Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

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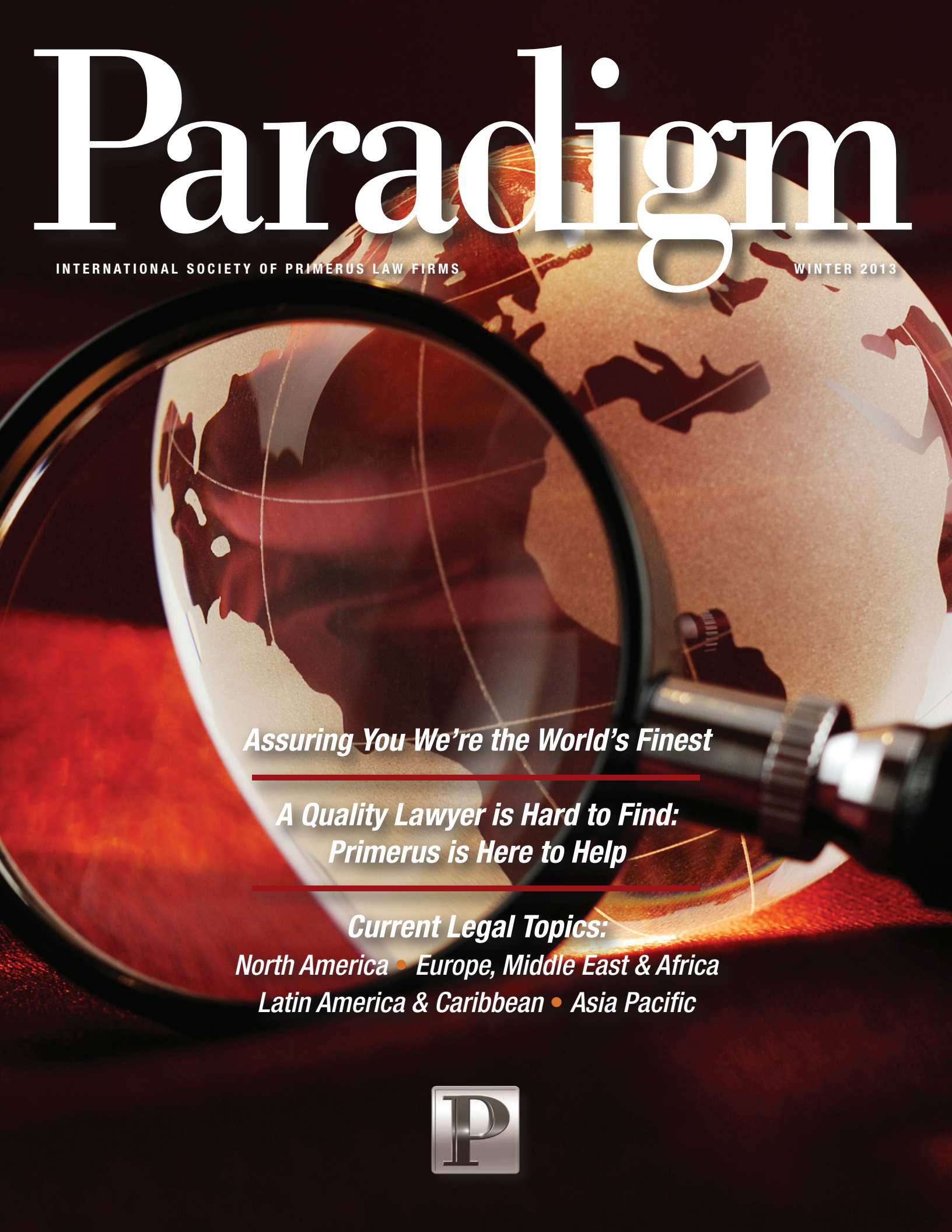


Assuring You We're the World's Finest

A Quality Lawyer is Hard to Find: Primerus is Here to Help

Current Legal Topics:

North America • Europe, Middle East & Africa

Latin America & Caribbean • Asia Pacific

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

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

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

About our cover

Primerus and all of its attorneys are under the magnifying glass to ensure they're providing nothing but the highest quality service and most reasonable fees – all the time, everywhere around the world. Thanks to our ongoing quality assurance efforts, Primerus can say with confidence, we are the world's finest.

Scan this with your smartphone to learn more about Primerus.

Primerus
The World's Finest Law Firms

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

North America, *pages 8-41*

Europe, Middle East & Africa, *pages 42-51*

Latin America & Caribbean, *pages 52-59*

Asia Pacific, *pages 60-64*

President's Podium

John C. Buchanan

Assuring You We're the World's Finest

As I write to you, we are closing the books on 2012, a very successful year for Primerus, and looking ahead to 2013, a year which promises even more growth for us within the United States and around the world. With 200 law firms in 44 countries, we are larger now than ever before. I expect early in 2013, we will be in 50 countries. Primerus truly is revolutionizing the law firm of the future, offering very high quality legal services at reasonable fees around the world.

But as many of you know from experience, with growth comes new challenges. How do we ensure that every lawyer in every one of our law firms around the world is meeting the quality and ethical standards that form the foundation of Primerus? After just returning from our first Primerus Global Conference in Scottsdale, Arizona, I can assure you our quality standards stand strong, and we are indeed the world's finest law firms. I know this is a bold claim. And as an attorney myself, I know you cannot make a claim like that without the evidence to prove it.

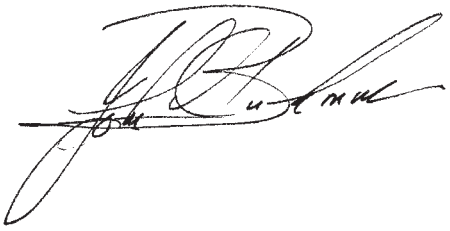
You'll read more on page 5 about the systems we have in place to ensure quality throughout our ranks, but I want to talk with you about just one of those safeguards: our newly established Quality Assurance Board. The board has the important role of further defining the high standards embodied in the Six Pillars and translating them across cultures around the world. The Six Pillars (Integrity, Excellent Work Product, Reasonable Fees, Continuing Legal Education, Civility and Community Service) form the bedrock of Primerus. Any Primerus law firm has a longstanding record of commitment to these values, and now we're doing the important work of making sure they mean the same thing to every member around the world.

The Quality Assurance Board, working together with our well established Accreditation Board, will review the performance of all member firms, facilitate client matter referrals and identify best practice standards. As one part of their duties, expect to see after-matter client surveys when you work with a Primerus firm. I'm a firm believer in the J.D. Power and Associates approach to customer (or client, if you will) satisfaction. This board, working as one piece of our larger approach to quality assurance, will help us use the proven J.D. Power system in the legal world. Not only are we out working for you by searching for the best law firms in the world, we vet them using a strict admission procedure, and then audit them annually (more often if needed) to ensure they're still meeting the highest quality standards.

I'm proud of the systems Primerus has in place to ensure that every interaction you have with one of our law firms is a positive one. When we say we have the world's finest law firms, we mean it. But perhaps it means even more to hear our clients talk about their experiences with us. Starting on page 5, you'll hear from just a few of many clients who say Primerus is the first place they come when they're looking for a good lawyer, because they know that the next Primerus firm they hire is certain to be as good as the last one they worked with.

If you haven't yet discovered exactly who the world's finest law firms are, I invite you to do so in 2013. I know it will be worth it.

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.



A Quality Lawyer is Hard to Find: Primerus is Here to Help

A recent study revealed how difficult it is for corporate counsel to find a good international law firm – and how often they've ultimately regretted their choice.

The study found 45 percent of North and Latin American companies fired the international law firms they hired, most often due to poor service and communication problems. The study, "The Selection and Retention of International Law Firms," conducted by LexisNexis and Martindale-Hubbell, asked 157 in-house counsel in Canada, the U.S. and Latin America about their hiring of foreign law firms (meaning those operating outside their domestic market).

"This statistic is very unfortunate and shows exactly why Primerus is the answer for corporate counsel around the world," said Primerus President and Founder John C. (Jack) Buchanan. "Very high quality and reasonably priced law firms is an invaluable service Primerus can provide to clients. We do the hard work of selecting and screening the best law firms and then we work every day to ensure they're meeting clients' needs at the highest standard."

Buchanan said Primerus has a broad strategy to ensure that their law firms worldwide are of the highest quality, so clients don't experience the trend reflected in this survey – problems with poor quality work and service from law firms. "We call ourselves the world's finest law firms and we mean it," Buchanan said.

Dependable Quality

Time and time again, clients report that Primerus is the first place they look for a quality, reasonably priced law firm, whether for work in the United States or abroad.

Matthew Morrison, Vice President of Claims Legal for QBE North America, said many Primerus firms are on his company's panel of approved counsel, and he calls on them routinely for litigation needs throughout the United States. Consistent quality from one Primerus firm to another gives him the confidence he needs to hire them.

"If a firm is a member of Primerus, we can make the analogy that it must be just as good as the Primerus firm we just worked with in Texas, or anywhere else," Morrison said. "We have a comfort level that we have the right attorneys for the case."

Quality Assurance

Ensuring there are no lags in quality in any Primerus firm is just one reason why Primerus recently established a Quality Assurance Board. The board's role is to ensure high quality service is provided to all Primerus clients by reviewing the performance of member firms, facilitating client matter referrals and identifying best practice standards.

According to Quality Assurance Board chairman David Villadolid, the board is an important part of Primerus' larger efforts of selecting, screening and conducting ongoing quality reviews of member firms. "The selection of competent and trusted counsel is the most important task, and Primerus has already done that in many international locations," he said. "But expanding and deepening the mutual understanding of our individual business and cultural customs is another essential way that all Primerus attorneys ensure their clients will continue to be well served."

According to Buchanan, the Quality Assurance Board is just one aspect of Primerus' larger coordinated effort to make sure that every one of its lawyers is the "world's finest."

"Everything Primerus does comes together in the big picture," Buchanan said. "And that big picture is to bring the world's finest law firms together with great clients in the delivery of fine legal services for reasonable fees."

Other ways Primerus assures the quality of its members include:

- **The Six Pillars** – Buchanan created Primerus in 1992 because he saw a pressing need for an organization that would help restore honor and dignity to the legal profession and rebuild the eroding trust in lawyers and the judicial system. In order to help accomplish that, Primerus established the Six Pillars to convey the core values of every member law firm and lawyer. Primerus lawyers are committed to living by these

common values: Integrity, Excellent Work Product, Reasonable Fees, Continuing Legal Education, Civility, and Community Service. Before becoming a member of Primerus, every law firm must have a reputation of following these standards, and once they are admitted to Primerus, every lawyer commits to following them in every interaction.

"In the twenty years since we established the Six Pillars, we have never wavered from them, and we never will. Primerus attorneys are united in our commitment to them, and clients immediately know what we are all about simply by considering the Six Pillars," Buchanan said.

- **Application Process** – Primerus seeks out, accepts and retains only the best firms for membership. After a firm completes a basic membership application form, Primerus conducts a more extensive investigation of every potential member firm, gathering information about the firm's policies and practices related to the Six Pillars, as well as references including clients, lawyers and judges. The firm also must sign a release of information request to be submitted to the firm's malpractice insurance carrier. Primerus also conducts an internal review, including sending a letter or email to all current member firms requesting any information they may have about a prospective member firm.
- **The Accreditation Board** – The final decision about a firm's membership falls to the Accreditation Board. The board functions as an independent body with final authority on the application of the rules of admission of firms and retention of membership. This removes any politics and personal preferences from the process of attracting and retaining members, resulting in a high quality standard that's applied universally to all members. Every year in July, Primerus audits every member firm to determine whether it is qualified to retain membership. Firms must complete a form indicating any change in status which could reflect a lack of continued commitment to the Six Pillars. The Accreditation Board reviews every audit and further investigates all irregular audits.

Primerus Does the Hard Work For Clients

"The Quality Assurance Board, the Accreditation Board, the Six Pillars and a stringent application and retention policy all work together to ensure that Primerus firms are the world's finest," Buchanan said. "We do the hard work of finding, screening and auditing law firms so that clients don't have to."

That's a service that has proven valuable to one high level risk management executive of a large global company.

He learned about Primerus from a college classmate whose firm joined about five years ago. He has attended several events of the Primerus Defense Institute and has been hiring Primerus law firms consistently ever since.

"It saves me a tremendous amount of time in that I know Jack [Buchanan] and Ruth [Martin] are probably a lot tougher in the vetting process than I am," he said. "I have a certain level of comfort knowing that if a law firm has made it through the gauntlet that is Jack and Ruth, then they will be acceptable to me." (Ruth Martin is General Counsel and Senior Vice President of the Corporate Client Division for Primerus.)

The executive said the Primerus firms he has worked with have met his top criteria for quality: first, having capability and prior experience in the same area of law that he is hiring them for and second, what he calls "bench strength," or using associates and senior partners appropriately depending on the level of skill and experience required by a case.

He said that when he recommends a Primerus firm to his general counsel, he's always pleased. "He is routinely impressed with the rate that we get for working with a partner, and when I show him the partner's bio, he's even more impressed," he said.

Finally, he likes that Primerus firms are small or medium-sized firms. "I like that we're not a number to them," he said.

Since he typically hires law firms for one case rather than a larger volume of work, he also likes the advantages that come from working within the larger Primerus society. "They know that if I don't get the service I am accustomed to receiving from a Primerus law firm, then they could be totally cut off from Primerus. Even though I may be a small client, I think the Primerus brand gives me bigger weight," he said. "Bad news travels faster than good news, so they have a vested interest in taking care of my file."

Thanks to the work of the Quality Assurance Board, and other parts of Primerus' broader screening and monitoring process, that assurance of great client service, excellent work and reasonable fees will only strengthen in the future.

"We use the word 'society' to refer to Primerus," Villadolid said. "By signing on to the Six Pillars, we have all agreed to certain self-evident truths, to the principals we all believe in. The Six Pillars are the measures of quality we provide to clients and other members. The Quality Assurance Board will help communicate and translate what 'quality' means in different cultures so that we all share the same common understanding."

And that, Buchanan said, will allow Primerus to continue to serve clients as a society of the world's finest law firms, every time and everywhere. P

Jim Rudolph

Legal Traps for Unwary College Students and their Parents

Whatever our areas of expertise, as attorneys we are often asked to advise a parent on a college student in trouble. Whether a child is a freshman going away to college for the first time, a senior returning for their last respite from the real world, or somewhere in between, each semester comes with its own bumps in the road and potential pitfalls. Here are some of the legal issues to be aware of:

Alcohol

While laws and codes of conduct vary, underage drinking is almost always an arrestable offense and will likely be punished by the school as well. For students who are 21 and over, Massachusetts and many other states have very strict open-container and public intoxication laws which students often violate. Many schools also have severe consequences for keeping alcohol in dorms, underage drinking or binge drinking, so students should be familiar with their student handbook and know whether campus safety officers need consent to enter and search a dorm room. It goes without saying that no student should ever drink and drive, but if your child's had a drink and is pulled over, it's best not to submit to a breathalyzer test. Most states will automatically suspend their license for a period of months for the refusal, but it becomes much more difficult for the State to prove its case at trial.

Parties

Any party-thrower must be aware of social host liability, both criminally and civilly. Criminally, a host can be charged for throwing a party where an underage individual is served or allowed to possess alcohol. Civilly, a host can be liable for damages caused by a person they've provided alcohol to after they leave the party. So if you're hosting a party, you must make sure not only that you keep the noise down, but that there's no underage drinking occurring, and that if you're providing the alcohol, no one is over-served.

Fake IDs

Students have always made and utilized fake indentifications, but they've never been as legally dangerous as they are today. While using someone else's real identification may only be a misdemeanor, it may also be punishable under laws applied to identity theft. Conversely, using a fake ID with a picture of yourself is more often going to be a felony offense. Most serious of all is making fake IDs, punishable by harsh laws directed at preventing identity theft, illegal immigration and terrorism.

