# Paradigm

INTERNATIONAL SOCIETY OF PRIMERUS LAW FIRMS

FALL 2013

**Finding the Best Lawyer for You**

**Helping Clients Find the Right Lawyer: Innovation in Client Service**

**Current Legal Topics:**

North America • Europe, Middle East & Africa
Latin America & Caribbean • Asia Pacific

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

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

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


## About our cover

Today's legal industry demands innovation. Lawyers must stay on the cutting edge of the latest technology and business practices to offer clients better service, higher quality work product and more efficiency and value for their money.

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Primerus
The World's Finest Law Firms

Publisher & Editor in Chief: **John C. Buchanan**
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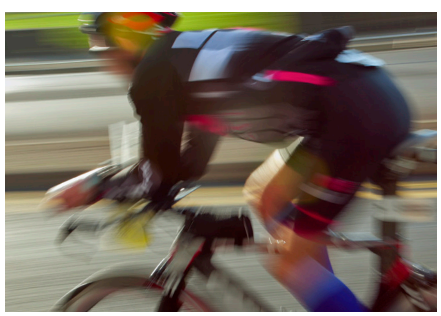
# The Primerus Paradigm – Fall 2013

President's Podium –
Finding the Best Lawyer for You
page 4

Helping Clients Find the Right Lawyer: Innovation in Client Service
page 5

Primerus Entertainment Lawyers Work Behind the Scenes for Celebrities Around the World
page 8



Primerus Community Service – Hull Barrett Wins Award from Augusta Sports Council for Outstanding Community Service
page 61

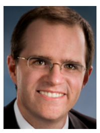
Primerus Member Firm Directories –
North America, page 39
Europe, Middle East & Africa, page 56
Latin America & Caribbean, page 60
Asia Pacific, page 66

Primerus Member Firm Locations
page 67

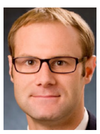
## North America, *pages 10-49*

Risk Assessment in Maritime Activity and the Law of Bailment
**Ronald J. Kitto**, page 10


Avoiding Potential Pitfalls in Drafting Force Majeure Provisions
**C. Stephen Stack, Jr.**, page 12

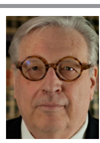
Contractors Beware: The King Can Always Sue You
**Timothy D. Boldt**, page 14

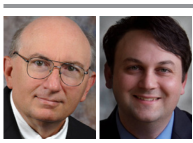
Buyer Beware: Recent Developments in Successor Liability
**Craig Billings Miller**, page 16


Capturing the Fair Market Value of a Family Business for Estate and Gift Tax Purposes: What Valuation Discounts are Available?
**Jaimee B. Henbest & Bradley S. Cohen**, page 18


Estate Plans Should be Reviewed and Revised as a Result of the Fiscal Cliff
**Eliot S. Nahigian**, page 20

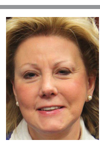
Proselytizing in the Workplace: A Balancing Act
**Robert I. Gosseen**, page 22

Defending Broker-Liability Claims Based on a Lack of Communication: An Overview of a Developing Defense in Louisiana
**Sidney W. Degan, III & Micah A. Gautreaux**, page 24


Supreme Court Limits What Biotechnology Can be Patented
**Matthew R. Osenga**, page 26


Insurance Broker Liability for Failure to Procure Adequate Insurance and the Duty of the Insured to Read the Policy
**Kelly A. Lavelle**, page 28

Congress Seeks Funds to Address Shortage of Primary Care Health Workers
**Kathleen Hatfield**, page 30


I Liked It When I Signed It – But I Don't Like It Now: Limitation of Liability Clauses
**Joey McCue & Logan Wells**, page 32


Agricultural Contract Clauses for Supplying Energy Crops to the Biofuels Industry: Part II
**William Mason & Brittany Brent Smith**, page 34


Time to Update Your Social Media Policy? Guidance from the NLRB
**Deirdre Fletcher**, page 36

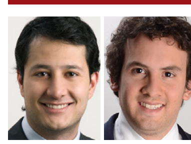

## Europe, Middle East & Africa, *pages 50-57*

Government Procurement and Tender Laws – an Israeli Perspective
**Hanan Salinger & Muriel Shachar**, page 50


The Advantages of Switzerland as an IP Management Location
**Andreas Glarner & Philippe Keller**, page 52


Art and Business Law
**Reinier W.L. Russell**, page 54


## Latin America & Caribbean, *pages 58-60*



The New Commercial Agency Contract for Goods Bill: Complying with the Requirements of the U.S.-Colombia Trade Promotion Agreement
**Juan David Alzate Peña & Guillermo León Ramírez Torres**, page 58


## Asia Pacific, *pages 62-66*

Introduction of the Design Patent Amendments in the New Taiwan Patent Act
**Chi-Che Tung**, page 62


The Development of Data Protection in China
**Caroline Berube**, page 64

## President's Podium

**John C. Buchanan**

# Finding the Best Lawyer for You

As we all know from experience, it's impossible to be successful in today's legal industry without innovation. In addition to being educated about the latest developments in his or her area of legal expertise, today's lawyer must also stay on the cutting edge of the latest technology and business practices to offer clients better service, higher quality work product and more efficiency and value for their money. Success depends on it, and clients not only demand it, but deserve it.

Those values – excellent client service, quality work product and good value – have been and will always be at the heart of Primerus. In fact, for 20 years, Primerus has been setting the standard by developing innovative ways to deliver better client service.

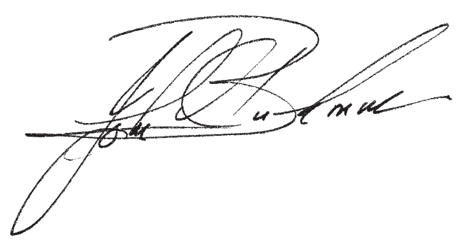
I founded Primerus in order to restore honor and dignity to the legal profession and to help rebuild the public's trust in lawyers and the judicial system – *and what's more critical to client service than trust?* Every client deserves to work with an attorney who has his or her best interest in mind, not their firm's bottom line. A trusted attorney puts the client's interests ahead of his or her own and truly cares about the client as not only a client, but a person.

Starting with that foundation, Primerus has developed one of the most valuable services to clients available in today's legal market – helping them find just the right lawyer for their needs. The most important decision a client must make in avoiding legal problems in the future, or resolving one that has occurred, is finding the right lawyer, with the right skills, in the right location, and at the right cost.

Fortunately, Primerus does exactly that. With a membership of nearly 200 firms in over 40 countries, we offer clients access to the world's finest attorneys. Our research department does the hard work of searching for and screening excellent lawyers everywhere in the world. But then we go a step further by working individually with clients to find the right lawyer. Our innovative Corporate Client Department is dedicated to helping companies find lawyers who are expertly skilled to meet their needs. If clients cannot find what they are looking for on our website, or if they simply don't have the time to look, a quick email or phone call to Primerus will do the job for them. Whenever possible, we will connect clients with a Primerus member, but because of our global connections, if Primerus doesn't have a member who can help them, we will work our connections to find another lawyer who can.

There is not another organization in the world that offers this service. There are many directories of lawyers and law firms, some of which do some peer review screening, but none offers a free, personalized service to the public with a dedicated staff to help them find and select the right lawyer for their business anywhere in the world.

You can read more about our innovation in client service on page 5. But don't take my word for it, read the thoughts of some clients who now look primarily to Primerus for their legal needs. If we haven't already, we look forward to partnering with you very soon in your quest for excellent lawyers and client service.



Whenever possible, we will connect clients with a Primerus member, but because of our global connections, if Primerus doesn't have a member who can help them, we will work our connections to find another lawyer who can.

# Helping Clients Find the Right Lawyer: Innovation in Client Service

When Matthew Tegmeyer, casualty manager for Vericlaim in Naperville, Illinois, needs a lawyer, his first stop is the Primerus website.

It's the same story for Rob Shaughnessy, Vice President of Claims for Southern Pioneer Property & Casualty Insurance Company in Jonesboro, Arkansas.

"When I use a Primerus firm, I know I am going to get quality legal counsel at a competitive rate," Shaughnessy said. "I know what I am getting, and I don't have to spend a lot of valuable time searching for law firms."

Tegmeyer and Shaughnessy are part of a long, and growing, list of clients who look to Primerus firms first for their legal needs. Whether it's through the Primerus website's directory of all Primerus firms around the world, or by asking Primerus attorneys they know to recommend an attorney in a different area, or by contacting Primerus staff members directly to ask for help finding a lawyer, clients around the world rely on Primerus.

According to Primerus President and Founder John C. "Jack" Buchanan, this benefit Primerus offers – helping clients find just the right lawyer for their needs – represents a unique and innovative client service.

"There is not another company or organization in the world that offers the same personalized service of helping clients find just the right lawyer for their needs," Buchanan said. "Primerus has a research department dedicated to searching out the finest lawyers around the world, a user-friendly online directory of all Primerus firms around the world with various search options, and an innovative Corporate Client Department dedicated to personally helping companies anywhere in the world find lawyers who are expertly skilled to meet their unique legal needs."

## Excellent Client Service Forms the Bedrock of Primerus

Several years ago, industry experts agree that a significant shift took place in the legal industry. After more than a decade of economic boom for law firms, with demand for legal services increasing each year, suddenly demand dropped. Now, a seller's market had shifted to a buyer's market, and clients began demanding more from their law firms – better and more adaptable service, high quality work product, and more efficiency and value for their money.

Fortunately for Primerus, those client demands are the fundamentals of how Primerus works, as exemplified in the Six Pillars: integrity, excellent work product, reasonable fees, continuing legal education, civility and community service. Primerus was founded in 1992 to restore honor and dignity to the legal profession and to help rebuild the public's trust in lawyers and the judicial system, and for 20 years it has worked to set the standard in client service.

> "Now, Primerus is our primary go-to source when we have a lawsuit."

"The Primerus brand of high quality legal services for reasonable fees was and is just what clients are seeking – quality and value," Buchanan said. "Primerus has always supported clients by holding law firms to the high standard of service that every business and individual deserves from an attorney. As a profession we had strayed away from that, and I formed Primerus to help bring it back."

## Helping Clients Find the Right Lawyer

Building upon those fundamentals of client service, Primerus' work as "matchmaker," bringing together clients with the perfect lawyer for their needs, represents the ultimate innovation in client service.

Primerus is uniquely equipped to do this for clients, Buchanan explained. While there are many directories of lawyers and law firms, none offer the same level of quality assurance and screening that Primerus does, accepting only the finest law firms around the world and subjecting them to consistent quality reviews.

And none other offers a free service to clients, with a staff to help them select the right lawyer for them anywhere in the world. A large part of that is the work of Primerus' Corporate Client Department. Formed in 2011, the department is dedicated to generating new business development opportunities for Primerus members, and in doing so, helping clients find the lawyers they need.

The department fields requests from clients seeking a law firm in a specific geographic location or with a specific expertise, or both. Many times, a Primerus firm member will fit the criteria, but if not, Primerus does not stop there. If Primerus has a firm in the same geographic area, but without the correct expertise, they will ask the Primerus firm to recommend another quality, local firm with the required specialty. Other times, Primerus will turn to its member development team to recommend a prospective law firm (one that the department has researched for quality but not yet invited for membership, or has not yet completed the membership process). Primerus also will tap into its more than 3,600 attorneys for recommendations of fellow quality lawyers.

"We try to go above and beyond to make sure clients find what they're looking for, whether it's a Primerus member or not," Buchanan said. "We want them to know their best interest is our best interest."

Within the Primerus society alone, consisting of nearly 200 law firms with about 3,600 attorneys in over 40 countries, the opportunities are countless. Primerus member Roger Brothers of Buchman Provine Brothers Smith in Walnut Creek, California, is pleased with the ways Primerus has helped him better serve his clients since joining in October 2012.

"Primerus has helped me provide representation for my clients, and I know the representation they're going to get will be good," he said.

Brothers was impressed with Primerus' vetting process. "I know every Primerus attorney has gone through the same process I went through," he said. "That immediately instills confidence."

And it does the same for clients. Matthew Tegmeyer, casualty manager for Vericlaim in Naperville, Illinois, first discovered Primerus through Primerus member John Brydon of Brydon, Hugo & Parker in San Francisco. Tegmeyer's company, Vericlaim, represents The Scott's Miracle-Gro Company, a Fortune 500 lawn care corporation, who often would look to Vericlaim for recommendations when they needed a litigator somewhere in the country. When they became displeased with a California law firm due to exorbitant fees, one of Tegmeyer's Vericlaim associates recommended Brydon, Hugo & Parker. Pleased with the results and the fees, they hired him for other cases, Tegmeyer said. Eventually, Brydon introduced Tegmeyer to other Primerus attorneys, and he began attending Primerus client events such as the Primerus Defense Institute Convocation.

"One thing I love about Primerus is they're not 'in-your-face,'" Tegmeyer said. "They are not beating down my door trying to get business, and I really appreciate that."

Now, he has worked with Primerus firms in Rochester, New York; New Orleans, Louisiana; Lexington, Kentucky; and others.

"The results were all excellent. The reporting was on spot and I didn't have to chase them down for it. And costs came down," Tegmeyer said. "Now, Primerus is our primary go-to source when we have a lawsuit."

Tegmeyer also likes that when he uses the Primerus name when contacting a new attorney, he knows he's going to get only the best treatment. "I want them to know that I got their name through Primerus because they take pride in that," he said.

In the process, his client at Scott's became a Primerus believer as well. That client, Scott's Manager of Risk and Insurance Jason Jakubson, joined Tegmeyer at the 2013 Primerus Defense Institute Convocation in Boca Raton, Florida, in April.

Primerus has also become Jakubson's first choice when he needs to hire outside counsel. "I have seen consistency among all the firms," he said.

He appreciates the opportunity to develop relationships with the attorneys at events such as the Convocation. "The best part was getting to meet with the firms and attorneys who were there. It gives me a little more trust factor and comfort level knowing we are going to work with a great attorney," Jakubson said. "Anytime you hire someone to represent you, you want that level of security."

Shaughnessy shares the confidence that any attorney affiliated with Primerus will be of top quality. "The firms are very consistent; no matter what firm I use, I get the same high quality service."

He discovered Primerus about four years ago when he needed legal representation in a state other than the five they write policies in. Sharon Stuart of Primerus firm Christian & Small in Birmingham, Alabama, referred him to a Primerus firm. It was then that he learned about the benefits of Primerus and since then, he has worked with a handful of Primerus firms, including Spicer Rudstrom in Nashville, Tennessee.

## Ensuring Clients Are Happy

The process doesn't stop with Primerus matching clients with great lawyers. Primerus' client service also includes a quality assurance component to ensure every client is satisfied, every time. The Primerus Quality Assurance Board was created to ensure high quality service is provided to all Primerus clients by reviewing the performance of member firms, facilitating client matter referrals and identifying best practice standards.

Primerus also invites clients into the society, by meeting them face-to-face at countless client events (webinars as well as conferences) throughout the year that include time for education as well as relationship-building.

Primerus has established client advisory boards for some of its institutes and practice groups, consisting of representatives from companies that regularly hire Primerus law firms. These boards are a valuable resource in advising Primerus firms on how to better serve corporate clients, as well as advising Primerus about the topics they would like to learn about at Primerus client events, such as the Primerus Defense Institute Convocation.

"We have many clients who have an affinity for Primerus, so we invite them to help us be better," Buchanan said. "We feel that client input is invaluable, and we welcome it in whatever form we can get it."

"Primerus has taken client service to a new level. Not only have we sought out the best law firms around the world to meet their needs, but we work one-on-one with clients to connect them with the lawyer they need. Hopefully that's a Primerus attorney, but if we don't have what they need, we will find it," Buchanan said. "Then we welcome their input and follow up to make sure our law firms are doing a great job. We truly want what's best for our clients." P

# Primerus Entertainment Lawyers Work Behind the Scenes for Celebrities Around the World

What do J.R.R. Tolkien, the Oscars, and celebrities including Tom Cruise, Jim Cameron and Philip Seymour Hoffman have in common?

A Primerus attorney has represented their interests. In fact, when you look behind the scenes of some of the latest entertainment headlines, you'll find a Primerus attorney.

Bonnie Eskenazi of Primerus member firm Greenburg Glusker in Los Angeles, California, represented the J.R.R. Tolkien Trust when they sought their contractual share of the adjusted gross revenue Time Warner Inc. made on the films based on his works. Jeff Horst of Primerus member firm Krevolin & Horst in Atlanta, Georgia, represented The Academy of Motion Picture Arts and Sciences when they sued an entertainment company that was renting oversized statuettes resembling Oscar. And Tony Morris of Primerus member firm Marriott Harrison in London, England, has since 1980 represented British music industry titan Neil Warnock, CEO and founder of The Agency Group, one of the world's largest entertainment booking agencies. (Warnock's clients over the years have included Pink Floyd, the Rolling Stones, Johnny Cash, Dolly Parton and Michael Jackson.)

Entertainment law is one of hundreds of practice areas represented by Primerus attorneys and includes many aspects, including broadcast rights, sports safety issues, sports and recording contracts, as well as matters involving copyright and intellectual property law.

Eskenazi, who is listed by *The Hollywood Reporter* as one of the "Power Lawyers," teaches entertainment law classes at Stanford University and tells her students there's really no such thing as entertainment law. "There's really no separate legal discipline of entertainment law," she said. "It sits at the intersection of so many other areas of law such as contract, tort, copyright, trademark, antitrust, secured transactions, and applies those disciplines to a unique industry."

Eskenazi's firm website lists celebrity clients including Tom Cruise, Jim Cameron, Warren Beatty, Oscar De La Hoya, Philip Seymour Hoffman and Hans Zimmer.

In one recent interesting and high-profile case, Eskenazi represented the heirs of J.R.R. Tolkien as they sought more than $150 million in compensation from Time Warner Inc., which made the "Lord of the Rings" trilogy and "The Hobbit." When J.R.R. Tolkien sold movie rights to his "Lord of the Rings" novels 40 years ago, he was entitled to 7.5 percent of future adjusted gross receipts, and in fact, Eskenazi said his Estate was never paid a penny until the Estate sued. The case eventually settled.

"Two trusts had been set up, one for the children and grandchildren," she said. "They owned a one-half interest in the receipts, but the other half of the money from exploitation of the work funded charities all around the world."

She said cases like this arise because studios have no incentive to pay royalties correctly, and it's very difficult to get them to do so. "The worst thing that's going to happen to the studio is that they are going to get sued, and if they lose they have to pay what they owed the profit participant anyway," Eskenazi said. "You just have to keep plugging along and plodding through the system in order to try to raise people's consciousness in Hollywood."

Eskenazi loves the law as it relates to entertainment. "I think it's exceptionally interesting and challenging to figure out the ways the law protects a person's creativity. It's difficult to do because it's intangible," she said.

Outside of work, Eskenazi likes to attend movies every now and then, but she's not an "ultra consumer." She said, "I don't go to premieres, and I don't go on set or to parties. I am not interested in the glitz and glamour. I'm a little bit law nerdy. I love teaching, and I love rolling up my sleeves and practicing law in this area."

Meanwhile the work of Horst, a litigator in Atlanta, made headlines in the *Los Angeles Times* and other media outlets when The Academy of Motion Picture Arts and Sciences settled a lawsuit against an Edwardsville, Illinois-based events rental company for copyright infringement stemming from the alleged renting and selling of eight-foot statues that look like the famous Oscar statuettes.

Horst worked with colleague David Quinto of Quinn Emanuel Urquhart & Sullivan, who handled the negotiation phase of the case. In the end, the rental company agreed to stop selling and renting the statue and pay his client's attorneys' fees.

Horst said The Academy takes its copyrights and trademarks very seriously, and will protect its intellectual property vigilantly.

Horst has worked on other cases in the entertainment and music industries, including representing the father of a young hip-hop star who signed a management contract for his son under which they needed to give up half of his royalties in perpetuity. When the singer's first album went platinum, they sued and reached a settlement with the management company.


