case be sound advice to set aside adequate documentation and evidence attesting to that fact, which might be useful in the event of a specific audit by Italian tax authorities or in case of any future tax litigation. After all, knowing is half the battle.P

Nermine Tahoun

Change of Law in Egypt

After revolution and political instability in Egypt, there were dramatic changes in laws due to the cancellation of the constitution and issuance of a new constitutional declaration.

The military became the main controller in the transition period after revolution, which aimed to protect and maintain Egypt's civil nature and provide more incentives and privileges to private and foreign investments. Economic and jurisprudence advisors to the Supreme Council of the Armed Forces (SCAF) started, for the first time since the Mubarak regime, to explore new major projects including the Suez Canal industrial free zone and port, development of Sinai and cultivation of new lands around the Nile River.

SCAF issued main principles to apply to all investors without any differentiation and to help eliminate corruption. These changes have resulted in more legal work for the Egyptian legislative sector and the lawyers working in Egypt, in order to ensure that the private sector complies with the new laws.

The current government worked to settle all claims raised against investors who worked with previous ex-regime public officials. These settlements aimed to encourage private sector investments for the long term. Still more changes are being made.

The Egyptian government successfully completed mega infrastructure and utility projects under this unstable transition period (i.e. Alexandria Hospitals Public Private Partnership Project), proving the strength of the Egyptian economy regardless of the instability of political regimes.

Despite the political challenges facing Egypt, it is still considered a very attractive country for investment. Egypt enjoys a diversified economy, water, desert, the Suez Canal, mineral resources including gas and iron, cultivated land and one-third of the monuments of the world, together with a 90 million person population, constituting a great labor force. Its location linking North Africa, the Middle East and Europe offers a great opportunity to build a new linking port after Hong Kong and Dubai. Although, even with such great potential, Egypt still faces great challenges due to inefficient management of its resources, and the country is still in great need of changes to laws in order to meet its real current need for new investments. P

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Boon for Single Brand Retailing in India – Relaxation in Foreign Direct Investment Norms

India is the third largest economy in the world – and stability coupled with consistent growth of such a large contributor to the global economy is not an easy task. The Indian government has been consistent in its support for market development through trade liberalization, financial liberalization, taxation reforms and opening up to foreign investments. India's twin growth engines of economic growth and demographic profile set it apart from other nations and present a compelling business case for global retailers looking to enter the Indian market. In its endeavors to encourage foreign investments in India, the Department of Industrial Policy and Promotion ("DIPP") of the Ministry of Commerce and Industry see Press Note No. 1 (2012 Series) dated January 10, 2012 ("PN 1")[1], has permitted 100 percent Foreign Direct Investment ("FDI") in single brand product retail trading under the Government route (i.e. with the prior approval of the Secretariat for Industrial Assistance and the Foreign Investment Promotion Board).

Prior to PN 1, up to 51 percent was allowed in the single brand retail sector. But with the recent 100 percent limit relaxation, entry in the Indian markets has become a very lucrative opportunity for global as well as domestic market players. The retail industry in India is of late often being hailed as one of the sunrise sectors in the economy. By relaxing the FDI laws relating to single brand retailing, the Indian government has definitely created a positive step forward, paving the way for foreign retailers selling single branded products to move into India without having to join with an India partner.

Background

Prior to the PN 1, FDI in single brand product retail trading was allowed up to 51 percent under the government route. Further, prior to PN 1, FDI in single brand product retail trading under the FDI policy was subject to the following conditions:

- Products to be sold should be of a 'Single Brand' only.
- Products should be sold under the same brand internationally, i.e. products should be sold under the same brand in one or more countries other than India.
- 'Single Brand' product-retailing would cover only products which are branded during manufacturing.
- The foreign investor should be the owner of the brand.

PN 1, with the 100 percent FDI infusion in single brand product retail trading under the government route, has

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been made subject to further conditions in addition to the aforementioned already existing conditions:

- Overseas retailers who want to invest in single brand product retail trading in India beyond 51 percent will have to source 30 percent of their goods from "Indian" small industries, village industries and cottage industries, artisans and craftsmen.

