Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS SPRING 2016

Traveling the World

Going Global Gets Personal

+

Current Legal Topics:

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North America

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

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

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

About our cover

Primerus brings together attorneys and clients to create a strong dynamic of communication and collaboration. In this issue, we explore how Primerus is creating more opportunities than ever for clients to meet trusted Primerus attorneys from around the world.

Scan to learn more about Primerus.

Primerus
The World's Finest Law Firms

Publisher & Editor in Chief: **John C. Buchanan**
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President's Podium

John C. Buchanan

Traveling the World

In 2016, Primerus is logging a lot of airline miles. Why? For two reasons: First, we are traveling the globe looking for more of the world's finest law firms. Second, we are spending more time than ever coming to you – our valued clients – so you can meet our fine attorneys and start reaping the benefits of our global society.

Let's start with the first. Primerus already has 175 law firms in 40 countries. But we're not resting until we have brought together even more of the world's finest small and mid-sized law firms for you. We know that on top of all the other challenges your business faces in a competitive global marketplace, you're left with the job of seeking out quality law firms who can handle your legal needs – all for a price that fits into your ever-tightening budgets. That's where Primerus steps in to help.

What we do for you is literally go around the world searching for high quality boutique law firms who are committed to performing excellent work for reasonable fees. We submit them to stringent screening before they are admitted to the society, and then continue to review their performance every year they remain members. We find these law firms so that you don't have to. But our work doesn't end there. We bring these firms together into a society to work together for you. We strive to take the risk and guesswork out of your job of finding new law firms.

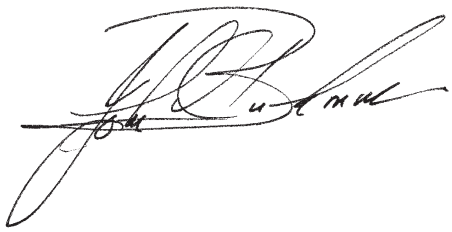
What we do for you is literally go around the world searching for high quality boutique law firms who are committed to performing excellent work for reasonable fees. We submit them to stringent screening before they are admitted to the society, and then continue to review their performance every year they remain members.

Second, we're traveling the world to give clients more chances to meet our quality attorneys face to face. We hear from clients time and time again that they appreciate meeting our attorneys in low-pressure, educational environments, so we're working hard to offer more of these opportunities around the world. In 2016, we will host client events throughout the United States, as well as in Madrid, Spain; Mumbai, India; Zurich, Switzerland; Rome, Italy; Mexico City, Mexico; Hamburg, Germany; and London, England.

The introductions that occur at meetings such as these lead not only to friendships, but also to relationships with some of the world's finest trusted legal advisors. Clients tell us that after meeting Primerus attorneys, they consistently turn to us when they need legal representation in a new jurisdiction, or simply for legal advice in an area where they cannot hire a Primerus attorney.

To companies around the world, Primerus offers the best of both big and small law. We're made up of small and mid-sized, independent law firms that provide very high quality legal services anywhere in the world. By joining together, we offer clients the advantages of small and mid-sized law firms – personalized partner level service, fewer conflicts of interest, reasonable fees and the flexibility that comes with less overhead and bureaucracy. But we also offer clients the advantages of big law firms with global connections that offer possibilities to partner with the best law firms around the world.

We hope to see you during our world travels this year!



Going Global Gets Personal

Primerus is truly a global society with 3,000 attorneys in 40 countries.

But how do the relationships start that lead to those global connections?

They start with an introduction, a handshake, a face-to-face meeting. That's why in 2016, Primerus is offering more opportunities than ever for clients to meet trusted Primerus attorneys from around the globe – in low-pressure, educational and social environments.

It worked for Jim Woody, senior manager of liability claims and litigation with Coca-Cola Bottling Company Consolidated, the United States' largest independent bottling company, based in Charlotte, North Carolina.

Woody, a client of Primerus member firm Christian & Small in Birmingham, Alabama, attended two Primerus Defense Institute (PDI) Convocations and one PDI Transportation Seminar. Since then, he's become a self-described "big Primerus fan," looking to Primerus when he needs legal representation.

"I was very impressed with the skill level and quality of the attorneys I met there," Woody said. "I left with both friendships and business relationships."

Over the past 16 years, Woody has developed relationships with law firms in the 12 southeastern states where he has bottling contracts with Coca-Cola. But now, as his business will nearly double in the coming 18 months and expand to new areas, he will rely on Primerus to find the trusted attorneys he needs.

"With the Six Pillars of Primerus, I feel confident that the integrity and thought process of Primerus attorneys is very consistent with what I think is a good legal process," Woody said.

All Primerus attorneys pledge a commitment to the Six Pillars – integrity, excellent work product, reasonable fees,

continuing legal education, civility and community service.

And those fit perfectly with the top three things Woody looks for in an attorney: honesty, diligence and judicial skills. "As [Primerus President and Founder Jack Buchanan] would say, 'good old fashioned lawyering,' and that is a trait that sometimes is lost."

"My company has very high standards," Woody said. "I once had an attorney that was not a Primerus attorney tell me that my employees are too honest. There's honest and there's not honest. There's no in between. I didn't use that attorney again."

Personal Connections Around the World

Woody welcomes the opportunities Primerus provides to meet member attorneys, because having a personal connection with an attorney he hires is very important to him.

"We go into litigation trying to find the right answer and resolution," Woody said. "That personal relationship with an attorney is critical to me. I need to know this attorney is going to represent us well, and in the end we're going to have as good a resolution as we possibly can."

He also relies on Primerus attorneys in states where he does not do business as a resource for legal advice and/or referrals. "To me, it's a win-win working with a group like Primerus," he said.

Woody likes the size of Primerus firms. Called small to mid-sized, Primerus firms generally have between 20 and 40 attorneys. While he works with both small and much larger firms, he finds that small firms are often more personal.

He's impressed by the quality he has seen among Primerus attorneys – both in the United States and internationally. "The consistency is what really attracts me, in knowing that if I select a Primerus attorney in Michigan, I will be treated the same way as if I work with a Primerus attorney in Louisiana," he said. "I have been amazed by the number of Primerus attorneys who know I will never have any cases in their area, but they still call me when they're in the area and want to come to see me. It makes me, as a client, want to give back."

Getting Up Close and Personal

In 2016, Primerus is holding more events than ever before to allow clients such as Woody to meet Primerus attorneys around the world. In the first three months of 2016, Primerus held client outreach events in Madrid, Spain; Mumbai, India; Las Vegas, Nevada; and Zurich, Switzerland. In April, Primerus will hold the 13th Annual Primerus Defense Institute (PDI) Convocation in Napa, California. The rest of 2016 includes client events in Rome, Italy; Mexico City, Mexico; Hamburg, Germany; and London, England.

Members and clients from around the world will also attend the Primerus Global Conference October 13-16, 2016, in Washington, D.C.

Primerus President and Founder Jack Buchanan said Primerus began inviting clients to events in 2004 with its first

PDI Convocation in Key Largo, Florida. The first one was small with about 30 members and 20 corporate clients. Since then, Primerus has held one Convocation each year with 60 to 70 PDI members and 50 to 60 clients attending.

"Each one has been an outstanding success," Buchanan said. "Clients tell us they welcome the opportunity to meet quality lawyers from around the world in a low-pressure environment. It's amazing to see how the connections made at events like these build the foundation for future friendships, as well as attorney-client relationships."

Though the Convocations and other Primerus client events provide clients with the opportunity to meet lawyers who can help them with their legal needs, they also help by providing educational offerings relevant to corporate clients in their day-to-day work.

Woody remembers one example from the 2014 PDI Convocation in Scottsdale, Arizona. A panel of Primerus attorneys and clients, including Woody, participated in the two-day program, which followed an evolving hypothetical case scenario based on real world litigation, highlighting cutting edge and practical case-related problems. The event culminated in a mock presentation from some of the finest Primerus trial lawyers.

The event showed to Woody that Primerus attorneys are interested not in transferring fault or finding someone to blame, but rather in working together with everyone involved to find the best result of a bad situation.

"That's the way I like to conduct business," Woody said.

Global Conference Goes to Europe

In October 2015, Primerus held a client event in conjunction with its Global Conference in Amsterdam, Netherlands – the first time the event was held outside of the United States.

According to Reinier Russell, managing partner of Primerus member firm Russell Advocaten in Amsterdam, the event was a great success, with more attendees than ever before.

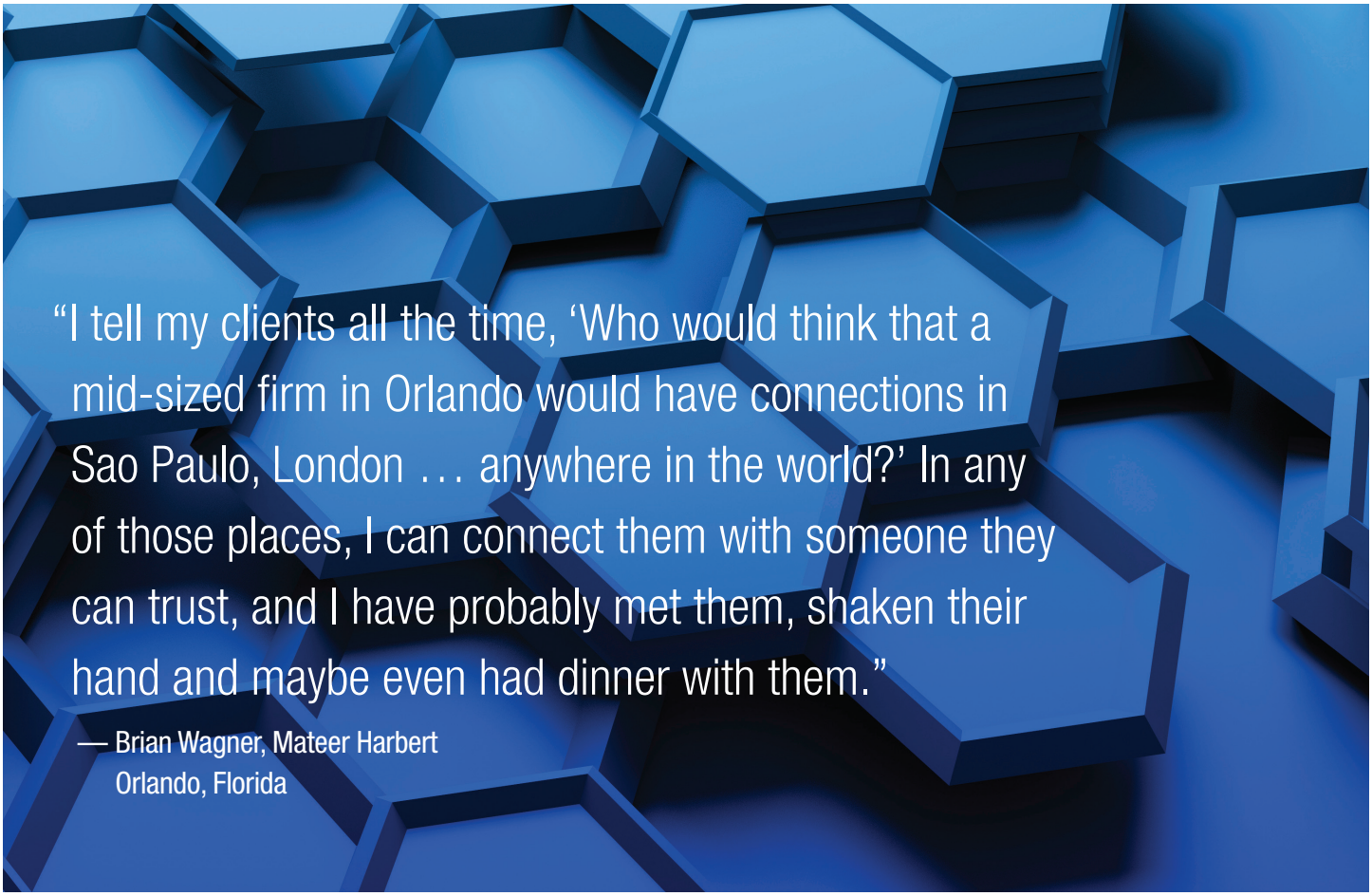
"It was a great environment to get to know each other and clients better," he said. "With the dedication and enthusiasm of all members, we strengthened personal ties. The result is providing better service to the clients we met and making it easier to make referrals to colleagues."

He added that within the world's big law firms, partners do not really know each other, whereas within Primerus, members really know each other personally.

Russell said that because Primerus is a global organization, holding client events around the world allows Primerus to better meet the needs of clients.

"The best way to reach clients is by approaching them in their home country," he said. "Knowing people allows us to tailor our assistance because we know what they are looking for."

At Russell Advocaten, Russell said they frequently talk with their clients



about Primerus so they understand the benefit it provides to have connections around the globe.

"Being a Primerus-approved member, we don't hesitate to refer our clients to our Primerus colleagues around the world," Russell said. "We actively promote the Primerus brand and our Primerus colleagues with our clients throughout The Netherlands."

Helping Clients Find the Right Lawyer

Primerus member Brian Wagner of Mateer Harbert in Orlando, Florida, and other Primerus attorneys are now working to find ways to make it even easier for clients to get connected with the Primerus attorneys they need.

It started when Wagner and Primerus member Patricia Barcellos of Barcellos Tucunduva Advogados in Sao Paulo, Brazil, started talking at a Primerus event in Zurich, Switzerland, about the large amount of business transactions between Florida and Brazil.

"Each of us had clients who did business in the other country," Wagner said. "This is a big benefit of being a Primerus member. If you have a client who needs an attorney in another place, Primerus offers a great way to assist your client in finding quality legal representation."

Wagner, Barcellos and other Primerus members are working to help discover other areas of overlap among members so they can better serve clients.

Thanks to Wagner's relationship with Barcellos, he can refer clients with confidence. "My clients trust me and my judgment and just going into a jurisdiction cold is not the best way to pick a lawyer," he said. "Now they have an opportunity for an introduction to someone I know."

Wagner said, "I think that's very important to clients. They want to know what to expect when they walk into a relationship with a lawyer. You have to walk in with a certain amount of trust, and of course that can then be won or lost."

And thanks to Primerus, Wagner can offer those connections all around the world. "This is typically something clients can get only by hiring the giant law firms. With Primerus, they can do it through me and save money."

"I tell my clients all the time, 'Who would think that a mid-sized firm in Orlando would have connections in Sao Paulo, London … anywhere in the world?' In any of those places, I can connect them with someone they can trust, and I have probably met them, shaken their hand and maybe even had dinner with them."

Buchanan said that's exactly how Primerus works. "We bring the best of both worlds to clients by offering excellent legal services from almost 200 high quality, multi-specialty, "Six Pillar" law firms located in every continent, except Antarctica, on the face of the planet," he said. "We also provide those highly valued legal services at half the cost the big companies would pay to the mega and large law firms."

Regulation A+: Does It Make the Grade?

Title IV of the Jumpstart Our Business Startups (JOBS) Act[1] amended the Securities Act of 1933[2] by adding a new Section 3(b)(2) that required the Securities and Exchange Commission (SEC) to promulgate rules or regulations to exempt a class of securities having characteristics of a liberalized version of the then existing Regulation A. The amendment, sometimes referred to as Regulation A+, exempts offerings of up to $50 million from the registration requirements of the Securities Act, permits general solicitation including solicitation of non-accredited investors, permits secondary sales by both affiliates and non-affiliates of the issuer, and in some cases preempts state regulation of the offerings.

Regulation A+ provides for two levels of offerings. Tier 1 applies to offerings with an aggregate offering price for the securities being offered of up to $20 million with not more than $6 million of secondary sales by affiliates of the issuer.

Tier 2 applies to offerings with an aggregate offering price for the securities being offered of up to $50 million with not more than $15 million of secondary sales by affiliates of the issuer. Issuers conducting offerings of up to $20 million may elect to proceed under either Tier 1 or Tier 2.

Secondary sales by both affiliates and non-affiliates are limited in an issuer's initial Regulation A+ offering and any subsequent Regulation A+ offering within one year of the initial qualification date to no more than 30 percent of the aggregate offering price.

Regulation A+ is available for business combination transactions, if they are not shelf transactions.[3]

The exemption provided by Regulation A+ is available to companies organized, and with their principal place of business in, the United States or Canada[4] who are not: SEC-reporting companies, investment companies registered under the Investment Company Act of 1940, blank check companies, issuers of fractional undivided interests in oil or gas rights or similar interests in other mineral rights, or disqualified by the "bad actor" provisions under Regulation A+.[5]

The securities eligible for offer and sale under Regulation A+ are limited to equity securities, debt securities and debt securities convertible or exchangeable to equity interests, including any guarantees of such securities. Asset-backed securities are not eligible for sale pursuant to Regulation A+.

Rule 255 permits issuers and those acting on behalf of an issuer to communicate orally and in writing to gauge potential investor interest in an offering both before and after filing an offering statement. For purposes of the antifraud provisions of the federal securities laws, testing the waters communications are deemed to be an offer of a security for sale. No solicitation or acceptance of money or other consideration, nor of any commitment, binding or otherwise, from any person is permitted until qualification of the offering statement.[6]

No sale of securities in a Tier 2 offering may be made to any purchaser that is not an accredited investor[7] or if aggregate purchase price is more than 10 percent of the greater of such purchaser's annual income or net worth, if a natural person,[8] or revenue or net assets, if a non-natural person, *unless* the securities are listed on a registered national securities exchange upon qualification.[9] The issuer may rely on a representation of the purchaser when determining compliance with the 10 percent investment limitation, provided that the issuer does not know at the time of sale that any such representation is untrue.