Credit

At almost every sporting, recruiting or other campus event you see the tables handing out cheap school-branded swag in exchange for credit card applications. Credit markets have tightened, but it's still dangerously easy for students to get credit and wind up under a mountain of debt. That debt can follow them for years, as can any consequences of late or missed payments.

Pranks and Hazing

More than ever colleges and states alike are rightly recognizing much of what were once considered pranks (for example, taking items from a

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fraternity, sorority or rival school) and accepted rights of passage as criminal hazing. For its part, Massachusetts for example, defines hazing as, "any conduct or method of initiation into any student organization, whether on public or private property, which willfully or recklessly endangers the physical or mental health of any student or other person," and specifically eliminates consent as a defense.

Social Networking and Defamation

Cyber-bullying is receiving more attention from law enforcement officials than ever before. Schools, too, have been quick in many instances to sanction students even for entirely online conduct. While schools have the right to monitor a student's online activity and act accordingly, it's also important to remember that everything put online is out there forever, and students certainly don't want to be answering questions about abusive or irresponsible social media use at future job interviews.

Gambling

Despite their wide acceptance, remember that poker games, sports pools, friendly wagers, and any other game of chance with money on the line is illegal in most states. Such activities open students up to the possibility of legal consequences, and perhaps more likely, university sanctions.

Cheating/Plagiarism

Every student has been warned about the dangers of cheating and of plagiarism and yet it continues apace. Today, in addition to everything students have ever been told, it's especially important to be aware of the dangers of internet plagiarism (purchasing papers from internet databases or individual paper writers) which can have legal consequences for both the student and the paper source and which will certainly have academic consequences for the student.

Date Rape

Date rape is a serious issue that has been reported with more frequency in recent years. The term can include forced sexual intercourse with an individual, intercourse with an individual who is too intoxicated to consent, or purposefully drugging someone for the purpose of getting them to submit to intercourse. For students that have been victims of date rape, it's important to remember that resources exist both on their campus and in their community, and they should immediately report the crime to law enforcement. If a student has been accused of date rape, it's important to immediately seek legal counsel.

Copyright Infringement

Ever since Napster, file-sharing has been unquestionably illegal and punishable both civilly and criminally. Today, BitTorrent remains a ready source of pirated content, the Motion Picture Association of America and individual movie studios continue to file actions against college students, and civil penalties for downloading even a single file can range well over $100,000. Not only should students avoid any illegal downloading, they need to password protect their wireless router to make sure that no one else is using their connection for it either.

Landlord/Tenant Issues

There's nothing more exciting for a student than his or her first apartment, and there's nothing more frustrating than issues with that apartment. One issue that students face frequently is the mishandling of a security deposit, the deposit paid up-front to ensure that if the tenant causes damage to the apartment, the landlord has the money to fix it. In many states, there are very strict rules for how a landlord must handle that deposit and landlords very rarely follow them. When landlords don't follow the law, they may lose their right to hold the deposit or withhold for damages. If they don't return the full deposit, they could be on the hook for substantial liability and will have to pay the tenants' attorney's fees.

Harassment and Discrimination

Colleges and universities are supposed to be academic havens for young people, but unfortunately both sexual harassment and discrimination by university officials still takes place. Both may give rise to administrative and civil claims, are dealt with in the student handbook, and run afoul of State law. In Massachusetts, a public institution cannot treat one individual differently based upon their race, color, religion, national origin, ancestry, sex, age, disability, sexual orientation, marital status or status as a recipient of public assistance. If your student has been sexually harassed or discriminated against, report it to law enforcement, administration, and your state agency overseeing discrimination claims as soon as possible.

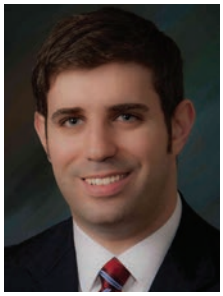
What If Your Student Gets in Trouble?

There are three important rules students need to keep in mind if they get in trouble: be respectful, don't go it alone, and deal with it sooner rather than later. Being respectful, asking for help (from an attorney if necessary), and being proactive will ensure that a bad situation is not made worse. Students and parents are well advised to consult an attorney (often a local one) immediately if there could be consequences to a student's actions.

Legal Emancipation

Last but not least, it's important to remember that as of the time your child turns 18, they are legally an adult. Since you're no longer their legal guardian you can no longer access their health information or make legal, medical, or financial decisions for them if they're incapable. So like any responsible adult, it's time for them to go see an attorney to discuss getting a healthcare proxy, HIPAA authorization, and a durable power of attorney.

Harry Beatty



Joshua Katz

New York's Expedited Procedure for Collecting on a Note or Default Judgment

It is common commercial practice to draft a separate promissory note evidencing the debt created in a transaction. New York State offers an attractive expedited procedure for collecting on such a note, and also for domesticating and collecting on a foreign default judgment, that could be of interest to attorneys from other jurisdictions.

In many jurisdictions, collecting on an instrument for money owed, such as a promissory note, can be a lengthy process. In addition to the delays and inefficiencies inherent in all litigation, when a defendant indisputably owes money on an unambiguous note, his only "defense" may be to delay collection in hopes that the creditor will grow frustrated and agree to compromise on the amount owed or, worse, so that he can secrete assets.

Typically, the first step in collecting on a note is to prepare a summons and complaint and attempt to effect service on the defendant, which can be difficult if the defendant chooses to be evasive. After service is effected, the defendant typically has between 20 and 60 days to respond to the complaint. The initial response may be a dilatory tactic, such as a request for more time to respond, or a meritless motion to dismiss that nevertheless delays matters while the court sorts out the issues raised in the motion. And although many jurisdictions, in theory, permit the plaintiff to move for summary judgment at any time, the reality is that many judges are loath to entertain summary judgment motions before the defendant has had an opportunity to conduct discovery, even if his defenses are highly dubious.

New York provides an attractive alternative to this morass. Briefly stated, pursuant to Section 3213 of New York's Civil Practice Law and Rules ("CPLR 3213"), if an action is based upon an "instrument for the payment of money only" or upon a judgment, the plaintiff may commence the action by immediately moving for summary judgment on the instrument or judgment. Thus, instead of preparing a formal complaint, the plaintiff files and serves a summons and motion for summary judgment. The defendant then is required to submit opposition to the motion as his initial response. The judges who sit in New York's commercial parts are familiar with this procedure, and generally will not permit a defendant to delay judgment by raising spurious defenses in opposition. Furthermore, even if the court does deny the motion, the moving and answering papers generally are treated as the complaint and answer, so the case can proceed as an ordinary action even if the motion fails.

This procedure can be particularly useful if you wish to domesticate a default judgment against a debtor that has a bank account or other attachable assets in New York, as many commercial firms do. Saving time in those circumstances can be the difference between collecting on a judgment, and having a defendant who has rendered himself judgment proof.

If you will be suing on an instrument, the question of whether the action is based upon an instrument for the payment of money only is crucial. The plaintiff must be able to establish the elements of its case by proving only, first, the existence of the instrument and, second, the amount of money owed. If anything

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needs to be proven beyond the existence of the instrument and a failure to make the payments called for by its terms, the procedure might lead into objections and detours about the propriety of invoking CPLR 3213, and end up creating delay instead of expediting recovery. The rule thus should be used only in clear cut cases. There is much case law debating what qualifies as an instrument for the payment of money only, but courts generally agree that the two quintessential examples are promissory notes and dishonored checks.

Happily, it is possible to structure transactions to maximize the availability of this procedure. In an acquisition, for example, an instrument for deferred purchase price can be drafted to be uncluttered with reference to extraneous documents or other factors. Indeed, an express statement might be added to the effect that the instrument is one for the payment of money only within the meaning of CPLR 3213. And New York is very liberal in enforcing a forum selection clause in commercial contracts, so a provision can be inserted into the instrument, and the other transactional documents, choosing New York law and submitting to jurisdiction in appropriate New York courts, to ensure that the expedited procedure is available.

Stephen D. R. Taylor

Strategic Considerations Relating to Effective Enforcement in the United States of Commercial Money Judgments Imposed by Courts in Other Countries

In the United States, efficient conversion of a foreign-country judgment into realized receipts requires several strategic decisions as a direct result of the distinctive characteristics of the U.S. legal structure. The speed, cost and amount of recovery can be heavily dependent upon making correct strategic choices. Critically, the optimal time for these decisions is as early as possible. The strategy for enforcement is best addressed before attempting domestication. In some circumstances, it may be better to instigate proceedings in the U.S., without recourse to domestic courts, if assets are located in the U.S. Such advance analysis is typically relatively inexpensive and can save time, money, and frustration, as well as significantly improving the chances, and the completeness, of recovery.

The U.S. is a single market with unparalleled mobility of people and assets encompassing over 50 legal systems. Since, in contrast to arbitration, the U.S. has not entered into any treaty relating to enforcement of foreign-country judgments, under the U.S. (Federal) Constitution, contract law remains primarily a matter for the states, each of which has developed distinctive substantive and procedural law. This gives rise to potentially significant strategic considerations for anyone considering enforcing contractual rights against parties based, or with significant assets, in the U.S.

It may be helpful to clarify from the outset that the correct U.S. legal terminology for judgments and orders ("judgments") issued by courts or tribunals ("courts") in a different country is "foreign-country judgment," not "foreign judgment," which signifies a judgment from another U.S. jurisdiction. Additionally, for reasons of space, this article addresses only enforcement of court judgments arising out of commercial contracts. Different rules exist for arbitral awards, non-monetary awards and for monetary judgments arising out of other causes.

The first stage in enforcing a foreign-country judgment is an action to domesticate it in a U.S. court. This is a litigation proceeding where the judgment holder petitions the court to, in effect, convert the foreign court's judgment into a judgment of the U.S. court. The other party has the right to contest the judgment and the court must satisfy itself (in very general terms) that the original court had a reasonable basis for asserting jurisdiction over the defendant,

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and that the defendant had sufficient connections with that country to justify being required to defend itself there. In addition, courts will seek to confirm that the defendant was given adequate notice of the allegations against it and afforded a fair opportunity to defend itself against those allegations before a reasonably impartial court. Critically, the standard differs from jurisdiction to jurisdiction – sometimes considerably – most notably in the minority of states that require or permit courts to consider reciprocity. In essence, this is an inquiry into whether the issuing court would (or has) domesticated similar judgments from U.S. courts. In practice, reciprocity can encompass a very broad and highly subjective analysis, with the inevitable unpredictability implied. A number of states will not domesticate a default judgment (where the party subject to the order did not appear). In such circumstances, the only option may be to start a completely new action for contractual remedies in the U.S.

A common misconception of non-U.S. parties is that they will be permitted to remove proceedings into a federal court. In fact, this is much less likely in contract matters than it would be for a U.S. party in a similar dispute. Unless the party from which recovery is sought is a unit of the federal government, state court jurisdiction is the default rule. The most commonly used exception to this default position in contract matters is through "diversity jurisdiction." Intended to preclude local bias in disputes across state lines, this can only be invoked if all entities on one side of a dispute are citizens of states and no adverse party is a citizen of any of those states (corporations and organs of government have citizenship for such purposes). The amount in dispute must also exceed $75,000. However, counterintuitively, non-U.S. parties may be deemed citizens of all states or to share citizenship with another party to the contract. Since diversity must be complete, any party that shares state citizenship with an opposing party precludes diversity federal jurisdiction. Opponents may also be able to "destroy" diversity by naming additional parties. In short, one cannot rely on federal court jurisdiction being available. The great majority of contract-related matters are heard in state courts.

Consequently, the selection of the jurisdiction in which to commence a domestication action can have significant ramifications. (This is a separate question from choice of law; courts in the U.S. regularly apply the law of another state or country if contractual language clearly calls for it, whereas contractual specifications of jurisdiction are subject to wider legal and policy considerations.) For a state court to accept jurisdiction, it must find that that state has a sufficient interest in, or connection to, the matter and that it is fair to the defending party that jurisdiction be exercised over that party. Since the party instigating an action has the burden of providing a plausible basis for jurisdiction, it is not an unfettered choice – only a small number of jurisdictions may be available, and a mistake can be costly. Jurisdictional determinations can be complex, requiring a skill set unique to U.S. legal practice. Not only can the right choice of jurisdiction greatly impact the outcome of proceedings, but a poor choice can spur expensive secondary litigation.

Once a judgment is domesticated, it can be enforced in that state. However, with the mobility of assets that characterizes the U.S. economy, adequate assets may not be in that state. As an illustration, targeting a bank account requires enforcement in the state in which the account is held at the time enforcement is attempted. If assets are in different states, the judgment must be re-domesticated (in as many states as effective enforcement requires). Unfortunately, while judgments of a court in one state are constitutionally accorded great deference by courts in another, in practice, variations in public policy, law and local interpretation mean that enforcement of a judgment from a court in one state is neither automatic nor guaranteed. In the majority of states, this secondary process is more streamlined. However, a defendant can also elect to challenge the propriety of the original judgment at this stage.

Enforcement is also a state law matter and varies by state. Different states offer different post-judgment collection remedies. For example, some do not allow bank or wage garnishments, while others do. Some states have procedural hurdles (such as requiring a creditor to post monetary bonds before enforcement procedures commence) that make collection actions burdensome or risky. Enforcement is a different area of expertise from litigation (such as securing domestication) that is founded on securing accurate information on the location of assets and the enforcement laws of the relevant state(s). In the real world, there are not always sufficient identified assets to satisfy the judgment in full immediately. In such circumstances, your counsel's ability to leverage available information to secure legally enforceable concessions from the debtor (in the form of additional security or liability for interest and costs) may be critical to securing recovery.

Todd Zimmerman

Limiting Your Exposure to Winter – Avoid the Liabilities Inherent with Snow and Ice

A large portion of the United States is dealing with another winter and the snow and ice that come with it. Though most people think of snow as pretty at first, followed by the realization that it can be a hassle, business owners are always left with another thought: Is the snow and ice yet another liability I need to worry about? While it is certainly impossible to address the specifics of liability for all states (and one has to question if Hawaii ever needs to concern itself), thinking through the issues below will allow any small business owner, risk or property manager to assess potential liabilities and protect against them.

Know Your State (and its Law)

The first step to any evaluation of potential liability is to know the general approach your state takes toward liability. There are two primary approaches to liability for snow and ice, but the trend seems to be toward putting some responsibility on the customer or "business invitee" to protect themselves against open and obvious natural accumulations of snow and ice. The first approach generally holds that a business or property owner is not liable to business invitees for injuries arising out of the natural accumulation of snow and ice (open and obvious states). The second approach places a responsibility on the business or premises owner to take reasonable steps to remove snow and ice in a timely manner (affirmative duty states).

While obviously a business owner would prefer the first approach, even businesses in open and obvious states still have potential liability. The term natural accumulations of snow and ice, leaves lurking in the shadows the evil step-brother "unnatural accumulations of snow and ice" for which there may still be liability. While snow and ice that falls to the ground, warms, melts and reforms is not generally unnatural snow and ice, there are times when natural can be made into unnatural accumulations. One example is where a shopping plaza or plant plows all of the snow to the exterior of a parking lot and creates large mountains of snow using a front end loader. What once was a natural accumulation has clearly become an unnatural accumulation. Similarly, where a downspout dumps water in front of a store's door, what is natural water could potentially become unnatural ice. Thus, merely because a business is located in an open and obvious state does not mean there is no cause for concern.