The growth of the film and music industries in Atlanta means that Horst's firm gets regular inquiries from people looking for legal help with entertainment related issues.

"The cases tend to be a little bit more high profile and that can be of interest to people," Horst said.

London firm Marriott Harrison has done work in film and television since it was founded in 1985, according to partners Tony Morris and Jonathan Pearce. They represent producers and creative talent in the origination, development, production and exploitation of feature films as well as television and other programming. The firm's corporate department also does merger and acquisition cases and works with those financing investment in television production and production companies.

Morris said he found one recent case particularly interesting because it challenged him intellectually. The case, in which Marriott Harrison represented Pattinson Productions Limited in its deal with All3Media – the United Kindgom's top independent television, film and digital production and distribution company – involved combining first look (an agreement in which a producer or studio agrees to pay a development fee for the right to have the first look at new material before others in the industry get to see it) and distribution in one agreement.

"I have not previously been asked to combine first look and distribution within such a complex commercial matrix," he said. "It took a lot of detailed drafting, and I was very proud of the finished result."

Marriott Harrison's clients include RSA Films, a company owned by Ridley Scott, the film director and producer responsible for films including "Alien," "Thelma & Louise" and "Black Hawk Down." RSA Films is a company Scott created many years ago, before he went to Hollywood, that produces commercials, music videos and some documentaries and other commissions for U.K. broadcasters. Morris advises RSA Films on these projects.

The firm also represents a number of clients in the music industry including Warnock and others.

Morris, a big music and film fan, loves his work. "I enjoy working with creative people," he said.

*For more information on Primerus firms specializing in entertainment law, visit primerus.com.*

Ronald J. Kitto

# Risk Assessment in Maritime Activity and the Law of Bailment

The recent hurricane activity in Southeast Louisiana has given parties that deposit cargo with marine terminal operators an opportunity to better define the extent to which terminal operators must protect the cargo in their care from damage in the wake of approaching storms. *AJC International, Inc. ("AJC") v. New Orleans Cold Storage and Warehouse Company, Limited ("NOCS")*, Civil Action No. 09-7519 in the United States District Court for the Eastern District of Louisiana is one such case. Although the case may initially appear to be of limited applicability, bailment principles under Louisiana law are generally consistent with those of other jurisdictions. So in that regard, the case provides instructional value to anyone who may deposit goods or equipment for storage with a bailee.

The facts in *AJC v. NOCS* are straightforward. In the summer of 2008, AJC delivered cargo to NOCS for cold storage pending overseas shipment.[1] At the time, NOCS's cold storage warehouse was located in eastern New Orleans on the north bank of the Mississippi River Gulf Outlet/Gulf Intracoastal Waterway ("MRGO/GIWW"). NOCS accepted the shipment which consisted of thousands of cartons of frozen chicken stacked on wooden pallets seven or eight cartons high and shrink wrapped. NOCS stacked the wooden pallets on the floor of the warehouse's freezer one on top of the other several tiers high.

On September 1, 2008, while the cargo was still being stored in the warehouse, Hurricane Gustav passed to the south and west of New Orleans, and made landfall along the Louisiana coast in Terrebonne Parish.[2] The warehouse lost power, and approximately one foot of water entered from the rising MRGO/GIWW. As a result of the loss of power and flooding, the bottom three or four layers of cartons on the bottom tier of pallets (which remained on the floor) became thawed and wetted rendering the frozen chicken unfit for consumption.

At trial, the Court found that AJC established a *prima facie* case that the goods were delivered but not returned to AJC in the same condition when delivered. Thus, the burden shifted to NOCS to prove that it exercised reasonable care.[3]

NOCS presented witnesses who testified that the company took precautions to protect cargo in its care from damage associated with hurricanes. The company reinforced the warehouse structure after it was rebuilt following Hurricane Katrina, and in the days leading up to the approach of Gustav, barricaded the warehouse overhead doors to prevent them from being blown out by heavy wind. NOCS also made arrangements to ensure that any loss of power could be restored in order to maintain freezer temperature to prevent thawing. However, there was no evidence that NOCS tried to protect the cargo from flood waters.

The Court noted that the warehouse was located outside of any hurricane protection floodwall or levee system and had sustained catastrophic damage both from wind and flooding during Hurricane

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Katrina. Consequently, the Court explained that NOCS was fully aware of the risks to AJC's cargo from rising waters. Although NOCS took some reasonable precautions to protect the cargo primarily from wind, NOCS failed to take any precautions with respect to protecting the cargo from flood waters, a known and foreseeable risk. Accordingly, the Court ruled that AJC was entitled to recover for the damage sustained to its cargo.

Following *AJC v. NOCS*, it is now clearer that bailees, including marine terminal operators, should assess all risks that goods in their care may be exposed, particularly during the approach of tropical storm systems, and incorporate reasonable precautions into their preparedness plans in order to protect the goods from those risks.

Also instructive in this case for the practitioner is the recognition of the shifting burden of proof. Although a plaintiff such as AJC generally carries the burden of proof in civil litigation, under the law of bailment, AJC was only required to establish a *prima facie* case of liability on the part of NOCS. It was then NOCS's burden to prove by a preponderance of the evidence that it exercised reasonable care to protect the cargo in its care. Having failed to carry its burden of proof, NOCS was found liable. P

1 It was undisputed that the relationship between NOCS and AJC was one of bailment. The relationship of a warehouseman toward his customer is that of a compensated depositary [under Louisiana Civil Code art. 2926, et seq. ]. *See, e.g., Colgin v. Security Storage & Van Co., 208 La. 173 (La. 1945)*. Under Louisiana law, it is well-settled that a warehouseman/bailee, such as NOCS, has a duty to use such care in regard to goods under its care as a reasonably careful owner of similar goods would exercise, and is bound to fulfill its obligations with the same diligence and prudence in caring for the things under its care that it uses for its own property. See, *Cook & Co. v. Gulf Shipside Storage Corp.*, 177 F.Supp. 869, 870 (E.D.La.1959), affirmed 276 F.2d 707 (5th Cir, 1960); Also see, *Acme Steel Co. v. A. J. Warehouse, Inc.*, 212 So.2d 271 (La.App. 4th Cir.1968); *Folger Coffee Co. v. M/V Medi Sun*, 492 F.Supp. 988, 992 (E.D.La.1980); La. Civ. Code Art. 2930.

2 It was undisputed that Hurricane Gustav for the purposes of this case was not an unforeseen or unexpected event as to constitute a *cas fortuit ou force majeure* under Louisiana law.

3 See e.g., *Cook & Co. v. Gulf Shipside Storage Corp.*, 177 F.Supp. 869, 870 (E.D.La.1959), affirmed 276 F.2d 707 (5th Cir. 1960); Also see, *Handyman Show, Inc. v. Emmis Television Broadcasting, L.P.*, 2008 WL 4401364 *4 (E.D.La. Sept. 24, 2008) (citing *Nat'l Auto. Ins. Co. v. Champ's New Orleans Collision Ctr.*, 06-1144, p. 3 (La.App. 4th Cir. 2/28/2007), 954 So.2d 197, 199; *Harper v. Brown & Root, Inc.*, 391 So.2d 1170, 1173 (La.1980).

C. Stephen Stack, Jr.

# Avoiding Potential Pitfalls in Drafting Force Majeure Provisions

In the world of complex contract negotiations, it is not uncommon for boilerplate clauses such as so-called "force majeure" provisions to receive scant attention. After all they say essentially the same thing, right? These common clauses essentially free both parties from liability or obligation when an event beyond the control of the parties, such as a war, strike, crime or weather event, occurs.

The recent decision of the United States Court of Appeals for the Fifth Circuit in *Ergon-West Virginia, Inc. v. Dynegy Marketing & Trade*, 706 F.3d 419 (5th Cir. 2013) serves as a reminder to contract lawyers that careful, or careless, drafting of force majeure provisions may prove to be of vital importance.

Hurricanes Katrina and Rita slammed into the Gulf Coast in August and September of 2005, wreaking havoc on the oil and gas industry. Many suppliers and purchasers of natural gas found themselves in a position of examining the force majeure provisions of their contracts to determine whether non-performance was excused. Two such contracts were those entered into by two sister companies ("Buyer 1" and "Buyer 2" or collectively "the Buyer Companies"), respectively, with the seller in *Dynegy* ("Seller").

Under both contracts, Seller agreed to deliver a daily contract quantity (DCQ) of natural gas to specified delivery points which the Buyer Companies agreed to purchase at a set price. Each contract contained a force majeure provision excusing a party's performance when it was rendered unable to meet its contractual obligations due to certain designated events beyond its control. In the aftermath of the hurricanes, Seller failed to deliver the DCQ under both contracts. Seller's internally designated suppliers which it was using to supply the Buyer Companies (but which were not identified in either contract or known to the Buyer Companies) had declared force majeure pursuant to their contracts with Seller. Seller notified both Buyer Companies that it was invoking the force majeure clause under the respective contracts and took the position its failure to deliver the DCQ was thereby excused. As a result, the Buyer Companies were forced to procure gas on the open market at a higher price than that specified in the contracts. The Buyer Companies filed suit seeking recoupment of the additional sums paid for the replacement gas.

The Buyer Companies' position at trial was that the respective contracts' force majeure provisions required Seller to attempt to secure replacement gas, which Seller admitted that it did not even attempt to do.

The force majeure provision of the Buyer 1 contract stated in pertinent part (emphasis added):

> In the event of either Party hereto being **rendered unable**, wholly or in part, by force majeure to carry out its obligations under this Contract…it

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> is agreed that on such Party's giving notice and full particulars of such force majeure…the obligations of the Party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and **such cause shall as far as possible be remedied with all reasonable dispatch**.
>
> The term "force majeure" as employed herein shall mean acts of God…hurricanes…or partial or entire failure of wells.

The Fifth Circuit found that the construction of the contract turned on the meaning of the term "remedied with all reasonable dispatch" and that a party to the contract was only entitled to invoke force majeure if that party "remedied with all reasonable dispatch" the force majeure event.[1] It rejected the district court's conclusion that the language was latently ambiguous and instead found that what was reasonable was "a question of fact that must be answered by looking to the circumstances of the case, including 'the nature of the proposed contract, the purposes of the parties, the course of dealing between them, and any relevant usages of trade.'"[2] Based on Seller's expert testimony at trial that it is standard practice in the natural gas industry for a seller to simply pass on force majeure if its upstream suppliers have declared force majeure, the Fifth Circuit found that it was reasonable for the district court, as the trier of fact, to conclude that Seller's responses to Hurricanes Katrina and Rita were enough to satisfy the reasonable dispatch requirement in the Buyer 1 contract.[3]

The force majeure provision in the Buyer 2 contract differed from the Buyer 1 provision. Like its counterpart in the Buyer 1 contract, it enumerated certain force majeure events, including hurricanes and well failures, but then it ended with a catch-all category: "and any other causes, whether of the kind herein or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome."

The Fifth Circuit held that because Seller stipulated that it could have purchased some gas on the open market at some price after its suppliers declared force majeure, the case turned on whether the final clause modified only the "other causes" or whether it modified each of the enumerated force majeure events as well.[4] Seller argued that the final clause applied only to other, unenumerated causes, and so the provision did not require a party to use due diligence, such as attempting to buy replacement gas on the open market, to overcome an enumerated cause, such as a hurricane. Buyer 2 argued that the due diligence clause applied to all force majeure events.[5]

The Fifth Circuit found that both possibilities were reasonable and had support in Texas case law (which governed per both contracts).[6] With both Seller and Buyer 2 proffering conflicting reasonable interpretations of the force majeure provision, the Court found the contract to be ambiguous and held that the district court should have considered the same extrinsic evidence that it relied on to illuminate the Buyer 1 contract to clarify the Buyer 2 contract.[7] The Court therefore ruled in Seller's favor as to both contracts.

From a practitioner's standpoint, the lesson to be learned from the *Dynegy* decision is an obvious one: Be very clear in drafting a contract about what is required of a party in the event of a force majeure event. Counsel for a buyer should consider including language that provides that the seller's duty to deliver the goods is not excused – even where an enumerated potential force majeure event occurs – when the seller can obtain replacement goods at a comparable price. To avoid any argument over what is "comparable," counsel likewise might want to establish a maximum percentage over the price currently being paid by the seller that the seller is obligated to pay (e.g., "seller's performance is not excused where replacement goods can be obtained at a price not exceeding X% over the price currently being paid by the seller to obtain said goods..").

Conversely, counsel for a seller will want to make clear that the seller has no duty to procure replacement goods if a force majeure event disrupts whatever source the seller has chosen to supply the goods. Language should be included indicating that the contract is a single source agreement, and the source should be identified by name. The potential force majeure events should be broad and all-encompassing.

As the Fifth Circuit noted, there is case law supporting both a duty to find replacement goods and a non-duty where the force majeure language is less than clear on the issue. Careful and precise drafting is therefore a necessity to ensure that "boilerplate" force majeure provisions adequately reflect the intention of the contracting parties. P

1 *Ergon-West Virginia, Inc. v. Dynegy Marketing & Trade*, 706 F.3d 419, 424 -425 (5th Cir. 2013)

2 *Id.* at 425 (citing *Christy v. Andrus*, 722 S.W.2d 822, 824 (Tex.App.-Eastland 1987, writ ref'd n.r.e.))

3 *Id.*

4 *Id.*

5 *Id.* at 425-26.

6 *Id.* (Comparing *Va. Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 407 n. 13 (Tex.App.-Houston [14th Dist.] 2009, pet. denied) (noting that the Texas trial court ruled that the gas buyer was not obligated to purchase gas on the open market after a force majeure event and citing *Tejas Power Corp. v. Amerada Hess Corp.*, No. 14–98–00346, 1999 WL 605550, at *3 (Tex. App.-Houston [14th Dist.] Aug. 12, 1999, no pet.), in support of its conclusion), with *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60, 68 (Tex.App.-Houston [14th Dist.] 2003, pet. denied) ("[O]ne party's assumption about the source of supply—and [even] the other party's knowledge of that assumption—is not enough to excuse performance if alternative sources of supply are still available to fulfill the contract."))

7 *Id.* at 426.

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# Contractors Beware: The King Can Always Sue You

If you are considering a contract with the state of Connecticut (or just about any other state), stop before you sign, and make sure you understand the meaning of "*Nullum tempus occurrit regi*," an ancient common law rule which means *no time runs against the king*. In *State v. Lombardo Bros. Mason Contractors, Inc.*,[1] the highest Court in Connecticut ruled that the State can take as long as it pleases to commence a lawsuit against any private party that provides goods or services to the state, including contractors. Although contractors are bound by State laws that limit the time for commencing a lawsuit against the State of Connecticut, the State, on the other hand, is no more bound by such rules than a medieval English king would have been. As explained by the Court, the doctrine stems from the presumption that the king was "daily employed in the weighty and public affairs of government," and as such, should not "suffer by the negligence of his officers, or by their contracts or combinations with the adverse party."[2] Although many presumed the doctrine to be dead, make no mistake, it is alive and well.

In *Lombardo Bros*., the State of Connecticut entered into contracts for the design and construction of a university library. The project was completed in 1996.[3] Water intrusion problems were quickly discovered and became progressively worse.[4] After four years of monitoring and observing, the State hired forensic engineers to conduct a multi-year investigation.[5] They concluded that the water intrusion was caused by design and construction defects related to roof parapets, structural steel, exterior wall cavities, flashing, windows and the HVAC system.[6] Rather than immediately seek remedies under the applicable design and construction contracts, the State retained a new design professional and different contractors to perform renovation work at a cost of $15 million.[7] In 2008, 12 years after completion of the initial project, the State filed a lawsuit against 28 parties involved in the design and construction of the original project, including its design professionals, construction manager and contractors.

The trial court dismissed the action based on the failure of the State to timely commence suit. In doing so, the court rejected the State's argument that the doctrine of *nullum tempus* applied under Connecticut common law and otherwise held that it was unfair and incompatible with a strong policy favoring deadlines for lawsuits. On appeal, the Connecticut Supreme Court overruled the trial court, finding in favor of the State's need to protect "the public fisc by allowing the government to pursue wrongdoers in vindication of public rights and property without regard to the time limitations applicable to other parties."[8]

Not only did the Court recognize the doctrine of *nullum tempus*, it ruled that the State's sovereign right to an unlimited time to commence a lawsuit cannot be waived, even by the express terms of a contract. Any such terms are unenforceable.[9]

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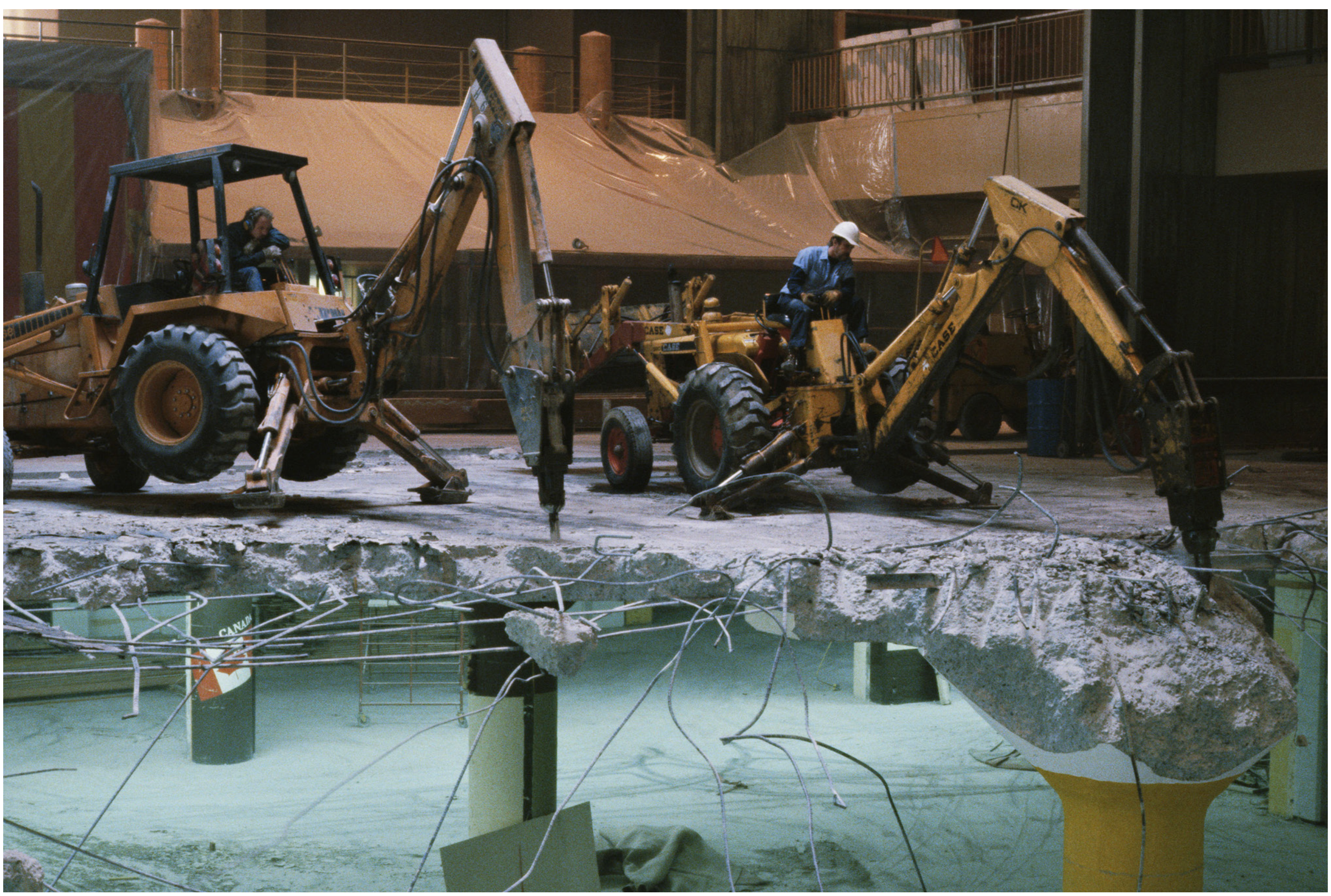
Although the *Lombardo Bros*. decision does not have any immediate impact on contractors entering into agreements with states other than Connecticut, the case is unsettling. *Nullum tempus* has not been specifically abolished in the overwhelming majority of states, either by court or by legislature.[10] Furthermore, the Supreme Court held in *United States v. Nashville, Chattanooga & St. Louis Railway Co*.[11] that "[i]t is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."[12]

Currently, it appears that only four states have specifically abolished the doctrine of *nullum tempus*. South Carolina and West Virginia have abolished it by statute.[13] Colorado and New Jersey have abolished it judicially.[14] It remains to be seen whether other states will use Lombardo Bros. to avoid the limitations periods, even in the face of express contract terms.