The final offering circular delivery requirements may be satisfied by delivering a notice to the effect that the sale was made pursuant to a qualified offering statement that includes the URL, which, in the case of an electronic-only

Gerry Balboni

Gerry Balboni is a corporate transactions attorney with over 20 years of experience representing companies and individuals that buy, sell and invest in growth businesses. He works with companies seeking capital, venture capital and private equity funds, buyers and sellers of businesses, and licensors and licensees of technology and software. He also provides assistance in Software as a Service and cloud licensing, data privacy and security, intellectual property protection, non-competition agreements, executive compensation, stock options, restricted stock awards, software and encryption export regulation and strategic alliances.

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	Section 3(a)(11)	Section 4(a)(2)	Regulation D				Regulation A+	
	Intrastate offering	Private placement	Rule 504	Rule 505	Rule 506(b)	Rule 506(c)	Tier1	Tier 2
Offering limit	No cap.	No cap.	$1M within prior 12 months.	$5M within prior 12 months.	No cap.	No cap.	Up to $20M, within prior 12 months, but no more than $6M by selling securityholders.	Up to $50M, within prior 12 months, but no more than $15M by selling securityholders.
Manner of offering	No limitation other than to maintain intrastate character of offering.	No general solicitation or general advertising.	No general solicitation or general advertising unless registered in a state requiring use of a substantive disclosure document or sold under state exemption for sales to accredited investors with general solicitation.	No general solicitation or general advertising.	No general solicitation or general advertising.	No restriction on general solicitation, if all purchasers are accredited.	"Testing the waters" permitted before a nd after filing Form 1-A. Sales permitted after Form 1-A qualified. No restriction on general solicitation.	
Issuer and/or investor requirements	All issuers and investors must be resident in state.	All issuers and investors must meet sophistication and access to information test.	None.	Unlimited accredited investors and up to 35 unaccredited investors.	Unlimited accredited investors and up to 35 unaccredited investors.	All purchasers have to be accredited.	None.	Unaccredited investors can only invest up to 10 percent of annual income or net worth.
SEC filing requirements	None.	None.	Form D.				Form 1-A, which must be reviewed and qualified by the SEC. File test-the-waters documents, any sales material and report of sales and use of proceeds with the SEC.	
State (blue sky) requirements	Blue sky law compliance required.	Blue sky law compliance required.	Blue sky law compliance required.	Blue sky law compliance required.	Covered Securities under Section 18 of the Securities Act, subject only to notice filing and anti-fraud authority.	Covered Securities under Section 18 of the Securities Act, subject only to notice filing and anti-fraud authority.	Blue sky law compliance required, NASAA coordinate review process available.	Covered Securities under Section 18 of the Securities Act, subject only to notice filing and anti-fraud authority.
Ongoing reporting (annual audit/ financial reports)	No.	No.	No.	No.	No.	No.	No.	Yes.
Resale	Rests within the state (generally a one-year period for resales within state).	Restricted.	Restricted, unless registered in a state requiring use of a substantive disclosure or sold under state exemption for sale to accredited investors with general solicitation.	Restricted.	Restricted.	Restricted.	Restricted.	Not restricted.

offering, must be an active hyperlink, where the final offering circular or the offering statement of which such final offering circular is part, may be obtained on EDGAR and contact information sufficient to notify a purchaser where a request for a final offering circular can be sent and received in response.

Regulation A+ permits delayed or continuous offerings if the securities: (1) relate to secondary sales by or on behalf of persons other than the issuer; (2) relate to a reinvestment plan or employee benefit plan; (3) are issued upon the exercise of outstanding options, warrants or rights, or upon conversion of other outstanding securities; (4) are pledged as collateral, or (5) are part of an offering which commences within two days after the qualification date, will be offered on a continuous basis, may continue to be offered for 30 days from initial qualification, and will be offered in an amount that, at the time the offering statement is qualified, is reasonably expected to be offered and sold within two years from the original qualification date.[10] The offering price in Regulation A+ is fixed at the date of the final offering circular. At the market offerings are not permitted.

All documents filed or provided to the SEC must be filed with the SEC electronically on EDGAR.[11]

Issuers in a Tier 1 offering must file an exit report within 30 calendar days after the termination or completion of the offering. Other than the exit report, issuers using Tier 1, have no periodic reporting obligations.

Issuers in a Tier 2 offering must file: (1) annual reports on Form 1-K; (2) semi-annual reports on Form 1-SA; (3) current event reports on Form 1-U;[12] and (4) a Special Financial Report on Form 1-K or 1-SA.

Issuers in Tier 1 offerings must register or qualify their offering in each state in which they seek to offer or sell securities pursuant to Regulation A+ under the coordinated state review program offered by the North American Securities Administrators Association (NASAA) at www.nasaa.org.

Issuers in Tier 2 offerings are not required to register or qualify their offerings with state securities regulators. Tier 2 offerings remain subject to state law enforcement and antifraud authority, and may be subject to filing fees and be required to file any materials that the issuer has filed with the SEC in the states in which they intend to offer or sell securities.

Securities sold under Regulation A+ are not "restricted securities" under the Securities Act and are not subject to the Securities Act limitations on resale that apply to securities sold in private offerings, however, resales of securities issued in a Regulation A+ offering must be registered, or offered or sold pursuant to exemption from registration with state securities regulators.[13]

1 Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

2 Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified at 15 USC § 77a *et seq.* (1933)).

3 *See* SEC, Compliance and Disclosure Interpretations: Securities Act Rules, Question 182.07 (Aug. 6, 2015), *available at* http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#182.01.

4 17 C.F.R. §230.251(b)(1). An issuer with headquarters located within the United States or Canada, whose business primarily involves managing operations that are located outside those countries is considered to have its principal place of business located in the United States or Canada if its officers, partners, or managers primarily direct, control and coordinate the issuer's activities from the United States or Canada. See SEC, Compliance and Disclosure Interpretations, *supra* note 13, at Question 182.03.

5 *See* 17 C.F.R. §230.251(b) for the complete list of issuers not eligible to use Regulation A+.

6 17 C.F.R. §230.255(a). *See* 17 C.F.R. §230.255(b) for specific content requirements for testing the waters communications.

7 Rule 501, 17 C.F.R. §230.501.

8 The annual income and net worth of natural persons is determined in the manner provided by Rule 501, 17 C.F.R. §230.501.

9 17 C.F.R. §230.251(d)(2)(i)(C). If the securities underlying warrants or convertible securities are being qualified pursuant to Tier 2 of Regulation A+ one year or more after the qualification of an offering for which investment limitations previously applied, purchasers of the underlying securities for which investment limitations would apply at that later date may determine compliance with the ten percent (10%) investment limitation using the conversion, exercise, or exchange price to acquire the underlying securities at that later time without aggregating such price with the price of the overlying warrants or convertible securities. *See* 17 C.F.R. §230.251, note to paragraph (d)(2)(i)(C).

10 17 C.F.R. §230.251(d)(3)(i)(F).

11 17 C.F.R. §230.251(f).

12 17 C.F.R. §230.257(b)(4).

13 *See* SEC, Compliance and Disclosure Interpretations, *supra* note 13, at Question 182.10.

Using the New Equity Crowdfunding Rules to Raise Capital

Clients often ask us about "crowdfunding" and whether there is a way to raise capital online via crowdfunding. Below is a summary of the current state of equity crowdfunding, its limitations and other potential options.

What is "crowdfunding"?

The term "crowdfunding" is used in many contexts and has many meanings depending on the source. For example, many companies have raised money through crowdfunding sites like Kickstarter and Indiegogo. This type of crowdfunding has been described as "cash for love" and the contributor typically receives something tangible in return for the donation. In 2015, watchmaker Pebble raised $20.3 million from 78,471 backers for its new smart watch and in 2014 the Coolest Cooler raised a total of $13.2 million from 62,642 backers for its high tech cooler. No equity or securities are issued to backers in this type of crowdfunding and such campaigns are generally not subject to federal and state securities laws.

However, companies that raise money online from investors in exchange for equity, securities or debt are subject to federal and state securities laws. Historically these laws have prohibited the type of activities that constitute equity crowdfunding.

Didn't Congress pass a crowdfunding law permitting equity crowdfunding?

To permit equity crowdfunding, Congress passed the CROWDFUND Act back in April 2012 as part of the Jumpstart our Business Startups (JOBS) Act.[1] The Act was designed to enable start-up companies to raise capital in small amounts from numerous investors through an online platform.

The Act wasn't effective immediately and directed the Securities and Exchange Commission (SEC) to adopt regulations implementing the Act within 270 days. Finally, in October 2015 – more than three years after Congress passed the Act – the SEC adopted Regulation CF implementing the crowdfunding rules.[2] The regulations will become effective on May 16, 2016.

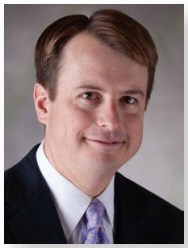
What are the advantages of equity crowdfunding?

The biggest advantage of equity crowdfunding is that it allows companies to raise capital from investors who are not "accredited" as defined by Rule 506 of Regulation D.[3] Traditionally, except through a public offering, companies have been limited to raising capital from investors who had sufficient net worth or income to meet the accredited investor definition. This significantly lowers the number of potential investors. Under the new equity crowdfunding rules, any individual may invest subject to certain limitations on the total amount invested by such investor in all crowdfunding investments.[4]

Another advantage is the ability to publish and distribute notices containing basic information regarding the issuer and the offering across multiple online platforms. Although the company cannot engage in traditional advertising strategies to reach investors, the new rules provide a method to reach a large number of potential investors online.

What are the disadvantages of equity crowdfunding?

Unfortunately, there are many disadvantages. First "blank check" companies formed for unspecified purposes or to purchase another company cannot utilize the new crowdfunding exemption. In particular, this will prevent many real estate funds from using crowdfunding. Second, the total amount sold to investors in any 12 month period cannot exceed $1 million. This small maximum offering amount will be insufficient for many offerings other



Wythe Michael

Wythe Michael focuses his practice on the legal issues facing growing businesses. Often acting as an outside general counsel, he provides practical solutions to legal issues by working with company management to understand and implement their business strategy. He regularly assists companies in connection with the structuring and documentation of private securities offerings.

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than true start-ups. Third, issuers must provide Generally Accepted Accounting Principles (GAAP) financial statements for the two most recently completed fiscal years (or shorter period since inception).

For issuers that intend to raise more than $100,000 by crowdfunding, the financial statements must be reviewed by a Certified Public Accountant (CPA). In some cases, issuers must provide audited financial statements. This is an added cost and administrative burden that doesn't exist in other exempt offerings. Fourth, issuers must file annual reports at the SEC for a period of time following the offering. Finally, we believe that many companies will be hesitant to admit a large number of unsophisticated investors as owners. Based on these disadvantages, we believe that Regulation CF will be unattractive to many companies seeking capital.

What other options are available?

We continue to believe that most companies seeking equity capital in excess of $500,000 will be best served by utilizing the exemption provided by Rule 506 of Regulation D. Under this rule, companies can raise an unlimited amount of funds from an unlimited number of accredited investors.

In 2013, Rule 506 was amended to provide two different options for issuers. Under Rule 506(b), which has been used for decades, companies are prohibited from using advertising or general solicitation to seek investors. This means that an unrestricted website open to the public cannot be used to solicit investors. Recently, however, the SEC recognized an exception to this rule for online platforms that prequalify potential investors and limit offers and sales to investors who meet the accredited investor requirements and other suitability requirements.[5] This exception provides opportunities to companies who desire to seek investors online, but who don't wish to comply with the verification requirements described below.

Under new Rule 506(c), companies may utilize advertising and general solicitation – including unrestricted, open offerings online – if the company is willing to restrict all of its sales to accredited investors and is willing to comply with more burdensome requirements regarding the verification of each investor's status as an accredited investor.[6] This exemption allows companies to reach a large number of potential investors without the burdens of the Regulation CF crowdfunding rules described above.

What are some examples of online platforms utilized by companies seeking capital?

Responding to these changes, a number of online platforms have sprung up to assist companies in raising capital online (again, as long as all investors are accredited). General equity crowdfunding platforms include Wealthforge, CircleUp, Crowdfunder, AngelList and Portfolia. In addition, a number of equity crowdfunding platforms focused on the real estate industry have emerged. Examples include Fundrise, RealtyShares, RealtyMogul, Prodigy Network and RealCrowd. Each of these platforms is different but each appears to require that investors be accredited and each appears to use a "cooling off period" after registration before investors are permitted to make investments. Most of the platforms expressly state that the platform is not designed to comply with Regulation CF (also called Title III of the JOBS Act). Some of these sites act as a platform that matches issuers and potential investors. Others focus only on debt-like instruments such as senior secured loans, mezzanine loans and preferred equity. Finally, a number of the platforms pool funds from investors into a new LLC formed by the platform that in turn invests into a separate LLC or partnership that owns the property.

We expect to see the continued development and growth of online platforms that match investors with companies seeking equity capital. However, we believe that platforms structured to comply with Rule 506 (instead of Regulation CF) will be more useful to established companies. P

1 See www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf. As is customary, Congress came up with a tortured acronym for the Crowdfunding portion of the JOBS Act: "Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012."

2 See www.sec.gov/rules/final/2015/33-9974.pdf

3 The definition of "accredited investor" can be found at 17 CFR §230.501.

4 For example, if both of an investor's annual income and net worth are equal to or more than $100,000, the investor's total investment in all crowdfunding offerings over a 12 month period may not exceed 10 percent of the lesser of their annual income or net worth. For other investors, total investment may not exceed the greater of $2,000 or 5 percent of the lesser of their annual income or net worth.

5 See CitizenVC No Action Letter, August 2015, www.sec.gov/divisions/corpfin/cf-noaction/2015/citizen-vc-inc-080615-502.htm

6 Of course, companies must be careful when advertising or publishing content online regarding offerings under Rule 506(c) to ensure that the content contains no misstatements, omissions or other information that could lead to a claim under the anti-fraud provisions of federal and state securities laws. Companies that utilize a broker-dealer must also comply with applicable FINRA advertising guidelines.

Recent Decisions Affecting Unconstitutional Land Use Conditions: The Inexact Exactions Doctrine

Local governments routinely impose conditions on land use permit applications to make development pay for itself. Valid permitting conditions are valuable tools for local governments to shift the financial burden of infrastructure improvements to developers. This article reviews the leading federal cases affecting what is known as the "unconstitutional conditions" or "exactions" doctrine.

What Is an Unconstitutional Land Use Condition?

The "unconstitutional conditions" doctrine prohibits the surrender of a constitutionally protected property right without payment of just compensation. Under Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994), local governments can condition a permit on the dedication of some property interest provided that there is (1) a logical relationship between the condition and the development and (2) a degree of connection between the permit condition and the impact of the development. Thus, under Nollan/Dolan, there must be an "essential nexus" and "rough proportionality" between the condition and the surrender of the property interest. The Court in Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013) applies these tests to monetary exactions in lieu of dedications.

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Nollan and Essential Nexus

In Nollan, approval of a building permit for a beachfront bungalow was conditioned upon the landowners' dedication of a lateral public pedestrian beach access easement across the rear of their property so as to prevent over-building and visual interference of the beach from a nearby street.[1] The Court held that the condition lacked an "essential nexus" to the project's impact[2] because simply imposing a height restriction on the bungalow would have achieved the same result as dedicating an easement. Without this logical connection to the state's goal, there was no "essential nexus" between the state's interest in guaranteeing the public's ability to view the beach and the lateral access easement across the rear of the Nollans' property.[3] Nollan found no essential nexus between the permit condition and the state's interests in protecting visual access to the shoreline, but it never answered the question of how close a connection was required between a permit condition and a proposed development's impacts.[4]

Dolan and Rough Proportionality

Dolan answered this question. In Dolan, a landowner applied for a building permit to expand her store and pave her parking lot. The City imposed development conditions requiring the landowner to dedicate some of her land for a public greenway for flood-control purposes and for a bicycle and pedestrian pathway to alleviate traffic congestion.[5] There was no issue about the logical connection between the permit conditions and the development. However, even when an essential nexus exists, a "degree of connection between the exactions and the projected impact of the proposed development" must exist.[6] The Fifth Amendment requires "some … individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[7] In Dolan, the City never established why public access to the land was needed to further the goal of preserving the floodplain when the owner's plans never contemplated development in the floodplain anyway. Moreover, tentative findings about anticipated increased storm water flow and additional vehicular traffic were simply insufficient to justify the conditions.[8] Therefore, the City had not demonstrated that the conditions were

roughly proportional to the impacts of the proposed development.[9]

Koontz and In Lieu of Payments

Koontz applied the "essential nexus/rough proportionality" test to coercive demands for monetary exactions. Koontz, the landowner, wanted to develop commercially zoned property and needed a permit from the controlling water management district to fill some on-site protected wetlands. Koontz offered to convey to the District a sizable conservation easement over the property. The District rejected the proposal, instead demanding payment to improve offsite District-owned wetlands. The Florida Court denied Koontz's takings claim because it concluded that Nollan/Dolan only applied when the government approved a permit, not when it denied a permit.[10] Since no permit was issued, the proposed exaction never ripened, and no property was ever taken.