Some of the objectives that the Indian economy seeks to gain with such relaxation are:

- Attracting investments in production and marketing;
- Improving the availability of such goods for the consumer;
- Encouraging increased sourcing of goods from India;
- Enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices.

Why India?

Indian organized retail industry is one of the fastest growing sectors with huge growth potential. Total retail market in India is estimated to reach USD $573 billion by 2012-13. Organized retail industry accounts for only 5.5 percent of total retail industry and is expected to reach 10 percent by 2012.[2]
Foreign companies' attraction to India is the billion-plus person population. Also, there are huge employment opportunities in the retail sector in India, not to mention cheaper procurement and labor. India's retail industry is its second largest sector, after agriculture, which provides employment. There is a huge industry with hardly any large players. In addition to these factors, improved living standards and continuing economic growth, friendly business environment, growing purchasing power and increasing number of conscious customers aspiring to own quality and branded products in India are also attracting global retailers to enter the Indian market.

Right Time to Tap the Indian Market

India has emerged as one of the prime destinations for the investment of funds from an impressive number of foreign investors. Undoubtedly, with the further relaxation in the FDI norms, there is a lucrative opportunity for foreign players to enter one of the biggest territorial markets and reach out to a large customer base. It is also imperative that the players participate in market expansion by getting introduced in the Indian markets sooner than their competitors.

The growth rate trend of the Indian industry together with the changing consumer inclination (such as increased use of credit cards, brand consciousness and the growth of population) are factors that encourage a foreign player to establish outlets in India and tap the huge Indian market.

At present, most major global brands and retailers who are not yet in India are assessing the Indian market with keen interest, recognizing its strengths as a retail destination. It is widely speculated that major brands like Pavers England, Ikea, Gap and Starbucks, etc. have either already set the machinery running in order to make a timely entry in India or are seriously considering making the move. Furthermore, international brands that had already partnered with an Indian partner now can go solo without diluting their stake in the Indian market.

With the relaxation of norms, opening up of the market and pro-investment attitude of the government, this is the ideal time for prospective foreign players to make an earnest start in a major retail market, as India has finally stepped beyond the brink of further liberalization. P

1 http://dipp.nic.in/English/acts_rules/Press_Notes/pn1_2012.pdf

2 http://business.rediff.com.

Shinji Itoh

Legal Structures for Investment in Japanese Real Estate

For foreign institutional investors to invest in Japanese real estate, two types of investment structures are often used – "TMK" structure and "GK/TK" structure. In this article, we offer a general overview of these structures. Direct investment in real estate and indirect investment through a corporation or branch office in Japan are also possible, but the TMK structure and the GK/TK structure offer some tax benefits as discussed below.

TMK Structure

A *tokutei mokuteki kaisha* or "TMK" is a corporate entity established under the Law Concerning Asset Liquidation (*shisan no ryudoka ni kansuru horitsu*; the "TMK Law"). A TMK purchases real estate in fee or trust beneficiary interests in real estate. The method for funding to purchase such assets is generally limited to specified bonds (*tokutei shasai*), preferred shares (*yusen shussi*) and specified borrowings (*tokutei kariire*). Foreign institutional investors become equity holders by purchasing the preferred shares of a TMK.

The TMK Law regulates TMKs strictly. Before commencement of its business, a TMK must file a business commencement notice (*gyomu kaishi todokedesho*) with a competent Local Finance Bureau of the Ministry of Finance. Together with a business commencement notice, a TMK must prepare and file an asset liquidation plan (*shisan ryudoka keikaku*, an "ALP"), which contains information on the property the TMK will purchase, how the property will be managed and disposed, how the funding will be done, and so forth. A TMK must operate its business in accordance with its ALP. With certain exceptions, any amendment to the ALP must be approved by relevant parties (e.g., shareholders and bondholders), and be filed with the Bureau. A TMK may borrow money as a specified borrowing only from a "qualified institutional investor" (*tekikaku kikan toshika*, a "QII") as defined under the Financial Instruments and Exchange Law (*kinyu shohin torihiki ho*, the "FIEL"). The financial statements of a TMK are required to be audited by an outside auditing firm. Periodic business reports must be filed with the competent Bureau.