The obvious impact of *Lombardo Bros*. is that contractors and their sureties and insurers are exposed to endless potential liability when contracting with the State of Connecticut and possibly other states. Insurance and bonding costs are likely to increase immediately. Additionally, there are a host of other concerns which should lead contractors to reevaluate internal policies and procedures. How does a contractor protect itself from an unending risk of liability? How long should contractors save documents from public works projects? Should project managers be required to keep detailed project diaries? Should post-project debriefings occur with a risk management team? Are there other contractual mechanisms that can provide limitations-type protection, for example, a claim waiver similar to those signed by contractors as part of the payment application process?

Contractors, and the organizations that advocate on their behalf, should address this issue with state legislatures and seek legislation abolishing *nullum tempus* in order to prevent results like that in *Lombardo Bros*.

1 307 Conn. 412 (2012).
2 *Id.* at 429-430.
3 *Id.* at 421.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id* at 438.
9 *Id.* at 458.
10 *Id.* at 427 "This view was then shared by virtually every court in the country."
11 118 U.S. 120, 125 (1886).
12 *State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 427 (2012). Ft nt. 20.
13 *See State ex rel. Condon v. Columbia*, 339 S.C. 8, 16–17, 528 S.E.2d 408 (2000); *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 227–28, 488 S.E.2d 901 (1997).
14 *See Shootman v. Dept. of Trans.*, 926 P.2d 1200, 1207 (Colo.1996); *New Jersey Ed. Facilities Auth. v. Gruzen Partnership*, 125 N.J. 66, 69, 592 A.2d 559 (1991).



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# Buyer Beware: Recent Developments in Successor Liability

For clients of the practicing mergers and acquisitions attorney, one of the central concerns in any deal, whether a small sale or a multimillion dollar merger, is what is my liability exposure post-closing?

Structuring a deal as a purchase of assets, rather than stock, is one of the best tools a buyer has in limiting post-closing liability. However, a recent decision in the United States Court of Appeals for the Seventh Circuit should have attorneys' and buyers' attention focused on issues requiring examination and consideration during the due diligence process with respect to successor liability exposure for any asset deal.

In Teed v. Thomas & Betts Power Solutions, LLC, 711 F.3d 763 (7th Cir. 2013), the Seventh Circuit found the purchaser in an asset purchase from a receivership auction in Wisconsin was liable for violations of the Fair Labor Standards Act ("FSLA") occurring during the period when asset seller owned and operated the business acquired. The court imposed successor liability even though a condition of the transfer of the assets from the receiver to the purchaser was that the transfer be "free and clear of all liabilities" and the more specific condition that the purchaser would not assume any liabilities that the seller might incur under the FSLA. Despite the language in the purchase agreement, which the Teed court conceded under Wisconsin state law would have cut off successor liability, because the claims involved violations of federal labor relations or employment law, a broader federal common law standard for determining successor liability claims was applied.

Under federal law as articulated by the Seventh Circuit, the following five factors are examined in determining whether successor liability will be imposed for acts occurring during the ownership of the predecessor:

(1) Whether the successor had notice of the pending lawsuit.

(2) Whether the predecessor would have been able to provide the relief sought in the lawsuit before the sale.

(3) Whether the predecessor could have provided relief after the sale.

(4) Whether the successor can provide the relief sought in the suit.

(5) Whether there is continuity between the operations and work force of the predecessor and the successor.

Although the result of the Teed case may seem harsh at first blush, when examining the facts of the case against the federal common law standard, it becomes clearer why the court found successor liability against the purchaser. First, the purchaser had notice of the pending lawsuit at the time of purchase. Second, the predecessor would not have been able to provide the relief sought in the lawsuit before the sale because it was insolvent and had defaulted on a bank loan (causing the sale of its assets by the receiver in the first place). The court

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viewed the predecessor's insolvency as a factor counting against successor liability, as imposition of such liability would result in a "windfall" for the plaintiff. Third, the predecessor could not have provided relief after the sale as all of the proceeds of sale (along with its remaining assets) went to the bank whose loan it had defaulted on payment. Fourth, the purchaser could provide the relief sought in the suit (the court calls this the "goes without saying" condition). And fifth, there was continuity between the operations and work force of the predecessor and the successor, as the court stated that nothing had really changed in the operations of the business. Even though not all of the factors pointed towards imposition of successor liability, the Seventh Circuit found that successor liability in the Teed case should be imposed given the facts and circumstances of the case.

The Seventh Circuit noted that the idea behind having a distinct federal standard applicable to federal labor and employment statutes is that the statutes "foster labor peace" or "protect workers' rights" and that the imposition of successor liability is a needed method of achieving the statute's goals. The court cites an example that without the threat of successor liability, there would be nothing workers could do to head off a corporate sale by the employer aimed at extinguishing that employer's liability to them for violations of the federal statutes.

Given this articulation of the federal standard by the Seventh Circuit, what should counsel look for during the due diligence period?

First, the party responsible for diligence in any potential deal needs to closely examine these areas of federal labor relations and employment laws for potential claims and what relevant statutes may be applicable. While not exhaustive, the Seventh Circuit cited the Labor Management Relations Act, the National Labor Relations Act, ERISA, Age Discrimination in Employment Act, Family and Medical Leave Act and 42 U.S.C. §1981 (racial discrimination in contracting) as areas where the more favorable federal common law standard is applied in determining whether to impose successor liability. Many of the above cited acts have different thresholds of employee before they are applicable. The reviewing attorney needs to be familiar, or work with another attorney or person familiar with, the applications of these laws in analyzing potential risks.

Second, if a potential issue exists, it is wise to require a holdback of a portion of the purchase price which should satisfy any claim made and/or include indemnification language in the purchase contract. If a potential buyer finds itself in a position similar to the purchaser in Teed, where it is bidding on assets in bankruptcy or a receivership auction, all known outstanding claims exposure should be considered when determining the purchase price of the assets.

In conclusion, the Teed case should be in the back of every attorney's mind when analyzing potential liabilities that a client may face when acquiring a business, and when issues arise in diligence involving federal labor and employment statutes, the attorney and client should not simply rely upon disclaiming liabilities of the seller in a purchase agreement to protect them from successor liability. P

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# Capturing the Fair Market Value of a Family Business for Estate and Gift Tax Purposes: What Valuation Discounts are Available?

Often, the greatest asset a business owner has is the business itself. In preparing to file an estate or gift tax return, it is important for the practitioner to not only consider what the value of the business is but also whether any discounts may decrease the value of the business and potentially reduce the tax burden of the business owner. Recently, the valuation of closely held business interests has been a highly scrutinized issue. Most of the time issues as to valuation are contested by the IRS when the business entity has no realistic business purpose other than to achieve preferential tax treatment on the transfer of wealth.

## Background

For estate and gift tax purposes, the fair market value (FMV) of property is generally determined as of the date of the decedent's death (unless an alternative valuation date is elected under IRC § 2032) or as of the date the gift is given.[1] The FMV is determined using the "Willing Buyer-Willing Seller" test. That is, what is the net amount a willing purchaser would pay to a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of the relevant facts?[2] When the business interest is not listed on an established securities market, the answer to this question is not always readily ascertainable.

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Treasury Regulation § 20.2031-3 and Revenue Ruling 59-60 provides factors that are considered when determining FMV, but there is no bright line formula.[3] Rather, all relevant facts and elements of value as of the applicable valuation date are to be considered.[4] Underlying those factors are three concepts that might be used to discount the value of a closely held family business for estate and/or gift tax purposes: lack of marketability, minority interest, and loss of key person. When applied properly, these discounts can be used to effectively, and legally, reduce the value of the business interest that has been transferred.

After determining the base valuation of the business interest, it may be appropriate to adjust the FMV using various discounts which are available based on the circumstances.

1. **Lack of Marketability.** Lack of marketability is defined in the International Glossary of Business Valuation Terms as "the ability to quickly convert property to cash at minimal cost."[5] A discount for lack of marketability ("DLOM") reflects the fact that the business interest is not easily converted to cash as there is no easily accessible market to sell the

shares of the closely held business. The discount stems from the idea that the value of a business decreases when it does not have the ability to be sold and converted quickly into cash. Some common factors affecting marketability are: attractiveness of the business and industry, prospects for a sale or public offering, and management. The adjustment for lack of marketability is often the largest adjustment and can range from 30% to 40%, depending upon the facts and circumstances.[6]

**2. Minority Interest.** Often called non-controlling interests, a minority interest lacks sufficient voting power to control the operation of the business.[7] Because of the lack of control, a minority interest is less desirable to a potential purchaser. Accordingly, the fair market value of such interest should reflect the limitations of power over the entity and the inability to sell the interest on the open market. Typical discounts run from 20% to 40%, although greater discounts may be available depending on the circumstances.

**3. Loss of Key Person.** The loss of a key person, particularly the owner of a business, can have a negative effect on the value of the business. In many situations, the owner is the face of the business, and the decrease in value of the business interest reflects that the business will not function at an equivalent level without the key person. In determining whether to apply a loss of key person discount, factors to be considered include whether the claimed individual was actually responsible for the company's profit levels and whether the individual can be adequately replaced.[8]

## How These Discounts Have Been Applied

In *Estate of Folks v. Commissioner*, the decedent owned 21 of the 127 outstanding shares of stock in First Folks Corporation ("First Folks"), a closely-held family corporation. The shares of stock were restricted by a limitation that provided that the shares were not to be transferred by sale, pledge, gift or otherwise to any person other than to the issue of T. John Folks, Jr., or to First Folks. In the event of an unauthorized transfer, the attempted transfer would be a nullity.[10]

Shortly after the decedent's death, the co-executors of the estate filed the estate tax return which reported the decedent's ownership interest in First Folks with a 50% discount, using discounts for minority interest and lack of marketability based in part on the severe restrictions on the shares.[11] The IRS asserted a deficiency, arguing at trial that a 35% discount for lack of marketability was appropriate under the circumstances.[12] The tax court ultimately found in favor of the estate, giving great weight in its decision to the transfer limitation of the stock.[13]

*Estate of Feldmar v. Commissioner* involved the valuation of a business interest which used a loss of key person discount because the success of the business was highly dependent upon specialized marketing techniques of the decedent.[14] The IRS asserted a deficiency arguing that the loss of key person discount was not applicable in this situation as there was insurance on the decedent's life.[15] The tax court found in favor of the estate, permitting a loss of key person discount as (1) the insurance proceeds were not a business asset, (2) the decedent was a large part of the business's success, and (3) an equal replacement was not readily available.[16]

In *Estate of Murphy v. Commissioner*, the decedent owned 51.41% of a family-run closely held corporation.[17] Eighteen days prior to her death, the decedent transferred 0.88% of her interest to her children.[18] When the executor filed the estate tax return, he reported the decedent's ownership interest as 49.65% of the corporation, employing a discount for minority interest because at the time of her death the decedent owned less than 50% of the outstanding stock.[19] The IRS argued that the estate should not benefit from such a discount.[20] The Court agreed and disallowed the minority interest discount, reasoning that the decedent's gift a mere eighteen days prior to her death was for the sole purpose of limiting estate tax and that the decedent continued to exercise control despite owning only 49.65% of stock after the transfer.[21]

## Conclusion

Valuation discounts are useful in decreasing the value of a closely held business under the proper circumstances. Tax Court history illustrates that valuation discounts are generally upheld in circumstances that have a legitimate business purpose, rather than purely an estate planning strategy to transfer wealth to the next generation. As long as valuation discounts are permitted under the tax regulations, practitioners should consider them when a client wishes to transfer an interest in a closely held business as a gift or when a closely held business interest is included in a decedent's estate. P

1 IRC §§ 2031 and 2512; Treas. Reg. § 20.2031-1(b); Estate of Gilford v. Commissioner, 88 T.C. 38 (1987)

2 Treas. Reg. § 20.2031-3

3 Treas. Reg. § 20.2031-1(b)

4 Rev. Rul. 59-60; See also, Estate of Andrews v. Commissioner, 79 T.C. 938, 940 (1982); Estate of Hall v. Commissioner, 92 T.C. 312 (1989)

5 International Glossary of Business Valuation Terms, as adopted in 2001 by American Institute of Certified Public Accountants, American Society of Appraisers, Canadian Institute of Chartered Business Valuators, National Association of Certified Valuation Analysts, and The Institute of Business Appraisers.

6 William P. Dukes, *Business Valuation for Basic Attorneys*, Journal of Business Valuation and Economic Loss Analysis, Vol. 1, Issue 1 Art. 7 (2006).

7 Douglas K. Moll, *Shareholder Oppression and "Fair Value": Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L. J. 293, 310 (2004).

8 Rev. Rul. 59-60 (Section 4.02(b))

9 *Estate of Folks v. Commissioner*, 43 TCM (CCH) 427, *7, *9 (1982)

10 Id. at *9.

11 Id. at *9 and *26.

12 Id. at *26.

13 Id. at *32

14 Estate of Feldman v. Commissioner, 56 T.C.M. (CCH) 118, *24 (1988)

15 Id.

16 Id. at *35

17 Estate of Murphy v. Commissioner, 60 TCM (CCH) 645, *7 (1990)

18 Id.

19 Id.

20 Id.

21 Id.

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# Estate Plans Should be Reviewed and Revised as a Result of the Fiscal Cliff

Estate plans for couples and individuals should be reviewed and revised because of The American Taxpayer Relief Act of 2012 (the "Act"). The Act, enacted on January 1, 2013, to avert the so-called "fiscal cliff," contains a number of significant estate and gift tax provisions including:

- A unified estate and gift tax exclusion of $5,000,000 indexed annually for inflation. For decedents dying after December 31, 2012, the exclusion amount, as adjusted for inflation, is $5,250,000 per individual.
- The Act also made permanent "portability" between spouses. Portability essentially allows the unused estate tax exclusion of a deceased spouse to be used by the surviving spouse.
- The Act also provides for a 40% estate and gift tax rate on the estate in excess of the exclusion amount of $5,250,000.

Prior to the Act, a typical estate plan for a husband and wife involved a trust that was created during the couple's lifetime. Upon the death of the first spouse, the trust was either divided into two trusts (an A Trust and a B Trust) or divided into three trusts (an A Trust, and a B Trust, and a QTIP Trust).

In a typical AB Trust plan, on the death of the first spouse, the deceased's share of the estate, but not more than the exclusion amount, would be held in an irrevocable trust (often referred to as the "exemption trust" or the "bypass trust") for the benefit of the surviving spouse, and the rest of the estate would continue to be held in a revocable trust for the benefit of the surviving spouse.

In a typical AB Trust plan, there was no estate tax due on the death of the first spouse, and the amount held in the exemption trust was not subject to estate taxes on the death of the surviving spouse. The surviving spouse's share of the estate that was held in the revocable trust for the benefit of the surviving spouse (sometimes called the "A Trust" or the "Survivor's Trust") would be subject to estate tax and an estate tax would be due if the value of the survivor's estate exceeded the estate tax exclusion in effect on the death of the surviving spouse.

As a result of the Act and the $5,250,000 estate tax exclusion and portability, most couples will not need to use an exemption trust to prevent an estate tax from being imposed. A couple with a combined estate of not more than $10,500,000 can retain the deceased's share of the estate in a revocable trust, elect portability on the death of the first spouse, and leave their entire estate to their children estate tax free on the death of the surviving spouse without using an exemption trust if the entire estate does not exceed $10,500,000 on the death of the surviving spouse. An estate tax return on the death of the first spouse is required to elect portability.

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A significant advantage to electing portability is that the entire estate on the surviving spouse's death will receive a step up in basis. Receiving a step up in basis on the death of the surviving spouse has the potential for reducing income taxes when assets are sold after the death of the surviving spouse. Another advantage of portability and leaving the entire estate to the surviving spouse in a revocable trust, is that it eliminates the exemption trust and the need to prepare an income tax return each year for the exemption trust.

There are situations in which an exemption trust still should be used on the death of the first spouse. For example, if the couple's estate will continue to grow and will likely exceed the combined $10,500,000 exemption of both husband and wife, then an exemption trust is likely to be appropriate. Also, an exemption trust may be appropriate to avoid increases in property taxes as a result of changes in ownership where the couple's real property value exceeds their residence and $1,000,000 of property tax value at the date of the first spouse to die. The use of an exemption trust is still appropriate where there are concerns of protecting assets from creditors, a remarriage by the surviving spouse, or concerns about management of assets by the surviving spouse or other beneficiaries. The exemption trust must still be used to have the benefit of the generation skipping transfer tax exemption for both spouses.

As a result of the changes in the estate and gift tax laws by the Act, individuals and couples should review and update their estate plans. P

Robert I. Gosseen

# Proselytizing in the Workplace: A Balancing Act

Section 703(a) of the Civil Rights Act of 1964 ("Title VII")[1] which, *inter alia*, makes it unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's religion, imposes parallel duties on employers to reasonably accommodate their employees' religious practices, *including proselytization*,[2] and at the same time, fulfill their duty to maintain a work environment free of religious harassment.[3] This, as we shall see, often requires a neat balancing act.

While there is no "bright line" test to guide employers, over the years judges have fashioned a number of commonsense rules for balancing the competing interests of religious proselytizing *and* maintaining a workplace free of religious harassment,[4] among them:

- Engaging co-workers in one-on-one discussions of religious beliefs, or even proselytizing them, is permissible,[5] providing it is not abusive (*i.e.*, demeaning people of other religions),[6] or it persists even though the co-workers to whom it is directed have made clear that it is unwelcome.[7]
- Writing religious letters to co-workers criticizing them for "ungodly, shameful conduct" is not permissible if it violates the employer's anti-harassment policy, even where an employee claims that her religious belief requires her to write the letters.[8]
- An employee may not proselytize co-workers by sending unsolicited e-mails to them.[9]
- "It is unlikely that a one-time offering of a public prayer would violate Title VII unless its content denigrated other religious beliefs or attendance was mandatory;"[10] "[o]ccasional public prayers and isolated references to Christian belief," where there is no "actual imposition on co-workers or disruption of the work routine" are permitted.[11]
- Religious speech, or proselytizing, that threatens to impede the employer's provision of effective and efficient services is impermissible.[12]
- While an employer is entitled to integrate its own religious beliefs and practices into the workplace, and run its business according to religious precepts,[13] if it holds religious services or programs, or includes prayer in business meetings or training sessions, absent a showing of undue hardship, Title VII requires the employer to accommodate employees who ask to be excused for religious reasons.[14]

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Thomas Carlyle's observation, more than 150 years ago, that "[m]an is emphatically a proselytizing creature,"[15] has never been truer in the workplace. For employers, maintenance of the balance between accommodation of some employees' religious beliefs and practices, including stepped-up proselytizing, and their co-workers' right to be free of any perceived religious harassment, will continue to require a nuanced approach to achieving the correct balance, as well as a number of concrete actions.