Know Your Property

After determining the laws of the state(s) that a business has facilities in, the next step is to actually evaluate the property. The purpose of this step is to ascertain everywhere that snow accumulates in light of where people walk/operate. Perhaps more important in either type of state however, is to observe where natural accumulations are becoming unnatural and dangerous accumulations. If the property manager always walks in the back door every day, he or she may not realize that the front downspout empties water right into the parking lot in front of the main customer doorway, where an unnatural depression exists. Similarly, without an inspection of the premises, what may seem like a clean parking lot, may in actuality have become a huge snow mountain (i.e. liability) next to the crosswalk the public uses. Thus an actual walk across the property will allow a business to better identify its actual potential liabilities.

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Know Your Procedures

All businesses do not necessarily have procedures for when it snows or freezes, but they should. In large retail settings someone should be tasked with making certain that if it snows or freezes outside of business hours the customary snow/ice removal steps are started. For front of the house or store employees, have a procedure on what to do if a customer reports an issue or hazard. Assess whether there are areas that are off limits or restricted when icy and if so designate a person to make such a determination and cordon off the area. Perhaps most important, have a procedure requiring whomever removes snow or ice to log the date, time and nature of their activity. While these are but a few of the common procedures, it is critical that appropriate management have a meeting and determine what procedures should be best practices for your particular business.

Educate Your Staff

Clearly all staff are not going to be responsible for removing snow and ice from the property – but they can certainly all be responsible for removing liability from the business. Make certain that your staff is aware that comments from customers or business invitees such as, "Wow your front walk is a solid sheet of ice" (which can be read as "someone not as helpful as me is going to fall and sue you") are not met with responses such as, "Yea, the weather sure is getting crazy out there." Instead, businesses should have a chain of reporting for snow and ice problems. More important than having procedures for winter is to make sure they are repeatedly communicated to your employees both prior to and during the winters.

Limit Your Risks Contractually

The ability to limit your risks contractually will vary greatly depending on size and negotiating status of different businesses, but all businesses can generally get some protection through the purchase of a commercial general liability policy or business insurance policy.

A second way liability can be limited, is to hire a snow removal company and shift the responsibility by contract. While small businesses may generally operate under an informal relationship wherein the "lawn guy" plows the parking lot for a hundred bucks when it snows, the prudent business will reduce its snow removal contract to writing and limit its liability. Thus, a strong snow removal agreement will spell out when and how snow is to be removed, require the contractor to be insured and bear responsibility for injury/damage claims made against the business for snow and ice and also provide the business a defense and indemnification for costs associated with defending a claim.

Yet a third way to limit liability contractually is to shift such responsibility in the terms of a lease. Whether it be a single store in a shopping plaza including terms in a lease, or the shopping plaza requiring the individual store to be responsible for the area around the particular store, liability to third persons for snow and ice related injuries is often addressed in leases.

Get a Second Set of Eyes to Look at Your Property

As any business owner knows, the mere fact that a state is an open and obvious state versus an affirmative duty state, will not prevent the business from getting sued. As I tell my clients, anyone can sue you for anything – but that doesn't mean they'll be successful. That said, it never hurts to have your defense attorney come out and provide a second "fresh" set of eyes regarding potential hazards and liabilities.

By implementing the steps set forth above, a business can affirmatively defend itself by demonstrating it took more than the minimal steps, and in turn avoid making an ordinary winter a costly one. P

Melissa Demorest

Crowdfunding: What You Need to Know

In April 2012, President Obama signed the JOBS Act into law.[1] Title III of the JOBS Act, the "CROWDFUND Act,"[2] permits crowdfunding, which allows a small business to raise up to $1 million in a year by issuing stock to many small-scale investors, without going through an initial public offering ("IPO"). The United States Securities and Exchange Commission ("SEC") will regulate crowdfunding. Before businesses can begin crowdfunding, the SEC must issue regulations on how it will be done. The regulations should be issued around the end of 2012.[3] Nothing can be done to actually issue crowdfunding securities until after the SEC issues its rules. Here is a summary of how crowdfunding will work:

How it Works

The basic structure of crowdfunding requires a crowdfunding issuer to work with a crowdfunding intermediary to issue securities to investors. The crowdfunding intermediary will handle the investor transactions and may not issue the funds to the issuer until the target offering amount (up to $1 million) is reached.

- Crowdfunding issuers will be permitted to issue up to $1 million in securities per year, with different requirements at different investment thresholds.
  - There are net worth limits on how much a particular investor can invest. For example, if an investor earns less than $100,000 annually, he can invest up to 5 percent of annual income or $2,000 (whichever is less). An investor whose net worth or annual income is more than $100,000 can invest up to 10 percent of her annual income or net worth, not to exceed $100,000 annually.
- Crowdfunding issuers will not be required to make all of the disclosures required in a public offering, but will have to make certain disclosures in a crowdfunding offering memorandum, including:
  - Name, address, and legal status of the entity
  - Issuer's business plan
  - Names of issuer's officers and directors, and anyone holding more than 20 percent of the equity in issuer
  - Description of intended use of proceeds
  - Target offering amount and deadline to reach it
  - Price, or method for determining the price
  - Description of ownership and capital structure of issuer
  - Description of issuer's financial condition, including specific financial statement requirements for target offering level
- Over $100,000, the issuer's financial statements must be reviewed by an independent CPA
- Over $500,000, the issuer's financial statements must be audited
- Issuer will be required to provide investors and the SEC with financial reports at least annually.
- The SEC rules will require that crowdfunding issuers use the services of a crowdfunding intermediary, such as a "funding portal" or a broker registered with the SEC, to issue the securities.
  - The crowdfunding intermediaries will be strictly regulated and cannot give investment advice. Their primary role will be to provide information and disclosures to investors, and to reduce the risk of fraud.

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- It is likely that FINRA (Financial Industry Regulatory Authority) will be appointed to oversee the crowdfunding intermediaries, who would also have to register with FINRA.
- Issuers may not directly sell securities, and must direct potential investors to the crowdfunding intermediary with whom they are working.

How Crowdfunding is Different from Kickstarter

Crowdfunding will allow businesses to issue securities to investors, and the investors may earn a return on their investment. Conversely, Kickstarter (www.kickstarter.com) and similar websites allow small businesses to raise funds, but do not allow the businesses to issue securities to their investors. Rather, Kickstarter investors receive incentives to invest, such as a product or an experience (e.g., a cool product that the company produces or tickets to a launch party).

Another difference is that Kickstarter is typically used to launch a product, or to release an independent film, or help a band to tour. Crowdfunding will apply the same concept to starting or growing a business, such as a tech startup or a local bagel shop.

One similarity between Kickstarter and crowdfunding is that no project or business can be funded until they have reached their target funding or offering amount.

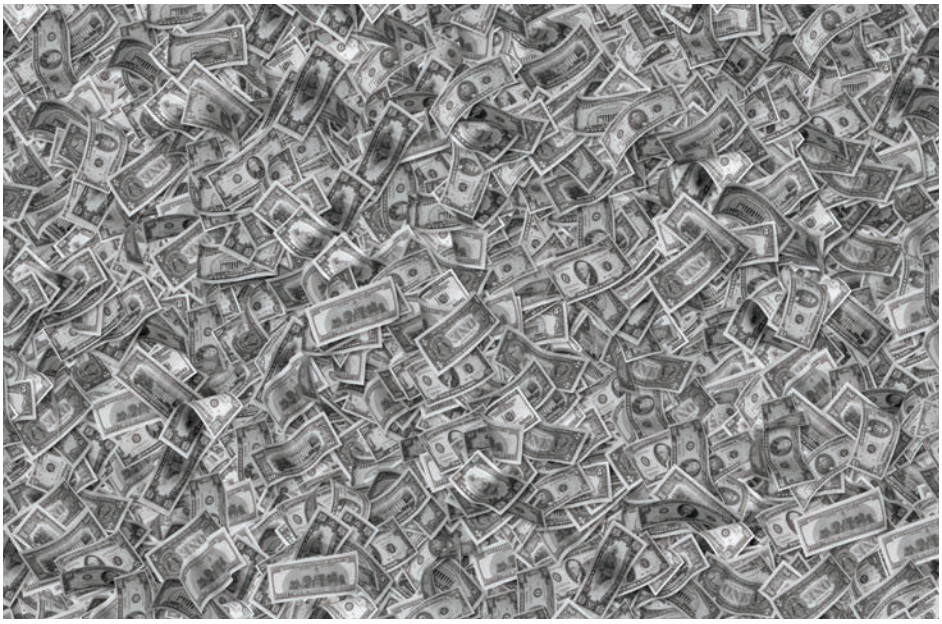
Benefits of Crowdfunding

The crowdfunding concept fills a funding gap for many entrepreneurs and small businesses, who may have a great idea, but no way to obtain traditional financing. Banks are still hesitant to lend in this economy, particularly to start-up businesses. Venture capital is also difficult to obtain. Crowdfunding gets the community at large involved in supporting the venture or idea, and provides a great alternative to borrowing money from family and friends.

Crowdfunding also allows individuals to invest in their community and keep their investment local, where they can see the results. Even if they don't get a direct return on their investment, they still benefit from helping develop their community.

Concerns about Crowdfunding

The biggest concern about crowdfunding is the potential for fraud. In an IPO, the issuer is required to provide significant financial information, in order to protect the investor. A crowdfunding issuer will be required to provide much less information, which could be a double-edged sword. On the one hand, a small business may not have the resources to complete an IPO, and crowdfunding provides lower barriers to entry. On the other hand, lowering the disclosure requirements increases the potential for fraud by fake companies.



Crowdfunding is also an inherently risky investment. Many startup businesses fail, and many crowdfunding investors may lose their entire investment, or at least are unlikely to earn much of a return on investment. Crowdfunding investors will need to be well apprised of the risks involved.

Another concern is how to walk the fine line between advertisement of a crowdfunding opportunity and giving financial advice. Crowdfunding intermediaries cannot give financial advice, but will have to make people aware of the opportunities available without even appearing to recommend certain opportunities over others.

What Can You Do Now?

If you are interested in crowdfunding, here are some things you can do now to prepare:

- Invest in your online presence and be as visible as possible to potential investors.
- Keep in mind that the terms of the offering may only be disclosed by the crowdfunding intermediary.
- Develop a plan for how much capital you need and what you will use it for.
- Prepare your pitch and plan for investor questions. Begin to work on the crowdfunding disclosure.
- Determine the rights of the crowdfunding shareholders (voting, etc.).
- There will be a cost to use the crowdfunding intermediaries, although those costs are not yet known.
- Investigate crowdfunding intermediaries.

Expect lots of attention around crowdfunding in early 2013, after the SEC has issued its rules. P

1 Jumpstart Our Business Startups Act, Pub. L. No. 112-106

2 "Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012" or the "CROWDFUND Act"

3 This article was submitted for publication on October 25, 2012. As of that date, the SEC had not yet issued preliminary rules for crowdfunding.

Sarah Scott

The Rising Tide of Obesity: Managing Your Risk as an Employer

Recent Federal Court Decision Deems Obesity a Disability Under the ADA

Studies estimate the rate of obesity in the United States to be at an all-time high – over one-third of adult Americans are now considered clinically obese. As this trend has risen over the years, many courts have grappled with the question of whether obesity may be considered a disability under the Americans with Disabilities Act (ADA) such that employers must offer accommodations to their employees whose obesity interferes with their job performance. A recent federal court decision in Louisiana adopted the EEOC's (U.S. Equal Employment Opportunity Commission) liberal view on this issue, holding that obesity on its own may be considered a disability under the ADA, even absent a showing of an underlying physiological disorder – something other courts have required in the past.

In *EEOC v. Resources for Human Development, Inc.* (827 F.Supp.2d 688 (E.D. La. 2011)), the employee at issue supervised the employer's day care program and weighed over 500 pounds. Although she had received exemplary performance reviews, she was ultimately fired based on concerns over her "limited mobility" and difficulty performing CPR. The employee later died due to complications from her obesity, but the EEOC brought suit on her behalf, arguing that a person with "severe obesity" (which they defined as having body weight in excess of 100 percent above normal) is disabled under the ADA. The employer, on the other hand, argued that there must be a showing of an underlying physiological disorder – such as a cardiovascular or respiratory problem – in order to bring the condition within the meaning of a "disability" under the ADA. The employer's position was supported by holdings in several other federal court cases. The court, however, was not persuaded, and adopted the EEOC's broader standard.

Although this case appears to buck the trend among courts up to this point, employers should consider the Louisiana decision a potential harbinger of a more liberal approach to the issue going forward, especially given the EEOC's position. Employers who encounter obese employees seeking accommodations under the ADA should consider seeking legal advice before dismissing such requests outright.

Employee Wellness Programs Are Increasingly Popular, But Not Without Risk

In an effort to confront the problem of obesity in the workplace before it becomes an issue, many employers are implementing wellness programs. Wellness programs encompass a broad array of approaches to incentivizing healthier lifestyles and promoting health and wellness. Some offer rewards for adopting healthier habits such as losing

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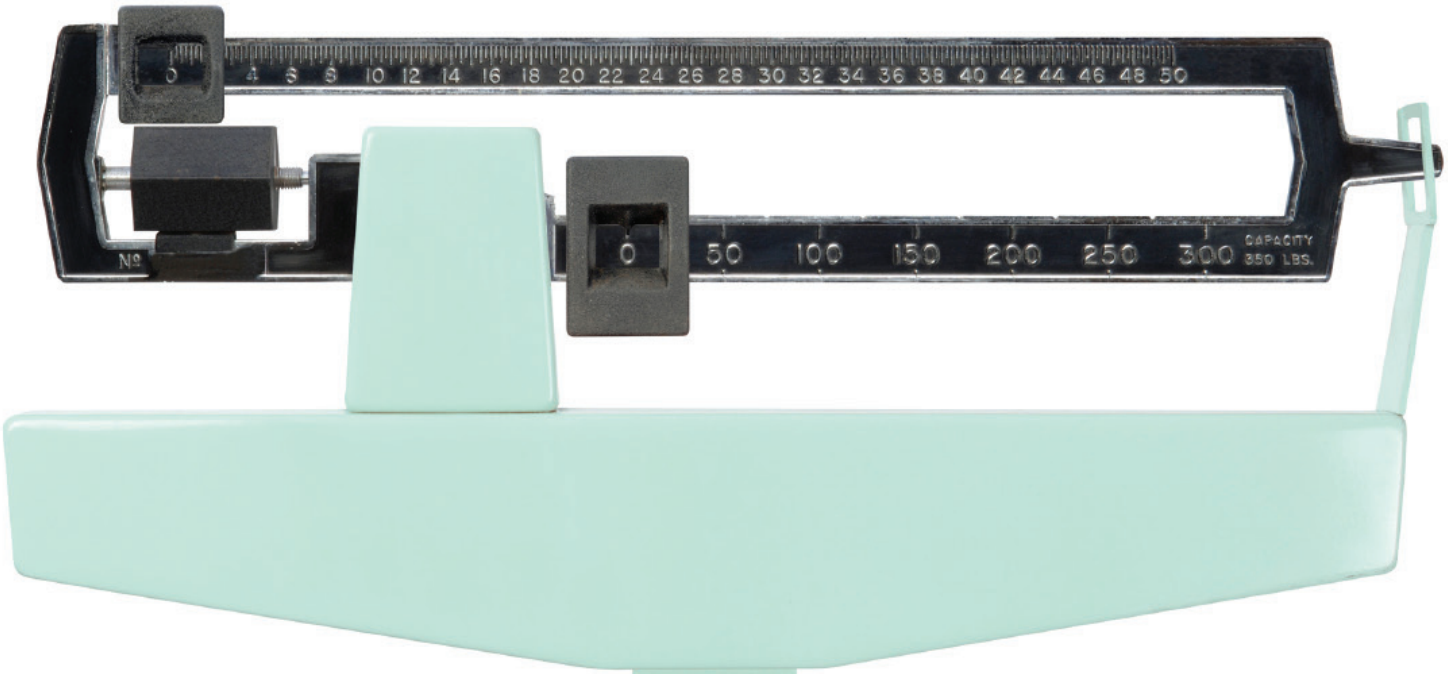

weight or quitting smoking, and some simply encourage employees to have better nutrition or to be more active. The most typical arrangement rewards participants in the program with reduced health plan premium costs (which are usually automatically deducted from paychecks), but other common examples include gift cards or additional paid time off as incentives for participation or reaching certain specified goals. Studies show that up to 60 percent of employers now offer some type of wellness program to their employees.