On appeal, the Supreme Court held that no matter whether the benefit was granted or denied, imposing an unconstitutional condition forced the owner into forfeiting a constitutional right in violation of the exactions doctrine.[11] Florida also struggled with how the government's coercive monetary demand violated the takings clause when admittedly "no property of any kind was ever taken."[12] The Court reasoned that the monetary demand operated on an identifiable property interest in a specific parcel of property, directing the owner to make a payment to secure development approvals.[13]

Unanswered Questions

Cases like California Building Industry Assoc. v. City of San Jose, 61 Cal. 4th 435, 351 P.3d 974 (Ca. 2015), currently pending Supreme Court review, have limited the exactions doctrine to conditions negotiated in administrative proceedings – not conditions imposed by ordinance or legislation.[14] In California, high housing demand caused a shortage of housing available to low- and moderate-income residents. To address this problem, California municipalities adopted "inclusionary zoning" or housing statutes requiring developers to set aside a certain percentage of housing units for low- and moderate-income residents. San Jose's inclusionary zoning ordinance required developers to set aside 15 percent of their newly-built homes for low- and moderate-income housing. Instead of setting aside residential units, developers could pay an in-lieu monetary fee. San Jose held that Nollan/Dolan only applied to administratively imposed conditions, not conditions imposed by ordinances or legislation. To an owner, this is a distinction without a difference.

Whether the Supreme Court will also recognize this distinction is uncertain. The Fifth Amendment's Takings Clause prohibits a deprivation of "life, liberty, or property, without due process of law" and is concerned with the impact of governmental action on property rights, not with whether it is administratively or legislatively caused. Takings jurisprudence has focused on the functional effect of land use restrictions rather than how the land use restrictions were adopted. The Court has looked to "the magnitude…of the burden a particular regulation imposes upon private property rights."[15] In San Jose, the landowner bore the burden of infrastructure improvements costs which were not caused by the development. Takings claims have long been remedies for private property owners who are forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[16]

Conclusion

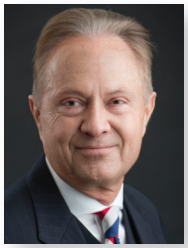
Property owners have enjoyed a remarkable string of victories in takings cases in recent years, but the Supreme Court may well strike down San Jose. This area of the law is still unsettled. Understanding federal and state regulatory takings case law is critical for local governmental entities, private real estate developers, and their counsel, to make sense of this constantly changing area of the law. P

1 Nollan, 483 U.S. at 835.
2 Id. at 837.
3 Id. at 838-39.
4 Id. at 836, n.4.
5 Dolan, 512 U.S. at 377.
6 Id. at 386.
7 Id. at 391.
8 Id.
9 Id. at 395.
10 St. Johns River Water Management District v. Koontz, 77 So. 3d 1220, 1228 (Fla. 2013) citing to City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999).
11 Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013).
12 Koontz, 77 So. 3d at 1225 (quoting St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 20 (Fla. 5th DCA 2009) decision quashed, 77 So. 3d 1220 (Fla. 2011) rev'd, 133 S. Ct. 2586 (2013)(Griffin, J., dissenting)); see also Koontz, 77 So. 3d at 1229-1230.
13 Id. at 2599-2600.
14 Petition for Writ of Certiorari, California Bldg. Indus. Ass'n v. City of San Jose, California, et al., No. 15-330 (U.S. Sep. 14, 2015).
15 Lingle, 544 U.S. at 542 (emphasis omitted).
16 Armstrong v. United States, 364 U.S. 40, 49 (1960).

Say What You Mean to Say: Venue, Jurisdiction and Forum Selection Provisions

Ironically, an *agreement* should focus on what happens in instances of disagreement. One of the first questions presented is where and how the parties can deal with a dispute and whose laws apply. Thus, written contracts should contain clauses pertaining to venue, jurisdiction and choice of law.

Boilerplate provisions on these subjects are recycled and passed on for generations. When drafting, it can be easy to forget that every word really counts. Ditching the copy-and-paste mentality is essential. This article will outline some of the traps presented, set forth how courts have interpreted various clauses and discuss practical considerations for drafting.



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Avoiding the Pits

As a general rule, proper forum selection clauses are presumed valid. *See, e.g., Atlantic Marine Construction Co., Inc. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013). Carefully pruning and nourishing such provisions each time they are planted into a new contract can help head off issues. Three prominent issues to be aware of are the sovereignty vs. geography distinction, mandatory vs. permissive language and potential inroads regarding choice of law protection.

1. Sovereignty vs. Geography

Many contracts provide general statements of jurisdiction. For example, a contract could state that the parties may bring an action "in the courts of Utah." However, this may not have the intended result. Many judicial interpretations are finding that a single two-letter word ("in" or "of") may wholly change the meaning of jurisdictional provisions. In *Doe 1 v. AOL, LLC,* 552 F.3d 1077 (9th Cir. 2009), the parties disputed the meaning of a forum selection clause stating exclusive jurisdiction resides with "the courts of Virginia." One party claimed the phrase included state and federal courts in Virginia, while the other argued it conferred exclusive jurisdiction only to state courts. *Id.* at 1081. The court looked to the plain meaning of the provision, and the definition of the word "of" as "indicating origin, source, descent, and the like." *Id.* at 1082 (citation omitted). Thus, the court concluded the word "of" designated only state courts as proper. *Id.* This creates a sovereignty versus geography distinction, where the word "of" is construed to refer to the sovereignty, while the word "in" refers to the geographical location of the courts. Accordingly, the court interpreted the word "of" to include only state courts of Virginia.

Doe 1 also discussed several other cases in line with this distinction. For instance, the court in *Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 926 (10th Cir. 2005), concluded that "Courts of the State of Colorado" referred to sovereignty and not geography, allowing only state courts. *Dixon v. TSE Int'l Inc.*, 330 F.3d 396, 398 (5th Cir. 2003), concluded likewise and held that "[f]ederal district courts may be in Texas, but they are not of Texas" and thus "Courts of Texas, U.S.A." meant the state courts. Finally, "the law, and in the courts, of the Commonwealth of Massachusetts" was interpreted to restrict "law" and "courts" to the state in *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir. 1984) (emphasis added). Conversely, courts have found "in" to mean both state and federal courts. *See, e.g., Basicomputer Corp. v. Scott*, 973 F.2d 507, 510 (6th Cir .1992) (holding a provision discussing courts "in the State of Ohio" did not exclude the federal

district court that unquestionably sat in Ohio).

If the parties intend for a forum selection clause to mean an action may be brought in any state or federal court within the specified state, they may be surprised to find that they have unknowingly limited themselves to state court by using the word "of." Conversely, if the parties intend to allow only state court actions, but use the words "courts in Utah," they may open themselves up to federal courts as well. In order to ensure there is some certainty, parties must use the correct language to specify the court or courts they want to have jurisdiction.

2. Mandatory vs. Permissive

It is also important to specify whether a jurisdictional provision is mandatory, rather than permissive. A mandatory forum selection clause "contains clear language showing that jurisdiction is appropriate only in the designated forum." *Am. Soda, LLP*, 428 F.3d at 926 (citation omitted). "In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere." *Id.* at 926-27.

Hence, it is not enough to just set forth the desired forum. In order to create any sort of certainty, specification of forum must also be accompanied by "mandatory or obligatory language." *Id.* at 927. Words like "shall" should be used. If there is no express language setting forth a forum selection clause as mandatory, then it may be sufficient to pair the forum selection with additional language indicating the parties' intent to make the venue exclusive. *Id.* This can be done using words such as "exclusive forum." *Id.* Such language can help ensure a provision meets the foundational requirement that "a waiver of one's statutory right to remove a case from state to a federal court must be clear and unequivocal." *Id.* (internal quotation marks and citation omitted).

Overall, such provisions do not need to be long or complex to be effective. The following provides an example incorporating the information touched upon in this article: "The Third District Court in and for Salt Lake County, State of Utah, shall have exclusive jurisdiction over the subject matter of this Agreement, any dispute or controversy arising out of this Agreement, and the parties hereto."

3. Choice of Law

Choice of law provisions specifying whose law is to apply are generally enforceable. *See, e.g., Robinson v. Ladd Furniture, Inc.*, 995 F.2d 1064 (4th Cir. 1993) ("North Carolina courts generally enforce choice of law provisions"); *Resolution Trust Corp. v. Northpark Joint Venture*, 958 F.2d 1313, 1318 (5th Cir. 1992) ("Under the Texas rules [where] parties have agreed to an enforceable choice of law clause, the law of the chosen state must be applied."). However, as with jurisdiction and venue, provisions governing whose law applies are also subject to minimum contacts requirements. A party must have minimum contacts with the forum state. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (discussing the "constitutional touchstone" of minimum contacts).

Also, courts at times disregard choice of law language due to conflict of laws and public policy doctrines. *See, e.g., Wissot v. Great-W. Life & Annuity Ins. Co.*, 619 F. App'x 603, 604 (9th Cir. 2015) ("we enforce the contract's choice-of-law provision unless the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties[']choice, or the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.") (internal quotation marks and citation omitted). A phrase such as "the law of the State of Utah shall apply without regard to conflict of laws principles" can help bolster an argument that the parties should be bound by the language as agreed upon in the contract.

Conclusion

Understanding the difference between the terms "in" versus "of," choosing mandatory words rather than permissive, and adding additional choice of law protection can go a long way in decreasing the unknowns of tomorrow when entering into a contract today.

A Primer on Electronic Discovery

As the owner of a business that may be a party to a lawsuit, you need to know about the discovery of electronically stored information (ESI), also known as e-discovery. Why? Because the requirements to preserve and produce ESI are quickly evolving and have often taken over lawsuits as if e-discovery has a life of its own. This article will address the basics of e-discovery so that your business can start taking steps to minimize its impact.

What Is E-discovery?

There is a phase in most lawsuits and arbitration proceedings when parties are required to exchange information. Before computers and other electronic devices were regularly used in business, the exchange of information required a company to look through its paper files for relevant documents, including letters, internal memoranda, and the like, which would then be copied and provided to the other party or made available for copying.

As businesses started using computers to create and store company information and email to communicate, a new treasure trove of relevant documents emerged, namely, the documents that were stored on the company's computer. Before the widespread use of text messages, communications were limited to emails, and email communication was also limited as many companies preferred faxes and snail mail instead. Thus, in its infancy, it was easy to produce ESI because the volume of ESI was minimal. As hard drives increased in storage capacity and more companies relied on a shared computer network rather than stand-alone computers, companies realized the benefit of storing information electronically as it would allow them to reduce the amount of paper.

Unfortunately, the pervasive use of electronic devices has created an explosion of ESI. ESI has now grown from merely reviewing and producing emails to scouring all of a company's electronic devices for evidence, in the form of documents, emails, text messages and instant messages. These are not merely stored on a company's individual computers or server, but also on other electronic storage devices, including external hard drives, tablets, laptops and cell phones. The bigger the company, the more bytes of information that need to be scoured. E-discovery thus now encompasses the discovery of information stored on all of these electronic devices.

Law Relating to Discovery of ESI

Both the California Code of Civil Procedure and Federal Rules of Civil Procedure (AFRCP) permit e-discovery in pending litigation. The rules for e-discovery in California can be found at Code of Civil Procedure 2019.040 [applying the discovery rules to ESI], 2031.010(e) [party may demand production of ESI], 2031.210 [objecting to discovery of ESI], 2031.280 and 2031.285 [production of ESI]. In federal actions, the rules can be found at FRCP Rules 34 [permitting production of ESI] and 37 [failure to cooperate with discovery]. In fact, virtually all states have similar laws that permit the discovery of ESI.

What to Do When ESI May Have to be Produced

Most often, a company is confronted with issues surrounding the discovery of ESI when first notified that a lawsuit may be filed. At that time, company representatives and counsel should get together to determine if there is ESI that relates to the claim. If there is any possibility that there is, the company should institute a "litigation hold." This is the process by which the company identifies any sources of ESI that may be discoverable (i.e., may be relevant or lead to the discovery of admissible evidence), and then take affirmative steps to preserve the ESI. This may be difficult.

Once a litigation hold is in place, it is important to take steps to make sure that the litigation hold remains in place. Why? Because if ESI is destroyed once you know a claim may be made for which ESI may have to be produced, the court may make

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an inference that the ESI was destroyed because it was harmful to your case. If that happens, it can be extremely damaging to your case.

During the lawsuit, any party can request discovery once the proper time has passed, which is generally 20 days after service of the lawsuit in state court and once the parties have completed their initial conference with the parties in federal court. One such discovery request is a request for the production and copying of documents. As noted above, both state and federal civil procedure allows a party to ask that the adverse party produce ESI. The request must set forth the category of documents sought and whether an inspection of a computer or other electronic storage devices is sought.

Once such a demand is made, the real work starts. Hopefully, prior to the request, your company instituted a litigation hold. If so, then steps must be taken to determine the scope of what must be produced and how it will be recovered. For a small company, this may be easy as the amount of ESI is limited. For a larger company, this exercise may be one of the most costly parts of the lawsuit. That is because a protocol is often needed. Where there is a large volume of materials, this may require counsel (with the help of their e-discovery experts and the client) to determine how to best search for responsive documents. This may require the parties to agree to search terms or, if an agreement cannot be reached, court intervention.

Once you have identified the ESI to be produced, the next step is getting it off electronic devices. Once that is done, it is necessary to have it reviewed to make sure that information that is privileged or otherwise protected from disclosure is not turned over. That generally requires review by your lawyers. Based on the volume of data to be reviewed, this can be yet another expensive proposition.

Shifting the Cost of Production of ESI

In many instances, the cost of producing ESI can be extremely high and it is unknown whether the cost of production outweighs the benefits. Because of this, the California Code of Civil Procedure provides ways to minimize or shift the cost of production. These include:

- Meeting and conferring with the opposing counsel to limit the scope of the discovery request;
- Obtaining an order from the court to limit the scope of the discovery sought, known as a protective order; or,
- Asking that the court shift the burden of producing the ESI to the opposing party.

In larger cases, the need to shift the cost of production may be important. Thus, working in advance with your counsel, your ESI expert and internal IT professionals to determine the cost of production and alternatives to reduce expenses is important.

Protections for Inadvertent Production

Despite best efforts, there are times when confidential, privileged or otherwise protected documents are produced. Both state and federal laws anticipate that by permitting the "clawback" of inadvertently produced documents.

As the name implies, a clawback is a request to return an inadvertently produced document. When this happens, the producing party must advise the opposing party of the inadvertent production and demand that the improperly produced document be returned. If the receiving party disputes that the document should be returned, the producing party can ask the court for an order for the return of the document(s). If the court finds a party unjustifiably refuses to return the documents or makes an unjustified request for the return of documents, the court may award fees to the prevailing party.

Failure to Produce ESI

Some companies are reluctant to produce ESI for various reasons: they believe it may prevent adverse information from being provided, the documents were lost due to the destruction or failure of the device storing it, the documents were purposely deleted to avoid production, or through sheer carelessness either from improperly searching for the documents (i.e., use of the wrong search terms) or downloading them. Whatever the reason, both state and federal courts provide that sanctions may be imposed against the party that fails to comply with production. The sanctions vary depending on the severity of the omission and include:

- An award of fees and costs incurred by the requesting party in obtaining a further order;
- An order precluding the producing party from producing any further documents;
- A monetary sanction payable to the court and opposing party as a penalty for non-production;
- An instruction to the jury that the jury could consider the failure to produce the ESI was because the ESI was damaging; and,
- An order striking the non-producing party's pleadings and entering judgment against them.

Conclusion

The above makes clear that e-discovery is fraught with danger. Any wrong move could damage your case. That is why a cottage industry has been created that assists companies with all aspects of ESI.

Being proactive can protect your company in many ways. Working with your counsel, your IT department and ESI experts can help your company develop a plan to organize your computers to make it easier to preserve, retrieve and produce ESI if the need arises. What is certain is that if you are threatened with a lawsuit, your company needs to be prepared to address ESI and e-discovery. We thus urge you to speak with your IT department and counsel to make sure you are ready. Taking steps now may save you in the future.

Thirteen Ways of Looking at Indemnification

Contract language is functional, not poetic, but a company's contract language still expresses or reveals how that company carries itself as a business. A lawyer reviewing a customer's contract for a client gets a feeling for the way the customer approaches its business activity; a lawyer drafting a contract on behalf of a client is documenting the client's specific posture toward its business relationships.

In this article, I will focus on the indemnification provision in commercial contracts. Indemnification can create significant shifts in liability between the parties. Just as you can tell a dog's health by touching its nose, you can also get a feel for a company's business culture by reading its indemnification language. Not to put too fine a point on it, the business imbalances in many indemnification provisions are unreasonable, inexplicable and unexamined. The points below are meant to facilitate a reevaluation of our indemnification boilerplate.