Taxation

A TMK may effectively avoid double taxation on its profit distributions by deducting the amount of distributions as an expense, if certain requirements prescribed by tax code are met. Such requirements include, among others, (i) a majority of the common shares and preferred shares issued by a TMK must be held by Japanese residents (such as a Japan corporation or a Japan branch of a foreign corporation); (ii) specified bonds in the amount of at least 100 million Japanese yen must be issued to one or more "institutional investors" defined under tax code; and (iii) more than 90 percent of the profits must be distributed to the shareholders for each fiscal year. If a TMK purchases real estate in fee, the TMK may be entitled to a reduced tax rate for the real estate acquisition tax and the real estate registration tax. It is a key advantage to use the TMK structure that, depending on the residency of the foreign equity holder, the investor may enjoy a reduced rate of the withholding tax on TMK's distributions under a tax treaty entered into by Japan.

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GK/TK Structure

TK Partnership

A *godo kaisha* or "GK" is a type of corporation which may be established under the Companies Act (*kaisha ho*). A GK resembles a Delaware limited liability company in its structure, but it is not a pass-through entity for tax purposes. A *tokumei kumiai* or "TK" is a bilateral contract, often referred to as a "silent partnership." Under a TK agreement, a TK investor contributes funds to the business of the TK partnership, in consideration for the promise by a TK operator to distribute the profits and losses arising from the TK business. A GK is often used as a TK operator to acquire the assets. Typically, TK operators borrow loans for their funding.

Only the TK operator may operate and manage the TK business, and generally the TK investor is not entitled to participate in decision making related to the TK business. The titles of the assets belong only to the TK operator, and the TK investor is not responsible for the debts of the TK business.

Taxation

Generally, the TK operator can treat distributions to the TK investor as an expense and thereby avoid double taxation at the TK operator's level. TK distributions are subject to the Japanese withholding tax of 20%.

Regulations

If a TK operator acquires real estate in fee using funds contributed by a TK investor, such TK operator becomes subject to a licensing requirement under the Real Estate Syndication Law (*fudosan tokutei kyodo jigyo ho*, the "RESL"). Also, a licensing requirement under the Real Estate Brokerage Law (*takuchi tatemono torihiki gyo ho*, the "REBL") is also applicable to the TK operator. These licensing requirements are so rigorous that they cannot be satisfied by the TK operator (GK), as a mere asset holding vehicle. On the other hand, these licensing requirements are not applicable if a TK operator acquires a trust beneficiary interest (shintaku jueki ken, a "TBI") in real estate instead of real estate in fee.

If a TK operator acquires a TBI using funds contributed by a TK investor, such TK operator becomes subject to a registration requirement under the FIEL, which is also unrealistic to be satisfied by a mere asset holding vehicle. Exemptions from such registration requirement are available; one of which is the QII special exemption and another is the entrustment to a discretionary investment advisor. If the TK investors consist of (i) one or more QIIs and (ii) 49 or fewer non-QIIs, the TK operator may apply for the QII special exemption. Also, the registration requirement is exempted if the TK operator entrusts the whole of its investment decisions to a registered investment advisor on a discretionary basis. In either case, there are certain filing requirements.

TBI

A TBI in real estate is created under a trust agreement between an owner of real estate and a trustee, usually a licensed trust bank. Under the trust agreement, the owner entrusts and transfers legal title to real estate to the trustee and in return acquires the TBI. The trustee administers the real estate at the instructions of the TBI holder. The TBI holder receives periodic distributions from trust income after deducting costs and expenses. A reduced tax rate is applicable for the real estate registration tax when entrusting the legal title to the trustee. Generally, the real estate acquisition tax is not imposed on the transfer of a TBI.

Conclusion

When investing in real estate in large size, foreign institutional investors tend to use the TMK structure. The TMK structure is more attractive than the GK/TK structure from a tax perspective. However, generally speaking, the set-up and maintenance of a TMK is costly as compared with a GK under the GK/TK structure. The GK/TK structure tends to be used when investing in real estate in mid or small size. Generally the management of the TK business (including cash distributions) is flexible as compared to a TMK, but the GK/TK structure attracts more regulatory issues.