Here, the Equal Employment Opportunity Commission's suggestions are eminently practical. Employers, it recommends, should:

- Train managers to gauge the actual disruption posed by religious expression in the workplace, rather than merely speculating that disruption may result;
- Train managers to identify alternative accommodations that might be offered

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to avoid actual disruption (*e.g.*, designating an unused or private location in the workplace where a prayer session or Bible study meeting can occur if it is disrupting other workers);

- Incorporate a discussion of religious expression, and the need for all employees to be sensitive to the beliefs or non-beliefs of others, into any anti-harassment training provided to managers and employees; and
- Advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules.[16] P

1 42 U.S.C. § 2000e-2(a)(1).

2 See, 42 U.S.C. § 2000(e)(j); *see also Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60 (1986). Proselytizing is usually defined as inducing someone to convert to one's faith. http://www.merriam-webster.com/dictionary/proselytize

3 Public employers face an even more daunting challenge. The First Amendment's Free Exercise Clause, which protects an individual's right to practice his or her own religion against restraint or invasion by the government (*Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222-23 [1963]), circumscribes public employers' ability to regulate employee proselytizing. The First Amendment's Establishment Clause, which prohibits governmental entities from compelling an individual to participate in a religion, or its exercise, or otherwise from taking action that has the purpose or effect of promoting or endorsing a particular religious faith or religion in general (*Lee v. Weisman*, 505 U.S. 577, 587 [1992]), requires public employers to bar proselytizing when it may be perceived as official government speech. *See, e.g., Tucker v. California Dep't of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1995), *quoting Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994), *cert. denied* 515 U.S. 1173 (1995) ("[a] teacher appears to speak for the state when he or she teaches; therefore, the department [of education] may permissibly restrict such religious advocacy").

4 The Title VII test for determining religious harassment parallels the test for sexual harassment. *See, e.g., Bodett v. Coxcom, Inc.*, 366 F.3d 736, 744 (9th Cir. 2004).

5 *See, e.g., Tucker v. California Dep't of Educ.*, 97 F.3d at 1213.

6 "[D]isparag[ing] the religion or beliefs of others" in the workplace may be illegal," according to the U.S. Equal Employment Opportunity Commission ("EEOC"). *EEOC Fact Sheet on Proposed Guidelines on Harassment Based on Race, Color, Religion, Sex*.

7 *See, Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074 (8th Cir. 2006) (Recent convert to evangelical Christianity felt obliged to expound her religious beliefs to co-workers. When co-worker complained, she stopped talking to the employee about her religious beliefs. Rejecting the co-worker's hostile work environment claim, the court held that the communications did not rise to requisite level of being severe and pervasive).

8 *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1020-21 (4th Cir. 1996) (employee, an Evangelical Christian, claimed she was "led by the Lord" to write to a subordinate at his home, and tell him that "there were things he needed to get right with God …").

9 *See, Ng v. Jacobs Eng'r Grp.*, 2006 WL 2942739 (Cal. Ct. App. Oct. 16, 2006) (Unpublished) (an evangelical Christian's religious beliefs compelled her to share her beliefs with co-workers in order to "save" them; she handed out religious pamphlets and sent myriad unsolicited and unauthorized internal E-mails inviting them to "call out to God for all needs," and inviting them to her unauthorized weekly prayer meetings. When co-workers complained, employer warned employee that she was violating its E-mail privacy and anti-harassment policies, and could be terminated; employee replied that she would take the risk in order to "preach the gospel." She was subsequently discharged, and her Title VII lawsuit was summarily dismissed).

10 *Carlson v. Dalton*, EEOC Request No. 05930480, 1994 WL 735488 (Apr. 26, 1994).

11 *See, e.g., Brown v. Polk Cnty., Iowa*, 61 F.3d 650 (8th Cir. 1995).

12 *See, Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (State employee prohibited from proselytizing clients she counseled); *Quental v. Connecticut Comm'n on the Deaf & Hearing Impaired*, 122 F.Supp.2d 133, 136 (D.Conn. 2000) (public employee's interest in evangelizing a client while she was on interpreting assignment outweighed by employer's interest in avoiding workplace disruption and avoiding violation of Establishment Clause in dealings with public); *see also, Asselin v. Santa Clara Cnty.*, 185 F.3d 865 (9th Cir. 1999)(Unpublished) (Public employer not required to accommodate juvenile probation officer's "religious practice" requiring him to "share the message and principles of Christianity" with minor wards).

13 *See, EEOC v. Townley Eng'r & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). When the Townleys, "born again believers in the Lord Jesus Christ," founded their company, they made a covenant with God that their business would be a "Christian, faith-operated business." *Id.* at 612, 625. They enclosed a Gospel tract in all outgoing mail; printed Biblical verses on all invoices, purchase orders and other commercial documents; and held a weekly devotional service during work hours. *Id.* at 612.

14 *Id.* at 620-21 *Young v. Sw. Sav. & Loan Assn.*, 509 F.2d 140 (5th Cir. 1975) (weekly staff meetings that included Christian prayers and mixed with business were deemed impermissible, where attendance was mandatory, even for atheists).

15 Thomas Carlyle, THE BEST KNOWN WORKS OF THOMAS CARLYLE: INCLUDING SARTOR RESARTUS, HEROES, HERO WORSHIP, AND CHARACTERISTICS (2010).

16 *EEOC Compliance Manual*, 12-IV Reasonable Accommodation, (July 22, 2008) (www.eeoc.gov/policy/docs/religion.html#_ftnref206)

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# Defending Broker-Liability Claims Based on a Lack of Communication: An Overview of a Developing Defense in Louisiana

Claims against wholesale insurance brokers for failure to procure proper coverage are not uncommon in Louisiana. In fact, such allegations are almost a "natural" off-shoot of first-party coverage disputes between insureds, insurance companies and insurance agents in the property insurance context. Over the last few years, though, a new defense to broker liability claims has developed in Louisiana. The purpose of this article is to analyze some of the cases that have addressed this defense.

In general terms, these cases involve a factual scenario where an insured hired an insurance agent to procure insurance coverage, and the agent then consulted a broker to assist in identifying and obtaining an appropriate policy. Under such facts, a traditional broker typically has no direct communication with the insured at all, dealing instead only with the agent. The question then becomes whether the insurance broker can be liable to the insured for failure to procure/produce proper coverage without any direct communication or contractual relationship with the insured. Several cases have responded with a clear "no."

In *T.J.'s Sports Bar, Inc. v. Scottsdale Ins. Co.*,[1] for example, a Louisiana federal district court dismissed an insured's Hurricane Katrina claims against a broker because there was no evidence of direct communication between the insured and the broker. There, Hurricane Katrina damaged the insured's sports bar. Following the insurer's denial of coverage, the insured sued the broker, alleging it was negligent in procuring the insurance, misrepresented the scope of the policy's coverage, and failed to advise the insured that it was under-insured.[2] However, finding that the broker was only a wholesale broker that had no direct communication with the insured, the court dismissed all claims against the broker:

> Given the legal duties of agents outlined in recent Orders of all Sections of this Court, the Court finds that Burns & Wilcox [*i.e.*, the broker] has met its burden in proving that T.J.'s has no possibility of recovery against it under Louisiana state law.[3]

The same result can be seen in *Nguyen v. Scottsdale Ins. Co.*,[4] where the same court dismissed another insured's claims against a broker following Hurricane Katrina. There, the insured obtained insurance through a retail insurance agent who had, in turn, approached the broker-defendant.[5] The plaintiff claimed the broker was liable for its Hurricane Katrina losses because it had made misrepresentations regarding the policy and failed to procure adequate insurance.[6] The court disagreed. In granting the broker's Motion to Dismiss, the court stated:

> Various sections of this Court have addressed these arguments

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> in post-Katrina cases and have found that because wholesale brokers do not communicate with insurance customers, plaintiffs have no possibility of recovery against them under Louisiana state law…. Moreover, two sections have reached the same conclusion with respect to Burns & Wilcox [*i.e.*, the broker] in almost identical cases….[7]

Other Louisiana cases which reached the same conclusion under similar circumstances include:

1) *Bowman v. Lexington Ins. Co.*:

> …Hull [the wholesale broker] has shown through sworn testimony that the nature of its business precludes any communication between it and customers. Given the legal duties of agents outlined in recent Orders of all Sections of this Court, the Court finds that Hull has met its burden in proving that the Bowmans [the insureds] have no possibility of recovery against it under Louisiana state law.[8]

2) *Teamer v. Lexington Ins. Co.*:

> …[T]he record establishes that Hull [the wholesale broker] has no communication between it and Lexington [the insurer] customers. Given the legal duties of agents outlined in recent orders of all Sections of this Court, the Court finds that Hull has met its burden in proving that Teamer [the insured] has no possibility of recovery against it under Louisiana state law.[9]

3) *Belmont Commons, LLC v. Axis Surplus Ins. Co.*:

> Many sections in this District have reviewed the liability question presented here: whether the intermediary broker who does not have a direct relationship and contact with the insured can be held liable under Louisiana law for breach of a fiduciary duty. Those courts hold no duty exists.[10]

A similar holding can also be seen in *Cajun Kitchen of Plaquemines, Inc. v. Scottsdale Ins. Co., et. al.*[11]

The evolution of this defense is still in its early stages overall, and close scrutiny of the pro-defense cases reveals some potential limitations on the defense's applicability. Specifically, all of the pro-defense cases were issued by the Louisiana Federal Eastern District Court. All are unpublished decisions. All involve only Hurricane Katrina claims. Further, the underlying concept of these rulings appears to be that, without evidence of direct communication or a contract between the insured and the broker, the only legal relationship that exists with the broker is between the broker and insurance agent. This implies that while the insured has no cause of action against a traditional, intermediary "broker," the agent may.

With these issues in mind, it is worth noting that the pro-defense cases were issued by four different judges (i.e., Barbier, Feldman, Fallon and Lemelle), not just one. This defense, then, appears to be thoroughly engrained in the Louisiana Eastern District. This makes it very likely the defense will at least be addressed, if not wholly adopted, by other Louisiana courts in the future.

Against the backdrop of these decisions are two pre-Katrina cases, *Ronald C. Durham v. McFarland, et. al.*[12] and *Alex M. LeGros v. Great American Ins. Co., et. al.*,[13] which seem to go in the opposite direction. Again, these two cases were decided before any of the pro-defense holdings cited above, which means neither of them directly repudiate those decisions.

While *Durham* does refer to a Louisiana Supreme Court decision in stating that a broker is not a mere "order taker" and can be liable to an insured, the "broker" in that case was communicating directly with the insured. Further, the ruling seems to use the terms "broker" and "agent" interchangeably, casting doubt on the decision's applicability in light of the distinction between wholesale brokers and insurance agents being considered here.

As to *LeGros*, that case involved the denial of a supervisory writ, and it does not appear from the holding that the broker ever asserted lack of communication as a defense. Instead, the broker simply argued it had no duty to the insured as a matter of law. The court responded by finding this argument was an improper topic for summary judgment because the presence or absence of an agency relationship and whether a breach of duty exists are factual questions.

Overall, it is still too soon to anticipate what limitations may ultimately develop with respect to this defense's application. At a minimum, though, there is repeated and consistent Louisiana case law supporting its viability. This means that lack of direct communication is a defense that should now be considered as part of a broker's defensive strategy when facing these types of claims from an insured in Louisiana. P

1 2007 WL 196989 (E.D.La.)(unpublished).
2 Id at *1-*2.
3 Id at *2 (citing Frischhertz v. Lexington Ins. Co., 2006 WL 3228385 (E.D.La.)).
4 2007 WL 647307 (E.D.La.)(unpublished).
5 Id at *1 and n.1.
6 Id at *1.
7 Id at *2 (internal citations omitted).
8 2006 WL 3733839, *2 (E.D.La.)(unpublished).
9 2007 WL 609738, *1 (E.D.La.)(unpublished).
10 2008 WL 2945926, *1 (E.D.La.)(unpublished)(citing cases).
11 2007 WL 60999 (E.D.La.)(unpublished).
12 527 So.2d 403 (La.App. 4th Cir. 1988).
13 02-1485 (La.App. 3 Cir. 11/12/03); 865 So.2d 792.

Matthew R. Osenga

# Supreme Court Limits What Biotechnology Can be Patented

What types of innovations can be patented? To meet the patentability requirements of the Patent Act, an invention must be useful, novel and non-obvious. The invention must be described in sufficient detail to permit one of ordinary skill in the art to make and use the invention. Are there any other limitations on what can be patented? Should there be? A recent Supreme Court opinion says yes, limiting the types of inventions that may be patented, particularly in the field of biotechnology.

## Background

Subject matter that may be eligible for a patent is set forth in 35 U.S.C. § 101:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title.

Over 30 years ago, in *Diamond v. Chakrabarty*, the Supreme Court decided genetically modified organisms could be patented. The inventor had developed a bacterium capable of breaking down crude oil that could be used in cleaning up oil spills. The United States Patent and Trademark Office (PTO) rejected his patent application on the basis that living things are not patentable subject matter.

The Supreme Court reversed, holding that the bacterium was not naturally occurring and qualified as patentable subject matter as a "manufacture" or "composition of matter" under the § 101. The Court cautioned that limitations should not be read into the statute that Congress has not expressed.

In what is now considered the high point of the permissiveness of patentable subject matter, the Court quoted the legislative history of § 101 that patentable subject matter includes "anything under the sun made by man."

*Chakrabarty* is widely viewed as the case that spurred the nascent field of biotechnology. The PTO took the Supreme Court's injunction literally and began issuing patents on isolated human DNA and similar discoveries. Isolating DNA sequences has permitted biotechnology companies to develop tests for genetic diseases and to create research tools to permit us to learn more about the human body and how to treat various diseases. These inventions are leading to personalized medicine, including customized medical decisions, practices and products tailored for individual patients.

While patents may have been the incentive to spur on these advances in biotechnology and medicine, patents also permit their owners to exclude use of the claimed technology for the term of the patent. This has raised the debate on access to these new medical breakthroughs.

More than 30 years later, the Supreme Court has waded into the field once more and decided that isolated DNA is a product of nature and is therefore not eligible to be patented.

## Association for Molecular Pathology v. Myriad Genetics

Genes set forth genetic characteristics of humans and other organisms. Each gene is encoded as DNA that occurs within the organism. Scientists can extract and isolate DNA from the genes for research, as mentioned above. Through manipulation, they can develop synthetic DNA in

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the laboratory known as complementary DNA (cDNA); this cDNA is also useful for research and further innovation.

Inventors at Myriad discovered the precise location and sequence of two human genes, known as BRCA1 and BRCA2, mutations of which can substantially increase the risks of breast and ovarian cancer in those patients in which the mutations are present. The inventors isolated the genes from the human genome and developed tests to determine if individuals have the genetic mutations and therefore the increased cancer risk. The tests require the DNA to be isolated before testing can occur.

Myriad obtained a number of patents based on this discovery, including patents claiming the isolated DNA coding and isolated cDNA coding for the BRCA1 and BRCA2 genes. With these patents, Myriad asserted the exclusive right to administer the genetic tests for the mutations of these genes that would indicate an increased cancer risk.

The PTO has been issuing these types of patents since *Chakrabarty*. Specifically, isolated DNA and cDNA do not exist in nature separated and isolated from the remainder of the human genome. Therefore, they are not naturally occurring and qualified for patents as "manufactures" or "compositions of matter."

A group of doctors and patients, led by the American Civil Liberties Union, sued Myriad and the PTO, seeking a declaration that the claims of the patents were invalid and that these inventions were not eligible for patent protection. If the court agreed with the plaintiffs, they would be free to administer the tests at facilities not administered by Myriad, and they would not have to pay license fees to Myriad for performing such tests.

## Supreme Court Opinion

When the case finally reached the Supreme Court, Justice Thomas wrote for a unanimous Court that claims to isolated DNA are not patent eligible, while claims to the synthetically created cDNA are.

His analysis started with the text of § 101, but then recognized several judicially created exceptions to the broad wording of the statute: laws of nature, natural phenomena and abstract ideas.

> Without this exception, there would be considerable danger that the grant of patents would "tie up" the use of [basic tools of scientific and technological work] and thereby "inhibit future innovation premised upon them."

In its reasoning regarding the isolated DNA, the Court reasoned that Myriad did not create anything. Its principal contribution was uncovering the precise location and genetic sequence of the BRCA1 and BRCA2 genes. The Court determined that "separating [those] gene[s] from [the] surrounding genetic material is not an act of invention." The extensive effort indicated by Myriad does not warrant a patent under § 101.

The Court did recognize that cDNA is a different matter. Isolated cDNA sequences do not exist within nature or the human body. They retain some characteristics of naturally occurring DNA, but are sufficiently distinct to warrant patent eligibility.

## Implications

One thing to note about this case is the fact that the plaintiffs did not acquire the relief initially sought. In the original complaint, the plaintiffs also challenged Myriad's claims to methods of screening cancer patients. It pursued these claims through most of the litigation, arguing that they were directed to abstract ideas and were thus not patent eligible. The Federal Circuit upheld these method claims and the Supreme Court declined to review that decision. Thus, the win is in a sense a Pyrrhic victory: the claims to methods of screening cancer patients for the genetic mutation remain in force. Nobody else can practice these methods without infringing the claims.

The historical underpinnings for a patent system generally stem from the desire to encourage investment in innovation and also to encourage disclosure of innovative discoveries and advancements. In exchange for disclosure of new inventions, patents permit innovators to exclude competition for a limited time and to charge monopoly profits during the limited term of the patent. The *Myriad* opinion instead seems to suggest that patents inhibit rather than encourage research.

How will this opinion affect the biotechnology industry? Given the extensive costs of research in these areas, will companies continue to make large scale investments? Following recent Supreme Court opinions on patentable subject matter, including Myriad, it seems that patents in the area of personalized medicine will be difficult to obtain and enforce. Further, many biotechnology companies are working on ways to grow organs that can be transplanted into the human body to replace defective organs. The goal is for these organs to be as similar to the natural organs as possible. This opinion seems to indicate that such organs could not be patented.

As far as specific guidance, the Supreme Court opinion did not provide a great deal of help. The Court specifically noted that it was not considering the patent eligibility of DNA where the order of the naturally occurring nucleotides has been altered. Where is the line? How different, how "inventive" does the new molecule or sequence need to be to be eligible?

The Court also noted that no method claims were at issue. Innovative methods of manipulating genes would appear to still be patent eligible. Further, no applications of knowledge about the genes were at stake. If the claims were limited to such applications, they would presumably also be patent eligible.

The Supreme Court has been reviewing a number of recent cases regarding patent eligibility. It has come down on the side of ineligibility in each one, thereby limiting the subject matter that can be patented. Will the Court continue to limit what can be patented or will it now let the dust settle for a while? P

Kelly A. Lavelle

# Insurance Broker Liability for Failure to Procure Adequate Insurance and the Duty of the Insured to Read the Policy

Policyholders hire brokers to reduce the risk that inadequate insurance will be procured. When an insurance claim is denied or a policy's limit of liability is insufficient, the policyholder will look to the broker's actions to determine liability. When an insurance broker promises, or gives some affirmative assurance, that he will procure a policy of insurance under such circumstances as to lull the insured into the belief that such insurance has been affected, the law will impose upon the broker the obligation to perform the duty which he has assumed.[1] Failure to perform this duty may result in liability under a number of theories including breach of contract and professional negligence.[2]

In response to an insured's claim that is premised on a broker's failure to procure adequate insurance, the broker may raise the defense of the insured's negligence in failing to read the policy. However, this defense is not always successful.

## Insurance Broker Can be Liable to Insured Who Failed to Read Policy

The majority of courts have held that insurance brokers cannot avoid liability for failure to procure the correct insurance by claiming that the insureds have a duty to read their insurance policies.[3] In other words, the comparative fault defense is unavailable to an insurance broker who asserts that the client failed to read his or her insurance policy.

In *Morrison v. Allen*,[4] the defendant issued a life insurance policy which was signed but not read by the plaintiffs. Two months after the policy was issued Mr. Morrison died as a result of injuries from a car accident. After making a claim for life insurance, Mrs. Morrison received notice that the claim was denied because the application was improperly completed with respect to information regarding a driver license suspension. Mrs. Morrison filed a claim alleging that the agents negligently failed to properly procure the insurance. The agent countered with the fact that the Morrisons did not read the application.