This article assumes the "Buyer" is the indemnitee, and the "Vendor," the indemnitor.

1. Basically, the indemnification provision creates a contractual obligation in one party (the indemnitor) to pay the other (the indemnitee) for damages resulting from certain occurrences, regardless of other theories of liability. Indemnification is an independent, contractual form of liability for the indemnitor.

2. Traditional contract damages should be the starting point for evaluating an indemnification provision – what kind of damages would arise from the indemnitor's simple breach of the contract? What are the foreseeable consequences arising from such breach?

3. The indemnification provision can bypass traditional defenses offered by contract doctrine and create liability for remote or consequential damages that would not have existed otherwise. In order to collect under a breach of contract theory, the Buyer has to prove the elements of contract damages – existence of a contract, breach, and harm. The Vendor would have contract defenses – remoteness, unforeseeability, unconscionability, and the like. The indemnification provision gives the Buyer an alternative avenue of recovery for the same damages (and potentially much more), under an analysis contained in the indemnification provision itself, without the defenses that the Vendor might otherwise have in a breach of contract claim.

4. Indemnification for breach creates a double liability for the same harm and, all things being equal, should be removed. The Buyer has sufficient recourse for simple breach in a direct action for breach – why compound Vendor's liability by adding an obligation to indemnify as well?

5. There are two "gaps" to look for around indemnification provisions: (a) the gap between regular contract damages and the indemnification obligation; and (b) the gap between the indemnification obligation and Vendor's insurance coverage.

6. If (a) the parties agree to a limitation of liability that waives consequential damages, but (b) the limitation contains a carve-out excepting indemnification obligations from the consequential damages waiver, and (c) the indemnification provision requires the Vendor to indemnify for breach of contract, then the indemnitor will end up with liability for consequential damages under

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the indemnification provision rather than breach of contract.

7. If the Vendor has sufficient negotiating power, it may be able to eliminate the indemnification obligation altogether. If not, the parties should negotiate indemnification terms appropriate to the scope of the contract. Two initial guidelines for proportionality: (a) avoid double liability, and (b) avoid liability for harm not caused by the Vendor.

8. Let's say a Vendor's acts contribute to the destruction of the Buyer's product and cause the Buyer to incur claims brought by Buyer's customers. If the Vendor's acts were properly performed in accordance with Buyer's instructions, then the Vendor should have no liability. Why should the Vendor incur liability without fault? If the Vendor's acts were in breach of the contract, the Vendor should be liable to the extent the Buyer's damages arose foreseeably from Vendor's breach. This is direct or indirect contract liability, and indemnification is not necessary. If the Vendor's actions were negligent, though, the Buyer should require the Vendor to pay for defense and damages to the extent the Vendor's fault caused Buyer's liability to the third parties, because the Vendor has no other liability to the third parties. Agreeing to cover damages to the extent caused by the Vendor's fault is "comparative" indemnification. Considering these scenarios, it seems reasonable for a Vendor to agree to indemnify a Buyer against third party claims caused by the Vendor's negligence. This covers things like the contractual claims by the Buyer's customers or other vendors, or third party personal injury claims – claims the Vendor would not otherwise be liable for. This is a good faith indemnification in which the Vendor agrees to assume liability for harm it has caused, and for which it would not otherwise be liable. In addition, Buyers will also want Vendors to indemnify for strict liability claims that are entirely in the Vendor's control – e.g., a software developer Vendor should indemnify the Buyer against third-party claims that the Buyer is infringing its copyright by using the Vendor's code.

9. How did broad form indemnification become so prevalent? In addition to comparative indemnification, there are two other general categories of indemnification: "broad form" (where the indemnitor is liable for all damages even if the indemnitee Buyer, or any one else, is at fault), which is most burdensome to the Vendor, and "intermediate form" (where the indemnitor is liable for all damages unless the indemnitee is solely at fault), which is also a disproportionate starting point. Broad form provisions, which are part of the business culture of the construction business, are so onerous that many jurisdictions won't enforce them (which is why intermediate form provisions were invented). How did they get to be boilerplate in contracts used in other industries?

10. The obligation to indemnify and the obligation to defend are often treated in a single provision, but they are separate obligations.

11. It's difficult to assess exactly the gap between indemnification and insurance, because in the end insurance coverage depends on the facts of the claim. It is important to consider the context of insurance, though. From the Buyer's perspective, what claims do you need a Vendor to cover that are not already covered by contract, warranty, or other legal recourse? From a Vendor's perspective, what kind of indemnification claims does your insurance cover? Viewed the other way, in negotiations it's good to know what the Vendor can "give" in the indemnification, knowing that those claims are meant to be covered. Note that Vendor's "contractual liability" coverage is not meant to cover all liability that Vendor assumes under contract.

12. Vendor employees are generally barred by state workers compensation law from suing the employer Vendor, so when they are injured while working on the Buyer's site, they will sometimes sue the Buyer for their injuries. To protect against this, Buyers should be indemnified for injuries suffered by the Vendor's employees.

13. If the negotiations of the indemnification provision are being conducted by the purchasing department, discussion will be slow. If the Buyer's purchasing department refuses to consult with (or fears) the Buyer's legal department, discussion will be hopeless.

Indemnification is a powerful risk management device, and as counsel for buyers and sellers we should take time to tailor our clients' indemnification provisions in light of their current business concerns, rather than relying on "standard" indemnification language. The indemnity provision probably lingers in the backwater of boilerplate because it can be difficult to address for a number of practical reasons – trying to explain it can test a client's patience; conversations with insurance brokers can test a lawyer's patience; and opposing parties can also have problems working with it. But if we use contract damages as the starting point and avoid creating unnecessarily oppressive obligations for vendors, we will be setting the framework for more efficient negotiations and helping to make our clients' commercial relationships stronger, more confident and more sustainable. P

California's Hangover: How Your Company Can Responsibly Serve Alcohol at Social Events

Spring is approaching, the weather is getting nicer, and it is a great time for company outings and morale-building events. However, California courts have been expanding the employer's potential liability when employers enter the social realm, especially for incidents stemming from alcohol consumption. Other states may or may not follow California's trend, however, the factors identified in this article are certainly smart preventive measures that may keep your company from establishing your state's precedence.

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The Holiday Party

In 2012, the Del Mar Marriott hosted a holiday party for its employees. Marriott provided each employee two drink tickets and taxi service home. A Marriott manager, on his own cognition, smuggled in additional alcohol. A Marriott employee got intoxicated, utilized the Marriott's free taxi service to get home, but then drove to another destination. In route, he was involved in an accident that killed another driver.

Marriott seemingly did everything right. It tried to manage its employees' alcohol consumption by using drink tickets. It stressed not to drink and drive. It even provided free taxi service home. How could Marriott be responsible for the actions someone took after he got home? How could Marriott be responsible for a rogue manager's actions?

Ultimately, the court found Marriot's preventative measures an issue of fact; the court held a jury should determine if the precautions taken adequately protected the individuals. It further opined, when an employer provides alcohol, to benefit its enterprise (team building, camaraderie, morale, etc.), then it should bear the burden of injuries proximately caused by its employee's excessive alcohol consumption. The court also found an employer should reasonably assume employees will find a way to drink to intoxication: employees can easily obtain more than their share of drink tickets, purchase more drinks after tickets are used, "smuggle in" alcohol, etc. Employers cannot claim ignorance.

Time for Business to Drink Lots of Water and Take Some Tylenol to Recover from this Hangover

Unfortunately for business owners, courts have not provided guaranteed steps needed to avoid liability, except perhaps prohibition. This article analyzes the cases filed through the past two years. It evaluates arguments made by the plaintiff's bar, analyzes moving papers, and examines how courts have viewed various company's precautions. Admittedly, two years will not provide meaningful case law and nothing in this article is a silver bullet. But, employers cannot wait for the perfect opinion or legislature to act. Below are some factors which have been argued could minimize liability.

Factors to Consider in Event Planning

Prohibition: The safest route is also the most draconian. Forbidding alcohol also guarantees the lowest attendance at an employee event. No one, besides your attorney, is seriously suggesting prohibiting alcohol at a company event.

Training: In almost every case over the past two years, a manager or supervisor endorsed excessive drinking that resulted in the injury. Before your event, conduct training with all your managers and supervisors regarding the company's policies and the company's expectations. Managers and supervisors need not be babysitters, but they need to understand they set the example. Document this training.

Also conduct training and reminders to the employees before and at the event. Messages like "Drink responsibly," "Don't drink and drive (with free taxi info on it)," "Report inappropriate conduct to a manager," etc.

Food: Will there be food and what kind of food? Some have argued that hors d'oeuvres, finger food and lighter meals make the cocktail the center of the event. Plaintiff's bar also argues that smaller portion sizes leads to increased intoxication.

Time of Day: When is your event, both time and day of the week? It is hard to argue your company endorsed drinking to the point of intoxication when the event is a Wednesday lunch. A Friday dinner opens more liability. And if your company event is during "happy hour" (at a bar) or an "after-party" it will be hard for you to argue alcohol was *not* the primary tool in building camaraderie.

Location: Holding your event at a bar/nightclub implicitly endorses a night of heavy drinking. Consider a restaurant, without a night scene, and eat a proper dinner at a table.

Message: How are you advertising the event, both in writing and at the water-cooler? What is the implied meaning of "come out and have some fun?" This means one thing for a baseball game and another at a sports bar at 8 p.m.

Service: Drink tickets are a good idea. But, when planning the number of drink tickets per person, don't base the number on your budget – instead focus on responsible drinking. For example, if the average person processes one drink an hour, giving your employees one drink ticket per hour might demonstrate to a jury your company believes in responsible drinking. Then when your managers are deposed, they can articulate this rationale.

Length: Don't advertise your event ends at "closing." Set a time range when the "official" event is over, then keep to it. Have managers and supervisors signal the end (again, not babysitting, but an overt signal that the sanctioned company event is over). One court has found if employees and supervisors continue to drink *after* the company party, subsequent actions are less likely to be linked back to the company event.

The difference between this and the Marriott case: in Marriott, the employee became intoxicated solely at Marriott's party; here, the employees and supervisors visited multiple bars *after* the company event, i.e. intoxication was not exclusively at the company event.

Transportation: If you are providing alcohol these days, you have to offer transportation home, *period*. This is less expensive than a wrongful death suit (and easier on the conscience).

As you can see, planning for a social event is more than just location and cost. Plan out contingencies, assume individuals will become intoxicated, and take *reasonable* preventative measures to protect your employees and the public. This article is not saying you have to apply all these factors, but you must think about them when planning. If employees get intoxicated at your event, how will a jury look at your company's message? With intentional planning and proper supervision, you can build team morale, strengthen your company's work force, and protect your company's interest along with everyone's safety. P

"STOP! In the Name of the Law!": Using Injunctions to Protect Your Business


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If the thought of a supplier suddenly going rogue and derailing your business keeps you up at night, you are not alone. In the world of commercial litigation, the balancing act in supply chains, exclusive dealing contracts and just-in-time delivery plans makes for a perfect storm when a supplier wants to exact (or coerce) a better deal "or else." The "or else," of course, is a breach of contract, which your business would have to litigate in court. And the thought of court probably keeps you up at night, too.

Is there a procedure to shelter from that storm? Yes. Enter the injunction.

What Are Injunctions and Why Are They Useful Tools?

An injunction is an equitable remedy, which if granted results in a court order that requires and/or prohibits an opposing party from doing specific acts. It is a powerful tool that can be utilized in many contexts: especially, supply chain/Uniform Commercial Code (UCC) cases and commercial litigation.

Injunctions are especially useful in supply chain/UCC matters. Supply chains often involve several different companies working together including suppliers, manufacturers and retailers, to produce and/or distribute a specific product. When disputes arise that threaten the continuity of the supply chain, it can have substantial impact on the companies involved, their employees and the public at large. Accordingly, injunctions can be a powerful tool in preserving the *status quo*.

While interruptions in supply chain management may pose the most obvious risk to a commercial entity, there are several other instances where injunctive relief can be used to protect a company's legitimate business interests. In cases involving unfair competition, tortious interference or breach of restrictive covenants, a company may seek a preliminary injunction at the beginning of its case to prevent the harmful action from continuing throughout the lengthy litigation process. A preliminary injunction can be used to prevent systematic employee raiding by a competitor (*Tata Consultancy Servs v Systems Int'l*, 31 F3d 416 (CA 6, 1994), a breach of a non-compete or non-solicitation agreement by a former employee (*Id*), or the unfair/illegal transfer of trade secrets (*Johns-Manville Corp. v. Guardian Indus. Corp.*, 586 F. Supp. 1034, 1074 (ED Mich. 1983).

Standard for Obtaining a Preliminary Injunction

What evidence will you need to win your case? In most states and in federal courts, there are four factors to be balanced:

1. **Likelihood of Success on the Merits**: In reviewing the first factor, the court must estimate the legal strength of your claim. A plaintiff must demonstrate with the facts available that it is likely to prevail in its claim as a matter of law. This is often the most difficult hurdle in obtaining injunctive relief because many of the facts may not be available to the plaintiff at the outset of the case.

2. **Irreparable Harm**: "Irreparable harm" means damages that cannot be compensated by a simple calculation of monetary damages. Overstreet v. Lexington-Fayette Urban County Government, 305 F.3d 566, 578 (6th Cir. 2002). Allegations of monetary harm are, however, sufficient to support a finding of irreparable harm if the nature of the plaintiff's loss would make damages difficult to calculate. Basicomputer Corp. v. Scott, 973 F.2d 507 (6th Cir. 1992).

3. **Substantial Harm to Others and (4.) Public Interest**: The court must consider any potential harm to the defendant or to the public interest when deciding whether to grant a preliminary injunction. This factor often weighs in favor of a corporate client seeking enforcement of an agreement or the cessation of unfair competition.

Tips for Optimizing Your Request for a Preemptive Injunction

There are several strategies you can employ to maximize your likelihood of success. The first and most important thing you can do is reevaluate all of your contracts now. Each contract should specify what constitutes an irreparable harm. For example, contract language that "the parties agree that any default in their obligations as set forth in this contract will irreparably harm their business reputation and goodwill and cannot be compensated by money damages."

If litigation is likely, also do the following:

A. Immediately Issue a Litigation Hold Letter

If an injunction lawsuit is even remotely likely, issue a litigation hold letter to your team immediately. This way, the evidence your company needs to prove its case is accessible.

Litigation hold letters require employees to suspend all protocols that relate to destruction of data that may be relevant to the potential litigation (for example, automatic email purging.)

Accessibility is crucial for two reasons. First, the sooner and easier you can produce key evidence, the sooner and easier it is to file for an injunction with your court. Second, and perhaps more importantly, opponents often claim they "need discovery" *for the sole purpose of slowing down the injunction process and to gain leverage in negotiations.*

By comparison, great companies identity their key players likely to be in possession of relevant material, inventory it and have it ready to provide to the opponent immediately.

B. Prompt, Specific Petition about Irreparable Harm

Provide specific, prompt examples of the irreparable harm your company will suffer without an injunction.

Courts equate "irreparable harm" with "emergency," and the longer your company waits to apply for an injunction, the less likely you are to convince a judge there is an emergency. Judges, like all people, also respond better to concrete examples – like the Tier III supplier that will go out of business or the contract that will go unfilled, causing job loss – so be sure to provide as much detail as possible. Vague statements of "business loss" are unpersuasive – and, moreover, are what money damages compensate. The goal for an injunction petition is to show why money damages are insufficient.

Provide the court with affidavits from your suppliers, plant managers, accountants, etc., and copies of contracts that will go unfulfilled. For supply chain cases, provide photographs and replicas showing why your company's part is essential to the whole, photographs of shops that will close, etc. The point is to provide the court with a vivid picture and persuasive case that irreparable harm that will result.

C. Use Market Reports and Business Records

Market reports and business records show the extent of damage that will be done without an injunction. In all states, business records are admissible into evidence so long as they are maintained in the regular course of business and contain information that the business typically records (for example, profit and loss statements). Market reports are also generally admissible as public records, provided they are from a reliable source, such as a public or academic reporting body. Both will show your company's reach over the market and the number of interests at stake in the case.

D. Emphasize Goodwill and Business Reputation

As a matter of law, loss of goodwill and damage to business reputation are irreparable harms. So, emphasize them! For an injunction to issue, the court must find the harm is not fully compensable by money damages (such as, for example, ordering your company's opponent to pay you the difference for having to secure your part from another supplier). *See Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992). The likely interference with customer relationships resulting from the breach of a contract is the kind of injury for which monetary damages are difficult to calculate. "The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute. Similarly, the loss of fair competition that results from the breach of a non-competition covenant is likely to irreparably harm an employer." Id. at 512 (internal citations omitted).

Vague statements about "harm to goodwill" are unpersuasive – discuss it with specific examples, by reference to connections in the community. For example, if your company's loss will cause a local plant to shut down, or render your company in breach of another contract or render inept to negotiate, say so. Now is the time when (appropriately placed) self-promotion is necessary. Have an executive available to sign an affidavit and testify.