Roger Downs

If You Operate or Trade in Australia – The Rules Have Changed

Introduction

Business operations in Australia have changed significantly as the *Personal Property Securities Act 2009* (Cth) (PPSA) came into full effect this year.

The PPSA has washed away a complex jumble of laws related to personal property in Australia to adopt a fresh approach based on legislation in Canada and New Zealand.

Who Is Affected?

Any business that operates in Australia or trades with Australian businesses needs to be aware of the new regime and in particular the need to register certain interests within strict time frames or face losing priority. Personal property captured under the new PPSA regime includes intellectual property, making registration important for foreign companies who license their intellectual property to Australian businesses.

Significance of the PPSA

The PPSA replaces a multitude of legislative instruments (at both state and federal levels) and promotes a single register that supersedes 23 different registers that were used throughout Australia to record interests in various types of personal property including motor vehicles, boats, deeds and charges over company assets.

The PPSA does not simply codify the laws it has replaced but instead imposes a **completely new regime for dealing with personal property**. Personal property includes practically anything, except land or water rights or a right or entitlement expressed under Australian law not to be personal property.

While interests in personal property can be perfected by possession and control, the majority of commercial transactions will rely on registration on the PPS Register for perfection of the interest.

An Example

- Company A leases portable sheds to Company B **but fails to register its interest** over Company B in respect of the leased sheds.
- Bank C takes a charge over the assets of Company B as collateral for loans **and registers its interest**.
- Company B defaults and Bank C appoints a receiver over Company B's assets.

Because Company A failed to register its interest, the Court held that Bank C's registered interest over the assets of Company B (including the sheds leased from A) prevailed over the ownership interest of Company A. Company A was left as an unsecured creditor of Company B.

The outcome in the above scenario would have been quite different had Company A simply registered its interest within the time required when it leased the sheds to Company B.

PPSA Registration

The new regime removes the traditionally accepted relevance of ownership and title and promotes the supremacy

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of the single register to prioritize interests in order of the date of earliest registration in a similar manner to dealings with real property in Australia and with personal property in other countries with legislation similar to the PPSA.

With registration at the heart of the new regime, the PPSA will impact most businesses. Interests in personal property that did not require registration under the old laws (such as rights under a retention of title clause or leases of goods) may now be required to register to maintain the validity and priority of their rights over such property.

Time Limits

Many interests that were registered on the old Australian State or Commonwealth registers have been transferred to the new register. However, not all interests could be transferred or needed to be registered before, so there is a 24-month transition period to register securities that were created before January 30, 2012 and were not previously required to be registered.

Interests arising under new contracts or arrangements since January 30, 2012, that require registration must be registered within required time limits, ranging from 15 to 20 business days depending on the nature of the interest.

The need to register under the PPSA is based on the substance of the arrangements rather than the form of documentation and it seems that "register or beware" must become the new mantra of prudent businesses trading in or with Australia.

New Terminology

In addition to the significant conceptual changes, the PPSA has introduced a range of new terms. Many of these terms will be familiar to those already acquainted with comparable laws in countries like Canada and New Zealand. The terms are worth defining in the Australian context and some of the most important new terms include:

- **Security interest:** an interest in personal property created by a transaction that in substance secures the payment or performance of an obligation, without regard to the form of the transaction.
- **Security agreement:** an agreement or other act, such as a deed of execution or a declaration of trust, or writing evidencing the agreement or act that creates a security interest.
- **Collateral:** personal property to which a security interest is attached.
- **Attachment:** the creation of a security interest in personal property which could be enforced against that property.
- **Grantor:** a person who has the interest in the collateral.
- **Secured party:** a person who holds a security interest for the person's own benefit or the benefit of another person (or both).

Benefits

The regulation of personal property interests under the PPSA has clear advantages over the regime that operated under the confusing quagmire of old statutes. The complexity of the old system has been removed and the use of a single register makes life much easier for people to register their interests and conduct searches.

It is now possible for people to trace the proceeds of their security interests. For example, if you owned flour and sold it on condition that ownership only passes on payment, you would not be able to maintain any claim over that flour under the old laws, if the person you gave it to mixed it with other ingredients to make a cake.