The Tennessee Supreme Court addressed this defense stating that "[a]gents employed…for their expertise…may not claim any greater duty on their clients' part to anticipate and rectify their errors." The Court would not allow the agents to shield their own negligence with the fact that their clients didn't catch their mistakes.

Similarly, in *Aden v. Fortsh*,[5] the New Jersey Supreme Court held that "[i]t is the broker, not the insured, who is the expert and the client is entitled to rely on that professional's expertise in faithfully performing the very job he or she was hired to do."[6] However, the court acknowledged that the comparative negligence principles could be applied in a professional malpractice case in which "the client's alleged negligence, although not necessarily the sole proximate cause of the harm, nevertheless contributed to or affected the professional's failure

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to perform according to the standard of care of the profession."[7] For example, if a client interfered with a professional in his or her performance by withholding or failing to provide pertinent information to that professional concerning the matter for which the professional was hired, then an argument can made that the client's action should be barred based on comparative negligence principles.[8]

## Insured's Failure to Read May Amount to Comparative Negligence

Some jurisdictions have recognized that while an insured's failure to read a policy does not operate as a bar to relief, in certain situations, it may amount to contributory or comparative negligence.[9] The issue becomes whether there is evidence from which a jury could find that, under the relevant circumstances, it was unreasonable for the insureds not to have read the policy.

In *Fillinger v. Northwestern Agency, Inc. of Great Falls*,[10] the defendant denied coverage for an accident that occurred during a hunting trip guided by the insured. The insured sued the broker for failure to procure adequate insurance. The court viewed the issue raised as "not being whether the insureds had an absolute duty to read the policy, but rather was there evidence from which the jury could have found that, in the circumstances of this case, it was not unreasonable for the insureds not to read the policy and whether the insureds acted reasonably in relying upon any representations made by their agent."[11] The court quoted *Fiorentino v. Travelers Ins. Co.*[12]:

> When the insured informs the agent of his insurance needs and the agent's conduct permits a reasonable inference that he was highly skilled in this area, the insured's reliance on the agent to obtain the coverage that he has represented that he will obtain is justifiable. The insured does not have an absolute duty to read the policy, but rather only the duty to act reasonably under the circumstances. The circumstances vary with the facts of each case, and depend on the relationship between the agent and the insured.

The Montana Supreme Court held that while insureds do not have an "absolute" duty to read their policy, their failure to do so may amount to contributory negligence.

## Insurance Broker Is Not Liable to Insured Who Failed to Read Policy

In a minority of jurisdictions, an insured's duty to read an insurance policy is absolute and may protect an insurance broker from a claim for failure to procure adequate insurance.[13] For example, in *MacIntyre & Edwards v. Rich*,[14] the insured, Scott and Margaret Rich, requested that insurance agency MacIntyre & Edwards, Inc., place their homeowner's coverage with Glen Falls Insurance Company. Per Scott Rich's request, the policy provided for an unlimited guaranteed replacement cost. In 2000, Glen Falls notified MacIntyre & Edwards that renewal policies for 2001 would have limits or caps on coverage. For the Riches, this meant that they would be insured for 125 percent of the total amount of insurance available for the dwelling, contents and other structures at the location. The agent received the notice but did not review it and did not relay the information to the Riches. The Riches admittedly did not read the renewal documents.

In 2001, the property was destroyed by fire and the Riches filed a lawsuit against MacIntyre & Edwards arguing that the agency failed to inform them of the change in coverage and that as a result of the agency's failure to inform the Riches of the changes in the renewal policy, the Riches suffered damages in excess of $250,000. The court held that the Riches had a duty to read their insurance policy and barred recovery against the agent noting that the change to the policy was readily apparent and if the Riches had reviewed the documents they would have been aware that they did not have the coverage they had requested.

However, it should be noted that some of the minority jurisdictions recognize an exception to this defense. The court in *Canales v. Wilson Southland Ins. Agency*[15] held that while generally, an insured is obligated to examine an insurance policy, the rule does not apply when (1) the broker has held himself out as an expert and the insured has reasonably relied on the broker's expertise to procure the requisite insurance or (2) there is a "special relationship" of trust which would prevent or excuse the insured of his duty to exercise ordinary diligence.[16] P

1 *web2.westlaw.com/find/default.wl?mt=Pennsylvania&db=BC-COMPANYSRBD&rs=WLW13.04&docname=CIK(LE10237295)&rp=%2ffind%2fdefault.wl&findtype=l&lvbp=T&vr=2.0&fn=_top&sv=Split&returnto=BusinessNameReturnTo&pbc=A03DD158&utid=1" \t "_top" Avondale Cut Rate, Inc. v. Associated Excess Underwriters, Inc.*, 406 Pa. 493, 178 A.2d 758 (Pa. 1962)

2 *Saunders v. Cariss*, 224 Cal.App.3d 905, 908-09, 274 Cal.Rptr. 186 (1990)

3 *Aden v.Fortsh*, 169 N.J. 64, 776 A.2d 792 (2001); *Williams v. Hilb, Rogal & Hobbs, Ins. Servs. Of Calif.*, 177 Cal.App.4th 624, 98 Cal.Rptr.3d 910 (2009)

4 338 S.W.3d 417 (Tenn. 2011)

5 169 N.J. 64, 776 A.2d 792

6 *Id.* at 69-70, 776 A.2d 792

7 *Id.* at 77, 776 A.2d 792.

8 *Id.*

9 *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 979 N.E.2d 1181 (N.Y. 2012.); *Fiorentino v. Travelers Ins. Co.*, 448 F.Supp. 1364 (E.D.Pa.1978); *Floral Consultants, Ltd. v. Hanover Ins. Co*, (Ill.1984), 128 Ill.App.3d 173, 83 Ill.Dec. 401, 470 N.E.2d 527; *Kirk v. R. Stanford Web Agency, Inc.* (N.C.App.1985), 75 N.C.App. 148, 330 S.E.2d 262; *Martini v. Beaverton Ins. Agency, Inc.*, 314 Or. 200, 838 P.2d 1061, 1067 (1992).

10 *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 283 Mont. 71, 938 P.2d 1347 (1999).

11 Id. at 79, 938 P.2d at 1352.

12 448 F.Supp. 1364 (E.D.Pa.1978)

13 *Westchester Specialty Ins. Serv., Inc. v. U.S. Fire Ins. Co.*, 119 F.3d 1505(11th Cir. 1997); *Dahlke v. John F. Zimmer Ins. Agency*, 252 Neb. 596, 567 N.W. 2d 548 (1997).

14 599 S.E.2d 15 (Ga.App. 2004)

15 583 S.E.2d 203 (Ga. App. 2003)

16 Id. at 204


Kathleen Hatfield

# Congress Seeks Funds to Address Shortage of Primary Care Health Workers

In April, Senator Bernie Sanders of Vermont chaired a subcommittee hearing of the Senate Health, Labor, Education and Pension Committee on the looming primary care worker shortage. He stated, "some 45,000 people unnecessarily die each year because they don't get to a doctor when they should." He declared that lack of access to primary care is a serious national concern especially acute in underserved rural communities and inner cities.

Equally alarming is America's projected inability to treat scores of new patients: the American Association of Medical Colleges estimates the shortfall in physicians could reach approximately 91,500 by 2020, and more than 130,000 by 2025. Why the shortage?

## The Problem

First, the Affordable Care Act will soon extend medical coverage to over 30 million more Americans. Second, the U.S. population continues to age and will need more care: it is projected that 10,000 Americans will turn 65 years old *each day for the next 20 years*. Third, while Medicare pays a significant share of the cost of training new doctors, money is tight and new doctors are expensive.

Medicare reimburses hospitals for some of their training costs using Graduate Medical Education (GME) payments tied to the level of Medicare services provided by the hospital. (Community Health Centers (CHCs) are also reimbursed with Medicare funding, and their costs are similarly calculated based on the facility's Medicare share.)

Hospitals seek to expand the number of new GME-funded physicians they can train but are hampered by the existing residency "cap" enacted by law as part of the 1997 Budget Act. The cap limits hospitals to a certain number of residents and prevents hospitals from increasing the amount of Medicare GME they can dedicate to training residents. Legislation to expand the cap has been introduced in several past congresses by Senator Bill Nelson (D-FL), but this year the Congress seems to be taking the issue more seriously: upon its introduction this year, cosponsors were Senate Majority Leader Harry Reid (D-NV) and Charles Schumer (D-NY). Additional Senate supporters now include Bob Casey (D-PA), Debbie Stabenow (D-MI), Bob Menendez (D-NJ) and William "Mo" Cowan (D-MA), the first three of whom serve on the Senate Finance Committee to which the bill has been referred.

Other congressional champions who seek to enlarge the healthcare workforce believe the nation should also expand the number of Federally Qualified Health Centers (FQHCs), which today provide medical, dental and behavioral health, as well as prescription drugs, to 22 million patients through 1,200 health centers. Other members of Congress have proposed bills to provide Medicare-funded GME to train physicians not only in hospitals, but also in health centers. To this end, Sec. 5508 of the Affordable Care Act provided $230 million for five years to support the expansion of primary care physician residency training in community-based ambulatory "Teaching Health Centers (THCs)." The funding built on years of evidence which

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showed that family physicians who train in health centers are nearly three times more likely to practice in underserved settings upon graduation than residents who never worked in CHCs. Among the 22 THCs created to date, 39 different sites nationwide are being funded in the amount of $150,000 per resident.

Further, while many advocates of more primary care providers focus on the expansion of GME to train more doctors and dentists, others believe the scope of the problem is too big to address with physicians alone. They argue that Medicare and even Medicaid-GME funding should be expanded to cover the training of graduate Nurse Practitioners (NPs) employed not just in hospitals, but also in different types of health centers. To this end, Section 5316 of the Affordable Care Act created a Family Nurse Practitioner Residency Training Program (NPRTP) in 15 to 20 FQHCs and Nurse-Managed Health Clinics (NMHCs) nationwide. To date, the program has helped establish NP residency training programs – most affiliated with universities – in California, Connecticut, Maine, Massachusetts, Pennsylvania, Texas and Washington. With additional funding, more NPRTP locations will be established in Alaska, Ohio, Mississippi, New Jersey, New York and North Carolina.

U.S. medical schools argue that they are working to solve the crisis by enrolling 30% more doctors by 2016. However, they have not yet seen a proportionate increase in the number of residents trained at teaching hospitals because the aforementioned residency cap froze Medicare-GME funded training slots at 1996 levels. Community health advocates go further and argue that GME funding must be expanded to cover physician training in both hospitals and health centers. Yet others argue, again, that federal funds should support training not only for doctors, but also other providers such as Nurse Practitioners in hospitals, health centers, Nurse-Managed Health Clinics and others. Clearly, pressure to address the problems outlined above is growing. Without changes to existing law, the fundamental goal of increased accessibility to affordable healthcare will not be realized.

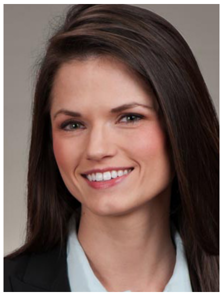
## Get Involved

How can hospitals, medical and health centers, and U.S. institutions of higher learning, including both medical and nursing schools, increase the number of heathcare providers needed? They can work to support legislative initiatives to address the workforce shortage:

- The Resident Physician Shortage Reduction Act (S. 577/H.R. 1180), introduced by Senators Bill Nelson (D-FL), Harry Reid (D-NV) and Charles Schumer (D-NY) in the upper chamber and by Reps. Joe Crowley (D-NY) and Michael Grimm (R-NY) in the House of Representatives, would expand the residency cap and create 15,000 new GME slots (3,000/year) over five years.
- The Training Tomorrows Doctors Today Act (S. 577/H.R. 1201), introduced by Reps. Allyson Schwartz (D-PA) and Aaron Schock (R-Ill), would also create 15,000 new GME slots over five years but would reserve one-third of the new residency slots for teaching hospitals that seek to train over their Medicare cap. This bill would also give first preference to funding of hospitals in states with new medical colleges.
- The Primary Care Workforce Access Improvement Act (H.R. 487), introduced by Reps. Mike Thompson (D-CA) and Cathy McMorris Rodgers (R-WA) would establish pilot projects that permit a portion of GME payments to go directly to community-based primary care physician residency programs; not just hospitals. Under the bill, supported by the American Association of Family Practitioners (AAFP), community-based facilities would collaborate with local hospitals, which would still provide residents with necessary in-patient training. Four models are identified for testing under the bill, which include:
  - a community-based entity working with two or more hospitals;
  - two hospitals working together to develop a primary care program;
  - a hospital subsidiary or independent corporation working with the community to further primary care; and
  - a medical school or university in collaboration with a hospital.
- Legislation is also being drafted by several members of Congress to reauthorize Sec. 5508, the Teaching Health Center Graduate Medical Education (THCGME) program, in response to support from the newly-established American Association of Teaching Health Centers (AATHC).

Hospitals, schools of medicine and nursing, and FQHCs/CHCs all have a stake in whether these legislative proposals become law. If you wish to affect the outcome of these congressional deliberations, please contact me. P

Joey McCue



Logan Wells


# I Liked It When I Signed It – But I Don't Like It Now: Limitation of Liability Clauses

Generally, everyone is happy when the contract is signed. Goods or services are sold, and money changes hands. Everything is good – until it is not. That is when we, as lawyers, get involved. That is also the point at which people reread, or worse, read for the first time, the contracts they signed.

Our society can neither function nor prosper without the use of contracts. Accordingly, the freedom of contract endures as a bedrock legal principal. An equally important, corresponding legal principal is that, barring extenuating circumstances, parties are bound by the terms of those contracts they freely enter into. This general principle, however, is not without exceptions. This article explores the application of one of those exceptions, the doctrine of unconscionability, to limitation of liability clauses in the context of a contract many of us will be a party to at least once in our lifetime, the home inspection contract.

Unconscionability is the "absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (S.C. 2007). *But see Lucier v. Williams*, 841 A.2d 907, 911 (N.J. Super. Ct. App. Div. 2004) ("There is no hard and fast definition of unconscionability."). "The doctrine [of unconscionability] is not one to be applied to disturb the agreed allocation of risk, even if it should result from superior bargaining power of one party, but rather to prevent oppression and surprise." *Coker Int'l, Inc. v. Burlington Indus., Inc.*, 747 F. Supp. 1168, 1172 (D.S.C. 1990).

In a recent decision, *Gladden v. Boykin*, 739 S.E.2d 882 (S.C. 2013), the South Carolina Supreme Court upheld the limitation of liability clause in the Palmetto Home Inspection Services, LLC ("Palmetto") inspection contract. Finding the provision, which limited Palmetto's liability to the $475.00 Mrs. Gladden paid for the home inspection, was not unconscionable, the court stated:

> Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

739 S.E.2d 882, 884-85. In *Gladden*, the home inspector was self-employed, operating out of his home, while Mrs. Gladden was trained as a real estate agent. It was undisputed that Mrs. Gladden read the contract prior to signing

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and paying for the home inspection services. There was no allegation that Mrs. Gladden was uneducated or unable to protect her own interests. Quite the reverse, Mrs. Gladden negotiated with numerous parties throughout the process of purchasing the home and specifically sought Palmetto's services, passing on a different home inspector described as "harder but best." *See Jordan v. Diamond Equip. & Supply Co.*, 207 S.E.3d 525 (Ark. 2005) (finding an exculpatory clause enforceable in part because the plaintiff had sought the services of the defendant).

The *Gladden* court further explained, "Limitations of liability and exculpation clauses are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider or offer service at a lower price, in turn making the service available to people who otherwise would be unable to afford it." 739 S.E.2d 882, 884 (citing *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731 (Tex. App. 2005) (noting courts uphold limitations of liability in burglar and fire alarm system contracts and finding limitation of liability clause in home inspection contract commercially legitimate for the same reasons)). Accordingly, the court found the clause was not unconscionable.

Courts in other jurisdictions have also found similar home inspection contracts, pursuant to which the home inspecting company's liability for any loss or damages arising out of the inspection and report would be limited to the fee paid for its services, were enforceable and not unconscionable. *See, e.g., Moler v. Melzer*, 942 P.2d 643 (Kan. App. 1997) (Clause in home inspection contract limiting inspector's liability to cost of inspection, was not unconscionable, as clause was not hidden, and record gave no indication of an inequality of bargaining or economic power, nor any indication that purchaser could not have sought a different inspection company.); *Head*, 159 S.W.3d 731 (Clause in home inspection contract, which limited home inspector's liability to the amount of the fee paid for the inspection, was not unconscionable, where purchaser was free to choose another inspection service, she was represented by an attorney in the transaction, and without the limitation clause, the inspector was subject to significant risk, which would likely cause the cost for inspection services to increase.).

Still, other courts have refused to enforce limitation of liability clauses in home inspection contracts. In those cases, however, it appears that, unlike South Carolina, the states in which those courts sit have well-documented public policies indicating home inspectors' liability should not be so limited. For example, in *Lucier v. Williams*, 841 A.2d 907, the court rejected a limitation of liability clause in a home inspection contract, relying heavily on a New Jersey statute requiring home inspectors to maintain errors-and-omissions insurance of at least $500,000 a year. The court also refused to enforce a limitation of liability clause in a home inspection contract in *Pitts v. Watkins*, 905 So.2d 553 (Miss. 2005); however, as in New Jersey, Mississippi requires home inspectors to carry general liability insurance and errors-and-omissions insurance of at least $250,000.

Correspondingly, the test applied in determining whether an exculpatory clause contravenes public policy is also significant. In South Carolina, courts have generally held that considerations of public policy prohibit a party from limiting liability for its negligence in the performance of a duty of public service, or where a public duty is owed, or public interest is involved, or when the parties are not on roughly equal bargaining terms. *Pride v. S. Bell Tel. & Tel. Co.*, 138 S.E.2d 155 (S.C. 1964). Courts applying the standards from *Tunkl v. Regents of University of California*, 383 P.2d 441 (1963), in evaluating exculpatory clauses tend to view such provisions in a harsher light. *See, e.g., Carey v. Merritt*, 148 S.W.3d 912 (Tenn. App. 2004) (applying *Tunkl* factors to find exculpatory clause in home inspection contract violated public policy).

Therefore, in light of courts' varied treatment of limitation of liability clauses in home inspection contracts, it is helpful to consider the following in determining whether such a clause is enforceable:

1. Is the contract one of adhesion?
2. What is the relative disparity in the parties' bargaining power?
3. What is the parties' relative sophistication?
4. Was the inclusion of the challenged clause a surprise?
5. Is the clause conspicuous?
6. Does the clause conflict with established public policy?

While this article deals with limitations of liability provisions in the home inspection context, the same analysis would likely be used by courts when evaluating such provisions in other professional contracts, e.g., pest control companies and appraisers. In this broader context, one must consider whether the exculpatory clause is reasonable and appropriate given the service it concerns. There should be a correlation between the amount charged for the service and the liability the provider is undertaking when those services are performed. P

William Mason

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# Agricultural Contract Clauses for Supplying Energy Crops to the Biofuels Industry: Part II

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

- Contracts for energy crop supply must be competitive and fair to farmers in the short- and long-term to attract the required quantities and quality of switchgrass, miscanthus, sorghum, agricultural residues and other energy crops.
- Biomass conversion facilities are dependent on reliable and uniform feedstock, and supply arrangements must address those requirements over the life of the facility.
- Bankers and investors providing biomass conversion project financing demand assurance of feedstock supply for the life of the project, and agricultural contract arrangements must provide confidence in the availability of feedstock for the long-term.
- Mother Nature dictates requirements and introduces uncontrollable variables into all parties' contract expectations. Supply contracts will fail unless they: take account of drought, storm or other acts of God; are adapted to realistic agricultural, capital and labor input cycles, as well as requirements for planting, cultivating and harvesting; and fit the particulars of the specified crop.[1]

Traditional agricultural contracts include agreements between farmers and those that purchase or market the farmers' crops, agreements between producers and suppliers, and agreements concerning land use. Two common forms of agricultural contracts, elements of each, common contractual clauses, and state statute considerations are summarized below.