E. Case Consolidation

In most states, an injunction lawsuit is a two-step process: a temporary, or preliminary, injunction issues while the case is scheduled for trial to determine whether a permanent injunction should issue. In the meantime, your opponent will request discovery (see point A) and leverage you to settle out of fear that the case will not resolve before time is up for your company. This is a particular risk for courts that do not have mandatory decision deadlines. In those courts, your case could proceed to trial and yet not decision issue before your contract expires. To avoid these risks, in your petition ask that the court consolidate the process. Rather than decide first whether a temporary injunction should issue, set an immediate trial on the merits.

Your ability to offer discovery on a short turnaround time, thanks to that litigation hold letter, will go far here.

Strike promptly, and strike thoroughly, and you will likely stop your rogue supplier in the name of the law from dismantling your business once and for all. P

New York Court Upholds Law Firm Financing Agreements

The Canons of Ethics for lawyers in the United States have long prohibited anyone other than a lawyer from holding an ownership interest in a law firm. As a result, a U.S. law firm must consist exclusively of attorneys. This differs from the practice in many other countries, where law firms may be part of an integrated enterprise including other professionals. The U.S. ethical rules also prohibit what is termed "fee-splitting" of attorneys' fees with a non-lawyer. These rules have been interpreted to prohibit dividing legal fees between attorneys and non-attorneys, even including non-attorneys who may assist with operating the law firm or with a specific legal matter.[1]

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Also common in the United States, unlike in many European, Asian and Latin American legal systems, is the mass tort action. In this type of litigation, a group of people with similarly caused injuries join together to pursue their claims in a single litigation or a consolidated group of litigations. Another legal institution more common in the United States than elsewhere is the contingent-fee litigation, in which an attorney represents a plaintiff or group of plaintiffs, with the understanding that the attorney's fee will be a percentage of the plaintiffs' recovery.

Most mass tort cases are also contingency-fee cases. Since these cases are often protracted and difficult, the law firms that specialize in handling them often have cash-flow issues. For example, a group of plaintiffs may wish to file a meritorious case asserting that they have suffered serious injuries, and alleging tens or hundreds of millions of dollars in collective damages. But almost invariably, the individual plaintiffs will be unable to pay any legal fees except as a share of the ultimate recovery. Indeed, the plaintiffs may not even be able to cover the day-to-day operating expenses of running the litigation, such as discovery expenses and experts' fees. If the law firm ultimately succeeds in proving or settling the case, it will eventually collect enough money to pay all its expenses and, if it selects its cases well, earn a lucrative legal fee. But the time between when an injured plaintiff walks in the door and when his or her case is resolved will usually be measured in years. A law firm may be able to cover the costs of one or two such cases – but if it specializes in these cases, it will usually need some form of financing arrangement with a lender to cover its cash flow needs between judgments or settlements and paydays.

By now, many lawyers are familiar with third-party litigation funding entities. These are entities that are willing to invest in a pending or proposed litigation, in return for a share of the recovery if the case is successful (and with no expectation of recovery if the case is unsuccessful). However, as litigation becomes more complex and expensive and law firms' overall cash flow needs increase, new forms of litigation funding are developing to finance the law firms themselves, particularly mass-tort or class-action firms handling virtually only contingency-fee matters. In one type of funding arrangement, similar to factor lending, the lender agrees to make a line of credit available to the law firm. The firm may draw upon the line of credit to fund its operating expenses. The lender is entitled to be repaid its principal, plus interest, plus in some cases a portion of the law firm's revenue.

This new form of law-firm-funding plays a valuable role in making it possible for law firms specializing in mass-tort and class action cases to pursue these cases on behalf of plaintiffs who will often have sound legal claims, but where neither the plaintiffs themselves nor their lawyers have the funds to pursue them. However, the legality of such funding arrangements is being challenged on the ground that they represent a sharing of fees between the lawyers and the non-lawyer funding entity.

Fortunately for the public and for this new form of law firm financing, a New York State court decision in August 2015 has upheld the validity of such funding agreements. In *Hamilton Capital VII, LLC v. Khorrami, LLP*,[2] the plaintiff funding entity agreed to provide a line of credit to the defendant mass-tort law firm. The law firm agreed to repay the amount borrowed with interest at a specified percentage. In addition, the law firm agreed to pay additional "revenue interest" in the amount of 10 percent of the law firm's gross revenues over a three-year period of time. The law firm granted the lender a security interest in its account receivables and agreed to provide the lender with regular reports on the status of its cases. The lender had no role in the legal work associated with the cases.

For several years, the law firm enjoyed the benefits of this arrangement, borrowing millions of dollars from the line of credit to finance its portfolio of mass-tort litigation. However, after the law firm fell into default on its payments, it sought to avoid its contractual obligations – under the credit agreement that it had voluntarily entered into – by arguing that the credit agreement provided for improper fee-splitting between the lender and the law firm. In particular, the law firm challenged the agreement's provisions under which the law firm granted the lender a security interest in the law firm's receivables and received a percentage of the revenues.

On August 17, 2015, Justice Shirley Werner Kornreich of the New York State Supreme Court (a trial court) in Manhattan rejected the law firm's arguments. The court explained that sound public policy favors allowing law firm financing agreements:

> Providing law firms access to investment capital where the investors are effectively betting on the success of the firm promotes the sound public policy of making justice accessible to all, regardless of wealth. Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing his or her case. Permitting investors to fund firms by lending money secured by the firm's accounts receivable helps provide victims their day in court. This laudable goal would be undermined if the Credit Agreement were held to be unenforceable. The court will not do so.

Justice Kornreich, quoting her colleague Justice Eileen Bransten, also observed that "there is a proliferation of alternative litigation financing in the United States, partly due to the recognition that litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or [a] stronger appetite for protracted litigation."

Justice Kornreich then rejected each of the law firm's specific challenges to the credit arrangement. With respect to the challenge to the lender's security interest in the law firm's accounts receivable, Justice Kornreich quoted from two earlier court decisions, one by Justice Bransten in late 2013 and the other from Delaware,[3] which upheld the practice of a lender's taking a security interest in both a law firm's earned and not-yet-earned fees:

> Defendants suggest that it is "inappropriate" for a lender to have a security interest in an attorney's contract rights. Yet it is routine

practice for lenders to take security interests in the contract rights of other business enterprises. A law firm is a business, albeit one infused with some measure of the public trust, and there is no valid reason why a law firm should be treated differently than an accounting firm or a construction firm. The Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest. Parenthetically, the court will note that there is no suggestion that it is inappropriate for a lender to have a security interest in an attorney's accounts receivable. It is, in fact, a common practice. Yet there is no real "ethical" difference whether the security interest is in contract rights (fees not yet earned) or accounts receivable (fees earned) in so far as Rule of Professional Conduct 5.4, the rule prohibiting the sharing of legal fees with a non-lawyer, is concerned. It does not seem to this Court that we can claim for our profession, under the guise of ethics, an insulation from creditors to which others are not entitled.

Justice Kornreich concluded that the law firm had not supported its "proposition that a credit facility secured by a law firm's accounts receivable constitutes impermissible fee sharing with a non-lawyer."

The court also held that, despite the law firm's contention, the credit agreement did not give the lender a prohibited ownership interest in the law firm. "A lender who loans money under a revolving credit facility is a creditor of the borrower. Unless the credit agreement provides for equity… the loan results in debt, not equity." The court also rejected the law firm's argument that the terms of the credit agreement in this case were objectionable because the law firm agreed to pay the lender a percentage of the firm's revenue on all of the firm's cases, rather than a percentage in certain cases.

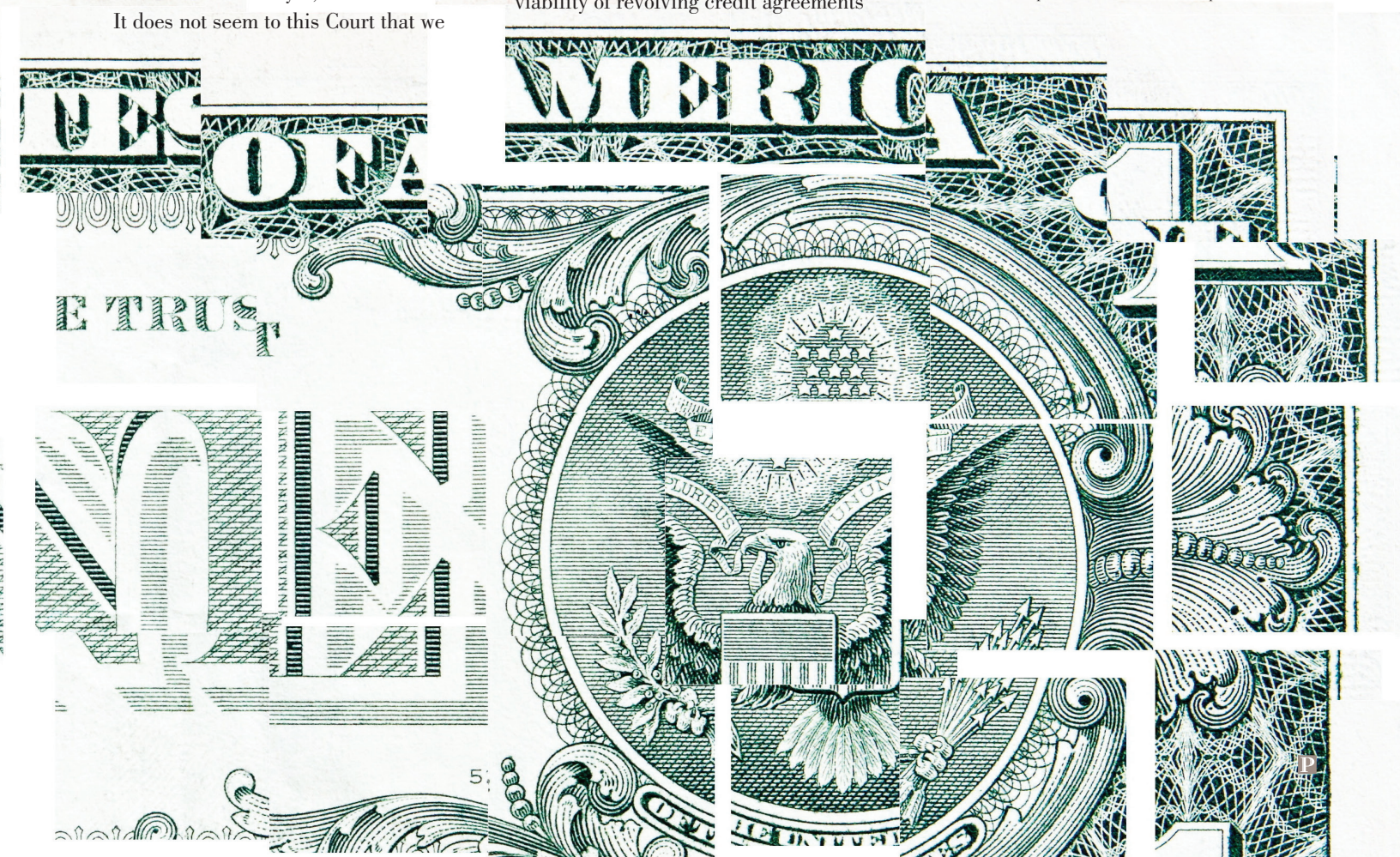
The *Hamilton Capital* decision strongly supports the lawfulness and viability of revolving credit agreements in which the lender receives a percentage of the law firm's receipts as with a factoring agreement, for mass-tort and other law firms. Lawyers whose firms need funding to take on new cases, injured parties who need well-funded lawyers who can vigorously pursue their claims, and investors looking for investment opportunities, can all benefit from this development.[4]

1 *See, e.g., Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third & Fourth Departments*, 2015 WL 4279720 (S.D.N.Y. 2015) (rejecting constitutional challenge to New York law and court rules prohibiting non-lawyers from taking an equity interest in a law firm); *Bonilla v. Rotter*, 36 A.D.3d 534, 829 N.Y.S.2d 52 (1st Dep't 2007) (precluding fee-sharing arrangement with investigator who located personal-injury clients at hospitals); *Ungar v. Matarazzo, Blumberg & Assocs., P.C.* 260 A.D.2d 485, 688 N.Y.S.2d 588 (2d Dep't 1999) (agreement under which non-lawyer administrative employee of law firm received half of the firm's earnings and profits constituted impermissible fee-sharing with a non-lawyer); *Prins v. Itkowitz & Gottlieb, P.C.*, 279 A.D.2d 274, 719 N.Y.S.2d 228 (1st Dep't 2001) (condemning fee sharing-arrangement with purported insurance expeditor charged with extortion); *Gorman v. Grodensky*, 130 Misc. 2d 837 (Sup. Ct. N.Y. Co. 1985) (prohibiting attorney's splitting fees with collections manager).

2 48 Misc. 3d 1223(A), 2015 N.Y. Misc. LEXIS 2954, 2015 NY Slip Op 51199(U) (Sup. Ct. N.Y. Co. Aug. 17, 2015).

3 *Lawsuit Funding, LLC v. Lessoff*, 2013 WL 6409971 (Sup. Ct. N.Y. Co. 2013); *PNC Bank, Delaware v. Berg*, 1997 WL 527978 (Del. Super. Ct. 1997).

4 The author's firm, Ganfer & Shore, LLP, represented the successful plaintiff in the *Hamilton Capital* case.



Your Collateral Needs Security Too: A Brief Introduction to the Personal Property Security Act (Ontario)

Ontario, like many other jurisdictions, has a system that allows parties to register a security interest over another person's personal property. This affords a creditor greater protection than relying solely on a security agreement.

The governing legislation in Ontario that guides the operation of this system is the (Ontario) Personal Property Security Act (the PPSA). Most other provinces and all of the territories have their own version of the PPSA, each with certain differences. It is imperative to consult legal counsel to determine how and in which jurisdiction a security interest may need to be registered.

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The PPSA registry system encourages lending, the giving of guarantees, purchasing on credit and facilitates business in general. Therefore, the PPSA is important, and registering your security interest is a key component of conducting business in Ontario.

The PPSA is similar to Article 9 of the Uniform Commercial Code (UCC) in the United States and should not be a source of intimidation to solicitors in the United States whose clients may have dealings in Canada.

The Basics

In order to register a security interest under the PPSA, a person must first ensure that he/she has a bona fide security interest.

A security interest is by definition an interest in personal property that secures payment or performance of an obligation. To determine if your agreement creates a security interest in personal property under the PPSA, you need to look at the overall effect of the agreement and the intention of the parties.

A security agreement must include the following:

1. an accurate description of the parties;
2. an accurate description of the collateral;
3. the financial and other obligations of the debtor to the secured party; and
4. the rights of the secured party in case of default.

The PPSA does not apply to every form of transaction. For example, the PPSA does not apply to an absolute sale (when something is fully paid for at the time of the sale), real estate (generally) and various statutory liens. If you are in doubt as to whether the PPSA applies, we recommend you contact legal counsel.

The Key to a Successful Registration: Accuracy

Financing Statements

To register a security interest, the secured party must file a financing statement in the registry system and deliver a copy of the financing statement to the debtor within 30 days of filing.

The registration system in Ontario is computerized and only accessible electronically.

At a minimum, the financing statement will provide basic information regarding the debtor, the collateral and the duration of the registration. Minor errors in the financing statement can lead to big problems, such as the registration being held invalid and losing priority status among creditors.

The test to determine if an error or omission will invalidate the financing statement is whether a reasonable person is likely to be misled materially by the error or omission.

Names

Since the PPSA registry is searched by name, inputting debtor names correctly is of paramount importance.

If the debtor is an individual, we recommend obtaining that person's passport or birth certificate (a driver's

license is insufficient) to ensure the accuracy of the name.

If you have concerns about the debtor's name or the debtor goes by several names, we recommend you use all combinations of the debtor's name in the registration. For example, Alexander R. Levy could be described as (i) Alexander R. Levy, (ii) Alex Levy, (iii) Alexander Ragan Levy, and (iv) Alex R. Levy.

In regards to a debtor corporation, you should be sure to have a copy of the articles of incorporation (or similar document) and any corresponding amendments in your possession.

A registration of a corporate name should list both the English name and the French name, if applicable. It the corporation uses a business name, it is prudent to register this name as well.

Description of Collateral

The secured party is given the option to describe the collateral using words on the financing statement.

Many years ago, describing the collateral using words was a requirement. However, under the current version of the PPSA, secured parties have the (recommended) option to simply check generic boxes describing the collateral such as "inventory" or "equipment," rather than describing the collateral in detail.

The benefit of checking the generic boxes to describe the collateral is that it affords the secured party greater protection. The downside is that a third party will not be able to tell exactly what collateral you have secured and may ask for an explanation. While the pros of additional protection must be weighed against the cons of potentially being bothered, generally speaking it is recommended that you check boxes rather than inserting words in the collateral description section of the financing statement.

Priority

To be granted the highest level of protection as a creditor, there must be "attachment" and "perfection" of a security interest.

"Attachment" of a security interest to collateral happens when the following conditions are met (i) a security agreement is signed; (ii) it contains a description of the collateral; (iii) value is given; (iv) the debtor has rights in the collateral; and (v) the attachment has not been postponed.

Assuming there has been attachment, perfection will require registration (the process involving the financing statement noted above) or possession (for tangible collateral only); the latter of which is beyond the scope of this article.