Implementing these programs can appear to be a win-win for employers, as they may result in workers losing weight, becoming healthier, avoiding costly medical issues, and missing work less frequently. However, employers should be aware of certain pitfalls that may accompany workplace wellness programs. For example, employers should avoid implementing wellness programs that are too aggressive, such as requiring employees to undergo a health risk assessment. The ADA states that such assessments must be voluntary, so participation cannot be a standard for employment. In addition, the recently implemented Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking about employees' genetic information, so questions about family history may violate the law. Moreover, the Health Information Portability and Accountability Act (HIPAA) forbids employer medical plans from charging higher rates based on health status – so a health assessment or wellness program designed to ferret out smokers, for instance, may violate HIPAA. (There are exceptions to this provision for employer wellness programs that meet certain criteria, such as providing alternative rewards to employees who cannot or should not achieve a particular health goal.) Finally, employers should take care not to allow certain employee health information to fall into the hands of those making employment decisions. A terminated employee could easily allege that he was fired not based on his job performance, but rather because of a health condition that may be protected under the ADA.

The potential for liability should not dissuade employers from implementing wellness programs at all. Such programs have proven successful in improving employee health and morale and reducing health care costs. If in doubt about the legality of such programs (or certain provision in such programs), employers should seek legal advice.

Richard Simon

A Business' Obligations Under the Identity Theft Protection Act

Federal and state governments have enacted laws imposing obligations on private business to take reasonable steps to protect unauthorized disclosure of personally identifiable information collected and maintained by them. This ranges from implementation of written information security programs geared to reasonably prevent unauthorized disclosure, to imposing an obligation on a business to notify the exposed individuals once a security breach occurs. This is in response to ever-increasing incidents of unauthorized access to millions of computerized records containing personal information of individuals, including customers, employees and others. Currently, 46 states and certain U.S. possessions have adopted some form of data breach notification law. There also are presently numerous federal laws that focus on specific industries, such as health and finance, and require notification of a security breach of personal information. It is important to note that the laws of certain jurisdictions, such as Texas, may apply to the personal records of individuals residing outside of its jurisdiction and others, like Massachusetts, apply to security breaches of personal information compiled and maintained by businesses formed and operating outside of the jurisdiction so long as any of the personal records relate to residents within its jurisdiction.

Although the details of each law regarding notification periods, methods of disclosure, consequences of failure to comply with notification requirements, and exceptions to the requirement for notification may vary, New Jersey's Identify Theft Prevention Act ("ITPA", *N.J.S.A 56:8-163* enacted in 2005) echoes the general purpose and scope of most state breach notification laws. ITPA remedially addresses three separate data security concerns with businesses that compile and maintain personal records; namely (1) notification of a security breach of records containing personal information, (2) destruction of both paper and computerized personal information records, and (3) restrictions on public agency and private entity use of an individual's Social Security numbers.

Under ITPA, any business conducting business in New Jersey that compiles or maintains records that include personal information must disclose any breach of security of the personal information records to all New Jersey customers whose personal information was, or is reasonably believed to have been, accessed by an unauthorized person. Businesses that compile or maintain computerized personal information for another business are required to notify the other business that must, in turn, notify the affected New Jersey customers. Unauthorized access includes access to personal records by an authorized employee that accesses the records for an unauthorized purpose.

Under ITPA, a business shall in the most expedient time possible and without unreasonable delay, disclose a breach of security of protected records to the state police and then to any customer who is a New Jersey resident. However, if the business establishes and documents that misuse of the personal information is not reasonably possible, notification is not required. The written documentation of the determination must be retained for five years.

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ITPA provides for the form and transmission of the required notice, which is dependent upon the costs of notification and the number of customers entitled to receive notice, and can include written notification, e-mail notification, conspicuous posting on the business's webpage and, in certain circumstances, through notification to major statewide media.

Company Violations Open Substantial Exposure

The reporting requirements are central to the ITPA. A business that violates the security breach notification obligations is exposed to substantial costs, fines and penalties, as well as private actions by affected customers.

There are steps that can be taken to minimize the likelihood of a data security breach. First, a business should evaluate the need to retain personal information and for how long. Next, perform a survey and pinpoint sources of both electronic data and hard copy unsecure retention of data, including assessment of existing (1) administrative procedures and what changes should be made to reasonably prevent unauthorized access to records containing personal information (2) existing technology, such as firewalls, policies and procedures for use of remote devices (e.g., laptops and employee-owned equipment) (3) assessing updating hardware and software to reasonably secure the relevant records from unauthorized access. Although encryption of personal information does not equal compliance and should not be presumed to do so, unauthorized access to personal information secured by encryption that does, in fact, render the personal information unreadable or unusable may excuse a business from the notification obligation.

ITPA also requires that a business that compiles or maintains customers' personal records, or otherwise has such records in its custody and control, must arrange for destruction of records that are no longer to be retained, by shredding, erasing or otherwise modifying the records so that they are unreadable, undecipherable or nonreconstructable through generally available means or technology. This provision addresses hard copy records, as well as electronic data, and the hard drives and servers that the data is stored on. Therefore, whether or not a business actually uses personal information records in the course of its business, if it has custody and control of such records, it must destroy the records as directed by the statute.

For example, if a business that prepares mass personalized mailings for other businesses is provided mailing lists containing personal information, the business is required to destroy the records once the project is completed.

In an effort to limit the use of Social Security numbers as a means of identifying an individual, ITPA restricts the use of an individual's Social Security number. The statute prohibits a private entity or public agency from posting or displaying an individual's Social Security number, or any four or more consecutive numbers of the entire number. The provision also prohibits use of the Social Security number on mailed materials unless required by state or federal law, printing the number on a card required for an individual to access products or services provided by a business, intentionally communicating or making the number available to the general public, requiring an individual to transmit the number over the Internet, or requiring the number to access an Internet Website, unless a password, PIN or other authentication device is also required. However, a business is entitled to continue to use Social Security Numbers for internal verifications of an individual.

Every business should re-evaluate its existing uses of Social Security numbers and determine if the use complies with the provisions of ITPA, and, if it does not, to modify the use accordingly.

We recommend that each of you familiarize yourself with your state's security breach notification or similar law. A good beginning point is the website – www.ncsl.org/issues-research/telecom/security-breach-notification-laws.aspx and Congressional Research Service Data Security Breach Notification Laws – www.fas.org/sgp/crs/misc/R42475.pdf. P

Richard Rosen

Tim Muller

Oppression of Shareholders, Good Faith and the Duty of Loyalty

Most business organization statutes including those for corporations, limited liability companies and limited partnerships provide remedies for oppressed shareholders or partners.

Statutes generally are phrased in terms of the power of the courts to dissolve a corporation or limited liability company when the Court finds that those in control of the corporation have acted illegally, fraudulently or in a manner which is oppressive to some shareholder, or members – or have engaged in conduct which is "unfairly prejudicial" either to the corporation or to any shareholder or member. These statutes generally provide for some remedy short of dissolution, normally a buyout of the minority interests. Some cases indicate that in certain circumstances the minority can be required to buy the interest of the majority.

The conduct of officers, managing members and directors will frequently be examined by the Courts using an objective standard. These individuals are often said to have fiduciary duties to the corporation and the shareholders or members of the company.

The most frequently cited description of the fiduciary duty of a partner is the famous enunciation by Justice Cardozo while he was on the New York Supreme Court.

> . . .[C]opartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.[1]

Subsequent statutory enactments including the Limited Liability Company Act did not go as far as Justice Cardozo did in 1928. The members of limited liability companies are by statute bound to duties of loyalty and care. There is also a requirement of good faith and fair dealing.

Shareholders generally owe no duty to the corporations or to other shareholders. They are passive investors. Rather, directors and officers stand in a fiduciary relationship to the corporation and its shareholders. The standard they must follow is "utmost good faith," a strict rule of honesty and fair dealing.

In Delaware, corporate officers owe fiduciary duties that are identical to those owed by corporate directors. Fiduciary duties run to shareholders and corporations not to fellow officers or directors.

What is a fiduciary duty? It means that directors and officers of corporations owe the corporation complete loyalty, honesty and good faith. A director or of-

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ficer's first duty is to act in all things of trust wholly for the benefit of the corporation. It includes a duty to disclose the information to those who have a right to know the facts.

The duty of good faith is comprised of: (1) a general baseline conception,[2] and (2) specific obligations that instantiate at conception. The baseline conception consists of four elements: (1) subjective honesty or sincerity; (2) non-violation of generally accepted standards of decency applicable to the conduct of business; (3) non-violation of generally accepted basic business norms; (4) and fidelity to office.[3]

Duty of care and the duty of loyalty do not cover all types of improper managerial conduct.[4] The duty of care requires the manager to perform his duties in a manner that he reasonably believes to be in the best interest of the corporation, with a view towards maximizing corporate profit and shareholder gain.[5] The duty of loyalty requires a manager to act fairly when he acts in his own self-interest or the self-interest of an associate or family member.[6]

The Model Business Corporation Act provided for good faith in the discharge of the duties of directors.[7] Frequently state corporation acts provide that under certain conditions the corporation has the power to indemnify the costs and outcome to litigation and other proceedings, providing the manager acted in good faith. Courts have been reluctant to allow corporations and managers to avoid the duty of good faith even by agreement.

Disinterested directors, for example, are frequently involved in making corporate decisions involving the conduct of other directors or officers. The duty of loyalty is typically inapplicable to these directors because by hypothesis they have no material, financial ties to either the directors whose transaction or conduct is at issue or to the transaction or conduct itself. As a result of the business judgment rule, typically it is also very difficult to prove that the directors have violated the duty of care.[8] The solution is to apply the duty of good faith to determine whether the approving directors have acted with the impermissible motive of favoring their colleague.[9]

Corporate directors and officers as well as majority members in limited liability companies are well advised to conduct business with a keen awareness of the threat of potential shareholder actions. Several steps are available to reduce or eliminate the possibility of a shareholder suit or oppression action:

1. Transparency: Corporate meetings should be properly noticed with sufficient details about proposed actions to allow for any owner or member to participate and have a voice.
2. Proper documentation of corporate action should be routinely expected and required.
3. Compensation details should be made available to all owners together with the mechanism by which compensation is determined.
4. Perks or prerequisites including club memberships, dues and travel should be examined for appropriateness, reasonableness and allowability.
5. Self-dealing by majority owners and officers in a corporation or LLC should be disclosed, noticed for appropriate consideration by the managing members or the entire membership, by the board of directors or shareholders, and objectively considered.
6. In certain circumstances, delegation of approval for transactions involving corporate insiders and the potential for self-dealing should be delegated to third-party neutrals, frequently lawyers retained by the corporation or limited liability company for that purpose. P

1 *Meinhard v. Salmon*, 249 N.Y. 458, 463, 164 N.E. 545, 546 (1928).
2 *See* Melvin A. Eisenberg, The Duty of Good Faith in Corporate Law, 31 Del. J. Corp. L. 1, 21 (2006).
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id. at 59.*
9 *Id.*

William Mason

Brittany Brent Smith

Agricultural Contract Clauses for Supplying Energy Crops to the Biofuels Industry

As important as technology advancement and biorefinery business formation are to the future of the biofuels industry, success is also wholly dependent on enormous quantities of biomass being produced by America's farmers. The purpose of this article is to further thinking and discussion on the essential terms of biomass supply arrangements among all parties – farmers, biorefinery owners, seed suppliers, feedstock supply companies, bankers, lawyers and public officials. Many interests must be balanced:

- Contracts for energy crop supply must be competitive and fair to farmers in the short- and long-term to attract the required quantities and quality of switchgrass, miscanthus, sorghum, agricultural residues and other energy crops.
- Biomass conversion facilities are dependent on reliable, uniform, and economical feedstock, and energy crop supply arrangements must address those requirements over the life of the facility.
- Bankers and investors providing biomass conversion project financing demand assurance of feedstock supply for the life of the project, and agricultural contract arrangements must provide confidence in the availability of feedstock over the long-term.
- Mother Nature dictates requirements and introduces uncontrollable variables into all parties' contract expectations. Supply contracts will fail unless they: take account of drought, storm, or other acts of God; are adapted to realistic agricultural, capital and labor input cycles, as well as requirements for planting, cultivating, and harvesting; and fit the particulars of the specified crop, for example, whether it is an annual or a perennial, or grows from a seed or a rhizome.

Traditional agricultural contracts include agreements between farmers and those that purchase or market the farmers' crops, agreements between producers and suppliers, and agreements concerning land use. Some common forms of agricultural contracts, elements of each, varying responsibilities of the parties, Uniform Commercial Code ("UCC") considerations, and other state statute considerations are summarized below.

Production Contracts

Generally, a production contract is an agreement by which a farmer agrees to sell or deliver a designated crop grown on identified acreage to a purchaser in a specified manner. The contract specifies production conditions,[1] quality of product, acceptable production inputs and management requirements.[2] More specifically, production contracts contain provisions covering the crop's entire production process from beginning to end, often specifying planting periods, cultivation practices, and other matters intended to ensure delivery of a certain quality and quantity of the crop to the purchaser.[3]

The farmer in a production contract provides growing services and supplies a small part of the total production input. He or she usually does not own the crop during production; in fact, under some agricultural production contract models, title to the growing crop and to the har-

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vested crop is never held by the farmer.[4] The farmer in a production contract has a reduced production risk which may lead to lower compensation.

The purchaser in a production contract supplies and finances nearly all of the production input and usually owns the crop during production as well as after harvest and delivery. The purchaser makes all or most production decisions and maintains a managerial position, often including the right to make field visits.

Depending on the biorefinery's specifications for biomass feedstock, the project owner might take on less overall business risk if it specifies, or actually provides to the farmer, the high biomass sorghum seed to be used to establish the crop, requires the farmer to follow specified agricultural schedules and practices in planting and cultivating the crop, specifies the fertilizer to be applied and its schedule, and provides a harvesting contractor to cut, weigh, and retrieve the biomass from the field. Due to the purchaser's extensive control over the details of the farm operation, the farmer has reduced risk of production as well as significantly less investment, and is therefore less likely to be subject to loss in the event of drought, flood or other crop failure.

Marketing Contracts

Generally, a marketing contract is an agreement by which a farmer agrees to sell or deliver all of a specifically-designated crop grown on identified acreage to a purchaser. The contract usually specifies only the price for an established quality of crop and delivery procedures for the harvested crop.[5]

A farmer entering into a marketing contract obtains a buyer and a price for the crop before it is harvested. The farmer supplies and finances nearly all production input and owns the crop during production. The farmer makes production decisions and assumes production-related risks. Because the farmer undertakes production risks, compensation is usually reflective of the market value for the crop.

The purchaser in a marketing contract buys a known quality and quantity of a crop for a negotiated price. The purchaser does not own the crop until it is harvested and delivered and exerts little influence over production decisions.

A biomass supply contractor for a cellulosic ethanol plant might enter into a marketing contract with area farmers. A farmer would agree to sell the entire crop on a particular 500 acres to the supply contractor for three years for a specified price per ton. The price could be fixed, or could be set by a formula that, for example, includes a factor based on the price of diesel fuel. Some cellulosic technology conversion processes are designed to handle biomass derived from a specific energy crop or with other specified delivery requirements. In that case, the marketing contract might specify that crops must be grown from a specified seed, or that the biomass must be delivered to the supply contractor with no more than a certain percentage of moisture content, or that it must be delivered in square bales.