## Cooperative Marketing Contracts

Agricultural cooperatives are a method by which farmers and purchasers work together to accomplish their respective goals. To meet these goals, a cooperative may enter into marketing contracts requiring its member-farmers to sell a specified portion of the member's crop or a specified crop produced from identified acreage exclusively to the cooperative. Marketing contracts under a cooperative structure may, in some cases, be limited in duration by state statute. For example, Tennessee mandates that marketing contracts under a cooperative structure may not exceed ten year terms.[2]

Under a cooperative marketing contract, the member retains title to the crop until delivery, at which point title passes to the cooperative.[3] Therefore, the member has control of production decisions and assumes production-

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related risks. The cooperative may see this lack of control as a disadvantage; however, the contract between the member and the cooperative may alleviate some of the cooperative's concern by specifying the quality of crop that will be accepted by the cooperative under the agreement.

Successful performance of marketing contracts is the "life-blood" of a cooperative.[4] Because of the dependent relationship between members and cooperatives, courts are more willing to order specific performance in the event of breach by a member, even when there are ascertainable money damages or the contract contains a liquidated damages clause.[5] The courts reason that the breach by one member undoubtedly affects all members, including the members' ability to carry on business, and the general credibility of the cooperative. The availability of specific performance is an advantage for a biomass supply contractor to a cellulosic ethanol plant because there is less concern that the steady stream of biomass feedstock will be hindered by a member's breach of his or her marketing contract.

Cooperatives may prove to be extremely valuable in biomass production because of the close relationship between the cooperative and its members, which in turn fosters a reliable source for a large quantity of biomass feedstock.

## Leases of Farmland

The farmland lease is both a contract and a conveyance of an interest in real property.[6] The tenant, as grantee of a leasehold estate, has the right of exclusive possession and control of the land for the term of the lease.[7] There are two major categories of farmland leases: the crop share and the cash rent lease.

Under a crop share lease, the landlord receives a specified share of crop proceeds in return for providing the land and a share of input expenses.[8] The tenant provides labor, management and the remaining input costs.[9] This type of lease gives the landlord an enhanced return if production or market value of the crop increases; however, the landlord also shares with the tenant the risk of crop failure and declining market prices. Provisions commonly found in crop share leases include: method of crop splits, responsibility for payment of input expenses, and responsibility for storage of the crop.[11] Because rent is paid by collecting a share of the crop proceeds, the landlord will typically perfect a security interest in the crop.[12] The tenant will be required, by the terms of the lease, to grant to the landlord a security interest in the crop, and the landlord will perfect its interest by filing a financing statement.

Under a cash rent lease, the landlord receives payment for use of the land. The landlord typically pays real estate taxes and for major repairs on the premises, but pays no portion of input costs. The tenant pays for all input costs, retains the entire harvested crop, and provides the labor and management. In this arrangement, the landlord has a fixed return and assumes no risk as to crop yield or market price fluctuation. The landlord does, however, carry the risk of non-payment as well as the risk that the tenant will use farming practices or grow a crop that damages the leased land. Cash rent leases, like crop share leases, usually require that the tenant grant the landlord a security interest in all crops to ensure payment of rent.

Clauses commonly found in both crop share and cash rent leases include: rights of entry after termination of the lease, land use obligations, upkeep of the leased property, type of crop permitted, actions of the tenant that require consent of the landlord and general maintenance duties.[14]

It is common for farmland leases to be year-to-year leases that automatically renew unless one party terminates the agreement as specified in the lease documents. However, with respect to biomass, the contractor supplying feedstock to the biorefinery owner will likely want, or be required by the project owner, banker, or investor, to enter into relatively long-term leases. The character of biomass feedstock will often require leases for ten years or more in order to realize the full benefits of the crop. With this in mind, if the landowner is already leasing his or her farmland, the decision to grow biomass instead may be chiefly a financial one, based on the return offered by the contractor compared to available alternatives.

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

1 For example, whether a particular crop is an annual or a perennial, or grows from a seed or a rhizome.

2 Tenn. Code Ann. § 43-16-133. Note that this statute does not specifically prohibit an auto-renew contract. In fact, in 2004, the "Tennessee Processing Cooperative Law" was enacted, which specifies that five-year auto-renew terms are permitted. Tenn. Code Ann. § 43-38-114.

3 Some state statutes may provide caveats to this general rule. For example, in Tennessee, "title to crops is transferred to the cooperative upon delivery unless the contract expressly provides for transfer at another time." Tenn. Code Ann. § 43-38-114.

4 Donald B. Peterson & Keith G. Meyer, Agricultural Law in a Nutshell 285 (1995).

5 Id.

6 Donald B. Peterson & Keith G. Meyer, Agricultural Law in a Nutshell 95 (1995).

7 Id. at 96.

8 The share of proceeds will likely depend on local custom and the landlord's total input contribution. Shares generally range from a quarter to a half of all crop proceeds.

9 Input costs refer to seed, fertilizer, chemicals, pesticides, fuel, machinery, and the like.

10 Peterson & Meyer, supra at 97.

11 Id. at 103.

12 A security interest will only be appropriate if the tenant retains title to the entire harvested crop until delivery to the landlord of its share.

13 Peterson & Meyer, supra at 103.

14 Certain crops are more invasive than others (e.g., switchgrass) and may require contracts to be more specific as to liability for damage to farmland and obligations of the tenant to return farmland to its original condition upon termination of the contract.

Deirdre Fletcher

# Time to Update Your Social Media Policy? Guidance from the NLRB

Use of web-based technologies to interact via the internet with networks of people ("social media") has revolutionized the way we share and distribute information and given rise to new complexities in the employer-employee relationship. Employees post content through platforms such as Facebook, blogs, and online forums, and employers use this powerful medium to promote their businesses, communicate with customers, and attract candidates.

If managed effectively, social media can be beneficial to both employees and businesses. However, employers who do not have a well-written policy with clear guidelines about when, where, and for what purposes social media may be used in connection with employment, leave themselves vulnerable to legal risks such as charges of unfair labor practices involving termination of employees for posts to Facebook.

## National Labor Relations Board Turns Its Focus to Social Media

The law has been slow to keep pace with the rapid growth of social media in the workplace. However, the National Labor Relations Board ("NLRB"), which investigates and remedies unfair labor practices, has focused its attention on protecting employees' rights to speech under the National Labor Relations Act ("NLRA") by scrutinizing employer policies aimed at regulating use of social media and determining what online communications fall within the protection of the NLRA.

The NLRA applies to most private employers[1] and grants to both unionized and non-unionized employees (except management) the right to engage in "concerted activity," which occurs "when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment."[2] (Section 7) "Concerted" actions include communicating with coworkers and third-parties about wages, management, and collective-bargaining, among others. Even unprofessional communications may be protected, if they relate to terms and conditions of employment.[3] In some cases, the actions of an individual employee may be protected if the employee is acting on behalf of other employees. Section 8 of the NLRA prohibits employers from interfering with an employee's exercise of Section 7 rights.[4]

In an attempt to provide guidance for navigating unchartered legal terrain, the NLRB's General Counsel issued three reports between August 2011 and May 2012 ("Reports") summarizing treatments by administrative law judges ("ALJ") in 35 cases arising in the context of "today's social media."[5] These were followed by the first Board decisions scrutinizing the lawfulness of policies under the NLRA and addressing when an employee can be discharged on the basis of social media activity.

In *Costco*[6], the policy advised employees that they could be fired for posts that defame the company or any person. Reversing the ALJ, the NLRB found the policy violated Section 8 because it was "over broad" and "would reasonably tend to chill employees" in the exercise of their rights to engage in "concerted

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activity." Employees could "reasonably" conclude that the policy prohibited them from protesting Costco's treatment of its employees, particularly since it included no language excluding protected communications.

The NLRB further explained that where a challenged policy does not explicitly restrict Section 7 rights (as in *Costco*), the violation is dependent upon showing: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule had been applied to restrict the exercise of Section 7 rights.

In *Karl Knauz Motors, Inc.*[7], the employee of a BMW dealership was terminated after posting photos of a car accident at his employer's neighboring dealership to his Facebook page with the caption: "This is your car. This is your car on drugs." The NLRB agreed with the ALJ's finding that the posts were not protected, but rather "a lark," that was neither a communication with a coworker nor related to any term of employment. The ALJ did rule, however, that later posts of photos of what the employee and a coworker discussed as "cheap refreshments" served at a promotional event were protected because they were part of an employee discussion and related to compensation. The NLRB did not address these latter posts, because the employee was terminated solely due to unprotected activity.

Decisions in *Hispanics United* (unlawful discharge for Facebook conversation employer considered "bullying conduct") and *Design Technology Group* (unlawful termination for Facebook "protest" about working late hours in unsafe neighborhood) followed in December 2012 and April 2013, respectively.[8] These four rulings suggest the NLRB takes a broad view of what constitutes protected social media activity considering it the modern-day equivalent of "water cooler" speech.

## What's "Unlawful"?

The Reports, although not as weighty as adjudication,[9] coupled with the NLRB rulings provide some direction when drafting a policy. A full discussion of their analyses is beyond the scope of this writing, but some key general principles emerge.[10] The NLRB inquiry is fact-specific, but employers should consider the following examples of policies deemed *unlawful* because "overly broad" and potentially "chilling" to an employee's right to engage in protected speech:

1. "Blanket" bans prohibiting:
    a. Derogatory remarks about employer, coworkers, customers or products.
    b. Posts that damage or defame the company or an individual.
    c. Posting "anything you wouldn't want your supervisor to see" or "inappropriate" photos of employer or coworkers.
    d. Contact with the media or government agencies (or requiring pre-authorization).
    e. Disclosure of "confidential" information (if wage, payroll or contact information is included).
    f. Posting any material non-public information.
    g. Use of employer logos and images of store or product without authorization.
2. Requiring:
    a. Employees to obtain approval before identifying themselves as employees or to attach disclaimers to personal posts.
    b. Confidentiality regarding internal employee investigations.
    c. Posts to be "accurate".
3. "Courtesy" provisions – "never be disrespectful."
4. "Zero tolerance" policy for bullying.
5. Suggesting use of "Open Door" policy rather than social media.
6. "Use Good Judgment about What You Share and How You Share" policies.

7. "Savings clauses" (if policy is otherwise over broad).

Employees do not have free reign to gripe with impunity. The decisions emphasize that posts which merely reflect an individual's contempt, or are simply egregious, with no connection to a shared concern about working conditions, likely are not protected speech. Concerted activity loses protection if it isn't just inaccurate, but "maliciously false" or "opprobrious," reflecting a desire to harm.

## Is Any Policy Lawful?

The policies deemed "unlawful" are troubling because they include familiar provisions that employers rely on to cover common business concerns. In *Hispanics United*, the NLRB ruled the employer's "zero tolerance" bullying policy unlawful under Section 8, stating that "legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights…" suggesting that any policy that is so broad or vague that it may not be clear that it is not intended to restrict Section 7 rights is unlawful.

However, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are less likely to be unlawfu1. Examples of *lawful* policies include:

1. Prohibiting:
   a. Spread of "maliciously false" statements.
   b. Disclosure of trade secrets or information subject to regulatory protection.
   c. Threats of violence, harassment or discrimination.
   d. Use of company resources for social media activities during "working time."
2. Requiring "appropriate business decorum" when using electronic means to communicate.
3. Reasonable restrictions on contact with media or government agencies if tied to a specified business rationale.

## Walmart's Policy Withstood Scrutiny

*Walmart* was one of seven cases discussed in the May 2012 Report and the only policy found lawful because it is well-crafted, direct, uses "everyday" language, provides definitions supported by examples, and addresses legitimate goals with respect to social media, enabling employees "to differentiate unacceptable behavior from protected concerted activities" with no unlawful "chilling" effect.

Although any policy should be employer-specific, examining Walmart's policy[11] with the NLRB's review of the decision[12] is enlightening. Consider these practices when drafting:

1. Tailor policy to company's culture.
2. Avoid broad language and blanket prohibitions.
3. Provide definitions, examples and guidance tied to goals unrelated to terms of employment.
4. Be consistent across policies.
5. Include savings clauses with examples of excluded conduct.
6. Distinguish between employer-owned and personal social media accounts.[13]
7. Don't ask for access to personal accounts.[14]
8. Review user agreements for Facebook and other platforms.
9. Before disciplining an employee ask:
   - Does the activity fall within scope of NLRA protection?
   - Does the content relate to terms of employment?
   - Is it "maliciously false" or unlawful?
   - Consulting legal counsel.

The law in this area is far from settled. Employers and practitioners should continue to monitoring developments and regularly review and update social media policy as necessary.

1 The NLRA applies to any private sector employer that has an "impact on commerce". It does not apply to federal or state governments or those who employ only agricultural workers or are subject to the Railway Labor Act.

2 See 29 U.S.C. §§151-169.

3 The Supreme Court explained that even "the most repulsive speech" is protected as long as "it falls short of a deliberate or reckless untruth." Linn v. Plant Guard 383 U.S. 53 (1996).

4 See 29 U.S.C. §§151-169.

5 NLRB, General Counsel: Memoranda OM 11-74 (Aug. 18, 2011); OM 12-31 (Jan. 24, 2012); and OM 12-59 (May 30, 2012). Available at: www.nlrb.gov/reports-guidance/operations-management-memos.

6 358 NLRB No. 106 (Sept. 7, 2012)

7 358 NLRB No. 164 (Sept. 28, 2012)

8 359 NLRB No. 37 (Dec. 14, 2012) and No. 96 (Apr. 19, 2013)

9 The GC's opinion is valuable, but the Reports are not binding and do not carry the legal weight of Board decisions which are issued after a party appeals the decision of an ALJ.

10 In Noel Canning v. NLRB, the D.C. Circuit ruled that President Obama's three January 2012 recess appointments to the NLRB panel were unconstitutional and therefore invalid. The ruling has the potential to void all NLRB decisions made in 2012. It will be appealed to the Supreme Court, but it is unclear when or how the issue will be determined. Until then, as a practical matter, employers may want to consider social media jurisprudence as in effect and applicable.

11 Available at: corporate.walmart.com/social-media-guidelines.

12 See NLRB Advice Memorandum, Walmart CA 11-067171 (May 30, 2012). Found at: www.nlrb.gov/cases-decisions/advice-memos.

13 Disputes have arisen concerning who owns LinkedIn, Twitter and Facebook accounts with claims based upon: unauthorized use, theft of publicity, invasion of privacy, and tortious interference. See Eagle v. Morgan (E.D. Pa. 2013), PhoneDog v. Kravitz (N.D. Cal. 2011), and Maremont v. Susan Fredman Design Group (N.D. Cal. 2011).

14 As of May 1, 2013, 9 states have and 35 are considering laws that make it illegal to ask employees to provide access to private accounts. Facebook's terms of use prohibit disclosure of passwords.

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# Government Procurement and Tender Laws – an Israeli Perspective

## Introduction

Since its establishment as an independent state in 1948, Israel has made great progress from the land of "oranges and kibbutz" to a technologically advanced state with an economy driven mainly by R&D (research and development) and high tech industries. This progress has been supported by several reforms, including liberalization of the foreign exchange markets and the creation of various incentives to attract foreign investments. In addition, Israel became a party to various international treaties with the major players worldwide (such as free trade agreements, treaties for the avoidance of double taxation, investment treaties and R&D industrial cooperation treaties). In 2010, Israel became a member of the Organisation for Economic Co-operation and Development.

## Israeli Tender Laws – A Brief History

When Israel was established as an independent state in 1948, its legislation was composed of a mosaic of legal systems including the Ottoman and English laws. However, Israel has gradually developed an advanced judicial system, especially statutes enacted by the Knesset (the parliament of the State of Israel). Today, the Israeli legislation is a mix of common and civil law, with extensive ongoing independent codification especially in the commercial and corporate fields.

With respect to public tenders and procurement law, the first rules were formulated by the courts, based on two main fundamental principles:

Equality: fair competition and equal opportunity for all to enter into contracts with the public sector.

Economic efficiency: safeguarding the public interest, e.g. ensuring that the contract is made at the best price/conditions for the public sector.

The next stage in the development of tender law, by the late 1980s, was the legislation of several laws and regulations for procurement by public entities, which have mostly confirmed and developed the principles first established by the courts.

As a result of the courts' attempts to set clear boundaries in order to implant appropriate standards in a young country, tender laws and regulations have been enforced throughout the years in an extremely strict and literal manner. Only very complex tenders have been allowed more flexibility. Such a strict approach has been based mainly on the equality principle mentioned above. For instance, no deviation from the tender documents is allowed, since if all potential bidders had known that such a deviation would have been permitted, maybe more bidders would have participated in the tender. Moreover, in such event participating bidders may have proposed a better price and won the tender. In addition, deviations may be an easy way to cover "foul play."

**Hanan Salinger** is the founder and the managing partner of Salinger & Co. He represents both Israeli and foreign clients on a wide range of issues such as mergers and acquisitions, joint ventures, tenders, securities matters, licensing, distribution and agency agreements, breeder's rights, as well as litigation and arbitration.

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This strict approach, together with the complexity of the selection process of the winning bid, has constituted fertile ground for attempts to contest the results of tenders. Indeed, during the last 20 years, litigation relating to tenders in Israel has exploded. Now many public entities issuing large tenders add within the project timetable an expected period for the legal proceedings that may be initiated by a losing bidder requesting to cancel the tender or to be awarded the tender. Furthermore, contesting the results of a tender has been made easier, thanks to the increasing rights of access to information granted to the public in general, and to bidders in particular. For example, bidders are entitled to request copies of the minutes of the tender committee's meetings, of the correspondence with all bidders, of legal and professional opinions requested by the tender committee, and mainly of the winning bid itself. Such disclosure may only be limited in few specific cases, such as commercial secrets in certain circumstances.

Such information rights give the "disappointed bidder" a powerful weapon, since the review of such extensive documentation will in most cases reveal some deviation or alleged deviation from the terms of the tender.

This is why a foreign entity, when considering submitting proposals in international tenders published in Israel, is always surprised to find its legal counsel so picky regarding the risk of a possible deviation from the terms of the tender in the proposal, while such deviations may not have similar consequences in other countries.

## Some Highlights for Foreign Bidders

Comply precisely with prerequisites. In order to make it easy to check compliance, it is highly suggested to formulate the response using the same wording used in the tender itself. Bidders should refrain from attaching documents or certifications that suggest even a small deviation from the requirements of the tender.

Israeli tenders usually include prepared forms to be completed by bidders. Tenders documents are not always provided in Word format, and many bidders retype the forms in order to insert the responses and submit a nice looking proposal. However, such retyping often involves modifications, or even unintentional typos that may be meaningful (for instance, omitting the word "not" in a sentence). Any deviation from the wording of the forms as they appear in the tender may lead to disqualification of the bidder. If possible, it is recommended to complete the forms in handwriting, to request a Word format version or to ask for specific instructions as to how the forms should be completed.

The rules applying to deviations also apply to any reservations expressed by a bidder in its proposal with respect to a tender request, or with respect to any provision to which a bidder may condition its proposal. Any reservations or conditions in a proposal may lead to disqualification of the proposal. Accordingly, to the extent a bidder has any issues to discuss with the entity issuing the tender, the matter should be carefully examined on a case by case basis by the bidder with its local legal counsel, in order to determine the best course of action in any specific case.