The basic rules for determining priority are:

1. a perfected security interest takes priority over an unperfected (unregistered) security interest;

2. in a case of conflict between perfected security interests, if all the security interests were perfected by registration, priority goes to the first to register, regardless of the order of perfection; if all were perfected by possession, priority goes to the first to perfect; or

3. when there is conflict between unperfected security interests, priority goes to the first to attach.

This is only a broad description. Determining priority can be a complicated affair.

Renewal

As mentioned above, the financing statement will require you to list the duration over which you will have security in the specified collateral.

If your security interest will last longer than the maximum duration allowed by the financing statement, it is imperative you file a financing change statement prior to the expiry of the original registration.

Failure to file a financing change statement may result in your security interest becoming unperfected and in certain circumstances losing its priority status.

Other examples of when a financing change statement should be registered generally include, but are not limited to, if the debtor changes its name or if all or part of the collateral is sold.

Conclusion

The PPSA, while nuanced, can be properly navigated with care and attention to detail.

If you are doing business in Ontario or considering doing business in Ontario and require advice on securitizing collateral, please feel free to contact me or another member of our team.

Solvency II: The Dawn of a New Era in the European and Global Insurance Market

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A new Directive, called Solvency II, is being welcomed as a revolutionary legal framework which will turn the European insurance business into a competitive and prosperous sector.

As of January 1, 2016, the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 as amended by the Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014, will be in force throughout the Member-States of the European Union (EU). It will replace the Council Directive 87/344/EEC of 22 June 1987, on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance. The new Directive is titled "On the taking-up and pursuit of the business of Insurance and Reinsurance" or in short, "Solvency II."

The new Directive implements a framework of regulations and technical standards to be met by insurance and reinsurance companies established and operating in any EU member-state in order to improve their efficiency and particularly, their risk management. The Directive is driven by the need to harmonize the regulations within the European single market and to modernize the insurance industry after its weaknesses were exposed by the recession that swept through the EU. Solvency II aims to reduce the risk of failure of such undertakings to the minimum i.e. 0.5 percent possibility of failure. By minimizing the risk of failure and increasing the efficiency of undertakings, the Directive will effectively reduce the undertakings' operational costs thus enabling them to reduce the basic premium payable by the policyholders.

The implementation of the Directive is expected to benefit undertakings outside the EU as well. Both non-EU undertakings with EU subsidiaries and EU undertakings with non-EU subsidiaries will be forced to incorporate – depending on their corporate structure – some of the Solvency II provisions. In addition, the drastic changes in the European insurance sector will encourage undertakings based in third countries to review their operational and risk management strategies in order to keep up with their European competitors.

Solvency II certainly seeks to pave the way for the insurance single internal market

of the future, but not at the expense of solid and stable mechanisms which have been in operation for decades. In other words, it will not attempt to fix what is not broken. The new Directive maintains and renews the effect of some provisions contained in the 1987 Directive. Such provisions are those related to legal expenses insurance.

The Directive provides that undertakings may offer to policy holders legal expenses insurance covering certain categories of claims. The legal expenses insurance must be included in a separate contractual document or a separate section within the policyholder's contract. The policyholder's freedom to select the lawyer who is going to represent him/her in negotiations or in court is almost absolute and may only be limited by the undertaking itself, provided that certain safeguards are in place to ensure the absence of any conflict of interest between the undertaking and the lawyer selected. Those safeguards have been designed to prevent the undertaking from reaching a settlement or handling a legal action in a way which is against the interests or is unfair given the circumstances of the insured.

Maintaining the previous regime in relation to the legal expenses insurance has a number of additional benefits, including the following:

A) Provided that no breach of the contractual terms occurs, the insured does not have to pay a lawyer to file a claim, defend a lawsuit or negotiate a settlement. Therefore, irrespective of the insured's income, the cost of litigation does not limit access to the justice system.

B) Fraudulent claims have been a scourge in the insurance market. In some EU member states, fraudulent claims have exceeded 10 percent of the total claims made against insurance companies. Provided that certain conditions are met, undertakings may appoint a lawyer of their selection, thus preventing the potential fraudster from setting up a fictitious claim with the assistance of a legal practitioner of his\her choosing.

C) If the policyholder opts for a lawyer selected on his/her behalf by the undertaking, he/she may rest assured that the case will be handled by an experienced and battle-hardened practitioner, as it is often the case with insurance litigators. The policyholder will receive legal services of excellent quality, thus minimizing the risk of losing in a legal action or reaching an unfair settlement after receiving advice by a firm selected by him/her. At the same time, undertakings bear an ongoing responsibility to cooperate with highly qualified legal practitioners in order to offer the best services available to their clients.

Although there is no available data as of the time of writing, it is certain that the changes brought by Solvency II will prove to be beneficial not only for the shareholders and investors of insurance undertakings, but for the policyholders as well. The first prudential reporting by insurance and reinsurance undertakings under Solvency II with reference to the first day of application (for undertakings with financial year ending on December 31) is expected sometime during April 2016. P

Management of Digital Risks

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In the Spring 2015 issue of this publication, we addressed the subject of risk management. This article will focus on one particular type of risk – digital risk. Firms' IT systems can be breached both from the inside and from the outside. For example, breaches can come from a network attack (hacking, distributed denial of service [DDoS]), viruses (Trojan horse, time bombs, worms), cybercrime, human error, a failure of the IT provider or power failure. The consequences for an enterprise can be serious – inaccessibility of the network, loss or theft of (part of) the computer system, data destruction, data manipulation, leaking of confidential information or personal data and related privacy issues. What are the legal options to manage these consequences and to ensure the continuity, security and privacy of the network and information systems of the company?

Contracts and Liability

Regarding digital risks, most business owners will immediately think of the security of the software and the quality of the hardware. However, you can limit digital risks and manage any potential negative effects in advance by means of good information and communications technology (ICT) contracts.

Entering a Contract

For the different digital services (such as maintenance and operation of the network system, data processing and data storage) the company will conclude contracts with different ICT suppliers (providers, cloud servers, big software providers, such as Microsoft, Apple and Google). These contracts are often standardized. However, an enterprise does not have to accept such standard contracts unreservedly, and it is advisable to negotiate the contents of such contracts. The contract has to provide clarity for both parties on several basic things: Who is responsible for what? Who has the power to do what? And what are the rights and duties of the parties involved in the service chain? Here, it is vital to observe the liability for claims of clients or third parties.

Besides negotiating the agreement, the use of your own General Terms & Conditions is highly advisable. Make sure that the General Terms are declared applicable correctly. If this turns out to be difficult, try to explicitly exclude specific provisions of your counterparty's General Terms in the agreement, as they often contain far-reaching exemption clauses. Also, check whether the General Terms of the provider contain a unilateral changes clause and make sure that the General Terms can only be changed with your permission or include in any case a notification obligation on the part of the provider in the event of a change in service. Finally, it is important to make clear arrangements in a choice of law and choice of forum clause with regard to the applicable law and the competent court.

During the Contract: Service Level Agreement and Security

The performance of the contract can be implemented via a service level agreement (SLA), which is rather common practice in ICT. An SLA includes, among other things, agreements on the level of quality and availability of the services (technical and functional specifications).

An important risk which has to be considered in the SLA is the security of the ICT systems and the data of the enterprise, especially if work is performed in different locations or in the cloud. Therefore, make agreements on the improvement of the network protection not just by firewalls, but also by means of encrypting and masking data. Authentication systems can provide the enterprise with extra protection against undesirable external factors, for instance, by the use of login codes, (changing) passwords and digital certificates. Also, define who will be responsible in the event of security breaches and thus for the damage of the enterprise, clients or third parties.

In addition, it is advisable to include a notification obligation on the part of the provider in the event of security breaches and other data leaks. You can also include in the agreement a back-up obligation on the part of the ICT provider, so that there will be an alternative besides your own back-ups.

An enterprise should of course also ensure the data privacy of clients and third parties in the network and information systems. The entrepreneur is responsible for correct storage and processing of personal data. Therefore, it is important to include in the agreement with the ICT provider who is or will remain the owner of the data, who has access to the data and/or is allowed to use it. A (mutual) confidentiality clause and a penalty clause can be included in the agreement and serve as a means for the compliance with these agreements. A prohibition to transfer personal data to third parties may also be necessary.

After the Termination of the Agreement

To ensure the continuity of the enterprise, clear agreements must be made regarding the termination of the agreement and what will happen with the data and systems in the event of bankruptcy or the takeover of a supplier. Thus, for instance, make sure to avoid a "vendor lock-in," by which the enterprise is not able to switch to another supplier because the data cannot be transferred (easily) to the new provider. Conversely, it is also important to determine what will happen to the data and systems if the enterprise does not comply with agreements, has outstanding bills, goes bankrupt or is otherwise in default. The enterprise is well-advised to include an obligation on the part of the provider to return the data in the event of the termination of the agreement.

International Regulations

Obviously, all agreements must be in accordance with national and international laws and regulations. This may be rather complex if the enterprise contracts with foreign parties or the data will be stored on a (cloud) provider's system, which is physically located abroad. The enterprise is thus well-advised to investigate who the contracting partners in the service chain are and where the data will be physically stored. By including investigative or monitoring powers, the enterprise can investigate whether the supplier complies with the applicable legislations so that the enterprise can also comply with its legal obligations.

Besides, the nationality of the persons whose data are digitally processed is relevant. For example, on grounds of the current European Data Protection Regulations, businesses from non-EU Member States have to provide an "adequate level of protection" for the storage and processing of personal data of EU inhabitants. A Thai business processing data of Italian customers in the U.S. is also subject to this Regulation, even though there is no physical relationship with Europe. In this case there is a problem because due to the so-called "USA Freedom Act" (formerly, Patriot Act), the United States does not comply with the European regulations. Until recently, transfer of personal data was permitted if an American company committed itself to comply with the "Safe Harbor Privacy Principles." On October 6, 2015, the European Court of Justice decided however, that the United States (American ICT service providers) could not provide an adequate level of protection for personal data. Currently, the European Union and the United States are working on finding a solution for this.

Meanwhile, for the protection of the privacy of EU-citizens, the European Parliament has drawn up a General Data Protection Regulation containing stricter rules and higher fines (see: "New Privacy Rules for European Union Will Apply to Companies Worldwide," *The Primerus Paradigm* Fall 2015). It is expected to become effective in 2017.

Conclusion

Entrepreneurs do almost everything digitally, but the risks of digital business operations are often not fully taken into account. With this article, we have tried to create greater awareness of digital risks and offer suggestions to manage them. Your outside corporate counsel, who knows your business like no other person, will be able to provide advice so that you will be aware of potential risks and be able to cover them legally, if desired. Then you, as entrepreneur, will be able to confidently use all the opportunities provided by the digital work environment. P

Practice Makes Perfect: Implementing EU Regulations Imposing Financial Corrections by Bulgarian Public Authorities

Regional policy is the European Union (EU)'s main investment policy established with the goal of maintaining sustainable and diverse development and economic growth stimulation in all EU states. Targeting all regions and cities in the EU, it is delivered during different programming periods through funding operations or operational programs adopted by the European Commission and financed under the European Funds.

Financial corrections are measures taken by European Member states in connection with irregularities that result in financial loss, unjustified expenditures or non-target spending of the funds of the EU. They consist of cancelling all or part of the public contribution, or in other words, cancelling payments to the contractors initially granted by the state.

The implementation of EU regulations in the field of imposing financial corrections requires that the Bulgarian public authorities lay down procedures governing these issues so that any unjust cancelation of such payments is avoided. Nonetheless, the contemporary state rules and regulations are not comprehensive enough, which of course raises many legal issues. Until recently only a few legal acts that concern the nature of financial corrections have been in force. This is the reason why the Supreme Court has been struggling to fill that gap in the Bulgarian national legislation through its practice.

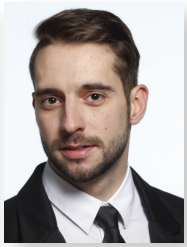
The main legal issue is whether the financial correction is considered an individual administrative act imposed by a public authority OR if they are penalty payments as a result of a breach of contract between a public authority and the respective beneficiary of the funds.

The answer to that question directly influences the beneficiaries' access to justice and effective legal protection upon unilateral cancelation of the payments agreed under a contract with a public authority. If the imposition of financial corrections is considered a contractual right of a public body, then the legal claim of the other party is to be filed in a civil court. If, however, a financial correction is recognized as an administrative act, the case shall be under the jurisdiction of the administrative courts. Such a difference in court competence defines the amount of court taxes the claimants shall pay. The civil courts' fee is 4 percent of the claim amount while the fee of an administrative court amounts to BGN 50 (approx. 30 USD).

Considering the aforementioned lack of specific regulations, the Supreme Administrative Court (SAC) has issued many awards encompassing legal analyses and interpretations on that matter. For many years it has asserted that the financial corrections are indeed a contractual right, a penalty payment as a result of breach of contract, of public bodies. It was not long before that made a radical change of SAC's opinion in several awards:

- Award No 10168 dated 18.07.2014 on administrative case No 8672/2014 by SAC provides that *"the Supreme Administrative Court has abandoned its understanding of the civil nature of these actions and understood that they are individual administrative acts."*
- Award No 930 from 27.01.2015 on administrative case No 13877/2014 by SAC: *"Considering the nature of a sanction, the act inevitably affects the interests of a party. The Managing Authority is a third non-contractual party that is empowered to impose sanctions unilaterally, thus the relationship between them is not of*

Bogdan Drenski



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equal standing. For these reasons the written act issued by the Managing Authority is an administrative act."

- In its Award No 10878 from 19.10.2015, The Supreme Administrative Court of Bulgaria clearly states: *"These relations are characterized by elements of subordination and should therefore be defined as administrative, despite being "dressed" in contractual form."*

Nonetheless, every so often a contradictive court award is issued. All the aforementioned demands practice unification that ought to be achieved through legal adoption. That led to the adoption of "Law on Management of European structural funds and investment funds" promulgated in State Gazette on December 22, 2015.

Pursuant to Art. 73 of that law, the financial correction shall be made and determined by a grounded decision of the Head of the Managing Authority (public body) of the program. Such a decision can be challenged before the Administrative Courts under the Administrative Code. The court shall render an award within two months.

Nevertheless, the Act on Management of European structural funds and investment funds adopted a principle familiar to civil law that in a way favors the Managing Authority. Upon contestation of the individual administrative acts, the state fees shall be determined as a percentage of the material interest or in other words, proportional to the amount of the funding cancelled by the same Managing Authority when imposing financial corrections. Unfortunately, this once again may be considered an economic filter for access to justice – any claim shall be rejected and returned if the full amount of the legal fee is not paid in advance. P

Ireland: The Number One Destination for Foreign Direct Investment

FDI and the Irish Economy

Ireland is the leading onshore European Union (EU) Organisation for Economic Co-operation and Development (OECD) white-listed location for Foreign Direct Investment (FDI), and 2015 was a record year for FDI into Ireland.

Ireland was identified as the number one destination for U.S. foreign direct investment in a 2014 report commissioned by the American Chamber of Commerce in Ireland.

The Irish economy is enjoying a period of renewed growth. Gross Domestic Product (GDP) rose by 5.2 percent in 2014 and by an estimated 6 percent last year. The biggest driver of Ireland's economic success is FDI. As the most globalized country in the western world, Ireland's export industry is thriving, which is not surprising given some of the following independent analysis:

- "In the top five best countries to do business" – *Forbes Magazine* 2014;
- "Number one in the world for investment incentives" – *IMD World Competitiveness Yearbook* 2014;
- "Best place to invest in Western Europe" – *Site Selection* magazine 2014;
- "World's most globalised country" – KOF – Globalisation List 2015;
- "In the top 10 most innovative countries in the world" - (2015 Global Innovations Index (GII));and
- "World leader in attracting high value FDI projects" – IBM Global Locations Trends 2015.

The figures speak for themselves:

- U.S .companies have invested €240 billion in FDI in Ireland;
- 130,000 people are employed in U.S. companies in Ireland. Those companies have invested more than $277 billion in Ireland since 1990;
- U.S. companies in Ireland export over $80 billion in goods and services annually (4 times more than US Companies in China);
- U.S. FDI in Ireland increased by 42 percent in the first nine months of 2014 to $37bn. During the same period, total investment to Europe fell 19 percent to $115 billion;
- Research & Development (R&D) outlay by U.S. affiliates in Ireland more than doubled between 2000 and 2012 from $465 million to $1.5 billion; and
- U.S. assets in Ireland total $1.2 trillion.

So it's easy to understand why Ireland is home to:

- Nine of the world's top 10 pharmaceutical companies;
- Nine of the world's top 10 global software companies;
- 13 of the world's top 15 medical technology companies;
- 60 percent of the world's top financial services companies; and
- Management of 50 percent of the world's fleet of leased aircraft.

Industrial Development Authority (IDA) Ireland, the Irish State Agency responsible for stimulating, supporting and developing export led business and enterprise in Ireland, approved 110 investment projects in Ireland in the first six months of 2015.