Uniform Commercial Code vs. Other State Law

The UCC governs the sale of goods, including agricultural products.[6] Both production and marketing contracts are for the sale of agricultural products and are therefore governed by the UCC. State statues may also specifically govern agricultural contracts, which provides for the possibility of conflicting laws.

State statutes that are consistent with the UCC may supplement, but ordinarily do not supplant, its provisions. To be consistent with the UCC, a state statute must be consistent with the text as well as the purposes and policies of the UCC, which are: (1) to simplify, clarify and

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modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.[7]

If a state statute conflicts with either the UCC's text or its purposes and policies, the UCC ordinarily supersedes the statute. However, if the state statute was specifically enacted to provide "additional protection to a class of individuals engaging in transactions covered by the UCC," a court may allow the state statute to supersede the UCC.[8] The question of whether the UCC or the state statue should apply is a question of law.

For example, a Tennessee statute limits the duration of certain agricultural contracts to three years.[9] The statute was apparently enacted during the Great Depression to protect farmers. However, the statute could be construed to be contrary to the UCC's text, purposes and policies: the UCC does not limit the duration of contracts, and the limitations imposed by the Tennessee statute are neither modern nor uniform with other jurisdictions.[10] There are advantages to farmers in longer-term contracts: establishment of a base farm income over a number of years; the ability to amortize investment in land, equipment or crop establishment; some assurance that the contract price would cover costs; and an opportunity to develop expertise in the management of a particular crop.

A state statute that limits the duration of agricultural contracts could be problematic for the developing biomass industry. A single season, or a two- or three-year term, contract does not provide a biorefinery owner with feedstock assurance. Because of the magnitude of the investment, a biomass supply contractor will likely seek to contract for a significant percentage of the facility's biomass feedstock requirements during the development phase of the facility. A three-year contract term, even with the possibility for renewal, is probably not sufficient. Balancing of the various laws that may apply to a contract for biomass supply is an important consideration.

The discussion of appropriate terms to include when contracting for biomass is one that must be continued among farmers, feedstock suppliers, bankers and biomass conversion facility owners as the industry progresses, to eventually find a middle ground on which all parties can agree. P

1 Examples of production conditions include: requirements for type and condition of soil for successful production, a precise schedule for the use of acceptable inputs, and specific production practices to be used by the farmer.

2 Agricultural production inputs refer to items such as seed, fertilizer, chemicals, pesticides, fuel, machinery, etc.

3 Christopher R. Kelley, *Agricultural Production Contracts: Drafting Considerations*, 18 Hamline L. Rev. 397 (1995).

4 Id. at 398.

5 Production Contracts, http://www.farmfoundation.org/news/articlefiles/105-May2004ProductionContract.pdf (last visited Oct. 18, 2012).

6 U.C.C. § 1-203(1)(k) (2004) and U.C.C. § 2-102 (2004).

7 U.C.C. § 1-103(a) (2004).

8 U.C.C. § 1-103, cmt. 3 (2004).

9 Tenn. Code Ann. §43-15-101 (2012).

10 The Tennessee statute was enacted in 1932 and has not been cited in any case since its enactment; no other state has a similar statute limiting the duration of agricultural contracts.

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An Offer You Can't Refuse? DOs and DON'Ts of Selling or Buying a Business

Selling or buying a business can be an exciting and rewarding experience.[1] While the sale of a business may take a year or less to achieve, *planning* should begin well in advance, even before it's a firm thought. Optimal results can be achieved for both buyer and seller with flexibility and creativity, careful preparation and strategic planning. The following includes tips for both parties to ensure a successful transaction.

Sellers: *Think like a Buyer – Maximize the Business Value*

What Should the Sale Achieve?

A critical first step for sellers is determining what they want the sale of their business to achieve. It is important to think through the implications for the seller personally, for their family, their employees, their key customers and suppliers. An owner often derives a great deal of self-worth and purpose from the business. He needs to prepare for life after the sale of the business and visualize what he will do with his time.

How will the seller's financial situation be affected by the sale? Often a seller's wealth largely depends on the business, and he will need help with the transition from receiving an income stream from the business, to generating a reliable income from investments.

How to Prepare the Business for Sale

Although business owners may have a price in mind, a business is really worth whatever a buyer is willing to pay. Sellers need to have a realistic value of their business at the outset. They should look at and evaluate their businesses as if they were an outside buyer, and employ expert help to determine the fair market value of their businesses. A valuation should highlight the strengths and weaknesses of the business.

Sellers then need to tackle the weaknesses, such as improving profitability, building a better repetition, diversifying customers or products, building a management team, reducing debt or upgrading processes. Unfortunately, some sellers do not prepare their businesses for sale and, should they be forced to sell during a crisis, in these cases they inevitably sell for less than the business could be worth.

An owner can anticipate a buyer's due diligence by performing searches against both himself (as the seller) and the business. The results can uncover issues which can be addressed early on in the process, such as discharging any old security registrations against the company's assets and settling outstanding litigation. Dealing with these issues early paves the way for a smooth negotiation and closing.

Seller's To Do List

To enhance the value of a business and facilitate a smooth sale, a seller and his advisory team should take several steps:

- **Organize the financials**: Aim to have a minimum five years' worth of complete financial statements for the business. Make sure all business tax returns have been properly prepared

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and filed, including discretionary expenses and transactions. If there has been any financing obtained or security given by the company, plan to disclose this information as well.

- **Organize incorporation documents**: A buyer will likely review the company's incorporation documents and its minute book, which should accurately reflect the company's history, including its directors, officers, shareholders and any significant transactions. For a share sale, one should ensure the history of the shareholders has been recorded correctly. Mistakes or missing records will alarm the buyer and delay the sale.
- **Resolve any litigation or other claims**: If possible, obtain a release from the other party. A buyer will not want to assume these liabilities. Outstanding claims will likely discount the purchase price.
- **Employee records need to be accurate**: If the business doesn't have signed employment agreements, a buyer will need to know the terms of employment for each employee. Severance needs to be assessed to determine if the seller or the buyer will be liable for employee turnover. Identify the employees who are necessary for the company's continued success.
- **Review the company's leases**: If the company operates out of leased premises, a buyer will need to know the terms of the lease and whether it is assignable. The same applies to leases of equipment.
- **Review supplier and customer contracts**: If the business doesn't have written contracts, document the key terms of its relationships. The buyer will need this information to understand the business and assess its value.
- **Identify special licenses or permits**: Any of these items required to run the business will either need to be transferred to the buyer or the buyer will have to apply to obtain them.
- **Identify inspection and maintenance records**: Ensure any records for critical equipment of the business are readily available. If a business owns real estate, a buyer will likely require an environmental inspection of the property.
- **Document receivables**: Prepare information regarding receivables, including their aging.
- **Consider tax planning opportunities**: Discuss with the advisory team how best to take advantage of any tax planning opportunities such as estate freezes, family trusts and holding companies, which can lead to tax savings.
- **Evaluate the potential buyer**: Potential buyers may come from several sources. Examples include family members or key employees, competitors or suppliers, as well as companies who already serve the

same customers. A seller should find out why the buyer is interested in the business, and his future plans for it (i.e., how it will be integrated into the buyer's life/business activities). What price range is the buyer willing to pay? Does the buyer have the financial ability to complete the deal?

Buyers: *Investigation is Key: Evaluate, Evaluate, Evaluate*

Buyers interested in acquiring a business will need to do their homework. This not only means completing due diligence on the potential acquisition, but also researching other businesses on the market versus the kind of business they are looking for, what financing will be required to complete a sale, and an analysis of how the business will integrate with the buyer's other assets.

For each available option, a buyer's team of advisors can assist with evaluating the advantages and disadvantages.

Buyer's Investigation List

Here is a list of issues to consider when contemplating the purchase of a business:

- What are you buying? Assets or shares? To take advantage of capital gains treatment and exemptions, if available, a seller will usually want to sell the shares of the business. If buying shares, buyers need to understand that they are assuming the liabilities of the business, including existing contracts and employees as well as the corporate history. To minimize the risk, buyers will need to focus on actual or potential liabilities as part of the due diligence. If buying assets, buyers need to determine which assets they need to run the business successfully.
- Who is the buyer? A buyer needs to determine the best way to structure the purchase. Should this business be merged with an existing business? Will it be a subsidiary of an existing company or a completely separate entity? Consultation with its team of advisors will help answer this question.
- Financing: A buyer must consider how he intends to finance the purchase. Is he purchasing it alone or with other investors? If the buyer intends to obtain traditional bank financing, he should discuss this aspect with his financial advisors well in advance. A buyer will also need to determine how he will finance the operations of the business. Will he be funding the operations directly or will he require access to an operating line of credit?
- Promise of exclusivity: A buyer's due diligence is one of the most important steps in the acquisition process. Completing due diligence on a prospective company, takes time and money. To protect this investment, a buyer should ask the seller for a promise that the seller will deal exclusively with the buyer for a certain period of time. This needs to be agreed at the outset.
- Due diligence: Buying a business involves risk. The goal of a buyer's due diligence is to determine the extent of the risks involved and to decide whether to accept those risks and proceed with the purchase. Certain risks can be minimized by the seller's representations and warranties in the Agreement of Purchase and Sale. A buyer's team of advisors can help him understand and, where possible, minimize the risks involved.
- Employees: A change of ownership can cause the seller's employees unease and uncertainty. After the acquisition, key employees may be a necessary and valuable resource for the buyer. It is important for buyers to put a plan in place to deal with this transition and to be aware that the relationship between the buyer and the seller's employees may or may not be successful.

  The buyer may not want to employ some or all of the seller's employees. If this is the case, this will need to be negotiated with the seller. Employee terminations can be costly, especially for long term employees, and the seller will want the buyer to be responsible for these costs.
- Non-competition and non-solicitation: Buyers should discuss the future plans of the seller to ensure that the seller and its principals are restricted from competing with the business or soliciting employees or customers of the business after the sale. These restrictions can be included in the Agreement of Purchase and Sale.

Be Prepared to Walk Away

If a buyer's due diligence reveals serious problems with the target business or risks that the buyer is unwilling to assume, or if the seller is less than trustworthy, a buyer should be prepared to walk away from the deal. Because due diligence can be a lengthy and expensive process, it can be tempting to push forward because of the time and money already spent. Keep a clear head. Consult with your advisors and if you don't feel comfortable proceeding, don't move forward.

The key to a successful purchase or sale is to start the planning process early, even if there are no current plans in place for either. Regular maintenance of company records and operations can ensure the business is in a strong position for whatever future plans are implemented. Both parties should invest in a trusted advisory team to work with them through the process, to a successful completion of the deal. P

1 Please note that while much of this discussion can apply to any business purchase or sale, this article's content pertains to buying and selling a business in Ontario, Canada.

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Social Media: What Corporate Counsel Must Know

There has been a huge increase in the popularity of social media like Facebook, Twitter and LinkedIn. Social media has transcended languages, borders and cultures; through social media a vast amount of information is exchanged daily and globally. People often post personal and professional information. This information can be viewed not only by friends and relatives but also by colleagues, clients and employers. Consequently, as a Corporate Counsel, you cannot ignore social media in a corporate environment. Social media can be a powerful tool you can use to your advantage. On the other hand, inappropriate use of social media can influence the (online) reputation of the company in an unwanted way. But that is not all: social media can also play an important role in employment relationships. As a Corporate Counsel, you are likely to be faced with questions such as: "Are employers allowed to monitor what information (future) employees exchange and who they exchange it with?" and "How should I deal with employees who are telling company secrets or are openly bad-mouthing their employer or their colleagues?"

Privacy legislation, which can vary from jurisdiction to jurisdiction, often plays an important role in employer-employee relationships. However, the key issues and pressure points are similar worldwide. More specifically, regarding employers, problems can arise throughout all stages of the employment relationship: that is, at the recruitment and selection stage, during employment and after the termination of employment.

Recruitment and Selection

Employers wish to gather information on future employees to get an overall picture of a person. But to what extent are employers allowed to review social media profiles and to what extent can and may that influence the employer's decision-making process? When hiring a sales professional, it is good to know who he is networking with. On the other hand, social networking with competitors can have a negative effect. Information on a person's situation at home or in private activities can be more important than expected. Think, for instance, of difficult care situations at home or of "dangerous" hobbies.

But how does this relate to, for instance, data privacy laws and anti-discrimination laws? In the U.S., job candidates need to provide the employer with a written authorization prior to a background check, whereas job candidates in the United Kingdom must be given the opportunity to first check the accuracy of the online data collected about them.

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In addition to privacy laws, anti-discrimination laws, and codes of conduct as implemented, for example, in France, user conditions of social networking sites themselves can also contain restrictions. User conditions (general terms and conditions) of social media or platforms may restrict the use of information for professional or recruitment purposes. In some jurisdictions, there is a difference between the types of social media. Employers in Germany and France may use information collected from professional social networks only (such as LinkedIn), but they are not allowed to use information from general social networking sites, such as Facebook.

During Employment

An employee must observe the rules and regulations of the organization he works for, and he must act as a good employee. Employees are expected to act professionally and to behave like good colleagues, especially when it comes to the use of social media. Information revealed on the internet is hard to remove and spreads fast. This can have negative effects for both employer and employee. It is a completely different question, however, whether an employer is allowed to use information available through social media on the employee's private life. Can a Tweet (such as "Relaxing on the beach") by an employee on sick leave to his Twitter followers be used in a dismissal procedure? Is an employer allowed to monitor what an employee posts on Facebook about his manager or about the company? Is an employer allowed to check who an employee is linked with on LinkedIn? The answer to these questions depends on data privacy laws that vary from country to country.

Monitoring Of Employee's Usage Of Social Media

Whether or not employers are permitted to monitor the social network use of their employees and if so, what considerations and limitations apply, are additional questions to be answered by the different legislations. In most jurisdictions, employers are permitted to monitor social media use on work-provided devices on condition that the employee's privacy is respected. The European Court of Justice has ruled that in Europe employees enjoy their right to privacy and private life in their work environment as well, therefore, a limited amount of private internet use must be allowed. Furthermore, the European Court of Human Rights has determined that, for example, monitoring telephone conversations and emails should be announced beforehand.

Of course, if the employer has a specific and good reason to suspect violations of company policies, it will, in general, be allowed to investigate that specific situation. However, monitoring internet use as a general policy is only allowed under certain conditions, or in some cases not at all.

In general, privacy rights of the employees must be balanced against the employer's legitimate interests to protect its business or IT. Some jurisdictions have established guidelines about appropriate monitoring in the workplace (e.g., UK and Switzerland). In others, it is important to have a consistent policy about monitoring that has to be made known to all employees beforehand, either via a works council or individually (Germany, the Netherlands, France). In Spain, monitoring is only permitted with the consent of the employee, and Switzerland does not allow preventive monitoring at all.

Dismissals Due to Inappropriate Usage of Social Media

To what extent employees can be dismissed based on inappropriate use of social media depends on the national legislation. When it comes to inappropriate use of social media, in the U.S., the focus will be on whether or not it is related to "concerted activity." In Canada and in most European countries, the reason given for dismissal will be checked. In Canada the criteria for inappropriate use of social media are (1) breach of the company policy, for instance, regarding confidentiality, computer use or anti-harassment and (2) damage to the company. Other considerations taken into account are whether it is a matter of frequent inappropriate use or one time inappropriate use only, and whether the employee has been warned.

A court in Australia considered an employee's 3,000 chat sessions in three years sufficient for the termination of the employment. In two recent decisions in France, the courts ruled that employees posting insulting comments about their employers on a social media website could be terminated for fault and also fined for the offense of public insult. It was held that comments posted on a social media site could not be considered private, since the postings were not set to be displayed only to friends.