All that has been said with respect to strictness applies even more to the bid bond or tender guaranty. ANY deviation will lead to disqualification, even if the deviation does not modify the scope of the bond, and believe it or not, even if the modification benefits the entity issuing the tender! **Israeli courts have disqualified a bid submitted with a bond which validity period was exceeding the period requested in the tender documents, since the tender issuer should not have to exercise its discretion in order to decide if any change in the wording of the bond is beneficial or not.**

Bidders should submit requests for clarification for any issue that is unclear, even for technical issues which, as detailed above, may have great importance. In addition, as a result of modifications made in the tender documents by the entity issuing the tender prior to the submission date, some contradictions or ambiguities may arise. For example, if the submission date has been postponed, and one of the prerequisites in the tender is experience of five years during the seven years preceding the submission date, a bidder fulfilling this requirement with respect to the original submission date may not be able to comply with respect to the postponed submission date.

In specific circumstances, for example in the case of a tender with special technological complexity, the selection process may include a best and final stage, in which the tender issuer requests bidders who have scored the highest scores in the tender to submit their best and final offers. In addition, negotiations may be conducted with certain or all of the bidders. The above may have implications with respect to the price and conditions proposed by a bidder in its bid, which should take into account that a discount may be requested at a later stage.

## Therefore…

…even if in certain branches of the law, the local laws in different countries may often be similar, based on judicial common sense or general principles of equity, it seems that tender laws are more to be seen as local laws. This may be especially true in Israel, where the courts had such a major contribution in shaping the tenders rules, based on specific cases brought before them. Accordingly, it is strongly recommended that any foreign company considering participating in a tender in Israel seeks legal guidance from a local firm specializing in international tenders. image of a company, the sensitivity level of information and safety aspects so that all employees know the company's rules and you can enforce them. It is advisable to include such a policy as standard in the staff regulations. P




Andreas Glarner

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# The Advantages of Switzerland as an IP Management Location

In 2011, the Canton of Nidwalden in Switzerland introduced its License Box, an attractive tax regime for IP (Intellectual Property) companies with a reduced tax rate for license income. After two years of positive experience, it may be considered the most liberal and advantageous among comparable systems within the European countries.

## Switzerland as Location for Innovation Companies

Switzerland is not only one of the world's leading financial centers, but also provides an outstanding environment for innovation. Switzerland ranks first in World Intellectual Property Organization's Global Innovation Index 2012 and is according to the Innovation Union Scoreboard 2013 the overall innovation leader in Europe, outperforming all Member States.

Factors which enable Switzerland to hold this position are certainly a stable political situation, a very stable currency with minimum transfer restrictions, highly sophisticated and secure financial institutions and the fact that Switzerland is home of some of the world's most recognized research institutions. Furthermore, its geographic location in the heart of Europe, its rich nature and the high quality of life, make Switzerland attractive for highly educated personnel.

Another key factor lies in Switzerland's tax system: Traditionally, Switzerland is known for competitive tax rates. This, on the one hand, is due to the fact that Switzerland has a direct democracy in which taxpayers have the right to vote on tax issues and governmental expenses. On the other hand, the states (cantons) are competing with each other to offer benefiting tax regimes which attract companies and individuals. With the introduction of the License Box system in 2011, the Canton of Nidwalden further reduced the taxing obligations for IP companies on net license income: The fixed income tax on net license income derived from the use of intellectual property is only one fifth of the regular income tax, i.e 8.8%.

Other European jurisdictions know very similar tax regimes for income generated through IP rights. This article will provide an insight on the differences of the different regimes and particular advantages.

## Concept of the License Box

The IP tax regime allows a legal entity with a statutory domicile in the Canton of Nidwalden to operate a separate division, the License Box, as part of its regular commercial operations. All IP and research and development (R&D) related activities, in particular related license incomes, are attributed to the License Box within the company. Incomes generated by the License Box are subject to the reduced tax rate.

Consequently, the License Box system allows a company to conduct any kind of operational business activities

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(i.e. employ personnel, conduct trade, R&D manage or actively use IP rights) and in the meantime profit from a reduced tax rate with regard to license income. Thus, there are no selective criteria an entity must fulfil in order to get access to favorable tax conditions regarding its licensing income.

The License Box reduces the tax rate for license incomes by 80%, i.e. to a cantonal income tax of 1.2%. Together with the federal tax (6.6%), the effective statutory tax rate for license income amounts to 8.8%.

## Broad Range of Privileged IP Rights

The definition of license income is based on Art. 12 para. 2 of the OECD Model Convention. Accordingly, license income "constitutes payments of any kind received as a consideration for the use of, or the right to use":

- copyrights of literary, artistic or scientific work including cinematograph films,
- patents,
- trademarks,
- designs or models,
- plans, secret formulas or processes, or for information concerning industrial, commercial or scientific experience (know-how).

It thereby remains irrelevant whether a patent or another IP right is registered in Switzerland: Profits from IP rights granted by third countries (e.g. U.S. patents) are also eligible for the relief.

Thus, the Canton of Nidwalden has chosen to adopt the widest definition of license income available within Europe. Most other European jurisdictions limit the application of a reduced IP tax rate to innovative profits derived from patents and possibly know-how. Only very few apply it to royalties derived from trademarks and none to all kind of copyrights.

The Swiss system does not – other than most of the comparable European models – differentiate between "old" and "new" IP rights. The reduced tax rate applies to any income derived from the IP rights defined under para. 1 above, i.e., independent of whether the IP rights have been developed before or after the introduction of the new tax regime.

Furthermore, it is irrelevant whether the Swiss IP company has been involved in the development of the the relevant IP right or if it has purchased the IP right in question from a third party. It is sufficient that the Swiss company receives license fees on licensed IP rights. Accordingly, passive IP holding companies also qualify for the regime. The Swiss system shares this advantage with Luxembourg. However, contrary to Luxembourg, even IP rights that have been purchased from an associated company fall under the License Box regime.

## Broad Range of Privileged IP Profits and Additional Tax Deductions

Both license incomes that have been generated through licensors situated in Switzerland, as well as abroad, fall under the scope of the tax reduction regime.

The reduced tax rate applies to net license income derived from qualified IPR. Thus, expenses in connection to the collection of the license fees may be deducted from the license income. The same applies to other financial and administrative expenses (including attributable tax costs) as well as depreciation and license payments to other companies.

Furthermore, the tax regime of the Canton of Nidwalden promotes R&D activities by allowing their full deduction as expenses, thus reducing the taxable income. In addition, tax provisions may be made for future R&D investments.

## Who Should Consider a License Box in Switzerland?

Taking into account the positive tax effect, nearly all companies having income from any form of IP rights should consider a License Box in Switzerland. Usually, and if there is no prior Swiss presence of a company, a turnover from IP of around USD 1'000'000 p.a. is recommended to make the establishment of a Swiss License Box profitable.

The setup and recurring costs are limited and can be agreed upfront with an appropriate service provider. These services normally include establishing and registration of the company, accounting, group reporting and tax fillings as well as providing a board member or director. Depending on the specific group requirements and the size of the company (i.e. total assets, turnover) the IP Company may even abstain from being audited.

The music and pharmaceutical industry were among the first to establish License Boxes in the Canton of Nidwalden. In the meantime, other industries followed and will follow. Keeping in mind that no local context is required, License Boxes are an alternative for many U.S.- based or other international companies having taxable income from IP rights, even if it is generated within a group.

## Conclusion

Even though the License Box of the Canton of Nidwalden has with currently 8.8% not the lowest effective tax rate on license income among the comparable systems of other European jurisdiction, it is, taking into consideration all relevant factors, likely to be the most advantageous:

- Other than with mentioned regimes, the reduced tax rates applies to a much broader catalog of IP rights, and in particular, includes profits generated from know-how and trade secrets.
- Consequently, there is no need to register additional IP in order to profit from the relief.

Moreover, the License Box tax relief also applies to license incomes gained from IP rights prior to their registration. This is of particular importance for companies operating in fast-moving markets where a technology may become outdated even before a patent registration has been granted.

Finally, the applicability of the regime is neither limited with regard to the source of the license payment nor to the developer of the IP right.

Reinier W.L. Russell

# Art and Business Law

Many pension funds, companies, banks and private individuals have bought works of art or even built art collections in recent years. The most important aspect is undoubtedly the aesthetic pleasure: you can sit back and admire a painting, a photograph or a sculpture whenever you want. The fact that the art market has been less affected by the economic crisis than other sectors is surely a pleasant bonus. However, art collectors may be confronted with legal issues that can have an impact on the value of their investments.

## Buying at Auctions

The art world has its own unique way of doing business. Purchase and sale often take place at auctions and by consignment. Auction houses usually act as intermediaries between sellers and buyers. The same applies to art dealers selling art on consignment. A purchase agreement, however, is entered into between buyer and seller. So who is the seller? Is it the auctioneer or the art dealer the artwork was consigned to? Or is it the owner? In the latter case there is no intermediary. That may not be completely insignificant as it can make a big difference for the buyer if he can turn to the auctioneer or art dealer he is familiar with, or if he has to contact an unknown seller in case any problems arise. A smart buyer should know who the actual seller is before making a purchase, and if he has actually empowered the intermediary he is dealing with to conclude the purchase.

Major auction houses usually do not disclose the names of the seller to the purchaser. This might lead to problems if a purchaser has a claim against a seller. If an intermediary does not wish to disclose the seller's name, the intermediary is presumed to be acting on his or her own behalf. In this case, a claim against the intermediary can be initiated. However, the custom of not disclosing the name of the seller can lead to unpleasant surprises if a work of fine art later turns out to be stolen. Usually, the general terms and conditions of auction houses exclude any liability for this. However, this liability exclusion clause is only applicable to professional art buyers and usually not to private individuals. Russell Advocaten has been active over the last decades in numerous cases defending the interests of both international auction houses as well as (private or professional) buyers and sellers from many countries.

## Origins Unknown

Before buying, it is very important to conduct research concerning the provenance of the artwork and to gather information with regard to its market value. The lack of provenance or gaps in a work of art's provenance can be an indication for a forged or stolen work of art.

The price can also indicate problems when works of art are offered for sale at a price below the market value, but well above the price for an imitation. Another shady situation is when an art dealer sells works of art that were consigned to him but does not forward the proceeds to the commissioner. A striking example of this is New York art dealer Lawrence Salander who embezzled tens of millions of dollars from his commissioners. Depending on the country in which the transaction takes place, the bona fide purchaser will be protected against claims by the original, duped owner. At the moment, we are defending such a bona fide purchaser of a work of art that may originally have been sold at an auction by Salander.

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## Not Made by the Artist

What happens if you have bought a forged work of art or if the object you purchased turns out to have been made by a different artist? In the Netherlands, the buyer can try to set aside the sales contract due to non-conformity ("my purchase is not what it should have been according to the contract or agreement") or due to error ("my purchase is not what I thought it was"). The buyer of forged sculptures by Rodin, Degas or Giacometti can request a refund of the purchase price on return of the artwork, which is what we are currently claiming in court. Art buyers have to bear in mind though that there can be changes in attribution and that such changes do not always render the original contract null and void.

## War-looted Art

Pursuant to Dutch law, the owner's right to claim stolen goods back expires after 20 years. However, special regulations apply to art looted during the Nazi regime which later came into possession of the Dutch state as part of the Nederlands Kunstbezit collection. The limitation period has been lifted for such claims and the Restitutions Committee will assess whether they are legitimate. After June 30, 2015, it will apply stricter criteria however, so it is best to submit claims before that date. The Restitutions Committee also renders advice on disputes between private individuals and museums. The first claims concerning such disputes have been successfully submitted by our law firm on behalf of the American and British heirs of a German-Jewish family.

Objects of art are still often seen as attractive loot. Therefore there are many international treaties, governing restrictions on trading in the spoils of war.

## Moral Rights of the Artist

Legal problems are not limited to buying a work of art however. The artist can, based on his moral rights as author, object to any form of damage or change to his work. Even in the case of ownership: the owner may not paint a moustache on a portrait or add clothing to a nude, as one German lady discovered in the classic 1912 case Felseninsel mit Sirenen.

In many cases, however, the line will be harder to define. Is a new office owner allowed to destroy a work of art that is integrated in an office wall and refers explicitly to the former owner? Are you allowed to radically renovate architectural structures without infringing the moral rights of the original designer? In practice, the artist's rights will be weighed against the (new) owner's interests. Some factors that may play a role here include whether there is an alternative to the renovation and the quality of the new design.

Destroying an original work of art often causes less problems than changing a work of art, as destruction does not reduce its artistic quality. However, even in that case the artist still has certain rights, such as, for instance, to get the opportunity to document his work of art. Besides, the owner must have a certain interest in destroying the work and he must show that there is no good alternative. When Amsterdam Airport Schiphol removed a work of art from a wall because of renovations and it then warped so badly that it could not be placed back, the company was permitted to destroy it.

In the USA, the protection of the moral rights of authors differs from state to state and objects are often only reluctantly recognized as "works of art". Though usually known to be rather generous in this respect, the State of California was reluctant to recognize a mural as a painting, i.e. a work of art enjoying protection.

## Experienced Advisor

The complexity of the art world and art law requires the consultation of a specialized and experienced art lawyer. Russell Advocaten has been well familiar with international art law issues for many years and is regarded worldwide as the leading law firm in the Netherlands dealing with art and law issues. P

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# The New Commercial Agency Contract for Goods Bill: Complying with the Requirements of the U.S.-Colombia Trade Promotion Agreement

The Commercial Agency Contract is regulated in Chapter V, Articles 1317 to 1331, of the Colombian Commerce Code "CCO" (Decree 410 of 1971).

The Commercial Agency Contract concept includes services and goods and is defined in Article 1317 of the above-mentioned Code, as follows: "Through the agency contract, one businessmen assumes in an independent and steady way, the obligation to promote or exploit business in a specific commercial branch and within a prefixed zone in the national territory, as the representative or agent of a domestic or foreign principal or as a manufacturer or distributor of one or more of the principal's products. The person assuming such an obligation is generally known as the agent."

On the other hand, the most important and critical aspects of the actual Commercial Agency Contract are related to the (i) justified and (ii) unjustified termination of the contract, which are regulated in the Articles 1324, 1325 and 1327 of the CCO.

According to these rules, in the first event, the principal will have to pay to the agent for each year of the contract period, an amount equal to one-twelfth of the average commission, royalty or profit, received by the agent during the previous three years of the contract (or the average based of all the remuneration if the contract is shorter). This payment has been named by the Colombian Doctrine as "Cesantía Comercial."

In the second event, the agent, based on his efforts to improve and upgrade the market position and goodwill of the brand, products and services subject of the contract, has the right to demand, in addition to the sum aforementioned, compensation from the principal. In this case, to determine the amount of compensation, it's necessary to consider the duration, importance and volume of the business and commercial activities held by the agent during the contractual relationship.

Notwithstanding, it is important to mention that the same rule applies when the agent finishes the contract with justification attributable to the businessmen, and that the agent loses his right to demand compensation from the principal if the contract terminates due his fault.[1]

## The Precedents of the Supreme Court of Justice regarding the Commercial Agency Contract

In Colombia, during the 1980s and early 1990s, the Commercial Agency Contract was subject to an intense debate in the High Courts, especially regarding the subject of the existence of Commercial Agency Contract on parallel with a Distribution Contract.

In the 1980s, the Colombian industry was deeply concerned by the possibility that their distributors could come back to them claiming the existence of a Commercial Agency Contract and thus the payment of the

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"Cesantía Comercial." The fears of the Colombian industry seemed to materialize when the Antioquia´s Superior Tribunal condemned Icopinturas S.A. to pay to a distributor the "Cesantía Comercial,"considering that the latter had contributed to open new markets for the products of the former. This sentence was revoked later by the Supreme Court of Justice who considered that the agent was buying the goods for himself with the intention of reselling them and thus, he was promoting his own business. This doctrine was ratified by the Supreme Court of Justice in the *Cacharrería Mundial vs. Jorge Ivan Merisalde* case, which became a leading case for a line of precedents that was ratified in the *Distrimora Ltda. vs. Shell* case of 1995 and later on, in the sentences enacted by the Bogota, Boyacá and Tolima's Superiors Tribunals as a result of the lawsuits promoted by several distributors[2] against *Productos Alimenticios Doria S.A.* in 2009.

The "Icopinturas" case caused a huge uproar in the national Doctrine, which considered that the Supreme Court Justice was protecting the interest of the Colombian Industry and their theory was oriented to forbid the application of the Commercial Agency Contract. As detractors of the "Icopinturas" case, Professors Jaime Arrubla Paucar and William Namén Vargas sustained that the existence of a Distribution Contract and buying for reselling did not exclude the existence of a Commercial Agency Contract considering that the agent was responsible for publicity and could only sell in the designated territory and within the prices fixed by the principals.

In 2010, both professors found themselves as members of the Supreme Court of Justice and by 2011, they were faced with a new case of Commercial Agency Contract. In October 19, 2011, the Supreme Court of Justice changed the precedent line that came from 1980 and condemned Hewlett Packard to pay his distributor the "Cesantía Comercial" considering that the Commercial Agency Contract could co-exist with a Distribution Contract.

## The Commercial Agency Contract and the U.S.–Colombia Trade Promotion Agreement

On November 22, 2006, the Colombian and United States of America governments finished negotiations of the terms for the Trade Promotion Agreement (TPA) between both countries. One of the commitments acquired by the Colombian Government was to promote before the Congress, the modification of the Commerce Code regarding the Commercial Agency Contract.

The current regulation of the Commercial Agency Contract is considered an obstacle for the American goods producers due to the fact that the commercial relationships they should establish to distribute their products within the Colombian territory, could be declared as Commercial Agency Contracts, granting the distributors the rights of an agent upon the termination of the contract.

In order to prevent the Commercial Agency Contract to be a barrier for the implementation of the TPA, the Colombian Government committed to reform the aforementioned contract:

- To eliminate the "Cesantía Commercial" that was mandatory and could not be excluded by pact between the parties.
- To eliminate the presumption of exclusivity of territory in order to allow the existence of several distributors (Article 1318 CCO).
- To modify the criteria used to calculate the compensation owed to the agent whenever the contract is terminated without cause.

## The New Commercial Agency Contract for Goods

On April 29, 2013, the Colombian House of Representatives, in Plenary Session, approved the Bill Number 146 of 2012, which creates the Commercial Agency Contract for Goods.

This new type of contract has the following scope, characteristics and contributions:

(i) Restricts its application solely to the promotion, exploitation, fabrication and distribution of goods and software.

(ii) Maintains the actual Commercial Agency Contract to services and other types of commercial activities that don't involve goods or software.

(iii)Excludes the applications of the Articles 1318, 1324, 1325 and 1327 of the CCO. However, the other CCO's norms continue to be fully applicable.

(iv)Eliminates the existing compensation consequences for termination of the contract, transferring this kind of responsibility to the General Rules, which are less onerous for the principal.

(v) Prohibits its applications to the current contracts executed and performed under the CCO's regulations.