Some recent FDI announcements include:

- Apple will be expanding its campus in Hollyhill, County Cork, and adding a new building for 1,000 additional employees by mid-2017;
- Google has begun construction on a new €150 million Data Centre at Profile Park in West Dublin;

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- Huawei has opened its newest Ireland R&D office in the center of Dublin's Digital Docklands, creating 50 new R&D jobs, bringing to 120 the total number of its R&D employees in Ireland;
- LinkedIn Ireland surpassed its 1,000 jobs milestone as it celebrates its fifth anniversary here;
- Citi officially opened the Citi Accelerator Hub in June 2015, an office space located in Citi's Dublin offices for Fintech startups;
- GE Healthcare's $40 million investment is set to double manufacturing in Carrigtwohill in County Cork;
- Uber is to invest €4 million in Limerick, creating 150 jobs by the end of 2015; and
- Bluefin Payment Systems will establish a Technology & Operations Centre in Waterford City, creating 40 new jobs over the next three years.

So What Makes Ireland So Attractive?

1. **European Market access**: Ireland is an EU member state and is the only English speaking Euro currency zone member, giving it access to a market of over 500 million consumers and reducing exchange rate risk on trade within the Eurozone.

2. **Track record**: Ireland has strong and long standing trade links to the U.K. and the U.S.

3. **Corporate tax rates**: This has been a core component of the favorable enterprise environment in Ireland for over three decades. The Irish tax regime is open and transparent and complies fully with OECD guidelines and EU competition law. Ireland's 12.5 percent corporate tax rate on trading income is the lowest onshore statutory corporate tax rate in Western Europe. In addition, Ireland has signed comprehensive Double Taxation Agreements with 72 countries, of which 68 are in effect. Dividends received by an Irish holding company from companies resident in these "treaty countries" are taxable at the 12.5 percent rate. The new Knowledge Development Box, which took effect on January1, 2016, is one of a suite of measures designed to incentivize companies to develop new technology in Ireland. It provides for a 6.25 percent corporate tax rate for income generated from commercializing certain intellectual property.

4. **Holding company regime**: Ireland offers an attractive regime for holding companies locating here, and for their shareholders. Many leading global companies, and private equity/wealth funds, have chosen to relocate their headquarters to Ireland. Holding company drivers include: (i) exemptions for Irish tax resident holding companies from Irish tax on capital gains realized on disposals of qualifying subsidiaries; and on dividends received from other Irish resident companies; (ii) favorrable treatment of foreign dividend income; (iii) generous exemptions from Irish withholding tax on dividends and interest payments made to non-Irish residents; (iv) no thin capitalization rules which allow an Irish holding company to be debt financed; (v) no "controlled foreign company", or "sub part F" rules means that the profits of a foreign subsidiary of an Irish holding company are not taxed in Ireland unless they are repatriated to Ireland; and (vi) generous reliefs for costs of acquiring IP and other intangibles.

5. **Skilled labor force**: Ireland has a skilled, multi-disciplined and English speaking workforce. Ireland was ranked first in the world for availability of skilled labor and for flexibility and adaptability of workforce by the International Institute for Management Development (IMD) World Competitiveness Yearbook 2015. According to Eurostat 2014, Irish labor costs have remained relatively stable since 2008.

6. **Ease of doing business**: A company can be incorporated within five business days. Business tax registration can be arranged by submitting one form to the revenue commissioner, and there are a number of different financing options available.

7. **Stability**: Ireland has a strong legal and regulatory framework that supports business. Ireland is a common law jurisdiction. Its legal concepts will be recognized and understood by most foreign investors, including U.S. multinationals. Ireland's courts system is efficient and pro-business. The Irish Commercial Court, a specific division of the High Court deals quickly with commercial disputes over €1 million or disputes involving intellectual property.

8. **Investment incentives**: The IDA offers various incentives to international companies choosing Ireland as their European base. To date it has partnered with 1,150 entities in establishing and expanding their Irish presence. Some of these incentives include: exemptions for certain start-up companies from tax in each of their first three years; R&D tax credits; 100% allowance on capital expenditure incurred on scientific research; and the Special Assignee Relief Programme (SARP) which offers a reduction in income tax to qualifying employees who relocate to Ireland.

So, 2015 was a record year for FDI in Ireland. IDA client employment reached its peak at 187,056. And the IDA has set lofty targets for the next five years including the creation of 80,000 new jobs, 900 investments, and €3 billion R&D investments. There has never been a better time to invest in Ireland. P

Traveling with Cash and Material Goods: What You Should Know Before Visiting Germany and the European Union

Lately, there have been an increasing number of cases in which customs authorities have carried out targeted cash controls on travelers. Therefore, a number of important rules must be considered when traveling across borders with EUR 10,000 or more. Traveling with certain material goods must be reported to customs when exceeding a defined value.

Cash Declaration

First, the timing of the declaration is important. Many travelers correctly presume that cash must be declared upon entering a country. It is less well known, however, that cash must also be declared upon leaving for an international trip. For example, travelers flying from Germany to the United States with around EUR 13,000 need to make two customs declarations: the first one at the customs office of the country of departure (Germany), and the second one at the customs office of the destination (USA). For this reason, it is important to identify the customs office's location in advance. At airports, be it Frankfurt Airport or London Heathrow, the declaration is to be made before the security checkpoint.

Non-Compliance Procedures Start at Baggage Screening

If no declaration is made, the screening of the carry-on luggage may already initiate non-compliance procedures, with customs offices in general withholding 25 percent of the carried amount to cover the expected fine.

Where several people travel together, further attention should be paid to how much cash each individual is carrying. The declaration always applies to the person carrying the cash. It is irrelevant whether the money carried by one person is also intended for any accompanying persons. If the money is not declared, customs offices are rigorous. In this case, the money should be split prior arriving at the airport.

Declaration Free of Charge

The declaration is free of charge within the EU. Even if the amount of EUR 10,000 is exceeded, no taxes or duties are due. If no declaration is filed when it would have been required, fines up to one million Euro are possible.

Material Goods are Treated Differently

Apart from cash, travelers often carry material goods like souvenirs. When traveling to the Federal Republic of Germany from a non-EU country via ship or plane, adults are allowed to carry undeclared goods worth up to EUR 430. Children under 15 may only carry goods worth up to EUR 175. Goods like tobacco products and liquors have different limits and are valued separately.

If these exemptions are exceeded, goods can be seized and draconian penalties may be prepared by customs authorities.

Customs Offenses Comparable to Tax Evasion

Customs offenses are often comparable to tax evasion, with the latter being handled by revenue offices. When it comes to imposing penalties for small offenses, however, customs authorities far exceed what is imposed by revenue offices for comparable offenses.

Using Frankfurt am Main, Germany, as an example, the revenue and finance authorities impose penalties in the form of "daily rates" for smaller tax evasion offenses. The person concerned has a choice of either paying the assessed daily rate or spending 24 hours in custody for each rate. The overwhelming majority decide to make the payment.

The amount of the daily rate depends on the person's individual income situation and varies between EUR 1

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and EUR 5,000. The monthly income available to the individual is determined by the authorities. If souvenirs result in a tax recovery, it is crucial how many daily rates are imposed, as those rates define the overall sum.

These issues are often resolved in mass procedures based on tables listing the range of sentences. In Frankfurt, for example, the individual must expect three to four daily rates as a penalty for EUR 500 in evaded taxes. Customs authorities, on the other hand, use a different computation method, where the evasion amount is divided by a factor of 40. Customs and duties evasion of EUR 500 then result in some 12 daily rates as a penalty. Compared with tax evasion of the same amount, this is a significantly more severe punishment!

People affected should obtain legal advice when being threatened with fines, regardless of whether missed cash declaration or a certain carried material good led to problems with the authorities.

Managing Directors' Conflicts of Interest

A conflict of interest can be defined as any situation where a director may abuse or neglect his/her duties to act impartially and objectively, in order to obtain some kind of personal or business advantage. A conflict of interest is not necessarily a wrongdoing or breach of fiduciary duties in itself. Any company director, once or several times throughout his/her career, can find himself facing a conflict of interest. What is important in order to foster the good governance and reputation of any company is to be able to effectively identify, manage and mitigate any actual, potential or perceived conflicts of interest.

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Identifying a Conflict of Interest

A director is expected to act fairly and impartially and in the company's best interest. Conflicts of interest may arise in situations where a director can be in a position to put his/her private interests (related, for instance, to family or to business elsewhere) ahead of those of the company. Conflicts of interest may arise in situations:

- where a director is also a director of another company which is a relevant client, supplier, distributor, competitor of – or has any other material relationship with – the first company;
- where a director also represents a major shareholder in the company with conflicting interests with the company;
- where a director receives a gift or some kind of benefit from a third party who stands to benefit from the director's decision;
- where a director has a material position with a regulator that is preparing industry policy affecting the company;
- where a director is associated with any relevant advisor to the company such as an auditor, tax or legal advisor, consultancy firm or investment bank;
- where a director, at some point while carrying out his/her duties, is required to deal with a spouse, relative or close personal friend; or
- where a director has any other private interest in a proposed transaction that he/she will be voting.

While any of the above examples should raise red flags in any company board, in other cases it may be difficult to assess whether a situation or behavior constitutes a conflict of interest. The question to ask is whether an unbiased third party could reasonably perceive that a director's actions are being compromised by his personal or other business affairs.

Managing a Conflict of Interest

The duty of directors to avoid conflicts of interest is well established in many jurisdictions, some of which have set forth strict guidelines for directors to abide by before a potential conflict of interest.

In addition to being observant of any applicable laws and policies, company boards should be able to react in due time with efficient procedures and specific actions aimed at helping their members identify, avoid if/where possible, and manage conflicts of interest. These actions may include:

- **Issuing a Code of Conduct for the Board and Staff**: A Code of Conduct should require all directors to avoid, whenever possible, any actual, potential or perceived conflicts of interest; explain how to identify conflicts of interest very clearly and using examples; and set forth

a detailed procedure for managing unavoidable conflicts of interest.

- **Building an Ethical and Open Business Culture**: The company board must strive to create a climate and culture – not only at board level but throughout the entire company – that promotes trust, integrity, accountability, independence and professionalism. In addition, promoting a culture in which directors and staff are comfortable enough to openly discuss any conflicts they may have will also contribute to manage conflicts of interest more effectively.

- **Updating Policies and Offering Continued Training and Development to Directors and Staff**: We live in a very changing world where a certain approach for identifying and handling conflicts of interest may vary over time. Not only is it important to revise and update existing policies but to offer continued training to directors and staff to keep them well-informed of any such developments.

- **Setting Obligations to Disclose and Record Conflicts of Interest**: A director facing a conflict of interest should be obligated to disclose any such situation immediately, rather than trying to handle the situation personally. Not only is it important to disclose the existence of a conflict of interest, be it to fellow directors or to another person or group created to that effect, but it is also advisable to update such records at least once a year, keeping track of any changes that may affect the concerned director.

- **Seeking Legal Advice**: It may be advisable to consult with a lawyer in order to better navigate and resolve any unclear or complex conflict of interest situation.

Mitigating a Conflict of Interest

Selecting the best option to mitigate a conflict of interest requires a previous analysis of the conflict itself. When analyzing a conflict we must pay attention to its seriousness, directness and significance.

We must analyze factors such as the importance of the particular decision or transaction affected by the conflict situation, the director's personal interest at play, and the extent to which the director is involved in the relevant decision or transaction. The dimension and interrelation of these elements will be the determining factors to select the best alternative to mitigate the conflict.

Setting obligations at board level to disclose and record a conflict of interest will often not be enough to actually mitigate the effects of a conflict of interest. Recommended measures by governments and public institutes to help manage and mitigate conflicts of interest affecting public officials often include the so-called "Six R's." These can also be used to manage conflicts of interest in any company.

1. Register

This remedy alone will be suitable for conflicts of interest that represent the lowest possible risk for a given transaction or situation, where disclosing and recording a conflict of interest can be enough to preserve transparency.

2. Restrict

If a conflict of interest affects a transaction or situation only partially, restricting the involvement of the director in the decision-making process can be an option. Often times, restricting the involvement of a particular director in the voting of a transaction may be easier or more advisable than entirely removing that director.

3. Recruit

In cases where replacing a director is not advisable, for instance, in a small operation where all the expertise is needed or where removing a director is not an option for other reasons, recruiting a third independent party for voting or overseeing the transaction and bringing objectiveness to the decision table can be an optimal alternative.

4. Remove

If the magnitude of the conflict is considerable, and in cases where all other options would prove inadequate, removing a director with opposed personal interests to those of the company may be the only alternative to preserve the board's integrity and credibility and the company's reputation.

5. Relinquish

In cases where a director faces a continued conflict of interest that is likely to affect the company's reputation, for instance, where a director's external professional duties are a concern and can be perceived as barring him from acting impartially, then the best alternative may be to require that director to relinquish such external professional duties.

6. Resign

Requiring that a director resigns is the most extreme option and will be advisable in cases where there is a severe collision of interests and no other remedy can be effective.

Conclusion

A poorly managed conflict of interest involving a director can not only discredit the director, but also damage the reputation of the company. Because directors are active members of their communities and may be involved or have connections with several organizations, it is imperative for companies to be adequately prepared to take action to effectively identify, manage and mitigate the effects of director's conflicts of interest. P

Free Trade Agreements and Foreign Investment into Australia

Australia's trade with foreign investors has changed and evolved significantly over the past few decades, from the traditional trade nations of the United Kingdom, United States and Europe to a stronger focus on Asia. This article examines the current status of the free trade or partnership agreements with Australia's leading trade partners.

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China is now Australia's largest trading partner, accounting for nearly a quarter (23.9 percent) of Australian bilateral trade in terms of goods and services, valued at A$160 billion. This is followed by Japan in second place with (10.8 percent or A$72 billion), and then the United States with (8.7 percent or A$58 billion). Securing fourth place is Korea with (5.2 percent or A$35 billion). Together with the recently concluded Trans-Pacific Partnership Agreement, Asia related trade deals account for over 62 percent of Australia's export market.

United States

Australia and the United States have celebrated the 10th anniversary of the Australia-US Free Trade Agreement (AUSFTA), which came into effect on January 1, 2005.

Two-thirds of all agricultural tariffs (including lamb, sheep meat and horticultural products) were initially eliminated, with a further 9 percent of tariffs cut to zero in 2008. More than 97 percent of non-agricultural tariff lines are now duty free and all agricultural tariffs are expected to be removed by 2022.

The AUSFTA has enhanced the attractiveness of Australia to U.S. investors while, at the same time, has made the United States the most popular destination for outbound investment from Australia.

In terms of tariff reduction, there has been a consistent increase in the volume of exports from Australia entering the U.S., tariff-free, from 46 percent in 2004 to 90 percent of exports in 2014.

Trans-Pacific Partnership

In October 2015, Australia, along with 11 other Pacific nations, concluded the world's largest regional agreement, the Trans-Pacific Partnership Agreement (TPP) on November 18, 2015, after seven years of negotiations. The TPP will generate stronger economic links between economies in the Asia Pacific region and the other participating countries, which account for around 40 percent of the global economy. The TPP is intended to refine and solidify existing World Trade Organisation (WTO) rules relating to copyright and patent laws and formulate new rules that would reflect modern economic development in the region, including Innovation technologies.

China

The negotiations for the China-Australia Free Trade Agreement (ChAFTA) concluded in November 2014, after a decade of negotiation. The ChAFTA was finally signed on June 17, 2015. Once ChAFTA takes effect, approximately 86 percent of Australia's exports to China will enter tariff free, increasing to 96 percent upon full implementation. Based on 2014 statistics, the volume of bilateral trade between Australia and China was approximately AUD$160 billion. Key outcomes for Australia include, beef tariffs of 12 to 25 percent eliminated over nine years; dairy tariffs up to 20 percent eliminated within four to eleven years; wine tariffs of 14 to 20 percent eliminated over four years resources, energy and manufactured products (92.9 percent of China's current imports of these products) will be duty free with the remaining

tariffs removed within four years. Another outcome is improved China market access for Australian service suppliers such as banks, insurers, securities and futures companies, professional service firms, educational service exporters, telecommunication services, tourism, travel-related services and health, as well as aged care services.

China granted Australia "most favored nation" status in the ChAFTA, which enables Australia to receive certain preferential treatment from China, similar to other countries granted this much sought after status.

To counteract the impact from the TPP (that is, reduction of exports and Chinese outbound investment), China has been actively involved in trade negotiations for the Regional Comprehensive Economic Partnership (RCEP) since its launch in November 2012. Fifteen countries, namely the ten member countries of the ASEAN nations plus India, Japan, South Korea, Australia and New Zealand form the RCEP countries. RCEP accounts for approximately 30 percent of world economic output.

Japan

Following the conclusion of negotiations, the Japan-Australia Economic Partnership Agreement (JAEPA) was signed in April 2014, and came into effect on January 15, 2015. This agreement is regarded as the best trade agreement Japan has signed with another country. Now, customs duty free or preferential access will be granted to 97 percent of Australian exports to Japan and bilateral trade is likely to surpass the A$72 billion achieved in the 2013/2014 financial year. Benefits include the elimination of tariffs on 99.7 percent of Australian resources, energy and manufacturing exports. A range of Australian agricultural exports can now enter Japan duty free.

Korea

The Korea-Australia Free Trade Agreement (KAFTA) was entered into on December 12, 2014. Tariffs have already undergone two cuts. A zero tariff now applies to 84 percent of Australian exports to Korea, and for 90 percent of Korean imports into Australia. Bilateral trade between Australia and Korea stood at AUD$35 billion in 2013/2014 and again, the likely trajectory for this trade figure is upwards, as the KAFTA progresses through the implementation stages.