Under the new laws, you should be able to maintain your claim over the value of the flour as a proportion of the proceeds of any sale of the cake, despite it becoming part of a cake, provided you register your interest in the flour against the purchaser.

Burdens

Although the PPSA avoids the administrative headache of having to maintain and use multiple registers, the radical change in the priority in interests places new burdens on those who hold security interests in Australia.

Anyone with such an interest must now ensure to register under the PPSA or stand to suffer the harsh consequences of not registering.

What You Must Do

If you operate a business in Australia or trade with Australia and:

- supply goods on the basis that you retain legal title (ownership) until payment; or
- lease or hire goods,

you will need to:

1. Develop a policy regarding which customers you will register against in the PPS register.
2. Check all terms and conditions of trade or supply contracts and have all customers sign up new terms and conditions with appropriate PPS provisions.
3. Register existing security interests before January 30, 2014.
4. Register any new contracts and supplies made under new purchase orders or contracts (even with existing terms) within the appropriate time frames.
5. Take great caution in the way you search existing businesses to identify any security interests over them, as the new PPS register has a range of "teething problems." In particular, take care when searching the register – as transitional interests have limited "temporary perfection" for two years, they may not be registered immediately on the register and have superior priority. P

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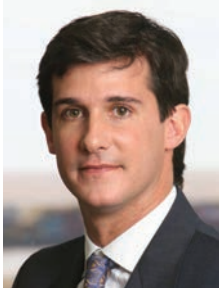

Mariano E. Carricart

Looking for Agribusiness Opportunities? Try Argentina

As you may already know, Argentina is well known as a massive country with a considerable amount of natural resources. Therefore, this country offers great opportunities for local and foreign investments, particularly in the agribusiness sector.

In Argentina, agricultural concerns represent the main economic activity with international recognition. In addition, historically Argentina has been an important player in the world market, being one of the principal producers and exporters of grains, commodities and food. We strongly believe that the results of an agricultural concern performed under correctly and professionally organized structures can be outstanding and will continue to be attractive to any investor.

Due to the continued high growth rates of the world population, the food industry promises more sustained growth. According to the Food and Agriculture Organization of the United Nations, the price of food has been increasing in recent years and will continue this trend, having reached on December 2010 its historical peak.

Considering the expanse and quality of the Argentine soil, it could be asserted that Argentina has the natural resources to become, together with Brazil, the United States and China, the principal suppliers of food in the world.

It is important to point out that thanks to the modern technologies applied to agriculture exploitation, traditional risks have been considerably reduced and production has increased correspondingly. In the last 15 years, productivity has increased threefold. Furthermore, in recent years agricultural production in Argentina highlights the growth of oilseed. Such circumstances have generated a friendly environment to investors.

Finally, we understand that investments under a proper structure together with: (i) advanced technology, (ii) adequate geographical and climate conditions, and (iii) an efficient management, constitute the factors which enable investors to obtain high rates of return from their investments.

International Financial Situation

After the 2008 international crisis, investors ceased to trust in international markets and particularly in certain financial products. Therefore, there is a trend to invest in the productive sector linked with the real economy.

In addition, after the crisis, the big deficits recorded by the United States and Europe have resulted in a reduction in financial aid from the governments to the producers of such economies. As a result, the prices of commodities have had a sustained growth as previously stated.

Vehicles of Investment

If an investor is interested in doing business in the agriculture sector, Argentina could be the right place. In general, investments are organized through a company or trusts. It will depend very much on how the vehicle obtains the funds to run the business. If the investor chooses to set up a company, there are basically two alternatives: an S.A. or an SRL. In either case, the taxes applicable

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to each vehicle are similar, however, for foreign investors the SRL may entail tax benefits in his or her country of origin. Both alternatives need to appoint managers – in the case of an S.A., a board of directors, and the SRL shall appoint a manager.

The trust could also be used as an alternative vehicle. The investor would place money in exchange of rights to collect the results of their investments. The investors will be appointed as beneficiaries of the trust. The advantage of the trust over other vehicles is that with the trust the investors have the guarantee that the funds can only be applied to the specific project set forth under a trust agreement. Likewise, the creditors of the trustee are not entitled to access the assets of the trust by virtue of any debts of the trustee.