This is not only an issue in France but also in Switzerland where employees must check the relevant privacy settings before posting derogatory comments. In France it was held that employees must be made aware about the possible sanctions and the consequences of inappropriate postings in advance. On the contrary, in the UK, an Employment Tribunal held that the employee's comments on Facebook were not in private even though the employee had set his privacy settings so that only his Facebook friends could see them. The Dutch court had the same line of reasoning about an employee posting an insulting remark about his employer to his friends on Facebook. According to the Dutch court, the term "friends" is a very relative notion on the internet because these friends can, and in this case they did, forward the message very easily. The employer's need to protect its

reputation was weighted more important. In the U.S., a report was issued about the protection of disparaging comments on social media about employers.

Clear Rules Required

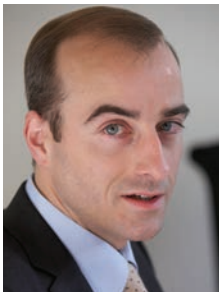
Therefore, it is important to lay down rules on the use of social media and on the employees' online activities regarding revealing information on the company they work for, as well as the sanctions for non-compliance. In the best case, employees expressly consent to such rules, implemented either as policies or contractual provisions. Such rules not only facilitate proving whether or not an employee has broken company rules, but are also valuable in the event the employer intends to hold the employee responsible for damages the company or clients suffered due to information spread via social media. These rules may include, for example, if and to what extent employees are allowed to befriend business relations and whether employees will have to create separate accounts for business relations and for solely personal contacts. It is worth considering setting up employees' business accounts according to the company guidelines. It can also be included whether, and if so, which social media can be used during work hours and to what extent they may be used. This will often depend on the position of the employee and the type of company. A sales manager of a software company will be allowed more social media activity than an accountant of a food wholesaler. In this regard, it may be also taken into consideration how often and to what extent emails and telephone calls are permitted for private purposes.

After Employment

After the termination of employment, employer and employee are most likely to still be active on the Internet. At this stage, issues such as duty of confidentiality and competition clauses are very important. It must be clear whether or not contacts with business relations and business-related social media and accounts will have to be cancelled. It is also advisable to make arrangements on whether LinkedIn contacts will have to be deleted or may be kept. You can include these guidelines, for instance, in a competition clause or a business relations clause. That way you can control that no business relations will be accepted as Facebook friends, or that the employer has a say in the management of a LinkedIn account. Arrangements like this can even be made if the above mentioned clauses have not been agreed upon, for instance in a special clause of the employment agreement or they can be included in the staff regulations.

Conclusion

There is not just one uniform way to deal with social media. After all, every country, every company and every human being is different from one another. A social media policy has to be tailored to fit the country, the company culture, the image of a company, the sensitivity level of information and safety aspects so that all employees know the company's rules and you can enforce them. It is advisable to include such a policy as standard in the staff regulations.



Thomas Schwab

The German Green Card Is Blue

Highly skilled employees now are a lot more likely to obtain residence titles for Germany. On August 1, 2012, the German law implementing Council Directive 2009/50/EC of May 25, 2009, on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, came into force.

In the course of this implementation, the legislator not only inserted Sec. 19a in the German Residence Act, but also used this as an opportunity to amend the preconditions for the granting of other residence titles.

General: Visa and Residence Permit

German law of residence differentiates between a Schengen visa, a national visa and a residence permit.

A Schengen visa entitles its holder to stay within the Schengen countries up to three months within a period of six months. Longer stays (e.g., in order to work or to study) require a national visa. Such a visa will be applied for with a German consulate in the foreign country. The national visa is valid for three months. After the foreigner has entered Germany, he not only must register with the registration office, but also must apply for the corresponding residence permit with the local foreigners' office.

U.S. citizens and citizens of a few other countries do not require a visa, neither for a short trip nor in case they intend to work or study in Germany. If they wish to stay in Germany for more than three months or to work, they may directly apply for the residence permit with the local office after having entered the country. However, most other third-country nationals will have to apply for a visa in order to enter Germany and then apply for a residence permit.

Temporary and Permanent Residence Permit

German Right of Residence makes another distinction: It differentiates between a temporary and a permanent residence permit. However, contrary to the U.S. green card, a permanent residence permit only may be applied for directly in a few cases. The main requirement is that the applicant has lived in Germany for several years on a temporary residence permit. For example, a foreigner who holds a residence permit as being self-employed – comparable with a U.S. E-2 investor visa – may apply for a permanent residence permit after three years.

New: EU Blue Card

The EU Blue Card is a residence title for highly qualified foreigners, particularly for those who graduated from university. In contrast to several other residence titles, foreigners who meet the preconditions are entitled to be granted the Blue Card. The authorities involved have no further discretion.

Requirements

Provided that the applicant complies with the general requirements for the granting of a residence title, an EU Blue Card will be issued if the applicant can show that he is highly qualified, i.e., he has a German university degree, one which was awarded by a foreign university and is accepted in Germany or a university degree which is comparable to a German degree. In certain cases, it might suffice to show professional experience of at least five years.

In addition, the applicant must submit an employment contract or a binding employment offer in which a

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gross annual compensation of at least EUR $44,800 (for 2012) is agreed upon. Certain other professions (scientists, mathematicians, engineers, doctors and IT specialists) require only a compensation of EUR $34,944 (gross, for 2012).

As a rule and comparable to Labor Certification in connection with a U.S. H-2B visa, the German Federal Employment Agency is involved and must check whether there are German or privileged foreign workers available. However, in case the annual compensation amounts to at least EUR $44,800, Labor Certification is waived. The same is true if the compensation is between EUR $34,944 and EUR $44,800, provided the applicant graduated from a German university.

Family Members

Regarding right of residence, the spouse of an EU Blue Card holder is allowed to immediately work in Germany without having to prove knowledge of the German language, requiring the consent of the Department of Labor or being restricted to certain professions.

Validity

When granted for the first time, the EU Blue Card generally is valid for a maximum of four years. If the employment contract is temporary, the EU Blue Card will be issued for the duration of the contract plus three months.

Permanent Residence Permit – "German Green Card" for EU Blue Card Holders

After 33 months, the holder of an EU Blue Card may be granted a permanent residence, i.e. settlement permit, if he complies with the general preconditions for it being granted – e.g. adequate knowledge of the German language, a basic knowledge of the legal and social system and the way of life in the Federal territory of Germany. The qualifying period is reduced to 21 months if the foreigner can prove German language proficiency level B1. With other employment based temporary residence permits, the period is five years. As mentioned above, it is three years for self-employed persons.

An applicant with a university degree but no exceptional skills will need Labor Certification and will have to wait years until he might be granted an EB-3 green card for the U.S. In contrast to this, an EU Blue Card applicant may not only come to Europe and be able to work and earn a living within just a few weeks or months. He may also be granted permanent residency before he would be allowed to enter the U.S. on a green card.

Of course, and particularly with highly qualified persons, getting a job is rarely the only reason for aspiring to legal permanent residency in the U.S. Time will tell whether the European regulations really are in direct competition with the U.S. immigration law, whether the EU Blue Card reduces labor deficit in Europe and, perhaps, also the time applicants for U.S. green cards have to wait until the cards become available.

By the way, foreigners who have legally lived in Germany for eight years may apply for German citizenship. However, as a rule with exceptions, they will have to abandon other citizenships – which is another matter altogether. P

Tiina Ashorn

The Finnish Regulatory Framework for Foreign Insurers

From 2002 to 2011, the number of foreign insurance companies in Finland has grown every year. According to the Federation of Finnish Financial Services, there were 39 domestic companies and 29 branch offices of foreign insurance companies in Finland at the end of 2011.

When planning its operation, a foreign insurer operating in Finland should become familiar with local legislation and local business conduct. The central Finnish law is the Finnish Insurance Companies Act, which requires incorporation and licensing in Finland in order to conduct insurance activities here. The Insurance Contracts Act regulates the relationship between the insurer and the policyholder.

In addition to Finnish insurance companies, foreign insurance companies also can carry on insurance business in Finland. The Act on Foreign Insurance Companies (398/1995) is applicable to all foreign insurance companies conducting insurance business in Finland. According to the Act, foreign insurance companies are divided into two groups based on whether their home is in the European Economic Area (foreign EEA insurance companies) or outside that area (third country insurance companies). An insurance company registered in an EEA state (EU, Iceland, Norway and Lichtenstein) can establish a branch in Finland or notify that it carries on insurance business on the freedom of services basis cross-border without having a branch in Finland. Insurance companies other than those established in one of the EEA states must have a license in Finland and the company must establish a branch in Finland.

The financial standing of a foreign EEA insurance company is overseen by the supervisory authority of its home state, also with respect to its branch in another EEA state. The Finnish Financial Supervisory Authority (FIN-FSA) only has limited authority in supervising the operations of a foreign EEA insurance company operating in Finland. In order to operate in Finland, a branch of a third country has to fulfill certain statutory basic capital requirements relating to minimum amounts of assets in Finland.

In addition to insurance companies, insurance agents and insurance brokers also can offer insurance. Insurance agents and insurance brokers have been clearly separated from each other. Agents operate for and on behalf of an insurance company and receive commission from the company. Brokers, on the other hand, operate for and on behalf of a client and receive commission from the policyholder. In Finland, an insurance company cannot pay the broker's fee. The activities of an insurance intermediary are governed by the Finnish Act on Insurance Mediation. The Act contains provisions relating to registering and reporting with the FIN-FSA and to the disclosure obligations of the intermediary. The insurer is bound by the advice and information provided to the policyholder by its agent. An independent insurance broker is not a representative of an insurer under the Insurance Contracts Act and the insurer is not responsible for information given by the broker. If

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the broker gives incorrect information to the policyholder, the broker may become liable for damages. The broker must have liability insurance.

The Act on the Law to be Applied to Certain Insurance Contracts of International Nature (91/1993) contains provisions on the applicable law, e.g., regarding policies where the insured risk is based in Finland and the insurer is a foreign company.

Application of a law other than Finnish law shall not diminish the rights of a consumer living in Finland, which he has under mandatory Finnish laws if the insurance has been marketed in Finland by the insurance company or its representative. The FIN-FSA has issued guidelines regarding this. According to the guidelines, the insurance terms and conditions and other information should be given to the policyholder in his mother tongue if it is Finnish or Swedish.

The Finnish Consumer Protection Act is applicable to insurance contracts with consumers concerning the general fairness of marketing, distance marketing and minimum requirements for policy terms. The distance marketing provisions are based on the Directive on Distance Marketing of Financial Services.

The main principles of protection of privacy in Finland are set out in the Personal Data Act which accommodates the EU Data Protection Directive (Directive 95/46/EC). There are special regulations concerning the processing of personal data in other laws and acts as well.

The Personal Data Act applies to processing of personal data in cases where the controller is established in the territory of Finland or otherwise subject to Finnish law. According to the general good requirements, the Personal Data Act shall be applied to insurers conducting insurance activities in Finland on freedom of services basis. Currently, a proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) is pending. The proposed regulation may result in new obligations and responsibilities in respect of data privacy issues (e.g., the right to data portability).

Another new interesting pending regulation concerns the ban on gender based calculations. The proposed legislation will significantly change the risk and premium calculations conducted by insurers. Application of gender-based calculation in order to determine risks and the subsequent premiums is no longer allowed as of December 21, 2012. Currently, the different treatment of genders is allowed.

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The Brazilian Civil Code and The *Bona Fides* Principle

A major change in Brazil's legal structure took place 10 years ago: a new Civil Code was issued to replace the one until then enforceable, promulgated in 1916. With that new legislation, civil and commercial obligations were unified and the legal statutes concerning companies and corporations were inserted therein.[1]

The Code also made the *bona fides* principle enforceable in private relationships and especially those between shareholders and *quota* holders.[2] However welcome and necessary, the legal concept brought to the Brazilian Civil Code demands that judges apply the good faith principle taking into account its cultural nature,[3] and considering it as human creation. In other words, judges and lawyers alike are now requested to use equity[4], a principle our Roman tradition (on which Brazilian Law is based) has neglected throughout centuries of legislated and written law.

Despite the ancient differences between Roman and Common Law, after that radical change made possible by the new Brazilian Civil Code, it is undeniable that the experience with corporations throughout American history will strongly benefit any lawyer who wishes to undertake a professional experience in Brazil. Moreover, one must consider that the two models – Roman and Common Law – have become intertwined, especially in the U.S., where there is a growing number of legislated and written law in spite of the case law tradition.[5]

One has then to study good faith as a dogmatic factor and therefore capable of providing solutions to conflicts between shareholders, bearing in mind that Brazilian legislators were not able to define the precise frames of the so called 'objective'[6] good faith they had idealized, thus imposing the understanding of the principle upon analysis and comparison of concrete cases[7].

Although one may say that to some extent the Roman *bona fides* has been mythified,[8] it is clear that Brazilian Lawyers and Professors of Commercial Law currently need to look into Common Law to better understand the very essence of that principle and comprehend its various facets, or at least establish guidelines to answer the following questions:

1) Must good faith orient the actions of a major shareholder in a limited company, or those of the minority?
2) How does one balance that principle with the power of control?
3) Can a decision be considered legitimate use of the power of control and at the same time not be an act of good faith?
4) Can commercial relationships manage to maintain their competitive nature and still be guided by such a moral concept?

Literature to provide answers to these questions is very limited in Brazil though abundant in the U.S. and England.[9] As stated before, Brazilian judges have not yet been able to combine good faith and company law in their sentences, always prevailing the idea that a free economy could allow a certain *laissez faire* to be the compass of the relationship between

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major and minor shareholders. For that reason, conflicts between those parties have been resolved by direct, non-critical and formal application of the binary code "legal/illegal."

But the main hypothesis is clear: the above mentioned relationships between shareholders must be judged and interpreted by using the classic notions of non-permitted behaviors extracted from the *bona fides* tradition, because this is what the Brazilian Civil Code says, at least in three different articles.

That very tradition has been able to define some kinds of actions one should not consider legal, and two of them seem to belong to Company Law: *the venire contra factum proprium and the tu quoque.*[10]

The *venire contra factum proprium* (or "the undoing of one's own action" or simply "contradictory behavior") can be described as a series of two or more events in which the active party acts in a certain legal way at first and afterwards, without any reasonable explanation and external factor to support his behavior, changes his mind and undoes the original action. It is important to point out that both actions – the first and the one that denies it – are legal if observed separately. However, when seen as a series of events, the second action is considered unlawful.

The *tu quoque*, on the other hand, implies the idea of "equity must come with clean hands." Should Brutus be given power after having committed murder and treason? Had Shakespeare taken Julius Caesar's point of view history would have provided us with another interpretation of that event.

Amongst shareholders sophisticated operations (mergers, takeovers and many other agreements) are often used as a preliminary strategy to sell a company's control and increase the advantages of the major shareholder. Minor shareholders often see their "tag along" advantages vanish and their investment diminish when a public offer is made. Are those "lawful" operations to be held as such in a scenario where the *bona fides* principle is enforceable?[11]

American Law has historically proven capable of understanding the importance and weight of the various principles that a commercial relationship involves. The ancient studies on the separate legal personality of a company are an eloquent evidence of that capability[12] and a significant motive for more interaction between Brazilian and American Lawyers.

Therefore, the Brazilian Civil Code, perhaps even more than diplomatic and political efforts, can approach Brazil and the United States by allowing a full cooperation between American and Brazilian judges and lawyers. P

1 Unlike American companies Brazilian companies are governed either by the Civil Code or by a specific statute for public companies (Lei 6.404/76). Two basic types of corporations come out of the Brazilian legislation: the limited corporations with quotas (which were influenced by the German GmBH) and the anonymous corporations.

2 The quota holder is the equivalent to the shareholder.

3 Menezes Cordeiro, Antonio Manuel da Rocha, 'Da Boa Fé no Direito Civil', Almedina (1984), page 18

4 According to Esser, Josef, 'Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts', Tübingen, (1956), page 150-151: 'The comments are true: the rule is not found after interpretation of the principle, but obtained from a judge's decision.' (unofficial translation by applicant).