Finally, it is important to mention and clarify that the Bill needs to pass the next two debates in the Colombian Senate to become an Act; however, we consider its approval in its current version very probable.[3]

1 Based on Article 1324 of the CCO.

2 Zuluaga y Soto S.A., Distrisagi Ltda. and Sierra Pineda y Cía. S. en C., respectively.

3 *This article was submitted for publication on May 28, 2013. As of that date, the Colombian Congress had not yet approved the final text of the Bill Number 146 of 2012.*

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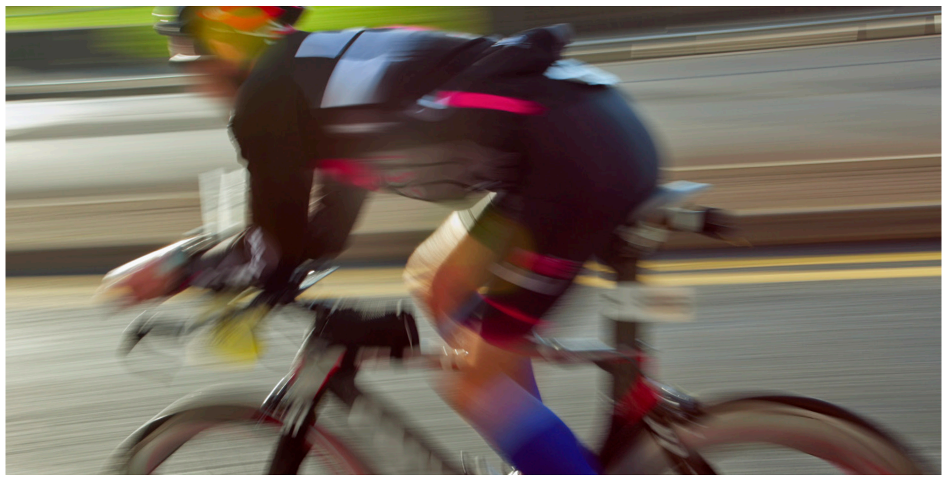
*"[Hull Barrett] has not only contributed countless hours of time and energy to the Augusta Sports Council, but their employees and company are always involved in community groups throughout the Augusta area."*

# Hull Barrett Wins Award from Augusta Sports Council for Outstanding Community Service



Primerus member firm Hull Barrett in Augusta, Georgia, has been involved with the Augusta Sports Council (ASC) since it was formed in 1991, helping the non-profit in their mission of strengthening the city of Augusta by recruiting, supporting and attracting sporting events.

Thanks to their hard work, the ASC recently awarded them their Pillar Award, which was created to honor a group that represents the highest standard of community service.

According to Brinsley Thigpen, ASC's CEO, "This year's recipient has not only contributed countless hours of time and energy to the Augusta Sports Council, but their employees and company are always involved in community groups throughout the Augusta area. It's hard to find a strong non-profit, like ours, that Hull Barrett attorneys have not supported through volunteer hours or participation in events."

Doug Batchelor of Hull Barrett, a longtime ASC board member, accepted the award on the firm's behalf. Batchelor said the ASC's founding stemmed from the nearby city of Atlanta being granted the 1996 Summer Olympics. A prominent local leader decided it would be a good idea for Augusta to have a sports council.

Since then, the ASC has created, recruited and/or supported more than 600 sports events in Augusta. These events have attracted 450,000 athletes to the area and had an estimated economic impact of more than $200 million. Some stand-out events include the 1996 Olympic Box-Offs, 1999 and 2002 Georgia Games Championships, ESPN Bassmaster Tournament, and most recently the ESi Ironman 70.3 Augusta, billed as the world's largest Ironman 70.3 event.

Hull Barrett volunteers have helped make many of those events happen and Batchelor served on the board every year until this year. He now serves on an advisory board, the finance and governance committees, and continues to donate his time reviewing contracts for the council. Other Hull Barrett attorneys and staff members have also served on the board, as committee chairs and as event volunteers.

"I cannot tell you how much I have enjoyed it," Batchelor said. "Over the years I have been able to meet athletes and celebrities that I never would have been able to."

Batchelor's interest in the ASC stems from his own athletic involvement playing polo for 30 years and most recently, cutting – an equestrian event where a horse and rider are judged on their ability to separate a single animal away from a cattle herd and keep it away for a short period of time. Thanks to the support of a number of local residents and entities including the ASC, Augusta hosts the largest cutting competition on the east coast which lasts over a week at the end of January each year.

Batchelor points out that the list of community organizations that Hull Barrett as a firm, or its employees as individuals, have supported is long. "We like our people to be out in the community," he said. "We think that's one of the best ways to attract clients and get to know people." P

Chi-Che Tung

# Introduction of the Design Patent Amendments in the New Taiwan Patent Act

The new Patent Act came into effect on January 1, 2013. In the new Patent Act, other than the amendments to the original provisions, related provisions regarding "partial design," "icon design," "group design" and "derivative design" were also added according to international practices and industry development trends.

The original provisions stipulated that protected new design patents have to be the "overall design" of the entire appearance of the object. However, to avoid competitors in the market plagiarizing parts of the novelty features of products and easily avoiding the protection of design patents, the amended Patent Act stipulates that the applicant may file a design patent application for the "partial design" of partial components of an object like car lights, or parts of the features for the appearance of an object like the exterior patterns on sneakers.

When filing an "overall design" patent application, the overall appearance of the drawing of the object in the specification must be outlined with ink lines. But when filing a patent application based on "partial design" of the object, the object to which the partial design applies must be stated in the specification. In addition, "the parts in the drawing which the design intends to claim" and "the parts in the drawing which the design does not claim" must be presented in a manner whereby the different parts can be clearly distinguished. For example, the appearance of "the parts in the drawing which the design intends to claim" of the patent application shall be specifically and realistically shown in solid lines, and "the parts in the drawing which the design does not claim" shall be shown in dotted lines or colored in grey or shown in a translucent manner to clearly distinguish "the parts in the drawing which the design intends to claim" from "the parts in the drawing which the design does not claim."

Computer Generated Icons ("CGI") like ones used for click-to-action functions and Graphical User Interface ("GUI") like function menus refer to types of drawings that are shown on display panels and monitors and only exist temporarily, and that cannot be constantly shown on objects like patterns or colors on wrapping paper or cloths. CGI includes application icons that are used for click-to-action functions shown on the monitors of computer or electronic devices. GUI includes pull down function menus or function menus in different forms. However, with the amendment of the Patent Act, it has been determined that the "icon design" of CGI and GUI used for objects are also a type of creation used for the appearance of the object, and thus it may also be subject to the protection of design patents.

When filing an "icon design" patent application, since icon designs have to be shown through monitors, display devices or various kinds of display panels, thus the object that shows the icon design has to be designated. The drawings of the CGI and GUI cannot be filed alone. Furthermore, other than still "icon designs," icon designs that change in appearance like video game characters that transform or user interfaces that change through click-to-action functions

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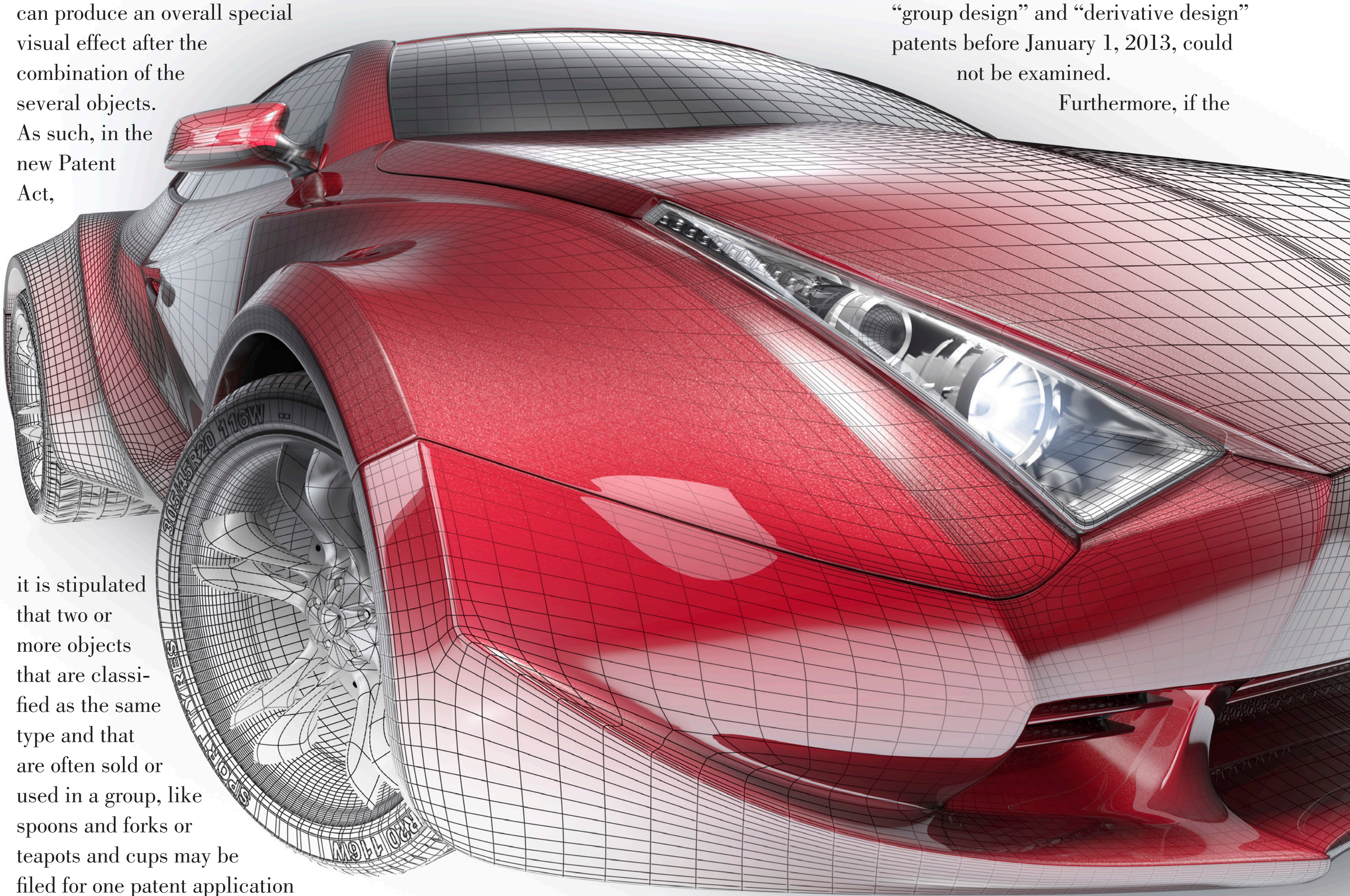
can also be filed for a patent application for the several changes of the appearance of the icon designs during the show of use of the drawing.

In the original provisions, it is stipulated that when filing new design patent applications, the appearance of each object shall be filed for, i.e. "an application for each design." However, when design industries are developing products, they often develop an entire creation for several objects that are often sold or used at the same time to achieve a design that can produce an overall special visual effect after the combination of the several objects. As such, in the new Patent Act, it is stipulated that two or more objects that are classified as the same type and that are often sold or used in a group, like spoons and forks or teapots and cups may be filed for one patent application as a "group design" to protect the design of the overall visual effects of the group. However, when exercising the rights of the design, the group design can merely be regarded as one design; the rights of each component of the group design cannot be exercised alone.




Furthermore, when developing new products, industries usually develop several similar product designs based on the same design concept, or develop similar designs due to improvements of the same product. In order to take into consideration similar designs developed based on the same design concept or due to improvements of the same product, which have the same value as the original design and thus shall be granted the same protection, the new Patent Act stipulates that when an applicant has two or more similar designs, the designs shall not be limited to the "first to file" condition, and the design after the second one may be filed as a "derivative design" patent application.

Compared to the "associated new design patent" of the original Patent Act, the deadline for filing a "derivative design" patent application is limited to when the applicant of the original design has filed a patent application (including the day that the patent application was filed) or before the patent examination of the original design. However, after the applicant of the derivative design obtains the patent rights, he/she may exercise the rights alone, and the derivative design shall not be classified as the original design and its effect shall be extended to the scope of similarity, thus the range of derivative designs is more independent and wider than the range of the original "associated new design patent."

Since the related provisions for filing "partial design," "icon design," "group design" and "derivative design" patent applications were implemented on January 1, 2013; therefore the applications filed for "partial design," "icon design," "group design" and "derivative design" patents before January 1, 2013, could not be examined.

Furthermore, if the priority date claimed by applicants that file for "icon design" and "group design" patent applications after January 1, 2013 and that claim priority rights is earlier than the implementation date of the amendment of the Patent Act, which is January 1, 2013, the priority date shall be January 1, 2013. P

Caroline Berube

# The Development of Data Protection in China

## Introduction

China recently increased its focus on data protection issues, in particular, those regarding personal information submitted electronically. Although China does not yet have a comprehensive national data protection plan, the Government has published a number of administrative regulations and related advisory rules over the past year that have significantly advanced data protection issues in China.

These regulations, some of which are binding and some of which are merely advisory, will likely become the foundation on which China's data privacy laws are built. Therefore, foreign companies will benefit from familiarizing themselves with these policies, even those which are not binding, as the principles will likely be incorporated into subsequent regulations.

## History of Data Protection in China

Until recently, data protection was only addressed at a national level in certain provisions of general Chinese regulations. This section summarizes the scope of data protection under these regulations. While the scope of data protection has been extended by subsequent legislation, these regulations still remain valid.

### Chinese Criminal Law

The most explicit data protection provisions are set forth in the Criminal Law of the People's Republic of China (the "Criminal Law") which prohibits any person from obtaining the personal information of any Chinese citizen by theft or other illegal means.

Additionally, the Criminal Law prohibits private organizations and their employees from selling or otherwise illegally providing personal information of any Chinese citizen they obtain during the course of performing their services. This provision had originally only applied to government agencies, but was extended in 2009 to apply to private organizations involved in the financial, telecommunication, transportation, education and medical sectors.

### Tort Liability Law

The Tort Liability Law of the People's Republic of China (the "Tort Law") also contains provisions regarding data protection. Article 2 of the Tort Law includes a right to privacy in the definition of civil rights. Accordingly, any person whose personal information is improperly obtained and/or disclosed may be entitled to file a claim under the Tort Law.

It should be noted that, although both the Criminal Law and Tort Law contain provisions addressing data protection, there have not been any detailed guidelines or interpretations regarding the enforcement of such provisions. Therefore, these have had only a limited impact on the enforcement of data protection in China.

## Development of Data Protection Regulations

In 2012, the Chinese authorities issued a number of rules, regulations, and advisory guidelines regarding data protection. This section summarizes the two primary national regulations issued by the Chinese authorities and discusses their impact on

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the development of data protection in China.

### Decision on Strengthening the Protection of Internet Data

On December 28, 2012, the Standing Committee of the National People's Congress published the Decision on Strengthening the Protection of Internet Data (the "Decision"). The Decision sets forth requirements for certain internet service providers ("ISPs"), telephone companies, and other organizations, including government agencies, that collect personal information in digital form in the course of providing services (collectively "Data Collectors").

In particular, the Decision requires that Data Collectors:

i. Inform individuals of the purpose, manner and scope of their collection of electronic personal information;

ii. Obtain consent from users before collecting electronic personal information;

iii. Strictly maintain the confidentiality of all electronic personal information collected during the course of their business;

iv. Develop and publish policies for the collection and use of electronic personal information; and

v. Take immediate remedial measures and notify the competent authorities in the event of a discovered or suspected disclosure or leak of the stored electronic personal information.

Data Collectors that fail to comply with the above-listed requirements may be subject to fines, confiscation of any illicit gains, revocation of licenses and registrations, termination of websites, as well as potential civil liability to the affected users.

The Decision contains one provision that may be counterproductive to the protection of personal information. This provision, often referred to as the "Real Name Provision," requires that users provide their real names when entering into an agreement for the provision of services.

While the Decision is the first national, binding regulation regarding data protection, it contains only 12 broadly worded articles. Therefore, Data Collectors will probably have to wait for an official guideline or interpretation regarding the implementation impact of these requirements, including the Real Name Provision.

### Guideline for Personal Information Protection Within Information Systems for Public and Commercial Services

On November 15, 2012, the Ministry of Industry and Information Technology (the "MIIT") issued the Information Technology Security – Guideline for Personal Information Protection Within Information Systems for Public and Commercial Services (the "Guideline"). Although the Guideline is not legally binding, it is relevant insofar as it provides the basic principles on which further regulations will likely be based.

The Guideline provides the first national definition of "personal information," which it defines as "information that can identify users independently or in combination with other information." The Guideline also identifies two categories of personal information: sensitive personal information," which is information that, if disclosed, could have adverse effects on the individual, and "general personal information," which includes all other personal information.

Additionally, the Guideline provides eight principles that should be followed in the handling of personal information:

i. Organizations should have a clear and justifiable purpose for collecting personal information;

ii. Organizations should collect the minimum amount of data required for such purpose;

iii. Organizations should publish the purpose, manner, and scope of their personal information collection;

iv. Organizations must obtain express consent before collecting sensitive personal information;

v. Organizations must ensure that all information collected is complete and up-to-date;

vi. Organizations shall strictly maintain the confidentiality of personal information and take appropriate measures to ensure that such personal information is kept secure;

vii. Organizations shall no longer use personal information once the original purpose for which it was collected has been completed; and

viii. Organizations must establish and implement appropriate internal policies for the maintenance of personal information.

It is worth noting that many of the above-listed principles mirror some of the requirements established in the Decision.

While the Guideline came into effect on February 1, 2013, no official text has been released. Also, it is important to remember that the Guideline is not legally binding. Nevertheless, the Guideline is the first national standard for data protection that applies to all industries, and therefore should be reviewed by all companies in the development of their data protection policies and procedures in China.

## Conclusion

China recently increased its focus on data protection issues, in particular, those regarding personal information submitted electronically. Although China does not yet have a comprehensive national data protection plan, the Government has published a number of administrative regulations and related advisory rules over the past year that have significantly advanced data protection issues in China.

These regulations, some of which are binding and some of which are merely advisory, will likely become the foundation on which China's data privacy laws are built. Therefore, foreign companies will benefit from familiarizing themselves with these policies, even those which are not binding, as the principles will likely be incorporated into subsequent regulations. P

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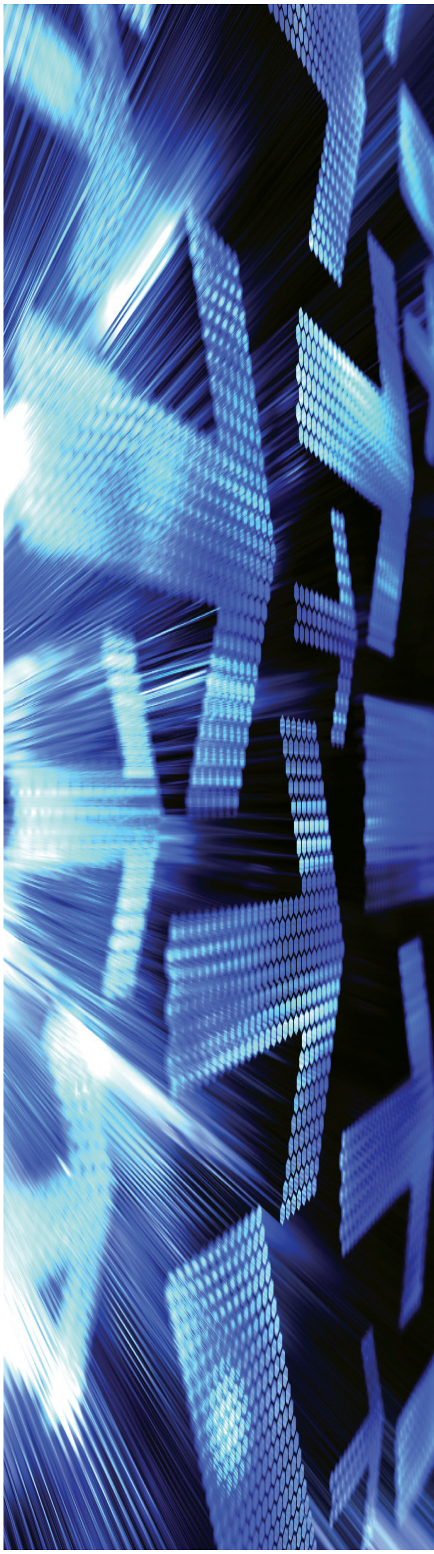

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Chicago, Illinois

**October 3-5, 2013 – Captive Resources Workshop**
Atlanta, Georgia – *Primerus will be a corporate sponsor with several panel presentations.*

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

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

**November 4-6, 2013 – Professional Liability Underwriting Society International Conference**
Orlando, Florida – *Primerus will be a corporate sponsor.*

**November 13-15, 2013 – Transportation Industry Defense Association (TIDA)**
Orlando, Florida – *Primerus will be a corporate sponsor.*

**April 24-27, 2014 – Primerus Defense Institute Convocation**
Scottsdale, Arizona

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

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