In general, when we cooperate with an investor, the projects consist of leasing and/or acquiring lands of good quality in order to carry through their agricultural exploitation.

Where to Invest

We should say that the Province of Buenos Aires, south of Santa Fe and Córdoba, are considered the best lands in Argentina. Regarding the agricultural exploitation, it is also important to mention that due to new technology (seeds) it is also possible to find farms in other places within Argentina where an investor could commence his or her business and see acceptable results.

Other Legal Aspects

Foreign exchange regulation may affect the transfer of money in and out of Argentina. Therefore, in each case, an analysis of the mentioned regulation must be made in order to ensure that the total amount of the investment will be available to be used in Argentina once transferred, and that both the original investment plus its return can eventually be transferred abroad.

Money laundering is a criminal offense in Argentina, and regulation is continually applied in order to prevent it. Therefore, it must be considered that the banks may request information, documents and/or affidavits in connection with the origin of the funds.

The applicable taxes will vary according to the structure of the vehicle. However, taxes which may apply to any investment are the following:

(a) National taxes: income tax, minimum supposed income tax, personal assets, value added tax (as of today the agriculture sector shall pay this tax at a rate of 21 percent over its purchases and receives 10.5 percent of value added tax on its sales, generating a non-usable positive balance), among others.

(b) Regional taxes: in general are gross income tax (turnover tax), land tax and stamp tax.

Risk Factors

Finally, any investor should consider the risk factors of this activity. In any agriculture activity, the investor should analyze the:

(a) Climate risk: The results of the agricultural exploitation depend very much on climatic conditions, which in some cases can be predicted, but in others not. The climatic conditions might reduce the productivity of the land and may affect the production process;

(b) Market risk: Market volatility and the variation of international prices of grain may adversely affect the investments. Currently in Argentina there are two markets which trade commodities: futures and options. Those are located in the cities of Buenos Aires (MAT/BA) and Rosario (ROFEX). These markets provide us with competitive prices without incurring any unnecessary costs;

(c) Foreign exchange regulation: The Argentine Central Bank has issued certain resolutions which regulate and limit the flow of funds in and out of the country.

Pyramid of the sun at Teotihuacan Ancient ruins of the Aztec like tribe – Mexico City, Mexico

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Primerus Community Service

"We want to give girls the necessary skills to be the CEO of a company or the CEO of their home."

— Erin Stone

Girl Scouts of America has changed thousands of women's lives throughout the years, including those of attorney Erin Stone and paralegal specialist Karen Kendrick at Primerus member firm Prince, Yeates & Geldzahler in Salt Lake City, Utah.

Stone and Kendrick, both Girl Scouts in their youth, are now giving back by being highly involved with the Girl Scouts of Utah (GSU).

Erin Stone

Karen Kendrick

Erin Stone, second from left, attends the 2012 Girl Scouts of Utah (GSU) Women's Day event with, from left to right, Heather Porter, GSU Development Specialist; Melissa Mathews, GSU Director of Development; and Nathan Measom, GSU Development Specialist.

Kendrick first volunteered 20 years ago as a member of various committees specializing in fundraising. As an avid golfer, she and her husband, Tom, organized, sponsored and competed in GSU's Going for the Green Golf Tournament each year. This labor of love began with just six teams in a spring snowstorm and grew to over 40 teams in the tournament's 18th year.

Kendrick has received considerable recognition in the community for her service with GSU, including the Hearts and Hands award for community contributions and the Thanks Badge I and Thanks Badge II, the highest awards for adults in Girl Scouting.

Stone has been serving as a member of GSU's board of directors for three years, and recently chaired the 2012 Girl Scouts of Utah International Women's Day event, an international holiday that celebrates the past, present and future achievements of women.

"Being a part of GSU is so rewarding," Stone said. "It is extremely inspirational. I have been able to interact with wonderful girls who are doing amazing things in the community. It is great to give girls confidence in themselves so they are able to give back to the community. I am so happy that I am able to give these girls these opportunities."