5 This is also noticeable on an international level, as one can see from the European experience.

6 Jurisprudence assumes there are two sub-concepts with regard to the principle of good faith. One could be defined as 'subjective' good faith, which takes into account the individual and their actions having their inner qualities as a parameter. The other is called 'objective' good faith and is defined by a set of allowed and not allowed codes of conduct. According to Menezes Cordeiro, the objective good faith is dictated by judges and not by a formal statute.

7 Larenz, Karl, 'Entwicklungstendenzen der heutigen Zivilrechtsdogmatik', JZ, (1962), page 106

8 Menezes Cordeiro, Antonio Manuel da Rocha, 'Da Boa Fé no Direito Civil', Almedina (1984), page 41

9 The subject never seems to lose its importance in the academic media (a new book called 'Good Faith in the Jurisprudence of the WTO', by Marion Panizzon, published in August 2006).

10 The other types of non-admitted behaviors are the abuse of power, the excepti doli, the suppressio and the surrectio.

11 Because of our Civil Law tradition Judges and Lawyers alike are often reluctant to use only the bona fides principle to determine the case solution, Brazilian Legislators have throughout the years legislated to turn that principle into concrete acts, such as in the case of minority protection, tag along etc.

12 Pennington, Robert, 'Company Law', Butterworths, eighth edition, (2001), page 36, a clear example of that is the case of Salomon v. A Salomon & Co. Ltd.

Ileana Cespedes

The History of Franchising in Panama

The franchise in Panama is regulated by means of Law 35 of 1996. A franchise is an arrangement in which the owner or user license of a trademark agrees to transmit technical know-how or technical assistance in a manner that allows the person to whom the franchise is granted to produce or sell goods or provide services in the same manner and with the operational, commercial and administrative methods established by the owner of the trademark in order to maintain the quality, the prestige and the image, which the trademark represents.

Panamanian legislation does not deal with the basic requirements of a user license contract by which a franchise is established. It only indicates that it is to be considered a franchise when technical know-how is transmitted or when technical assistance is provided in order to develop the business in the Republic of Panama while complying with certain quality standards.

This means that under Panamanian legislation, both the franchiser and the franchisee shall only have the obligations and the rights contained in the user license contract, which is submitted to the Directorate General of Industrial Property of the Ministry of Commerce and Industries, known as "DIGERPI" in Spanish, for its registration. Under Article 122, the following requirements have to be fulfilled in order to obtain the registration of a user license:

1. Personal or corporate name, nationality, place of organization, number of identity certificate or personal identity of the parties.
2. Denomination and/or description of the trademark, together with an indication of the number and date of registration.
3. Specifications of the products or services covered by the authority to use the trademark.
4. Type and term of the user license.

For a user license to be registered with the DIGERPI, the trademark must be already registered, otherwise the application will not be processed until the Certificate of Registration of the owner of the trademark has been issued.

The franchise contract in Panama is governed by the principle of the autonomy of the will of the parties as provided by the Civil Code, since the franchiser and the franchisee may freely establish their rights and obligations, as well as the jurisdiction to which they will submit in the event of a conflict arising from the franchise contract concerning a specific activity.

In order to establish a franchise in Panama, it only has to comply with the existing legislation concerning industrial property and the other conditions required for a corporation to operate, such as the Notice of Operation (commercial license), and in the case of franchises of food, it must have the respective health permits.

The first franchise to be established in Panama was in 1957 concerning the vehicles of frozen products of Tastee Freeze, and two years later, the Dairy Queen franchise opened, which still remains in the market. The franchises that have more extensively developed in Panama are McDonalds, Kentucky Fried Chicken, Pizza Hut and Burger King.

There are also national franchises such as Pio Pio and Don Lee. The Authority of the Micro, Small and Medium Enterprises, known as "AMPYME" in Spanish, is now developing models of franchises for such smaller enterprises in the Republic of Panama, and its main goal is the development of the methods of a system of franchises in four stages:

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1. Knowledge Stage: during which the investor shall have the opportunity to learn every detail of what should be understood as a franchise.
2. Planning Stage: reviewing and establishing the strategy to adopt in the development of the franchise and the guidelines to follow.
3. Execution Stage: all of the manuals discussed in the planning stage are executed and developed.
4. Establishment Stage: advisory services are provided concerning the establishment and actual operation of the franchise system in real time.

AMPYME is, with its model, mainly seeking to create a document for investors involved in the franchise system to use as an instrument for planning, induction and consultation, in order to achieve knowledge of the franchise in its strategic, commercial and operational aspects, while at the same time identifying the expectations of the franchiser and the objectives to achieve in the development of the project.

AMPYME has identified the following advantages or contributions of franchises to the national government:

- Fostering the development of "micro, small and medium" enterprises
- Creating jobs
- Fostering self-employment
- Increase in the quality and productivity of commerce and services
- Increase in the GIP
- Increase of consumption
- Development of the investment
- Receipt of foreign currency due to export of franchises
- More offers of products and services in distant zones
- Regional development

Due to the construction of new commercial centers, there are now more than 200 franchises in Panama, including both local and international ones. The international ones are prevailing in the market, and this is one of the reasons why AMPYME has chosen 10 concepts to develop for the creation of franchises, such as beauty salons, ceviche sales, ice cream, roast meat restaurants, laundries, shoemakers and tailor shops, popular drugstores, child care centers, bakeries and sweets producers.

Finally, the success of franchises in Panama is based on the trust and smooth communication of the parties and the enterprise will of the franchisee, as well as the professional administration of the franchiser.

Mario Melgar-Adalid

The Supreme Courts of Justice in Mexico and the United States

Mexico stands with one foot in the legal tradition of Spain and the other in American institutions. Among American institutions, the Supreme Court of the United States has had the most influence on the shape of the Mexican Supreme Court of Justice.

The influence of the Supreme Court of the United States can be seen in the structure and organization of the Mexican Court. From a semantic point of view, only Mexico, Uruguay and Brazil (Federal Supreme Court) have adopted the term "Supreme Court" (*Suprema Corte*). Other Spanish speaking nations use the terms *corte suprema* or *tribunal supremo*. Argentina calls its court the *Corte Suprema de Justicia de la Nación* and Peru, Costa Rica, Bolivia, Chile, Colombia, Ecuador, El Salvador, Guatemala and Honduras have named their highest court the *Corte Suprema de Justicia*.

The Supreme Court of the United States is a constitutional court that is a paradigmatic example of a constitutionally diffused power system of checks and balances. The Supreme Court of Justice of Mexico has been moving towards a semi-centralized constitutional court model similar to that of the U.S. as opposed to the centralized power models in European courts.

While there are similarities between the two court systems in the U.S. and Mexico, there are also substantial differences, including the composition of the courts, the requirements to be appointed, the role of the president in appointing the members of the court and the leadership of the courts. For example, in Mexico, the Constitution establishes the following requirements for justices of the Court: of Mexican nationality, at least 35 years of age, must be a licensed attorney with 10 years of practice, of a good reputation and the individual must not have any criminal convictions that warrant a prison sentence of more than one year for crimes such as robbery, fraud, breach of trust or others that seriously affect his/her good reputation. Furthermore, it is required for justices to have served with efficiency, competence and integrity in the administration of justice, and those with no judicial experience must be distinguished and honorable legal professionals. In Mexico, the requirement that one must be an attorney to serve on the Supreme Court has not always been a conspicuous one, given that the Constitution of 1857 did not provide such requirement (the Constitution of 1917 is currently in effect). In the past, justices were elected through a popular vote, and voters based their decision on the personal attributes of the candidates for the Supreme Court rather than their training or academic merits.

Upon concluding their term, Mexican justices, like associate justices in the U.S., receive a retirement pension; however, upon conclusion of their term, Mexican justices are barred from representing any causes before the federal courts, a prohibition that does not exist in the U.S. Another restriction imposed in Mexico that is not imposed in the U.S. is that those individuals who served as

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Secretary of State, Attorney General for the Mexican Republic or the Federal District, or Governor or Head of Government for the Federal District are barred from serving as justices for one year after the conclusion of their respective terms. This restriction does not exist for public officials in the U.S.

The procedure by which justices are appointed to the Supreme Court allows for discussion in both the U.S. and Mexico and does not leave the power to appoint solely in the hands of the executive power. In Mexico, the president sends a slate of three candidates to the Senate so that they can decide on who will be appointed. In the U.S., the president nominates the justices, and such nomination is ratified by the Senate.

In the U.S., once the appointment is approved by the Senate, associate justices have life tenure, subject to good behavior. In Mexico, Supreme Court justices serve a 15-year term, which is an approach that seems more adequate, as it allows the renewal of the court upon the expiration of each justice's term. Mexico has adopted the same approach as the U.S. as far as not imposing a maximum age limit to serve as a justice; however, Mexico does have a minimum age requirement set at 35 years of age.

The composition of both courts has had parallel historical developments. In the U.S., the Supreme Court has nine members, while the Mexican court has 11. In Mexico, this number was once 26 members. The number of Supreme Court justices in the U.S. has changed between six, seven and nine members, as it stands today. Former U.S. President Franklin D. Roosevelt unsuccessfully attempted to change the composition of the court despite his influence during a time in which he had great political control. His attempt at restructuring was futile and merely led to a serious confrontation between the executive and judicial powers. As far as leadership of the supreme courts, both countries have different approaches. In Mexico, the president of the court is designated by the associated justices to serve a four year term, while in the U.S., the chief justice is nominated by the president, subject to ratification by the Senate. In Mexico, it's a requirement that the president of the court be a current justice of the Supreme Court, while in the U.S., the chief justice does not have to be chosen from existing members of the Supreme Court.

There are differences between the jurisdictions of the two courts given the power with which each is vested. While the Mexican Supreme Court is overwhelmed by numerous matters, the U.S. Supreme Court only resolves close to 70 cases each year. The very nature of these two courts is also different. The Supreme Court of Justice is up to date on what takes place throughout the entire judicial branch in the country and effectively carries out its role as head of the Judicial Power of the Federation. On the other hand, the Supreme Court of the U.S. does not hear administrative or governmental matters. A decentralized and efficient organization is in charge of matters outside the jurisdiction of the Supreme Court of the U.S. in order to allow it to perform its paramount judicial role.

Professional training is not an obstacle to serving on the Supreme Court of the U.S. Unlike the majority of countries, the U.S. does not require its justices to be licensed attorneys; however, it is only logical for the majority of the associate justices to be licensed attorneys, even though this is not mandated by law. Supreme Court justices typically hail from the most prestigious schools in the U.S.. In particular, Harvard University is the academic institution that has contributed the most associate justices, 20 to be exact. Throughout the history of this court, only five justices have been self-taught given that they did not have a formal legal education.

In Mexico, out of 11 justices, the president of the Supreme Court, Juan Silva Meza, along with Luis María Aguilar, Olga Sánchez Cordero, Margarita Luna Ramos and Sergio Valls studied at the UNAM School of Law, and Fernando Franco, Jorge Mario Pardo Rebolledo and Arturo Zaldívar studied at the *Escuela Libre de Derecho*. Two justices studied at public state universities – José Ramón Cossío at the *Universidad de Colima* and Guillermo Ortiz Mayagoitia at the *Universidad Veracruzana*. Sergio Salvador Aguirre studied at a private univeristy, the *Universidad Autónoma de Guadalajara*. The last two justices mentioned above finished out their terms on the last day of November 2012; therefore, the Senate will determine who will fill these vacancies on the court based on two slates sent by the President. P

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Deborah Loedt

Hiring and Firing Local and Foreign Employees in China

This article aims to provide current and prospective employers in China with an overview of the legal issues related to hiring local and foreign employees.

Entering into a Chinese Labor Contract

A. Requirements for Labor Contract

The Labor Contract Law of the PRC ("LCL") sets the provisions that govern all labor contracts entered into in China.

A valid labor contract must expressly state certain terms, including the name of the parties, term of employment, remuneration, position, duties, location and working hours.

There are no national requirements that labor contracts be executed in Chinese or, if executed in multiple languages, that the Chinese version prevail. However, local authorities in many cities (such as Shanghai and Changzhou) do require that the Chinese version prevail, while authorities in other cities (such as Guangzhou and Shenzhen) allow the foreign language version of a labor contract to prevail.

An employer must execute a written labor contract with an employee within one month from the date the employment commences. If not, then beginning on the second month the employer will be liable to pay double salary each month during the first year of employment until a written contract is executed, after which this is treated as a de facto labor contract with no fixed term.

In addition to the above, foreign employees are required to obtain their work and residence permits *before* they commence work.

B. Non-Competition Clause

In China, non-compete clauses are limited in time (two years maximum) and scope (geographic/industry restrictions). Also, non-compete clauses only apply to senior managers, technicians and related senior employees who are privy to confidential information.

An employer is required to compensate a former employee in order to enforce the non-compete clause. Upon termination, the employer must pay compensation to the former employee on a monthly basis throughout the course of the non-compete period.

The amount of the compensation generally falls between 20 percent and 60 percent of the former employee's average salary over the previous year. The employer does not have to pay any social charges on this compensation and any income tax due must be paid by the employee.

Termination by the Employer

A. Requirements for Termination

An employer may terminate an employee immediately without prior notice for serious violations of the labor contract. In the event of termination without notice, the employer must provide the employee with written notice stating the reasons for termination with supporting elements, as necessary. No additional compensation is required.

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Alternatively, an employer may terminate an employee by providing the employee with 30 days' written notice if the employee is or becomes unfit for the position and no suitable alternative position is available, or if the purpose for the position changes and parties are unable to amend the labor contract. Note that the employer will also be required to pay a termination fee described in section B below.

Finally, the employer and employee may terminate the labor contract by mutual agreement in which case they generally agree on the termination amount to be paid to the employee.

An employer must provide the former employee with a certificate of termination that states the effective date of termination, position held at termination, and duration of employment. An employer must also notify the relevant labor union, if any, in the event of any unilateral termination of an employee.

The termination requirements apply equally to both foreign and local employees. However, an employer should also terminate a foreign employee's work permit and residence permit.

B. Compensation for Termination

Any employee fired unilaterally by the employer with 30 days' written notice is entitled to compensation. The amount of compensation due is equal to one month's salary per year of service.

The monthly salary amount is the average salary earned over the previous year, inclusive of any bonuses or other monetary compensation, but is capped at three times the average local salary during the previous year.

Note that an employer will be liable to pay double compensation if he terminates the employee during any of the following periods: work-related disease/disability, pregnancy, maternity leave, and the lactation period (one year from the delivery date). An employer must also pay double compensation if it terminates an employee that is within five years of retirement and has worked for the same employer for at least 15 consecutive years.

Hiring Individuals in China without a China Entity

Although companies must have a Chinese entity to directly hire employees in China, there are options by which a foreign company without a Chinese entity can hire individuals in China.

A. Third Party Employer Agency

One option for a foreign company to engage an individual in China is through a third party employer agency (the "Agency"). This arrangement is only permitted through qualified companies (i.e., FESCO).

In this arrangement, the foreign company enters into a service contract with the Agency and the Agency then enters into a contract with the individual. Accordingly, the Agency is the employee's legal employer in China, and therefore is responsible for the work conditions, salary payment, social charges and termination compensation, if any.

Consequently, the Agency's interests may conflict with those of the foreign company, especially regarding termination compensation, as the Agency will want to provide a higher compensation package to avoid any claims by the former employee. The Agency often requires that the foreign company enters into a third party settlement agreement and will not return any deposit paid until all applicable termination payments have been made.