Foreign Investment Review Board (FIRB)

FIRB examines investment applications by foreign persons (including foreign governments) in land and commercial enterprises in Australia.

All foreign governments must seek and obtain prior FIRB approval before making any direct investment in any class of assets in Australia. New FIRB Rules took effect December 1, 2015, introducing application fees for real estate property purchases and penalties for non-compliance.

Business

Currently, non-government, foreign companies or investors can acquire a business or a substantial interest in an Australian business valued under $252 million without having to seek prior FIRB approval. If the business value exceeds $252 million, prior approval is required. For agribusiness, the threshold is $55 million (including investors from China, Japan and Korea).

A beneficial higher (non-prior approval) threshold of $1,094 million applies under the free trade agreements with investors from the United States, New Zealand, Japan, Chile and South Korea. In prescribed sensitive business sectors, like media, lower thresholds requiring prior approval still apply. Only non-government investors from United States, New Zealand and Chile are subject to the higher threshold at $1,094 million for agribusiness.

Agricultural Land

Foreign investors (including China, Japan and Korea) must seek prior approval for a proposed acquisition of an interest in rural land, where the foreign property and the cumulative value of other rural land interests already held by the investor exceeds, or is likely to exceed, after the acquisition, $15 million dollars. For non-government investors from United States, New Zealand and Chile, a higher threshold of $1,094 million applies.

Real Estate

Residential

Unless an investor has at least temporary residency rights in Australia, foreign investors usually cannot purchase established residential housing interests in Australia. Foreign non-residents, including temporary residents, may purchase new dwellings. There is no limit on the number of new dwellings a foreign investor may purchase, however FIRB approval is required prior to each acquisition. Temporary residents are permitted to purchase one established dwelling as for their principal place of residence but must sell the property within three months from the time the property is no longer used as their principal place of residence.

Developed Commercial Property

Generally foreign investors do not have to apply for prior approval to buy developed commercial real estate valued at less than $252 million in Australia. A lower threshold of $55 million applies, if investing in prescribed sensitive sectors and heritage listed developed commercial real estate. For non-government investors from United States, New Zealand, Japan, Chile and South Korea, a higher threshold of $1,094 million applies. Developed commercial property includes assets such as shopping centres, hotels, motels and other tourist accommodation.

Summary

Since the Australia-U.S. Free Trade Agreement came into effect on January 1, 2005, Australia has signed ten bilateral agreements with New Zealand, Singapore, ASEAN, Thailand, Chile, Malaysia and most recently Korea, Japan and China.

To reap the benefit of the Free Trade Agreements, investors need to explore opportunities for business potential in foreign markets. It's up to business to take advantage of a less costly and more favorable basis of trade to generate new business in a low, or zero, tariff environment created by the Free Trade Agreements. P

Australian Consumer Law and the Volkswagen Diesel Episode

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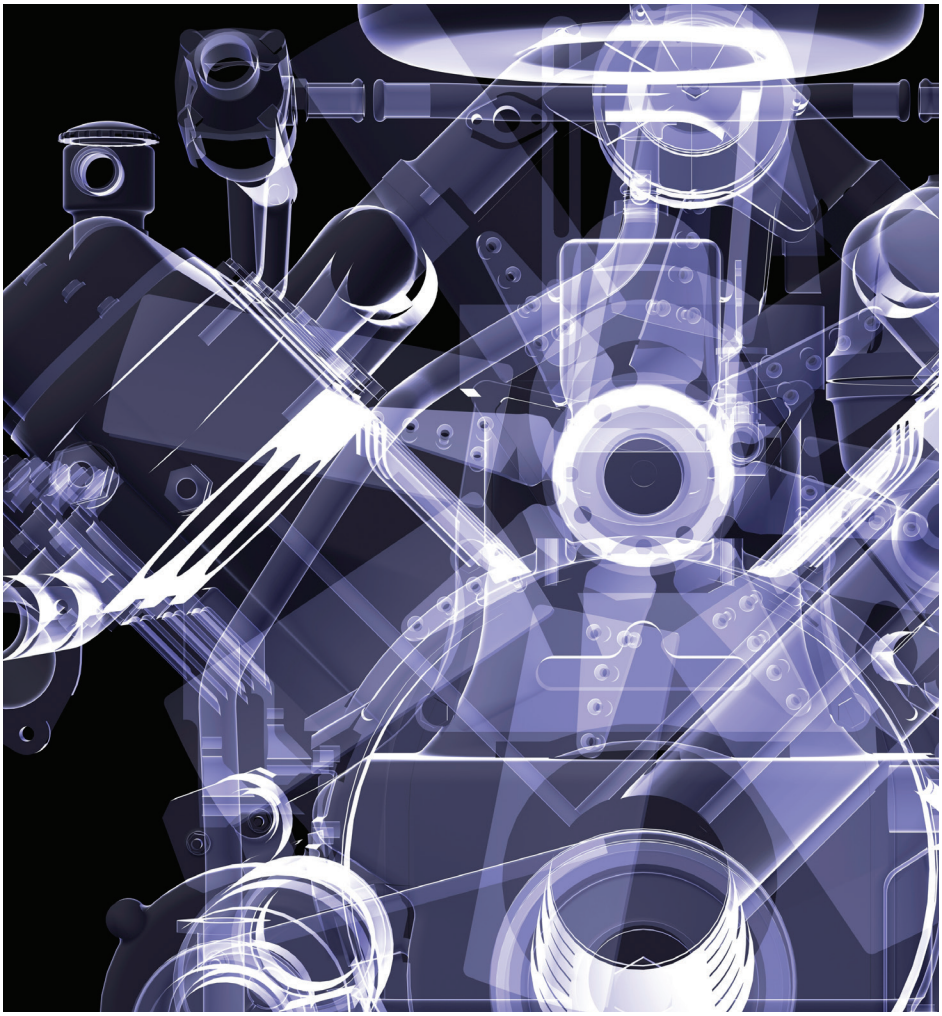

The consumers of Australia are protected by laws at the state and territory levels, as well as nationally, most significantly by the *Competition and Consumer Act 2010* (Cth). The most significant part of the 2010 Act is its second schedule, known as *The Australian Consumer Law* (ACL). The ACL outlines certain rights of consumers, sets out standards for goods and services and provides penalties for breaches.

Protections for consumers provided in the ACL include:

1. Ensuring that goods supplied will correspond with the description of those goods and be fit for their disclosed purpose;

2. Requiring that goods sold are of acceptable quality, safe and free of defects; and

3. Guaranteeing that services are provided with due care and skill.

In addition, the ACL prevents any of these protections from being "contracted out." Remedies where the guarantees are not met include having the goods repaired, replacing the goods or providing a refund. The ACL also gives Australian Federal Courts the power to grant injunctions where the ACL is breached.

The statutory liability for products is primarily borne by manufacturers, however suppliers along the supply chain can also be liable in certain circumstances. In addition, the definition of "manufacturer" in the ACL is quite broad, including those who apply their brand name to the goods. This is of particular concern to importers into Australia, as they may be held liable, and are likely to be sued when the original manufacturer is not in Australia.

One of the most significant provisions in the ACL is the s18 prohibition against a person, in trade or commerce, engaging in conduct that is misleading

or deceptive or is likely to mislead or deceive. This can be infringed without any proof of intention to mislead. This section and its earlier equivalents have been relied upon in cases ranging from furniture[1] and rice farms[2] to fragrances[3] and cricket tests.[4] The provision famously prevented fast-food chain Taco Bell from starting its Australian presence due to the existence of a restaurant named "Taco Bell's Casa" in Sydney.[5]

One of the biggest limitations of the ACL or consumers, is in enforcement. In Australia, unsuccessful litigants are usually obliged to pay the majority of the winner's legal costs. Many cases involving misleading and deceptive conduct are accordingly between two competing businesses as opposed to between business and consumer. While the ACL provides consumer protection for goods and services, the legal costs in seeing those guarantees complied with often outweigh the value of the product itself.

The Australian Consumer and Competition Commission

Enforcement of the ACL is often effected by the Australian Consumer and Competition Commission (ACCC). Known as the "consumer watchdog" of Australia, the ACCC has the authority to investigate and research matters relating to competition and consumer protection, as well as educate the public regarding such issues. The ACCC is also concerned with enforcing the ACL by bringing court action against business perceived to have breached their obligations under the ACL.

The most recent success for the ACCC was the Federal Court of Australia requiring ReckittBenckiser, manufacturer of the Nurofen pain killer range, to withdraw products that were said on the packaging to treat specific pains (such as migraines or back pain) despite each containing the same active ingredients. The ACCC has also succeeded in court action for a range of problematic practices including misleading "free range" claims, producing fake testimonials for removalists and unfair and aggressive sales pitches for vacuum cleaners.

Safety Standards and the Australian Consumer Law

The ACL is also important in the enforcement of product safety standards in Australia. Although it contains no particular standards itself, it provides the Government with the authority to declare certain safety standards for consumer goods or product related services. The ACL stipulates that where such a safety standard exists, a person cannot supply any good that does not comply with those standards nor may they be offered for supply, unless exported outside of Australia and with the approval of the Government. The ACL also prohibits the manufacture, possession or control of any contravening goods where the goods are to be used in the used in trade or commerce.

A significant example of such safety standards are the Australian Design Rules (ADRs) which set national standards for the safety, theft resistance and emissions of vehicles. The ADRs, which are made up of a vast collection of separate legislative instruments, provide very technical specifications often based on standards produced by international bodies. The ADRs are not an approvals system, rather manufacturers must self-certify that they comply with all applicable ADRs. It is the threat of investigation and legal action from bodies such as the ACCC that seeks to ensure compliance with the ADRs.

Consumer Law and Volkswagen

On October 1, 2015, the ACCC provided a press release confirming its investigations into the Volkswagen (VW) Group.[6] The Group, which includes Volkswagen, Audi and Skoda, admitted to the use of software code in certain diesel-fueled vehicles. This code was capable of determining when a vehicle was being run under test-conditions in order to change engine controls that resulted in a lower output of nitrogen oxides (NOx), thus allowing the vehicles to breach certain emissions standards.

The ACCC has stated that they are investigating two potential breaches by Volkswagen:

1. The use of the software to manipulate test results, which is specifically prohibited by the ADRs and thus breach ACL mandatory safety standards; and

2. That the use of the software may have misled customers given that claims relating to environmental benefits or fuel efficiency are factors influencing consumer choice.

There is a maximum penalty of $1.1 million per breach of the ACL for corporations.

The ACCC indicated that VW has yet to confirm the local use of software; however testing by the International Council of Clean Transportation (ICCT) does suggest that some affected vehicles may have breached Australia's emissions standards (a mix of the Euro 4 and Euro 5 standards that were previously enforced in the European Union). In response, VW has agreed to recall the affected vehicles and modify them in order to bring them within Australian emissions standards.

The case involving VW is an example of how Australian consumer laws and protection operates around the notion that prevention is far better than treatment. The options for redress are usually quite limited for a single disgruntled consumer. However, breaches of the ACL can still be met with formidable litigants, either in the form of the ACCC or a class-action suit. It is the risk of this court action that provides a significant factor in business seeking to comply with the ACL. P

1 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 19.*

2 *Bullabidgee Pty Ltd v McCleary* (2011) 15 BPR 29,421.

3 *Campomar Sociedad Limited v Nike International Ltd* (2000) 202 CLR 45.

4 *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181.

5 *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177.

6 www.accc.gov.au/media-release/accc-update-on-vw-enforcement-investigation

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Primerus Business Law Institute (PBLI)

Primerus Firm Celebrates 25th Anniversary with a Year Dedicated to Service

When Primerus member firm Ogden & Sullivan set out to celebrate their 25th anniversary, they decided to look far beyond themselves.

Starting in September 2015, the firm organized a "Year of Service," designating one charity per month through September 2016 to be the recipient of their community service efforts.

"We wanted to showcase that in our 25 years of existence, we have been doing not just good work in the community, but also good works," said one of the firm's founders, Timon Sullivan.

"We wanted to showcase that in our 25 years of existence, we have been doing not just good work in the community, but also good works," said one of the firm's founders, Timon Sullivan.

The effort was a perfect fit for the firm's commitment to one of the Primerus Six Pillars – community service.

The 15-attorney firm, based in Tampa, Florida, kicked off the Year of Service with an open house reception in September for clients, community members, firm employees and fellow Tampa lawyers.

Then, in October, they got to work sponsoring and donating time to the Tampa Pig Jig – an annual fundraiser featuring a barbeque competition to benefit NephCure Kidney International. This non-profit organization supports conducting research, improving treatment and finding a cure for the debilitating kidney disease, FSGS (Focal Segmental Glomerulosclerosis) and Nephrotic Syndrome. The event has raised $600,000 over the past four years for NephCure.

Sullivan, who served as a celebrity barbeque judge, has a personal connection to the young professionals who founded the event. Sullivan coached many of the event founders in youth sports. In addition, Will, a young professional who was diagnosed with an aggressive form of FSGS in 2008, attended the Jesuit School in Tampa along with Sullivan's now adult children.

In November 2015, firm employees collected food for needy families through Metropolitan Ministries. In addition, the firm donated 25 turkeys for Thanksgiving dinners to area families. Firm employees continued their generosity in December 2015, buying gifts for needy children through the Salvation Army's Angel Tree program.

Ogden & Sullivan's community projects continue into 2016, with the following:

- In January, the firm conducted a job skills presentation for members of Dress for Success – an organization which promotes the economic independence of disadvantaged women by providing professional attire, a network of support and career development tools to help women to thrive in work and in life. Ogden & Sullivan also held a clothes drive to provide professional clothes for Dress for Success.
- In February, the firm raised funds and provided care packages to young surgery patients who are under the care of Mending Kids – a charity that provides free surgical care to underprivileged children in the United States and worldwide.
- In March, the firm once again participated in Tampa Bay's Cut for a Cure, which raises funds and awareness regarding pediatric cancer. The Cut for the Cure charity specifically funds research for the development of chemotherapy and other medications designed to treat childhood cancers. Sullivan and other members of the firm shaved their heads in order to raise money for this charity last year.
- In April, the firm will conduct a food drive to support Feeding America – a charity dedicated to feeding America's hungry through a nationwide network of member food banks.
- The firm has designated May as its official month to support Academy Prep, a private middle school for students qualifying for need-based scholarships in Tampa. For the last eight years, attorneys at Ogden & Sullivan have volunteered hundreds of hours at Academy Prep through

Mock Mediation and Mock Trial programs designed to introduce the eighth grade students to the legal system. The firm has also provided financial support to the school.

- In June, the firm will raise funds and volunteer at Camp Hopetáke – a local charity that provides a free summer camp for children with severe burn injuries.
- In July, the firm will raise funds and provide other donations to a local chapter of the well-known Ronald McDonald House Charities which helps families stay close to their hospitalized children.
- Finally, the firm will conclude its Year of Service Project in August 2016 by conducting a fundraiser and raising awareness for Hillsborough Pace – a local organization focused on supporting the middle and high school aged girls and young women in the community.

Firm employees have personal connections to many of these charities in the firm's Year of Service project, Sullivan said.

"We encouraged the employees to tell us what they would like to see us get involved with, and we found out that they were doing a lot of good stuff in the community that we didn't really know about," he said.

Ogden & Sullivan is working together doing not only good legal work, but also making their community a better place through its Year of Service project. P

2016 Calendar of Events

Scan to learn more about Primerus.

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

January 21, 2016 – Primerus Europe, Middle East & Africa Institute/ Association of Corporate Counsel Europe Legal Seminar
Madrid, Spain

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

February 25-26, 2016 – Primerus Asia Pacific Institute/ Lex Witness Grand Masters In-House Counsel Legal Seminar
Mumbai, India – *Primerus will be a corporate sponsor.*

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

March 16-18, 2016 – Primerus Young Lawyers Section Boot Camp
Orlando, Florida

March 17, 2016 – Primerus Europe, Middle East & Africa Institute/ Association of Corporate Counsel Europe Legal Seminar
Zurich, Switzerland

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

May 4-5, 2016 – Primerus Business Law Institute North America Meeting
New Orleans, Louisiana

May 6, 2016 – Primerus South Central Regional Meeting
New Orleans, Louisiana

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

May 20, 2016 – Primerus Northeast Regional Meeting
Boston, Massachusetts

June 3, 2016 – Primerus Southeast Regional Meeting
Raleigh, North Carolina

June 10, 2016 – Primerus Midwest Regional Meeting
Pittsburgh, Pennsylvania

June 15-16, 2016 – Primerus Latin America & Caribbean Institute/Association of Corporate Counsel Mexico Chapter Legal Seminar
Mexico City, Mexico

July 14-16, 2016 – Primerus Europe, Middle East & Africa Institute International Conference in conjunction with the Association of Corporate Counsel Germany Chapter
Hamburg, Germany

September 8, 2016 – Primerus Europe, Middle East & Africa Institute/ Association of Corporate Counsel Europe Legal Seminar
London, United Kingdom

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

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

There are other events for 2016 still being planned which do not appear on this list. For updates please visit the Primerus events calendar at primerus.com/events.

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