Stone is also coordinating other programs for GSU, including an event with Women Lawyers of Utah, where Girl Scouts and attorneys will work side by side on a service project. This event gives the participants a chance to give back to the community while providing the girls with an opportunity to meet and mingle with professional women. Another upcoming event that Stone is excited about is Camp CEO, where women CEOs will attend camp with Girl Scouts and teach the girls leadership skills.

"We want to give girls the necessary skills to be the CEO of a company or the CEO of their home," Stone said. "We want to show them that they have options and can be successful women no matter what path they choose."

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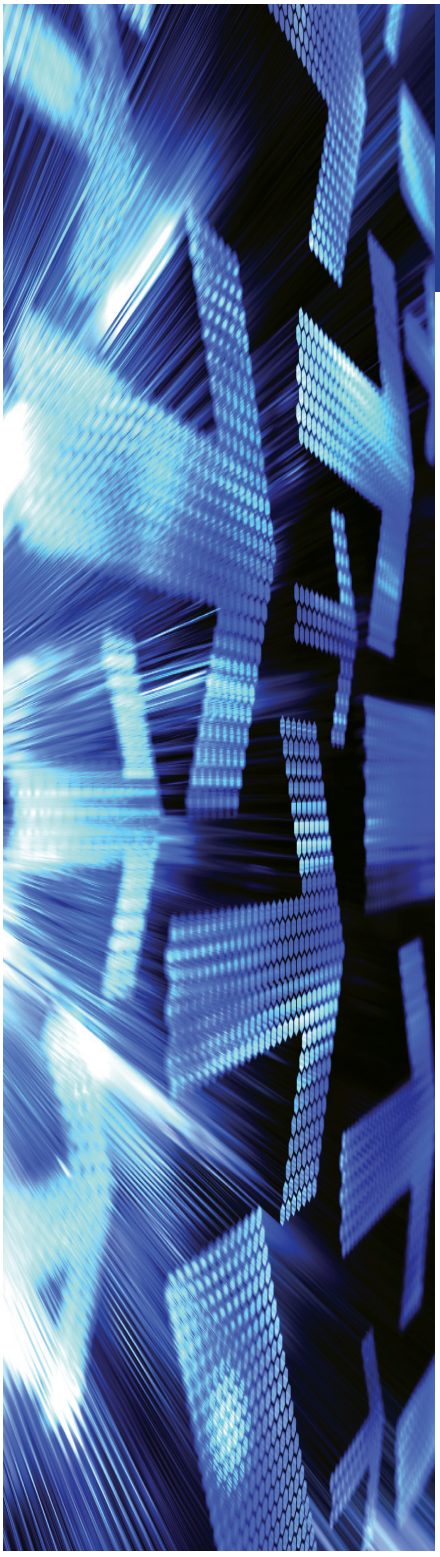

2012-2013 Calendar of Events

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September 18, 2012 – Catalyst: A European Business Forum,
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September 20-21, 2012 – Primerus Defense Institute Insurance Coverage and Bad Faith Seminar,
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September 30 - October 3, 2012 – Association of Corporate Counsel Annual Meeting,
Orlando, Florida – *Primerus will be a corporate sponsor.*

November 1-4, 2012 – Primerus Global Conference, Scottsdale, Arizona

November 7-9, 2012 – 2012 Professional Liability Underwriting Society (PLUS) International Conference, Chicago, Illinois – *Primerus will be a corporate sponsor.*

March 1-2, 2013 – Primerus Latin America & Caribbean Chapter Meeting,
Panama City, Panama

March 21-22, 2013 – Primerus Defense Institute Transportation Seminar,
Nashville, Tennessee

April 17-21, 2013 – Primerus Consumer Law Institute Spring Conference,
Las Vegas, Nevada

April 25-28, 2013 – Primerus Defense Institute Convocation,
Boca Raton, Florida

May 16-18, 2013 – Primerus Young Lawyers Section Boot Camp: Trial Skills,
Nashville, Tennessee

October 24-27, 2013 – Primerus Global Conference,
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October 27-30, 2013 – Association of Corporate Counsel Annual Meeting,
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Many additional conferences and events are being planned for 2012. Please visit the Primerus events calendar at www.primerus.com/events.

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