B. Independent Contractor Agreement

Another alternative is to hire a local individual through an independent contractor agreement. This type of agreement is governed by the Contract Law of the PRC ("Contract Law") as opposed to the LCL, and thereby gives the foreign company more latitude in the terms of the agreement. This also allows the foreign company to engage an individual in China without having a legal entity in China.

Generally the independent contractor is responsible for his/her own income tax on fees paid (which are not a salary on a tax perspective) and social insurance payments. It is important that these be clearly structured as an independent contractor agreement, as the foreign company may be liable for fines for illegal employment and similar violations if a court determines that it is a labor contract instead of an independent contractor agreement.

Note that a Chinese individual can only convert the equivalent of USD 50,000 into local currency per year, which may limit the payment of services fees. However, there is no limit on the amount of foreign funds a Chinese individual may receive, so there would be no limit in the event the receiver does not need to convert the funds.

Conclusion

Much of the legal framework regarding hiring and firing employees, whether local or foreign, is similar to that in other jurisdictions. Furthermore, the differences between local and foreign employees are being reduced, making it easier for foreign companies to understand their requirements as employers in China. As long as a foreign company is aware of its responsibilities, it should not encounter any difficulties in hiring or firing either local or foreign employees in China.

Edward Sun

Repatriating Dividends from China-based Investments

Legal Grounds

Chinese law allows for the repatriation of cash dividends to an investor's home country provided that the proper protocol is followed. However the web of regulations pertaining to repatriating dividends may appear to be unclear, confusing and even contradictory to the average investor. This is where many individuals become hesitant or apprehensive about involving themselves with foreign investment enterprises ("FIE" or "FIEs") in China. The ability to remit liquid dividend-based capital is of paramount importance. This article serves to allay fears related to the repatriation of cash dividends, and inform the investor about the current state of dividend taxation in China.

In 1998, the State Administration of Foreign Exchange ("SAFE") published the *Relevant Questions Concerning the Remittance of Profits, Dividends, and Bonuses Out of China Through Designated Foreign Exchange Banks Circular* (No. 29 of 1998; hereinafter "Circular 29"). Compared with the earlier regulations, Circular 29 increased the documentary requirements necessary before the remittance of dividends was permissible. Further laws and regulations have been promulgated since the late 1990s, however the process and documentation required by Circular 29 have remained effective until now, and are detailed on the following pages. Additional publications are as follows, and it may behoove the investor to obtain English language copies of the proceeding documents:

1. *Circular on Issues concerning Outward Remittance of Profits, Stock Dividends and Stock Bonuses Processed by Designated Foreign Exchange Banks in 1998*
2. *Enterprise Income Tax Law of the People's Republic of China in 2008*
3. *Implementation Regulations of the Corporate Income Tax Law of the People's Republic of China in 2008*
4. *Circular of the State Administration of Foreign exchange on Amending "Circular on Issues concerning Outward Remittance of Profits, Stock Dividends and Stock Bonuses Processed by Designated Foreign Exchange Banks in 1999*
5. *Administration of Foreign Exchange Accounts inside China Provisions in 1997*
6. *Notice of the Ministry of Finance and State Administration of Taxation on Several Preferential Policies in Response of Enterprise Income Tax in 2008*

Taxation of Dividends

The State Administration of Taxation issued the *Notice of the Ministry of Finance and State Administration of Taxation on Several Preferential Policies in Response of Enterprise Income Tax* in 2008, a 10 percent withholding tax on dividends paid to nonresident companies and their individual shareholders was introduced, it should be noted that dividends paid out of pre-2008 earnings continue to be exempt from withholding tax. The 10 percent withholding tax may be reduced under an applicable tax treaty, depending on any trade agree-

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Tax Rate on Dividends from Current Tax Treaties

List of Anti-double Taxation Treaties issued by State Administration of Taxation, http://www.chinatax.gov.cn

TAX RATE	COUNTRY/REGION
0%	Georgia (If the beneficial owner holds directly or indirectly at least 50% of the capital of the company paying the dividends and the total investment is no less than € 2 million)
5%	Kuwait, Mongolia, Mauritius, Slovenia, Jamaica, Sudan, Laos, South Africa, Croatia, Macedonia, Seychelles, Serbia, Barbados, Oman, Bahrain, Saudi Arabia, Brunei, Mexico
5% (Holds directly 10% of the capital of the company paying the dividends)	Venezuela, Georgia (Investment in the company paying the dividends is no less than € 100,000; 10% of gross dividends if the beneficial owner holds directly less than 10% of the capital of the country paying the dividends)
5% (Holds directly 25% of the capital of the company paying the dividends)	Algeria, Luxemburg, Korea, Ukraine, Armenia, Iceland, Lithuania, Latvia, Estonia Ireland, Moldova, Cuba, Trinidad and Tobago, Hong Kong, Greece, Singapore (10% of gross dividends if the beneficial holder owns less than 25% of the capital of the company paying the dividend)
7%	United Arab Emirates (UAE)
7% (Holds directly 25% of the capital of the company paying the dividends)	Austria (10% of gross dividends if the beneficial holder owns less than 25% of the capital of the company paying the dividend)
8%	Egypt, Tunisia
10%	United States of America and all other countries or regions not listed above

ments that the investor's home country has with China. The possible reductions can be seen in the table above.

Procedures and Documents Required for Remittance

According to the various aforementioned SAFE publications, the designated foreign exchange bank must be provided with the following materials by all foreign investors in FIEs before giving its approval to remit annual profits or dividends abroad:

1. Tax payment certificate and tax declaration form (those enterprises enjoying reduced tax treatment or tax exemption should provide the documents issued by the local tax administration departments evidencing this);
2. An auditor's report issued by an accountancy firm relating to the annual profit or dividend for the relevant years;
3. Decision of the board of directions on the distribution of profits, dividends, and bonuses;
4. The Foreign Exchange Registration Certificate of the particular FIE;
5. The capital verification report in relation to the FIE issued by an accountancy firm; and
6. Other materials or documents that may be required by SAFE on a case-by-case basis.

As a note, and codified in the *Circular of the State Administration of Foreign Exchange on Amending "Circular on Issues concerning Outward Remittance of Profits, Stock Dividends and Stock Bonuses Processed by Designated Foreign Exchange Banks,"* no enterprise with foreign investment whose registered capital has not been fully paid as provided by the articles of contract is allowed to remit foreign exchange profits or stock bonuses abroad. If the delay in fully paying in registered capital as provided by the articles of contract is caused by special reasons, approval of the former inspection and approval institutions will be requested. Profits and stock bonuses distributed in accordance with the proportion of paid-in registered capital can be remitted abroad based on the approval documents issued by the former inspection and approval institutions and other documents specified in the Circular. P

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Gateway of India overlooking the Arabian Sea. – Mumbai, India

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Primerus Community Service

One doesn't need to look too far to find the commitment to community service at Collins & Lacy, P.C. It starts at the top and trickles down to each individual attorney devoting time to the causes they love.

Because of this wide-reaching effort, Collins & Lacy, of Columbia, South Carolina, won the 2012 Primerus Community Service Award, as announced at the Primerus Global Conference in November. Primerus names two finalists in addition to the winner. This year's finalists are Kubasiak, Fylstra, Thorpe & Rotunno of Chicago, Illinois, and Lewis Johs Avallone Aviles L.L.P. of New York, New York.

Collins & Lacy

This year, Collins & Lacy made its commitment to community service even more official by developing a new core values statement, which says, "We are devoted to our communities through our support and involvement."

At the beginning of this year, the firm's managing partner, Ellen Adams, challenged all employees to identify their "passion" in pursuit of excellence in both their professional and personal lives. She encouraged firm employees to pursue their passion by identifying one goal and outlining the steps to achieve that goal. Many attorneys and staff have incorporated community service into their overall passion for excellence by renewing their commitment to helping others and their communities. As a result, working together and individually, the firm has served about 50 organizations in the four cities where the firm is located.

"Collins & Lacy has always placed a premium on contributing to and connecting with our community. We find this creates a workforce of committed citizens who carry over good stewardship and dedication into the practice of law for the benefit of our clients," said the firm's founding partner, Joel Collins.

Collins also received the Primerus Lifetime Achievement Award at the Global Conference. The award is given to members who have helped build their individual institutes, as well as the Primerus organization as a whole, since the establishment of Primerus in 1992.

"Incorporating the Primerus Community Service Pillar into our firm's core mission and values has allowed our entire team of attorneys and staff to see the importance of our Primerus membership in a very real and relevant way for the communities in which we live and work, and to carry on this ethic in every area possible," Collins said.

As a firm-wide community service project, Collins & Lacy implemented the 2012 Denim Days project. Employees were invited to wear jeans on the last Friday of each month in exchange for a $5 donation to a local charity. The firm then identified the top charities it would like to support: Kids' Chance of S.C., Sexual Trauma Services of the Midlands, Harvest Hope of S.C., American Red Cross, S.C. Bar Foundation, American Cancer Society, Alzheimer's Association of S.C., National Alliance on Mental Illness, Special Olympics, Senior Resources/Meals on Wheels, Muscular Dystrophy Association, Habitat For Humanity and Jamil Shrine Cripples Hospital. The project has raised over $1,100 to date.

In August 2012, the firm conducted the first "Biggest Giver" food drive to benefit Harvest Hope Food Bank and Crisis Ministries, creating a fun competition between office locations. The firm delivered a total of 223 food items to these organizations in each of the cities where it's located.

Here are just a few examples of individual attorneys' volunteer efforts:

- The firm's Workers' Compensation team is dedicated to supporting Kids' Chance of South Carolina with attorney Rebecca Halberg currently serving as the president of this organization. Kids' Chance is a nonprofit corporation developed in 1992 by the S.C. Workers' Compensation Educational Association, and is committed to providing financial scholarships for children of South Carolinians killed or seriously injured in work-related accidents.
- Jack Griffeth is the current president and a longtime member of the South Carolina Bar Foundation which promotes legal aid and the advancement of justice in South Carolina through grants to related

Collins & Lacy made its commitment to community service even more official by developing a new core values statement, *"We are devoted to our communities through our support and involvement."*

community organizations throughout the state. Jack also is the past president of the Greenville Bar Association, wrapping up his term in December 2011.

- Charles Appleby is dedicated to enriching the Columbia community. In addition to his role as vice president of the contemporaries of the Columbia Museum of Art, Charles co-chaired the city's first ever New Year's Celebration, drawing thousands of residents and visitors to Columbia's Main Street.

Kubasiak, Fylstra, Thorpe & Rotunno

As last year's winner of this award, Kubasiak, Fylstra, Thorpe & Rotunno continues its commitment to community service. Their efforts include:

- Daniel J. Kubasiak is a member of the board for Catholic Charities Housing Development Corporation as well as the Poshard Foundation for Abused Children.
- In addition to donating time on pro bono cases and active church involvement, Bernard Peter serves on the Illinois State Bar Association Corporate Law Department and Employee Benefits Section Councils, for which he works on preparing newsletters and holding seminars for the entire section.
- David Schaffer has volunteered his time to raise funds to create and exhibit a film about the life and work of the late Rev. James J. Close, a Roman Catholic priest and the long-time president of the Mercy Home for Boys & Girls. He did the legal work for free to establish the Father Close Fund, Inc., as an Illinois not-for-profit corporation. The film, tentatively titled "Father Jim: In His Own Words," will be used to memorialize and preserve his charitable work and to promote his beliefs and values.

Lewis Johs Avallone Aviles

Over the years, the law firm of Lewis Johs has worked to support its local families, schools, charities, and military troops overseas. But in the past year, the firm's community service work took on a special mission.

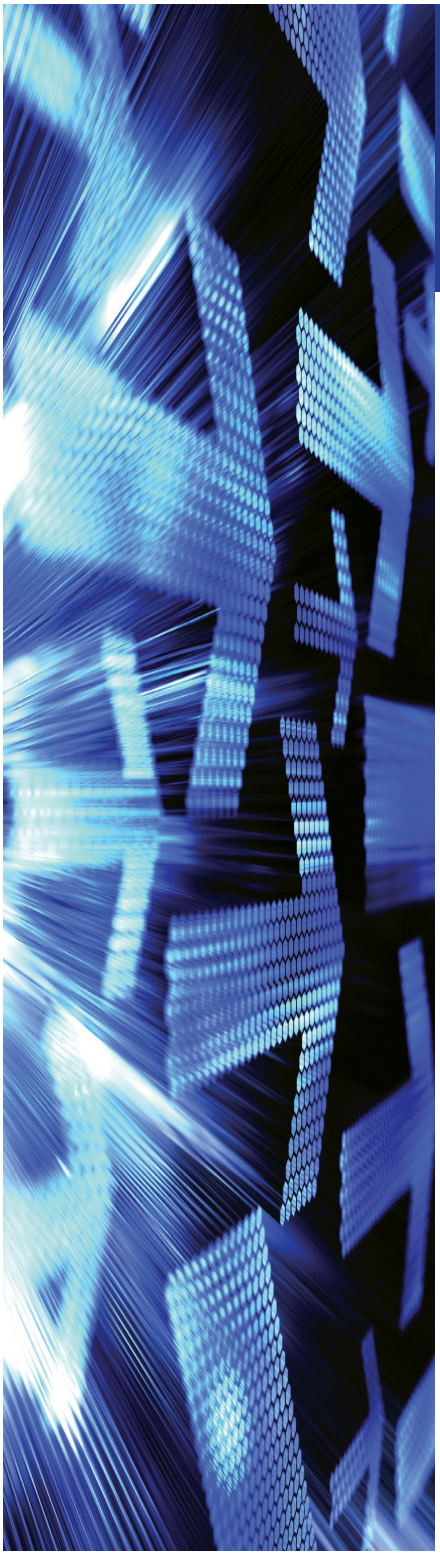
During the 2011-2012 school year, the firm was approached by an impoverished single mother who had a child with special needs. This 9-year-old boy had a diagnosis of autism and Fragile X, a genetic condition which causes changes in the X chromosome resulting in intellectual disabilities. The boy has significant speech delays and has difficulty sitting for even a very short period. His sensory needs require almost constant motion, including swaying, walking, jumping and swinging. He has a number of perseverative behaviors including flapping his hands and rocking.

This boy, after receiving appropriate educational services in school with a full complement of after-school services to meet his intellectual, sensory and physical needs, was being stripped of his after-school services and switched into a public school and classroom that was completely inappropriate to meet his educational needs. The public school was changing his educational service program without performing the needed evaluations and testing that would justify this change.

His mom came to the firm for help, even though she couldn't afford to pay any legal costs whatsoever. The firm decided to take on this case involving the Individuals with Disabilities Education Improvement Act without fees. They drafted the demand for due process which initiates the suit and hoped to convince the public school that this boy was entitled to a free and appropriate public education in an effort to settle the case, or find a more appropriate placement for the boy.

The school district, aware of the financial constraints of the family, declined to offer a different program or any additional services. After nine full days of hearing, including opening statements, direct and cross examination of over nine witnesses, the firm obtained a favorable decision allowing the boy to attend an appropriate school to meet his educational needs. The decisions also allowed him to continue with his much needed and appropriate after-school services.

"Getting to know this mom and working with her, fighting alongside her, was so rewarding," the firm's application said. "Using our legal skills for a family that needed it, and a family that was turned away by other counsel, was truly extraordinary. Since that experience, we have made it part of our mission to help families in need as much as possible."



2013 Calendar of Events

Scan this with your smartphone to learn more about Primerus.

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

May 31-June 2, 2013 – Primerus International Conference
Barcelona, Spain – *Hosted by the Primerus Europe, Middle East & Africa Institute*

October 24-27, 2013 – Primerus Global Conference
Asheville, North Carolina

October 27-30, 2013 – Association of Corporate Counsel Annual Meeting
Los Angeles, California – *Primerus will be a corporate sponsor*

Many additional conferences and events are being planned for 2013. Please visit the Primerus events calendar at www.primerus.com/events.

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

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